

**Penal Discourse and Imprisonment in South Africa:  
An Examination of the Evolving Discourse Surrounding  
Imprisonment in South Africa, from the Colonial Period  
to the Post-Apartheid Era, and its Effects on the  
Human Rights of Prisoners**

**VOLUME II**

**Stephen Allister Peté**

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Thesis presented for the degree of  
DOCTOR OF PHILOSOPHY  
In the Faculty of Law and Management Studies  
UNIVERSITY OF KWAZULU-NATAL  
November 2015

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# VOLUME II

## 4. Part Three

### Post-Apartheid Period

## **CHAPTER 4.1**

### **The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election**

Article published in a SAPSE accredited journal:

Peté, SA (1998) The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election *South African Journal of Criminal Justice* 11(1): 51-83.

# HEINONLINE

Citation: 11 S. Afr. J. Crim. Just. 51 1998



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# The politics of imprisonment in the aftermath of South Africa's first democratic election

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STEVE PETE\*

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## 1 Introduction

The years following the first democratic election in South Africa in 1994 constitute a fascinating period in the history of punishment in this country. Not only did the events of these years reflect the turmoil of South Africa's transition away from apartheid towards democracy but also they saw the emergence of trends, already apparent in other parts of the world, which seem bound to influence fundamentally the form and content of punishment in this country.

In order to make sense of the events which took place during these years the major themes around which public debate and conflict revolved during this period must be identified. Thereafter the competing interest groups involved must be distinguished and their respective viewpoints revealed. Finally, the structural realities of the South African prison system must be borne in mind, as they constitute the framework within which the struggles between competing interest groups took place.

Most of the public debate and political conflict during the period under review revolved around three burning issues — overcrowding, amnesty, and parole. Each of these interrelated issues is dealt with under a separate main heading below.

Three main competing interest groups may be identified: the public at large; the government authorities; and the prisoners themselves.

Public opinion was dominated by fear and concern at the high level of crime in the country. The perception that the country was in the grip of an unprecedented crime wave hardened public opinion against the early release of prisoners by means of amnesty or parole. There was very little public debate on the question of rehabilitation of prisoners or their reintegration into society.

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Instead, the emphasis was on retribution, incapacitation and deterrence. The public mood was a mixture of anger and fear. Public anger was directed at the fact that many prisoners were released after serving only a fraction of their sentences and were not adequately punished for their heinous crimes. Public anger was combined with the fear that large numbers of hardened criminals were being allowed back on to the streets to prey on innocent citizens.

The government authorities were represented by two subgroups: first, the Department of Correctional Services under the Minister of Correctional Services, Siphon Mzimela, and, secondly, the Parliamentary Committee on Correctional Services under its chairperson Carl Niehaus.

As the direct authority in charge of the South African prison system, the Department of Correctional Services was almost constantly in the firing line as the public, the prisoners and other arms of government expressed their dissatisfaction with the prison system. The Department's view was dominated by the problem of chronic overcrowding, which placed it under enormous strain to relieve the pressure by means of early parole or general amnesty ('bursting' as it was known). The period was characterised by three dramatic proposals by the Department aimed at reducing the prison population and increasing the available accommodation: first, the proposal that 40 % of the prison population (consisting of petty offenders) be released into 'correctional supervision' (i.e. the sentence to be served within the community under departmental supervision); secondly, the proposal that prisons be partially 'privatised', which gave rise to the controversial idea that abandoned mine shafts should be converted into maximum security prisons; thirdly, the proposal (which was eventually carried into effect by means of a pilot project) that prisoners on parole be electronically 'tagged' in order to assist with their monitoring. The latter two proposals reflect trends which have emerged in the rest of the world. There is a partial withdrawal of the state from the sphere of punishment and an advance by the private sector into this sphere, and an increasing reliance on advanced technology to monitor and control prisoners and parolees.

The views of the Parliamentary Committee on Correctional Services were linked to those of the Department of Correctional Services, since both institutions were confronted with the same reality of chronic overcrowding within South Africa's prisons. Significant tensions arose between the two institutions, however, partly because of the different political affiliations of Carl Niehaus (African National Congress) and Siphon Mzimela (Inkatha Freedom Party), and partly because the Parliamentary Committee acted in the capacity of 'watchdog' over the Department of Correctional Services.

The third main interest group was formed by the prisoners themselves. The views of prisoners were articulated in the media by the South African Prisoners' Organisation for Human Rights and its chairperson Golden Miles Bhudu.

These views were shaped by the massive tide of political and social transformation which was sweeping through South Africa at the time. Prisoners viewed themselves as victims of the old apartheid regime, who were entitled to participate in and benefit from the new democratic order. This resulted in a highly charged political atmosphere within the prisons during the period in question. It is not surprising that the period was characterised by protest and unrest. Conflict over the right of prisoners to vote led to massive unrest in prisons during 1994. This unrest continued to a lesser extent during 1995, focused on the question of a general amnesty for prisoners, and spilled over into 1996, when the issue of parole, sparked by the early release of two high-profile white-collar criminals, became hotly contested.

The conflicting views of the three interest groups referred to above formed a volatile mix which was bound to explode in conflict and heated debate. Public anger and fear impelled the person on the street to oppose vigorously any policy or proposal aimed at the early release of prisoners. Chronic overcrowding impelled the government authorities in precisely the opposite direction. In the middle of this conflict were the prisoners themselves, their expectations raised by the democratic reforms in the country, forced to live in a system still struggling to break with its apartheid past. In addition to the problem of chronic overcrowding, many of the prison buildings were old and dilapidated, resulting in substandard living conditions for prisoners. The Department of Correctional Services was severely understaffed, and disturbing allegations were made that staff were racist and corrupt. Particularly serious from the human rights perspective was the allegation that certain corrupt warders were involved in arming prison gangs. These gangs remained a powerful force within the country's prisons and their activities resulted in serious human rights abuses. This was the framework within which the various role players involved with the prison system operated during the years which followed South Africa's transition to democracy.

## **2 Overcrowding**

### **2.1 Introduction**

The defining characteristic of imprisonment in South Africa during the post-election period was the chronic overcrowding which prevailed in prisons throughout the country. In terms of South Africa's interim Constitution, which was in effect during much of this period, prisoners had the right, first, 'to be detained under conditions consonant with human dignity' and, secondly, not to be subjected to 'cruel, inhuman or degrading treatment or punishment'.<sup>1</sup> It is clear that chronic overcrowding within South African prisons during the

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<sup>1</sup> Sections 25(1)(b) and 11(2) of Act 200 of 1993.

period in question constituted a violation of these rights. As UNISA criminologists JJ Nesor and D Takoulas pointed out in an article written during 1995:

‘It is a fact that this country has among the highest per capita prison populations in the world. Consequently many South African prisons are encroaching on the fundamental right of prisoners through overcrowding. This is the most obvious problem of our penal system and one which could have significant consequences if left unchecked.’<sup>2</sup>

At the end of March 1995 the Minister of Correctional Services provided Parliament with details of the extent of overcrowding in South African prisons. On 31 December 1994 there was accommodation for 95 695 prisoners, but the number of people imprisoned on that date was 113 856. The average rate of overcrowding was 18,98 %, which had been reduced from an overcrowding rate of 29,9 % on 31 December 1993. The effects of overcrowding in the prisons was exacerbated by a shortage of Correctional Services staff. The Minister pointed out that, owing to budget cuts, only 29 439 of the required 36 095 Correctional Services posts could be filled. There was thus a staff shortage of 18,4 %.<sup>3</sup>

## 2.2 Crisis caused by overcrowding at Pollsmoor maximum security prison

In April 1995 the overcrowding in Pollsmoor Maximum Security Prison attracted special public attention, when it was revealed that the prison was more than 100 % overcrowded. Although the prison could accommodate only 1 703 prisoners, a further 1 901 prisoners were being incarcerated there on 29 March 1995. A further cause for concern was that awaiting trial prisoners were being held for long periods before being brought to trial. Two hundred and ten awaiting trial prisoners had been held in Pollsmoor for three to six months; 86 for six months to one year; and 33 for one year to two years.<sup>4</sup> The Minister commented as follows:

‘The problem of the serious over-occupation at Pollsmoor should be addressed urgently . . . It is evident that the number of unsentenced prisoners as well as the long periods for which they are being detained, are major contributory factors to this highly unsatisfactory situation . . . The population of this prison is reaching such proportions that the safety, human dignity and physical care of prisoners are being prejudiced.’<sup>5</sup>

<sup>2</sup> JJ Nesor & D Takoulas ‘Bursting at the seams: Prison overcrowding — a brief overview’ (1995) 30 *The Magistrate* 135–43 at 135.

<sup>3</sup> *The Citizen*, 29 March 1995, 8; *Cape Times*, 29 March 1995, 5.

<sup>4</sup> *Cape Times*, 19 April 1995, 5; *Die Burger*, 19 April 1995, 8.

<sup>5</sup> *Cape Times*, 19 April 1995, 5.

The chairman of the Parliamentary Portfolio Committee on Correctional Services, Carl Niehaus, inspected Pollsmoor prison on 19 April 1995, and his findings were reported as follows:

'... Niehaus said the overcrowding was so extreme that prisoners could take the government to the constitutional court and would probably win. Niehaus described conditions in the prisons as "entirely unsatisfactory", with cells occupied by double the number of prisoners they were built for. At Pollsmoor, prisoners often had to make do with exercise periods of less than half an hour and many slept on the floor, he said. Although the safety of society had to be considered, the best solution was to grant amnesty to certain categories of criminals whose sentences would be converted to correctional supervision.'<sup>6</sup>

One member of Parliament, Mark Wiley of the National Party, believed that the situation at Pollsmoor was so serious as to justify the erection of temporary corrugated iron prison camps surrounded by barbed wire and watch towers.<sup>7</sup>

### 2.3 Proposal to release 40 % of the prison population into correctional supervision to reduce overcrowding

At the end of April 1995 there were 113 712 inmates in South African prisons, which had been designed to accommodate only 95 000 prisoners. Towards the end of June 1995 the Minister of Correctional Services suggested that overcrowding in South African prisons could be relieved by releasing prisoners convicted of petty offences. These prisoners would serve the remainder of their sentences under correctional supervision within the community. It was believed that petty offenders accounted for approximately 40 % of the prison population, which amounted to approximately 40 000 prisoners. The Minister and his Department believed that petty offenders such as those convicted for minor dagga offences should not be kept in prison, since they did not pose a threat to society. The Minister pointed out that the cost of keeping these prisoners in jail was in many cases out of proportion to the offences which had been committed:

'A stolen pair of shoes may have cost R100 and the person is sentenced to a year in prison. We then have to pay R50 a day to keep them there.'<sup>8</sup>

Keeping petty offenders out of prison would also remove the danger of such persons being negatively influenced by hardened criminals within the prisons:

'We do not want to put people in prison and then, when we release them, they are worse criminals than when they went in.'<sup>9</sup>

The Minister's view that petty offenders are exposed to negative influences

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<sup>6</sup> *Business Day*, 20 April 1995.

<sup>7</sup> *Business Day*, 20 April 1995, 2.

<sup>8</sup> *Sunday Times*, 25 June 1995, 1.

<sup>9</sup> *Ibid.*

in prison was shared by officials in his department. In July 1995 a spokesman for Correctional Services stated:

'We are trying to get to a point where you only incarcerate dangerous prisoners . . . We want people who make mistakes to serve out their sentence in the community. That way, they don't come out (of prison) as criminals.'<sup>10</sup>

The idea of keeping petty offenders out of prison by allowing them to serve their sentences within the community received support from the chairman of the Transformation Forum on Correctional Services. In July 1995 the *Cape Times* reported as follows:

'It costs the taxpayer R5,8 million a day to maintain South Africa's 117 000 prisoners in jails that have been described as "universities of crime". ANC MP and chairman of the Transformation Forum on Correctional Services Mr Carl Niehaus said in an interview yesterday: "Millions of rands are being poured down the drain. It is the wrong way to fight crime and the country cannot afford it. We have turned our prisons into universities of crime which produce more serious criminals in the end . . . I have seen massive overcrowding at Pollsmoor, Diepkloof in Johannesburg and at Pretoria Central. In Butterworth awaiting trial prisoners are so overcrowded that they cannot all lie down to sleep at the same time." Mr Niehaus said he would like to see magistrates and judges make more use of community service for first-time offenders and people convicted of less serious crimes. Keeping them out of jail would save the country massive bills as community service was far cheaper. It would also keep minor criminals out of contact with prisoners convicted of serious crimes . . . If the number of prisoners were reduced, more time and resources could be spent on rehabilitating those prisoners who were a real danger to society, he said.'<sup>11</sup>

Releasing petty offenders into correctional supervision would clearly have cost benefits. A NICRO spokesperson, Rosie Shapiro, commented that it cost about R500 to set up a six-month community services programme for one person, including the cost of salaries of supervisors. The same amount of money would keep a prisoner in jail for about only ten days.<sup>12</sup> The idea of releasing such a large number of prisoners into the community would, however, create certain practical problems. It would place much greater strain on the system of community supervision, and discussions were held with the Public Services Commission on the question of training probation officers to cope with the strain.<sup>13</sup>

The main opposition to the scheme did not, however, focus on the practical problems involved. Instead, it was the perception that the government planned to release thousands of criminals on to the streets that resulted in most

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<sup>10</sup> *Cape Times*, 24 July 1995.

<sup>11</sup> *Cape Times*, 26 July 1995, 5.

<sup>12</sup> *Sowetan*, 26 July 1995, 6.

<sup>13</sup> *Sunday Times*, 25 June 1995, 1.

opposition to the plan. Although arguments in favour of the increased use of correctional supervision were logically convincing, the public mood at the time was characterised by near panic over the perceived increase in violent crime rather than by logic. The *Sowetan* commented as follows:

'By freeing large numbers of prisoners while society is terrorised by crime, Mzimela (and the Government) will run the risk of being misunderstood to mean that the rights of criminals are more important than those of ordinary law-abiding citizens.'<sup>14</sup>

In October 1995 Carl Niehaus mentioned at a press conference that many prisoners in South African gaols 'had not committed serious crimes' and 'could be better accommodated in strict correctional supervision programmes, rather than by serving sentences in overcrowded prisons'.<sup>15</sup> Although Niehaus pointed out that suitable candidates for release on correctional supervision would have to be identified by means of a gradual process, and specifically avoided mentioning any proposed number of prisoners to be released, the newspaper reports reflected the extent of public panic about crime, rather than accurately reporting what Niehaus had said:

'Thousands more prisoners will soon be back on the streets as the Government, desperate to alleviate overcrowding in jails, prepares to commute many jail sentences to correctional supervision and community service.'<sup>16</sup>

'"PLEASE, NOT AGAIN" will probably be the shell-shocked reaction of the average, embattled, law-abiding citizen to the announcement that a couple of thousand more prisoners are to be given early release from jail.'<sup>17</sup>

An apology was later published by *The Star* following a complaint by Niehaus to the Press Council.<sup>18</sup>

#### 2.4 Threat of 'bursting' to relieve chronic overcrowding

By the end of March 1996 the chronic overcrowding in South African prisons had reached crisis proportions. Part of the reason for the crisis was a significant increase in the number of awaiting trial prisoners. Thirty thousand such prisoners were clogging the prisons and were not being processed quickly enough by the justice system. The Commissioner of Correctional Services warned that the Cabinet might have to be requested to authorise the release of prisoners before their sentences had been completed.<sup>19</sup> The prospect of such a

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<sup>14</sup> *Sowetan*, 3 July 1995, 8.

<sup>15</sup> *The Star*, 24 October 1995, 2.

<sup>16</sup> *The Star*, 5 October 1995, 1.

<sup>17</sup> *The Daily News*, 5 October 1995, 12.

<sup>18</sup> *The Star*, 24 October 1995, 2.

<sup>19</sup> *Natal Witness*, 2 April 1996, 5.

general release of prisoners, known as 'bursting', was greeted with alarm by the newspapers, as evidenced by the following headlines:

'JAILBIRDS FLYING TO FREEDOM — There's no more room, our jails are bursting at the seams, say officials.'<sup>20</sup>

'JAILS IN TURMOIL — "Prisons may burst" — warning that overcrowding could force general release of criminals.'<sup>21</sup>

The following bleak picture of overcrowding within the prisons was painted in the *Weekend Argus*:

'... Commissioner of Correctional Services, Henk Bruyn, warned that the situation in prisons had "reached crisis proportions" ... There is cell space available for 95 000 prisoners but the prison population of about 113 000 is expected to grow to 130 000 by the end of the year. Two or three toilets, and one or two showers, are shared between every 60 convicts in urban prisons throughout the country. Correctional Services spokesman Chris Olckers said overcrowding quotas of more than 200 percent had been recorded in some prisons ... African National Congress MP Carl Niehaus said ... public security was under threat because there was an increased possibility of prisoners escaping. If parole policies were not revised, and the entire justice system comprehensively re-assessed as "a matter of urgency", "bursting" might prove inevitable, he said. "We are faced with a time bomb which poses serious risk to the public at large. I don't want to sound alarmist, but if the proper steps aren't taken as soon as possible, piecemeal crisis management may be looked at," he said.'<sup>22</sup>

The Department of Correctional Services responded to the general alarm by assuring the public that 'bursting' would be employed only as an 'absolutely last resort'. Meetings were to be held between the Ministers of Justice and Correctional Services to devise a way of speeding up the trials of unsentenced prisoners.<sup>23</sup>

During May 1996 the problem of chronic overcrowding in South Africa's prisons remained high on the public agenda. The Deputy Commissioner of Prisons in charge of finance, Mr Harding Fourie, told Parliament that an additional amount of R859 million was urgently required to avoid the forced release of between 10 000 and 15 000 prisoners. His message to Parliament was blunt and alarming:

'The department maintains all less serious prisoners have already been released and the next "burst" will release hardened criminals. In a country where one serious crime is committed every 17 seconds, with one murder every 29 minutes 12 seconds, one robbery every five minutes 42 seconds, one rape every 18 minutes 23 seconds and one vehicle theft every five minutes 39 seconds — I say to

<sup>20</sup> *The Saturday Paper*, 30 March 1996, 6.

<sup>21</sup> *Weekend Argus*, 31 March 1996, 1.

<sup>22</sup> *Weekend Argus*, 31 March 1996, 1; *The Saturday Paper*, 30 March 1996, 6.

<sup>23</sup> *The Star*, 2 April 1996, 3.

government "let's get real, let's get serious". We have to find those funds and we have to reprioritise our national agenda.'<sup>24</sup>

## 2.5 Proposal that a 'population-sensitive inflow strategy' be utilised to reduce overcrowding

In a submission to the Parliamentary Committee on Correctional Affairs during 1995 Professor Dirk Van Zyl Smit proposed that a 'population-sensitive inflow strategy' be utilised to reduce overcrowding within South Africa's prisons. In other words, the decision to detain a person in prison would be linked to the availability of prison accommodation. This would be achieved by making the courts take responsibility for all decisions on correctional supervision and parole. Instead of the division which existed between the Department of Correctional Services and the Department of Justice, the functions of these two departments would be integrated. Correctional Services would operate as an integral part of the administration of justice, and courts would take responsibility for overcrowding within the prisons. Such a system would clearly reduce the sentencing autonomy of the courts. Nesar and Takoulas summarise Professor Van Zyl Smits' views on this point as follows:

'... [T]his system would mean a loss of some autonomy by the courts, but would do away with the current charade, whereby the sentencing autonomy of the courts is ostensibly maintained, only for it to be undercut by administrative decisions made by the correctional administration. The integration of corrections into the administration of justice will increase the authority of the courts but will also mean courts must accept direct responsibility for the consequences of their decisions.'<sup>25</sup>

## 2.6 Proposal that a 'sentencing budget' be utilised by the judiciary to reduce overcrowding

In June 1996 it was suggested by the ANC study group on correctional services that the problem of overcrowding could be alleviated if judges and magistrates were obliged to operate within a 'sentencing budget'. The length of sentences which could be imposed would be limited by the resources and space available within the prisons. This would reduce overcrowding but would restrict the discretion of a judge or magistrate to impose a sentence which he/she considered appropriate in a particular case. Because of the controversial nature of the suggestion it was put forward as an option for discussion rather than a concrete proposal. The ANC study group also proposed that the system of 'credits' which was used to determine a prisoner's parole date should be scrapped. Instead, prisoners should qualify for parole after serving at least half their sentences. Greater use should be made of community service and correctional

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<sup>24</sup> *Sunday Tribune*, 19 May 1996, 7.

<sup>25</sup> *The Magistrate*, 141.

supervision, and more attention should be paid to the needs of victims of crime.<sup>26</sup>

## 2.7 Pressure to build new prisons to alleviate overcrowding

In March 1995 it was reported that the physical condition of certain of South Africa's prisons had deteriorated to such an extent that escape was 'made easy'. A spokesperson for the Department of Correctional Services described the physical state of prisons in South Africa as 'rotten' and stated that many prisons were crumbling from 'sheer age'. In one incident prisoners in Bethal in the Eastern Transvaal used the lid of a toilet in their cell to break a hole in the wall of their cell and escape.<sup>27</sup>

The poor physical state of South Africa's gaols, together with the problem of chronic overcrowding, was used to justify the need to construct new prisons. In June 1995 it was reported that there were plans to build seven new prisons in an effort to alleviate to some extent the overcrowding within South African jails. Three new prisons were to be completed by September 1995 at Paarl, Worcester and Umzinto, at a cost of R50 000 000. These prisons would house 1 148 inmates. A further four new prisons were to be built at Porterville, Goodwood, Malmesbury and Pietermaritzburg at a cost of R474 000 000, which would accommodate 5 550 prisoners.<sup>28</sup>

## 2.8 Privatisation as a means to alleviate overcrowding

In May 1996 the issue of privatisation of prisons was raised for public debate by the Minister of Correctional Services. The Minister announced that preparations were well advanced to get large companies involved in the business of building prisons, instead of channelling their investment capital only into office complexes and shopping malls. He also announced that the private sector was involved in plans to build factories next to new and existing jails.<sup>29</sup>

Heralded as 'bold new initiatives' designed to make prisons more self-sufficient, there was very little criticism of these proposals in the media. The problems which might be encountered in attempting to mesh the profit motive of business with the traditional aims of imprisonment (deterrence, rehabilitation, retribution, incapacitation, etc) were not raised for discussion. There was no consideration of the fact that the aim and underlying ethic of a prison is very different to that of an office complex or a shopping mall, or that problems

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<sup>26</sup> *The Star*, 19 June, 1996.

<sup>27</sup> *The Star*, 17 March 1995, 1.

<sup>28</sup> *Sunday Times*, 18 June 1995, 11; 1995 *Annual Report of the Department of Correctional Services* 1.

<sup>29</sup> *Cape Times*, 17 May 1996, 1.

might arise if prisoners were turned into a captive and powerless factory labour force. There was also no discussion of the ethical problems surrounding the use of prisoners to perform forced labour, or the potential for abuse if the profit motive replaced the traditional aims of imprisonment. The potential problem that businesses with access to a cheap captive prison labour force would have an unfair advantage over businesses without such access was also not discussed.

In fairness to the Minister, a full-scale privatisation of the prisons was clearly not his aim. Prison buildings built by the private sector would be leased by the government for a period of twenty years, after which they would become government property. The running of the prisons would remain firmly in the hands of the government.<sup>30</sup>

## 2.9 Electronic 'tagging' as a means to enable greater numbers of prisoners to be placed under correctional supervision and relieve overcrowding

In April 1996 it was reported that prisoners under correctional supervision in Pretoria were to be used as guinea pigs in an experiment involving a radio-tracking device which would monitor their movements. Between 50 and 100 prisoners under house arrest would be required to wear a tamper-proof electronic bracelet, which would enable their parole supervisors to keep track of them.<sup>31</sup>

Apart from references to the 'strangely Orwellian' nature of the experiment, the newspaper reports during the early stages of the project did not direct any criticism at the scheme from a human rights perspective.<sup>32</sup> As the pilot project was about to be launched in September 1996, however, the chairperson of the Parliamentary Correctional Services Committee, Carl Niehaus, stated that many members of the committee 'felt that a system of "tagging" people was extremely sensitive in SA in view of the country's history'.<sup>33</sup>

A public row broke out between the Department of Correctional Services and the Parliamentary Correctional Services Committee. The Committee demanded that the pilot electronic tagging scheme be halted due to reservations about the manner in which the tender had been awarded (the tender having been the highest of the four tenders received); concern that outdated electronic monitoring equipment was being 'dumped' on to the South African market; the absence of clarity as to whether or not electronic monitoring was constitutional; and the lack of consultation with the Committee. The Department of

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<sup>30</sup> Ibid.

<sup>31</sup> *The Star*, 11 April 1996, 1; *Beeld*, 25 April 1996, 17.

<sup>32</sup> *The Saturday Paper*, 11 May 1996, 5; *The Citizen*, 18 May 1996, 8; *Saturday Star*, 18 May 1996, 6.

<sup>33</sup> *Business Day*, 5 September 1996, 4.

Correctional Services decided to proceed with the pilot project despite the concerns of the Committee and stated that consultation with the Committee would take place once the pilot project had been completed. Niehaus responded by stating that the pilot project would proceed without the blessing of Parliament and that it was not desirable to proceed while overlooking democratic institutions.<sup>34</sup>

### 3 Amnesty

#### 3.1 Introduction

The demise of the apartheid system and the transition to democracy created the expectation amongst prisoners that many of them would be granted amnesty for offences committed during the apartheid years. This expectation was fuelled by announcements such as that made by President Mandela during his inauguration speech, that certain categories of prisoners would be released. It was not specified whether the amnesty would be restricted to 'political' prisoners or would be extended to 'common-law' prisoners. As time passed it became clear that there was to be no large-scale amnesty for 'common-law' offenders, and discontent amongst these prisoners began to grow. There was a great reluctance on the part of the government to become involved in a public debate on the issue of amnesty for 'common-law' criminals. It was believed that this would open a Pandora's box of applications for amnesty by large numbers of prisoners.

#### 3.2 The Kriegler report into the serious prison violence of 1994

During 1994 frustration amongst prisoners on the issue of amnesty erupted into violence which lasted from April to June of that year. The unrest began with a programme of mass action organised by the South African Prisoners' Organisation for Human Rights on the issue of voting rights for prisoners during the country's first democratic general election. This issue was soon broadened into a demand for a general amnesty for prisoners following the election. As a result of the unrest 37 prisoners were killed and 750 were injured. Hostages were taken and large numbers of prisoners escaped. The violence came to an end only in June 1994 after the government granted a six-month remission of sentence to all common-law prisoners.<sup>35</sup>

During the unrest President Mandela requested Mr Justice Kriegler to investigate the causes of the shocking violence which was occurring in South

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<sup>34</sup> *The Daily News*, 5 September 1996, 1; *Die Burger*, 5 September 1996, 11; *Business Day*, 5 September 1996, 4; *Beeld*, 7 September 1996, 6; *Saturday Star*, 7 September 1996, 5; *Saturday Argus*, 7-8 September 1996, 8.

<sup>35</sup> *The Star*, 11 April 1995, 3; *Weekend Argus*, 7 May 1995, 18.

Africa's prisons. Judge Kriegler's report was released to the public only during May 1995. It found the main reason for the unrest to have been the frustrated expectation on the part of prisoners that they would be granted amnesty following the general election. This was, however, not the only complaint raised by prisoners. They also complained of assault by warders, racist language by staff, poor food, and chronic overcrowding. According to the report, prisons were 31 % overcrowded at the time of the unrest. Many prisoners were allowed out of their cells for only one hour per day and were left on their own from mid-afternoon, when the cells were locked after supper, until roll-call the next morning. Among Judge Kriegler's general recommendations were that

'... the government create mechanisms which gave prisoners access to independent organisations, allowed for frequent inspections of prisons and swift grievance procedures'.<sup>36</sup>

On the important question of amnesty Judge Kriegler recommended that prisoners be granted a general remission of a quarter of their sentences, subject to a maximum of three years. President Mandela decided, however, to restrict the amnesty to the six-month general remission of sentence which was granted in June 1994. The Minister of Correctional Services was adamant that no further amnesty would be granted:

'The president has now spoken the last word on the question of special remission of sentences. There will be no further debate.'<sup>37</sup>

The Minister clearly hoped that the issue of amnesty had been finally resolved, but this was not to be.

### 3.3 The issue of amnesty continues to smoulder during the first few months of 1995

During 1995 the issue of amnesty for 'common-law' offenders continued to smoulder. The cause of the prisoners on this issue continued to be championed by the South African Prisoners' Organisation for Human Rights (SAPOHR).

During March 1995 SAPOHR demanded that the government set up an Amnesty Resolution Committee, which would be empowered to grant amnesty to common-law offenders who had been imprisoned for offences committed during the apartheid era. If this was not done by 10 April 1995, SAPOHR threatened to instigate a programme of mass action within South African prisons which would include 'go-slow' protests and demonstrations.<sup>38</sup> The response of the government was firm. The Minister of Correctional Services stated that the Government 'would not allow itself to be held to

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<sup>36</sup> *Weekend Argus*, 7 May 1995, 18.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Beeld*, 8 March 1995, 4.

ransom by threats of violence' and all activities of SAPOHR within South African prisons were restricted in terms of the Correctional Services Act of 1959.<sup>39</sup> The president of SAPOHR, Golden Miles Bhudu, was warned that any threat of violence or incitement to violence would result in legal action being taken against his organisation by the Department of Correctional Services.<sup>40</sup> The Minister of Correctional Services stated:

'In view of the fact that calls and demands of this nature have in the past been followed by serious and destructive riots in prisons, which also caused loss of lives and extensive damage to property, President Mandela has instructed me to restrict with immediate effect all such SAPOHR activities at prisons which could promote unlawful activities or which could lead to loss of lives and damage to property.'<sup>41</sup>

On 11 April 1995, after the deadline set by SAPOHR had passed, it was reported that prisoners at only 13 of South Africa's 234 prisons had embarked on partial hunger strikes and go-slows.<sup>42</sup> The organisation renewed its call to prisoners to disrupt the daily routine in prisons by peaceful demonstrations but, as evidenced by the newspaper headlines of the time, it soon became clear that SAPOHR's mass action campaign had failed:

'Threatened prisons mass action fails to take off'<sup>43</sup>

'Extent of prison strike "insignificant" '<sup>44</sup>

'Bid for nationwide prisons strike fails'<sup>45</sup>

It is unclear whether the mass action campaign failed because SAPOHR had been denied access to prisons, or for other reasons. SAPOHR claimed at the time that prisoners who took part in the protests had been intimidated by prison warders. The organisation alleged that warders at Barberton Medium A prison had set dogs on prisoners who were taking part in the protest. Even more serious was SAPOHR's allegation that warders at Krugersdorp prison had used members of the notorious '26' prison gang to threaten and intimidate protesters. SAPOHR's allegations were denied by the Department of Correctional Services.<sup>46</sup>

### 3.4 Various amnesties granted

Although the 1995 mass action campaign organised by SAPOHR around the

<sup>39</sup> *The Citizen*, 10 March 1995, 8; *Sowetan*, 13 March 1995, 6; *The Citizen*, 14 March 1995, 13.

<sup>40</sup> *The Citizen*, 14 March 1995, 13.

<sup>41</sup> *The Citizen*, 10 March 1995, 8.

<sup>42</sup> *Business Day*, 11 April 1995, 2.

<sup>43</sup> *The Citizen*, 11 April 1995, 3.

<sup>44</sup> Translated from *Die Burger*, 12 April 1995, 2.

<sup>45</sup> *The Star*, 12 April 1995, 3.

<sup>46</sup> *Business Day*, 12 April 1995, 2; *New Nation*, 9 February 1995, 8.

issue of amnesty ostensibly failed, it is interesting to note that a general amnesty was granted to prisoners shortly after the campaign came to an end. On 27 April 1995, Freedom Day, President Mandela announced a six-month remission of sentence for all categories of prisoners other than sentenced child abusers (who were not entitled to any remission of sentence at all) and prisoners sentenced to terms of less than two years (who were entitled to a remission of one-quarter of their sentences). This meant the immediate release of approximately 15 000 prisoners, which reduced the South African prison population from approximately 117 000 to just over 100 000.

The granting of the six-month amnesty was clearly motivated to a significant extent by the chronic overcrowding in South Africa's prisons.<sup>47</sup> News of the amnesty was not well received by the public, however, which was in the grip of a 'moral panic' over violent crime. The government found itself in a Catch 22 situation. On the one hand, overcrowding in the prisons had reached intolerable proportions, and the situation had to be alleviated by the general release of prisoners ('bursting'). On the other hand, the public was clearly in no mood to respond positively to the release of prisoners. *Beeld* commented as follows on 1 May 1995:

'When women are attacked at filling stations, kidnapped and raped, when old people (particularly in rural areas) are still the targets of criminals and when even expensive household security systems do not protect one from assault and murder, the release of criminals leads to loss of hope.'<sup>48</sup>

Besides opposition from the public, the mass release of prisoners also created other problems. The Director of the Johannesburg branch of NICRO, Jeanette Schmid, pointed out that there were not adequate support structures in place to deal with the increased numbers of prisoners being released:

'Most of the prisoners will not have homes and families to go to when they are released, and addressing the bleak question of employment is poised to present an even bigger problem.'<sup>49</sup>

These fears were not exaggerated. At the end of June 1995 a report in the *Daily News* painted a dismal picture of the lives of prisoners who had been released:

'They are the shame of the Government of National Unity — ex-prisoners and juvenile awaiting-trial prisoners released and sent back onto the streets. On the streets their lives have little meaning beyond the next meal and the roughly-rolled joint that helps them forget the misery of their daily existence.'<sup>50</sup>

In June 1995 it was reported that a presidential pardon had been granted to prisoners over 60 years old who had committed non-violent crimes. A total

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<sup>47</sup> *The Natal Witness*, 28 April 1995, 8; *Sowetan*, 28 April 1995, 3.

<sup>48</sup> Translated from *Beeld*, 1 May 1995, 8.

<sup>49</sup> *The Star*, 5 May 1995, 12.

<sup>50</sup> *Daily News*, 27 June 1995, 18.

of 215 prisoners were pardoned on this basis, including a certain Mr Alwyn Lombard, the brother of a former Reserve Bank deputy governor, who had been convicted of fraud and sentenced to seven-and-a-half years' imprisonment. Mr Lombard had only spent 124 days in prison before he was released in terms of the presidential pardon.<sup>51</sup> The Attorney-General of the Witwatersrand, Klaus von Lieres und Wilkau, described the release of Lombard as 'disastrous for the criminal justice system in South Africa'.<sup>52</sup> *The Citizen* commented bitterly on the case as follows:

'The crime he committed involved a massive amount and it cost the State at least R250 000 to gather evidence against him overseas. We do not see how judges can tolerate a situation in which sentences are cut to nothing by administrative action or amnesty.'<sup>53</sup>

In December 1995 it was reported that eight presidential amnesties had been announced since 1990. These had resulted in 133 229 sentences of imprisonment being shortened.<sup>54</sup>

### 3.5 The focus shifts to the Truth and Reconciliation Commission

Despite the failure of its mass action campaign during April 1995, SAPOHR continued to pursue the issue of amnesty for certain prisoners. In October 1995 certain members of SAPOHR, including its president, shackled themselves to the flagpoles outside the Rand Supreme Court. They demanded that a committee be created to review the release of 500 inmates who claimed to be political prisoners. The Minister of Justice, Dullah Omar, rejected this demand on the grounds that legislation did not provide for the creation of such a committee. He stated as follows:

'The previous indemnity Act made provisions for dealing with political prisoners who committed offences before October 8, 1990 . . . There is no law to deal with offences after that date except for the legislation providing for the Truth and Reconciliation Committee which sets a new cut-off date of December 5, 1993.'<sup>55</sup>

Towards the end of February 1996 SAPOHR warned that tensions were rising as prisoners struggled to have their cases heard by the Truth and Reconciliation Commission. SAPOHR threatened to resume the 'armed struggle' within prisons if the Department of Correctional Services did not allow prisoners to have their cases reviewed by the Commission.<sup>56</sup> While this issue certainly led to an increase in the tensions which existed at the time, it

<sup>51</sup> *The Citizen*, 22 June 1995, 8.

<sup>52</sup> *The Star*, 21 June 1995, 15.

<sup>53</sup> *The Citizen*, 14 June 1995, 6.

<sup>54</sup> *Die Burger*, 15 December 1995, 15.

<sup>55</sup> *The Citizen*, 12 October 1995, 4.

<sup>56</sup> *The Sunday Independent*, 18 February 1996, 3.

was the issue of parole which eventually sparked the most serious unrest within the prison system during 1996.

### 3.6 Legal challenge to the amnesty granted to mothers with minor children during 1994

As well as political pressure from prisoners and the public on the question of amnesty, the government also had to face legal challenges on the issue. In November 1996 the Durban and Coast Local Division of the High Court gave judgment in the case of *Hugo v President of the Republic of South Africa*.<sup>57</sup> This case involved the constitutionality of Presidential Act 17 of 1994, in terms of which President Mandela had granted a special remission of the remainder of their sentences to certain categories of prisoners. The categories of prisoners granted remission included 'all mothers in prison on 10 May 1994 with minor children under the age of 12 years'. The applicant was a male prisoner who had a son who was under 12 years old. His wife had died some years before, and he claimed that the Presidential Act was unconstitutional in that it discriminated against both him and his son on the grounds of gender. The court agreed with this contention and held that

'the applicant would have qualified for the remission of the remainder of his sentence in terms of the Presidential Act if he had been the mother and not the father of his son, who was under the age of 12 years at the relevant date. Accordingly, an "adverse distinction" had been made as between the applicant, as a single parent of his son, and any incarcerated mother, whether or not she was a single parent; he had certainly been distinguished unfavourably from such a mother. The Presidential Act has clearly therefore discriminated against the applicant, and it was, if anything, even more discriminatory of his son.'<sup>58</sup>

In reaching this decision the Durban and Coast Local Division in *Hugo's* case declined to follow a judgment on the same point which had been handed down a year earlier by the Transvaal Provincial Division, in the case of *Kruger v Minister of Correctional Services*.<sup>59</sup> In *Kruger's* case the court held against certain prisoners who had applied to have the amnesty granted to mothers declared unconstitutional. The court based its decision on the grounds that

'... there was no obligation upon even a government official with power to dispense largesse or favour, to do so in accordance with the Constitution, for the simple reason that there was no corresponding right upon any citizen to lay claim to the benefit of an act of charity.'<sup>60</sup>

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<sup>57</sup> 1996 (4) SA 1012 (D).

<sup>58</sup> At 1014.

<sup>59</sup> 1995 (2) SA 803 (T).

<sup>60</sup> *Kruger v Minister of Correctional Services* 1995 (2) SA 803 (T) at 803.

The court in *Hugo's* case countered this argument by holding that '... the fact that an applicant might not have any right to claim a portion of the largesse being distributed would not prevent him from interdicting a discriminatory distribution thereof'.<sup>61</sup>

The court in *Hugo's* case decided not to set aside any portion of the Presidential Act because of the obvious practical difficulties which would result, but ordered that the President should rectify the situation within a period of six months from the date of the court order.

## 4 Parole

### 4.1 Introduction

On 1 March 1994 the parole system applicable to prisoners in South Africa was altered substantially. In terms of the release policy which existed before that date a prisoner was automatically entitled to a remission of one-third of his sentence in return for good behaviour. If that prisoner was a first offender, he was entitled to a further one-third remission of sentence. Once a prisoner was released from prison he was not required to serve any period of his sentence under correctional supervision within the community.<sup>62</sup>

A cornerstone of the new release policy which came into effect on 1 March 1994 was the idea that a prisoner should serve his entire sentence without remission. This did not mean that the whole sentence would be served behind bars. Instead, part of the sentence would be served in prison and the remainder within the community under correctional supervision. In other words, the new policy involved the introduction of a system of release on parole. In terms of the new policy a prisoner would automatically be considered for release on parole after he had served half his sentence. Furthermore, if a prisoner accumulated a sufficient number of 'credit points' during his time in prison, he would be considered for release on parole after one-third of his sentence had been served. 'Credits' were to be allocated to prisoners for 'behaviour, discipline, adaptation, participation in specialised programmes, diligence and productivity'.<sup>63</sup>

The new release policy was far more complex and uncertain than the old policy. This was bound to lead to discontent on the part of prisoners. Furthermore, the success of the new policy depended largely upon the effectiveness of the system of correctional supervision. As will be pointed out, staff shortages and other factors resulted in very little, if any, supervision for many prisoners released into the community.

<sup>61</sup> *Hugo v President of the Republic of South Africa* 1996 (4) SA 1012 (D) at 1013.

<sup>62</sup> *The Star*, 21 June 1995, 15.

<sup>63</sup> *RSA Review*, 30 September 1995, 13.

The system of correctional supervision expanded rapidly during 1995. Forty-five additional community corrections offices were created throughout the country, and a further 149 posts were created within the branch of the Department of Correctional Services dealing with correctional supervision.<sup>64</sup>

#### 4.2 Three main criticisms of the parole system

In June 1995 there were forty-eight full-time and three part-time parole boards. They released an average of 4 300 prisoners each month, 354 of whom would be rearrested for committing further crimes at a later stage.<sup>65</sup> Three main points of criticism were directed at the parole system in general and the parole boards in particular. First, it was believed that the boards possessed too much power, which enabled them to 'interfere' unduly with the length of sentences handed down by the courts. Secondly, the boards were criticised as being 'unrepresentative' of the community at large. Thirdly, there was a perception that the boards were secretive bodies which deliberated behind closed doors and were generally unaccountable to the public.

The first line of criticism was based on the fact that, under the new parole system, it was within the sole discretion of the parole boards to decide whether prisoners would serve between one-half and two-thirds of their sentences inside prison, or within the community. The parole boards thus wielded a significant degree of power over the lives of prisoners. Public outrage at the 'tampering' by prison officials (i.e. parole boards) with sentences handed down by the courts was a constant theme in South African newspapers during the period under review. For example, in June 1995 the Attorney-General of the Cape, Frank Khan, stated as follows:

'The sentences currently handed down by courts are appropriate, but are tampered with by prison officials with accommodation problems . . . Court sentences have been slashed to the point where they are scarcely recognisable from the original sentence. As in the rest of the world, the sentencing judge should have the final say in parole matters.'<sup>66</sup>

During the same period the Minister of Justice, Dullah Omar, publicly criticised the Department of Correctional Services for the early release of prisoners on parole, and demanded that the judiciary should have a greater say over the length of time that prisoners actually spent in prison. The Department of Correctional Services responded by blaming the judiciary for delays in the judicial process which, the Department claimed, led to overcrowding and suffering in the prisons.<sup>67</sup>

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<sup>64</sup> 1995 *Annual Report of the Department of Correctional Services* 1.

<sup>65</sup> *The Star*, 21 June 1995, 15.

<sup>66</sup> *The Star*, 7 June 1995, 6.

<sup>67</sup> *The Star*, 19 June 1995, 7; *Sowetan*, 19 June 1995, 2 and *Cape Times*, 19 June 1995, 4.

The second line of criticism against the parole boards arose out of the fact that the boards were made up of officials from the Department of Correctional Services, without any community representatives. There were also very few female parole board members. This made the boards unrepresentative of the community at large. In February 1995, for example, the Mayor of Cape Town, Patricia Kreiner, was quoted as follows:

‘I challenge the board to appoint a woman and suggest that I could find a suitable woman who would serve on the board voluntarily.’<sup>68</sup>

In June 1995 a report in *The Star* described the parole boards as follows:

‘The boards are made up of correctional services personnel only, a fact which has attracted criticism from many non-governmental organisations like Lawyers for Human Rights . . . [The national director of Lawyers for Human Rights, Jody] Kollapen believes the community needs to be part of the parole boards, just as it needs to become more involved in all aspects of prison life.’<sup>69</sup>

The third line of criticism against the parole boards was that they consisted of ‘faceless bureaucrats’ who were not accountable to the public for their decisions:

‘There is something wrong with a system that allows a group of faceless bureaucrats, which the Parole Board is, to fly in the face of both professional expertise and public sentiment in the administration of post trial justice.’<sup>70</sup>

‘These are the “prison bureaucrats” — the clerks, the sergeants and young officers — who have the legal discretion to overturn judges’ decisions.’<sup>71</sup>

#### 4.3 The response of prisoners to the new parole ‘credit system’

While the newspapers were full of public criticism directed at the parole boards, very little was said about how the prisoners themselves felt about the power vested in the parole boards. As indicated in the following quotation, prisoners were generally unhappy with arbitrary nature of the new parole system and the power of the parole boards over their lives:

‘[Brigadier Gert] Jonker [spokesman for the Department of Correctional Services] says the credit system is not popular among prisoners because it has introduced uncertainty into their release dates. While participating in the credit system may bring their parole board hearing forward, it does not guarantee that they will be released.’<sup>72</sup>

On 21 June 1995 the Minister of Correctional Services admitted in Parliament that there had been problems with the new ‘credit system’ applicable

<sup>68</sup> *The Citizen*, 1 February 1995, 21.

<sup>69</sup> *The Star*, 21 June 1995, 15.

<sup>70</sup> *Cape Times*, 30 January 1995, 8.

<sup>71</sup> *The Star*, 21 June 1995, 15.

<sup>72</sup> *The Star*, 21 June 1995, 15.

to parole, but assured the National Assembly that a new parole system was being investigated, which would be easily understood by both prisoners and administrative staff.<sup>73</sup>

#### 4.4 Staff shortages and dissatisfaction seriously undermine the system of correctional supervision and lead to protests

The effectiveness of the system of correctional supervision depended on a sufficient number of trained staff being available to implement the system. During 1995 there was a shortage of 6 267 posts in the Department of Correctional Services as a whole. Within that section of the department dealing with correctional supervision there was one staff member to deal with every 37 probationers, as compared to an ideal ratio of one staff member for every 26 prisoners.<sup>74</sup>

During 1996 it became apparent that the system of correctional supervision was faltering because of a shortage of staff:

‘Since the introduction of the parole programme in 1993, a whopping 2 500 prisoners on parole had absconded in the Cape Peninsula alone, said Peter Jones, local acting head of correctional services. Because of staff shortage the department is forced to concentrate on only the most dangerous criminals who have broken their parole conditions. “We have only 83 personnel, so it is not always our priority to look for absconders apart from the small percentage of more dangerous people,” said Mr Jones.’<sup>75</sup>

‘“The prison authorities play with semantics”, says Cape Attorney-General Frank Kahn. “They say they are converting the form of punishment when they put someone on parole. But, in effect, they are freeing them because they don't have the staff to police them.”’<sup>76</sup>

Apart from staff shortages, supervisors were also poorly equipped to perform work in dangerous areas. During May 1996 officials responsible for monitoring about 4 000 parolees in the Durban area refused to visit parolees in certain known ‘danger spots’, including Umlazi, KwaMashu and Chesterville. According to the officials, they were at serious risk of being shot at, stabbed, hijacked and mobbed while on home visits to parolees in these areas. They demanded that they be equipped with two-way radios and cellular phones before they would resume visits to these townships.<sup>77</sup>

The problem that parole officers were afraid to visit ‘dangerous’ townships was not restricted to Durban. Particularly disturbing from the human rights

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<sup>73</sup> *The Citizen*, 22 June 1995, 8.

<sup>74</sup> *1995 Annual Report of the Department of Correctional Services* 7.

<sup>75</sup> *The Argus*, 21 June 1996, 1.

<sup>76</sup> *Financial Mail*, 12 July 1996, 20.

<sup>77</sup> *Daily News*, 31 May 1996, 1.

perspective was the fact that prisoners whose homes were located in such townships or in rural areas were less likely than other prisoners to be released on parole. The result was a parole system tainted by racial and class bias. This point is illustrated by the following distressing extract from a newspaper report dated 12 July 1996:

‘Justice officials say black prisoners are usually denied early parole because many parole supervisors refuse to travel to black townships. So, for the lack of a parole officer, blacks are denied the early release often granted to (mostly white) residents of upper-class suburbs. Parole, therefore, is a “white thing” which contributes to racial antagonism, political posturing and prison strikes . . .’<sup>78</sup>

The same point was made by SAPOHR as follows:

‘The reason for many prisoners not being released on parole is that officers assigned for checking these addresses cannot or claim not to find the addresses. This problem can be attributed to the fact that in most instances officers assigned to the task are predominantly white or Indian. Now taking into consideration South Africa’s past and the fact that most of the prison population are from South African townships and these officers are afraid of these townships. This means that addresses in townships will not be confirmed because these officers will never venture out into these townships . . . This situation also affects prisoners who live in rural areas. Their addresses are said to be unmonitorable, and therefore the prisoners will not be released. This situation is extremely unfair since these incarcerated persons did not chose to live where they live. They should not be punished for their living where they live.’<sup>79</sup>

#### 4.5 General dissatisfaction of prison personnel

It was not only those staff members involved in correctional supervision who were dissatisfied with their working conditions. Staff morale appears to have been low throughout the Department of Correctional Services during the post-election period.

In its 1995 *Annual Report* the Department stated that the year was marked by a number of ‘illegal strikes’ by personnel which resulted in a loss of 33 322 man days.<sup>80</sup>

On 5 June 1996 the Police and Prisons Civil Rights Union (POPCRU) conducted a nationwide protest march on the offices of police commissioners. Among the grievances of the union were the alleged failure of the South African Police Services and the Department of Correctional Services to implement affirmative action, and the alleged exclusion of members of disadvantaged groups from senior positions.<sup>81</sup>

<sup>78</sup> *Financial Mail*, 12 July 1996, 20.

<sup>79</sup> SAPOHR Report dated 19 February 1997, 3.

<sup>80</sup> 1995 *Annual Report of the Department of Correctional Services* 1.

<sup>81</sup> *The Star*, 30 May 1996, 2.

#### 4.6 Dissatisfaction with early parole — a public outcry is sparked by the 'di Blasi' affair

The dissatisfaction of the public and prisoners with the parole system is well illustrated by a number of cases involving the early release of certain high-profile prisoners. The first of these cases involved a prisoner by the name of Guisseppi ('Pino') di Blasi, who was released after serving only sixteen months of a four-year sentence of imprisonment for the murder of his estranged wife, the artist Francesca Gobbi. The killing took place in 1992 while Gobbi was on holiday in Hout Bay. One newspaper described the murder in the following gruesome terms:

'He [di Blasi] tracked his estranged wife to Hout Bay where she was on holiday with her lover, Loris Brunini, and, when she tried to flee, he shot her in the back then pumped two further shots into her head from point blank range.'<sup>82</sup>

All the elements were present for a highly charged public debate. At the time of di Blasi's release public concern over the high crime rate was running at fever pitch. The case involved a crime of passion and 'international' personalities, which resulted in sensationalist newspaper reporting. To make the matter even more newsworthy, it was reported that one of the reasons di Blasi was released on parole was the fact that he had risked his life to save a fellow inmate of Pollsmoor during the prison riots of 1994. A correctional services spokesperson stated that:

'When di Blasi noticed a cell in his block had caught alight during the mayhem, he rushed through into the burning cell to rescue a fellow prisoner.'<sup>83</sup>

During the debate over di Blasi's release it emerged that of his initial sentence of 48 months' imprisonment he had been granted a special remission of two months in return for his meritorious service during the prison riots. He had been granted a further remission of six months as a result of an amnesty declared by President Mandela. This left him with an effective sentence of 40 months, of which he had served 17 months when he was released on parole.

A number of distinguished public figures were soon involved in the debate over di Blasi's release. The judge who had convicted di Blasi, Judge DM Williamson, was quoted as stating that the parole system might be improved if prisoners who were to be considered for parole were referred to the trial judge for his/her input before a decision was taken on their release.<sup>84</sup>

The mayor of Cape Town, Patricia Kreiner, then added her voice to the chorus of public dissatisfaction with the early release of di Blasi. She was quoted by *The Citizen* and the *Cape Times* as stating that

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<sup>82</sup> *Sunday Times*, 29 January 1995.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Die Burger*, 28 January 1995.

'... our legal system has been discredited and we have been made to look like idiots'.<sup>85</sup>

She went on to attack the parole board on the grounds that it was unrepresentative, since there were no women serving on the board. The mayor's stance on this issue was bound to be politically popular, in light of the strong anti-criminal feeling which prevailed at the time. The public mood was summed up in an editorial in the *Cape Times* as follows:

'Almost everyone but the Parole Board itself is appalled by the decision to release convicted murderer Guisepppe di Blasi from prison a mere 16 months after being sentenced to four years. The Cape Attorney-General, Frank Khan, has described the early release as a disgrace. The Democratic Party says it makes a mockery of our courts. The National Party sees it as totally unacceptable. The ANC has criticised the present parole procedures for their confusion . . . There is something wrong with a system that allows a group of faceless bureaucrats, which the Parole Board is, to fly in the face of both professional expertise and public sentiment in the administration of post-trial justice.'<sup>86</sup>

One of the strongest opponents of di Blasi's release was the Attorney-General of the Western Cape, Frank Kahn. A public row erupted between the Department of Correctional Services and Khan, who was still in the process of appealing against the leniency of the four-year sentence of imprisonment imposed on di Blasi. Khan feared that di Blasi might flee South Africa and return to Italy. Once there, it would not be possible for the South African authorities to force his return to South Africa, since Italy did not surrender its own citizens for trial.<sup>87</sup>

Kahn suggested to a legal forum which met during February 1995 that the final decision to release a prisoner on parole be taken by a judge or a magistrate. He also suggested that a special court be created to deal with offences committed within prisons, as well as to decide upon the release of prisoners on parole. He pointed out that such a special court existed in Germany, and that in France special magistrates were appointed to review the decisions of parole boards.<sup>88</sup>

The di Blasi saga finally came to an end in September 1995, when the Appellate Division upheld the appeal brought by Kahn against the leniency of di Blasi's sentence. Among the reasons advanced by the Appellate Division for increasing di Blasi's sentence was that the original sentence of four years' imprisonment was 'shockingly inappropriate' and that 'a premeditated, callous murder should not be punished too leniently lest the administration of justice

<sup>85</sup> *The Citizen*, 1 February 1995; *Cape Times*, 2 February 1995.

<sup>86</sup> *Cape Times*, 30 January 1995.

<sup>87</sup> *Sunday Times*, 29 January 1995.

<sup>88</sup> *Die Burger*, 16 February 1995, 3; *Cape Times*, 17 February 1995, 4.

be brought into disrepute'.<sup>89</sup> The Appellate Division's judgment was well received by the public, and was described by *Die Burger* as a measure of hope for a public under siege by criminals.<sup>90</sup>

#### 4.7 Further dissatisfaction with early release on parole — the Blank and Bhamjee affairs

The 'di Blasi affair' was followed by an equally interesting saga involving two other 'high-profile' white-collar criminals, Greg Blank and Abdul Bhamjee. These prisoners were released on parole during July 1996. Blank had been sentenced to eight years' imprisonment after conviction on 48 counts of fraud involving nearly R10 million, and was released after serving 21 months of his sentence. Bhamjee had been sentenced to fourteen years' imprisonment for the theft of R7,4 million, and was released after serving 52 months of his sentence.<sup>91</sup>

Blank had used contacts in the business world to solicit R1,2 million for improving the Krugersdorp prison where he was held, and the perception arose that he may have received favourable treatment because of this. This was denied by the Department of Correctional Services as well as by certain prisoners at Krugersdorp prison, who claimed that Blank had worked selflessly to improve the lives of all prisoners.<sup>92</sup> The ANC's Carl Niehaus, on the other hand, alleged that Blank had possibly exercised improper influence over the Department of Correctional Services. It was alleged that Blank had given gifts to the head of the prison, donated gym equipment worth thousands of rands to the prison, and arranged free rugby tickets for senior prison personnel. Mr Niehaus stated that the impression was being created that white-collar crime was not taken seriously and that it was easy to get out of prison if you were white and rich.<sup>93</sup>

Sparked by the release of Blank and Bhamjee, dissatisfaction with the parole system flared up once again. SAPOHR called on prisoners to refuse to eat or work until the Department of Correctional Services gave a detailed account of the criteria and calculations used when Blank and Bhamjee were released on parole. By 3 July 1996 26 of the country's 266 prisons were affected by the unrest, with an estimated 3 500 inmates taking part in the 'strike'. The Department of Correctional Services condemned the action taken by prisoners and stated that the parole system was under review.<sup>94</sup>

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<sup>89</sup> *S v Di Blasi* 1996 (1) SACR 1 (A) at 1.

<sup>90</sup> *Die Burger*, 22 September 1995.

<sup>91</sup> *Beeld*, 3 July 1996, 1; *The Citizen*, 4 July 1996, 1.

<sup>92</sup> *The Sunday Independent*, 23 June 1996, 4; *Beeld*, 7 June 1996, 2.

<sup>93</sup> *Beeld*, 3 July 1996, 1.

<sup>94</sup> *Die Burger*, 4 July 1996, 2; *The Star*, 4 July 1996, 3; *Business Day*, 4 July 1996, 1; *The Citizen*, 4 July 1996, 1.

Although tensions ran high in the prisons taking part in the protest action, little violence or damage to property was reported. Prisoners set fire to four cells at the Barberton Prison, causing damage estimated at R250 000, and broke steel grids at the Goedemoed Prison near Aliwal North.<sup>95</sup> At Burgersdorp one of the warders was stabbed in the face by one of the protesting inmates but not seriously injured.<sup>96</sup>

Newspaper editorials at the time complained bitterly about the fact that prisoners were being released from prison after serving only a fraction of their sentences:

'In both the making and the application of the law, the judicial system is carefully designed to ensure that criminals receive appropriate sentences, neither too severe nor too lenient. By paroling convicts before — and often long before — the full sentence has been served, the Correctional Services are in effect usurping the powers and functions of the courts. In the current climate, the public wants to see criminals effectively dealt with, and early releases seem to make a mockery of the good work done by the police in apprehending them and the courts in convicting and sentencing them.'<sup>97</sup>

On 4 July 1996 SAPOHR called for the suspension of the countrywide protest action by prisoners. The SAPOHR chairman, Golden Miles Bhudu, said that he had been assured by the public protector, Selby Baqwa, and the chairman of the portfolio committee on correctional services, Carl Niehaus, that a high-priority investigation had been launched into the release of Blank and Bhamjee. He had also been assured by Niehaus that the government had launched a comprehensive enquiry into the parole system.<sup>98</sup> By 5 July 1996 the situation at the prisons which had been affected by the protest action was returning to normal.<sup>99</sup>

On 8 July 1996 there was another twist in the Blank/Bhamjee saga. A prisoner who had allegedly shared a cell with Blank claimed that warders had promised him certain privileges in return for planting a weapon which was then discovered by Blank and reported to the authorities. In this way Blank took credit for handing in the weapon and proved himself as an exemplary prisoner.<sup>100</sup> The prisoner who made the allegation claimed that warders had threatened to kill him if he spoke about Blank. He alleged that white-collar criminals had formed a syndicate within the Krugersdorp Prison to help each other obtain early release on parole by reporting on illegal firearms and master

<sup>95</sup> *The Citizen*, 5 July 1996, 1.

<sup>96</sup> *The Citizen*, 4 July 1996, 1.

<sup>97</sup> *The Natal Witness*, 4 July 1996, 8.

<sup>98</sup> *Business Day*, 5 July 1996, 2; *The Citizen*, 5 July 1996, 1; *The Star*, 5 July 1996, 3.

<sup>99</sup> *The Citizen*, 6 July 1996, 4; *Die Volksblad*, 6 July 1997, 2.

<sup>100</sup> *Sowetan*, 8 July 1996, 3.

keys circulating in the prison.<sup>101</sup> In August 1996 he made an unsuccessful attempt to commit suicide. He claimed that warders had threatened to poison his food and that unknown persons had made intimidating phone calls to his wife.<sup>102</sup>

At the end of August 1996 SAPOHR threatened to call a national strike if the sentences of forty prisoners at the Westville prison were not reduced for good behaviour. The union stated that the men had made exceptional contributions to their prison in that they had converted a juvenile prison into a youth centre, and should be granted the same benefits that Greg Blank had received in return for his efforts at the Krugersdorp prison.<sup>103</sup>

#### 4.8 The abolition of the death penalty and the question of parole for prisoners serving life sentences

Another issue concerning the parole system which emerged during the post election period involved former 'death row' prisoners. The abolition of the death penalty following the landmark Constitutional Court decision of *S v Makwanyane* in 1995 led to concerns over the fact that a sentence of imprisonment for 'life' did not necessarily mean that a prisoner would spend the rest of his life in prison.

The policy was that a prisoner who had been sentenced to imprisonment for life was considered for parole once he had served twenty years of his sentence. Applications for parole by prisoners serving life sentences were considered by the National Advisory Council of the Department of Correctional Services.<sup>104</sup>

In June 1995 *Beeld* reported that a judge who sentenced a criminal to imprisonment for life was entitled to request in writing that the criminal serve at least thirty or forty years in prison. This request would be taken into account by the Department of Correctional Services.<sup>105</sup>

Where the judge had in mind a sentence other than life, but nevertheless wanted the offender to serve a substantial time in prison, a possible way to avoid early release on parole was to impose what *The Citizen* called a 'cricket score sentence'. This was clearly detrimental to the administration of justice:

'[W]hat is happening now, with judges being forced to impose cricket score sentences to ensure that criminals are kept in prison for as many years as the judges have in mind, is bound to react adversely on the judicial system. We would rather

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<sup>101</sup> *The Argus*, 9 July 1996, 6; *The Star*, 9 July 1996, 3.

<sup>102</sup> *Sowetan*, 2 August 1996, 5; *Saturday Star*, 3 August 1996, 3.

<sup>103</sup> *The Star*, 28 August 1996, 2.

<sup>104</sup> The Chairperson of the National Advisory Council is a judge, and the members of the Council include the various Attorneys-General of the Provinces.

<sup>105</sup> *Beeld*, 29 June 1995, 4.

have a situation in which judges impose sentences which will be carried out. We therefore call on the government to make this matter one of urgency by appointing a commission to go into the question of sentencing and parole before the situation gets totally out of hand.<sup>106</sup>

During the same month as the above call was made, draft legislation dealing with the question of life sentences was tabled in Parliament. The Criminal Procedure Amendment Bill introduced by the Democratic Party was aimed at ensuring that, in certain cases, criminals sentenced to imprisonment for life would stay in prison until they died. The legislation further proposed that judges be authorised to stipulate that the sentence of a particular prisoner should not be reduced, nor parole granted to that prisoner. The effect of the Bill was summed up by *The Natal Witness* as follows:

‘The bill includes two new categories of sentence, “imprisonment for life with or without the possibility of parole or early release” and “imprisonment for a specified period with no possibility for parole or early release”. This will give judges the option of giving effective life sentences without any options or lesser prison terms without options.’<sup>107</sup>

With public concern over increasing crime at an all time high, the prevailing mood in Parliament tended to favour the Democratic Party’s suggestions. The ANC chairman of the parliamentary justice committee, Johnny de Lange, stated that:

‘The provisions on sentencing options will get a sympathetic ear because we want to create sentences which are deterrent and which will prevent dangerous criminals being let loose on the streets through bureaucratic bungling.’<sup>108</sup>

The National Party justice spokesman, Danie Schutte, stated that the National Party would support the proposed legislation, but that

‘in view of the present violence in the country it is not enough; capital punishment is still needed as a final sentencing option.’<sup>109</sup>

In October 1995 the chairman of the portfolio committee on correctional services, Carl Niehaus, announced that 145 of the 289 prisoners who had been incarcerated on ‘Death Row’ in Pretoria Maximum Security Prison, had been transferred to similar institutions closer to their homes. They had been classified as maximum security prisoners until such time as their status could be determined by the 1996 Parliamentary session. The extent of the psychological trauma suffered by these prisoners seems to have been recognised by the portfolio committee:

‘[Niehaus] said the Death Row prisoners had been transferred due to concern for

<sup>106</sup> *The Citizen*, 17 August 1995, 6.

<sup>107</sup> *The Natal Witness*, 9 August 1995, 1.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

their psychological and mental wellbeing and the negative connotations they had about their surroundings . . . [He] added that vital psychiatric attention needed by erstwhile Death Row prisoners was lacking because of manpower shortages at prisons.<sup>110</sup>

One of the 'privileges' to which former 'Death Row' prisoners would now be entitled was regular visits from their family members. Niehaus pointed out that certain prisoners on 'Death Row' had not seen their children for a period of seven years.<sup>111</sup>

It should be noted that it was not only 'Death Row' prisoners who were deprived of the right to visits during the post election period. During September 1996 SAPOHR called for the scrapping of legislation which allowed prison authorities to stop any prisoner from receiving visits. This followed the suicide of a prisoner at the Diepkloof prison who had been denied a visit from his wife. SAPOHR's call was supported by Carl Niehaus who stated that 'contact with family is a right'. The Department of Correctional Services maintained that visits were 'privileges' as opposed to 'rights'.<sup>112</sup>

Towards the end of March 1996 the National Advisory Board on Correctional Services recommended provisionally that a prisoner sentenced to life imprisonment should be considered for parole after serving twenty years of his sentence. The Board also recommended that a prisoner sentenced to life imprisonment should be considered for parole on reaching 65 years of age, provided that such prisoner had served fifteen years of his sentence. According to the Board it would be unconstitutional to imprison an inmate for life without the prospect of parole. Further, it would be difficult to control such inmates, since there would be no inducement for them to obey prison regulations.<sup>113</sup>

## **5 Other issues affecting the human rights of prisoners during the post-election period**

During the post-election period other issues arose which affected the human rights of prisoners, besides those issues concerning questions of overcrowding, amnesty and parole which have been discussed above.

### **5.1 The human rights of juvenile prisoners**

In May 1995, as the result of an amendment to s 29 of the Correctional Services Act 8 of 1959, 866 awaiting trial children were released from prisons.

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<sup>110</sup> *The Star*, 5 October 1995, 1.

<sup>111</sup> *Ibid.*

<sup>112</sup> *The Star*, 17 September 1996, 5.

<sup>113</sup> *Die Burger*, 27 March 1996, 15.

Many of them were transferred to places of safety, but others ended up on the streets.<sup>114</sup>

The human rights of juvenile offenders had long been neglected, and 1995 saw the establishment of a Ministerial Committee for Youth at Risk to assist in the transformation of the child and youth care system. During this period the Department of Correctional Services established a 'Subdirectorate: Youth Offender Services' to manage the detention and treatment of juvenile prisoners.

Four Youth Development Centres were to become operational during the first half of 1996 and a fifth centre was to be erected with the help of RDP funds, bringing the total number of centres for juvenile offenders to eight.<sup>115</sup>

## 5.2 Abuse of human rights by prison gangs

In January 1996 prisoners at the Pretoria Central Prison alleged that prison warders were implicated in prison violence. They claimed that warders had formed links with certain prison gangs and were providing these gangs with knives and sharp objects. The concern expressed by the prisoners was related to incidents of fighting between prisoners at the Klerksdorp and Barberton prisons towards the end of 1995, which left seven prisoners dead.<sup>116</sup> The helplessness felt by prisoners in the face of gang violence was expressed by one inmate as follows:

'Those of us who do not belong to gangs are in danger. There is no one to protect us in case violence erupts.'<sup>117</sup>

In August 1996 SAPOHR alleged that the new Pietermaritzburg prison had become 'a den of open gangsterism where officials turn a blind eye to stabbings and the open display of an assortment of weapons by prisoners' and that 'there was a stabbing a day in the facility, often in full view of prison warders, but officials had failed to charge assailants and regularly put perpetrator and victim back into the same cell'.<sup>118</sup>

The following allegation is made in a report obtained from SAPOHR for this chapter:

'Warders who wish to trade in mandrax and dagga use the gangs as distributors. In return the gangs get special privileges when it comes to their cells being searched or other minor privileges not extended to all prisoners. Warders also threaten to move non gang prisoners to gang sections of the prison if, for instance they (non gangsters) wished to report an assault by the warder to the Head of the Prison or some other authority. It is difficult to come out with tangible proof of this because

<sup>114</sup> *The Citizen*, 14 June 1995, 6; *RSA Review*, 30 September 1995, 17.

<sup>115</sup> 1995 *Annual Report of the Department of Correctional Services* 1.

<sup>116</sup> *Beeld*, 4 January 1996, 4; *Sowetan*, 5 January 1996, 2.

<sup>117</sup> *Sowetan*, 5 January 1996, 2.

<sup>118</sup> *Daily News*, 16 August 1996, 3.

of the fear non gangsters have of gangs. Those willing to supply information only do it secretly and will seldom give an official statement.<sup>119</sup>

The implications of allegations such as these for the human rights of prisoners are extremely serious. They paint a picture of fear and corruption, a reign of terror orchestrated by certain corrupt warders and implemented by vicious gangsters.

The problem of gangsterism within South Africa's prisons was acknowledged by the Minister of Correctional Services in August 1996, when he proposed the construction of 'super maximum security prisons' to be located in remote areas. The aim of these new gaols would be to break the cycle of gang-related violence within South African prisons:

'We want them far away from their families, away from their theatre of operations and in a place where they will be under constant guard, in single cells, and with little if any contact with other prisoners.'<sup>120</sup>

A possible location for one of the new super maximum security prisons was a disused mine in the Free State, which would be converted using private sector finance.<sup>121</sup> This proposal foreshadowed the public debate which was to take place in the following year, during which the Minister was heavily criticised for suggesting that disused mine shafts be converted into prisons.

During August 1996 a serious gang war broke out in the Waterfall prison near Utrecht. Six hundred prisoners were involved in the violence which left thirty-five prisoners injured, three of them seriously. SAPOHR alleged that prison staff had been involved in bringing knives into the prison which had contributed to the violence.<sup>122</sup>

### 5.3 The abuse of the human rights of prisoners with AIDS

During the post-election period the human rights of prisoners with AIDS were significantly breached. The South African Institute of Race Relations summarised the position as follows:

'In May 1995 four inmates of the Diepkloof Prison in Johannesburg, who had been diagnosed as having the HIV virus . . . applied to the Transvaal Provincial Division of the Supreme Court in Pretoria for a declaratory order confirming their right to privacy. The four stated that warders at the prison constantly referred to them as "HIV" or "AIDS" prisoners in front of other prisoners and staff. Three of the four also claimed that their blood had been tested for HIV without their consent. One said the prison had shown so little regard for his right to privacy that he had learnt that he was HIV positive from a fellow inmate. Moreover, notices stating "HIV"

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<sup>119</sup> SAPOHR Report dated 19 February 1997, 2.

<sup>120</sup> *Cape Times*, 23 August 1996, 3.

<sup>121</sup> *Ibid.*

<sup>122</sup> *The Natal Witness*, 23 August 1996, 3.

were posted on the cells of those who had tested positive, while their food was also labelled "HIV".<sup>123</sup>

'In July [1995], Lawyers for Human Rights called on the minister of correctional services, Siphso Mzimela, to revise the "discriminatory policy" of segregating HIV-positive prisoners and to distribute condoms in prisons to halt the spread of the virus. The organisation believed that "archaic" prison policies resulted in fewer prisoners undergoing HIV testing for fear of "punitive" segregation measures if their results were positive . . . In September [1995], the Transvaal Provincial Division of the Supreme Court in Pretoria awarded damages of R1000 to a former prisoner who had been tested for HIV by prison authorities without his knowledge or consent. Mr Justice Kirk-Cohen found that the man's right to privacy had been violated and that he had not given "informed consent", which was required for testing.'<sup>124</sup>

The report of the Working Group on Prison Health Care which was tabled on 1 November 1995 recommended that condoms be made available to prisoners and that the separation of prisoners due to their HIV status be discontinued.<sup>125</sup>

#### 5.4 The plight of awaiting trial prisoners

During the post-election period the justice system as a whole was severely clogged, and this resulted in long delays between the time that an offender was arrested and eventually tried. The human rights of awaiting trial prisoners were severely compromised by these long delays. In Durban the long periods which prisoners had to wait before being allocated a trial date led to an extended strike by awaiting trial prisoners at Westville prison. Prisoners refused to attend court until the wheels of justice were speeded up.<sup>126</sup> A similar protest action by awaiting trial prisoners took place at the Vryheid prison during July 1996.<sup>127</sup>

## 6 Conclusion

The conclusions of this article are limited by the nature of the empirical data utilised. Much of the data consisted of reports drawn from a variety of national and local newspapers. Additional data was obtained from the 1995 *Annual Report of the Department of Correctional Services*, information provided by SAPOHR, and sundry other publications. Although valuable in tracing the public mood on various issues, as well as the political positions of various interest groups involved, such data do not fully reveal the everyday experiences

<sup>123</sup> *South Africa Survey 1995/1996* 473.

<sup>124</sup> *South Africa Survey 1995/1996* 203; *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

<sup>125</sup> 1995 *Annual Report of the Department of Correctional Services* 1.

<sup>126</sup> *Weekly Mail and Guardian*, 26 April–2 May 1996, 11; *The Citizen*, 7 June 1996, 9.

<sup>127</sup> *The Star*, 24 July 1996, 9; *Beeld*, 24 July 1996, 4; *The Natal Witness*, 24 July 1996, 3.

of the inmates of South African prisons. This chapter can only point in a general way to the severe human rights abuses suffered by prisoners during the post-election period. Many stories of the individual suffering experienced by prisoners during these years remain to be told and it is hoped that this article may form part of the background to the telling of these stories.

## CHAPTER 4.2

### **'The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-up to South Africa's Second Democratic Election**

Article published in a SAPSE accredited journal:

Peté, SA (2002) 'The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-up to South Africa's Second Democratic Election *South African Journal of Criminal Justice* 13(1): 1-56.

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Citation: 13 S. Afr. J. Crim. Just. 1 2000



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‘The good, the bad and  
the warehoused’:  
The politics of imprisonment  
during the run-up to South Africa’s  
second democratic election

STEVE PETE\*

**1 Introduction**

The years leading up to South Africa’s second democratic election on 2 June 1999 were significant in that policies put in place by the country’s first democratic government began to work their way through into practice.

In the field of corrections, a ‘two-pronged’ approach was initiated. On the one hand, certain ‘high risk’ offenders (the ‘bad apples’) were removed from ‘normal’ prisons and placed in Pretoria’s ultra-secure ‘C Max’ facility. This facility provided maximum security with minimum comfort, bordering on a serious abuse of the human rights. On the other hand, several new facilities were built which were dubbed ‘five star hotels’ by the newspapers. These facilities were designed to cater for prisoners at the other end of the inmate spectrum, who were provided with every opportunity to rehabilitate themselves.

In practice, the ‘two-pronged’ approach was only relevant to a small proportion of the prison population. Sandwiched between the ‘good’ prisoners in their ‘five star hotels’ and the ‘bad’ prisoners in ‘C Max’ were the bulk of the prison population, ‘warehoused’ in chronically overcrowded facilities throughout the country. Chronic overcrowding and its results overshadowed much of what transpired during the period under review.

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Increasing numbers of awaiting trial prisoners gave rise to particular problems. High crime rates and other factors brought pressure to bear on the criminal justice system, which resulted in long delays between the arrest and trial of many suspects. This gave rise to tensions between the Department of Correctional Services, which was flooded with increasing numbers of awaiting trial offenders, and other government departments perceived to be responsible for the delays.

Chronic overcrowding lent added impetus to the privatization of parts of the prison system. Contracts were concluded with the private sector to design, build and manage a number of facilities. There was also serious discussion about the possible conversion of ships into floating prisons, which would be managed by the private sector, as well as continued talk of converting disused mine shafts into maximum security prisons.

Due to severe overcrowding and staff shortages, prison personnel suffered from severe stress and low morale. Disturbing reports of corruption among prison personnel continued to surface at regular intervals, as well as allegations of brutality and racism on the part of warders. There was also much political in-fighting amongst prison staff.

The effects of overcrowding and lack of resources were also felt in the area of parole and correctional supervision. Many prisoners released on parole or sentenced to correctional supervision simply absconded and could not be traced due to lack of resources. This caused much unhappiness amongst correctional services staff employed in this area, as well as much public indignation. A pilot scheme for the electronic monitoring of parolees was completed and plans made to introduce it on a large scale.

The problem of juveniles held in adult prisons while awaiting trial continued to be a major problem. There was consensus on the desirability of removing these juveniles from adult prisons, but this was not possible due to lack of alternative facilities. Serious tensions emerged between the departments of Welfare, Justice, and Correctional Services on this issue.

Gangs continued to conduct a reign of terror within many prisons. Warders and gangs seemed to be involved in a violent struggle for the control of certain prisons, with the gangs appearing to hold the upper hand at times. In some prisons certain warders seemed to operate as extensions of the gangs. A combination of corrupt warders and violent prison gangs resulted in the continued existence of a serious drug problem in many prisons. The influence of the prison gangs also extended beyond the prison walls into the community, with increasing links being formed between prison gangs and street gangs. Escapes continued to occur but were fewer than in previous years.

The entire Correctional Services Act was redrafted to bring it into line with the South African Constitution. The new act contained several important

innovations including provisions for an independent 'Inspecting Judge' who was empowered to act as a watchdog to ensure that prison conditions complied with basic human rights. Legislation was also passed allowing courts to fix a certain portion of a prisoner's sentence during which it would not be possible for that prisoner to be paroled.

The South African Human Rights Commission emerged as one of the main watchdogs over human rights in prisons. There was much political tension between this body and the Department of Correctional Services. The Commission had to deal with certain bizarre matters, including the rumour that prisoners who had been hanged at Pretoria Central Prison during the apartheid era had been turned into zombies and were working as slaves in the South African Mint!

Some problems caused by the transition from an authoritarian state to a constitutional democracy continued to haunt the criminal justice system. One such problem was the large number of 'death row' prisoners who were now in limbo following the 1995 ruling of the constitutional court outlawing the death penalty.

Chronic overcrowding put paid to all but a few programmes aimed at the rehabilitation of prisoners. Recidivism remained unacceptably high.

The South African public continued to regard crime as the most serious problem facing the country. There was little public sympathy for convicted criminals and strong support for measures limiting their privileges. A constitutional court decision in April 1999 extending to prisoners the right to vote met with strong public disapproval.

Overall, during the period under review the human rights of South African prisoners continued to be seriously compromised. Chronic overcrowding was clearly the main culprit. A serious lack of resources to deal with this problem, coupled with strong public anger over crime, meant that little was done to alleviate the suffering of most ordinary prisoners. This article paints a picture of some of that suffering.

## **2 'C Max' and 'Supermax' — South Africa's 'purgatories'**

### **2.1 Introduction**

The iron fist within the velvet glove of the post apartheid penal system was to be a series of 'C Max' and 'Supermax' prisons designed for the most violent offenders.

### **2.2 'C Max' and 'Supermax' defined**

Both 'C Max' and 'Supermax' prisons were designed to be escape proof, with the emphasis on containment and isolation rather than rehabilitation. They were modeled on 'super maximum' prisons in other parts of the world, such as the penitentiary in Marion, Illinois, which holds the most violent prisoners

in the United States of America under the harshest and most controlled penal conditions.<sup>1</sup> To establish a 'C Max' prison, a normal maximum security prison would be converted so as to render it escape proof, whereas a 'Supermax' prison would be designed and built from scratch to contain the most violent and dangerous prisoners within the penal system. With the violent elements removed, the authorities hoped that the rest of the prison population could benefit from a renewed emphasis on rehabilitation through education and skills training.<sup>2</sup>

### 2.3 The idea behind a 'purgatory' for dangerous prisoners

The minister of correctional services explained the reasoning behind the new super maximum prisons to the press as follows:

'We have to separate those who do not want to be rehabilitated from those who want to change their lives and go back into the community. We cannot rehabilitate while the criminally violent and dangerous prisoners are mixed with the others. They pollute the environment.'<sup>3</sup>

'We believe people of that ilk should be separated from the rest of the prison community and put in a place where they will be on their own and pose no danger to their warders and have time to think about how they will spend the rest of their lives.'<sup>4</sup>

Clearly, the minister regarded these prisoners as akin to an infectious virus, which needed to be isolated from the rest of the prison population. He went on to note that those confined within the super maximum prisons would only feel a human touch once a day (when they were handcuffed before being taken to a cage for an exercise period) and conceded that it was a type of 'purgatory'. The minister predicted that by January 1999 at least half of South Africa's 7 000 most violent prisoners would be safely locked up in C Max and Supermax prisons.<sup>5</sup>

### 2.4 South Africa's first C Max prison

South Africa's first 'C Max' prison was constructed by converting the old death row cells in the Pretoria Prison. The construction work took six weeks and cost R600 000.<sup>6</sup> The prison was opened by the Minister of Correctional Services in September 1997. It was designed to house ninety-five high risk prisoners, such as murderers, rapists, gang leaders and prisoners with a history of violence. The convicted hit squad killer Eugene de Kock was one of the first inmates.

<sup>1</sup> *The Sunday Independent* 22 March 1998 page 3.

<sup>2</sup> *Business Day* 4 December 1997 page 6.

<sup>3</sup> *Sunday Tribune* 19 October 1997 page 10.

<sup>4</sup> *Saturday Argus* 18 October 1997 page 7.

<sup>5</sup> *Business Day* 4 December 1997 page 6.

<sup>6</sup> *Beeld* 23 September 1997 page 1.

Safe containment of prisoners was a priority. Whenever C Max prisoners left the prison they were shackled to a 'stun belt' operated by a warder with a remote-control device. The belt was capable of delivering an electric shock of 50 000 volts which would temporarily stun the prisoner. Warders were also equipped with 'stun shields' (a perspex shield fitted with a non-lethal shocking device) for use in riot situations.

The living conditions of prisoners within the prison were extremely harsh:

'Prisoners will be forced to live without human contact for 23 hours a day and will only be allowed out for an hour's exercise a day in a cage. . . . Prisoners will live in concrete and steel cells measuring 4 m by 2 m under constant surveillance by warders who can observe them through wire mesh ceilings. . . . When leaving their cells to exercise, they will be handcuffed and escorted individually.'<sup>7</sup>

'All the prisoner's meals would be served in their cells, to be eaten with plastic utensils. . . . The prisoners would not be allowed to speak to anyone other than their warders. . . . Inmates at C Max would not be allowed to shave. Instead, a commercial brand of hair remover would be applied to their faces before showering. Showers would be taken in an isolated, locked cage. . . . The inmates would not be allowed to smoke . . . would be allowed no money, jewellery, television sets, electrical appliances or contact visits. They could make a maximum of 10 minutes' telephone calls a week and would be allowed a limited number of letters. These would be searched for contraband. . . . Each prisoner would be evaluated every three months to determine if he could be sent to an ordinary maximum security prison.'<sup>8</sup>

## 2.5 The reaction of human rights groups

From the start, the draconian regime under which prisoners were forced to live in Pretoria's C Max prison came under fire from human rights groups and others. During September 1997 members of the Human Rights Commission visited the prison and expressed some disquiet about the strict regulations which denied prisoners human contact for 23 hours a day. An organization representing the De Kock family claimed that this amounted to torture.<sup>9</sup> The Centre for the Study of Violence and Reconciliation condemned the regulations as inhuman:

'The severe restrictions on communications between prisoners cut off what was a clear emotional and developmental need for all people. The denial of this was inhuman. Such treatment could engender a range of psychological problems ranging from depression to psychosis.'<sup>10</sup>

Sheena Duncan, chairperson of the human rights organization 'Black Sash', condemned C Max in the strongest possible terms:

<sup>7</sup> *The Daily News* 25 September 1997 page 3.

<sup>8</sup> *The Daily News* 23 September 1997 page 2.

<sup>9</sup> *The Daily News* 25 September 1997 page 3.

<sup>10</sup> *Business Day* 25 September 1997 page 2.

'We did not think we would ever have to fight this battle again, but . . . [t]he conditions of imprisonment in the new . . . prison in Pretoria are as bad, if not worse, than anything which preceded them before 1994. . . . It seems our minister of correctional services has absolutely no understanding of the fundamental human rights enshrined in South Africa's constitution. . . . Complete isolation for 23 hours out of 24 is torture on its own, but add to that a wire mesh ceiling to every cell, which means no privacy at all, and one hour or 'exercise' in handcuffs in a small cage and it is enough to drive people out of their minds — as we know from past experience. . . . We are challenged by the fact that Eugene de Kock is one of the first to be confined in this section. . . . He represents everything we abhorred in the past; but we must defend his rights because to let them go by default is to relinquish the very idea of rights which can protect all the people in this country.'<sup>11</sup>

The prison was also attacked by Lukas Muntingh and Rosemary Shapiro, members of the National Institute for the Prevention of Crime and the Rehabilitation of Offenders. They submitted that the prison would dehumanize its inmates, which would lead to further human rights abuses. They quoted Justice Richard Goldstone, the president of Nicro, who warned that any severe human rights abuse is preceded by a process of dehumanization. Imprisonment in C Max amounted to solitary confinement, which was an additional punishment over and above the deprivation of liberty which constituted the punishment of imprisonment in terms of the constitution. Solitary confinement was inhumane and contrary to internationally accepted conventions. Confinement in C Max would not serve to rehabilitate offenders. As for preventing escapes, they pointed out that during 1997 only one third of escapes took place from prisons. Most escapes took place from police cells, court cells or while prisoners were in transit. In any event, since only a small proportion of prisoners were to be detained at C Max and other proposed maximum security prisons, these prisons would not address the problem of poor security at prisons generally. It was also pointed out that the admission criteria for inmates of C Max were not clear, which resulted in a strange mix of rapists, murderers, escapees and political offenders being held there. The fear was expressed that C Max would be used increasingly as a dumping ground for a variety of offenders for whom it was not intended. The department was urged to concentrate instead on the problem of awaiting trial prisoners. These prisoners comprised nearly 30 per cent of the prison population, which was 25 per cent more than the internationally recognized standard. The article concluded as follows:

'The C Max prison and mineshafts and prison ships proposals show a lack of vision in Correctional Services. One cannot but conclude that political gain is a strong motive for these knee-jerk reactions which compromise human rights.'<sup>12</sup>

<sup>11</sup> *The Citizen* 27 September 1997 page 11.

<sup>12</sup> *Cape Argus* 6 October 1997 page 8.

In December 1997 the Human Rights Commission described conditions at C Max as excessively harsh:

'At C Max inmates are kept in isolation for 23 hours a day. Apart from a 10-minute shower in a shower cage and a further one hour in a 4 m by 1,5 m exercise cage, the inmate is confined to a cell. . . . Will it simply not destroy individuals while our stated commitment is to rehabilitate them?'<sup>13</sup>

In March 1998 these concerns were repeated in a report in the *Sunday Independent* newspaper:

'At C Max, inmates spend 23 hours a day in tiny cells, they shower and exercise in cages and they are denied contact with fellow prisoners. Such conditions have appalled human-rights groups. Recently, the American political activist and former prisoner Alan Berkman was invited by the HRC to speak on the physical and psychological effects of incarceration at maximum-security prisons. He pointed out that . . . the repressive conditions in supermax jails had caused immeasurable damage to prisoners, torturing them and reducing them to the status of animals.'<sup>14</sup>

For prisoners themselves, the experience of being confined in C Max was a nightmare, as the following testimony by one such prisoner indicates:

'The walls close in on you. You can't sleep for weeks at a time. You can't tell whether it's day or night. And the hallucinations are scary. . . . They won't leave. And you can't hide from them.'<sup>15</sup>

## 2.6 The minister responds

Despite the outcry from human rights activists, the Minister of Correctional Services stuck to his guns, insisting that the conditions of detention in Pretoria's C Max prison were not a violation of the basic human rights of inmates:

'Our department abides by the Constitution . . . prisoners are given access to reading material, are allowed to study and are able to write letters to loved ones.'<sup>16</sup>

Mzimela challenged "starry-eyed" human rights groups to stop "barking" that the rights of dangerous inmates were being violated in the country's first C Max prison (150 inmates) in Pretoria and to take him to the Constitutional Court. "Nobody can tell me I am violating fundamental human rights if I take dangerous inmates out of ordinary prisons where they run amok," Mzimela said. Organisations like the Human Rights Commission were "nitpicking" about the details of the C Max instead of seeing the project for what it was: part of a two-pronged strategy to isolate dangerous prisoners who disrupted rehabilitation programmes.'<sup>17</sup>

<sup>13</sup> *Business Day* 4 December 1997 page 6.

<sup>14</sup> *The Sunday Independent* 22 March 1998 page 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> *The Cape Times* 10 October 1997 page 3.

<sup>17</sup> *Business Day* 4 December 1997 page 6.

## 2.7 Objections to the 'secret' admissions policy

Because the conditions of confinement in C Max were so harsh, the criteria according to which prisoners were allocated to the prison were of ongoing concern to inmates and their legal representatives. There seemed to be no fixed public criteria according to which a prisoner would be allocated to C Max, and even awaiting trial prisoners were detained in the prison. This gave rise to public concern:

'Awaiting trial prisoners are being held at C Max, raising fresh concerns about the rules prison officials follow before putting people into the controversial hi-tech jail. . . . The Department of Correctional Services refuses to name the inmates, number them, or detail their crimes. But it confirms that at least two are suspects in a spate of highway heists which netted villains millions of rands late last year.'<sup>18</sup>

'C Max became a source of controversy when it was opened in Pretoria on September 22 last year because it was planned almost in secret and the department has yet to clarify the rules for dumping prisoners into the high-tech jail. . . . Two convicted murderers, backed by Lawyers for Human Rights, are taking legal action against the department for its decision to transfer them to C Max late last year. And last December the Human rights Commission (HRC) discovered during a routine visit that at least 10 awaiting-trial prisoners were being held at C Max, alongside convicted killers. Despite assurances that C Max is an 'open and transparent institution', the department refuses to name the inmates, say exactly how many there are, or detail their alleged crimes. . . .'<sup>19</sup>

## 2.8 The building of new Supermax prisons

Despite all the controversy surrounding the first C Max prison in Pretoria, the planning and construction of Supermax prisons in other parts of the country went ahead.

In October 1997 it was reported that tenders would be sent out for the construction of the first four super maximum prisons in South Africa. These would be situated in KwaZulu-Natal, the Western Cape, the Eastern Cape and Gauteng. Each would cost approximately R200 million and each would house 1 500 inmates.<sup>20</sup>

In December 1997 it was announced that the government hoped to award the contract for South Africa's first super-maximum prison, to be situated at Kokstad in KwaZulu-Natal, during 1998.<sup>21</sup>

## 3 New 'model' prisons — 'Five Star Hotels' for the lucky few

In complete contrast to Pretoria's 'C Max' prison, were two new 'model' prisons which came into operation towards the end of 1997. They were both

<sup>18</sup> *Weekly Mail and Guardian* 23–29 January 1998 page 8.

<sup>19</sup> *The Sunday Independent* 22 March 1998 page 3.

<sup>20</sup> *Sunday Tribune* 19 October 1997 page 10; *Eastern Province Herald* 11 April 1997 page 9; *The Cape Times* 10 October 1997 page 3; *Beeld* 23 September 1997 page 1.

<sup>21</sup> *Business Day* 4 December 1997 page 6.

situated in the Western Cape, one at Goodwood and the other at Malmesbury.

The Goodwood medium security prison was built at a cost of R139 million to house 1 692 prisoners.<sup>22</sup> It became operational on 1 October 1997 amid much fanfare in the press. It was described as a 'five-star hotel' and the 'ultimate luxury prison in South Africa'. Everything in the prison was geared to the rehabilitation of inmates:

'The prison grounds are grassed and neatly maintained and the brightly painted corridors and cells mirror the exterior. The cells are designed to sleep a maximum of 18 inmates and the bolted beds ensure there is no overcrowding. . . . All the cells are fitted with powerpoints for electrical appliances, including television sets, VCR's, radios and clocks. Inmates are also eagerly awaiting the completion of their soccer field. . . . Goodwood Prison is still setting up many rehabilitation programmes, including life skills, psychology, conflict management, education, religious care, recreational and health care. There are also advanced programmes to treat sexual offenders and inmates suffering from chronic aggression. The prison will also offer pre-release programmes focusing on money management and preparation for job interviews.'<sup>23</sup>

'Even the cell walls in the prison are painted a warm, apricot colour to ensure that the inmates — the authorities avoid the word 'prisoner' because it is not 'user-friendly' — feel at home from the start. . . . The pride of the prison is the training and school section, which includes bright classrooms and private consultation facilities. No cost is spared to ensure that the needs of each prisoner are met. [E]ven light fittings and windows are aesthetically pleasing. . . . Some say facilities at the prison are comparable to those at a first-rate convention centre.'<sup>24</sup>

'It has a fully electronic control centre, where doors can be opened and closed at the touch of a finger, and television surveillance monitors. Prisoners have television sets and showers in their cells and there is a training and education section for trades and life skills.'<sup>25</sup>

The Malmesbury prison, built at a cost of R173 million for 912 selected prisoners, was officially opened on during December 1997. The Minister of Correctional Services envisaged that it would become a showpiece of prison reform in South Africa. It was to be reserved for prisoners serving two to four years with a good prognosis for rehabilitation. Each prisoner admitted to the prison would have to sign a contract declaring himself willing to undergo rehabilitation.<sup>26</sup>

#### **4 Chronic overcrowding and its effects**

For the vast majority of South African prisoners who were not bad enough to be sent to C Max, or lucky enough to be confined in one of the 'model'

<sup>22</sup> *The Cape Times* 17 November 1997 page 9.

<sup>23</sup> *The Cape Times* 17 November 1997 page 9.

<sup>24</sup> *Saturday Star* 4 October 1997 page 8.

<sup>25</sup> *Saturday Argus* 18 October 1997 page 7.

<sup>26</sup> *The Citizen* 6 December 1997 page 8 and *Saturday Argus* 6 December 1997 page 3.

prisons, daily life was dominated by a single fact. During the period under review South African prisons remained chronically overcrowded. Part of the reason for this chronic overcrowding was a dramatic increase in the daily average prison population from 110 069 during 1995; to 118 731 during 1996; to 134 202 during 1997.<sup>27</sup>

At the end of January 1997 there were 93 055 sentenced and 33 864 awaiting trial prisoners in South African jails, which had been designed to hold only 94 352 prisoners. The average occupancy rate was 137 per cent, but some prisons were even more overcrowded than this. The occupancy rate of Pollsmoor prison in the Western Cape was 208 per cent, while the rate for Lusikisiki prison in the Eastern Cape was 290 per cent.<sup>28</sup>

During February 1997 members of the Human Rights Commission visited the Empangeni prison in northern KwaZulu-Natal and found more than 400 prisoners locked in cells meant to hold only 246 inmates. Prisoners were forced to sleep on the floor because of a lack of space for beds.<sup>29</sup> Later that month the *Sunday Independent* reported that gang warfare, escapes, homosexual rape and drugs had become a way of life in South African prisons. According to the report, many prisons were holding up to three times more prisoners than they were designed for and the penal system was crumbling. On the day prior to the report, three inmates had been killed in a gang fight at Modderbee prison near Benoni. When confronted with these facts the Director of Prison Services, Annelie Rabie, agreed that the situation was 'a crisis', but pointed out that there were no short-term solutions to the problem of overcrowding.<sup>30</sup>

Of major concern to the Department of Correctional Services was the possibility that legal action might be taken against it due to the inhumane conditions of detention caused by overcrowding. At the end of February 1997, for example, the commissioner of correctional services announced that the prisons were 134 per cent full and concluded as follows:

'If it is borne in mind that the department is also facing a big manpower shortage of nearly 7 000, it is obvious that the department cannot fulfil its mandate to the government by ensuring that people are incarcerated in a humane manner in prisons.'<sup>31</sup>

Introducing a debate on his budget in April 1997, this concern was reiterated by the Minister of Correctional Services. He stated that it was only a matter of time before inmates took the government to court because of inhumane prison conditions. He pointed out that the 28 per cent increase in his

<sup>27</sup> 1997 *Annual Report of the Department of Correctional Services — Safe Custody of Prisoners* 1.

<sup>28</sup> *The Sunday Independent* 23 February 1997 page 5.

<sup>29</sup> *The Citizen* 21 February 1997 page 13.

<sup>30</sup> *The Sunday Independent* 23 February 1997 page 1.

<sup>31</sup> *The Daily News* 14 March 1997 page 4.

department's 1997/98 budget had been offset by the astronomical increase in prison population figures. The situation was made worse by the fact that 7 440 posts in the department were vacant and daily absenteeism among staff amounted to 10 per cent of the workforce.<sup>32</sup>

Because of overcrowding, the authorities had little room to maneuver on issues such as bail or parole. As soon as a harder line was taken in these areas, the effects were felt in the form of increased pressure on an already overcrowded system. The authorities were caught between public anger and concern over crime, which demanded a tougher stand on bail and parole, and the reality of a chronically overcrowded prison system, which was physically unable to accommodate more prisoners. In April 1997 John Kane-Berman of the Institute of Race Relations pointed this out:

'Further tightening of the bail law will do more harm than good if the Minister of Correctional Services has to keep on releasing convicted criminals prematurely in order to give the Minister of Justice more space in jail for suspected criminals denied bail under his new proposals.'<sup>33</sup>

Each passing month brought more reports of appalling conditions within the chronically overcrowded prisons. During October 1997 a reporter from *The Star* newspaper visited the Leeukop prison and found the following conditions:

'None of the cells visited had hot water, few had working showers and most of the toilets did not flush. There was an average of between 30 and 33 prisoners in a cell, toilets and urinals were within a few metres of prisoner's beds, and double bunk beds were about 20 cm apart. Most of the cells had illegal electric wiring hanging out of neon light fittings in the cells. Prisoner Abe Kele said the shower in his cell had not worked for two years. He said the toilet had to be flushed with a bucket of water; and because it was so close to the beds, the stench bothered them all night.'<sup>34</sup>

During the same month the minister was candid in his condemnation of the conditions prevailing in most of South Africa's prisons:

'In the majority of our prisons conditions are inhumane because of overcrowding. We have cells which were built to house 18 inmates and they contain 65, where every spare inch is taken and people spill over to sleep in the toilets because there is absolutely no space . . . that is inhumane. It is cruel. Single cells at Pollsmoor were built to house one person, but they have six each. At Durban's Westville Prison it is overcrowded by 200 per cent. People have no room and absolutely no privacy. This brings other problems like murder and constant sodomy, which stem from overcrowding. Those are conditions which offend the very constitution we are trying to uphold.'<sup>35</sup>

<sup>32</sup> *The Star* 23 April 1997 page 7.

<sup>33</sup> *Financial Mail* 11 July 1997 page 26

<sup>34</sup> *The Star* 2 October 1997 page 6.

<sup>35</sup> *Sunday Tribune* 19 October 1997 page 10.

In November 1997 the minister's concerns were echoed by the National Commissioner for Correctional Services, Khulekani Sitole. He told the parliamentary portfolio committee on correctional services that the overcrowding in South Africa's prisons was so bad as to constitute a possible violation of prisoners constitutional rights. Overall prisons were 129 per cent overcrowded, with prisons such as Cape Town's Pollsmoor Prison being 200 per cent overcrowded. While 6 000 new beds were becoming available, there was a shortage of 60 000 beds. Some cells which were designed to hold 16 prisoners, were forced to hold 62. Often, toiletries such as toothbrushes and separate bars of soap could not be provided for all prisoners.<sup>36</sup>

During the same month, a report in the *Business Day* newspaper sketched the following bleak picture:

"There are more than 138 000 inmates in the prison system. . . . Yet the country's 299 prisons, three-quarters of which are more than 20 years old, have a capacity to house only 95 000 prisoners. Prisons are, on average, at 145 per cent of capacity. . . . The correctional services department's budget for the current financial year caters for a mere 118 000 prisoners. Battling with extreme overcrowding and a budget which ignores about 20 000 inmates, the prison system is coming apart."<sup>37</sup>

The report went on to discuss the findings of a board of inquiry which had examined conditions at Pollsmoor prison near Cape Town. The board of inquiry found that almost 7 000 inmates were squeezed into a facility designed for 1 900. Due to lack of staff and facilities, prisoners received only two meals a day — breakfast and lunch. After lunch, prisoners were forced to wait for approximately 19 hours before their next meal. The inquiry found that lawlessness in the prison had reached horrific proportions. Drug trafficking among inmates was commonplace, with approximately R30 000 drug related money changing hands every week. The report also detailed the horrific story of an inmate who had swallowed a valuable item for safekeeping. While he was still alive, his stomach was cut open with a razor blade by fellow prisoners who wanted the item. After retrieving it from the man's stomach, they cut his heart out, sliced it up and ate it. The wardens were too busy to notice what was happening.

As at 31 December 1997, according to official statistics, South Africa's prisons were overpopulated by a massive 43,3 per cent.<sup>38</sup>

In January 1998 conditions within the admission centre of Pollsmoor Prison were described as follows:

'Shane Ismail, a dentist who is on hunger strike after awaiting trial for five months, said in a telephone interview he was covered in a lice rash. Between 40 and 50

<sup>36</sup> *City Press* 2 November 1997 page 4.

<sup>37</sup> *Business Day* 10 November 1997 page 16 and see also *The Star* 6 January 1998 page 11.

<sup>38</sup> 1997 *Annual Report of the Department of Correctional Services — Safe Custody of Prisoners* 5.

prisoners were crammed into cells which were intended for 20 people, he said. "The conditions are horrific. This place is condemned and leaking and full of cockroaches and lice. I have a lice rash over my whole body," he said.<sup>39</sup>

In May 1998 the issue of whether or not conditions of detention within South African prisons were constitutional or not came to the fore once again. Replying to questions in the National Council of Provinces, the minister of correctional services conceded that the human rights of prisoners might be infringed due to overcrowding. The minister stated that deficient infrastructure and serious overcrowding made it difficult to ensure that all inmates were detained in accordance with the constitution.<sup>40</sup>

During the same month two Human Rights Commissioners, Helen Suzman and Jody Kollapen, visited the Pretoria prison. They found that it was 220 per cent overcrowded and described the conditions at the prison as totally unsatisfactory.<sup>41</sup> A spokesman for the Human Rights Commission stated as follows:

'It is clear to us from the visit . . . that the situation in this prison is totally unsatisfactory and that no prisoner should be held under the type of conditions we observed. . . . It is highly likely that the criminal justice system will generate more custodial awaiting-trialists in the coming months. This scenario will simply exacerbate an already hopeless situation and the consequences could be catastrophic.'<sup>42</sup>

Some of the specific observations of the commissioners included the following:

- Most cells held between 50 and 55 people but had been designed only to hold between 28 and 30 people.
- All the occupants of a cell had to share a single toilet, a urinal and two showers.
- Most toilets were not in proper working order, many of the showers were totally inoperative and most cells had no hot water.
- Mzwakhe Mbuli, the 'peoples poet' who was detained in the prison on charges of bank robbery, made numerous allegations of serious assaults on prisoners by warders.

Also during May 1998, a reporter from the *Weekly Mail & Guardian* newspaper visited the Johannesburg Prison and described conditions as follows:

'The first thing that hits you is the smell. It is the same in every prison: a rancid aroma of cleansing fluid, stale sweat, urine and more than a whiff of despair which

<sup>39</sup> *Cape Argus* 2 January 1998 page 1.

<sup>40</sup> *Cape Argus* 13 May 1998 page 6.

<sup>41</sup> *Business Day* 15 May 1998 page 2.

<sup>42</sup> *Sowetan* 15 May 1998 page 4.

clings to your senses long after you have left Johannesburg's overcrowded remand jail, "Sun City". It is here that awaiting trial inmates, including 1 071 juveniles, while away their time in cramped cells crumbling under the strain of housing more bodies than they were built to contain. In one graffiti-covered ground floor cell designed for 20, some 55 people huddle together against the brisk morning air. . . . "Thirty-five of us slept on beds last night," complains Peter Molepo, a rape suspect who has been on remand for 11 months. "The others had to make do with the concrete floor, and it was bitterly cold." The battleship-grey metal bunk beds with their stained paper-thin mattresses are allocated on a first-come-first-served basis. The blankets are also in short supply. And they have not been washed for six months. "Our laundry is broken and we can only air them in the sun at the moment," said an apologetic Flora Monama. She is head of operational services at the prison, and appears sympathetic to prisoners griping about their ablution facilities. "These men share one toilet, one shower and two handbasins — and it is the same in all the cells. Overcrowding is a problem even in the kitchens because we have only been allocated pots to cook for 2 500 and we have more than 6 000 locked up. . . . The head of the prison, Gregory Mohlathe, has warned of the possibility that a serious contagious disease could spread through the jail like wildfire. . . . Mohlathe says another feared scenario is that inmates could become so disaffected by the conditions that they resort to rioting, or taking warders as hostages to highlight their plight. "It's a miracle we have not had anything terrible up to now."<sup>43</sup>

By the middle of 1998 overcrowding was so bad that the release of 9 000 prisoners as part of Nelson Mandela's 80th birthday celebrations in July of that year had little impact on the problem.<sup>44</sup>

By the end of 1998 the situation had still not improved. During December of that year an international human rights watchdog, Human Rights Watch, produced a 506 page report dealing with the human rights situation in 68 countries. As far as the state of the penal system in South Africa was concerned, the organization concluded that prisons remained seriously overcrowded and plagued by prison violence. Several prisoners were reported to have died during 1998 after assaults by prison staff.<sup>45</sup>

## 5 Awaiting trial prisoners

### 5.1 Introduction

The problem of overcrowding in South Africa's prisons was exacerbated by ever increasing numbers of awaiting trial prisoners. The reason for this increase was not simply the crime wave which was perceived to be sweeping the country, but also problems experienced by the courts and police services. The Department of Correctional Services was thus at the receiving end of problems in other areas of the criminal justice system beyond its control.

<sup>43</sup> Mail and Guardian 22–28 May 1998 page 9.

<sup>44</sup> *The Star* 11 August 1998 page 12; *Die Burger* 29 July 1998 page 2.

<sup>45</sup> *The Daily News* 8 December 1998 page 12.

## 5.2 Possible causes of the delays

In January 1998 Martin Schonteich, a parliamentary affairs manager at the South African Institute of Race Relations, pointed out that awaiting trial prisoners spent an average of five months in prison before their trials were finalized. One of the main reasons for this was that the police tended to arrest first and investigate afterwards. This practice had been inherited from the old South African Police before the end of apartheid. Many accused could not afford or were not granted bail and so remained in custody while the police conducted their investigation. These investigations took much longer than they should since the detective service was understaffed and only a quarter of the detectives had been on a detective's course.

The practice of arresting first and investigating afterwards also led to a waste of time and resources within the judicial system. Once a person was in custody, magistrates were reluctant to postpone their cases for the lengthy periods required to complete the investigations. This resulted in cases being postponed over and over again for periods of one month at a time. On each occasion the accused had to be brought to court and the court staff spent valuable time each day simply postponing cases. Cases in which the investigations went on for too long were withdrawn. Often, by the time the police investigation was complete and the accused was recharged, the state witnesses were untraceable and the case had to be withdrawn once again:

'The endless postponements and renewed bail applications have set in motion a vicious circle, in which prosecutors have less time to devote to actual trials, exacerbating the waiting period for the accused in prison.'<sup>46</sup>

## 5.3 The Constitutional implications

The constitutional implications of the long delays experienced by awaiting trial prisoners were not lost on the South African Human Rights Commission. According to Section 35(3)(d) of the Constitution, every accused person has the right to a fair trial, which should begin and be concluded without unreasonable delay. With 33 000 awaiting trial prisoners, the criminal justice system was clearly in crisis. During September 1997 Jody Kollapen, a Human Rights Commissioner, spelt out the consequences:

'Everybody is entitled to a speedy trial, depending on the circumstances and complexity of the case. If prisoners can show that their constitutional rights to speedy trials have been violated, they have the right to claim damages.'<sup>47</sup>

## 5.4 Friction between various government departments

The problem of awaiting trial prisoners was bound to cause friction between the various government departments involved in the criminal justice

<sup>46</sup> *The Star* 6 January 1998 page 11

<sup>47</sup> *Cape Argus* 22 September 1997 page 4.

system. The Department of Correctional Services, already in crisis due to overcrowding among sentenced prisoners, saw itself as being at the receiving end of problems not of its own making. To the Minister of Correctional Services, the solution was simple. Legislation should be passed which would restrict the period a person was permitted to spend in prison awaiting trial. This would prevent abuses of human rights such as the case of a woman who had been awaiting trial in a Johannesburg prison for four years.<sup>48</sup> The minister clearly had no faith in the ability of magistrates to deal with the problem:

'We think the best way to go about it is to legislate. That will be the guarantee for us, because if we leave it to the good hearts of magistrates or the justice people, very little will happen.'<sup>49</sup>

The minister stated that his department had tried in vain to work out a solution with the Department of Justice:

'We proposed that they rehire retired magistrates and prosecutors and hold courts at weekends and at night in order to deal with these large numbers of people awaiting trial.'<sup>50</sup>

The Department of Justice did not regard this as a viable solution to the problem. Instead, a spokesman for that department stated that a monitoring mechanism had been introduced which would ensure that the cases of prisoners who had been awaiting for more than six months would be investigated to determine the cause of the delay. The spokesman also stated that a new court management programme known as the 'cluster system' was being implemented, and that a new pre-trial services system, responsible for tracking alleged offenders and providing court-based services to witnesses, had been introduced. These measures were expected to reduce the number of awaiting trial prisoners.

The Minister of Correctional Services insisted that legislation was needed limiting the time a person could be detained while awaiting trial to a period of six months. He made the following pointed comment directed at the South African Police Services:

'I think it is the height of inefficiency to investigate a case for more than six months. I have grave problems understanding that.'<sup>51</sup>

The legislation advocated by the minister was not passed during the period under review.

<sup>48</sup> *The Cape Times* 10 October 1997 page 3.

<sup>49</sup> *Cape Argus* 24 November 1997 page 1; *The Daily News* 25 November 1997 page 7.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

## 5.5 Resistance by awaiting trial prisoners

Awaiting trial prisoners did not take the long delays lying down, but devised ways to fight back. During July 1997 for example, the following report appeared in the *Saturday Argus* newspaper:

'In a bizarre development putting fresh strain on a creaking justice system, awaiting-trial prisoners have been refusing to appear in court to be charged. . . . The prisoners' motivation was apparently to use a "delaying tactic" in the hope of eventually having their cases thrown out of court. Some observers fear that cases could get "lost" amid the increasing burden on the system.'<sup>52</sup>

In November 1997, 220 awaiting trial prisoners refused to go to court in protest against undue delays in their trials. It was reported that some prisoners had been awaiting trial for as long as two years.<sup>53</sup>

Another tactic used by awaiting trial prisoners was the hunger strike. During December 1997, for example, twelve prisoners embarked on a two-week hunger strike in the run-up to Christmas, to protest that fact that they had been held in Pollsmoor prison for several months without trial.<sup>54</sup>

During May 1998 it was reported that 54 prisoners in the Pretoria Local Prison had embarked on a hunger strike to protest the long delays experienced before their matters to come to trial. The 'People's Poet', Mzwakhe Mbuli, was one these prisoners. He complained that awaiting trial prisoners were being held in inhumane conditions due to overcrowding at the prison. Members of the Human Rights Commission visited the prison and expressed concern that it might be unconstitutional to hold prisoners in such conditions. The commissioners found that 3 924 of the 4 800 prisoners being held in the jail were awaiting trial prisoners. The prison was designed to hold only 2 276 prisoners, which meant that it was 220 per cent full. Because of the overcrowding it was not possible to keep showers, toilets or kitchens in a proper state of repair. Blankets and cutlery were in short supply. The commissioners requested that a team be appointed to investigate the situation at the prison as a matter of urgency.<sup>55</sup>

## 5.6 The effect of tighter bail laws and the inability to afford bail

Towards the end of 1997, public concern over the continuing crime wave which was perceived to be engulfing South Africa was such that the authorities decided to tighten the bail laws. The proposed legislation provided that there would be no after hours bail applications; bail hearings would be postponed on the basis of a written notice from an attorney-

<sup>52</sup> *Saturday Argus* 5–6 July 1997 page 1.

<sup>53</sup> *The Star* 6 January 1998 page 11

<sup>54</sup> *Cape Argus* 2 January 1998 page 1.

<sup>55</sup> *Beeld* 15 May 1998 page 4.

general that the suspect was to be charged with a serious offence; and bail would be refused where there was 'a likelihood that the release of the accused will disturb the public order or undermine public peace or security'.<sup>56</sup> Objections were raised to the final proposal on the basis that it would amount to deciding bail on the basis of 'mob rule' as opposed to the merits of the case. It was felt that the decision to grant or refuse bail should be based on the merits of the case, rather than on the outrage that the release of the accused was likely to cause in a particular case. Such was the public concern over crime that none of the political parties could be seen to be completely opposed to the proposed legislation. It was passed into law on 26 November 1997 and came into effect on 1 August 1998.<sup>57</sup>

Concern was raised about the effect of the tighter bail laws on overcrowding in prisons. It was pointed out that, following the previous tightening of the bail laws in September 1995, there had been a dramatic increase of 61 per cent in the number of awaiting trial prisoners.<sup>58</sup> During November 1997 Martin Schonteich, parliamentary affairs manager for the South African Institute of Race Relations, summed up these concerns as follows:

'Since the current bail law came into effect in 1995, the number of unsentenced prisoners has increased from 23 750 to 38 000. About 28 per cent of all prisoners fall into this category; in the case of Pollsmoor it is well over 50 per cent. Due to a slow moving criminal justice system, awaiting trial prisoners spend an average of five months in prison before their trial is finalised. Only 50 per cent to 75 per cent of these people are convicted; the rest are acquitted having cost the taxpayer R70 for every day spent in prison. Minister of Justice Dullah Omar's new bail law, which is intended to make it more difficult for accused persons to be released on bail, will exacerbate the situation.'<sup>59</sup>

Another major concern was that many awaiting trial prisoners were too poor to afford even the smallest amounts of bail. During November 1997, for example, members of the parliamentary portfolio committee on correctional services pointed out that about 8 000 awaiting trial prisoners remained behind bars, despite the fact that bail of less than R1 000 had been set. Many of these prisoners could not afford to pay even R100 for bail, yet it was costing the taxpayer R72 a day to keep these prisoners in jail.<sup>60</sup>

During January 1998 the results of a comprehensive study into bail at Cape Town's Pollsmoor prison were reported. The study found that three quarters of the awaiting trial inmates had been granted bail but could not afford to

<sup>56</sup> Sub-section 60(4)(e) read with subsection 60(8A) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Second Amendment Act 85 of 1997.

<sup>57</sup> Criminal Procedure Second Amendment Act 85 of 1997.

<sup>58</sup> *Financial Mail* 17 October 1997 page 37.

<sup>59</sup> *Business Day* 10 November 1997 page 16.

<sup>60</sup> *City Press* 2 November 1997 page 4.

pay. The amounts of bail set were not high. In 46 per cent of cases the amount was less than R500 and in 92 per cent of cases it was less than R1 000. A system of private 'bail agents' was suggested:

'Such agents provide bail money, which is paid back, with a service charge, at the end of the trial. This has a two-fold advantage. First, a private bail agent is likely to go to great lengths to satisfy himself that the accused would stand trial — by checking up on his background, family attachments, assets, and so on, which the police are too understaffed to do. . . . Second, if the accused should break his bail enforcement conditions the private bail enforcement agent has a pecuniary interest in tracing him. Many accused, once imprisoned, find it difficult to raise money for bail. A bail agent could assist by liaising with the accused's family, friends, bank manager or employer. Bail agents might also be prepared to accept property in lieu of cash, something which the South African courts are not prepared to do.'<sup>61</sup>

In May 1998 the Human Rights Commission announced that almost 6 500 of the 15 000 awaiting trial prisoners in Gauteng, had been granted bail but could not be released because they were unable to pay their bail. This contributed to chronic overcrowding which meant that awaiting trial prisoners were being held in conditions which were inconsistent with what the law and the constitution required.<sup>62</sup>

In August 1998 the results of yet another study into bail were reported in the press. The Bureau of Justice Assistance, a joint initiative of the Ministry of Justice and the New York-based Vera Institute of Justice, produced a report in which it was stated that more than 20 000 awaiting trial prisoners had been granted bail but were forced to remain in jail because they could not afford to pay their bail. The report stated that:

'It is unjust for poor people to be held in prison simply because they cannot afford to pay bail, and it may be a violation of their constitutional rights.'<sup>63</sup>

The report concluded that the practice amounted to discrimination against poor people on the grounds of their financial status. It pointed out that the awaiting trial section at Pollsmoor Prison was designed to accommodate 1 690 persons, but was forced to hold 3 800 prisoners. The number of awaiting trial prisoners in the country exceeded 43 000. This large number of awaiting trial prisoners created many problems. For example, in Johannesburg it was often the case that as many as 160 prisoners were brought to court with only five policemen to guard them. This led to escapes. A new system was being introduced whereby a prisoner's first appearance in court would be conducted on a closed circuit television which linked the Johannesburg Prison with the Regional Magistrates Court. This would reduce transportation costs and minimize the possibility of escapes.

<sup>61</sup> *The Star* 6 January 1998 page 11.

<sup>62</sup> *The Citizen* 2 May 1998 page 1.

<sup>63</sup> *Saturday Star* 29 August 1998 page 6.

## 6 Privatization, mine shafts and prison ships

### 6.1 Privatization

One proposal to help ease chronic overcrowding within South Africa's prisons, was to privatize parts of the penal system. The drive to privatize was dubbed 'APOPS' (Asset Procurement and Operating Partnership System) by the Department of Correctional Services, and gained momentum as overcrowding increased.<sup>64</sup>

Initially there was talk of as many as nine prisons being designed, constructed and managed by the private sector, but eventually the cabinet approved a pilot project involving four prisons.<sup>65</sup> The contracts for these prisons were expected to exceed R10,5 billion. Local consortiums with international finance and technology were said to be vying for the contracts. The four prisons offered for tender in the pilot project were: 1. A 1 500 bed prison in Boksburg for awaiting trial prisoners; 2. A 1 500 bed maximum security prison at Louis Trichardt; 3. A similar maximum security prison at Grootvlei in the Free State; and 4. A youth development centre for 800 juveniles at Barberton. The contracts for these prisons were to operate according to the regulations laid down in the Correctional Services Bill, and would run for a maximum of 25 years.<sup>66</sup>

The Human Rights Commission raised concerns about the protection of the human rights of prisoners in private prisons, and posed the following questions:

'Whether the contractor would be bound to uphold all of the human rights norms and standards set out in the Bill of Rights.

What relationship, if any, would exist between private prisons and civil society organisations.

What the channels of accountability of such private contractors would be.'<sup>67</sup>

In response to these concerns, the department simply issued the assurance that issues of human rights and accountability had been addressed.

The privatization scheme received strong support from some quarters. In November 1997 Martin Schonteich, parliamentary affairs manager for the South African Institute of Race Relations, stated as follows:

'Mzimela is to be congratulated for looking to the private sector for assistance. . . .

If all goes well, the first private sector prisons should be built next year, to be operational in April 1999. The situation is so critical, however, that the correctional services department should explore other ways to privatise specific aspects of the

<sup>64</sup> 1997 *Annual Report of the Department of Correctional Services—Perforce by the Commissioner of Correctional Services* 1.

<sup>65</sup> *The Citizen* 17 April 1997 page 6; *The Star* 23 April 1997 page 7.

<sup>66</sup> *The Citizen* 18 October 1997 page 16; 1997 *Annual Report of the Department of Correctional Services—Effective Resource Management and Utilisation* 14.

<sup>67</sup> *The Citizen* 24 October 1997 page 11.

prison system in the meantime. The board of inquiry on Pollsmoor prison recommended that "a private security firm should be employed to man all points of entry" into the prison. This would allow wardens to concentrate on their core functions: to guard, feed and rehabilitate the prisoners in their charge.<sup>68</sup>

Once again, concerns for the human rights of prisoners within privatized prisons were brushed aside. In January 1998 Schonteich responded to fears that business would neglect prisoners in order to maximize profits as follows:

'The operators will be contractually bound to comply with standards set by the department. Privatized prisons will be accessible to department inspectors at all times. Inmates of private prisons will also be protected by the constitution. . . .'<sup>69</sup>

The drive to privatize appeared unstoppable, and in May 1998 the minister of correctional services announced that he intended privatizing the Ekuseni and Baviaanspoort youth development centres.<sup>70</sup>

## 6.2 Mine shafts and prison ships?

An issue related to the privatization of prisons was the possible conversion of disused mine shafts and decommissioned ships into prisons, with the help of the private sector. The idea enjoyed significant support among the South African public, as is indicated in the following extract from a report in the *Daily News* newspaper dated 18 March 1997:

'The view that disused mine shafts be used to house dangerous criminals conjures images of people being thrown into dungeons populated by man-eating lions and other predators. For many who have had their loved ones summarily taken away, little ones deprived of bread-winners who were to have raised them, that is precisely what those who have shown no respect for life or limb deserve.'<sup>71</sup>

Shortly after this report, a political row erupted between the Minister of Correctional Services and the Human Rights Commission on the issue. The minister supported the idea of converting disused mine shafts into high security prisons. If the exercise was cost effective, there was no reason it should not be done. He referred to the construction of a super-maximum prison in the state of Colorado in the United States which had been built into the side of a mountain. He asked how one should characterize a father who raped his 3-day-old daughter, where the child died as a result. He stated that such a person was 'worse than an animal'. For a whole range of such people, imprisonment down mine shafts was too good a punishment. A spokesman for the National Party disagreed with the minister on two points. Firstly, he believed that the death penalty should be reinstated for criminals such as

<sup>68</sup> *Business Day* 10 November 1997 page 16.

<sup>69</sup> *The Star* 6 January 1998 page 11.

<sup>70</sup> *Cape Argus* 13 May 1998 page 6.

<sup>71</sup> *The Daily News* 18 March 1997 page 10.

those described by the minister. Secondly, he took offence at the comparison between criminals and animals, stating that:

‘Animals are decent things which would never rape their 3-day-old baby.’<sup>72</sup>

On the other side of the debate, the deputy chairperson of the Human Rights Commission, Shirley Mabusela, opposed the idea of imprisoning people in disused mine shafts. It would amount to cruel, inhuman or degrading treatment and thus violate section 12(1)(e) of the constitution. It would also violate rule 9 of the United Nations standard on minimum treatment of prisoners, which required that prison cells should have windows large enough to enable prisoners to read or work by natural light and be constructed so as to allow the entrance of fresh air, whether or not there was artificial ventilation. Mabusela took the minister to task for referring to certain prisoners as ‘animals’, since this might convey the wrong image to prison officials who would then neglect the human rights of prisoners under their care. She received support from Golden-Miles Bhudu, the chairman of the South African Prisoners Organisation for Human Rights (SAPOHR), who stated as follows:

‘They should not be in charge of an institution to correct offenders. They should be farming pigs or wild animals.’<sup>73</sup>

As for the conversion of disused ships into prisons, in March 1997 the Minister disclosed that he had been offered a 394 berth ship.<sup>74</sup> It was proposed that the ship be converted into a prison and moored off the Western Cape. In October 1997 the minister announced that the department was well on its way to reaching agreement with private companies to provide prison ships for awaiting-trial prisoners. The companies that won the contracts would negotiate where they were to be berthed.<sup>75</sup> The Minister was quick to allay the fears of the residents of Simon’s Town that a ship carrying 1 200 prisoners would be anchored at the Simon’s Town naval base. It was planned to import ships hulls from the Ukraine at a cost of seven million rand and to convert them into floating prisons at a cost of forty million rand.<sup>76</sup>

## **7 Prison personnel — stress, corruption and political in-fighting**

### **7.1 New Minister of Correctional Services**

A new Minister of Correctional Services was appointed during the period under review. On 1 August 1998 Ben Skosana, a member of the Inkatha Freedom Party, was appointed in the place of Sipo Mzimela.

<sup>72</sup> *Pretoria News* 26 March 1997 page 2.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *The Cape Times* 10 October 1997 page 3; *Financial Mail* 17 October 1997 page 37.

<sup>76</sup> *Saturday Argus* 18 October 1997 page 7.

## 7.2 Staff shortages

The Department of Correctional Services was troubled by severe staff shortages during the period under review. At the end of December 1995, for example, the ratio of correctional services personnel to offenders was 1 to 4,91. This ratio was higher than in many other countries, for example: Denmark 1 to 0,92; Britain 1 to 1,33; Canada 1 to 2,32; Germany 1 to 1,5; and Botswana 1 to 3,77.<sup>77</sup> The 1997 *Annual Report of the Department of Correctional Services* attributed part of the blame for this situation to the dramatic increase in the prison population during 1997.<sup>78</sup> During the debate on his budget vote in April 1997, the minister of correctional services pointed to an acute staff shortage within his department of 7 440 posts.<sup>79</sup> He stated that:

'The staff we have are overworked, extended and cannot perform their jobs to the best of their abilities. . . .'<sup>80</sup>

## 7.3 Stress

The high ratio of prisoners to staff resulted in high stress levels amongst warders, which caused a serious drop in their morale. In February 1997 a departmental spokesman called for an urgent investigation into the low morale of warders.<sup>81</sup> High stress levels also resulted in high levels of absenteeism among warders. In January 1998, for example, the *Cape Argus* newspaper carried the following report:

'Overcrowded Pollsmoor Prison's admission centre is in crisis with 3 300 inmates living in inhumane conditions and dozens of warders on stress-related sick leave. . . . Mike Green, supervisor of internal security at Pollsmoor, said the centre was designed to take only 1 650 prisoners and strain was taking a huge toll on staff and inmates. . . . Frustration had built up among staff and there were up to 40 warders a day on sick leave, which was frequently stress-related. "We are hopelessly overpopulated and understaffed," said Mr Green.'<sup>82</sup>

## 7.4 Corruption

From time to time disturbing allegations of corruption were made in the press. During January 1997, for example, a family member of a prisoner held in the Boksburg prison alleged that prisoners were obliged to pay warders R5 per week for a bed and a further R5 per week for a mattress. Every visit cost R2 per visitor, toothpaste cost R8 per tube, matches cost R1 per box and

<sup>77</sup> *The Sunday Independent* 23 February 1997 page 5.

<sup>78</sup> 1997 *Annual Report of the Department of Correctional Services — Safe Custody of Prisoners* 2.

<sup>79</sup> *Die Burger* 23 April 1997 page 5.

<sup>80</sup> *The Cape Times* 23 April 1997 page 9.

<sup>81</sup> *Die Burger* 27 February 1997 page 15.

<sup>82</sup> *Cape Argus* 2 January 1998 page 1.

cigarettes R5 per box. It was alleged that anything, including prostitutes and drugs, could be bought if a prisoner had enough money.<sup>83</sup>

During April 1997 the press carried details of a report by the Human Rights Commission into violence which occurred at the Leeuwkop prison during November 1996. The report concluded that a small number of warders were involved in the smuggling of weapons and dagga into the prison.<sup>84</sup>

In order to combat the problem of corruption among prison staff an anti-corruption unit was established by the department of correctional services during 1996. During the month of October 1997 alone, 24 instances of corruption were reported to the unit via an emergency line and letters.<sup>85</sup>

During January 1998 it was reported that inmates in the Johannesburg prison were able to purchase prostitutes, alcohol and even weekends at the Sun City gambling resort with the help of corrupt prison warders. The report also alleged that prisoners and corrupt warders had formed criminal syndicates which were involved in smuggling and theft of state property. The information was provided by a prisoner who was angry at being transferred from the Johannesburg prison (ironically nicknamed 'Sun City') to the C Max prison in Pretoria. He provided different photographs showing himself in a warder's flat with weapons, drink and prostitutes, which he alleged were freely available to prisoners who could afford it. He even offered to undergo a lie detector test to confirm the accuracy of his allegations. A warder who had been fired from the department admitted that he had entertained prisoners in his flat at the prison. He claimed that the informer had been transferred to C Max to stop him telling the truth about the activities of the syndicates. He also alleged that several prison staff members were involved in the syndicates, and claimed that he had been involved personally in loading stolen goods at the prison. He said that supplies delivered to the prison were sometimes given back to the suppliers in return for a fee. The Department of Correctional Services stated that it was aware of the allegations of corruption which had been investigated by its own corruption unit through an independent attorney.<sup>86</sup>

## 7.5 Assaults by warders on prisoners and allegations of racism

Apart from allegations of corruption, another common complaint against warders was that they often assaulted prisoners. In March 1997, for example, the quarterly report of the South African Prisoners Organisation for Human

<sup>83</sup> *Beeld* 7 January 1997 page 5.

<sup>84</sup> *The Citizen* 16 April 1997 page 21.

<sup>85</sup> *Die Volksblad* 5 December 1997 page 6; 1997 *Annual Report of the Department of Correctional Services — Preface by the Commissioner of Correctional Services* 1.

<sup>86</sup> *Rapport* 11 January 1998 page 1.

Rights claimed that it had received 22 letters from prisoners in KwaZulu Natal, 90 per cent of which complained of assaults by prison staff.<sup>87</sup>

During May 1998 the *Natal Witness* newspaper reported an allegation that an inmate had died in the Ngwavuma Prison after he was assaulted by prison officials. Five inmates of this prison filed complaints of abuse, mainly assault, by staff members.<sup>88</sup>

According to the 1997 *Annual Report of the Department of Correctional Services* a total of 402 prisoners died in South African prisons during 1997, but none of these deaths were due to assaults by warders. A total of 327 deaths were classified as being due to natural causes; 24 due to suicide; 25 due to assault by fellow prisoners; 1 due to drowning; 2 due to shooting incidents; and 23 due to 'other causes'.<sup>89</sup>

Allegations of racism were also made against warders. During May 1998, for example, racism was alleged to have been one of the causes of a hostage drama at St Albans prison in the Eastern Cape. During the drama two warders were wounded, one prisoner was shot dead and seven prisoners were wounded. Three warders and two civilians were held hostage for two days without food. The drama ended when a crack police squad burst into the secured block, killing one prisoner, wounding seven, and freeing the hostages.<sup>90</sup> When the matter came to court, one of the inmates who had been involved in the hostage taking issued a warning that conditions at the prison left a lot to be desired:

'Notorious convict Thembisile "Tyson" Makaluza warned yesterday that "something big" was going to happen at St Albans Prison if urgent steps were not taken to eradicate apartheid and improve conditions there. . . . "Apartheid is alive at that prison. Coloured and white prisoners are treated differently from blacks. They do not listen to our complaints there. I would like you to listen and take note of what I am saying to you because something big is going to happen there." He said he and other prisoners were being handcuffed when they slept at night. ". . . I and other black prisoners are being assaulted by warders."<sup>91</sup>

## 7.6 Political 'in-fighting'

During the period under review there were disturbing reports of political in-fighting between management and staff, as well as within management itself.

The demilitarization of the prison service, together with affirmative action (by the end of 1997, 70 per cent of all staff were said to be from 'previously

<sup>87</sup> *Sowetan* 24 March 1997 page 3.

<sup>88</sup> The *Natal Witness* 28 May 1998 page 3.

<sup>89</sup> 1997 *Annual Report of the Department of Correctional Services — Humane Detention and Treatment of Prisoners* 4.

<sup>90</sup> *Eastern Province Herald* 15 February 1997 page 1.

<sup>91</sup> *Eastern Province Herald* 22 February 1997 page 1.

disadvantaged' groups),<sup>92</sup> led to tensions between staff and management within the prisons. Amanda Dissel, the co-ordinator of the Criminal Justice Policy Unit of the Centre for the Study of Violence and Reconciliation at the University of the Witwatersrand pointed out that these tensions resulted in decreased levels of discipline within the prisons. Prison gangs took advantage of this to increase their influence within the prisons, as management control declined.<sup>93</sup>

Within management itself, a public row erupted between the National Commissioner of Correctional Services, Khulekani Sitole, and his counterpart in KwaZulu-Natal, Thandiwe Kgosidintsi. During December 1998 Kgosidintsi made a number of serious allegations of corruption against Sitole, which were handed to the Auditor-General for investigation. Kgosidintsi alleged that Sitole was financing a private soccer team with departmental money; that he took unauthorized trips overseas and had funded an overseas holiday with departmental money; that he transferred staff members without the authority to do so; and that he had promoted a staff member suspected of murder. These allegations were all denied by Sitole.<sup>94</sup>

Sitole then announced that he intended to suspend Kgosidintsi because of the allegations she had made against him, as well as the fact that she was also under investigation by the auditor-general for mismanagement of funds. He claimed that Kgosidintsi harboured a grudge against him, and that the claims she had made against him were designed to divert attention from the investigation into her affairs. The Police and Prisons Civil Rights Union (POPCRU) took the view that both Sitole and Kgosidintsi should be suspended. A spokesman stated as follows:

'Both of them are under investigation by the auditor-general for financial irregularities, therefore they should both be removed from their posts to allow proper investigations to take place.'<sup>95</sup>

This was not the first time that the National Commissioner of Correctional Services had attracted public controversy, as is indicated by the following amusing report in the *Pretoria News*:

'Prisons Commissioner Khulekani Sitole has raised the dope issue once more, causing a stir — again — by suggesting that dagga should be decriminalised in prisons because it kept inmates passive. This seemed uncharacteristically kind for someone who floated the notion of using mineshafts to house prisoners.'<sup>96</sup>

<sup>92</sup> 1997 *Annual Report of the Department of Correctional Services—Preface by the Commissioner of Correctional Services 2*; *City Press* 29 June 1997 page 2.

<sup>93</sup> *The Sunday Independent* 23 February 1997 page 1.

<sup>94</sup> *Beeld* 23 December 1998 page 6.

<sup>95</sup> *The Daily News* 24 December 1998 page 2.

<sup>96</sup> *Pretoria News* 9 May 1998 page 1.

## 7.7 Human rights training

Progress was made with the demilitarization of correctional services personnel. In line with the new ethos within the department, a programme of training correctional services staff in human rights was started in June 1998. The training was carried out in cooperation with the Centre for the Study of Violence and Reconciliation as well as human rights lawyers. Initially, four hundred staff members were involved in the programme.<sup>97</sup>

## 7.8 Low morale amongst departmental psychologists

Stress caused by difficult working conditions and poor remuneration packages resulted in low morale amongst skilled personnel such as departmental psychologists. In February 1997 *The Cape Times* newspaper reported as follows:

'Demoralised psychologists working at Pollsmoor say rehabilitation is "a joke" and that they had already applied for severance packages, but were turned down because they were sorely needed at the prison. Head psychologist for the Western Cape Mr Fred Borchardt said that most of the prisoners up for parole had never seen a psychologist. . . . Ms Petra Badenhorst, the only psychologist working in Pollsmoor's maximum security section, said she saw less than 10 prisoners a day, sometimes none. This is because much of the time she was called away to other prisons to sort out problems. . . . "Most of the prisoners leave here without a single day of evaluation and having had no rehabilitation at all," she said. On top of the heavy case loads, the psychologists worked in bad conditions for bad salaries.'<sup>98</sup>

In August 1997 it was reported that there were only 37 psychologists to serve 135 000 prisoners throughout the country. In Gauteng there were only 14 psychologists to cater for 35 000 prisoners, plus 2 000 persons under house arrest and 6 390 members of staff. The Director of Psychological Services stated that it was no longer possible to put out all the fires. During the previous three months, eight psychologists had resigned due to poor salaries, bad working conditions and lack of recognition. Twenty-eight posts were vacant at the time. Prisoners were often severely traumatized by incidents such as the initiation ceremony in certain prisons. New young prisoners were sexually assaulted during their first night in prison, and some became infected with AIDS.<sup>99</sup>

## 8 Parole and Community Corrections

### 8.1 Introduction

The problems associated with chronic overcrowding and shortage of staff were not restricted to the management and control of the prisons themselves.

<sup>97</sup> *Die Volksblad* 19 June 1998 page 4 and *Die Volksblad* 26 June 1998 page 2.

<sup>98</sup> *The Cape Times* 25 February 1997.

<sup>99</sup> *Beeld* 5 August 1997 page 8.

The system of parole and community corrections, which operated in tandem with the punishment of imprisonment, also suffered as a result of excessive numbers of offenders to be processed, lack of resources, and too few staff. This resulted in large numbers of offenders breaking the conditions of their parole or sentence to correctional supervision.

## 8.2 Problems experienced in the Durban area

During January 1997 it was reported that since 1993, 2 146 parolees and 156 people sentenced to correctional supervision had absconded in the Durban area and could not be traced.<sup>100</sup> With public concern about crime at an all time high, this news caused an outcry in the press. An editorial in Durban's *Daily News* commented as follows:

'Scarcely a day seems to pass without the disclosure of another bungle in the public service, but when it comes to the safety of ordinary, law abiding people, the same, lame old excuses of blaming the wrongs of the past coupled with promises of investigation just won't wash any longer. Latest in a long list of police and prison service problems is the army of 2 000 or more convicts in the Durban area who have jumped parole and vanished. . . . The depleted police force can obviously do nothing about it, or the problem would not have dragged on since 1993. What is even more alarming is the very real fear that, apart from mouthing platitudes, the Government is too cash strapped and powerless to do much either.'<sup>101</sup>

In February 1997 a National Party Member of the Provincial Parliament in KwaZulu-Natal, Connie Galea, called for the government to intervene:

'If thousands of convicts simply disappear, criminals will laugh at the judicial and prison authorities and have no respect for the law.'<sup>102</sup>

In March 1997 it was reported that the entire parole system in the Durban area was collapsing. There were not enough supervising officials in the area, which meant that some prisoners on probation had not been visited for months. Out of 3 500 visits required per month, the supervising officers were only able to carry out about 1 000. Since November 1992 a total of 2 340 parolees in the Durban area had gone missing. Between 20 and 25 warrants of arrest were being issued for absconders each month but these were not executed.<sup>103</sup>

In April 1997 the *Sunday Tribune* newspaper reported that:

'South Africa's parolees and convicts under house arrest, including rapists, are absconding by the hundreds because prison authorities don't have the time or resources to keep an eye on them. . . . The system is crumbling due to inadequate manpower, vehicles, and the monitors' refusal to work without full pay.'<sup>104</sup>

<sup>100</sup> *The Daily News* 15 January 1997 page 1; *Cape Argus* 17 January 1997 page 6.

<sup>101</sup> *The Daily News* 17 January 1997 page 8.

<sup>102</sup> *The Natal Witness* 23 February 1997 page 4.

<sup>103</sup> *Pretoria News* 11 March 1997 page 4; *The Daily News* 10 March 1997 page 3.

<sup>104</sup> *Sunday Tribune* 6 April 1997 page 5.

A spokesman for correctional services stated that the department could not cope with the speed at which people were being placed into the parole system by courts and parole boards.

In June 1997, the lack of vehicles and other resources available to probation officers in the Durban area came under public scrutiny. Because of the lack of vehicles the addresses of those prisoners about to be released on parole could not be checked. According to an official, this meant that these prisoners had to remain in prison:

'We receive about 30 to 50 confirmations a day and having done nothing for the last two weeks, everyone's frustrated. In fact one prisoner even offered to buy us a car so that his address could be confirmed.'<sup>105</sup>

Officials also complained about the quality of the equipment provided:

'We have become targets in some areas like Umlazi, KwaMashu, Wentworth and Chesterville and are clearly not wanted. We have standard vehicles, no radios or working cellphones. Once you leave the office, you are alone. When we come under attack we are outgunned and cannot even call for assistance. We have been fighting for better protection as well as more members and vehicles but nothing has happened. We have had enough.'<sup>106</sup>

### 8.3 Problems experienced in other parts of the country

It was not only the Durban area which experienced problems related to parole and community corrections. In June 1997 it was reported that the system of correctional supervision in the Western Cape was breaking down. In that province 3 991 of the 6 983 prisoners under correctional supervision had been classified as absconders.<sup>107</sup>

The report referred to the fact that the South African system of correctional supervision was based on the 'Georgia model' developed in the United States of America. In the United States there were sufficient resources to allow one correctional supervisor for every 25 cases, whereas in South Africa the ratio was one supervisor for every 300 cases. In South Africa, many people did not have a fixed address, which was one of the prerequisites for a person to be placed under correctional supervision. Professor Cilliers, a criminologist at the University of South Africa, pointed out that in many areas of a township such as Khayelitsha, there were no street names, house numbers or telephone numbers.<sup>108</sup>

<sup>105</sup> The Saturday Paper 7 June 1997 page 3.

<sup>106</sup> Ibid.

<sup>107</sup> *The Star* 10 June 1997 page 8; *The Natal Witness* 10 June 1997 page 9; *The Cape Times* 5 June 1997 page 2.

<sup>108</sup> Ibid.

During August 1997 it was reported that 4 100 persons had absconded from correctional supervision in the Western Cape. A special unit had been set up to trace defaulters, but only 55 were caught per month.<sup>109</sup>

Later that month the position in Gauteng was highlighted in the press. It was reported that since 1992 almost 4 000 parolees and more than 1 400 people sentenced to correctional supervision had absconded in that province. Only a handful of absconders were ever rearrested since the police were too busy trying to trace persons who had escaped from police custody.<sup>110</sup>

In November 1997 the Commissioner for Correctional Services, Khulehani Sitole, told the Parliamentary Portfolio Committee on Correctional Services that community supervision in South Africa was a joke. There were only 1 100 staff members to supervise 46 000 offenders and the situation would become even more serious if more petty offenders were released into community supervision. It was estimated that about 45 000 prisoners in South Africa were petty offenders, but simply releasing these prisoners would conflict with the 'zero tolerance' approach to crime.<sup>111</sup>

Despite the general 'doom and gloom' surrounding the system of parole and correctional supervision, there were some 'success stories' which were reported in the press. In November 1997, for example, the *Cape Argus* reported that 140 absconders from the correctional supervision system were rearrested shortly after an article on the escalating problem appeared in the newspaper.<sup>112</sup> In June 1997 *Die Volksblad* reported that only 86 of the approximately 5 800 people released on parole and into correctional supervision in the Kroonstad area had absconded. Fourteen of these absconders had been traced and prosecuted.<sup>113</sup>

#### 8.4 Electronic monitoring as a solution to staff shortages

During 1997 an electronic monitoring system for parolees was tested on 83 prisoners in Pretoria.<sup>114</sup> In September of that year the Minister of Correctional Services announced that the programme had been a success. He stated that he intended to ask Cabinet to approve the system for use on all parolees throughout the country. The cost of electronic monitoring was R14 per day compared to R70 per day to keep a person in prison. The system could operate via telephone lines or by radio. Radio was more expensive but in

<sup>109</sup> *Cape Argus* 15 August 1997 page 1; *The Cape Times* 5 June 1997 page 2.

<sup>110</sup> *Saturday Star* 23 August 1997 page 3.

<sup>111</sup> *City Press* 2 November 1997 page 4.

<sup>112</sup> *Cape Argus* 18 November 1997 page 9.

<sup>113</sup> *Die Volksblad* 30 June 1998 page 4.

<sup>114</sup> *Sowetan* 14 February 1997 page 2.

South Africa this system was believed to be more suitable since many people did not have telephones.<sup>115</sup>

In January 1998 it was reported that only three out of 170 prisoners who were subject to electronic monitoring in the Pretoria area were guilty of desertion. The system had also been tested in Britain, with a two year pilot project in Manchester yielding similar positive results. Despite these promising results, one drawback was the cost of introducing the system on a large scale. The test project alone had cost R1,8 million.<sup>116</sup> According to the 1997 *Annual Report of the Department of Correctional Services*, however, the long term cost implications were positive:

'The cost implication of the implementation of electronic monitoring is approximately R68 million for the first year. This will make provision for the monitoring of 10 000 offenders. The cost implication for the next two years will be R95 million and R127 million respectively. The estimated saving compared to imprisonment and ordinary monitoring will be approximately R100 million during these three years.'<sup>117</sup>

## 8.5 Mandatory terms of imprisonment without the prospect of parole

Towards the end of 1997 the Parole and Correctional Supervision Amendment Act 87 of 1997 was passed, which allowed courts to fix a mandatory term of imprisonment, during which it would not be possible for the prisoner concerned to be released on parole. Although the Act did not come into operation immediately (the date of commencement being left open for proclamation in the future) concerns were raised about the possible effect of the Act on overcrowding. In May 1997, for example, the Department of Correctional Services estimated that an extra 900 000 'bed nights' would be needed once the proposal was put into effect. A departmental spokesman also expressed concern at the shortage of 850 parole officers in South Africa.<sup>118</sup>

## 8.6 Sexual offenders and parole

Increasing concern was expressed at the number of sexual offences committed by prisoners who were on parole for similar offences at the time. In January 1997, for example, it was reported that an eight year old school pupil from Naledi Extension Two, Soweto, was raped at knife point by a man believed to have been released a short time previously on parole.<sup>119</sup> It was incidents such as this which led to public demands that

<sup>115</sup> *The Citizen* 12 September 1997 page 17.

<sup>116</sup> *Die Burger* 6 January 1998 page 7; *Beeld* 5 January 1998 page 2.

<sup>117</sup> 1997 *Annual Report of the Department of Correctional Services— Supervision and Control Over Probationers and Parolees in the Community* 3.

<sup>118</sup> *Business Day* 8 May 1997 page 2.

<sup>119</sup> *Sowetan* 20 January 1997 page 2.

caution be exercised before sexual offenders were released on parole. On 6 February 1997 it was reported that:

From this week, prison parole boards will be stricter when considering releasing men convicted of rape, child abuse and child molestation. . . . [According to a departmental spokesman, the announcement] was a result of the rise in reported rapes and an "extensive community outcry" against violent crime and the violation of the rights of women and children.<sup>120</sup>

On 27 September 1997, as the result of a perceived epidemic of violent crimes against women in South Africa, a set of national guidelines for the victims of sexual offences came into effect. The guidelines provided that victims of sexual offences were entitled to attend the sittings of parole boards for sexual offenders. No sexual offender would be considered for parole until he had served at least three quarters of his sentence. The admission to prison of all rapists, child molesters and pedophiles had to be reported to the department's psychologists and social workers. A register of this category of prisoners would be opened and kept at a central location.<sup>121</sup>

## 9 Juvenile offenders

### 9.1 Introduction

Throughout the period under review many juvenile offenders remained imprisoned within 'adult' prisons under conditions that left much to be desired. All those involved were well aware of the fact that it was contrary to the United Nations Convention on the Rights of the Child to detain children in adult prisons. However, although everyone accepted that juvenile offenders should be separated from the rest of the prison population and held in facilities that were suited to their particular needs, it was clear that there was no 'quick fix' solution to the problem. Intense public pressure was brought to bear on the authorities not to allow a repeat of the disastrous situation which had arisen in May 1995 with the release of 866 juvenile offenders from adult prisons. On that occasion, many juvenile offenders escaped from the places of safety to which they were transferred. They ended up on the streets and were drawn once again into a life of crime.<sup>122</sup> If juvenile prisoners were to be removed from adult prisons, it was clear that they would have to be placed in secure facilities from which they could not escape. The problem was that there were not sufficient secure care facilities to accommodate all the juvenile offenders, and they had to remain in the adult prisons until such facilities were constructed.

<sup>120</sup> *Cape Argus* 6 February 1997 page 3.

<sup>121</sup> *Die Volksblad* 15 November 1997 page 2.

<sup>122</sup> SA Pete 'The politics of imprisonment in the aftermath of South Africa's first democratic election' (1998) 11 *South African Journal of Criminal Justice* 51–83 at 79–80.

## 9.2 Poor conditions of detention for many juvenile offenders

Many juvenile offenders were detained under extremely poor conditions, mainly related to excessive overcrowding and gang activity.

In February 1997 the Human Rights Commission reported that about 166 children were locked into nine cells at Port Elizabeth's St Albans Prison for 20 hours per day. A number of these children had been awaiting trial for several months and many had been sodomised.<sup>123</sup>

In October 1997 the following horrific report on conditions in the Ethokomala Special School in Evander, Mpumalanga province, appeared in the *City Press* newspaper:

'City Press went inside the hell-hole that is Ethokomala — where minor criminals are supposed to be rehabilitated but not a finger is lifted to help them. "On the contrary, most of the children who go out of here end up committing worse crimes — or return here over and over again," says a staff member speaking on condition of anonymity. Staff say many children enter the detention camp for minor offences — but come out of it hardened criminals. It is not surprising. There are so many ills here no child can escape them. There is sodomy, gangsterism, racism, defiance. . . . The environment of the "special" school is hardly conducive to rehabilitation. This is no place for teddy bears and toy cars. No fancy drawings on the walls, no counselling, nothing. The walls are awash with graffiti which would not be out of place in a maximum security section of an adult prison. . . . There are virtually no recreational facilities. At least 17 kids share a single cell, and have to use one toilet — a hole in the ground with no seat. Staffers say these holes often get blocked. Many window panes are broken, and there are no heaters. . . . As we walked around the penitentiary we heard kids brag about gory crimes. "Me? Roof. I took money from Checkers. I had a gun, I got it from a huisbraak. . . . Heee, the gatas killed two of my accused (fellow-suspects). They caught us nine-nine (red-handed). Ah well, if you die, you die." "I fought with another boy. I hit him with a steel rod. He is in a wheelchair." "I milk whites' cars. Tapes and so on." And the only one who smilingly pleads innocence. . . . "They say I was with boys who broke into a house, put a missies under the shower, forced her to stand there, opened up hot water, and put little dogs inside in oven and turned it on. . . ."<sup>124</sup>

During the following month, the Minister of Correctional Services pointed out that children as young as 10 years old were being 'dumped' in prison to await trial. He discovered that unsentenced children were sleeping in toilets to separate them from adult prisoners at Nylstroom Prison in the Northern Province.<sup>125</sup>

During February 1998 the Community Law Centre at the University of the Western Cape released the results of a study entitled *Children in Prison in South Africa*. The study revealed that South Africa fell far below international

<sup>123</sup> *Eastern Province Herald* 8 February 1997 page 3.

<sup>124</sup> *City Press* 26 October 1997 page 7.

<sup>125</sup> *Cape Argus* 27 February 1998 page 3.

standards for the detention of children. Problems included the keeping of children with offenders over the age of 21; poor diet; lack of education and recreational facilities; gangsterism; rape; overcrowded sleeping quarters; lack of exercise and lack of health care.<sup>126</sup>

During May 1998 the results of a study which had been conducted by the Community Law Centre at the University of the Western Cape, entitled 'Children in Prison in South Africa' were reported in the press. According to the study, there had been an alarming increase in the number of children sent to jail in South Africa. Between September 1996 and 1997 there had been an increase in the number of children awaiting trial in prisons from 698 to 1 175. Once in jail, children had to contend with overcrowded sleeping quarters; gangsterism; lack of education; poor hygiene; inadequate diet and clothing; poor health; rape; and Aids. Often the families of these children did not even know that they were in prison. The co-ordinator of the study, Mrs Julia Sloth-Nielsen, pointed out that:

Many prisons visited by researchers on the project were degrading and most produced hardened, bitter children without faith in the goodness of society. What happens in these places is hidden from view.<sup>127</sup>

In June 1998 the head of the Department of Criminology at the University of South Africa, Professor Beauty Naude, issued a statement expressing her shock at the conditions prevailing in the Medium B Section of the Pretoria Local Prison. She claimed that cells were overcrowded and classrooms were makeshift and very poorly equipped. Out of 400 juveniles, only about 90 were participating in educational and training programmes. The rest just sat around in their cells. This was despite the fact that when the section was opened a year and a half previously, the head of the Education and Training Department of the Department of Correctional Services had promised that a comprehensive educational and recreational programme had been compiled to equip juvenile prisoners with lifestyle and other skills. A spokesman for correctional services blamed the problems being experienced on overcrowding which had been made worse by extreme budgetary constraints.<sup>128</sup>

### 9.3 Section 29 of the Correctional Services Act

Following the disastrous situation which had arisen in 1995 with the escape of many juvenile offenders from places of safety to which they had been transferred, section 29 of the Correctional Services Act was amended by Act 14 of 1996. The 1996 amendments were designed as a temporary measure to allow juvenile offenders to be held in adult prisons until such time as juvenile secure care facilities became available. When the amendments were put into

<sup>126</sup> *Sunday Tribune* 22 February 1998 page 21.

<sup>127</sup> *The Independent on Saturday* 30 May 1998 page 9.

<sup>128</sup> *Pretoria News* 22 June 1998 page 3.

effect, it was hoped that secure care facilities would be available within two years, when they would fall away. This was not to be, and the amendments remain in effect at the time of writing.

In terms s 29 as amended, it is possible to detain a juvenile who is over 13 and under 18 years old in an adult prison awaiting trial, provided that the presiding officer has reason to believe that the detention of the juvenile is in the interests of the administration of justice as well as the safety and protection of the public, and that there is no secure place of safety within a reasonable distance from the court.<sup>129</sup> The offence the juvenile is alleged to have committed must be so serious as to warrant detention in a prison, and the state must lead oral evidence to assist the presiding officer to answer the following questions:

1. If I place the awaiting trial juvenile in a place of safety, is there a substantial risk that he or she will abscond?
2. If I place the awaiting trial juvenile in a place of safety, is there a substantial risk that he or she will cause harm to other persons who are awaiting trial in that place?
3. What are the prospects of the juvenile committing further offences?<sup>130</sup>

The answers to these questions enables the presiding officer to decide whether or not the juvenile deserves to be held in prison while awaiting trial. The legislation also provides that an awaiting trial juvenile who is detained in a prison must be brought back to court every 14 days, so that the court may reconsider whether or not to continue detaining the juvenile in prison.<sup>131</sup>

In practice, the provisions of s 29 were simply ignored by many magistrates. Because of this, the Legal Resources Centre in Pretoria launched three urgent applications in the High Court seeking the release of various juvenile offenders held at different prisons in Gauteng. It was claimed in the applications that magistrates failed to make decisions as to the seriousness of the offences alleged to have been committed by juveniles; failed to hear oral evidence, and failed to review their decisions every 14 days as required by s 29.<sup>132</sup> During March 1998 the *Sowetan* newspaper summed up the situation:

'Lack of interdepartmental coordination and bungling by officials, including magistrates, social workers and policemen, have apparently led to under-age offenders languishing in jail in contravention of the laws of the country. According to Section 29 of the Correctional Services Act, no person under the age of 18 shall be held in prison unless the magistrate believes it is in the interest of safety and protection of the public, and there is no secure place of safety within a reasonable

<sup>129</sup> Section 29(5)(a).

<sup>130</sup> Section 29(5A)(a).

<sup>131</sup> Section 29(5)(a).

<sup>132</sup> *The Sunday Independent* 15 March 1998 page 1.

distance of the court. However, recent media reports have revealed that certain magistrates, especially in Gauteng, were ignoring the provisions of the law and were keeping children in prison for more than 14 days. Welfare and Population Development director-general Dr Benny Mokaba said . . . if the magistrates were following the procedure on how to classify and place young offenders, most of the children in jail could be taken to places of safety as they posed no danger to society. . . . Justice Minister Mr Dullah Omar, however, put most of the blame on the Welfare Ministry. "Most of these children are involved in very serious crimes and there are no facilities secure enough to keep them," he said.<sup>133</sup>

#### 9.4 The race to provide secure care facilities for juvenile offenders

The authorities hoped to construct at least one secure-care facility for juvenile offenders in each province. It was estimated that this would cost R35 million.<sup>134</sup> The work had to be completed by 10 May 1998 when it was believed that the amendments to s 29 of the Correctional Services Act were due to expire, rendering the detention of juvenile offenders in prison unlawful. The new facilities were to be very different to adult prisons:

'South Africa is transforming facilities for children in prison and by April next year expects to have emptied jails of young people awaiting trial. Youths older than 14 who commit serious crimes will in future be detained in new, secure care centres while awaiting trial, two of which have already been opened. . . . Minister of Welfare and Population Development Geraldine Fraser-Moleketi . . . [said that the] new care centre would be "nothing like a prison. . . . Rather, secure care will be a way of working with youth which ensures that they are physically and emotionally contained while providing for their need for care, safety, education, development and relationships with their family and community."<sup>135</sup>

By early 1998 it was already clear that the construction of sufficient secure care facilities to house all the country's juvenile offenders would not be completed by 10 May 1998, but the Minister of Welfare and Population Development remained optimistic:

'Secure care facilities will be ready in Mpumalanga, Northern Province, Free State and KwaZulu-Natal before or just after May 10. We already have a facility in Gauteng, and the North West facility will be ready in eight months.'<sup>136</sup>

In February 1998 the Minister of Correctional Services raised the political temperature by announcing that he would not accept awaiting trial children in prisons after 10 May 1998. From that date, he would consider them to be the sole responsibility of the Department of Welfare and Population Development. He pointed out that the number of awaiting trial children in prisons had increased from 245 in May 1997 to 1 400 in February 1998.<sup>137</sup>

<sup>133</sup> *Sowetan* 16 March 1998 page 2.

<sup>134</sup> *The Star* 11 May 1998 page 12.

<sup>135</sup> *Cape Argus* 18 June 1997 page 5.

<sup>136</sup> *Sunday Tribune* 22 February 1998 page 21.

<sup>137</sup> *Cape Argus* 27 February 1998 page 3.

In March 1998 the political temperature rose even higher:

'A row has erupted between Justice Minister Dullah Omar and Welfare Minister Geraldine Fraser-Moleketi over the issue of jailed children. Omar said yesterday that it was "absolutely essential" for Section 29 of the Correctional Services Act which provides for the jailing of children awaiting trial to be reenacted when it falls away on May 10. . . . Fraser-Moleketi whose department has called for the release of children into secure facilities, said yesterday that Omar's pronouncements were "premature".'<sup>138</sup>

'Dullah Omar . . . has indicated that the legislation will have to be reenacted to prevent more than 600 awaiting trial children accused of serious crimes from being released back onto the streets. But Fraser-Moleketi has said she is determined to prevent section 29 from getting back on to the statute books "if it is not required". . . . On Thursday Omar told the parliamentary standing committee that it was "absolutely essential" for section 29 to be reenacted as there were no secure facilities for holding dangerous child offenders. . . . Omar said it was a simple truth that there were no facilities other than prison to keep them.'<sup>139</sup>

Although more than 200 children were moved out of prisons and into residential care facilities in the months leading up to the 10 May 1998 deadline, there were simply not sufficient alternative facilities available to allow section 29 of the Correctional Services Act to be repealed by that date.<sup>140</sup> The section remained on the statute books, and many children remained in adult prisons. After the deadline had passed the Human Rights Commission pointed out that approximately 1 200 children between the ages of 14 and 18 remained in prison awaiting trial:

'The SAHRC urges the Government to demonstrate its commitment by creating additional facilities and ensuring that minor children are transferred to such facilities as soon as possible. The United Nations convention on the rights of the child states that an accused child must be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedoms of others.'<sup>141</sup>

In September 1998 an alternative to section 29 was proposed in the form of the Criminal Procedure Amendment Bill. Various options were suggested. One option was to allow a child younger than 14 years to be locked up in an adult prison if he or she was accused of a serious crime and if a secure facility was not available. 'Serious crimes' included murder, rape, committing robbery when armed with a firearm or other dangerous weapons, kidnapping and dealing in illegal drugs and firearms. Another option was to allow only those juveniles between the ages of 16 and 18 to be held in an adult prison in the absence of a secure juvenile facility. Juveniles younger

<sup>138</sup> *The Cape Times* 20 March 1998 page 6; see also *Cape Argus* 20 March 1998 page 3.

<sup>139</sup> *The Sunday Independent* 22 March 1998 page 1.

<sup>140</sup> *Sowetan* 11 May 1998 page 8; *Pretoria News* 14 May 1998 page 5.

<sup>141</sup> *Sowetan* 13 May 1998 page 5.

than 16 would have to be held in a secure care facility or else released into the custody of their parents.<sup>142</sup>

## 9.5 Rehabilitation of juveniles

There were some limited efforts to rehabilitate juvenile offenders. One such effort was initiated by Credo Mutwa, an African spiritual leader, which involved the use of African culture:

'Mutwa is convinced that the only way that law-breaking African children can be rehabilitated after the process of spiritual destruction started by colonialism and completed by apartheid, is to put them in touch with their traditional culture. The Khulisa project, conceptualised, developed and sponsored to the tune of more than R230 000 by Mutwa, who is patron of the project together with his business partner Lesley-Ann Tintinger, is based on the use of traditional African folklaw as a means to instruct and uplift the youth. Combined storytelling and arts activities, it attempts to restore self-respect and a sense of responsibility in young offenders. . . . Mutwa says: "In Western civilization we live in a world of separatism. The result is that humanity is denied a great deal of valuable traditional knowledge. No one is born a natural criminal. Society makes them so. When people's culture is destroyed, they are opened to all kinds of negative behaviour."<sup>143</sup>

In November 1997, in a publication entitled *The First Call: A South African Children's Budget* IDASA reviewed the results of certain 'diversion programmes' for juvenile offenders:

'"Diversion" programmes form the core of a restorative system for juvenile offenders. This process "diverts" less-serious offenders from the criminal justice system into rehabilitation programmes run by the welfare department and by non-governmental welfare organisations, particularly the National Institute for Crime Prevention and Rehabilitation (Nicro). These programmes involve community service, social and life skills and focusing on the offence and its consequences, among others. . . . Last year, 4 200 juveniles successfully completed Nicro's diversion programme. However, access to diversion is limited to those urban centres where Nicro services are available. . . . [T]he welfare system, already stretched to the limit and without promises of further funding, cannot hope to extend diversion services to all urban and rural centres not covered by Nicro in the short term. . . . But in the future . . . there is scope to spend more of the welfare budget on children and families and to improve access to welfare services, such as diversion, particularly in the rural areas. Until then, equitable access to diversion services and fair justice might remain a faraway dream for many juvenile offenders. . . .'<sup>144</sup>

During May 1998 the results of a pilot programme set up by the Inter-Ministerial Committee on Young People at Risk were reported:

'A pilot project in Durban has, over the past year, referred 400 children to "diversion" programmes; placed 1 080 with parents, family members or friends on

<sup>142</sup> *Business Day* 8 September 1998 page 2.

<sup>143</sup> *Sowetan* 3 October 1997 page 3; *Business Day* 8 October 1997 page 4.

<sup>144</sup> *The Cape Times* 12 November 1997.

warning; and secured 1 254 children the company of a parent or guardian at their first interview.<sup>145</sup>

In July 1998 the Minister of Justice launched a booklet entitled *Law Talk for Children: Play Your Part*, which provided practical suggestions on how children could access the justice system with a little trauma as possible.<sup>146</sup>

In August 1998 the Emthonjeni juvenile development centre outside Pretoria was opened by President Mandela. It was the first centre to be designed and built to cater to the needs of juvenile offenders. The centre cost R123 million to build. The centre was designed to house 640 juvenile offenders and was divided into various units. Each unit would be managed separately. Inmates were referred to as 'students' and the warders as 'mentors'. Warders were specially chosen and trained to work in the centre. It was envisaged that the centre would be the first prison in the country to be managed by the private sector. There were approximately 11 700 juvenile prisoners in South African jails at the time, with nine centres for the detention of juvenile offenders situated in various parts of the country.<sup>147</sup>

## 10 Prison gangs — A continuing reign of terror

### 10.1 Introduction

Prison gangs were responsible for a continuing reign of terror within South African prisons during the period under review. Not only did the gangs make life for many of their fellow inmates a living hell, but also played a significant role in corrupting prison staff. In some cases they seemed to be vying with prison management for the control of certain prisons. Furthermore, the influence of the gangs extended beyond the prison walls, and there were increasing links between prison gangs and community street gangs.

### 10.2 Gangs and corruption amongst warders

In January 1997 the following shocking report appeared in the *Sowetan*:

"The rivalry between the mainly black Police and Prisoners Civil Rights Union and the mainly white Public Servants Association allegedly hindered prison duties and resulted in corruption and murder plots. . . . [P]risoners were used to further the cause of the two fighting unions. . . . [L]ong term prisoner George Koka . . . alleged that prison operational head Captain Johan Matthee and prison head Colonel Eddie Jacobs asked him to form a hit squad to kill certain Popcru members. . . . In testimony given later by 26 Gang leader Ishmail Basil Dagee, he claimed that two Popcru members asked him to "hit" a prison commander, Mr BML Jacobs, with a "bomb". Dagee said he refused. . . . It further emerged in testimony to the SAHRC that violence in prison was also sparked off by fights over

<sup>145</sup> *The Star* 6 April 1998 page 5.

<sup>146</sup> *Sunday Tribune* 26 July 1998 page 16.

<sup>147</sup> *Beeld* 26 August 1998 page 13.

young boys who were turned into “wives” by older prisoners, especially gang leaders, who sodomised them.’<sup>148</sup>

### 10.3 Gangs and violence at Leeukop Prison

The power of gangs within South African prisons was revealed in a report released by the Human Rights Commission in April 1997. The report concerned violence which had occurred in November 1996 at Leeuwkop Prison, during which more than 30 prisoners had been injured. It concluded that:

‘... gang activity within this prison is highly prejudicial to good order as well as the enjoyment of basic human rights by the prison population.’<sup>149</sup>

The report recommended that gang leaders should be isolated and removed from the prison if necessary and that management should not negotiate with gang leaders, since this enhanced their credibility. It further recommended that staff should be trained in conflict resolution, human rights and mediation.<sup>150</sup>

The *Sowetan* commented on the commission’s findings as follows:

‘Gangs operating in prisons with the full knowledge and recognition of prison management are one of the factors that contributed to the gang violence which erupted at Leeukop Prison in November last year.’<sup>151</sup>

It was difficult to avoid the conclusion that warders were involved in the smuggling, since dagga and knives were generally available at the prison and steps taken to curb the smuggling of such items were not effective.<sup>152</sup>

### 10.4 Gangs and violence at Helderstroom Prison

Prison authorities and gang members struggled for control of certain prisons. During February 1997 violence erupted at the Helderstroom maximum security prison in Paarl, and a total of 49 prisoners were beaten by warders. During the subsequent investigation by the Human Rights Commission, the head of the prison blamed the incident on the fact that prisoners wanted to control the prison. Due to the high ratio of prisoners to warders, the authorities were unable to maintain effective control, and warders bemoaned the fact that they were unable to impose ‘effective disciplinary measures’, including force, on prisoners. Warders also felt aggrieved at criticism from ‘outsiders’ who did not understand the difficult conditions under which they had to work. Gang activity was regarded by the authorities as one of the main causes of the incident:

<sup>148</sup> *Sowetan* 22 January 1997 page 13.

<sup>149</sup> *The Citizen* 16 April 1997 page 21; *Business Day* 16 April 1997 page 3.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Sowetan* 17 April 1997 page 6.

<sup>152</sup> *Ibid.*

Prison authorities told the commission that an increase in gang activity within the prison had led to the incident. Three gangs — the 26s, the 27s and the 28s — were active in the prison. Their activities in jail included robbery, intimidation, drug dealing, gun-running and assaults on warders and other prisoners. Warders showed the investigation team a large variety of home-made knives, a home-made key moulded out of molten plastic that could open most doors in the prison, and dagga and Mandrax. Prison authorities conceded that it was possible some warders might be involved in smuggling drugs into prison.<sup>153</sup>

An internal investigation by the department found that the assaults did take place on 13 February 1997 as alleged by the Human Rights Commission. According to this investigation, the activity of the 26, 27 and 28 gangs had made the prison virtually ungovernable since October 1996. Warders feared for their lives and began to stay away from work due to low morale. On 11 February 1997, the acting head of the prison ordered that certain prisoners who had been identified as gang leaders be moved from the general section into single cells. It was during this move that the assaults took place. Prisoners alleged that they were hit with batons and fists, thrown against the walls and the bars of cells, shocked repeatedly with electric shields, and that warders kicked and jumped on them. After the assaults some prisoners required stitches and at least one suffered broken legs.

The Human Rights Commission praised the departmental committee which conducted the investigation for its thoroughness. It urged the department to take the next logical step by suspending the warders involved and initiating disciplinary action against them.<sup>154</sup>

Warders at the Helderstroom prison threatened to go on strike if any of their colleagues were suspended as a result of the investigation by the Human Rights Commission. About 400 warders from different trade unions vowed to fight for their rights and accused the Human Rights Commission of failing to take account of the warders' point of view. They invited the commission to return to the prison to listen to the warders version of events.<sup>155</sup>

## 10.5 Links to outside gangs

It was reported that links between gangs inside and outside prisons, which had started during the 1980s, continued to be strengthened during the period under review. Members of 'The Firm', a gang based in Mitchell's Plain and Elsiesrivier, were linked to the 28 prison gang, while members of a rival gang known as the 'Americans', were linked to the 26 prison gang. It was reported that Helderstroom prison was controlled mainly by the 28's while Pollsmoor was controlled by the 26's.<sup>156</sup>

<sup>153</sup> *Cape Argus* 26 February 1997 page 7.

<sup>154</sup> *Die Burger* 7 May 1997 page 7.

<sup>155</sup> *Die Burger* 31 May 1997 page 8.

<sup>156</sup> *Die Burger* 21 March 1998 page 11.

## 11 Escapes

Escapes from prisons declined during the period under review. In February 1997, for example, it was reported that there were approximately 100 escapes from prisons throughout the country each month. This was not high for an overall prison population of almost 130 000.<sup>157</sup> The 1997 Annual Report of the Department of Correctional Services pointed out that:

'The total number of escapes for this period represents 0,0022 per cent of the average daily prison population in custody. It is important to note that the Department experienced its lowest escape figures since 1992.'<sup>158</sup>

The rate of escapes from police cells was not as encouraging. There were more than 700 breakouts from police cells during the first three months of 1997, during which more than 2 000 criminal suspects escaped from police custody.<sup>159</sup>

During November 1997 *The Citizen* reported that during the previous few days 48 prisoners had escaped in eight separate breaks from jails, police cells and courts. The Department of Correctional Services announced its intention to restrict prisoners' parole until they had served 80 per cent of their sentence if they were involved in any way with an escape or escape attempt. This would also apply to awaiting-trial prisoners who escaped from police cells or custody. If any prisoner or awaiting trial prisoner escaped more than once, they would have to serve their entire sentence and would not be considered for parole.<sup>160</sup>

During January 1998 the problem of escapes from police cells came under scrutiny once again:

'The Justice Ministry is . . . considering imposing heavier sentences on escapers. The Inkatha Freedom Party and the Democratic Party have called for independent commissions to investigate recent escapes, most of which have been from police cells. . . . Last month 298 prisoners escaped from police cells and jails, according to Correctional Services figures. Mr Douglas Gibson, DP spokesperson on justice, said an independent inquiry was needed to establish why so many prisoners escaped from police cells. It should be led by a judge, who should be assisted by representatives of a reputable police force, such as that in Britain, the US or Canada. Standards had improved in the Department of Correctional Services, but not in the Department of Safety and Security, which was in charge of police cells.'<sup>161</sup>

During December 1998 it was reported that there were fewer escapes from South African prisons during 1998 than during the previous three years. There

<sup>157</sup> *The Sunday Independent* 23 February 1997 page 5.

<sup>158</sup> 1997 *Annual Report of the Department of Correctional Services — Safe Custody of Prisoners*.

<sup>159</sup> *Saturday Star* 23 August 1997 page 3.

<sup>160</sup> *The Citizen* 13 November 1997 page 1; 1997 *Annual Report of the Department of Correctional Services — Safe Custody of Prisoners 4*.

<sup>161</sup> *The Cape Times* 6 January 1998 page 5.

were 480 escapes during 1998 compared to 1 069 during 1997 and 1 345 during 1996. The department attributed the decline to the tough action taken against corrupt employees.<sup>162</sup>

Soon after this report, as if to mock the figures put out by the department, eleven prisoners escaped from the Johannesburg Prison on Christmas day. The prisoners held up a warder with two firearms. One prisoner put on the warder's uniform and escorted the other prisoners out of the prison, forcing another warder to open a steel gate. Shortly after the escape, one of the prisoners was shot dead, another wounded and two others taken into custody. The other escapees remained at large. Subsequently a warder was charged with corruption and dealing in ammunition.<sup>163</sup>

## 12 New legislation

### 12.1 The Parole and Correctional Supervision Amendment Act 87 of 1997

On 26 November 1997 the Parole and Correctional Supervision Amendment Act 87 of 1997 was assented to, but its commencement was deferred until a future date. In terms of the provisions of the Act, a court which sentences an offender to a term of imprisonment of two years or longer, is entitled to fix a 'non-parole period' during which parole may not be granted to such offender.<sup>164</sup> The 'non-parole period' may not exceed two thirds of the term of imprisonment or 25 years, whichever is the shorter.<sup>165</sup> Apart from the 'non-parole period', the Act provides that a prisoner may not be considered for parole until he has served at least half his period of imprisonment, provided that no prisoner shall serve more than 25 years before being considered for parole.<sup>166</sup> In the case of a sentence of life imprisonment, the Act provides that a prisoner shall not be placed on parole until he has served at least 25 years of his sentence, provided that he may be placed on parole when he has reached the age of 65 years and he has served at least 15 years of his sentence.<sup>167</sup>

In the case of a prisoner sentenced to life imprisonment, the Act gives the court which sentenced that prisoner the authority to make the final decision as to whether or not that prisoner is to be placed on parole.<sup>168</sup> The Act also provides for the membership of parole boards to be drawn from the broader community. In terms of the Act, each parole board will consist of a chairman;

<sup>162</sup> *Sunday Times* 27 December 1998 page 3.

<sup>163</sup> *Beeld* 29 December 1998 page 2.

<sup>164</sup> Section 276B(1)(a).

<sup>165</sup> Section 276B(1)(b).

<sup>166</sup> Section 65(4)(a)(ii).

<sup>167</sup> Section 65(4)(b)(v).

<sup>168</sup> Sections 64B(1) and (2) read with s 63(2).

a vice-chairman; a police official; a Department of Justice official and an alternate, with a legal background; two Department of Correctional Services officials; and two members of the community.<sup>169</sup>

Another interesting innovation contained in the Act is the provision for complainants or relatives of murdered person to be present and to make representations when the placement of the criminal on parole is being considered by the parole board. In terms of the Act, when a court sentences a person to imprisonment for a serious offence (ie an offence mentioned in Schedule 2 of the Criminal Procedure Act or the crime of murder), it shall inform the complainant or any relative of the murdered person who is present at the time, that he or she has the right to make representations when placement of the prisoner on parole is considered or to attend any relevant meeting of the parole board.<sup>170</sup>

## 12.2 The Correctional Services Act 111 of 1998

The Correctional Services Bill was approved unanimously in the National Assembly on 11 September 1998 and assented to on 19 November 1998.<sup>171</sup> Its aim was to bring all legislation regulating correctional services into line with the South African constitution. The date of commencement of the new Act was left open for proclamation at a future date.

On 19 February 1999 selected sections of the Act were brought into operation. These sections included those relating to the establishment of a 'Judicial Inspectorate' of prisons, which was to be an independent office under the control of an 'Inspecting Judge'.<sup>172</sup> The purpose of the Judicial Inspectorate was to facilitate the inspection of prisons, so that the Inspecting Judge could report on the treatment of prisoners in prisons; the conditions in prisons; and any corrupt or dishonest practices which might exist in prisons.<sup>173</sup> Inspections would be carried out by 'Independent Prison Visitors', who would be appointed by the Inspecting Judge after publically calling for nominations and consulting with community organizations.<sup>174</sup> The Inspecting Judge would also establish 'Visitors' Committees' for particular areas, consisting of the Independent Prison Visitors appointed to prisons in those areas.<sup>175</sup> The Visitors' Committees would deal with complaints which could not be resolved by the Independent Prison Visitors.<sup>176</sup> If a Visitors' Committee was unable to resolve a particular complaint, it would be

<sup>169</sup> Section 5C(2)(a).

<sup>170</sup> Section 64C(1).

<sup>171</sup> *The Citizen* 12 September 1998 page 8.

<sup>172</sup> Section 85(1).

<sup>173</sup> Section 85(2).

<sup>174</sup> Section 92(1).

<sup>175</sup> Section 94(1).

<sup>176</sup> Section 93(5).

submitted to the Inspecting Judge.<sup>177</sup> Each Independent Prison Visitor would submit a quarterly report to the Inspecting Judge.<sup>178</sup> The Inspecting Judge would submit a report on each inspection to the Minister of Correctional Services.<sup>179</sup> The Inspection Judge would also submit an annual report to the President and the Minister of Correctional Services.<sup>180</sup> The Minister was required to table this annual report in Parliament.<sup>181</sup> On 1 June 1998 President Nelson Mandela appointed Judge JJ Trengrove as the Inspecting Judge.<sup>182</sup>

Other important sections of the new Correctional Services Act which were brought into operation on 19 February 1999 concerned the establishment of 'Joint Venture Prisons'. The Minister of Correctional Services was empowered to enter into a contract with any party to design, construct, finance and operate any prison or part of a prison.<sup>183</sup> Contracts in respect of the operation of a prison could not be for more than 25 years.<sup>184</sup> A 'Controller' would be appointed for each joint venture prison, who would monitor the daily operation of that prison and report to the Commissioner of Correctional Services.<sup>185</sup> Provision was made for the State to regain control of a joint venture prison if the management of that prison had lost or were likely to lose effective control of that prison, and it was in the interest of safety and security to do so.<sup>186</sup> The new Act thus afforded legislative sanction to the privatization of parts of the South African prison system.

A further section of the new Correctional Services Act which was brought into operation on 19 February 1999 required the Commissioner of Correctional Services to conduct regular evaluations to ensure that the Department was being run in an economical and efficient manner, and that the principles set out in the new Act were being met.<sup>187</sup> The results of these internal service evaluations had to be included in the Department's annual report to Parliament.<sup>188</sup>

## **13 The Human Rights Commission**

### **13.1 Introduction**

The extent of human rights abuses within South African prisons during the period under review is indicated by an announcement made by the

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<sup>177</sup> Section 94(3)(b).

<sup>178</sup> Section 93(7).

<sup>179</sup> Section 90(3).

<sup>180</sup> Section 90(4)(a).

<sup>181</sup> Section 90(4)(b).

<sup>182</sup> *The Cape Times* 10 July 1998 page 3.

<sup>183</sup> Section 103(1).

<sup>184</sup> Section 103(2).

<sup>185</sup> Sections 105 and 106(1).

<sup>186</sup> Section 112(a).

<sup>187</sup> Section 95.

<sup>188</sup> Section 95(4).

chairperson of the Human Rights Commission, Barney Pityana, in January 1997. He pointed out that almost one third of the 1 108 complaints received by the Commission during the previous six months were complaints about conditions in prisons. Many of the complaints related to gang activity, corrupt officials and violence. Because it was underfunded and under-resourced, the Commission was unable to deal with most of these complaints.<sup>189</sup>

### 13.2 Public hearings

Due to the extent of the complaints received from prisoners, the Human Rights Commission decided to hold a series of public hearings into the conditions in South Africa's prisons. The extent of the problem was considerable. In January 1997, for example, 77 complaints of assault were received from the Boksburg prison alone. The Commission decided to conduct an in depth study into 40 prisons throughout the country. Law students would examine and classify the complaints received and public hearings would be conducted. Proposals would be submitted to correctional services on urgent matters which could not wait for the outcome of the public hearings.<sup>190</sup>

### 13.3 Zombies

During October 1997 it emerged that a rumor had been circulating in the country that people hanged by the previous government were not dead, but were working as slaves in the South African Mint or had been turned into zombies! The Human Rights Commission received a number of requests from relatives of the deceased to confirm that their loved ones were in fact dead. The rumor concerning slave labour arose because the South African Mint was closed to the public and the names of its workers were unknown. The rumor concerning zombies was connected to a belief, which was fairly widespread in certain areas of South Africa, that a dead person would become a zombie if his tongue was cut out before burial. The Human Rights Commission arranged that relatives could visit the graves of those who had been hanged in order to satisfy themselves that they were in fact dead. Negotiations also took place between the Human Rights Commission and the Ministry of Justice on the question of whether or not relatives should be allowed to exhume the bodies and bury them elsewhere.<sup>191</sup>

## 14 Determining the fate of former Death Row prisoners

With the abolition of the death penalty in 1995, the fate of 453 prisoners who were on death row at the time became uncertain. Because their death

<sup>189</sup> *The Citizen* 30 January 1997 page 4.

<sup>190</sup> *Weekly Mail and Guardian* 30 May — 5 June 1997 page 9.

<sup>191</sup> *Saturday Argus* 18 October 1997 page 3.

sentences had been declared unconstitutional, a mechanism had to be found to resentence these prisoners. The constitutional court had ordered that death row prisoners should remain in custody until their sentences were either set aside or substituted by new sentences. However, the problems involved in resentencing such a large number of prisoners proved difficult to resolve in practice. Approximately two years after the death penalty was abolished, a draft Criminal Procedure Act Amendment Bill came before parliament, proposing that each death row prisoner be resentedenced by the original trial court. One state advocate responded to the proposal as follows:

'The Bill's proposal that death row prisoners be retried is correct in law. . . . But it presents a practical nightmare. It would involve dealing with thousands of pages of court records and clog up both the courts and attorney-generals' offices, impacting on awaiting-trial prisoners' rights to be dealt with speedily. It is an intractable problem, but one that has to be dealt with.'<sup>192</sup>

A 'quick-fix' solution to the problem was suggested, which involved parliament enacting legislation replacing every death sentence with a life sentence. There were concerns, however, that this might be open to constitutional challenge.

## **15 Rehabilitation**

### **15.1 Recidivism**

There were very few rehabilitation programmes operating in South African prisons during the period under review. It is not surprising, therefore, that the recidivism rate for South African prisoners remained very high. In July 1997, for example, the South African Institute of Race Relations reported that between 87,5 per cent and 95 per cent of all prisoners were not rehabilitated and committed further offences.<sup>193</sup>

In July 1998 *Die Burger* newspaper approached certain academics for their opinions on the question of rehabilitation in South African prisons. According to Professor Wilfred Scharf of the Institute of Criminology at the University of Cape Town, only 2 per cent of prisoners in South African prisons were ever exposed to any form of rehabilitation. Mr Christiaan Bezuidenhout of the department of criminology at the University of Pretoria stated that between 73 per cent and 78 per cent of criminals committed further crimes after being released from prison.<sup>194</sup>

### **15.2 Rehabilitation and the use of prison labour**

Although the vast majority of South African prisoners received no training of any kind, there were initiatives to provide small groups of prisoners with

<sup>192</sup> *Weekly Mail and Guardian* 15–21 August 1997 page 5; *Business Day* 7 August 1997 page 2.

<sup>193</sup> *Die Burger* 24 July 1997 page 11.

<sup>194</sup> *Die Burger* 29 July 1998 page 2.

marketable skills. For example, during March 1997 a project known as the 'Graceway Community Project' was launched at the Westville Prison. It was a private sector initiative which was aimed at providing prisoners with both formal and informal skills and was to cost R13 million over five years. Prisoner training programmes would take place over a three-month period, and would comprise mainly building skills which would carry a recognized certificate from the Building Skills Training Board. Other courses would include arts and crafts, creative writing and catering. The project was to be self-funded, with the Department of Correctional Services providing office space, building material, and a limited number of prison staff. The project was to include on-site skills training at Westville Prison and the establishment of a halfway house at Eston outside Pietermaritzburg. By 1998 it was planned to open a manufacturing factory next to the half-way house in which prisoners would work. Although the Competitions Act precluded Correctional Services from economic activity for gain, it was hoped that the project, which was run via the medium of a Section 21 Company (ie a company not for gain), would not fall foul of this legislation. The project manager stated as follows:

'Many functions of correctional services are to be privatised. At Graceway, we are hoping to get contracts using prison labour.'<sup>195</sup>

The idea of using prison labour to preform public works was raised a number of times during the period under review. During April 1997, for example, the *Eastern Province Herald* made the following suggestion:

'... is it not possible to use prisoners — particularly people serving short-term sentences for minor offences — in labour-intensive projects like providing services for the townships? Such teams of convicts could maintain roads, clear sites for housing projects, dig trenches and prepare areas for water and sewerage. . . . Such labour could be put out to tender, subject to guarantees of proper treatment of prisoners and assurances that they will be kept under close guard. Only this week, Correctional Services Minister Siphon Mzimela . . . said his department was facing a bill of up to R12 billion to renovate and upgrade jails and to build new ones.'<sup>196</sup>

The report failed to point out the numerous problems which could arise by using prison labour at a time when unemployment on the open labour market was at very high levels. During November 1997 *The Natal Witness* pointed to some of these problems in an editorial dealing with the issue of whether or not to use probationers and persons sentenced to community service to clean the city and contribute to a business watch programme:

'Does the SAPS, already overstretched by the crime rate, really have the capacity to do this (ie monitor the programme) as well? And are business people the right people to be appointed to this function? Is there no scope for neglect or even abuse

<sup>195</sup> *Sunday Tribune* 23 March 1997 page 7.

<sup>196</sup> *Eastern Province Herald* 24 April 1997 page 4.

in such an arrangement? . . . Furthermore, the city knows from experience that its municipal cleaning staff is extremely sensitive to intrusions on to their domain. Is this scheme going to precipitate another standoff, as happened over the "litter buggy"? And what of the other groups that have their own schemes for keeping the townscape clean and safe?<sup>197</sup>

### 15.3 Education and training

Apart from the Graceway Community Project discussed above, several other relatively small scale education and training programmes for prisoners were started during the period under review. Some examples are detailed below:

During January 1997 it was reported that one hundred and twenty juveniles at the Groenpunt Prison had been awarded business certificates for successfully completing a small business competence course.<sup>198</sup>

During May 1997 *The Natal Witness* reported on a programme which was being run in the Pietermaritzburg Prison:

'About 36 inmates who are due for parole at the local prison will today graduate from a skills course run by School Leavers Opportunity Training (Slot). The 10-day course, known as Slot 1, is part of a pilot project which the facilitators hope will be run in other prisons in the province. . . . The group of graduates will now attend a 10-week course known as Slot 2 at Project Gateway where they will be taught fabric painting, aluminium fabrication, agriculture and other practical courses. . . . [T]hose who wish to run small businesses after completing the course, and are already paroled, will be able to do a Slot 3 course, which will equip them with business skills.'<sup>199</sup>

In October 1997 it was reported that the government had launched a pilot educational programme for prisoners in the Eastern Cape and Gauteng in conjunction with the private sector:

'Government has launched a R750 million project aimed at educating prison inmates, with Port Elizabeth's St Albans as one of two prisons in the country selected to host pilot projects. The other is Leeukop Prison near Midrand, Gauteng. . . . [The Production Management Institute of South Africa] has been tasked by Correctional Services with providing courses for prisoners, which will make them marketable when they leave prison. . . . R20 million had been made available for use at Eastern Cape prisons.'<sup>200</sup>

In August 1997 *Die Burger* reported on the official opening of a 'business school' in Pollsmoor Prison, which had been started by two prisoners who were qualified chartered accountants. The Old Mutual insurance company donated ten computers to the school which would teach accounting and computing to prisoners.<sup>201</sup>

<sup>197</sup> *The Natal Witness* 27 November 1997 page 10.

<sup>198</sup> *Sowetan* 27 January 1997 page 23.

<sup>199</sup> *The Natal Witness* 15 May 1997 page 2.

<sup>200</sup> Eastern Province Herald 7 October 1997 page 8.

<sup>201</sup> *Die Burger* 29 August 1997 page 4.

In December 1997 it was announced that a prison radio station was about to start broadcasting at the Brandvlei Youth Correctional Centre. Equipment worth R40 000 had been donated for the project.<sup>202</sup>

In March 1998 it was reported that a garment-making training course had been launched at the Boksburg Prison by the Gauteng Training College.<sup>203</sup>

A drug and alcohol rehabilitation center was opened officially at the Mossel Bay prison during September 1998. The eight week programme was based on Christian principles and only catered for volunteers who were determined to give up alcohol and drugs. Certificates were issued to inmates who were able to steer clear of alcohol and drugs for a period of two months after completing the course.<sup>204</sup>

In September 1998 the *Mail and Guardian* reported on the progress of an entrepreneurship programme that had been running in the Empangeni Prison since the middle of 1996. The programme was sponsored by the Richards Bay Minerals company and consisted of six days of training in business entrepreneurship. The programme was based on the premise that:

'a needy person who turns to crime is usually more entrepreneurial and prepared to take risks than someone who depends on welfare.'<sup>205</sup>

It was reported that 80 inmates had completed the course between July 1996 and September 1998.

## 15.4 Sports and entertainment

During the period under review some effort was also made to rehabilitate prisoners through sports and entertainment. During June 1997, for example, a match was arranged between a Krugersdorp Prison soccer team and the Moroka Swallows professional soccer team:

'Swallows played the prisoners at the prison on Friday to kick off its Crime Stop Community Project. The project, which will see the team play several other prison teams around Gauteng, is seen by Swallows as helping to do their bit to help stop crime and rehabilitate prisoners.'<sup>206</sup>

Towards the end of 1997 a series of rock concerts were held in a number of prisons throughout the country. The show at the Durban Westville Prison was reported as follows:

'The Competent Artistes Prison Bash concept, which was launched at the Krugersdorp Prison last month, hit Durban's Westville Prison on Tuesday, and

<sup>202</sup> *Cape Argus* 9 December 1997 page 8.

<sup>203</sup> *Sowetan* 16 March 1998 page 8; *The Citizen* 14 March 1998 page 13.

<sup>204</sup> *Die Burger* 12 September 1998 page 12.

<sup>205</sup> *Mail and Guardian* 11–17 September 1998 page 9.

<sup>206</sup> *The Star* 9 June 1997 page 6.

was judged to be such a success that six bashes will be held in Gauteng this week at Leeukop Prison, Pretoria Central Prison and Johannesburg Prison (Sun City). . . . The bash is a road show involving four of the country's top bands — Chimora, Freddie Gwala, Pure Gold and Platform One — who drive home an anti-crime message by performing for prisoners. . . . All prisoners attending the bashes are asked to sign a pledge undertaking to give up crime. These pledges are then put up on cell walls for all to see. . . . The bashes are by far the biggest events ever staged at prisons. At Krugersdorp 1 500 prisoners attended. At Durban Westville over 1 200 inmates, including women, saw the show.<sup>207</sup>

The fact that prisoners were being entertained by some of the country's top entertainers proved to be too much for certain politicians, such as the ANCs Tony Yengeni:

'Allowing prisoners to attend concerts by such stars as Brenda Fassie and Boom Shaka was "going overboard", senior ANC member Mr Tony Yengeni said yesterday. . . . Mr Yengeni . . . pointed out that people in the community were struggling to find a daily meal, while prisoners were housed, fed and entertained in the name of human rights. . . . Responding, Mr Korabie said the Department of Correctional Services was reviewing the privileges of prisoners, so as to limit them to basic human rights.'<sup>208</sup>

Rock concerts were not the only music heard in the prisons during the period under review. During September 1997 *Sowetan* reported on a choir festival for prisoners called 'Choral Sounds Behind Bars':

'Music heals and it is an extraordinary experience to see the faces of men serving scores of years shine with and indescribable brightness, goodness. The Leeuwkop Prison Choir has men who are serving over 40 or 50 years' hard labour. It is incredible to see and hear them sing. I don't know if this kind of thing is done anywhere else in the world. . . . In singing they give to the world something very special, something that years of imprisonment will never replace. They give something of their better selves in a manner that is also joyful. It is the best gift these chaps can give to a world that is punishing them for mistreating it. There is no better form of rehabilitation.'<sup>209</sup>

During May 1998 *The Citizen* carried a report on the Pollsmoor Prison choir known as 'The Soul Redeemers':

'Set up in 1994, the 11 member choir competes in contests and wants to release a record. . . . Dressed in green prison uniforms, their arms scarred and tattooed, the Pollsmoor choir looks more at place in a chop shop than a church. Then they begin singing, their voices harmonising perfectly on classics such as Frank Sinatra's "My Way". Down the hall, two convicts cleaning floors sway to the music.'<sup>210</sup>

<sup>207</sup> *Sowetan* 2 October 1997 page 22; and see also *The Star* 21 August 1997 page 7.

<sup>208</sup> *The Citizen* 17 February 1998 page 8.

<sup>209</sup> *Sowetan* 15 September 1997 page 9.

<sup>210</sup> *The Citizen* 18 May 1998 page 8.

## 16 Rights and privileges

### 16.1 Limiting privileges

Early during 1998 the prison authorities proposed limiting the privileges enjoyed by prisoners. This initiative was clearly influenced by the public perception that life in prison was too 'soft'. An editorial in *The Natal Witness* applauded the fact that the 'privilege package' granted to prisoners was to be reevaluated. According to the editorial, a 'skewed view of what constitutes human rights' had upset the balance between punishment on the one hand and rehabilitation on the other. The writer bemoaned the fact that:

'... while many in the community live below the breadline, prisoners — in the name of human rights — are not only housed, fed and clothed, but also have access to radio and television and are, from time to time, treated to concerts by top popular artists.'<sup>211</sup>

The shocking conditions caused by chronic overcrowding in many South African prisons were not mentioned.

In November 1998 details of the new policy were reported in the press:

'In terms of the new Correctional Services policy, prison visits have been limited to 45 minutes for the well-behaved category. No edibles will be allowed into prisons and prisoners have been ordered to use prison tuckshops. Prisoners have also been prevented from owning television sets. . . .'<sup>212</sup>

The aim of the new policy was said to be the creation of a 'manageable environment' in prisons. A departmental spokesman stated that:

'We want to make sure that there is no smuggling of unauthorised articles like Mandrax and dagga which are brought in with food. . . . And with regard to private TV sets, the privilege had been taken away because people make unauthorised connections.'<sup>213</sup>

The South African Prisoners Organisation for Human Rights responded that smuggling was a product of corruption amongst warders rather than the result of privileges granted to prisoners.

Two urgent court interdicts were brought by an inmate of the Pretoria prison to prevent the Department of Correctional Services from removing television sets from cells in accordance with the 'New Privilege System', but to no avail. Prisoners then threatened to go on a hunger strike if the television sets were removed from their cells. The head of the South African Prisoners Organisation for Human Rights, Golden Miles Bhudu, stated the position of the prisoners as follows:

'It is an undisputable fact that due to the failure of the Prison Department to correct, reform, educate, train and rehabilitate offenders, inmates do nothing else

<sup>211</sup> The *Natal Witness* 18 February 1998 page 8.

<sup>212</sup> The *Natal Witness* 3 November 1998 page 2.

<sup>213</sup> *Ibid.*

throughout their imprisonment, but get up in the morning, have their breakfast, watch TV, listen to the radio, engage in senseless topics and gangster activities, smoke dagga and have sex. It is misleading and fraudulent of the Minister of Correctional Services to try to win hearts in the broader community by saying prisons are hotels. . . . The Minister needs to tell the community that it is precisely these 'hellholes' which are mainly responsible for the lawlessness that has become the order of the day.'<sup>214</sup>

Despite strike action by prisoners, the new privilege system was successfully implemented by the authorities. On 21 November 1998 it was reported that:

'A nationwide strike by prisoners this week has been resolved with inmates returning to their cells, unsuccessful in having their lost privileges reinstated. Prisoners embarked on a strike after the Department of Correctional Services revoked their privileges from November 1. . . . Around the country, prisoners were up in arms and embarked on hunger strikes and protests on Monday. In Greytown, 83 inmates refused to be locked in their cells.'<sup>215</sup>

## 16.2 Conjugal visits

Under the headline 'Nessies van liefde agter die tralies' ('Love nests behind bars'), *Beeld* reported on an application to court by three prisoners seeking the right to have sex while imprisoned. Apart from the controversial nature of the application itself, it was made even more sensational by the high public profile of one of the applicants. He was Janusz Walus, the killer of South African Communist Party leader Chris Hani, who wished to be allowed to have sex with his girl friend.

According to Jan Nesor, a professor of criminology at the University of South Africa, the legal position in relation to prisoners' rights was that they were entitled to all basic human rights apart from those which might jeopardize their safe custody. The question, however, was whether sex while imprisoned was a right or a privilege. According to the Department of Correctional Services, prisoners rights included clothes, food, accommodation, medical care and visits. Privileges included recreation, watching television, buying treats from tuck shops, and playing sport. Sex, according to the department, definitely fell within the category of privileges.

Each of the co-applicants presented different arguments in favour of allowing them to engage in sex before their release. One of the applicants, Julia Mashele claimed that her marriage would collapse if she was not allowed to bear a child for her husband, and she should therefore be allowed to have sex with her husband outside the prison. According to Professor Nesor, this request was not that unusual. Certain categories of prisoners in certain American states enjoyed conjugal rights, as a way of preparing them

<sup>214</sup> *City Press* 15 November 1998 page 4.

<sup>215</sup> *The Independent on Saturday* 21 November 1998 page 5.

to reintegrate into the community. Furthermore, prisoners in South Africa were allowed out of prison to attend to serious family obligations such as funerals. The other applicant, Dean Plank claimed that prisoners were allowed to marry while in jail and therefore they should also be allowed to consummate the marriage in jail.

For his part, Walus argued that condoms were distributed freely in prisons. This allowed homosexual prisoners to have sex, whereas heterosexual prisoners were denied the same right. The department's response to this argument was that although prisoners were entitled to condoms on request, this did not mean that sex between male prisoners was encouraged. A departmental spokesman said that condoms were not the same as a bowl of peppermints in a restaurant, to which anyone walking past could help himself. Rather, it was a case of 'it happens', and so in order to comply with national health policy, condoms were provided for prisoners. This was done together with counseling and warnings about sexually transmitted diseases such as AIDS. Apart from anything else, the spokesman maintained, it was practically impossible to create 'love nests' in South Africa's overcrowded prisons. With 140 000 prisoners occupying facilities designed to hold only 97 000, what would the department do if all 140 000 prisoners demanded the right to conjugal visits?<sup>216</sup>

### 16.3 Prisoners and the vote

Before South Africa's first democratic general election in 1994, the issue of whether or not prisoners were to be allowed to vote led to serious prison riots, during which 37 prisoners died and 750 others were seriously injured.<sup>217</sup> As the date for South Africa's second democratic general election came closer, the same issue came to the fore. In January 1999 the Legal Resources Centre filed a court application on behalf for two Gauteng prisoners who wanted the right to vote in the coming election. The application was reported in the press as follows:

'In a desperate legal bid, whose outcome will decide the fate of South Africa's more than 150 000 prisoners, convicted robber Mr Arnold August and awaiting-trial prisoner Ms Sibongile Mabutho have jointly applied for eligibility to vote in terms of the Constitution. Section 19 states that every citizen is free to "vote in elections for any legislative body established in terms of the Constitution, and to do so in secret and to stand for public office and, if elected, to hold office". The applicants want the Department of Correctional Services to make suitable election arrangements in all prisons, including setting up registration stations.'<sup>218</sup>

<sup>216</sup> *Beeld* 1 November 1997 page 6.

<sup>217</sup> SA Pete 'The politics of imprisonment in the aftermath of South Africa's first democratic election' (1998)11 *South African Journal of Criminal Justice* 51-83 at 62.

<sup>218</sup> *The Independent on Saturday* 9 January 1999.

In February 1999 the application was turned down by the Pretoria High Court. The presiding judge stated that the predicament that prisoners found themselves in was of their own making. The matter then went on appeal to the constitutional court.<sup>219</sup>

On 1 April 1999 the constitutional court reversed the decision of the High Court. The court held that, in the absence of any legislation to the contrary, it was not for the Independent Electoral Commission (IEC) or the courts to deny prisoners their constitutionally protected right to vote. Predictably, this raised a public outcry. Public anger at rampant crime was at an all time high. Crime was perceived to be destroying the country, which made it difficult for ordinary citizens to understand why criminals should be afforded the right to vote. Furthermore, IEC policy at the time made it clear that certain categories of law abiding South African citizens (for example those who were not in possession of a bar coded identity book, or those who were overseas at the time of the election) would not be allowed to vote. To the person in the street it was incomprehensible that convicted criminals were to be allowed to vote, whereas law abiding citizens would be denied that right for what were perceived to be technical reasons:

'Some people will find the Constitutional Court's ruling on Thursday pretty hard to stomach. It is grotesque that convicted child-molesters, rapists, hijackers, robbers, murderers and other imprisoned criminals will have the vote. Having deprived their victims of their rights, convicts will now be allowed to exercise the right to vote in terms of a decision by the court. As things stand at present, law-abiding citizens will not be allowed to vote if they do not have bar-coded ID books or are out of the country on election day. The disenfranchised may include our country's sports teams.'<sup>220</sup>

'Law-abiding citizens are entitled to be outraged that prisoners will be allowed to vote in the June elections. . . . The general feeling is they forfeited that right by violently breaking the law of the land. . . . [T]o make plans for murderers to vote, yet deny that right to SA cricket captain Hansie Cronje and his team who will be in England on June 2 for the World Cup tournament, is ludicrous.'<sup>221</sup>

Opposition parties immediately made plans to challenge the policy denying the vote to South African citizens who were traveling or living outside the country on election day:

'Opposition parties are set to launch a joint legal challenge to secure the vote for disenfranchised South Africans travelling and living abroad, following last week's constitutional court ruling in favour of prisoners.'<sup>222</sup>

After all the public furore, on election day the voting in South Africa's prisons proceeded without a hitch.

<sup>219</sup> The Mercury 24 February 1999 page 4.

<sup>220</sup> *Sunday Tribune* 4 April 1999 page 16.

<sup>221</sup> The Mercury 5 April 1999 page 4.

<sup>222</sup> The Mercury 6 April 1999 page 3.

## 17 Conclusion

The conclusions drawn in this article are limited by the nature of the empirical data used. Much of the data consisted of reports drawn from a variety of national and local newspapers. Additional data was obtained from the 1997 *Annual Report of the Department of Correctional Services* as well as various legal cases and statutes. Although valuable in tracing the public mood on various issues, as well as the political positions of various interest groups involved, such data does not fully reveal the everyday experiences of the inmates of South African prisons. This article can only point in a general way to the severe human rights abuses suffered by prisoners in the run up to South Africa's second democratic election in June 1999. Many tales of individual suffering remain to be told.

## **CHAPTER 4.3**

### **No Reason to Celebrate: Imprisonment in the Aftermath of South Africa's Second Democratic Election**

Article in preparation for publication:

Peté, SA (2015) No Reason to Celebrate: Imprisonment in the Aftermath of South Africa's Second Democratic Election (*In prep.*)

## **No Reason to Celebrate: Penal Discourse and the Human Rights of Prisoners in the Aftermath of South Africa's Second Democratic Election**

Stephen Allister Peté<sup>1</sup>

### **4.3.1 Introduction**

**"The degree of civilization in a society can be judged by entering its prisons."<sup>2</sup>**

**Fyodor Dostoevsky**

South Africa's second democratic election was held on 2 June 1999. It was an important election, in that it served to consolidate the constitutional democracy which had been ushered in with the first democratic election held in 1994.<sup>3</sup> By the time of the second democratic election, the public euphoria which had greeted the demise of apartheid and the dawn of a new democratic era, had begun to dissipate. For the first time since 1994, most South Africans appeared to be pessimistic rather than optimistic about the direction in which the country was headed.<sup>4</sup> An important factor contributing to the pessimism of many South Africans, as well as constituting a central issue in the election campaign of 1999, was that crime in the country was perceived to be at unacceptably high levels. According to one group of scholars:

"Negative sentiment [towards government efforts to reduce crime] began to mount in late 1996 and skyrocketed in mid-1998. By September 1998, only 17% said the government was doing a

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<sup>2</sup> From Fyodor Dostoevsky (1862) *The House of the Dead* translated by Constance Garnett and quoted in Fred R Shapiro (2006) *The Yale Book of Quotations* Yale University Press: New Haven, as reflected in the 2013 IOS Application created and developed by English Channel Inc., Tokyo.

<sup>3</sup> See, in general, Lodge, T (1999) *Consolidating Democracy: South Africa's Second Popular Election* Johannesburg: Witwatersrand University Press.

<sup>4</sup> According to Robert Mattes, Helen Taylor and Cherrel Africa: "Since 1994, when 76% of a national sample said the country was headed in the right direction, regular Markinor surveys tracked a gradual decline in optimism about the overall direction of the country, with especially sharp drops after 1996. The first Opinion '99 survey, conducted in September 1998, registered the first time that the optimistic and pessimistic trend lines actually crossed, with 44% saying the country was headed in the wrong direction, and 43% saying the right direction." See Mattes, R, Taylor, H & Africa, C (1999) Chapter 3: Public opinion and voter preferences 1994-1999. In Andrew Reynolds (Ed) *Election '99 South Africa: from Mandela to Mbeki* Claremont: David Philip 37- 63 at 38.

good job and a massive 81% gave it a negative rating. While it recovered slightly as the election neared, crime (along with jobs) remained one of the ANC's biggest electoral headaches."<sup>5</sup>

In brief terms, therefore, it may be said that – although South Africans remained deeply divided along the lines of race and class – they were united in their fear of crime and the common perception that not enough was being done to combat the problem.<sup>6</sup> This was to remain a dominant theme within South African public discourse for many years. Moreover, it was a theme which affected the colour and tone of public debate in many other areas of South African life, including the punishment of offenders – which is the focus of this article.

The primary aim of this article is to identify and examine the main themes which characterised the public discourse surrounding imprisonment in South Africa during the years immediately following the country's second democratic election. This article also traces the dialectical relationship between such a discourse and the continued systematic violation of the basic human rights of many of those confined in South African prisons during this important period. This was the time during which the inhabitants of Mandela's "rainbow nation" began to realise that the honeymoon of the immediate post-apartheid period was over. South Africans started to appreciate that their new democracy, now under the leadership of Thabo Mbeki, could not easily solve the daunting set of economic and social problems – including deteriorating conditions in the country's prisons – by which it was confronted. South Africans were forced, finally, to accept that the end of apartheid did not mean an end to the abuse of prisoners' basic human rights in poorly maintained and chronically overcrowded prisons, with significant levels of gang activity, and high rates of HIV infection.

A central theme examined in this article is prison overcrowding. The years leading up to South Africa's second democratic election – the period immediately prior to that examined in this article – had been characterised by chronic overcrowding within South African prisons. This had given rise to negative

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<sup>5</sup> Mattes, R, Taylor, H & Africa, C (1999) Chapter 3: Public opinion and voter preferences 1994-1999. In Andrew Reynolds (Ed) *Election '99 South Africa: from Mandela to Mbeki* Claremont: David Philip 37- 63 at 44.

<sup>6</sup> One consequence of the general atmosphere of fear which was pervasive in South Africa during the early post-apartheid period, given the high levels of violent crime in the country, was the passing into law of minimum sentence legislation. Minimum sentencing provisions were passed into South African law in terms of the Criminal Law Amendment Act 1997 (Act 105 of 1997) and came into effect on 1 May 1998. Set to expire after a set number of years, the minimum sentencing provisions were explicitly renewed on a number of occasions, until they were made permanent by Section 3 of the Criminal Law (Sentencing) Amendment Act 2007 (Act 38 of 2007), which removed the need for periodic renewal. This legislation was to have a negative effect on the ongoing problem of prison overcrowding in South Africa.

effects which had permeated the entire penal system of the country.<sup>7</sup> Unfortunately, as this article shows, chronic overcrowding remained a major problem for South African prison authorities during the years following the second democratic election. Along with chronic overcrowding, came a host of attendant evils such as poor conditions of detention (particularly distressing in the case of vulnerable classes of prisoners like children); high levels of gang activity; the spread of HIV/AIDS; the escape of dangerous criminals from different prisons in the country; and instances of corruption and other criminal activity amongst prisoners and staff. In addition to the central problem of chronic overcrowding, these all emerge as strong themes within the public penal discourse of the time. Each of these themes is closely examined in this article.

In order to capture adequately not only the content, but also the "feel" of the public discourse surrounding imprisonment in the aftermath of South Africa's second democratic election, this article makes use of data drawn from a large number of newspaper reports which appeared in a wide variety of South African newspapers during the period in question. Data drawn from most major South African daily and weekly newspapers published during this period are reflected in this article. The wide variety of different newspaper reports consulted during the research process produces a vivid picture of this particular time in South Africa's penal history.<sup>8</sup> In addition to comparing different newspaper reports on particular events, the article also makes reference to official reports and speeches by public officials. While the main focus of this article is on the different strands of public discourse surrounding imprisonment, it also provides an accurate picture of what it was like to be a prisoner in South Africa during the period in question.

#### **4.3.2 The Nightmare of Chronic Overcrowding Continues**

If any theme may be said to dominate the public discourse surrounding imprisonment in South Africa in the aftermath of the country's second democratic election, it is that of continued chronic overcrowding, and its effects.<sup>9</sup> The issue of prison overcrowding was discussed in the national press

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<sup>7</sup> See Peté, SA (2000) 'The Good, the Bad and the Warehoused': The politics of Imprisonment During the Run-Up to South Africa's Second Democratic Election *South African Journal of Criminal Justice* 13: 1-56.

<sup>8</sup> There is considerable truth in the following well known phrase which appeared in the 13 June 1948 edition of the *Washington Post*: "News is a first rough-draft of history" (see website: [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2010/08/who\\_said\\_it\\_first.html](http://www.slate.com/articles/news_and_politics/press_box/2010/08/who_said_it_first.html) accessed 7 March 2015).

<sup>9</sup> For a summarised overview of certain of the prominent themes covered in this section, see Peté, SA (2006) Between the Devil and the Deep Blue Sea: The Spectre of Crime and Prison Overcrowding in Post-Apartheid South Africa *Obiter* 27(3): 429- 453 at 438 - 443.

from the very beginning of the period in question. In the month following the second democratic election, for example, it was reported that the Minister of Correctional Services, Ben Skosana, and the Minister of Justice, Penuell Maduna, had paid a surprise visit to a number of prisons in the Gauteng area. They found the conditions in the Johannesburg Prison to be shocking. The holding cells were dilapidated, overcrowded and stuffy – with no bright lights and with leaking water pipes. A total of 15 000 prisoners were detained in the prison, which had been designed to accommodate 6 000.<sup>10</sup>

The public pressure brought to bear on prison authorities at this time concerning the issue of prison overcrowding, and seemed to cause a degree of overreaction among certain officials. During August 1999, for example, the Commissioner of Correctional Services, Dr Khulekani Sitole, allegedly told *Beeld* newspaper that once offenders were sentenced, they forfeited a significant portion of their human rights. According to this report, Sitole maintained that the only rights to which prisoners were entitled, were the rights to food and a place to sleep. He was responding to an allegation by the *South African Prisoners Organisation for Human Rights* that prisoners were being denied their human rights because 154 000 prisoners were being detained in prisons designed to accommodate a maximum of 98 000 prisoners. According to the report, Sitole stated that the use of disused mine buildings to accommodate prisoners was being considered.<sup>11</sup> In response to Sitole's alleged comments, the *South African Prisoners Organisation for Human Rights* demanded that he be dismissed.<sup>12</sup>

The overcrowded conditions in South African prisons at this time resulted in at least one unfavourable comparison to the conditions prevailing in prisons in other parts of the world. During September 1999, it was reported that a South African serving a term of imprisonment in South America had elected to serve the last six months of his sentence in a Columbian prison, rather than be returned to Pollsmoor Prison in Cape Town. The prisoner, a certain Mr Clive Solomons, maintained that conditions in Pollsmoor Prison were much worse than those in the South American prison – situated in Santa Marta, Columbia – where he was serving a three and a half year sentence. A religious worker who visited Mr Solomons, Shona Allie, stated that although prisons in South America were a bit overcrowded, the

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<sup>10</sup> *City Press*, 25 July 1999, 5.

<sup>11</sup> *Beeld*, 16 August 1999, 9. This idea may have been linked to a somewhat bizarre suggestion made more than two years previously – that disused mine shafts be used to accommodate South African prisoners. For a discussion of this suggestion and the public outrage which greeted it, see Peté, SA (2000) 'The Good, the Bad and the Warehouse': The politics of Imprisonment During the Run-Up to South Africa's Second Democratic Election *South African Journal of Criminal Justice* 13:1-56 at 21-22.

<sup>12</sup> *Beeld*, 18 August 1999, 2.

facilities were much better than in South African jails. Most cells were single quarters and married men's wives were allowed to spend weekends with them. She stated that the cells of prisoners in Bogota and Medellin were air conditioned and that prisoners could walk freely in the prison.<sup>13</sup>

Reports on the harsh realities of life in South Africa's overcrowded prisons did not seem to engender much public sympathy for prisoners. In an editorial which commented on an "open day" which had been held at the Johannesburg Prison, the *Pretoria News* summed up the general desire of the South African public to see criminals harshly punished, as follows:

"... it was with some astonishment that we witnessed a so-called 'open day' at Johannesburg Prison. It was enthusiastically recorded how festive and colourful the day was: soft drinks and cake for prisoners who were treated to plays and games on the prison's sports fields. Rehabilitation is one thing, but what kind of message did this transmit to the public? That prison is in fact not a punishment but a far kinder place than they had imagined? ... The threat of a term in jail – a harsh environment where privileges are few and hard-earned – should serve as a deterrent. The 'open day' conveyed an unfortunate message."<sup>14</sup>

A significant factor contributing to the overcrowding of South Africa's prisons at this time, was the large number of awaiting trial prisoners clogging up the system. Towards the end of 1999, the Minister of Correctional Services, Ben Skosana, expressed concern at the large numbers of awaiting trial prisoners within the penal system. He speculated that, by 2002, awaiting trial prisoners could outnumber convicted prisoners in Gauteng.<sup>15</sup> At the time he was speaking, awaiting trial prisoners made up about one third of the 155 000 prisoners in South Africa. Each prisoner cost the South African taxpayer R80 per day, which amounted to R12.4 million per day for the upkeep of South Africa's prison population. The *Independent on Saturday* described the problem of increasing numbers of

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<sup>13</sup> *Cape Argus*, 6 September 1999, 1.

<sup>14</sup> *Pretoria News*, 1 November 1999, 7.

<sup>15</sup> In fact, the massive increase in the number of awaiting trial prisoners within the South African penal system reached a peak around this time, after which it stabilised and then began to decrease. Unfortunately, this did not bring an end to the problem of overcrowding in South African prisons. Writing in 2006, Lukas Muntingh and Chris Gifford commented as follows about prison overcrowding in South Africa during the first decade after the fall of apartheid: "The total number of prisoners has grown steadily and dramatically over the last 11 years. The cause of the increase has changed during this time. Between 1995 and 2000, the major driver of the prison population rise was a massive increase in the size of the unsentenced prisoner population. After 2000, the number of unsentenced prisoners stabilised, and then began to decrease. But the prisoner population continued to grow, now as a result of an increase in the number of sentenced prisoners." See Giffard, C & Muntingh, L (2006) *The Effect of Sentencing on the Size of the South African Prison Population - Report 3* Newlands, Cape Town: Open Society Foundation for South Africa at 2.

awaiting trial prisoners as a “time-bomb”, and referred to the overcrowding in South Africa’s prisons, which then stood at 156%, as “horrifying”. The Minister of Correctional Services attributed the rise in the number of awaiting trial prisoners to increased police efficiency, and because the courts were too slow in their prosecutions. The Department of Justice, on the other hand, maintained that the increase was due to tough bail laws, which were being strictly applied by the courts. A spokesperson for the Department of Justice, Paul Setsetse, pointed out that the Ministers of Safety and Security, Justice, Defence, and Correctional Services, had recently undertaken a snap tour of South Africa’s prisons. They had found that, although most awaiting trial prisoners had been granted bail, they could not afford to pay and were forced to remain in prison. The Ministers discovered that one awaiting trial prisoner in Diepkloof had spent 11 months in prison, because he was unable to afford R50 bail. A senior researcher at the Institute for Security Studies, Martin Schonteich, pointed out that – from 1995 – the proportion of awaiting trial prisoners had been increasing in relation to the prison population as a whole. This was due to the tightening of the bail laws, coupled with deterioration in the functioning of the justice system caused by experienced prosecutors leaving the system. According to Schonteich there had been a decrease in the number of awaiting trial prisoners during the preceding few months, following the establishment of pre-trial service projects by the government – which assisted magistrates to grant affordable bail. The Minister of Correctional Services indicated that the government was looking for ways to keep petty offenders out of prison and stated that: “We need the assistance of non-governmental organizations which can absorb those who commit petty offences, while prisons will deal mainly with hardened criminals.”<sup>16</sup>

One of the ways in which the authorities hoped to begin reducing the numbers of awaiting trial prisoners, was by managing the flow of criminal cases at court. During November 1999, it was announced that the Integrated Management of Awaiting Trial Prisoners Project – which had been running successfully in Durban, Port Elizabeth, Johannesburg, Pietermaritzburg and Empangeni – was being introduced in the Western Cape. The objectives of the plan were to reduce overcrowding caused by awaiting trial prisoners, by:

1. Reviewing all cases to ensure that there was at least a *prima facie* case against each awaiting trial prisoner.

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<sup>16</sup> *Independent on Saturday*, 4 December 1999, 1.

2. Surveying, on a voluntary basis, all awaiting trial prisoners in order to determine which of them intended to plead guilty, and then fast-tracking the cases of those who intended to plead guilty.
3. Facilitating the completion of outstanding trials by speeding up the resolution of outstanding issues.
4. Managing corrective action for those cases which were not court ready, because they still required further investigation.<sup>17</sup>

Another way in which it was hoped to reduce overcrowding in South African prisons, was to introduce a system of electronic monitoring of prisoners. During November 1999, the Minister of Correctional Services stated in Parliament that such a system would be implemented during the 2000/2001 financial year – with R83.65 million set aside in the medium-term expenditure framework for this purpose. As at 30 September 1999, the capacity of the 236 prisons in South Africa was 99 803 prisoners, whereas the total prison population amounted to 157 575 prisoners.<sup>18</sup>

Despite the initiatives to reduce overcrowding, the situation in many prisons remained grave. Towards the end of 1999, the Boksburg Prison came under the public spotlight after the head of the prison, Benjamin Modisadife, told the *Sunday Independent* that the prison had been operating in "crisis management mode" for a number of years due to overcrowding of approximately 200%. Modisadife described meal times at the prison as being "like opening the gates of hell when more than 4000 inmates – many of them hardened criminals – push and shove their way into the mess hall."<sup>19</sup> The *Sunday Independent* described the cells in the Boksburg Prison as unhygienic and overcrowded to such an extent, that prisoners were forced to roll up their "[t]hin foam mattresses blackened by filth and grime" during the day, to create more space.<sup>20</sup> One of the warders at the Boksburg Prison, Lawrence Baloyi, explained that warders at the prison were operating under considerable strain, since each warder was responsible for no fewer than 150 inmates.<sup>21</sup>

The Minister of Correctional Services was greatly concerned by the seemingly intractable problem of prison overcrowding at this time. On 14 December 1999, he warned at a press conference of an

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<sup>17</sup> *Cape Argus*, 2 November 1999, 3.

<sup>18</sup> *The Daily News*, 12 November 1999, 3.

<sup>19</sup> *The Sunday Independent*, 12 December 1999, 6. The report went on to point out that, at this time, there was a staff shortage of 4 495 members within the Department of Correctional Services.

<sup>20</sup> *The Sunday Independent*, 12 December 1999, 6.

<sup>21</sup> *The Sunday Independent*, 12 December 1999, 6.

approaching national disaster due to the continued increase in the numbers of prisoners within the system. Overall, South African prisons were 159% overcrowded at the time.<sup>22</sup> Prison overcrowding was, however, worse in some areas. For example, the Provincial Commissioner of Correctional Services for the Northern Province, Peter Ramashala, revealed that prisons in his province were 200% overcrowded.<sup>23</sup>

The new year did not herald much improvement in the problem of chronic overcrowding – which bedevilled many of South Africa's prisons. The stresses and strains caused by this problem continued to generate heated public debate in the nation's press. In June 2000, for example, the Commissioner of Correctional Services for the Western Cape, Stephen Korabie, warned that prison overcrowding was so severe in his region that he might be forced to prohibit any new admissions to prisons in the province. Patricia de Lille, a member of parliament, threatened to apply for a High Court interdict prohibiting the referral of any further juvenile offenders to Cape Town's Pollsmoor Prison.<sup>24</sup> Human Rights Commissioner Jody Kollapen warned that a constitutional obligation owed to prisoners was being breached, and described appalling conditions in certain of the holding cells for awaiting trial prisoners at a Pretoria prison. No fewer than 60 prisoners were obliged to use a single toilet, which meant that: "In the event of an outbreak of diarrhoea, some prisoners are forced to relieve themselves on a piece of paper then throw it out of the window ..." <sup>25</sup> At this time, the South African penal system, which was designed for a maximum of 100 384 inmates, was being forced to accommodate no fewer than 172 271 prisoners; a massive 63 970 of these were awaiting trial prisoners.<sup>26</sup>

During July 2000, the problem of awaiting trial prisoners received further attention in the media. The Minister of Correctional Services, Ben Skosana, visited Cape Town's Pollsmoor prison and commented negatively on the case of an 18-year-old awaiting trial prisoner who had been forced to remain in prison for over eight months, since he could not afford to pay bail in the paltry amount of R100. According to the *Cape Times*, it had cost the State R18 480 to keep this prisoner locked up for this period. The newspaper commented that this particular inmate was only one of many awaiting trial prisoners who had been accused of petty offences and remained confined in Pollsmoor Prison because

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<sup>22</sup> *Pretoria News*, 15 December 1999, 2.

<sup>23</sup> *Beeld*, 16 December 1999, 6.

<sup>24</sup> The juvenile section of Pollsmoor Prison was 180% overcrowded, and the admissions centre 206% overcrowded at the time. See *Cape Argus*, 6 June 2000, 6.

<sup>25</sup> *Pretoria News*, 28 June 2000, 4.

<sup>26</sup> *Sowetan*, 8 June 2000, 2.

they were unable to pay bail amounts of less than R500. The newspaper also made the point – repeated decade after decade within South African penal discourse – that the longer a petty offender remained in prison, the greater the risk of that petty offender becoming a hardened criminal.<sup>27</sup>

In August 2000, public debate on the issue of prison overcrowding continued to generate alarm. The chairperson of the National Institute for Crime Prevention and Rehabilitation of Offenders, Carl Niehaus, warned that the penal system would collapse within a few years unless action was taken to remedy the problem of overcrowding.<sup>28</sup> The Inspecting Judge of Prisons, Judge Hannes Fagan, commented during a human rights conference at the University of the Western Cape that, due to overcrowding, conditions in South African prisons were "ghastly". Pointing to a massive three-fold increase in the number of awaiting trial prisoners in South Africa over the preceding five years, Judge Fagan warned against the *de facto* development of a new form of "detention without trial", as periods of pre-trial imprisonment got longer and longer.<sup>29</sup> Human Rights Commissioner Jody Kollapen also added his voice to the concerns being expressed at this time. He warned that chronic overcrowding in South African prisons amounted to a violation of the constitutional right to dignity of prisoners. He felt, however, that high levels of crime and violence in the country resulted in the muted response of the public to the crisis caused by overcrowding in South African prisons.<sup>30</sup>

In order to reduce the large numbers of awaiting trial prisoners, the National Council on Correctional Services recommended that all awaiting trial prisoners who had been granted bail of less than R1000 be released.<sup>31</sup> After their release, such prisoners would be required to report once a week to a police station near to where they lived. It could be assumed that these prisoners represented no threat to public safety and would not abscond or otherwise interfere with the administration of justice. It could also be assumed that the only reason that such prisoners remained incarcerated, was because of poverty. It was

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<sup>27</sup> *The Cape Times*, 6 July 2000, 3. The idea that South African prisons operate as *de facto* "universities of crime" has been expressed many times during South Africa's penal history. For example, see Peté, SA (2015) *Holding Up a Mirror to Apartheid South Africa: Public Discourse on the Issue of Overcrowding in South African Prisons 1980 to 1984 - Part 2 Obiter* 36(1): 17-40, particularly Section 2 entitled "A Legacy of Hatred, Reduced Deterrence, the Creation of 'Universities of Crime' and Concern Over Global Perceptions".

<sup>28</sup> *Beeld*, 2 August 2000, 2.

<sup>29</sup> *Mail and Guardian*, 4-10 August 2000, 14. In paragraph 8.2 of his annual report for the year 2000, the Inspecting Judge of Prisons stated that the number of awaiting trial prisoners had almost tripled during the preceding five years, from 24 265 in January 1995 to 63 964 in April 2000 – an increase of 164%.

<sup>30</sup> *Sowetan*, 10 August 2000, 12.

<sup>31</sup> The National Council on Correctional Services was a statutory body set up to advise the Minister of Correctional Services.

calculated that the implementation of this proposal would lead to the release of about 13 000 prisoners. Kollapen explained the economic sense of the proposal, as follows:

“It simply does not make sense to incarcerate someone at the cost of R90 a day (R630 a week or R2 700 a month) when that same person has been granted bail that does not exceed R1000 ... It is unacceptable to incarcerate people purely on account of their poverty. For the thousands who are unable to raise bail of between R100 and R1000, their incarceration is a direct result of their poverty and there can be no compelling reasons for their continued incarceration.”<sup>32</sup>

These pleas to release petty offenders who were languishing in prison because they could not afford to pay small amounts of bail, were heeded. On 6 September 2000 a decision was taken by Cabinet to release awaiting trial prisoners who had been granted bail which was R1000 or less. This was thought to involve approximately 11 000 prisoners.<sup>33</sup> It was also decided that a further 7 000 prisoners would be granted early release on parole. Furthermore, the Department of Correctional Services sought to amend legislation requiring police to detain suspects charged with stealing goods worth more than R200. The proposed legislative amendment would allow police to release suspects immediately in cases of theft if the value of the goods alleged to have been stolen amounted to less than R2 500.<sup>34</sup>

Although opposition parties generally supported the release of the 11 000 awaiting trial prisoners, a spokesman for the Democratic Alliance, Hendrik Schmidt, commented as follows:

“This so-called once-off decision by cabinet can mainly be attributed to the impending collapse of the justice system. Due to poor management, disastrous financial policy, the backlog of cases in the judicial system, as well as the appointment of inexperienced staff, the average number of awaiting-trial prisoners has increased three-fold in our prisons over the past five years.”<sup>35</sup>

As was to be expected, the reaction of many members of the South African public to the release of large numbers of offenders, was hostile – to say the least. An example of such reaction may be found in the following extract from a letter to *The Star* by a certain C McPherson of Sandton:

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<sup>32</sup> *Sowetan*, 10 August 2000, 12.

<sup>33</sup> *Sowetan*, 7 September 2000, 2.

<sup>34</sup> *Independent on Saturday*, 9 September 2000, 1.

<sup>35</sup> *Business Day*, 8 September 2000, 4. See also *Independent on Saturday*, 9 September 2000, 1.

“Enough is enough. It may just be coincidence, but since the government implemented its release of awaiting-trial prisoners, along with more violent, hardened criminals, the crime stories have been pouring in. Not ‘friend of a friend of a friend’ stories, but tales of crimes committed against people I know: armed robberies of business premises, burglaries at residential properties, hijackings, guns being stuck in people’s faces and threats of death. It could be coincidence, but I doubt it. Either these crimes have been committed by people who have been released from prison, or by criminals who yet again have been sent the message that in South Africa we can get away with crime, we just can’t get away from it!”<sup>36</sup>

The public mood was not improved by the fact that the release of the awaiting trial prisoners did not go as smoothly as planned. Around 160 prisoners, considered to be potentially "dangerous" – due to the serious nature of the offences with which they had been charged – were released in error. By 19 September 2000, the Minister of Correctional Services announced that only 19 of the approximately 160 dangerous prisoners released in error had been re-arrested.<sup>37</sup>

Despite the releases referred to above, the problem of chronic overcrowding in South African prisons continued to cause suffering and stress among all concerned. In November 2000, the Minister of Correctional Services was obliged to admit that that certain offenders were being confined in "appalling conditions", and that correctional services staff were being subjected to enormous stress in their work environment. These problems were directly related to overcrowding. The Minister admitted to suffering from sleepless nights due to the severity of the situation.<sup>38</sup>

During April of the following year, the head of the Judicial Inspectorate, Judge Johannes Fagan, described the conditions arising from overcrowding in the country’s prisons as “horrendous”. In his annual report to Parliament’s Correctional Services Committee, the judge pointed out that numerous prisons were grossly overcrowded – which led to horrendous conditions of detention, especially for awaiting trial prisoners. He pointed out that many prisons were operating at 200% of their capacity, while one was operating at an astonishing 393% of its capacity.<sup>39</sup> He appealed to the Correctional

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<sup>36</sup> *The Star*, 22 September 2000, 11.

<sup>37</sup> *Die Burger*, 20 September 2000, 7; *Cape Argus*, 20 September 2000, 5.

<sup>38</sup> *Daily News*, 6 November 2000, 2.

<sup>39</sup> See paragraph 8.1 of “Report of the Inspecting Judge of Prisons for the year 2000”.

Services Committee to enable more awaiting-trial prisoners to be released, and stated that these prisoners were being held under “inhumane conditions and in flagrant disregard of the Bill of Rights, the Correctional Services Act of 1998 and the United Nations Standard Minimum Rules for the treatment of Prisoners.”<sup>40</sup> Whereas in the past awaiting-trial prisoners used to spend at most two months in jail before their trials, the average was now 138 days. The Judge labelled this situation as “atrocious”, and pleaded with the committee as follows:

“This is detention without trial as far as I’m concerned and I’m waiting for someone to take this to the Constitutional Court ... Please, we want your assistance. We’ve just got to have a provision that we can again release awaiting-trial prisoners.”<sup>41</sup>

An editorial in the *Cape Times* on 5 April 2001 commented as follows on Judge Fagan’s report to the Correctional Services Committee:

“Judges tend to be temperate souls by nature, so the relevant authorities would be well advised to take note when Justice Johannes Fagan uses words like ‘inhumane’, ‘atrocious’ and ‘horrendous’ to describe the plight of awaiting-trial prisoners.”<sup>42</sup>

An editorial in *The Star* warned that Judge Fagan’s plea in favour of a qualified release for awaiting trial prisoners would “spark howls of protest that the citizenry is not being protected against thieves and muggers” – but concluded that:

“South Africans made a huge effort to create a constitutional dispensation that would put us among the civilized nations of the world. We dare not lose sight of that guiding light.”<sup>43</sup>

It was around this time that Israel Makoe – television actor and former prisoner – described life in a South African prison as follows:

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<sup>40</sup> *Cape Times*, 4 April 2001, 3; and similar report in *Eastern Province Herald*, 4 April 2001, 2.

<sup>41</sup> *Cape Times*, 4 April 2001, 3; and similar report in *Eastern Province Herald*, 4 April 2001, 2.

<sup>42</sup> *Cape Times*, 5 April 2001, 10.

<sup>43</sup> *Star*, 5 April 2001.

“I saw people starved, watched friends being sodomised. You die inside. And you are made to beg and grovel for life’s basics, feeling frightened and ashamed, beaten, mocked, hungry and bored.”<sup>44</sup>

During September 2001, the Minister of Correctional Services, Ben Skosana, announced in Parliament that a total of 168 497 prisoners were confined in South African prisons on 31 July of that year. Of these, 117 595 were sentenced and 50 902 were awaiting trial. The prisons remained drastically overcrowded, since they were only designed to accommodate 105 016 prisoners. The Minister made reference to the high crime rate, as well as the increasing numbers of awaiting trial prisoners, and commented:

“The interventions we employed in 2000 to release low-risk awaiting-trial prisoners and advance the parole dates of certain categories managed to reduce our prison population from 172 000 to 160 000. However, the figure has once again risen to above 168 000.”<sup>45</sup>

The Minister announced that the Department of Correctional Services intended to increase dramatically the capacity of the prison system by 30 000 beds within a few years – by building low-cost “new generation” prisons for medium and low-risk prisoners.<sup>46</sup>

One of the dangers of prison overcrowding is that it poses a significant health risk to both prisoners and the general population. During October 2001, this danger was pointed out to the Parliamentary Portfolio Committee on Correctional Services by a certain Dr Stephen Craven, who had worked in the maximum security section of Pollsmoor prison for 13 years. Among the potential health problems which he warned could be caused by prison overcrowding, were dysentery, meningitis and tuberculosis.<sup>47</sup>

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<sup>44</sup> *Sowetan*, 14 March 2001, 11.

<sup>45</sup> *Natal Witness*, 19 September 2001, 1.

<sup>46</sup> *Natal Witness*, 19 September 2001, 1.

<sup>47</sup> *Die Burger*, 3 October 2001, 11. It is interesting to note that, a decade later, the same problem of chronic overcrowding in certain South African prisons continued to give rise to the same health concerns. A study published in the *South African Medical Journal*, in 2011, examined the probabilities of tuberculosis transmission among awaiting trial prisoners incarcerated in communal cells in Pollsmoor Prison near Cape Town. The authors of the study claimed that the conditions in which these prisoners were held constituted a “health emergency” and pointed out that severe overcrowding played a major role in the very high risk of such prisoners contracting tuberculosis. In the words of the authors: “Levels of overcrowding (230%) in communal cells and poor TB case finding result in annual TB transmission risks of 90% per annum. Implementing current national or international cell occupancy recommendations would reduce TB transmission

During November 2001 it was reported that Parliament had approved the Judicial Matters Amendment Bill, which provided for the release of awaiting-trial prisoners who were unable to pay low amounts of bail. At that time it was estimated that there were 11 250 prisoners who were confined in South African jails because they were unable to afford bail of R1000 or less.<sup>48</sup>

The various initiatives aimed at reducing the number of awaiting trial prisoners confined in South African prisons started having some effect towards the end of 2001, when it was announced that the average number of such prisoners had fallen for the first time since 1995.<sup>49</sup> The problem was, however, far from being solved. In March 2002, the Inspecting Judge of Prisons pointed out that more than two thirds of the 55 000 prisoners awaiting trial in South Africa would not be convicted. Upon release, many of these prisoners would have been unjustly incarcerated in overcrowded prisons for up to two years.<sup>50</sup> The problem of overcrowding remained extremely serious in many of South Africa's prisons. For example, on 31 March 2002, a total of 178 998 prisoners were confined in a penal system designed to accommodate only 109 106 inmates, meaning that the system was 164% overcrowded.<sup>51</sup> Adding to the concern expressed in the public discourse at this time, was that certain prisons were more seriously overcrowded than others, meaning that some prisons were more than 200% overcrowded. For example, in April 2002 it was reported in the press that the Pietermaritzburg New Prison, which had been designed to hold 1 185 prisoners, was forced to accommodate 2 984 inmates. Four communal cells, designed to hold 19 prisoners each, were crammed with 40 to 50 prisoners each.<sup>52</sup> The Department of Correctional Services did not attempt to hide the fact that the constitutional rights of prisoners were being violated due to the chronic overcrowding. For example, in the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, the Commissioner of the Department, Mr Linda M Mti, stated that one of the major obstacles faced by his department was "the

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probabilities by 30% and 50%, respectively." See Johnstone-Robertson, S, Lawn, SD, Welte, A, Bekker, L & Wood, R (2011) Tuberculosis in a South African Prison: A Transmission Modelling Analysis *South African Medical Journal* 101(11): 809-813. The duration of this problem over time provides evidence of its systemic, deeply ingrained nature.

<sup>48</sup> *Daily News*, 7 November 2001, 1.

<sup>49</sup> According to the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, Part 3.1 "The Prison Population", the number of prisoners awaiting trial declined from 57 676 on 28 February 2001 to 55 285 in December 2001.

<sup>50</sup> *Pretoria News*, 25 March 2002, 15.

<sup>51</sup> Department of Correctional Services, Annual Report for the period 1 April 2001 to 31 March 2002, Part 3.1 "The Prison Population."

<sup>52</sup> *Daily News*, 23 April 2002, 3.

extent of overcrowding in the prisons, which violates the human rights of inmates, undermines secure incarceration and undermines our efforts to create a rehabilitation friendly environment.”<sup>53</sup>

A year on from the honest but alarming statement of the Commissioner referred to above, the problem of prison overcrowding remained as intractable as ever. There was an increase in the daily average prison population from 172 203 (during the period 1 April 2001 to 31 March 2002) to 181 533 (during the period 1 April 2002 to 31 March 2003).<sup>54</sup> This meant that South African prisons were 163.2% overcrowded during the 2002/2003 period – prompting the Minister of Correctional Services, in his annual report for this period, to refer to overcrowding as “one of the greatest challenges we continue to confront”.<sup>55</sup> The problems caused by prison overcrowding continued to be highlighted in the press. For example, in March 2003 it was reported that, according to a study conducted by the South African Law Society, “what prisoners particularly unsentenced and awaiting trial prisoners are experiencing comes well within the constitutional proscription of not to be treated in a cruel, inhuman or degrading way.”<sup>56</sup>

What is clear from the above, is that the problem of chronic prison overcrowding, as well as the manner in which it impacted negatively on the lives of thousands of prisoners – depriving them of certain basic human rights – was widely acknowledged during the period following South Africa's second democratic election. Discussion of the problem during the period in question formed a major part of public penal discourse, as reflected in the nation's press. Furthermore, the extent of the problem was accepted by various prison authorities in speeches and reports. As noted above, the specific driver of the crisis in prison overcrowding which came to a head at this time, was the extremely rapid rise in the number of awaiting trial prisoners within South African prisons during the immediate post apartheid

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<sup>53</sup> Department of Correctional Services, Annual Report for the period 1 April 2001 to 31 March 2002, Introduction by the Commissioner of the Department of Correctional Services, Mr Linda M Mti.

<sup>54</sup> Department of Correctional Services, Annual Report for the period 1 April 2002 to 31 March 2003, Part 2, “Strategic overview and key policy developments.”

<sup>55</sup> *Ibid* – “Foreword by the Minister of Correctional Services Mr Ben M Skosana MP.” It is interesting to note that, a full decade after this comment by the Minister of Correctional Services, the problem of prison overcrowding and a high prison population, remained a serious concern in South Africa. According to the *Annual Report of the Judicial Inspectorate for Correctional Services* for the period 1 Apr 2012 to 31 Mar 2013, South African prisons were approximately 128% overcrowded during that year. [See page 40 of the report, available at <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf> accessed 4 February 2015]. In February 2013 the Minister of Correctional Services, Sbu Ndebele, commented as follows: “That our offender population has remained constant, whether you remove pass laws, group areas, or apartheid laws, should make us search more urgently for answers to the high prison population in South Africa.” [See *Mail & Guardian Online* available at <http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele> accessed 12 Feb 2013.]

<sup>56</sup> *Business Day*, 28 March 2003.

period. Dirk van Zyl Smit – a leading South African penal scholar writing at the dawn of the new millennium, which falls within the period examined in this article – noted that the demise of apartheid had led to an overall decrease in the number of sentenced prisoners:

"The changes in the regime have had some surprising effects on the prison population. The official number of sentenced prisoners has increased only marginally from 90,485 on 30 June 1988 to 92,157 on 31 December 1998. This apparent increase in the sentenced prison population is misleading, however. The 1988 figures did not include sentenced prisoners held in the so-called independent homelands of Transkei, Ciskei, Venda and Bophutatswana. A better, although still rough, way of understanding these figures is to calculate the rate of sentenced prisoners per 100,000 of the population in South Africa without the homelands on 30 June 1998 and then to compare it to the rate for the reunited South Africa on 31 December 1998. The respective rates for sentenced prisoners per 100,000 of the population show a dramatic decline, from 306 in 1988 to 216 in 1998."<sup>57</sup>

The apparent decrease in the overall number of sentenced prisoners – which may, perhaps, be regarded as a "democratic dividend" – was, unfortunately, more than offset by a dramatic increase in the number of awaiting trial inmates in the newly democratic country:

"Although detention without trial and the imprisonment of civil debtors has been abolished, the number of unsentenced prisoners has increased from 19,418 on 30 June 1988 to 54,121 on 31 December 1998 ... This spectacular increase is a relatively recent tendency, as figures from a slightly different period show. While in the 20 years between mid-1976 and mid-1996 the number of unsentenced persons almost doubled (from 15,139 to 28,047), the numbers more than doubled in less than three years from 30 June 1996 to 31 March 1998, reaching 57,210 on the last date ..."<sup>58</sup>

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<sup>57</sup> Van Zyl Smit, D (2001) National Report - South Africa. In Van Zyl Smit, D & Dünkel, F (Eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2<sup>nd</sup> Ed. The Hague: Kluwer Law International 589- 608 at 589.

<sup>58</sup> Van Zyl Smit, D (2001) National Report - South Africa. In Van Zyl Smit, D & Dünkel, F (Eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2<sup>nd</sup> Ed. The Hague: Kluwer Law International 589- 608 at 590. Van Zyl Smit noted the disastrous impact of chronic overcrowding on the basic human rights of South African prisoners, stating that: "the prisons are being flooded with unsentenced prisoners in such numbers that overcrowding is reaching a level where it is virtually impossible, even with the best intentions, to implement regimes that meet minimum standards of human dignity." See Van Zyl Smit, D (2001) National Report - South Africa. In Van Zyl Smit

The period examined in this article thus marked a high point in the numbers of unsentenced prisoners clogging up South Africa's prisons. Following this period, a steady rise in the number of sentenced prisoners would contribute more and more to the problem of prison overcrowding. Writing in 2006, Giffard and Muntingh noted that:

"South Africa has a serious prison overcrowding problem. The total number of prisoners has grown steadily and dramatically over the last 11 years. The cause of the increase has changed during this time. Between 1995 and 2000, the major driver of the prison population rise was a massive increase in the size of the unsentenced prisoner population. After 2000, the number of unsentenced prisoners stabilised, and then began to decrease. But the prisoner population continued to grow, now as a result of an increase in the number of sentenced prisoners."<sup>59</sup>

Fast forward a few more years to 2010, and scholars were once again expressing concern at the high number of unsentenced prisoners in South African prisons:

"On 31 December 2010 the awaiting trial detainee population in South Africa was 46432, approximately 30% of the total inmate population and almost double the Department of Correctional Services' proposed benchmark figure of 25 000. In some correctional facilities where overcrowding has reached a 'critical level', awaiting trial detainees account for 52% of the inmate population ... On 31 March 2010, 24 305 remand detainees out of 50 511 (48%) had been in custody for longer than three months. Approximately 14% (3403) of these remand detainees had been detained for over 12 months, and 3-4% (972) for over two years. Literally thousands of people in South Africa spend long stretches of their lives in conditions frequently described as 'inhumane', and without access to educational or rehabilitative programs. More than half of those in remand detention will be released due to acquittal or their charges being withdrawn or struck off the roll."<sup>60</sup>

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D & Dünkkel, F (Eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2<sup>nd</sup> Ed. The Hague: Kluwer Law International 589- 608 at 606.

<sup>59</sup> Giffard, C & Muntingh, L (2006) *The Effect of Sentencing on the Size of the South African Prison Population - Report 3* Newlands, Cape Town: Open Society Foundation for South Africa.

<sup>60</sup> Ballard, C (2011) *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform* Cape Town: University of the Western Cape, Community Law Centre at 5.

Although the focus of concern during the post-apartheid period has "see-sawed" between the numbers of sentenced and unsentenced prisoners confined within the South African penal system at any one time, one factor has remained constant – concern about the overall problem of prison overcrowding and its effects. South African prisons were to remain overcrowded throughout the post-apartheid period – although the degree of overcrowding fluctuated – from the first democratic election right up to the present date. The short period examined in this article sheds at least some light on this issue. The public discourse on prison overcrowding during the period examined reveals that all concerned were well aware of the nature and extent of the problem. As has been pointed out in the introduction to this article, an enduring theme which dominated South African public discourse during this time (as well as during the entire post-apartheid period) – was fear of crime. The pressure on politicians to appear tough on crime was immense. In light of this it was, perhaps, inevitable that knowledge on the part of all concerned about the evils of prison overcrowding in South Africa would not translate into a solution to the problem. South Africans' fear of crime was simply too strong to allow for any measure which would have brought about a drastic reduction in the prison population.

There is, however, a further point to be made about the apparent "disconnect" between the public discourse which clearly recognised and condemned the problem of prison overcrowding on the one hand, and the continued failure of all concerned to implement true long-term solutions to the problem on the other hand. In his seminal work *Discipline and Punish*, the philosopher Michel Foucault pointed to the strange fact that imprisonment as a form of punishment was publicly and regularly condemned as an utter failure from the time it developed in Europe during the industrial revolution, but nevertheless grew from strength to strength. Foucault puts his finger on the cyclical and repetitive nature of critiques levelled at imprisonment as a form of punishment – stating that "the critique of the prison and its methods [which] appeared very early on ... was embodied in a number of formulations which – figures apart – are today repeated almost unchanged."<sup>61</sup> The same appears true in relation to the problem of overcrowding in South African prisons, which is discussed over and over – from year to year and from decade to decade in the public media and in official reports – but is never truly solved. It could be – using an argument analogous to that used by Foucault to explain the persistent "failure" of imprisonment in Europe – that overcrowding is a systemic feature of this form of punishment as applied in South Africa. Persistent overcrowding in South African prisons may be linked to the fact that imprisonment in this country has always been used as a mechanism of social control, rather than simply

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<sup>61</sup> Foucault, M (1979) *Discipline and Punish: The Birth of the Prison* London: Peregrine Books at 265.

a means of combatting crime.<sup>62</sup> Overcrowded prisons may be the inevitable consequence of efforts to keep order in a chronically unequal society – in which millions live in appalling conditions below the poverty line.

### **4.3.3 The Impossibility of a "Building Solution" to the Problem of Prison Overcrowding**

One of the ways in which the chronic overcrowding detailed in the previous section could be alleviated, although only to a limited extent, was by the construction of new prisons. It was reported that the government, somewhat over-optimistically, planned to ensure that two new prisons were built every year over a period of 10 years. The extent of overcrowding was so great, however, that it was impossible for South Africa to "build its way" out of the problem. The Minister of Correctional Services, Mr Ben Skosana, was reported as admitting that South Africa could not solve the problem of overcrowding – simply by building new prisons.<sup>63</sup>

One way in which the government sought to relieve the considerable pressure it was under to increase prison accommodation, was to look to the free market. It was proposed that certain new prisons would be built and managed by the private sector. During July 1999, a contract worth R1.3 billion was concluded between the government and a private consortium for the construction and management of the Mangaung Maximum Security Prison in Bloemfontein. During the same month, a further contract was concluded between the government and a private consortium, South African Custodial Services, for the construction and management of the Kutama-Sinthumule Maximum Security Prison in Makhado (Louis Trichardt).<sup>64</sup> Together, these first two Public Private Partnership (PPP) prisons were to provide accommodation for 5 952 prisoners. The Mangaung Maximum Security Prison had its first intake of prisoners on 1 July 2001, and the Kutama-Sinthumule Maximum Security Prison started

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<sup>62</sup> This was certainly true during the colonial, immediate post-colonial and apartheid periods. It has also been true during the post-apartheid period. Writing in the late 1990s, for example, Dirk van Zyl Smit pointed out that incarceration of prisoners during this period would continue "to play a prominent part in the South African system of social control." See Van Zyl Smit, D (2001) National Report - South Africa. In Van Zyl Smit, D & Dünkel, F (Eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2<sup>nd</sup> Ed. The Hague: Kluwer Law International 589 - 608 at 591.

<sup>63</sup> *Beeld*, 16 December 1999, 6.

<sup>64</sup> *Beeld*, 28 July 1999, 5. In a speech delivered on 11 August 2000, the Minister of Public Works, Ms Stella Sigcau, described South African Custodial Services as "a consortium equally owned by Wackenhut Corrections Corporation, a USA based international prison operating company and Kensani Corrections, a local empowerment company owned by a group of women."

operating on 20 February 2002.<sup>65</sup> Unfortunately, the passage of time would show that privately run prisons were not the "silver bullet" some may have been hoping for, for solving South Africa's problem of prison overcrowding.<sup>66</sup>

The Kutama-Sinthumule Maximum Security Prison referred to above received publicity in the press due to its technologically advanced facilities.<sup>67</sup> According to a report in *Beeld*, the prison was designed to accommodate 3 024 inmates, which would make it the world's biggest private prison, and it was to be reserved for the most serious offenders. All cells were controlled from a number of high-tech electronic control rooms fitted with one-way glass, which allowed warders to observe the prisoners. Each cell was connected to a control room by means of an intercom. Each section in the prison was equipped with its own gymnasium, and there was even an in-door soccer field. A number of classrooms were provided for the presentation of educational programmes. An American company, Wackenhut Corrections Corporation, was to be responsible for the rehabilitation of prisoners. Each prisoner would be evaluated upon entering the prison, taking into account the crime of which he had been convicted, as well as his educational standard, personality and psychological condition. Psychologists would then work out a rehabilitation programme for each inmate. The programme would determine into which section of the prison a particular inmate would be placed. Prisoners in different sections would wear different coloured uniforms - blue, orange or green. Uneducated prisoners would be required to complete school grades 0 to 9, while grades 10 to 12 were optional. Tertiary educational programmes could be followed by correspondence. Rehabilitation programmes would range from classes for drug addicts and alcoholics, to classes dealing with child abuse and sexual problems. The prison was to be equipped with its own hospital, which had place for up to 50 patients. A medical doctor, a dentist and a

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<sup>65</sup> Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, Introduction by the Commissioner of the Department of Correctional Services, Mr Linda M Mti.

<sup>66</sup> At the time of writing, the Mangaung and Kutama-Sinthumule Maximum Security Prisons remain the only two privately run prisons in South Africa. Furthermore, considerable management problems have arisen in at least one of these prisons – Mangaung – forcing the government to take over the running of that prison for 10 months between October 2013 and July 2014, before handing back control to G4S, the private sector company contracted to run the prison. [See *City Press* 15 July 2014 "Correctional services withdraws from Mangaung prison" at: <http://www.news24.com/Archives/City-Press/Correctional-services-withdraws-from-Mangaung-prison-20150430> accessed 6 May 2015]. According to a 2013 report in *Business Day*: "South Africa's two privately run prisons are a vastly expensive failure and are expected to cost the state about R20 bn over the 25 years of the contract ... Acting national commissioner of correctional services Nontsikelelo Jolingana said the public-private partnerships had not been carefully thought through and the Cabinet had decided not to proceed with four other private prisons. Mr Ndebele [the Minister of Correctional Services] added that the private prisons were an experiment that did not work. In the UK, where private prisons were pioneered, 'they are coming to a similar conclusion that they do not work very well'." See *Business Day* 6 November 2013 "Ndebele acknowledges failure of private prisons" by Wyndham Hartley at: <http://www.bdlive.co.za/national/2013/11/06/ndebele-acknowledges-failure-of-private-prisons> accessed 6 May 2015.

<sup>67</sup> The name of the prison was derived from the names of two former chiefs of the region.

radiologist would be on duty at the hospital permanently. Prisoners would never have to leave the prison premises, which would cut down on the possibility of escape.<sup>68</sup>

In addition to the private sector projects mentioned above, the government also proceeded with certain of its own construction projects during the period under review. Towards the end of 1999, plans were announced for the construction of a new super maximum-security prison in Kokstad in KwaZulu-Natal. The project was to attract a fair amount of controversy though. For example, the South African Council of Churches objected to the fact that inmates confined in this new facility would be subjected to solitary confinement:

“We protested vigorously in the apartheid years at the use of solitary confinement as an instrument of torture. We are angry that the present government appears to have adopted this means of torture as part of its plan to control crime. We do not expect that the members of the new government, many of whom suffered this particular torture in the past, can agree to its imposition in the new South Africa.”<sup>69</sup>

Fears were expressed that solitary confinement within the new super maximum-security prison would result in prisoners becoming insane. The *Natal Witness* described what life would be like for inmates as follows:

“Their days will be spent in solitude in a two-metre square cell with a small sink for water, a small concrete slab protruding from the wall as a table and another one filling a side for a bed. Prisoners will be allowed to the library and a short trip to the shower, one at a time. There has been some concern from local people that the nature of the confinement will make a lot of the prisoners go insane and will result in many suicides. Food will be cooked in a kitchen built outside the prison. Even trolleys delivering food to the cells will be self-propelled. A trolley will drop food on electronically operated trays at the door of each cell and flaps will be simultaneously opened for a few seconds to allow prisoners to take their plates. There will be no chance to send messages or objects in and out of the prison by the kitchen staff ...”<sup>70</sup>

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<sup>68</sup> *Beeld*, 28 November 2001, 10.

<sup>69</sup> *The Citizen*, 1 October 1999, 8.

<sup>70</sup> *Natal Witness*, 19 October 2000, 12.

Apart from concerns over the issue of solitary confinement, reservations were expressed in relation to the tender process for the project. The Democratic Party spokesperson for Correctional Services, Hendrik Schmidt, pointed out that the chairperson of the Parliamentary Portfolio Committee for Correctional Services, Aubrey Mokoena, was also the chairperson of the board of directors of a black empowerment company called “Rainbow”. Rainbow had entered into a joint venture with Concor, a large multi-national construction company, for the completion of the R244.7 million Kokstad Prison project. Although the Parliamentary Portfolio Committee had no input on who should get tenders, the Democratic Party maintained that it was ethically and morally undesirable for Mr Mokoena to wear two hats. The South African Prisoners Organisation for Human Rights agreed that there was a clear conflict of interest between Mr Mokoena’s positions.<sup>71</sup>

Even after it was built, the Kokstad Prison project continued to be dogged by controversy, and in September 2000 it was reported that the new prison, having cost R350 million, was standing empty because of a dispute between the Kokstad Council and the government. The prison could not be opened until the town’s water treatment and sewage works were upgraded and the long-term bulk supply of water secured. This would cost R57 million. The Minister of Public Works, Stella Sigcau, visited the town and told the Town Council that it would have to bear this burden. The Mayor of Kokstad, Mandla Mate, complained that the amount was “too much for this little town to bear.” Town councillors addressed a letter to President Thabo Mbeki in an effort to resolve the impasse.<sup>72</sup> Finally, there was further controversy over the name to be given to the new prison. Zoleka Xapha, chairperson of parliament’s Correctional Services Portfolio Committee told *City Press* that “people in that area [i.e. Kokstad] complain the prison was given their township’s name, Ebongweni, when they were not consulted and their township is being associated with an institution that accommodates criminals, giving the impression they (the township people) are criminals.”<sup>73</sup>

Despite the controversy surrounding the Ebongweni Maximum Prison in Kokstad, it was put into operation during the period 1 April 2002 to 31 March 2003, with accommodation for 1440 offenders.<sup>74</sup> In technological terms it was clearly a state-of-the-art facility. The *Natal Witness* described this aspect of the new prison as follows:

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<sup>71</sup> *The Citizen*, 1 October 1999, 8.

<sup>72</sup> *Eastern Province Herald*, 27 September 2000, 1.

<sup>73</sup> *City Press* 15 October 2000, 2.

<sup>74</sup> Department of Correctional Services, Annual Report for the period 1 April 2002 to 31 March 2003, Part 2 Programme Performance, “Strategic overview and key policy developments.”

“Everything operates at the touch of a button. The solitary confinement cells and all the doors are closed and opened by someone in a control room where everything is viewed on screens ... Walking inside the prison is like walking through a network of veins. There is a system of passageways and iron gates and doors leading to different sections of the jail. You lose your sense of time and direction as you wind and turn in the passages .... Each section [of the prison] has its control room. The control room boasts a big table with a map outlining the layout of each section. It has hundreds of buttons and flickering lights ... The main control room could be likened to a radio station’s editing room with its wall of monitors in colour and monochrome. With a click of a mouse, the whole jail can be locked or opened.”<sup>75</sup>

Apart from those prisons referred to above, other new prisons completed during the period under review included the Qalakabusha Prison in Empangeni in KwaZulu-Natal, which was designed to accommodate 1 392 prisoners, and the Devon Pre-Release Centre near Springs, which would accommodate 600 offenders.<sup>76</sup> Clearly, however, the extent of overcrowding in South African prisons – as well as the exorbitant costs of constructing new prisons – meant that the prison authorities could not build their way out of the problem of chronic overcrowding.

#### **4.3.4 Discourse Surrounding the Spread of HIV/AIDS in South African Prisons**

One of the major developments which affected the human rights of prisoners in South Africa during the period under review, was the uncontrolled spread of HIV within the prisons, and the increasing numbers of prisoners who began to succumb to AIDS-related illnesses. The issue began to generate political heat towards the end of 1999, when the Minister of Correctional Services, Ben Skosana, addressed Parliament on the issue of whether or not HIV-positive prisoners should be separated from other prisoners. The Minister stated that HIV-positive prisoners were not held separately from other prisoners, since this would impinge on their right to confidentiality. Furthermore, it was impossible to separate prisoners in this way for the simple reason that South Africa's prisons were too overcrowded. Prisoners with full blown AIDS and who were bleeding, incontinent, unconscious or displaying persistent AIDS-related infections like tuberculosis were, however, medically isolated. He stated that

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<sup>75</sup> *Natal Witness*, 19 October 2000, 12.

<sup>76</sup> See: *Daily News*, 6 November 2000, 2; and *Star*, 15 February 2001, 3.

40 terminally ill prisoners had been released on medical grounds since January 1999. This allowed these prisoners, who had been rendered helpless by disease, to die at home or within a specific institution.<sup>77</sup> Opposition parties were quick to take the government to task for its lack of a comprehensive policy to halt the epidemic. The New National Party called on the government to ensure that all prisoners were tested for HIV/AIDS upon entering and leaving prison. This would indicate how many prisoners were infected with the AIDS virus while being held in prison. A spokesperson for the party, Johann Durand, stated that he was outraged that the Department of Correctional Services did not consider the spread of AIDS in prisons to be a threat:

“The NNP demands that the government open the debate on possible measures which can be taken to prevent the spread of Aids in prisons. Much work needs to be done to find effective means to reduce transmission of HIV by sex and drugs in prison. The failure to provide basic measures, such as information, education and the means of prevention available on the outside, violates the rights of prisoners to health, security of person and equality before the law.”<sup>78</sup>

The Department of Correctional Services responded to the call by the New National Party to have all prisoners tested for AIDS, by stating that, in terms of guidelines promulgated by the World Health Organisation, it would be unethical to introduce compulsory testing.<sup>79</sup>

While the political wrangling was going on, increasing numbers of prisoners were falling ill and dying. In November 1999, it was reported that the 68 prisoners with full-blown AIDS were being treated symptomatically for AIDS-related illnesses such as diarrhoea, tuberculosis and sexually transmitted diseases, but that no prisoners with AIDS were being treated with antiretroviral AIDS drugs like AZT.<sup>80</sup> During the same month, it was reported that the Department of Correctional Services had embarked on a policy of releasing terminally ill prisoners who were in the final stage of irreversible diseases, including those with AIDS – in order to reduce the cost of treating such prisoners. Human rights campaigners were reported to be concerned that the government was shirking its responsibility to care for such terminally ill patients.<sup>81</sup>

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<sup>77</sup> *The Daily News*, 12 November 1999, 3.

<sup>78</sup> *The Citizen*, 22 November 1999, 4.

<sup>79</sup> *Beeld*, 23 November 1999, 11.

<sup>80</sup> *The Star*, 24 November 1999, 11.

<sup>81</sup> *Sowetan*, 11 November 1999, 1.

Halfway through the following year, the epidemic appeared to be getting worse. In July 2000 the *Pretoria News* reported that an alarming rise in the number of sick and dying persons in prisons was “draining the already beleaguered coffers of the Department of Correctional Services.” A large number of the 521 prisoners who died in Gauteng during the first half of 2000 – were believed to have died as a result of AIDS-related infections. This figure was expected to double by the end of 2000, and would be considerably higher than the total of 534 prisoners who died during 1998. In KwaZulu-Natal, there were 144 prison deaths during 1998; 194 during 1999 and 127 during the first seven months of 2000. The Minister of Correctional Services admitted that sick prisoners were already placing a huge financial strain on the Department.<sup>82</sup>

During the same month that the alarming information referred to above was revealed to the public, it was reported in the *Mail and Guardian* that a man who had contracted HIV while incarcerated in Pollsmoor prison six years previously, was suing the Minister of Correctional Services in the Cape High Court. The action had been instituted three years previously in 1997. It would act as a test case to determine whether the Department of Correctional Services was legally liable for failing to provide adequate protection to inmates, as well as failing to act against the increasing incidence of rape among prisoners. The newspaper reported that there were 2 700 known HIV-positive prisoners among South Africa’s prison population of 172 000. The report pointed out, however, that the rate of HIV-infection was probably much higher than this, and commented that:

“Prisoners say HIV status can be used as a means to assert power and obtain favours through the threat of rape, while some prison gangs practise sodomy as part of their culture. Infection is also spread through sharing needles used for tattooing gang members ... Prison doctors see only a small proportion of the rape survivors because of feelings of shame or threats of further violence.”<sup>83</sup>

Public concern on the issue did not diminish in the months which followed. During September 2000 it was again pointed out in the press that there had been an alarming increase in the number of prisoners dying from tuberculosis and other AIDS-related diseases. It was reported that, since December 1996, there had been a 30% increase in the number of tuberculosis cases in South African prisons. The

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<sup>82</sup> *Pretoria News*, 26 July 2000, 2.

<sup>83</sup> *Mail and Guardian*, 28 July-3 August 2000, 15.

number of prisoners who had died in South African prisons (excluding deaths in police cells) had increased from 402 in 1997, to 534 in 1998, to 737 in 1999. A total of 663 had died from January to July 2000. The situation was made worse by chronic overcrowding, and due to uncompetitive salary structures, the Department of Correctional Services was unable to employ suitably qualified medical personnel.<sup>84</sup> In the face of this mounting crisis, the Minister for Correctional Services announced, at a parliamentary briefing, that offenders could soon be tested for AIDS upon their arrival in prison. Testing would be anonymous and aimed at determining the extent of the epidemic among inmates. The Minister revealed that the number of prisoners known to be HIV positive had increased by 300% from 1997 to 2000, and announced that a new AIDS policy for prisons was being formulated.<sup>85</sup> The South African Prisoners Organisation for Human Rights also responded to the mounting crisis. The president of the organisation, Mr Golden Miles Bhudu, called on the Department of Correctional Services to release those prisoners who were terminally ill with AIDS, into the care of their families. He stated that: “If they test positive, they must be released in the early stages, so that when they have full-blown AIDS and are terminally ill, they are the responsibility of their families.”<sup>86</sup>

In October 2000, the role of gang behaviour in the spread of HIV/AIDS within South African prisons received further publicity. Three researchers from Vista University – Michelle Minnie, Annette Prins and Eugene van Niekerk – presented a research paper on the topic at a conference in Port Elizabeth, which was reported on in the press. The researchers claimed that gang behaviour in South African prisons, which resulted in the psychological, social and sexual victimisation of certain inmates, was playing a significant role in the disastrous spread of HIV/AIDS within the prisons. The *Eastern Province Herald* reported on Michelle Minnie’s submissions to the conference, *inter alia*, as follows:

“Mrs Minnie said evidence suggested that institutionally induced homosexual acts were rife in prisons and certainly not new to the prison context. For example, one of the chief aims of the powerful ‘28 Gang’ was to actively recruit ‘wyfies’ – young men with feminine traits – and to promote sodomy among its members.”<sup>87</sup>

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<sup>84</sup> *City Press*, 10 September 2000, 5.

<sup>85</sup> *Die Burger*, 20 September 2000, 7; and *Cape Argus*, 20 September 2000, 5. The number of HIV-positive prisoners had increased from 1 094 in July 1997 to 3 209 in July 2000.

<sup>86</sup> *Cape Argus*, 16 October 2000, 4.

<sup>87</sup> *Eastern Province Herald*, 6 October 2000, 7.

In the same month, Gideon Morris, the Secretary of the Office of the Inspecting Judge, commented on the disturbing rise in the number of South African prisoners dying of AIDS-related illnesses. He pointed out that, whereas 186 prisoners had died as a result of AIDS-related illnesses during 1995, more than 1000 prisoners had already died of such illnesses during 2000. He stated that – according to post-mortem results – AIDS was the most probable cause in 90% of prison deaths. He also expressed the following deeply shocking opinion:

“It is hard to say precisely, but it is estimated that between 70% and 80% of all arrested suspects are being sodomised by fellow prisoners before they are even officially charged. Many of the suspects are raped within the first 48 hours of being detained.”<sup>88</sup>

According to Morris, many awaiting trial prisoners received a “death penalty” through AIDS before they were found guilty by a court of law. He pointed out that 40% of awaiting-trial prisoners were eventually found not guilty by the court.<sup>89</sup> According to Morris, massive overcrowding meant that prisoners could not be properly segregated, which resulted in gangsters having access to awaiting trial prisoners. He submitted that the dramatic increase in the number of prisoners dying of AIDS-related illness was the result of an increase in the number of HIV-positive people entering prison, the high incidence of rape in prison – together with overcrowding.<sup>90</sup> The *Pretoria News* commented in an editorial as follows:

“The news that the majority of awaiting trial prisoners are being robbed and sodomised by fellow inmates effectively means that they are being sentenced to death by their Aids-infected rapists. Even more unpalatable should be the fact that about 40% of these unfortunates will eventually be found not guilty when brought to trial ... Where is the fairness in this? Surely an awaiting trial prisoner deserves respect and protection from the brutality that seems to have become the norm within our correctional institutions? Surely even sentenced prisoners do not deserve such treatment? It is estimated that 45 000 inmates will die of Aids in our prisons by 2010 – which gives an indication of just how bad the situation is.”<sup>91</sup>

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<sup>88</sup> *Pretoria News*, 17 October 2000, 5.

<sup>89</sup> *Pretoria News*, 17 October 2000, 5.

<sup>90</sup> *The Citizen*, 18 October 2000, 4.

<sup>91</sup> *Pretoria News*, 18 October 2000, 15.

During November 2000, the Minister of Correctional Services announced that a draft policy to deal with AIDS in prisons had been drawn up by the Department of Correctional Services, and was being circulated for comment.<sup>92</sup>

By January of the following year, it was reported that South African prisoners were being screened for HIV/AIDS on entering the prison system, and were provided with pre-test and post-test counselling. A spokesperson for the Department of Correctional Services stated that there were 3 200 prisoners who were known to have HIV/AIDS. Mention was made of a report compiled by the United Nations Joint Programme on AIDS, which found the incidence of homosexual sex in Southern African prisons to be high. The report found that in Malawi and Zambia, at least one man in eight engaged in homosexual sex while in prison.<sup>93</sup>

In April 2001, the treatment of prisoners with AIDS was put in the spotlight once again, when *City Press* reported on the death of an awaiting trial prisoner, Vusi Nxumalo. Nxumalo, who had full-blown AIDS, died while shackled to a hospital bed and in leg irons. A war of words erupted between the Department of Justice and the Department of Correctional Services, with each blaming the other for failing to ensure that Nxumalo was allowed to die in dignity. Nxumalo's father stated as follows:

“I feel very sad to lose my only son, in whom I had put all my hope. He died a cruel death in the hands of the police and prison warders ... I fail to understand why the prison warders decided to chain someone, who was already weak and could hardly lift his head. When he appeared in court he was already in the wheelchair, but still they did not care ...”<sup>94</sup>

It was at this time that the Inspecting Judge of Prisons, Judge Johannes Fagan, delivered his annual report to parliament. He told parliament that natural deaths in South Africa's prisons had risen by 584% during the previous five years, and that this rise was due mainly to the impact of HIV/AIDS.<sup>95</sup> The policy of the Department of Correctional Services was not to subject prisoners to mandatory testing, which meant that the real incidence of HIV/AIDS among prisoners was unknown. A spokesman for

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<sup>92</sup> *Daily News*, 6 November 2000, 2.

<sup>93</sup> *The Citizen*, 13 January 2001, 5.

<sup>94</sup> *City Press*, 1 April 2001, 1.

<sup>95</sup> *Business Day*, 4 April 2001, 3.

Correctional Services admitted, however, that the increase in ‘natural deaths’ in prisons was putting the department’s medical budget under considerable pressure.

During August 2001, it was reported that a series of voluntary tests had been conducted on prisoners between January and April 2001 to determine how many were infected with HIV. The survey found that 4 105 prisoners were HIV positive, but it was feared that the actual number of HIV-positive prisoners in South African prisons could be much higher. A total of 51 prisoners died of AIDS-related illnesses during the same period. This indicated that an average of 12 prisoners could be expected to die of AIDS-related illnesses each month. The Department of Correctional Services applied for an additional budget of R600 000 to conduct an HIV-prevalence survey with the Department of Health. Other measures being taken by the Department of Correctional Services to combat the AIDS epidemic in prisons – included HIV-awareness campaigns, peer support groups, the distribution of pamphlets, the showing of audio-visual educational material, and various other initiatives by non-governmental organisations. It was reported that, during the year 2000, the non-governmental organisation, Hope World Wide, undertook research into the nature and extent of the AIDS epidemic in South African prisons. This research involved interviews with 300 prisoners, and resulted in the following disturbing findings: 48% said that they had had two or more sexual partners before they were arrested; 46% said that they had never used a condom; 31% were unsure about the risks of disease; 81% did not know how to get a condom in prison; 52% were unaware of their HIV status; and 60% had little knowledge about AIDS. According to the report, the release of prisoners for medical reasons had been restricted to sentenced prisoners, and the organisation called on the Department to extend its policy to include awaiting trial prisoners. The organisation felt that such prisoners should be allowed to die in dignity with their loved ones.<sup>96</sup>

In September 2001, the Minister of Correctional Services, Ben Skosana, announced in Parliament that the number of AIDS-related deaths in South African prisons had quadrupled in the first six months of 2001, compared to the first six months of 2000. Whereas 257 prisoners had died of AIDS-related illnesses during the period January to July 2000, 1 101 prisoners had died during the period January to July 2001. The total number of prisoners known to be HIV-positive had increased from 3 209 to 4 368 between 2000 and 2001. The Minister stated that the Department of Correctional Services would not request the government to allow it to implement a programme of compulsory AIDS testing in prisons,

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<sup>96</sup> *Sowetan*, 3 August 2001, 13.

since such a programme would be unconstitutional. According to the Minister, the Department of Correctional Services had set up a dedicated section to coordinate programmes to combat AIDS at the provincial and national level.<sup>97</sup> During the same month, Judge Johannes Fagan, the head of the Judicial Inspectorate of Prisons, stated that the Correctional Services Act would be amended to allow terminally ill awaiting trial prisoners to be released, in order that they could die in a dignified manner. Legislation at the time only allowed for the early release of sentenced prisoners who were terminally ill.<sup>98</sup> The public was clearly becoming increasingly concerned about the issue, and in its editorial of 29 September 2001, the newspaper *Beeld* called on the government to study the increase in the number of AIDS-related deaths in prisons, as a matter of urgency. The newspaper pointed out that prisons comprised a vital part of the democratic order and that it was unacceptable for prisons to become nests for the propagation of AIDS. It characterised the situation as critical and called for drastic steps to be taken.<sup>99</sup>

Researchers also became involved in the public debate concerning the uncontrolled spread of HIV in South African prisons. Sasha Gear and Kindiza Ngubeni of the Centre for the Study of Violence and Reconciliation, conducted a study on sex and rape in South African prisons during the year 2001. On the question of how many prisoners were raped, Gear commented that:

“It is difficult to say how many prisoners are raped or coerced into unwanted sex. What can be said with confidence is that some are more vulnerable to forced sex than others. Physical features certainly play a role ... But those most at risk are awaiting trial prisoners. Gang leaders often come to the observatory when people arrive, and they point out who they want.”<sup>100</sup>

Gear then went on to describe the relationship between prisoners and their “wives”:

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<sup>97</sup> *Beeld*, 19 September 2001, 7; *Natal Witness*, 19 September 2001, 1; *Die Burger*, 20 September 2001, 7. Note that the total number of known HIV/AIDS cases in South African prisons provided by the Minister of Correctional Services in September 2001, differ slightly from the following figures, which appear under the heading “Health Care” in part 3.1 of the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, and reflect the total number of known HIV/AIDS cases as at 31 December, of each of the following years: 1998 = 1 865 cases; 1999 = 2 536 cases; 2000 = 3 397 cases; 2001 = 4 720 cases.

<sup>98</sup> *Beeld*, 26 September 2001, 3.

<sup>99</sup> *Beeld*, 29 September 2001, 18.

<sup>100</sup> *Business Day*, 22 October 2001, 9.

“A ‘wife’ is considered to be nothing. He cannot talk to others without permission; he can be rented out to other men; he rarely leaves his cell. The ‘male partner’ goes out into the world to do business. His wife is obliged to give him sex when he returns.”<sup>101</sup>

Further light was shed on this issue during February 2002, when the South African Prisoners Organisation for Human Rights told the *Sowetan* that a high incidence of sodomy and gang-rape contributed to the increase in HIV-AIDS infections in prisons. According to the organisation, the chances of someone being sent to prison HIV-negative and coming out HIV-positive were extremely high. It was alleged by the South African Prisoners Organisation for Human Rights that some warders turned a blind eye to rapes in prison, or even accepted bribes to allow gang members to access new inmates for the purposes of rape. According to the deputy director of medical support services in prisons, Maria Mabena, HIV-positive prisoners died faster than persons outside prison, who were diagnosed at approximately the same time:

“There are various reasons for this, including overcrowding, bad diet, the immune system being compromised, limited movement and stress. Most prisoners are uncooperative. They sometimes refuse to do things such as exercise that would improve their health status.”<sup>102</sup>

The following month, the Institute for Security Studies issued a warning that if sodomy and sexual violence in South African prisons were not curbed, AIDS would continue to spread, resulting in massive death rates over the next five to ten years.<sup>103</sup> In its editorial of 19 March 2002, *The Star* commented on the problem of male rape in prisons as follows:

“This problem has a huge ripple effect. The incidence of HIV/Aids, already believed to be rampant in prison, is likely to rise with forced anal intercourse. Brutalised men often go into society changed men – but not for the better. And, say the experts, prisons become the training ground for future violent acts of crime perpetrated by these ex-prisoners. Our jails have become, it seems, places where bad people are sent to become worse people ... Central to the problem

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<sup>101</sup> *Business Day*, 22 October 2001, 9.

<sup>102</sup> *Sowetan*, 1 February 2002, 9.

<sup>103</sup> *Citizen*, 14 March 2002, 8.

are factors such as cells meant for six men housing 16 inmates, that the prison authorities allow gangs free reign, and that warders are not infrequently corrupted by such gangs.”<sup>104</sup>

It is clear, therefore, that the spread of HIV among the South African prison population, as well as increasing numbers of deaths due to AIDS-related illnesses, remained serious problems throughout the period under examination in this article. The public discourse surrounding this issue reflects the immense suffering to which thousands of South African prisoners were subjected at this time. The appalling conditions in many prisons allowed the HIV epidemic to spread like wild fire, with the main culprits being chronic overcrowding and rampant gang activity. The most basic human rights of many prisoners were seriously compromised, as the nightmare of the epidemic unfolded before the eyes of the South African public and prison officials.

#### **4.3.5 The Continued Vulnerability of Juvenile Offenders in Adult Prisons**

The chronically overcrowded state of South African prisons during the period under review impacted particularly harshly upon prisoners who were vulnerable in some way. Juvenile prisoners were one such group – many of whom were detained in adult prisons throughout South Africa. This was despite efforts on the part of the government, in the years preceding this, to build separate accommodation for juvenile prisoners.<sup>105</sup> During July 1999 it was reported that about 275 juvenile prisoners were detained awaiting trial in various prisons in Gauteng.<sup>106</sup> Two months later, the director of research and programme development at the National Institute for Crime Prevention and the Rehabilitation of Offenders, Lukas Muntingh, pointed out that: “The greatest tragedy is that there are more children awaiting trial in South Africa’s prisons today than there were in 1994 when Mandela’s government came to power.”<sup>107</sup>

Life for juveniles at this time in South Africa’s overcrowded adult prisons, was described as “hell”. For example, one 15-year-old who had been held as an awaiting trial prisoner in the severely overcrowded

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<sup>104</sup> *The Star*, 19 March 2002, 14.

<sup>105</sup> For an account of the race to provide separate and sufficient secure accommodation for juvenile offenders in South Africa during the period leading up to the second democratic election, see Peté, SA (2000) 'The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-Up to South Africa's Second Democratic Election *South African Journal of Criminal Justice* 13(1): 1-56 at Section 9.4.

<sup>106</sup> *Sowetan*, 20 July 1999, 5.

<sup>107</sup> *The Sunday Independent*, 19 September 1999, 3.

Pollsmoor Prison on two occasions, reported he had experienced beatings and gang violence, and had almost been stabbed to death. He described lice-infested beds and unhygienic living conditions. He complained that the last meal of the day was served at midday, and that the monotony of the day was broken only by the occasional workshop.<sup>108</sup> Almost a year later, in June 2000, the plight of juvenile prisoners in Pollsmoor did not seem to have improved much. At this time, 396 juveniles aged 14 to 17 years were being detained in the severely overcrowded prison. Western Cape Commissioner of Correctional Services, Stephen Korabie, threatened to stop any new admissions to the prison because of the chronic overcrowding, and Pan Africanist Member of Parliament, Patricia de Lille, threatened to apply for a High Court interdict to prevent any more juveniles being detained to Pollsmoor Prison for petty offences. In response to this political and legal pressure, the head of the Western Cape Department of Justice, Hisham Mohamed, stated that closing the prison would not solve the problem of overcrowding. He pointed out that two months previously, nine new courts had been established in the Western Cape to deal with the backlog of court cases – which was a major cause of the overcrowding. In addition, he had held a meeting with chief magistrates to examine ways in which juvenile court rolls could be processed more quickly. Furthermore, the Department of Welfare had agreed to take 60 children to a place safety facility at Faure. Mohamed stated that a task team had been initiated at the Wynberg Court to examine all awaiting trial prison cases, and pointed out that an additional R2.8 million had been invested to help speed up the processing of cases.<sup>109</sup> The following month, the Minister of Correctional Services, Ben Skosana, visited juvenile offenders in the chronically overcrowded Pollsmoor Prison, and commented that:

“A prison is not a place for children. I have been touched by the conditions inside the prison. This is a problem too big for one department. It needs co-operation with the departments of Welfare and Education.”<sup>110</sup>

The District Surgeon responsible for Pollsmoor Prison, Dr Paul Theron, described the conditions under which juvenile offenders were held in the prison, as a catastrophe. He claimed that the human rights of the children were being violated on a daily basis. There was overcrowding, a lack of basic amenities like clean toilets and washing facilities, and general chaos in the daily existence of warders and prisoners. Approximately 1500 awaiting trial children and juveniles younger than 19 were confined

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<sup>108</sup> *The Sunday Independent*, 19 September 1999, 3.

<sup>109</sup> *Cape Argus*, 12 June 2000, 4.

<sup>110</sup> *The Cape Times*, 6 July 2000, 3.

with 476 sentenced children – as well as about 400 adults. Children were forced to sleep in shifts, since there was not nearly enough bedding. It was feared that more than half the children were infected with HIV. Theron prepared a report on the health of the juveniles imprisoned in Pollsmoor, in which he concluded that one in every three prisoners suffered from a sexually transmitted disease. A third of offenders suffered complications arising from bullet and stab wounds, as well as old amputations. Smoking-related illnesses were common and many young prisoners used dagga, mandrax and cocaine. Most young prisoners suffered from depression, dizziness and aggression.<sup>111</sup>

The response of the authorities to the plight of juvenile offenders in Pollsmoor Prison, was not sufficient to prevent Patricia de Lille – together with three concerned mothers of children confined in the prison – from launching an urgent application in the Cape High Court against the Ministers of Justice and Correctional Services; the Western Cape MEC for Education; and the Officer Commanding Pollsmoor Prison.<sup>112</sup> On 18 July 2000, Mrs Justice Jolyn Knoll ordered the removal of about 300 children from Pollsmoor prison to places of safety. The Minister of Correctional Services and the Officer Commanding the prison were ordered to ensure that all children at the prison be examined immediately by a district surgeon. They were further required to ensure that the children be provided with medical and psychological treatment. Finally, they were ordered to enquire into the circumstances of the accommodation and detention of all children at Pollsmoor, and to determine whether it was reasonable, practicable and lawful to transfer them to other places of accommodation and detention.<sup>113</sup> The *Sowetan* reported that: “De Lille’s victory was bitter-sweet when it was revealed that one of the children to be released from Pollsmoor had raped and murdered her sister two years ago.”<sup>114</sup>

In response to the legal action outlined above, the Minister of Correctional Services instructed his provincial commissioners to establish task teams to ensure that children confined in prisons across the country be provided with basic healthcare and transferred to places of safety. It was reported that, out of 28 090 juveniles in custody, 4 253 children were being held in South African prisons at the time.<sup>115</sup> The Minister of Correctional Services was clearly unhappy with the state of his department and complained that: “We must not find ourselves being compelled through a High Court order to adhere to

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<sup>111</sup> *Die Burger*, 12 July 2000, 1.

<sup>112</sup> *The Citizen*, 18 July 2000, 2.

<sup>113</sup> *The Citizen*, 19 July 2000, 7.

<sup>114</sup> *Sowetan*, 21 July, 3.

<sup>115</sup> *Sowetan*, 21 July, 3.

minimum acceptable standards of conditions of detention.”<sup>116</sup> It was reported that the Minister had given his commissioners a one-month deadline to put in place plans for the transfer of children into places of safety or reformatories. Provincial commissioners were required to establish health task forces to monitor the health conditions of prisoners, and to formulate methods for the treatment and prevention of contagious diseases. The Minister warned that he was considering taking drastic steps to reduce the number of awaiting trial prisoners.<sup>117</sup>

Patricia De Lille kept up the political pressure on the Department of Correctional Services by visiting the Johannesburg Central Prison at the end of July 2000. As a result of this visit, it was announced that 72 awaiting trial juveniles in the prison would be transferred to a place of safety. Eleven children would remain in the prison because of the seriousness of their crimes. De Lille commented that the cells were surprisingly clean, but overcrowded – with 35 children sharing a cell designed for 19 prisoners. The prison kitchen, which was designed to cater for 3000 prisoners, was forced to cater for 6500 people. She stated as follows:

“We cannot keep children under these conditions. It’s not a good reflection on us as a nation ... This is actually where we produce criminals. If we save some, we’ll send fewer hardened criminals back into society and begin to break part of the cycle of violence and crime.”<sup>118</sup>

During September 2000, child activists Pricilla and Jessica McKay told an international conference in Durban that the way in which children in South African prisons were being treated was a violation of the United Nations Convention on the Rights of the Child, as well as the South African Constitution. Referring to Durban’s Westville prison, they claimed that on any given day, 60 to 90 children shared a space big enough for only 19 people. The children had to share a single toilet, and only two toilet rolls were issued for the use of all the children each day. Mattresses were so scarce that each thin mattress had to be shared by three children. The activists claimed that during the month of August 2000, there were 500 children in the awaiting-trial section of the Westville prison – which meant that the section was overcrowded by a massive 300%. The children in this prison complained of being cold in winter. They also complained that there were only two social workers and four child-care workers to care for

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<sup>116</sup> *The Star*, 24 July 2000, 2.

<sup>117</sup> *The Star*, 24 July 2000, 2; *Natal Witness*, 24 June 2000, 2.

<sup>118</sup> *Sowetan*, 24 July 2000, 6.

about 500 children. The children were locked up unsupervised from 2 o'clock in the afternoon until 9 o'clock the next morning – resulting in a “high potential for sodomy”. The activists concluded that:

“Prisons are not fit places for children. The conditions in the awaiting-trial section constitute a punishment before the child’s trial has even begun ... Because of poverty, unemployment, homelessness, school dropouts and HIV/Aids, children will continue to fall foul of the law. It is therefore essential to abide by the Convention on the Rights of the Child and the constitution and to provide adequate alternative care ... They are the future of our country.”<sup>119</sup>

Two months after the above statement was made, it was reported that 467 children were being held in Durban’s Westville Prison. A spokesperson for the South African Prisoners Organisation for Human Rights, alleged that some of these children had been held, awaiting trial, for up to three years without being released or given bail. The Director of a group known as “Children’s Rights Ministry”, the Reverend Livingston Jacob, described the conditions under which the children were kept as “shocking and overcrowded.”<sup>120</sup> He stated further:

“I was deeply shocked to hear some of their complaints. They told me they were treated badly, some of them were beaten up and assaulted by the wardens. A particular boy was sjambokked consistently. I witnessed, first-hand, bruises on his body ... There are no constructive programmes for these children. If the wardens treat children like animals then they are going to retaliate and take revenge on innocent people in civil society.”<sup>121</sup>

During the same month, the Minister of Correctional Services, Ben Skosana, told the Pretoria Press Club that – due to overcrowding in the prisons – more than 3000 children were being confined together with adult prisoners. He stated that there were no facilities to detain these children separately. He referred to a recent case in which two brothers aged 12 and 13 years respectively, were sent to prison on a charge of housebreaking and theft. The head of the prison to which they were sent at first refused to admit these children – but was warned that he would be guilty of contempt of court if he continued to refuse to lock the children up.<sup>122</sup>

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<sup>119</sup> *The Star*, 5 September 2000, 6.

<sup>120</sup> *Daily News*, 23 November 2000, 1.

<sup>121</sup> *Daily News*, 23 November 2000, 1.

<sup>122</sup> *Beeld*, 29 November 2001, 22.

Amidst the gloom surrounding the treatment of juveniles in South African prisons during the period under review, one ray of light was the progress made by the South African Law Commission towards creating a new procedural system for children who came into conflict with the law. During September 1999, it was reported that the Law Commission's project committee on juvenile justice had circulated a discussion paper for comment, and hoped to evaluate the final draft legislation in early December 1999 – with a view to presenting it to Parliament in mid 2000.<sup>123</sup> In general, however, it is clear that the human rights of juveniles detained in South African prisons during the period under review were severely compromised.

#### 4.3.6 Concern Over Mass Escapes

Despite a general drop in the number of escapes by prisoners during the period under review, the manner in which those escapes that did take place were effected, was cause for serious concern.<sup>124</sup> On a number of occasions, large numbers of prisoners managed to escape – either by using violence or with the assistance of corrupt prison officials. During July 1999, for example, a group of gunmen armed with AK47 assault rifles forced a Correctional Services vehicle off the road and freed a group of awaiting trial prisoners who were being transported from Pollsmoor Prison to court. Thirty of the 48 prisoners who were being transported escaped, but 17 were quickly re-arrested. Among those re-arrested was Junior Zulu, the suspected member of a group of dangerous criminals who specialised in cash-in-transit robberies. It was believed that this group had planned and executed the military style operation in order to free Zulu.<sup>125</sup> Two months after this incident, it was reported that 21 awaiting trial prisoners had escaped from the Pietermaritzburg New Prison by cutting through iron bars with an angle grinder.<sup>126</sup> In an editorial, the *Natal Witness* commented, *inter alia*, that:

“The escape raises serious questions. How could the angle grinder – equipment being used in current prison renovations – have been acquired without the knowledge of prison staff? And

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<sup>123</sup> *The Sunday Independent*, 19 September 1999, 3.

<sup>124</sup> The number of escapes by prisoners dropped significantly between 1995 and 2000: 1995 (1247); 1996 (1345); 1997 (1050); 1998 (497); 1999 (425); 2000 (236) – See *City Press*, 11 February 2001, 22. Escapes from prison itself, from work teams, from public hospitals, from courts, and during escorts, totalled 241 during the period 1 April 2000 to 31 March 2001, and 233 during the period 1 April 2001 to 31 March 2002 (see the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, Part 3.1 Escapes from Custody).

<sup>125</sup> *The Star*, 8 July 1999, 2; *Cape Argus*, 8 July 1999, 1.

<sup>126</sup> *Natal Witness*, 20 September 1999, 3.

how was it that the prisoners were able to use this very noisy cutting tool in the early hours of a Saturday without alerting anyone in authority? Was there connivance? Or was there virtually no supervision at the prison over the weekend? How motivated are prison staff to perform their duties diligently? Is morale high, or has it been sapped by the controversies surrounding upper staff echelons in the past year, and, perhaps, by the incompetence of some top brass. Something is seriously wrong at the Pietermaritzburg New Prison.”<sup>127</sup>

The chairperson of parliament’s Correctional Services Portfolio Committee, Aubrey Mokoena, visited Pietermaritzburg New Prison and described the conditions he found there as abnormal and outrageous. He raised concerns about the overcrowding and filthy conditions in the prison, and stated that:

“We came here to see and hear for ourselves how exactly the jailbreak happened. We have found that prison management handed over the control of the area being renovated to the construction company, and prison security was compromised in the process.”<sup>128</sup>

The National Commissioner of Correctional Services, Khulekani Sitole, also visited the prison, but refused to condemn all the officials at the prison. He pointed out that it was not easy to work in overcrowded conditions. The prisoner to officer ratio was supposed to be 20 to 1, but currently stood at 50 to 1.<sup>129</sup>

The following month, it was reported that the head of the Empangeni Prison in KwaZulu-Natal, Mr Jabulani Zikhali, together with two other officials, were facing suspension following the mass escape of 31 awaiting trial prisoners. The prisoners had escaped by boring a hole through a corrugated iron roof. A spokesperson for the Department of Correctional Services commented on the dilapidated state of KwaZulu-Natal’s prisons as follows: “Some of these prisons are almost 100 years old and are rotten.”<sup>130</sup> Two months later, it was reported that 11 of the 31 awaiting trial prisoners who had escaped from the Empangeni Prison had been recaptured – but that a further 14 prisoners had escaped from that prison in separate incidents. Only three of those 14 escapees had been recaptured. The Minister of Correctional Services, Mr Ben Skosana, announced that four prison officials at the Empangeni Prison

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<sup>127</sup> *Natal Witness*, 22 September 1999, 8.

<sup>128</sup> *Natal Witness*, 23 September 1999, 2.

<sup>129</sup> *Natal Witness*, 23 September 1999, 2.

<sup>130</sup> *Independent on Saturday*, 23 October 2002, 5.

were to be suspended and that the management was to be redeployed.<sup>131</sup> In an amusing twist to this saga, it was reported that the last group of prisoners to escape from the Empangeni prison had left a note stating that they wished to be at home during the Christmas period. In order to help prevent further escapes from the Empangeni and Pietermaritzburg prisons during the Christmas season, it was decided to transfer a number of prominent and dangerous prisoners, held in these prisons, to other prisons. This would also help ease the problem of overcrowding, which was particularly bad in the case of the Empangeni prison which was 210% overcrowded at this time.<sup>132</sup>

Allegations surfaced that, in certain cases, prisoners who attempted to escape were severely assaulted by warders. For example, it was reported that a prisoner by the name of Peter Sethabela had died from injuries sustained during an attempt to escape from the Vereeniging Prison. Three other prisoners who – together with Sethabela – were facing charges ranging from robbery and theft to murder, succeeded in escaping from custody. Sethabela’s family alleged that they had received reports from two prisoners that Sethabela was repeatedly and severely beaten up by warders at the prison after he had been caught trying to escape. His sister told the *Sowetan* that:

“When I went to the government mortuary to identify and clean his body, he had several injuries. His left eye had been damaged and he had a deep gash at the back of his head. His cheek bones, left leg and a hand were broken. And his neck was twisted.”<sup>133</sup>

Certain prisoners, with the help of corrupt prison officials, became true escape artists. For example, during August 2001, a prisoner by the name of Mzimasi Thungulu escaped from the St Albans prison in the Eastern Cape. He had been sentenced to 60 years imprisonment for murder, armed robbery and attempted murder. He had conducted a reign of terror in the Border-Transkei area, during which time he was involved in a string of murders, including that of a policeman.<sup>134</sup> He was known by the nickname “McGyver”, since he had been successful in escaping from custody on no fewer than nine previous occasions. The Correctional Services Commissioner for the Eastern Cape, Raphapheng Mataka, stated that he was sure that Thungulu had been assisted in his escape by a group of prison officials acting as part of a syndicate:

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<sup>131</sup> *Beeld*, 4 December 1999, 15.

<sup>132</sup> *Beeld*, 21 December 1999, 8.

<sup>133</sup> *Sowetan*, 24 December 1999, 4.

<sup>134</sup> *Eastern Province Herald*, 28 August 2001, 3.

“It was not the first time Thungulu received assistance from our officials – all of his escapes have involved an official or officials ... there is a group of officials who are involved and we know them and we are on their trail.”<sup>135</sup>

The *Eastern Province Herald* quoted a “reliable source” as stating that the prison officers had assisted Thungulu to escape so that they could kill him. The source alleged that the reason the officers wished to murder Thungulu, was because he had confidential information about the illegal activities of these prison warders. It was alleged that the prison officers used Thungulu to sell drugs inside the St Albans Prison. Shortly after the escape of Thungulu, three staff members at the St Albans prison were suspended. In addition, Clifford Mshunqane replaced Silverman Nomzanga as the head of the prison. Thungulu was recaptured shortly afterwards.<sup>136</sup> Unfortunately, the problem of escapes from prisons in the Eastern Cape was soon to return to haunt prison officials in that region. A mere two months after Thungulu had been recaptured, the *Eastern Province Herald* reported that nine awaiting trial prisoners had escaped from the Dordrecht prison. The newspaper stated in an editorial that:

“Eastern Cape jails must be among the easiest in the world to escape from ... [T]he ongoing escapes from our prisons and police cells are shocking testimony of ineptitude and corruption ... Earlier this week nine awaiting-trial prisoners armed with knives overpowered policemen and warders and broke out of the Dordrecht prison. How good can the discipline and security be if nine prisoners can get knives in jail ... the disastrous statistics are a symptom of ineffective methods, weak legislation and corrupt officials. The bottom line is that our criminals are in paradise, often aided and abetted by the people into whose captivity they are entrusted.”<sup>137</sup>

Certain of the escapes during the period under review involved violence. For example, during September 2001, one prisoner was killed and another seriously wounded during an attempted escape by three prisoners from Waterval Prison in Utrecht. The prisoners had dispossessed a prison guard of a firearm, which he had taken into the prison in contravention of regulations. A gun battle ensued between the escapees and two policemen who observed the incident. Both policemen suffered gunshot wounds and one prisoner managed to escape – but was rearrested shortly afterwards. This was not an

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<sup>135</sup> *Eastern Province Herald*, 25 August 2001, 2.

<sup>136</sup> *Eastern Province Herald*, 25 August 2001, 2; *Eastern Province Herald*, 28 August 2001, 3.

<sup>137</sup> *Eastern Province Herald*, 11 October 2001, 4.

isolated incident. During May of the same year two prisoners had escaped from the same prison by taking a prison guard hostage. The prison guard was later found murdered, and the escapees were rearrested after several days on the run.<sup>138</sup>

Certain escape attempts were foiled by the authorities. For example, during September 2001 it was reported that a plan to free nine prisoners convicted of a spate of politically motivated killings in the Richmond area, had been foiled. At least three of the prisoners had been convicted on 20 counts of murder arising from three massacres, and were serving multiple life sentences. Prison authorities intercepted a letter allegedly written to the nine prisoners by certain of their relatives, indicating that an automatic rifle would be smuggled into the Pietermaritzburg New Prison – which could then be used by the prisoners to effect their escape. It was reported that at least four cars were to have been used to convey the escapees to the Swaziland border, and that prominent political leaders were implicated in the plot. The prisoners were transferred to an ultra-maximum security section of the prison, in order to prevent the planned escape.<sup>139</sup>

Assistance by corrupt warders to escapees, seems to have played a role in a number of the escapes which took place during the period under review. For example, during January 2002 seven prisoners escaped from the Ingwavuma Prison, while another seven prisoners escaped from the Eshowe Prison. By 19 January 2002, five of the escapees had been recaptured. Three of the prisoners who had escaped from the Eshowe Prison and who were recaptured, alleged that a prison warder had assisted in their escape. They alleged that they had paid the prison warder R2000 to supply them with an angle grinder, which they then used to cut the bars of their cell. The warder was arrested, charged – and appeared in court. A total of five warders were suspended as a result of the incident. The Correctional Services Commissioner for KwaZulu-Natal, Linda Mti, stated that:

“Our preliminary report on the recent escapes exposed serious deviations from policy and procedures. These manifest themselves in gross negligence, bordering on collaborating with escapees and poor management.”<sup>140</sup>

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<sup>138</sup> *Natal Witness*, 8 September 2001, 3.

<sup>139</sup> *Natal Witness*, 12 September 2001, 4; *Daily News*, 13 September 2001, 4.

<sup>140</sup> *Natal Witness*, 16 January 2002, 3; see also *Natal Witness*, 21 January 2002, 2.

To sum up, although the number of escapes from South African prisons was in decline during the period under review, those escapes that did take place revealed a disturbing pattern of corruption, violence, and the abuse of human rights.

#### **4.3.7 The Spectre of Corruption Continues to Haunt Public Discourse**

It is certainly no exaggeration to state that, during the post-apartheid period, South African public discourse, across the board, has been haunted by the spectre of corruption on the part of various government officials and their private-sector allies.<sup>141</sup> The South African penal system was certainly not spared from allegations of corruption and criminal activity by officials during the post-apartheid period – including the years reviewed in this article.<sup>142</sup> Disturbing allegations of criminal and corrupt practices perpetrated by prison staff surfaced on a number of occasions during the period under review. For example, during February 1999, a group of 11 prisoners were allegedly assaulted by warders in East London's Fort Glamorgan Prison, following an incident in which a prisoner stabbed and wounded a prison warder. The prisoners were allegedly assaulted by warders with batons, a pick-axe handle and a knife – and then thrown into solitary confinement. Injuries to the prisoners required hospital treatment and included broken hands, legs, arms, lacerations to the face, deep gashes to the head, stab wounds on the head, and smashed teeth. A provisional court order for the release of the prisoners from solitary confinement was obtained on 7 August 1999 and confirmed during September 1999. David Theron, the Magistrate who confirmed the final order, held that the detention of the inmates in single cells for six months was unlawful and stated that the atrocities committed by warders were shocking. It was reported that the prisoners had instituted a civil claim against the warders and the Department of Correctional Services for damages, in the amount of R1.2 million.<sup>143</sup>

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<sup>141</sup> While a myriad quotations could be used in support of this point, the following words of respected constitutional law scholar Pierre de Vos seem apposite: "[W]hy did an obviously brilliant, courageous and seemingly deeply principled struggle hero like Jackie Selebi become corrupt? Why are we confronted almost every day by news of crooked cops, Home Affairs officials and tenderpreneurs? Why does it sometimes feel as if we are being engulfed in a tidal wave (or is it a Tsunami) of sleaze and corruption in South Africa?" See Pierre de Vos "On corruption in South Africa" in his "Constitutionally Speaking" blog, dated 5 July 2010, available at: <http://constitutionallyspeaking.co.za/on-corruption-in-south-africa/> (Accessed 8 May 2015.)

<sup>142</sup> For a brief discussion concerning allegations of corruption during the period immediately prior to South Africa's second democratic election, see Peté, SA (2000) 'The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-Up to South Africa's Second Democratic Election *South African Journal of Criminal Justice* 13(1): 1- 56 – Section 7.4 entitled "Corruption" at 23-24.

<sup>143</sup> *City Press*, 19 September 1999, 5.

During August 1999 it was reported that more than 100 complaints had been made to the South African Prisoners Organisation for Human Rights by prisoners who claimed they were being forced to pay prison warders to escort them when they wished to see visitors or were required to appear in court. According to a spokesperson for the South African Prisoners Organisation for Human Rights, Xoliswa Falati: “The prisoners have to plead with relatives to bring them money because they have to pay to survive in prison.”<sup>144</sup> Another spokesperson for the organisation, Phineas Mnambathi, stated that:

“It’s common practice. If you need to move for any reason – whether it is to go and watch soccer on TV or you need medical attention from the internal hospital – you have to pay. You pay for decent meals. Prison warders have turned their jobs into private businesses which offer nothing for free. The system is in tatters ... I visit prisons at least once a week. And a lot of things I hear, this total abuse of power, I experienced for myself, so I know they are not stories.”<sup>145</sup>

According to *The Star*, in a report published at the same time as the article referred to above, a female inmate of a Gauteng prison had contacted the newspaper on a public telephone, and complained that corruption in the prison was commonplace. She told the newspaper that prisoners who were favoured by warders were able to smuggle goods into the prison and could sell them for a profit. According to this informant, the situation was even worse for male prisoners:

“My husband is in another prison, and it’s much worse for men. They have to buy their mattresses and pay for protection if they don’t want to be raped or beaten up.”<sup>146</sup>

*The Star* contacted another prisoner for comment. He was a male prisoner confined at Leeukop Medium C Prison, and he stated that:

“You can get anything you want if you have money. But without it you can do nothing ... You pay for everything here. And how much depends on the person you are dealing with. If, for example, you have a case you want dropped, you can give them money and they will arrange things so that you can organise it. That costs R50 or more, depending on the case ... If you pay

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<sup>144</sup> *Sowetan*, 23 August 1999, 6.

<sup>145</sup> *Pretoria News*, 23 August 1999, 3.

<sup>146</sup> *The Star*, 23 August 1999, 1.

R100 they let you out for visitations when you don't qualify ... We had a shop going and in April they came and took everything. We had R11 644,67 in cash and a lot of stock. They said they would bring it back in September when they will charge 10% profit and give us 5%. But that is not fair because it will become their business, set up with our money.”<sup>147</sup>

A Democratic Party spokesperson, Mr Hendrik Schmidt, stated that it was intolerable to learn that prisoners were being forced to pay warders for basic rights such as transport and extra blankets:

“Correctional Services Minister Ben Skosana should intervene immediately and problem prisons should be targeted in a co-ordinated effort to rid the system of corrupt warders and officials ... If collecting evidence is the main obstacle to bringing these people to book, perhaps Mr Skosana should devise an alternative system of gathering evidence, whereby prisoners can freely come forward to report cases without any threat to their safety.”<sup>148</sup>

The Commissioner of Correctional Services, Khulekani Sitole, responded to the allegations of corruption within his department, by stating as follows: “Lies, lies ... I am running a sound administration and corruption is under control.”<sup>149</sup> In an editorial, *The Star* responded to Sitole's comment, by stating that:

“We doubt very much that it [i.e. corruption] is under control. That, of course, doesn't mean that no attempts are being made to stamp out corruption. But the big question is whether the system is so rotten that it negates the chance of rehabilitation? In other words, Sitole needs to tell us what the odds are that men and women will emerge with greater integrity when they leave his jails.”<sup>150</sup>

Ironically, Khulekani Sitole himself was to fall victim to allegations of corruption made against him. Two researchers at the Centre for the Study of Violence and Reconciliation, Amanda Dissel and Stephen Ellis, commented on Sitole's case, as follows:

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<sup>147</sup> *The Star*, 23 August 1999, 1; *Pretoria News*, 23 August 1999, 3.

<sup>148</sup> *The Citizen*, 24 August 1999, 6.

<sup>149</sup> *The Star*, 24 August 1999, 6.

<sup>150</sup> *The Star*, 26 August 1999, 18.

“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 ...<sup>151</sup>

In defence of the Department of Correctional Services, a spokesperson pointed out that an anti-corruption unit had been formed within the Department during October 1997, and that it had probed 117 cases of alleged corruption in 1998. Since the unit was formed, 11 officials of the Department had been dismissed and 12 officials suspended. However, it seemed that corruption within the penal system was still rife. A spokesperson for the South African Prisoners Organisation for Human Rights, Phineas Mnambathi, claimed that the organisation had received 400 to 500 complaints of corruption since October 1997. Mnambathi stated that most prisoners were afraid of reprisals from warders, if they were branded as a “snitch.”<sup>152</sup> The month after these comments were made, it was reported that the assistant director of Rooigrond Prison near Mafikeng, Linda Phasiwe, had been suspended due to allegations that she had allowed prisoners to visit their homes. Another official at the Rooigrond Prison, Reuben Motsumi, was also suspended for assisting a prisoner to visit his parents in Rustenburg.<sup>153</sup>

The stress of working in an overcrowded and sometimes corrupt environment clearly exacted a toll on prison staff during the period under review. For example, in August 2000, two wardens at the Westville Prison in Durban died after one of the wardens shot his colleague and then turned his gun on himself. This followed the escape of a dangerous prisoner from the same prison a few days earlier. The prisoner, Mr Siphon Masuku, had been sentenced to 30 years’ imprisonment for robbery and kidnapping. These incidents prompted a personal investigation by the Minister of Correctional Services, Mr Ben Skosana.<sup>154</sup> The Minister blamed overcrowding in South African prisons for the emotional and psychological stress suffered by prison officials: “Related emotional and psychological stress has become a constant ailment with some prison officials – resulting in ineffectiveness, despair, violent

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<sup>151</sup> Dissel, A & Ellis, S (2002) Reform and Stasis: Transformation in South African Prisons. Paper for the Centre for the Study of Violence and Reconciliation, first published in *Ambitions réformatrices et inertie du social dans les prisons sud-africaines Critique Internationale* 16.

<sup>152</sup> *The Star*, 24 August 1999, 6.

<sup>153</sup> *City Press*, 26 September 1999, 5.

<sup>154</sup> *The Daily News*, 23 August 2000, 1.

treatment of inmates and, at worst, homicide and suicide.”<sup>155</sup> The following month, the Minister announced that 23 officials had been dismissed during the first six months of 2000, following departmental investigations into escapes, fraud, theft and other offences.<sup>156</sup>

As disturbing as they were, the reports of violence and corruption in South African prisons which appeared during the period under review, were soon to be overshadowed by shocking accounts emerging from evidence presented to the Jali Commission of Enquiry into allegations of corruption in the Correctional Services Department. This national commission of enquiry was set up in September 2001, following the murder of Thutu Bhengu, the Deputy Correctional Services Commissioner for KwaZulu-Natal.<sup>157</sup> Bhengu was gunned down in the study of her home near Pietermaritzburg’s Napierville Prison, while in the process of finalising a report on an internal departmental investigation into allegations of wide-scale bribery and corruption within the Department of Correctional Services in KwaZulu-Natal. Following the murder, the Minister of Correctional Services, Ben Skosana, cancelled the internal departmental investigation in favour of a broader national inquiry. During August 2001, Durban High Court Judge Thabani Jali was appointed to head this enquiry.<sup>158</sup> What emerged from this inquiry falls outside the scope of the present article. From the above it is clear, however, that corruption and criminal activity on the part of South African prison officials, constituted a significant theme within public penal discourse in South Africa during the period under review.

#### **4.3.8 A Continued Reign of Terror by Prison Gangs**

A common theme over many years within South African penal discourse, concerns the activities of the notorious "numbers" gangs within South African prisons.<sup>159</sup> During the period under review, these gangs continued to conduct a reign of terror within the South African penal system. During June 2000, Cape High Court Judge, Dennis Davis, stated that, unless the problem of prison gangs was solved,

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<sup>155</sup> *The Cape Times*, 1 September 2000, 5.

<sup>156</sup> *Die Burger*, 20 September 2000, 7.

<sup>157</sup> The Commission was duly constituted in terms of Proclamation 135/2001, dated 27 September 2001.

<sup>158</sup> *Natal Witness*, 24 August 2001, 2.

<sup>159</sup> See, for example, Peté, SA (2015) *Angels and Demons, Innocents and Penitents: An Analysis of Different ‘Characters’ Within the Penal Discourse of Apartheid South Africa 1980 to 1984 - Part 1 De Jure* 48(1): 55-74 – see Section 3 entitled "Demons and Gangsters - The Explosion of Interest in Prison Gangs"; Peté, SA (1998) *The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election South African Journal of Criminal Justice* 11(1): 51- 83 – see Section 5.2 entitled "Abuse of Human Rights by Prison Gangs" at 80-81; Peté, SA (2000) "The Good, the Bad and the Warehoused": *The Politics of Imprisonment During the Run-Up to South Africa's Second Democratic Election South African Journal of Criminal Justice* 13(1): 1-56 – see Section 10 entitled "Prison Gangs: A Continuing Reign of Terror" at 39- 41.

prisons would continue to produce sufficient criminals to keep crime at a high level. He made these remarks while giving judgment in the case of two prisoners who were convicted of murdering another inmate in the back of a prison truck. The Minister of Correctional Services stated in Parliament that, in addition to other measures, it was the policy of his Department to separate gang leaders from their gangs:

“The introduction of the C-Max unit and the new super maximum prison where gang leaders and members who participate in violent actions can be separated from the rest of the prison population is a further measure in the fight against gangs.”<sup>160</sup>

During the period under review in this article, South African gangs were responsible for acts of almost unbelievable savagery. For example, in September 2000 it was reported that lawyers were preparing to sue the police and the Department of Correctional Services for damages following an indecent assault by gang members on Charles Philander – an awaiting-trial prisoner in Cape Town’s Pollsmoor prison. It was alleged that the assault was so brutal that Philander was likely to be incontinent for life. The assault allegedly began in a prison truck, which was returning to Pollsmoor from the Cape Town Magistrate’s Court. Gang members allegedly requested Philander to help them to smuggle a dagga parcel into the prison. When he refused, they forced the parcel into his rectum. On their return to the prison, Philander was unable to get help from the warders, and was locked in a cell along with 50 other prisoners. He was then overpowered by gang members, who wanted to retrieve the dagga parcel. He was allegedly jumped on and punched in the stomach in an effort to dislodge the parcel. According to Philander, the gang members then tried to give him an enema with a bottle of water, and eventually retrieved the parcel using a bent wire coat hanger and a white toothbrush. Philander claimed that he was assaulted throughout the night but that his constant screams of pain were ignored. The next morning he was transported to hospital, where it was discovered that the extent of his injuries were so severe that he would require reconstructive surgery. According to the *Cape Argus*, the dagga was eventually recovered from his abdominal cavity.<sup>161</sup>

Another example of the brutality of prison gangs during the period under review, concerns two extremely violent murders which took place at St Albans prison on 31 October 2000. Six prisoners

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<sup>160</sup> *Cape Argus*, 26 June 2000, 4.

<sup>161</sup> *Cape Argus*, 19 September 2000, 8.

were put on trial for these murders in February 2002. The victims, Andre Lambert and Gavin Frolick, had been stabbed to death with fragments of a broken toilet bowl. All the prisoners involved, including the deceased, allegedly belonged to either the 26s or 28s prison gangs.<sup>162</sup> A witness in the murder trial – prisoner Mbulelo Noge – gave evidence on how Andre Lambert was killed. According to Noge, one of the accused held Lambert’s arms behind his back, while another accused ripped open Lambert’s stomach from the chest downwards with a shard of porcelain taken from a broken toilet bowl. Lambert’s intestines were then pulled out of the wound.<sup>163</sup>

Fighting between prison gangs was the cause of much of the violence in South African prisons during the period under review. For example, during December 2000, it was reported that a fight involving 52 inmates from opposing gangs had erupted at Leeukop Prison. Members of the 26 and Air Force gangs allegedly attacked each other with sharpened objects and other improvised weapons – resulting in six inmates and a warder being injured.<sup>164</sup> During November the following year, a violent conflict broke out in the St Albans Prison between members of the 28s and 26s prison gangs, as well as prisoners not affiliated to any of the gangs. At least 35 prisoners were injured and a juvenile inmate was killed.<sup>165</sup> The Minister of Correctional Services, Mr Ben Skosana, visited the St Albans prison to take personal stock of the situation, and expressed his regret at the incident.<sup>166</sup> Yet another incident of gang violence was reported in March 2002 – this time in the Brandvlei Prison, Worcester. A suspected gang member and a warder were seriously injured.<sup>167</sup>

Despite the continuing gang violence outlined above, there had been positive developments in certain South African prisons by the time of South Africa's second democratic election. For example, in his excellent book *The Number*, Jonny Steinberg reviews developments at Cape Town’s notorious Pollsmoor Prison between 1995 and 2000. During the early years of South Africa’s democracy – January 1995 to December 1997 – Steinberg notes that there were 336 recorded assaults by warders on inmates, and over 400 recorded assaults on inmates by inmates, making the Pollsmoor Admission Centre “probably the most violent place in Cape Town.”<sup>168</sup> This virtual state of war was brought to an

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<sup>162</sup> *The Herald*, 26 February 2002, 4.

<sup>163</sup> *The Herald*, 1 March 2002, 4.

<sup>164</sup> *Sunday World*, 17 December 2000, 6.

<sup>165</sup> *The Herald*, 21 November 2001, 3.

<sup>166</sup> *The Herald*, 24 November 2001, 6.

<sup>167</sup> *Cape Argus*, 4 March 2002, 2.

<sup>168</sup> Steinberg, J (2004) *The Number: One Man’s Search for Identity in the Cape Underworld and Prison Gangs* Johannesburg: Jonathan Ball at 311.

end following reforms introduced into the prison by a certain Jonny Jansen, who assumed control of the prison during 1997. According to Steinberg, when Jansen took control of the prison:

“The gangs controlled Pollsmoor’s corridors openly and brazenly. His own staff were armed to the teeth and patrolled the prison with their hands clenched round their batons.”<sup>169</sup>

Following Jansen’s reforms, however, the situation improved significantly. Steinberg comments as follows:

“In 1999 there were 11 recorded assaults on inmates by inmates, down from 78 in 1995. Recorded assaults by warders on inmates were down to three. The prison truly was a different place. An outsider who visited the prison regularly between 1997 and 2000 told me: ‘It was extraordinary to see the prison change before my eyes. In 1997, you walked through the corridors with armed guards. The tension was so severe you felt the goose bumps rise on your skin. By 1999, you walked freely through the prison, talking to inmates casually. The food was the same, the overcrowding was the same, but the atmosphere was that of a different planet.’”<sup>170</sup>

Despite the positive developments referred to above, it is probably still fair to state that, during the period under review, the South African penal system was unable to free itself from the fear and violence engendered by prison gangs. The gangs continued to conduct a reign of terror within the prisons – which impacted negatively on the basic human rights of ordinary prisoners. The problem continued to be highlighted within public discourse, as it had been for many decades – but the numbers gangs continued to operate as an entrenched part of the South African penal system.

#### **4.3.9 Conclusion**

South Africa's second democratic election held on 2 June 1999 may be said to have marked the end of the "honeymoon period" which followed the country's transition to democracy in 1994. The mood of many South Africans became more pessimistic as they were forced to reconcile themselves to the fact that the end of apartheid did not mean a quick end to deeply entrenched social and economic problems.

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<sup>169</sup> *Ibid* at page 321.

<sup>170</sup> *Ibid* at page 332.

South Africans were united in their fear and revulsion at what were perceived to be unacceptably high levels of crime in the country. This generally negative mood filtered into the public discourse surrounding imprisonment at this time. What emerges from a close examination of this discourse – gleaned from a large number of reports in a wide range of national and local newspapers, as well as from official sources – does not paint a pretty picture. The period was characterised by the continued abuse of the basic human rights of many of those unfortunate enough to find themselves behind bars in South African prisons at this time. As during the pre-election period, chronic overcrowding within the prisons continued to be the main problem confronting prison authorities. This intractable problem exacerbated a host of evils which beset prisoners in South Africa during the post-election period. Living conditions within many South African prisons were appalling; prison gangs continued to conduct a reign of terror; the HIV/AIDS epidemic within South African prisons escalated alarmingly; the conditions of detention of children were highly satisfactory; and corruption among prison staff continued to impact negatively on the entire penal system. Sadly, for many prisoners in South Africa, the second democratic election did not lead to an improvement in their conditions of detention – but rather to the continued violation of their human rights. Moreover, anyone in South Africa who took the time to read any of the national or local newspapers, must have been aware of this fact. If there is any truth to Fyodor Dostoevsky's famous maxim quoted at the beginning of this article, it seems clear that South African society must be judged harshly for the generally poor treatment of its prisoners during the years following the country's second democratic election.<sup>171</sup>

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<sup>171</sup> "The degree of civilization in a society can be judged by entering its prisons." From Fyodor Dostoevsky (1862) *The House of the Dead* translated by Constance Garnett and quoted in Shapiro, FR (2006) *The Yale Book of Quotations* New Haven: Yale University Press, as reflected in the 2013 IOS Application created and developed by English Channel Inc., Tokyo. (Accessed 16 April 2015.)

## CHAPTER 4.4

### **Between the Devil and the Deep Blue Sea: The Spectre of Crime and Prison Overcrowding in Post-Apartheid South Africa**

Article published in a SAPSE accredited journal:

Peté, SA (2006) Between the Devil and the Deep Blue Sea: The Spectre of Crime and Prison Overcrowding in Post-Apartheid South Africa *Obiter* 27(3): 429- 453.

# **BETWEEN THE DEVIL AND THE DEEP BLUE SEA – THE SPECTRE OF CRIME AND PRISON OVERCROWDING IN POST-APARTHEID SOUTH AFRICA**

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## **SUMMARY**

Chronic overcrowding has plagued the South African penal system since the advent of democracy in 1994. This has resulted in the large-scale gross violation of the basic human rights of large numbers of prisoners. After examining certain historical examples of overcrowding in the prisons of Africa generally, the article focuses on the history of chronic overcrowding in the prisons of South Africa during the post-apartheid period. The hard choices facing the South African people and government in relation to this issue are then examined.

## **1 INTRODUCTION**

More than ten years since the advent of democracy, the ever-present reality of violent crime continues to threaten the hopes and dreams of South Africans, both rich and poor. Dinner table talk, particularly in the homes of South Africa's affluent middle class, is dominated by discussions of crime and corruption, while the media are filled with countless horror stories detailing tragedies caused by criminal violence. South Africans are in no mood to deal gently with the folk devils (to coin Stanley Cohen's term)<sup>1</sup> who threaten the prosperity promised by the reintegration of South Africa into the world economy following the demise of apartheid.

But there is another more muted theme which has emerged in post-apartheid South Africa, which regularly forms the basis for reports and editorials in both the visual and print media. This theme concerns the chronic overcrowding which has plagued the South African penal system since the

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<sup>1</sup> Cohen *Folk Devils and Moral Panics – The Creation of the Mods and the Rockers* (1973).

advent of democracy. After ten years of consistent reporting on the subject in the mass media, as well as many official reports and numerous scholarly articles in academic journals, the vast majority of informed South Africans are well aware of the fact that the majority of the prisons in the country are grossly overcrowded, and have been in this condition for many years. Furthermore they know (or at the very least ought to know) that this gross overcrowding results in the wide scale violation of the basic human rights of large numbers of prisoners.

Prison overcrowding in South Africa has reached such serious proportions that the country as a whole, and the government in particular, faces a stark choice. On the one hand, the government can take the difficult and drastic steps required to deal decisively with the problem of prison overcrowding, and thereby risk a massive political backlash caused by a perception that it is soft on crime. On the other hand, it can continue to tinker with the system without really addressing the problem, knowing full well that, without drastic and decisive steps being taken, chronic overcrowding in South African prisons will continue, as will the violation of the basic human rights of those confined within the prisons. On the one hand are the folk devils responsible for the nightmare threatening South Africa's dream of building a prosperous "rainbow nation". On the other hand is the deep blue sea – allowing the systematic and widespread violation of the basic human rights of prisoners caused by chronic overcrowding to continue unchecked, thereby compromising the founding principles of the "rainbow nation".

The purpose of this article is to examine the problem of prison overcrowding in post-apartheid South Africa, and to discuss the hard choices facing the South African people and government in relation to this issue.

## 2 THE HISTORICAL CONTEXT

Prison overcrowding is not simply a phenomenon which characterises the penal system of post-apartheid South Africa. Indeed, many prisons in Africa were chronically overcrowded from the time they were built, and continue to be so today. It is probably true to say that if there is a single theme which characterises the punishment of imprisonment in the African context, from the time this form of punishment spread across the continent to the present day, it is ongoing chronic overcrowding. One reason for this is the particular way in which prisons in Africa were employed to establish control over indigenous populations. Administrative sentences, which entailed short arbitrary periods of detention, were widely used. Bernault points out that the purpose of administrative imprisonment was to act "as an economic incentive to enforce tax collection, forced labor, or cultivation, and to provide colonial companies with a constant influx of cheap labor".<sup>2</sup> The extensive use of imprisonment as a method of social control is clear from the following:

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<sup>2</sup> Bernault "The Politics of Enclosure in Colonial and Post-Colonial Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 1 12.

"In the Upper Volta in 1932, during the peak of the farming season, the administrators pronounced at least 1,900 monthly disciplinary sentences of imprisonment – an average of one imprisonment for every 140 persons annually ... In Tanganyika, one decade later, the state enforced regulations on soil erosion by imprisoning recalcitrant peasants on a large scale. In Kenya, the thirty prisons ... received approximately 28,000 detainees in 1931 – 36,000 in 1941 and 55,000 in 1951, or one detainee for 146, 136 and 109 Africans, respectively. The highest figures come from the Belgian Congo, where, in the late 1930s, the administration evaluated the number of annual detainees at 10 percent of the male population. In 1954, in the province of Kivu, almost 7 percent of the adult males spent some time in prison."<sup>3</sup>

As a result of such policies, penal systems were constantly and chronically overcrowded. In French West Africa, for example, official inspectors operating in the early 1900s denounced chronic overcrowding in the prisons.<sup>4</sup> This position did not improve with time. During the period 1958 to 1960, for example, Laurant Fourchard describes the general state of affairs within the penal system of Upper Volta as follows:

"Administrative reports (*process-verbal*) regarding prison inspections document the unsanitary conditions and dilapidated state of the prisons at the time of independence. At Fada-N'Gourma (an eastern town of the Upper Volta), 'Conditions of hygiene are extremely bad, the building is totally decrepit. The cells are very poorly ventilated; prisoners sleep on the bare floor at about three per cell on rotting mats. There is no separate area for toilets in the prison; there are just latrines under the open sky in the middle of the tiny courtyard. During the rainy season, the gutters inundate the cells; the timberwork is on the verge of collapsing ...'"<sup>5</sup>

In the British colonies, prisons were often similarly dilapidated and chronically overcrowded. For example, Killingray notes that by 1919 the Owerri prison in southeastern Nigeria, which was designed to accommodate 100 inmates, was forced to accommodate 900 prisoners. According to the reports of prison medical officers, many prisoners confined in this prison fell sick and died due to unsanitary conditions and a shortage of food.<sup>6</sup> In Ghana, overcrowding was a problem from the time of the establishment of the penal system. In 1899 Acting Governor Low described the Accra Prison as follows:

"The present place used as a prison in Accra is in every way unfitted for this purpose. It is an old Fort, formerly used by the Merchants for trade purposes. Within its walls prisoners are crammed into unsuitable rooms, sometimes as many as 15 in one room. There is no accommodation for the various grades of prisoners. Debtors, political prisoners, prisoners awaiting trial, are all huddled into one room at night and penned like sheep during the day within a small concreted yard under a galvanized iron roof ..."

<sup>3</sup> *Ibid.*

<sup>4</sup> In December 1907 the prison at Kindia in Guinea, which consisted of two small rooms measuring 5 by 6 metres, contained twenty-nine prisoners. See Bernault 12.

<sup>5</sup> Fourchard "Between Conservatism and Transgression – Everyday Life in the Prisons of Upper Volta, 1920-1960" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 135 141.

<sup>6</sup> Killingray "Punishment to Fit the Crime? Penal Policy and Practice in British Colonial Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 97 101.

<sup>7</sup> Quoted in Seidman "The Ghana Prison System: An Historical Perspective" in Milner (ed) *African Penal Systems* (1969) 431 440.

By 1949 the overcrowding in Ghanaian prisons had reached crisis proportions, and this situation became worse as time went on. The prison population of Ghana increased from 1 500 before the Second World War to 3 600 by 1951, and the chronic overcrowding within the Ghanaian prison system continued into the post-colonial period.<sup>8</sup>

The prisons of South Africa were similarly overcrowded during the colonial period. The prisons of colonial Natal provide a good example of this continuing phenomenon. From the time of their establishment in 1842, the prisons of the colony were overcrowded. Colonial legislation aimed at the social control of the indigenous population, enforced by the punishment of imprisonment, resulted in large numbers of persons being imprisoned. For example, in 1872 the Durban Gaol was overcrowded to such an extent that only 176 cubic feet of space was available for each prisoner, as opposed to the 900 cubic feet required in terms of official policy.<sup>9</sup> On 5 November 1872 the Durban Gaol Board noted that “in some cases it is to be feared that life has been sacrificed for want of proper accommodation for the sick”.<sup>10</sup> In May 1877 the Lieutenant-Governor of the Colony concluded that the state of accommodation at the Pietermaritzburg Gaol was “wholly inadequate to the demands upon it, the daily number of prisoners being far greater than the prison can properly accommodate, whilst sometimes there is excessive overcrowding”.<sup>11</sup> With the outbreak of the Anglo-Zulu War in 1879 the Pietermaritzburg Gaol became even more overcrowded. In 1880 the Superintendent of the Gaol stated that it was “almost impossible to crowd more prisoners into the cells where the prisoners have not 200 cubic feet each”.<sup>12</sup> Health problems arose as a result of the overcrowding, and the District Surgeon pointed out that serious forms of dysentery and diarrhoea were a frequent occurrence in the Pietermaritzburg Gaol.<sup>13</sup> Eventually, in order to relieve the overcrowding, the prison authorities were ordered to pitch tents for African prisoners. The Resident Magistrate of Pietermaritzburg complied with the order but complained that “it involves crowding and it is impossible to put men under long sentence in tents”.<sup>14</sup>

In 1886, a mere three years after additional accommodation had been constructed at the Durban Gaol, the District Surgeon noted that, in the cells reserved for “Coloured” prisoners: “As many as from 5 to 8 adults are placed

<sup>8</sup> Seidman 448.

<sup>9</sup> This was set out in the *Digest and Summary of Information Respecting Colonial Prisons of 1867* in Chapter XVI 84. The figure of 900 cubic feet of space per prisoner was applicable to prisoners in England and it was generally accepted that even more space was necessary for prisoners in tropical climates such as that of colonial Natal.

<sup>10</sup> Colonial Secretary's Office, Natal 424/2228 Meeting of Durban Gaol Board on 5 November 1872.

<sup>11</sup> Colonial Office, London 179/126 Bulwer to Hicks Beach 9 January 1878: Enclosure Number 1 – Minute of Lieutenant Governor 31 May 1877.

<sup>12</sup> Colonial Secretary's Office, Natal 778/4359 Superintendent Pietermaritzburg Gaol 10 November 1880.

<sup>13</sup> Colonial Secretary's Office, Natal 778/4359 District Surgeon Pietermaritzburg.

<sup>14</sup> Colonial Secretary's Office, Natal 778/4359 Resident Magistrate Pietermaritzburg to Colonial Secretary 17 November 1880.

frequently in a small cell of say 577 feet cubic space.”<sup>15</sup> Despite further additions to the Durban and Pietermaritzburg Gaols in 1889 and 1890 respectively, overcrowding remained a problem. In October 1892 overcrowding in the Durban Gaol was so severe that 50 short-sentenced prisoners were forced to sleep in the corridors at night.<sup>16</sup> In December 1893 the Superintendent of the Durban Gaol advised the government that 73 prisoners were forced to sleep in the corridors at night.<sup>17</sup> In 1903, the Governor of the Durban Gaol stated:

“[T]hough the new block ... has been completed and occupied during the year, the cell accommodation is still insufficient for the requirements, and the Gaol is practically always much overcrowded ... The great majority of cells, each intended for only one convict, are occupied by three, and even then a considerable number of convicts have to be accommodated to sleep in corridors of Blocks.”<sup>18</sup>

Chronic overcrowding in the prisons of Africa continued into the post-colonial period. For example, during the period 1953 to 1964, the prisons of Ghana were overcrowded by between 125 and 164 percent.<sup>19</sup> Seidman notes that: “Complaints about the seriousness of overcrowding permeate the reports since 1949, as they had perennially before that.”<sup>20</sup> Seidman goes on to point out that the average Ghanaian prisoner in the late 1960s was confronted by “conditions of almost animal overcrowding” and states that: “[t]he impact upon the convict admitted to the prisons must be the same as it was in 1876.”<sup>21</sup> Writing in 1972, Tanner points out in relation to the penal systems of Africa as a whole that “overcrowding of prison buildings is widespread” and, referring specifically to prisons in Ghana, states that “it has been officially admitted that many have held double the authorised number”.<sup>22</sup> In relation to the prisons of Kenya at the start of the 21<sup>st</sup> century, Dissel describes conditions as follows:

“Kenya’s prisons, described as ‘death chambers’, are overcrowded and unhygienic. For instance, in Nakuru prison, 450 convicted inmates and 780 remand prisoners were held in 14 cells. Prisoners sleep on dirty and damp cement floors. The communal cells are often poorly ventilated and badly lit, and lack adequate washing facilities. Overflowing buckets in one corner of the cell usually serve as the only toilets. Acute water shortages in some prisons have exacerbated the unsanitary conditions.”<sup>23</sup>

<sup>15</sup> Colonial Secretary’s Office, Natal 1066/684 Report of District Surgeon Durban 15 February 1886.

<sup>16</sup> Colonial Secretary’s Office, Natal 1345/4668 Report in *Natal Witness* of 11 October 1842.

<sup>17</sup> Colonial Secretary’s Office, Natal 1382/5780 Superintendent Durban Gaol 13 December 1883.

<sup>18</sup> Natal Blue Book 1903 Volume II Departmental Reports – Report of Chief Commissioner of Police 9.

<sup>19</sup> Seidman 449.

<sup>20</sup> Seidman 458.

<sup>21</sup> Seidman 451.

<sup>22</sup> Tanner “Penal Practice in Africa – Some Restrictions on the Possibility of Reform” 1972 10 *The Journal of Modern African Studies* 447 453.

<sup>23</sup> *Ibid.*

Conditions in the prisons of Uganda during this period seem similarly bleak, with Dissel reporting as follows:

“Due to overcrowding, facilities were overused. Toilets, often in the form of buckets, were filthy and overflowing. The cells were generally unclean and prisoners complained of lice, bedbugs and fleas. Proper bedding was not available and prisoners had to sleep on the bare floor. Poor conditions in these prisons inform severe health risks and had led to a number of deaths from malnutrition, dehydration, dysentery and pneumonia ...”<sup>24</sup>

Turning to South Africa during the apartheid period, it is no surprise to note that most prisons were chronically overcrowded, due to the fact that the criminal justice system was used to enforce apartheid policies.<sup>25</sup> The report of the Truth and Reconciliation Commission set up after the demise of the apartheid system, notes that pass-law offenders constituted as many as one in four inmates confined in South African prisons during the 1960s and 1970s.<sup>26</sup> The report states that prisoners of all races experienced “overcrowding and harsh conditions” but notes that conditions were “particularly brutal” for black prisoners.<sup>27</sup>

It should be clear from the above that chronic overcrowding is not a problem which is new to the prisons of Africa in general, or South Africa in particular. In fact, it has characterised imprisonment in Africa from the time this form of punishment became widespread on the continent to the present day. What is surprising in the South African context, however, is that the demise of apartheid and the birth of democracy in 1994, followed by the adoption of the final democratic constitution in 1996, has served not to alleviate the problems of overcrowding in South Africa’s prisons, but to exacerbate them.

### **3 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE FIRST DEMOCRATIC ELECTION**

South Africa’s first democratic election in 1994 did not bring with it a reduction in the overall prison population. In fact the opposite was true, and imprisonment in South Africa during the post-election period was characterised by chronic overcrowding which prevailed in prisons throughout

<sup>24</sup> *Ibid.*

<sup>25</sup> Dissel and Ellis note, *eg*, that: “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. 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.” See Dissel and Ellis “Reform and Stasis: Transformation in South African Prisons” Paper for the Centre for the Study of Violence and Reconciliation, first published in “Ambitions réformatrices et inertie du social dans les prisons sud-africaines” July 2002 16 *Critique Internationale*.

<sup>26</sup> Truth and Reconciliation Commission of South Africa Report Vol 4 Chapter 7 “Institutional Hearing: Prisons” 1998 200 par 8.

<sup>27</sup> Truth and Reconciliation Commission of South Africa Report Vol 4 Chapter 7 par 9.

the country.<sup>28</sup> The extent of the problem was pointed out time and again by those responsible for oversight of the correctional system. In April 1995, for example, following an inspection of Cape Town's Pollsmoor prison, the chairman of the Parliamentary Portfolio Committee on Correctional Services, Carl Niehaus, was reported to be concerned that overcrowding in the prison was so extreme that prisoners "could take the government to the constitutional court and would probably win".<sup>29</sup> In July 1995 Niehaus stated in an interview that he had seen "massive overcrowding" at Pollsmoor, Diepkloof in Johannesburg, and at Pretoria Central, while in Butterworth awaiting trial prisoners were "so overcrowded that they cannot all lie down to sleep at the same time".<sup>30</sup> By March 1996 overcrowding in South African prisons had reached levels which were sufficiently disturbing so as to trigger alarming statements from a range of officials:

"Commissioner of Correctional Services, Henk Bruyn, warned that the situation in prisons had 'reached crisis proportions' ... There is cell space available for 95 000 prisoners but the prison population of about 113 000 is expected to grow to 130 000 by the end of the year. Two or three toilets, and one or two showers, are shared between every 60 convicts in urban prisons throughout the country. Correctional Services spokesman Chris Olckers said overcrowding quotas of more than 200 percent had been recorded in some prisons ... African National Congress MP Carl Niehaus said ... 'We are faced with a time bomb which poses serious risk to the public at large. I don't want to sound alarmist, but if the proper steps aren't taken as soon as possible, piecemeal crisis management may be looked at,' he said."<sup>31</sup>

#### **4 OVERCROWDING IN SOUTH AFRICAN PRISONS LEADING UP TO THE SECOND DEMOCRATIC ELECTION**

The period leading up to South Africa's second democratic election on 2 June 1999 saw the problem of overcrowding in the country's prisons becoming progressively worse.<sup>32</sup> For example, by the end of January 1997 there were 93 055 sentenced and 33 864 awaiting trial prisoners in South African jails, which had been designed to accommodate a maximum of 94 352 inmates. This meant that the average occupancy rate was 137%, but some prisons were more overcrowded than others. For example, the occupancy rate of Pollsmoor prison in the Western Cape was 208%, whereas that of Lusikisiki prison in the Eastern Cape was 290%.<sup>33</sup> In February 1997 it was reported that, in Empangeni prison in northern KwaZulu-Natal, more than 400 prisoners were confined in cells designed to

<sup>28</sup> See Peté "The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election" 1998 11 *South African Journal of Criminal Justice* 51 53.

<sup>29</sup> 1995-04-20 *Business Day*.

<sup>30</sup> Quoted in 1995-07-26 *Cape Times* 5.

<sup>31</sup> 1996-03-31 *Weekend Argus* 1; and 1996-03-30 *The Saturday Paper* 6.

<sup>32</sup> For a detailed discussion of the South African penal system during this period see Peté "The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-up to South Africa's Second Democratic Election" 2000 13 *South African Journal of Criminal Justice* 1-56.

<sup>33</sup> 1997-02-23 *The Sunday Independent* 5.

accommodate 246 inmates. Members of the South African Human Rights Commission reported that prisoners were forced to sleep on the floor because of a lack of space for beds.<sup>34</sup> In April 1997, during a parliamentary debate on his budget, the Minister of Correctional Services pointed to the astronomical increase in the prison population, and stated that it was only a matter of time before inmates took the government to court because of inhumane prison conditions.<sup>35</sup> During October 1997 a reporter from *The Star* newspaper visited Leeukop prison and reported as follows:

“None of the cells visited had hot water, few had working showers and most of the toilets did not flush. There was an average of between 30 and 33 prisoners in a cell, toilets and urinals were within a few metres of prisoners’ beds, and double bunk beds were about 20 cm apart. Most of the cells had illegal electric wiring hanging out of neon light fittings in the cells. Prisoner Abe Kele said the shower in his cell had not worked for two years. He said the toilet had to be flushed with a bucket of water; and because it was so close to the beds, the stench bothered them at night.”<sup>36</sup>

During the same month, the Minister of Correctional Services himself admitted that chronic overcrowding had resulted in the majority of South African prisoners being confined in inhumane conditions:

“In the majority of our prisons conditions are inhumane because of overcrowding. We have cells which were built to house 18 inmates and they contain 65, where every spare inch is taken and people spill over to sleep in the toilets because there is absolutely no space ... that is inhumane. It is cruel. Single cells at Pollsmoor were built to house one person, but they have six each. At Durban’s Westville Prison it is overcrowded by 200 per cent. People have no room and absolutely no privacy. This brings other problems like murder and constant sodomy, which stem from overcrowding. Those are conditions which offend the very constitution we are trying to uphold.”<sup>37</sup>

In November 1997 the Minister’s opinion was echoed by the Commissioner for Correctional Services, who told the parliamentary portfolio committee on correctional services that overcrowding in South Africa’s prisons was so bad that it constituted a possible violation of prisoners’ constitutional rights. He told the committee that some cells which had been designed to house 16 prisoners were forced to hold 62, and that often toiletries such as toothbrushes and separate bars of soap could not be provided for all inmates.<sup>38</sup> By 31 December 1997, according to official statistics, South African prisons were overcrowded by a massive 43,3%.<sup>39</sup> In the preface to the Department of Correctional Services Annual Report for 1997, the Commissioner of Correctional Services, Dr K Sitole, clearly acknowledged the problem of overcrowding. He stated that “exploratory investigations” had been initiated, which involved “more unconventional methods of relieving overcrowding of our prisons, such as using prison ships

<sup>34</sup> 1997-02-21 *The Citizen* 13.

<sup>35</sup> 1997-04-23 *The Star* 7.

<sup>36</sup> 1997-10-2 *The Star* 6.

<sup>37</sup> 1997-10-19 *Sunday Tribune* 10.

<sup>38</sup> 1997-11-2 *City Press* 4.

<sup>39</sup> Department of Correctional Services Annual Report for the period 1 January 1997 to 31 December 1997 – Safe Custody of Prisoners 5.

and the conversion of inner city buildings into prisons".<sup>40</sup> The fact that the Department of Correctional Services was even considering these "unconventional methods" indicates that the problem of overcrowding had reached crisis proportions. Early the following year conditions within the admission centre of Pollsmoor Prison were described as follows:

"Shane Ismail, a dentist who is on hunger strike after awaiting trial for five months, said in a telephone interview he was covered in a lice rash. Between 40 and 50 prisoners were crammed into cells which were intended for 20 people, he said. 'The conditions are horrific. This place is condemned and leaking and full of cockroaches and lice. I have a lice rash over my whole body,' he said."<sup>41</sup>

In May 1998 the Minister of Correctional Services again conceded that the human rights of prisoners might be infringed due to overcrowding, and stated that deficient infrastructure and serious overcrowding made it difficult to ensure that all inmates were detained in accordance with the constitution.<sup>42</sup> During the same month, two Human Rights Commissioners visited the Pretoria Prison and found it to be 220% overcrowded. A spokesman for the Human Rights Commission stated as follows:

"It is clear to us from the visit ... that the situation in the prison is totally unsatisfactory and that no prisoner should be held under the type of conditions we observed ... It is highly likely that the criminal justice system will generate more custodial awaiting-trialists in the coming months. This scenario will simply exacerbate an already hopeless situation and the consequences could be catastrophic."<sup>43</sup>

By the middle of 1998 overcrowding in South African prisons had reached such serious proportions that the release of 9 000 prisoners as part of Nelson Mandela's 80<sup>th</sup> birthday celebrations in July of that year had little impact on the problem.<sup>44</sup> In his annual report for that year, the Commissioner of Correctional Services referred explicitly to a "crisis of overcrowding" within South African prisons:

"The biggest single challenge to Correctional Services is the ever-increasing prison population and the reality of overcrowding. Together with our colleagues in the National Crime Prevention Strategy we are exploring a number of creative and pro-active options to relieve the crisis of overcrowding, such as the Integrated Justice System. The pilot project on electronic monitoring has proved to be highly successful and all indications are that it will be extended to other parts of the country."<sup>45</sup>

<sup>40</sup> Preface to the Department of Correctional Services Annual Report for the period 1 January 1997 to 31 December 1997 by the Commissioner of Correctional Services, Dr K Sitole.

<sup>41</sup> 1998-01-02 *Cape Argus* 1.

<sup>42</sup> 1998-03-13 *Cape Argus* 6.

<sup>43</sup> 1998-05-15 *Sowetan* 4.

<sup>44</sup> 1998-08-11 *The Star* 12; and 1998-07-29 *Die Burger* 2.

<sup>45</sup> Preface to the Department of Correctional Services Annual Report for the period 1 January 1998 to 31 December 1998 by the Commissioner of Correctional Services, Dr Sitole.

## 5 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE SECOND DEMOCRATIC ELECTION

The period following South Africa's second democratic election on 2 June 1999 did not bring with it a reduction in the chronic overcrowding being experienced in the prisons of the country. For example, towards the end of 1999 the head of the Boksburg Prison, Modisadife, allegedly told a Sunday newspaper that, due to chronic overcrowding of around 200%, the prison had been operating in "crisis management mode" for the past three years. In a graphic description of the overcrowding, Modisadife told the newspaper that: "It's like opening the gates of hell when more than 4000 inmates – many of them hardened criminals – push and shove their way into the mess hall."<sup>46</sup> The *Sunday Independent* confirmed Modisadife's assessment of the situation, and described the conditions within the cells of the Boksburg Prison as follows:

"Conditions are unhygienic and there is a desperate shortage of beds and blankets. Thin foam mattresses blackened by filth and grime are rolled up to save space during the day. At night, they must suffice for beds."<sup>47</sup>

The newspaper pointed out that the Department of Correctional Services was short of 4 495 staff members nationally, and that the warder-to-inmate ratio in South Africa was 5-to-1, whereas it was only 3-to-1 in Botswana and 1,5-to-1 in Germany and Australia. On 14 December 1999 the Minister of Correctional Services, Skosana, warned at a press conference that South Africa would face a national disaster if the serious problems in the country's prisons were not resolved soon. The Minister pointed to the chronic overcrowding in the prisons, which was then at a level of 159%, and stated that his department could not house many more prisoners. He also pointed to a disturbing 100% increase in the number of offenders serving terms of more than 20 years, and attributed this to the constant "corrosion of the fabric of society". If this trend continued it would force the department to reclassify prisons and inmates, retrain staff, beef up security, and upgrade programmes.<sup>48</sup> During the same month that the Minister of Correctional Services made these comments, the Provincial Commissioner of Correctional Services for the Northern Province, Ramashala, revealed that prisons in his province were 200% overcrowded. This meant that the prisons in the Northern Province were the most overcrowded in South Africa.<sup>49</sup>

There is extensive reference to the consequences of overcrowding in the Department of Correctional Services Annual Report for 1999. For example, in the preface to the report, the Acting Commissioner of Correctional Services, Nxumalo, states as follows:

<sup>46</sup> 1999-12-12 *The Sunday Independent* 6.

<sup>47</sup> *Ibid.*

<sup>48</sup> 1999-12-15 *Pretoria News* 2.

<sup>49</sup> 1999-12-16 *Beeld* 6.

“One of the main obstacles in our endeavour to make educational and training programmes more readily accessible to all prisoners has been severe overcrowding of our prisons. At an average occupation rate of 163% the sheer numbers of the people in prison are placing tremendous pressure on the available facilities and resources - not only in terms of education and training, but also with regard to psychological and social services and most other prison activities. Only once the warder/prisoner ratio is established at levels that are internationally acceptable in terms of correctional practice, together with the increased availability of space in prison, will we really be able to make treatment and developmental programmes available to all prisoners on a sustained basis. Overcrowding of prison, in my opinion, remains the single most important challenge facing the Department. We simply have too many prisoners in our system. Correctional Services is in the unenviable position that it has to take responsibility for the care and safe custody of all prisoners who are referred to prison, yet it has no control over the influx of prisoners. The number of awaiting-trial prisoners in prison has escalated to an all-time high, but what is even more disturbing is the fact that the number of awaiting-trial prisoners, as a percentage of the entire prison population, is unacceptably high at almost 36%. This particular phenomenon is being addressed at various forums within the Criminal Justice Cluster, but to say that the problem is being overcome would be an overstatement. While the building of new prisons and the upgrading of existing prisons are an ongoing process, one can never regard the erection of more prisons as the solution to the problem of overcrowding. The simple truth is that the prison population has to decrease.”<sup>50</sup>

The following year marked the turn of the century, but did not witness improved conditions for those confined in South African prisons, which continued to be characterised by chronic overcrowding. By June 2000 the overcrowding in prisons in the Western Cape had become so serious that the Commissioner of Correctional Services for the province, Korabie, threatened to stop any new admissions to the province's prisons from the end of that month. Furthermore, Pan Africanist Congress Member of Parliament De Lille threatened to apply for an interdict from the Cape High Court to prevent the Department of Justice from referring children to Cape Town's Pollsmoor Prison for petty offences.<sup>51</sup> The newly appointed Commissioner of Correctional Services, Reverend Mbete, pointed out to the Parliamentary Select Committee on Security and Constitutional Affairs that, although the penal system was designed to accommodate a maximum of 100 384 prisoners, the actual prison population at the time was 172 271 prisoners. Of that total, only 108 301 were sentenced, whereas 63 970 were awaiting trial.<sup>52</sup> A member of the South African Human Rights Commission, Kollapen, pointed out at a workshop on overcrowding held at the University of South Africa, that in one of the holding cells in a Pretoria prison, there were more than 60 awaiting-trial prisoners who were forced to share a single toilet. He stated *inter alia* as follows:

“In the event of an outbreak of diarrhoea, some prisoners are forced to relieve themselves on a piece of paper then throw it out of the window ... [I]f we allow

<sup>50</sup> Preface to the Department of Correctional Services Annual Report for the period 1 January 1999 to 31 December 1999 by Acting Commissioner of Correctional Services, Nxumalo.

<sup>51</sup> The juvenile section of Pollsmoor Prison was 180% overcrowded and the admissions centre 206% overcrowded at the time. See 2000-06-06 *Cape Argus* 6.

<sup>52</sup> 2000-06-08 *Sowetan* 2.

this problem to continue, it will create a scenario where a breach of constitutional obligation is regarded as acceptable.<sup>53</sup>

During July 2000 the Minister of Correctional Services, Skosana, visited Cape Town's Pollsmoor Prison. He commented on the case of Cupido, an eighteen-year-old awaiting-trial prisoner. Cupido had been granted bail of R100, but had been forced to remain in prison for more than eight months since he could not afford to pay this trifling amount. The *Cape Times* commented that the State had spent R18 480 in keeping Cupido in prison for this period. The newspaper pointed out that he was only one of hundreds of Pollsmoor prisoners arrested for minor offences, who had been forced to remain behind bars since they could not afford to pay bail amounts of less than R500. The longer such petty offenders remained in prison, the greater the risk they would end up as hardened criminals.<sup>54</sup>

The month after the Minister's visit to Pollsmoor Prison, Niehaus, the chairperson of the National Institute for Crime Prevention and Rehabilitation of Offenders, pointed out that South African prisons were 84% overcrowded. He stated that things were getting worse on a daily basis, and that the entire system would collapse within a few years if action were not taken to remedy the situation.<sup>55</sup> During this period the Inspecting Judge of Prisons, Judge Fagan, told a conference on human rights and crime at the University of the Western Cape, that conditions in South African prisons were "ghastly" due to chronic overcrowding. While the sentenced prison population had increased from 93 000 to 110 000 over the previous five years, the number of unsentenced prisoners had increased from 24 000 to 64 000. The Inspecting Judge characterised the lengthy periods many prisoners spent awaiting a trial date as "detention without trial".<sup>56</sup> The Human Rights Commission, in the person of Kollapen, commented on the large numbers of prisoners awaiting trial at this time. In an article which appeared in the *Sowetan*, Kollapen pointed out that whereas the sentenced prison population had grown by 15% during the preceding five years, the number of unsentenced prisoners in South African prisons had increased by a phenomenal 163%.<sup>57</sup> This had resulted in chronic overcrowding, which in turn meant that the physical conditions in prisons were such that they were not consistent with prisoners' constitutionally guaranteed right to dignity. The problem, Kollapen pointed out, was that because of the high levels of crime and violence in the country, the South African public was in no mood to listen to arguments in favour of prisoners' rights. This meant that the issue of prison overcrowding was not one which lent itself "to reasonable and unemotional public debate."<sup>58</sup>

<sup>53</sup> 2000-06-28 *Pretoria News* 4.

<sup>54</sup> 2000-07-06 *The Cape Times* 3.

<sup>55</sup> 2000-08-02 *Beeld* 2.

<sup>56</sup> 2000-08-04 to 2000-08-10 *Mail and Guardian* 14.

<sup>57</sup> In par 8.2 of his annual report for the year 2000, the Inspecting Judge of Prisons stated that the number of awaiting trial prisoners had almost tripled during the preceding five years, from 24 265 in January 1995 to 63 964 in April 2000, which amounted to an increase of 164%.

<sup>58</sup> 2000-08-10 *Sowetan* 12.

On 6 September 2000 the Cabinet endorsed a decision to release those awaiting-trial prisoners who had been granted bail of between R50 and R1 000, but were still in prison. It was expected that approximately 11 000 prisoners would qualify for release.<sup>59</sup> In addition to these 11 000 awaiting-trial prisoners, it was also announced that 7 000 convicted prisoners were to be released on parole nine months early.<sup>60</sup> As was to be expected, the reaction of many members of the South African public to the release of large numbers of offenders, was hostile to say the least. The public mood was not improved by the fact that the release of the awaiting-trial prisoners did not go as smoothly as planned. Approximately 160 “dangerous” prisoners, who had been charged with offences such as murder and hijacking, and who were not entitled to release in terms of the Cabinet decision, were freed together with the other awaiting-trial prisoners being released. Two Dundee prisoners who were mistakenly released in this way were re-arrested 24 hours later after allegedly hijacking a vehicle. On 19 September 2000 the Minister of Correctional Services stated that of the approximately 160 dangerous prisoners released in error, only 19 were still at large.<sup>61</sup>

The releases referred to above did not solve the problem of chronic overcrowding. During November 2000 the Minister of Correctional Services admitted that overcrowding resulted in offenders being confined in “appalling conditions”. He admitted further that correctional services staff were subjected to tremendous stress which could cause stress-related acts of violence, affecting the lives of officials, their families, and colleagues. According to the Minister, the situation gave him “sleepless nights”.<sup>62</sup> Not surprisingly, the problem of chronic overcrowding came increasingly under the spotlight of South Africa’s newly appointed Inspecting Judge of Prisons. In the introduction to his very first annual report, the inspecting judge stated as follows:

“In executing its statutory mandate of monitoring the conditions in which prisoners are held, this office found that prisoners in certain prisons were being kept under the most awful conditions. The cause was overcrowding. Our 236 prisons were designed to accommodate 101 000 prisoners. In April 2000 they were holding 172 000 prisoners, of whom 64 000 were awaiting trial. The Department of Correctional Services was trying to cope as best it could but the crisis required drastic action. The Cabinet came to the relief by authorizing the release of some 8451 awaiting-trial prisoners who could not afford to pay their bail amounts.”<sup>63</sup>

The inspecting judge further pointed out the impact of chronic overcrowding on the basic human rights of South African prisoners:

“Our prisons are severely overcrowded. Reports from Independent Prison Visitors described the awful treatment that some prisoners had to endure due to overcrowded prisons. Visits to prisons bore this out. Built to accommodate

<sup>59</sup> 2000-09-07 *Sowetan* 2.

<sup>60</sup> 2000-09-09 *Independent on Saturday* 1.

<sup>61</sup> 2000-09-20 *Die Burger* 7; and 2000-09-20 *Cape Argus* 5.

<sup>62</sup> 2000-11-06 *Daily News* 2.

<sup>63</sup> Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

100 668 prisoners, the prisons housed 172 271 prisoners in April, which meant that approximately 72 000 prisoners were kept in prisons without the necessary infrastructure such as toilets, showers, beds, etc. being available to them. This was worsened by the uneven distribution of prisoners resulting from the need to separate different genders and categories. Whilst some prisons had an occupancy rate of 100%, many were over 200% with one reaching an astonishing 393%. There was gross overcrowding in numerous prisons, which led to detention under horrendous conditions, especially for awaiting-trial prisoners.<sup>64</sup>

Referring to awaiting trial prisoners, the inspecting judge stated that: "The list of infringements of prisoners' basic human rights caused by overcrowding was endless."<sup>65</sup> He noted that the judicial inspectorate had recommended the urgent release of awaiting-trial prisoners for a number of reasons. Firstly, these prisoners were being detained under inhumane conditions and in flagrant disregard of the Bill of Rights, the Correctional Services Act of 1998 and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Secondly, the spread of disease had to be curtailed while still manageable. Thirdly, enormous stress was being placed upon the personnel of the Department of Correctional Services in the prisons. Fourthly, the state could not afford the burden of paying for the accommodation of so many prisoners.<sup>66</sup>

The following year did not witness any significant improvement in the problem of chronic overcrowding. For example, during October 2001 the implications for general health of the chronic overcrowding within South Africa's prisons was drawn to the attention of the Parliamentary Portfolio Committee on Correctional Services by one Dr Craven, an independent medical doctor who had been working in the maximum security section of Pollsmoor prison for 13 years. He told the committee that the chronic overcrowding and lack of amenities in the prison gave rise to serious health problems such as dysentery, meningitis, and tuberculosis. Sooner or later these health problems would find their way from the prison to the outside world and would impact upon the people of the Western Cape.<sup>67</sup>

In his foreword to the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, the Minister of Correctional Services, Skosana, referred to overcrowding as the "major challenge" facing the Department. Introducing the report, the Commissioner of Correctional Services, Mti listed severe overcrowding in South African prisons as one of three major obstacles faced by the Department of Correctional Services. He stated explicitly that "the extent of overcrowding in the prisons ... violates the human rights of inmates, undermines secure incarceration and undermines

<sup>64</sup> Par 8.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

<sup>65</sup> Par 8.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

<sup>66</sup> Par 8.5 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

<sup>67</sup> 2001-10-03 *Die Burger* 11.

our efforts to create a rehabilitation friendly environment ...”<sup>68</sup> Mti went on to acknowledge that:

“The severe overcrowding of prisons, as illustrated by the statistics provided ... in Part 3 of this report, continued to be of major concern to the Department. Overcrowding not only results in violation of the human rights of offenders, but also in the over-extension of staff and the creation of conditions that undermine rehabilitation. The period under review reflected that a major cause of overcrowding is the fact that the Department currently has to accommodate awaiting-trial and pre-sentence prisoners (prisoners awaiting sentence), which figure stood at 55 500 at the end of March 2002.”

On a slightly more positive note, the Inspecting Judge of Prisons pointed out at the start of his annual report for this period that, for the first time in many years, the total prison population had remained stable, while more prison space had become available. This did not mean, however, that the problem of overcrowding had been solved, and the inspecting judge stated that: “Overcrowding caused by the excessive numbers of awaiting-trial prisoners remains a major problem.”<sup>69</sup> Later in his report he stated that: “Overcrowding in our prisons continues to seriously hamper the efforts of the Department of Correctional Services to give effect to its statutory responsibility, namely to detain all prisoners under humane conditions.”<sup>70</sup> As to the impact of chronic overcrowding on the human rights of South African prisoners, the inspecting judge stated that: “Overcrowding leads to major problems including restricted living space, poor conditions of sanitation and personal hygiene, spread of disease, little outdoor exercise, unsatisfactory food, inadequate health care, more tension and violence.”<sup>71</sup> He explained the consequences for the basic health of prisoners as follows:

“Reports from Judges, Medical Practitioners who work in prisons and IPV’s indicate considerable discrepancy in the standards of health care from prison to prison. While prisons with manageable numbers of prisoners are coping, those with severe overcrowding and inadequate sanitary and ablution facilities have to do battle with infestations of fleas, lice and scabies and the spread of contagious diseases such as TB and HIV/AIDS. Overcrowding remains the root cause of the health problems and, as pointed out earlier, the root cause of the overcrowding in turn is the totally unacceptable number of awaiting-trial prisoners.”<sup>72</sup>

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<sup>68</sup> Introduction to the Department of Correctional Services Annual Report for the Period 1 April 2001 to 31 March 2002, by Mti.

<sup>69</sup> Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

<sup>70</sup> Par 5 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

<sup>71</sup> Par 7.1.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

<sup>72</sup> Par 7.3.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

## 6 OVERCROWDING IN SOUTH AFRICAN PRISONS LEADING UP TO THE THIRD DEMOCRATIC ELECTION

The years leading up to South Africa's third democratic election in 2004 were marked by continued chronic overcrowding within the country's prisons. For example, on 31 March 2002, the Department of Correctional Services had cell accommodation for 109 106 prisoners as opposed to a total prison population of 178 998 prisoners, which meant an average national level of overcrowding of 64%.<sup>73</sup> In April 2002 it was reported that the Pietermaritzburg New Prison, which was designed to accommodate 1 185 prisoners, was holding 2 984 inmates. Four communal cells designed to hold 19 prisoners each, were each packed with between 40 and 50 prisoners.<sup>74</sup>

In his report for the period 1 April 2002 to 31 March 2003, the Minister of Correctional Services acknowledged both the problem as well as the negative consequences of severe overcrowding within the prisons of South Africa by stating as follows:

"Overcrowding in our prisons remains one of the greatest challenges we continue to confront. It impacts negatively on staff morale, on the services rendered, on the health of offenders, on effective safe custody and on the ability of the Department to allocate resources effectively for the rehabilitation of offenders. Moreover, it results in high maintenance costs of prison facilities."<sup>75</sup>

As at 31 March 2003, South African prisons were overcrowded by 71%. This meant that they were forced to house 78 507 prisoners more than the number they had been designed to accommodate.<sup>76</sup> The Inspecting Judge of Prisons confirmed that overcrowding in South Africa's prisons was worse than it had ever been and provided the following bleak assessment of the situation:

"The problems that we have in our prisons can virtually all be attributed to overcrowding. We now have the highest number of prisoners we have ever had in our country and it is placing an unbearable burden on the Department of Correctional Services. As will be argued later, we do not need and cannot afford more prisons. We need less prisoners. That lies primarily in the hands of the police, the prosecutors and the magistrates."<sup>77</sup>

The overcrowding in certain prisons during this period was so bad that the heads of certain prisons were forced to resort to section 63A of the Criminal Procedure Act 51 of 1977. In terms of this provision, a head of a prison, who

<sup>73</sup> Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002 Part 3.1 "The Prison Population."

<sup>74</sup> 2002-04-23 *Daily News* 3.

<sup>75</sup> Foreword to the Department of Correctional Services Annual Report for the period 1 April 2002 to 31 March 2003, by the Minister of Correctional Services.

<sup>76</sup> The Department of Correctional Services Annual Report for the period 1 April 2002 to 31 March 2003, Programme 2 Incarceration 31.

<sup>77</sup> Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

is satisfied that overcrowding in his prison is constituting a material and imminent threat to the human dignity, physical health or safety of awaiting-trial prisoners who are unable to pay their bail amounts, is able to apply to court for their release under various conditions. According to the inspecting judge, around 176 prisoners were released in Cape Town following applications in terms of this provision, while similar applications in Johannesburg and Pretoria led to further releases.<sup>78</sup> In a telling passage, the judge pointed out in his report that, among other reasons, the introduction of the section had not been successful in reducing overcrowding since:

“[I]t is invidious for heads of prison to state on oath that the overcrowding in his/her prison ‘constitutes a material and imminent threat to the human dignity, physical health or safety’ of the accused. An affidavit to that effect could reflect on the head of prison and might be used in damages claims by prisoners.”<sup>79</sup>

The inspecting judge concluded his report for this period by pointing, as he had done so often in the past, to the crisis which existed in South African prisons due to chronic overcrowding. He confirmed that 187 615 prisoners were confined in South African prisons on 20 January 2003, making this “the highest number we have ever had”.<sup>80</sup>

The following year witnessed a continuation of the *status quo*, with the problem of chronic overcrowding within the South African penal system appearing as intractable as ever. For example, in March 2003 *Business Day* reported that a recent study by the South African Law Society had found prison conditions to be so bad that there were grounds for a legal challenge in the Constitutional Court. With the exception of prisons in Nelspruit and East London, the report found that conditions in South African prisons were worse than they had been when evaluated by the Law Society in 2001 and concluded that: “Government needs to be taken to task through its ministers via the Constitutional Court because what prisoners, particularly unsentenced and awaiting-trial prisoners, are experiencing comes well within the constitutional proscription of not to be treated in a cruel, inhuman or degrading way.”<sup>81</sup>

In his annual report for the period 1 April 2003 to 31 March 2004, the Minister of Correctional Services referred to the continuing efforts of the Department “to reduce the ever-increasing challenge of overcrowding which, like corruption, constitutes a serious stumbling block to successful realisation of the objective of rehabilitation”.<sup>82</sup> In his report for this period, the inspecting judge of prisons pointed out, yet again, that the majority of prisons in South Africa were chronically overcrowded:

<sup>78</sup> Par 10.5 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

<sup>79</sup> *Ibid.*

<sup>80</sup> Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

<sup>81</sup> 2003-03-28 *Business Day*.

<sup>82</sup> Foreword to the Department of Correctional Services Annual Report for the period 1 April 2003 to 31 March 2004, by Minister of Correctional Services, Balfour.

“Our prisons are bursting at the seams. With space for 114 787 prisoners, 187 640 are crammed in. The result is at best problems with food, health, exercise, stress levels and rehabilitation. At worst prisoners are dehumanised, develop a grudge against authority and turn prisons into universities of crime ... Far too many people are in prison. 4 out of every 1000 South Africans are prisoners. We are one of the worst countries in the world in our use of imprisonment. Two thirds of the world's countries have imprisonment rates of less than 1½ per 1000. The cost of keeping so many prisoners is enormous with a total cost to the State of about R20m per day. We have to drastically reduce the number of prisoners so that meaningful rehabilitation programmes can be implemented. For a start there is the appalling number of awaiting-trial prisoners – 53 876 out of our total of 187 640 prisoners. These prisoners remain in prison waiting to be tried for an average of about 3 months, some for years. About 60% of them will not be convicted. Until their court appearance they just lie or sit all day in overcrowded cells without any instruction that could improve them. Unnecessary arrests by the police, unaffordable bail and delays in completing cases are the main causes. As regards the sentenced prisoners, use of alternatives to incarceration such as correctional supervision should be encouraged.”<sup>83</sup>

Later in his report, the inspecting judge pointed to the devastating consequences of this chronic overcrowding for the basic human rights of prisoners, describing the suffering of South African prisoners in the following moving terms:

“Virtually every prison had to cope with overcrowding which led to a litany of problems including gangsterism, contagious diseases, emotional stress of prisoners and staff causing low morale, inadequate ablution facilities, rehabilitation and educational courses hampered by the overcrowding, prisoners being kept in cells for many hours due to lack of staff to guard them when out of the cells. In April 2003 cells that were designed for 38 prisoners in Johannesburg Medium A Prison were crammed with 101 awaiting-trial juveniles, with a single toilet that at 10 am was not flushing because the water tank had run dry. There was also no water to drink at that hour.”<sup>84</sup>

The inspecting judge pointed out that chronic overcrowding impacted very negatively on the health of prisoners. Not only was it conducive to the spread of disease, but there was a shortage of doctors, nurses and medicines due to the huge number of prisoners who had to be dealt with.<sup>85</sup> Finally, the inspecting judge unequivocally linked the scourge of overcrowding to a violation of the constitutional right of South African prisoners to be detained in conditions consistent with human dignity:

“Our Bill of Rights guarantees to prisoners 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’. (Act 108 of 1996 s35 (2)(e)). Such right is continuously being infringed in our prisons. Blame does not attach to the Correctional Officials. It is due to the awful conditions created by overcrowding

<sup>83</sup> Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

<sup>84</sup> Par 14 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

<sup>85</sup> Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

and the Correctional Officials have no say in how many prisoners are sent to their prisons by the courts.”<sup>86</sup>

It is difficult to imagine a more telling indictment of the South African penal system, almost ten years after the advent of democracy in 1994.

## **7 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE THIRD DEMOCRATIC ELECTION**

The period following South Africa’s third democratic election in 2004 did not witness a significant reduction in the chronic overcrowding which had plagued the South African penal system during the first decade of the country’s democracy. In the introduction to his report for the period 1 April 2004 to 31 March 2005, the inspecting judge referred to the conditions in some of South Africa’s overcrowded prisons as “awful” and pointed out that although there had been a steady decline in the number of awaiting-trial prisoners, this was unfortunately matched by an increase in the number of sentenced prisoners.<sup>87</sup> Later in his report, the inspecting judge noted that as at 31 January 2005, there were 187 446 prisoners in South African prisons, made up of 52 326 awaiting-trial prisoners and 135 120 sentenced prisoners.<sup>88</sup> He maintained that there were at least 30 000 too many awaiting-trial prisoners, and 35 000 too many sentenced prisoners, in South African prisons.<sup>89</sup> He also listed the ten most overcrowded prisons in South Africa as at 31 January 2005, with overcrowding rates of between 268% and an incredible 383%.<sup>90</sup> Commenting on the excessive numbers of children confined in South Africa’s prisons,<sup>91</sup> the inspecting judge stated that: “Children should not be in prison at all save in exceptional circumstances.”<sup>92</sup> In order to illustrate the consequences of chronic overcrowding within the majority of South Africa’s prisons, the inspecting judge made reference to a series of pronouncements by reputable persons and institutions on conditions within the prisons. These pronouncements indicate clearly the extent to which the basic human rights of South African prisoners are violated as a result of continued chronic overcrowding:

<sup>86</sup> Par 15 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

<sup>87</sup> Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>88</sup> Par 7.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>89</sup> Par 7.3 and 7.4 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>90</sup> Par 6.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>91</sup> According to the inspecting judge, there were 3 284 children under the age of 18 years in prison, with 12 being younger than 14 years. A total of 1 775 of these children were awaiting trial, while 1 509 were serving sentences. See Par 7.6 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>92</sup> Par 7.6 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

“Most graphic were the words of Judge Bertelsmann when he and Judge Makobe refused to send Mrs Winnie Madikizela-Mandela to prison (11 February 2005):

‘During September 2004, our prisons that were built to house 113 825 prisoners, had 186 546 inmates, which meant that they were overcrowded by more than 63%. Most of our prisons are therefore forced to house prisoners in conditions which are indubitably in conflict with the aspirational values of the Constitution. In most prisons, inmates are crammed into cells designed many years ago for virtually half their number. Beds are placed bunk-style on top of one another, with only a few inches separating them. Prisoners are locked up for 23 hours per day, with sanitary facilities which are by definition overburdened and consequently in a regular state of disrepair. The same holds good for the warm water supply, electricity and other creature comforts.

It is no exaggeration to say that, if an SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell, the SPCA would be prosecuted for cruelty to animals. The crisis in our prisons has huge constitutional implications for the whole criminal justice system, and urgent steps need to be taken to address our entire sentencing and prison regimes.’

Judge Bozalek in a report after a prison visit on 13 May 2004 wrote:

‘[T]hey (the cells) are grossly overcrowded ... the facilities are outdated and unhygienic. There is no mess hall where the prisoners can eat and the toilets which they use are inside the cells and stand open. As a result the prisoners eat, sleep and perform their basic bodily functions in small overcrowded cells. Furthermore it appears that apart from their hour-long exercises each day conducted in the concrete courtyard and when the prisoners attend a parade or fetch their food to be brought back to their cells, they spend the entire day locked in their cells.’

The 2004 Prison Report of the Law Society of South Africa, published in March 2005, in the Executive Summary stated:

‘During the 2004 inspection visits, it was noted that the situation in the prisons continued to deteriorate further, with overcrowding again rearing its ugly head. A whole new paradigm shift is urgently needed to address the situation in our correctional facilities’ and “the growing problems of overcrowding in our correctional facilities, and the subsequent problems caused by this overcrowding.’

The boredom suffered by prisoners who were locked in their cells for 23 hours of the day in some prisons, was commented on, for example –

‘[I]t was found that the conditions in the juvenile section were appalling. There were 55 juveniles in a cell with maximum capacity of 28, and they were unable to move around the cell. They were sitting on the beds (both top and bottom bunks) and just stared at the walls. They also had to share bunks when sleeping as the cell could not accommodate enough beds.’

Dr Jonny Steinberg, the author of the book ‘The Number’ dealing with prison gangs, in January 2005 produced an insightful report for the Centre for the Study of Violence and Reconciliation on ‘Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa’. In the concluding paragraph, he wrote:

‘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 ...’<sup>93</sup>

<sup>93</sup> Par 6.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

## 8 SUGGESTIONS FOR REDUCING SOUTH AFRICA'S TOTAL PRISON POPULATION

Year after year, the Inspecting Judge of Prisons pointed to the fact that South Africa's total prison population was in need of drastic reduction. For example, in his report for the period 1 April 2002 to 31 March 2003, the inspecting judge stated that:

"We are already incarcerating far too many people. 4 out of every 1000 South Africans are in prison. We are among the countries with the highest prisoner numbers per population in the world. 65% of all countries have incarceration rates of 1.5 or less people per 1 000. In Africa the median rate for Western and Central African countries is only 0.6 per 1 000.

We are the highest in Africa, (Rwanda perhaps excepted) with about 10 times as many per 1000 as Nigeria, also 3 times as many per 1000 as Brazil. We have almost 4 times more per 1000 than the UK and Western European countries."<sup>94</sup>

In his report for the following year, the inspecting judge confirmed that South Africa was one of the worst countries in the world in its use of imprisonment, and pointed to the high cost of imprisoning so many people:

"The cost of incarceration is enormous. During 2002/2003 the cost amounted to R7 115 101 000, that is R19.5-million per day. As pointed out earlier, because of the conditions in our prisons, we are not effectively curbing crime by locking up so many people. On the contrary, we are creating criminals because of the conditions they are subjected to. There is one answer only. We must reduce our prison population drastically. At least from the present 187 640 to say 120 000 (which would be equivalent to 2.6 per 1000 which is still high)."<sup>95</sup>

In his report for the period 1 April 2004 to 31 March 2005, the inspecting judge made it clear that conditions within the majority of South African prisons were "lamentable", and that the cause was overcrowding.<sup>96</sup> The judge stated that the Department of Correctional Services was not to blame for this state of affairs, but that the blame lay "with the operation of the criminal justice system from arrest to sentence and with legislation".<sup>97</sup> Once again, the judge made it clear in his report that South Africa was imprisoning too many people.<sup>98</sup> The impact of chronic overcrowding on prisoners was so grave that the inspecting judge suggested a number of short-term fixes, including the release of awaiting-trial prisoners who were too poor to pay

<sup>94</sup> Par 11.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003. For similar comments in relation to the need to drastically reduce the prison population see: par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000; and par 7.1.1 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

<sup>95</sup> Par 15 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

<sup>96</sup> Par 6.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>97</sup> Par 6.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>98</sup> See Par 8.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

their bail amounts (according to the judge there were 13 880 such prisoners on 31 March 2005); an amnesty (*ie* unconditional release) for certain categories of sentenced prisoners; and the advancement of approved parole dates for sentenced prisoners.<sup>99</sup> As far as long-term solutions were concerned, the judge recommended that the aim should be to reduce the total prison population from 187 000 (52 000 awaiting trial and 135 000 sentenced) to 120 000 (20 000 awaiting trial and 100 000 sentenced).<sup>100</sup> The judge pointed out that, even if the total prison population could be reduced to 120 000, it would still mean that 2.6 out of every 1 000 South Africans would be confined in prison. This would still be bad by world standards, but at least South Africa would “no longer rank among the very worst” countries in the world.<sup>101</sup>

The inspecting judge did not only point to the importance of reducing the South African prison population. He also made practical suggestions as to how this could be achieved. For example, in his report for the period 1 April 2003 to 31 March 2004, the inspecting judge stated as follows in relation to awaiting-trial prisoners:

“Why are there so many prisoners awaiting trial? One of the reasons is unnecessary arrests by the police. More than 16 500 cases would appear to be withdrawn each month after the accused had waited on average 3 months in prison. Arrest should be used only if a notice to attend court would not be effective.

Another reason is the fixing of bail at an unaffordable amount. Once a court has decided that an accused can await his trial outside prison, it should not thwart its own intention by fixing bail at a sum the accused cannot afford ... There are about 13 000 prisoners who cannot afford the bail set and are being held in prison only because of their poverty.

Unnecessary remands of cases is another reason for the delays in concluding cases. In 1995 about 4 300 awaiting-trial prisoners were held for more than 3 months, now there are 21 883 such prisoners.”

The inspecting judge acknowledged in his report that the total number of awaiting-trial prisoners, which had grown drastically in the years just before the turn of the century, had stabilised and even begun to decrease slightly in the years which followed.<sup>102</sup> Unfortunately, the total number of awaiting-trial

<sup>99</sup> Par 9 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>100</sup> Par 10 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>101</sup> Par 10 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>102</sup> In his report for the period 1 April 2004 to 31 March 2005, the inspecting judge acknowledged the steady decline in the total number of awaiting-trial prisoners since the year 2000 as follows: “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 52 326 is most welcome. It must now continue down to the target figure of 20 000 such prisoners.” See par 11.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

prisoners remained at around 50 000, whereas the South African penal system had accommodation for only 20 000 such prisoners. In his report for the following year, the inspecting judge pointed to problems similar to those outlined in the above quotation, as contributing to the unacceptably high number of awaiting-trial prisoners, that is, the large number of unnecessary arrests (accounting for around 18 000 awaiting trial prisoners per month, who were eventually released after appearing in court); the large number of awaiting-trial prisoners who were unable to afford their bail (accounting for around 14 000 awaiting-trial prisoners); and court delays which resulted in lengthy periods awaiting trial (the judge called for “urgent attention” to be paid to speeding up the judicial process).<sup>103</sup>

In relation to sentenced prisoners, the inspecting judge pointed out time and again that the total number of such prisoners was continuing to increase at a pace beyond the capacity of the South African penal system to cope with these prisoners. As South Africans prepared to celebrate the first ten years of their democracy in 2004, the inspecting judge was becoming increasingly concerned with the effect of minimum sentence legislation on the total number of sentenced prisoners in South Africa. This legislation had been introduced in 1997 as an emergency measure, but continued in force in the years which followed, and was contributing to the steady increase in the number of sentenced prisoners. In his report for the period 1 April 2003 to 31 March 2004, the inspecting judge pointed out that the number of sentenced prisoners in South African prisons had “steadily increased from 92 581 in January 1995 to 133 764 on 31 March 2004”. He proposed that greater use be made of diversion and of the many alternatives to incarceration and recommended that the minimum sentencing legislation should be repealed. He suggested that the aim should be to reduce the number of sentenced prisoners to 100 000. In his report for the following year, the inspecting judge focused once again on the problems caused by the minimum sentence legislation, and proposed that this legislation (first introduced as an emergency measure and since extended to 30 April 2005) not be further extended, but allowed to lapse. He pointed out that:

“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 ... Our sentenced prisoner population has increased by 26 813 prisoners since April 2000, despite about 7 000 being released on nine months’ advanced parole in September 2003. The growth rate of about 7 000 per year will inevitably lead to such inhumane conditions that mass releases will be required periodically.”<sup>104</sup>

Unfortunately the suggestions made year after year by the inspecting judge were either not implemented at all or not decisively enough to deal effectively and decisively with the problem of chronic overcrowding in South Africa’s prisons. For the fact remains that, after more than ten years of democratic rule, South African prisons remain chronically overcrowded.

<sup>103</sup> Par 11 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

<sup>104</sup> Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

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## 9 CONCLUSION

More than a decade after the introduction of democracy in 1994, continued chronic overcrowding within the prisons of South Africa and the consequent ongoing violation of the basic human rights of the majority of prisoners in this country, remains a national disgrace. It is a disgrace which is shared not only by those politicians and officials directly involved in correctional services, but by the South African public as a whole. It is clear that this "dirty secret" of South Africa's democracy is well-known to ordinary South Africans, and has been for many years. Shortly after the turn of the century, for example, the Inspecting Judge of Prisons made it clear in his annual report that prison overcrowding and its consequences was receiving wide coverage in the South African media:

"The media played a significant role during the year to create awareness of the overcrowding problem in prisons. The open door policy of the Department of Correctional Services led to extensive TV, radio, newspaper and magazine coverage. 'The Cage of Dreams' produced at Pollsmoor Prison was seen by millions on TV. Overcrowding was discussed in Parliament and referred to by the Minister of Correctional Services in speeches. On International Human Rights Day on 10 December groups of attorneys visited 12 major prisons around the country and witnessed the overcrowding. This office was also involved in TV and radio interviews, addresses to meetings as well as magazine articles."<sup>105</sup>

Despite the public awareness created by wide media coverage, South Africans continue to call for ever harsher measures to be taken against criminals, and turn a blind eye to the appalling conditions of imprisonment in this country. Political pressure has resulted in more arrests and longer sentences, causing the problem of chronic overcrowding to become worse during the first decade of democracy. The problem of chronic overcrowding within the country's prisons, as well as the negative impact of this phenomenon on the basic human rights of the majority of prisoners, has been acknowledged time and again by politicians as well as the highest officials within the Department of Correctional Services. Certain of these politicians and officials have even gone so far as to acknowledge publicly that the overcrowded conditions in South African prisons constitute a breach of the constitutional rights of inmates, leaving the government exposed to the risk of constitutional litigation by prisoners. Year after year, the Inspecting Judge of Prisons has pointed out the absolute necessity of reducing the total number of persons imprisoned in South Africa, as well as the consequences of not doing so. And yet, despite acknowledgement of the severity of the problem by all concerned, the *status quo* is maintained year after year, and South African prisoners continue to be confined in grossly overcrowded conditions.

More than a decade after the advent of democracy, the question confronting all South Africans is whether fear of crime, as real as this fear may be, has caused us to lose our moral compass in relation to the manner

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<sup>105</sup> Par 7.1.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

in which we treat convicted criminals. If our institutions of punishment have become instruments of degradation and even torture, due to continued chronic overcrowding, should we not admit this to ourselves and the world? If we are not prepared to make such an admission, are we not morally bound to demand that drastic and immediate action be taken by the South African government to reduce the prison population, so as to allow punishment, whether its aim be to rehabilitate, to deter, or simply to provide a measure of retribution, to take place in a humane manner? The time has come for South Africans to resolve that we will no longer allow inhumane punishment to take place in our name, even if this means that some criminals receive more lenient punishment than we would like, or escape punishment altogether. It is a hard choice, but it is one that can no longer be avoided.

## **CHAPTER 4.5**

### **When Dreams Become Nightmares: The Public Discourse Surrounding the Jali Commission of Inquiry into Corruption in the South African Penal System and the Revelations Contained in its Final Report of 2005**

Article in preparation for publication:

Peté, SA (2015) When Dreams Become Nightmares: The Public Discourse Surrounding the Jali Commission of Inquiry into Corruption in the South African Penal System and the Revelations Contained in its Final Report of 2005  
*(In prep.)*

# **When Dreams Become Nightmares - The Public Discourse Surrounding the Jali Commission of Inquiry into Corruption in the South African Penal System, and the Revelations Contained in its Final Report of 2005**

Stephen Allister Peté<sup>1</sup>

## **1. Introduction**

In the aftermath of South Africa's first democratic election held on 27 April 1994, the overwhelming majority of South Africans dreamed of a future characterised by tolerance and respect for the basic human rights of each of the country's inhabitants. In the heady days, months and even years following that iconic election – these dreams did not seem to be impossible to achieve. After all, Mandela's "rainbow nation", having secured a peaceful transition from the hated system of apartheid to a constitutional democracy based on human rights, was living proof that dreams could turn into reality. It is difficult to say precisely when those dreams began to fade. In the immediate aftermath of the transition to democracy, most South Africans realised that the country was faced with enormous challenges and that the post-apartheid period would not be a picnic. Not many, however, could have predicted the extent to which corruption would take hold in different areas of public life – and turn the dreams of so many into nightmares.

The purpose of this article is to examine an important turning point in the history of post-apartheid South Africa, during which one such dream – the dream of a penal system based on humane treatment and respect for human rights – officially turned into a nightmare. It will be argued in this article that the release of the final report of the Jali Commission of Inquiry into corruption within the South African penal system, marks the point at which South Africans finally had to accept that their dream had been swept aside by the nightmare of corruption.

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In order to convey an accurate sense of the manner in which ordinary South Africans came to learn of the shocking evidence presented to the Jali Commission, Sections 2 and 3 of this article will examine the public discourse surrounding various hearings held by the Commission – as reflected in a wide variety of reports published in a range of South African newspapers. It is impossible, in a short article like this, to cover the public discourse surrounding all the hearings of the Commission, which, after all, took place over a number of years. It is possible, however, to analyse the manner in which the South African press covered the first few hearings – in order to reveal the extent to which the South African public must have been shocked to learn about the extent of corruption within the penal system.

Section 4 of this article will analyse in detail certain of the shocking revelations contained in the final report of the Commission, which was published in December 2005 – just over a decade after South Africa's first democratic election.<sup>2</sup> Once again, it is impossible to provide a comprehensive overview of the entire report, which runs to five substantial volumes. It is possible, however, to provide a fairly detailed analysis of the first volume of the report, which, although over 900 pages long and thus fairly lengthy, contains many of the main allegations, findings and recommendations of the Commission. The sheer magnitude of the corruption revealed in the first volume of the report leaves no doubt that the dream of a South African penal system free of corruption and based upon respect for human rights, was well and truly in tatters.

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<sup>2</sup> See Report of the Jali Commission of Inquiry, December 2005, Volume 1 at iii.

## **2. Public Discourse Surrounding the Establishment of the Commission and the Flood of Allegations Concerning Corruption at Durban-Westville**

### **2.1 "Murder Most Foul" Leading to the Establishment of the Commission**

The immediate event which gave rise to the establishment of the Jali Commission of Inquiry into alleged incidents of corruption, maladministration, violence and intimidation within the South African penal system, was a brutal murder which took place on 26 June 2001. The victim was a certain Ms Thuthukile Bhengu – who was in charge of Human Resource Management in the KwaZulu-Natal Provincial Office of the Department of Correctional Services. She was gunned down in the study of her home near Pietermaritzburg's Napierville Prison.<sup>3</sup>

Although it was generally known that that violence and intimidation existed within the Department of Correctional Services, the murder of Thuthukile Bhengu was particularly shocking to members of the Department, because, in the words of the final report of the Jali Commission of Inquiry published four and a half years later, "even though ... sinister forces operating in the Department had been violent towards male and female members previously, at no stage had a female member been murdered."<sup>4</sup> The Commission commented further that, "[i]n the eyes of the ordinary law abiding members" of the Department, the murder of Thuthukile Bhengu "gave the impression that the sinister forces within the Department were prepared to go to any extent to achieve their objectives."<sup>5</sup> The Commission noted that, during this period, intimidation and fear were prevalent within the Department, including its Head Office.<sup>6</sup>

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<sup>3</sup> Two senior correctional officers, Mr Mlungisi Dlamini and Mr Lucky Mpungose, were charged with her murder. They were found guilty in June 2002, and were sentenced to life imprisonment. The evidence before court was that Ms Bhengu had refused to consider a fraudulent job application from Mr Mpungose's fiancé. See the Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26, footnote 43.

<sup>4</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26.

<sup>5</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26.

<sup>6</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26.

Following Thuthukile Bhengu's murder, the Minister of Correctional Services, Ben Skhosana, decided to call for a national inquiry. During August 2001, Durban High Court Judge Thabani Jali was appointed to head a national commission of inquiry to investigate and report on incidents of corruption, maladministration, violence or intimidation within the Department of Correctional Services.<sup>7</sup>

On 1 February 2002, it was reported that eight prisons throughout the country were to be investigated by the Commission, with the Durban-Westville and Pietermaritzburg Prisons being at the centre of the inquiries.<sup>8</sup> On 4 February 2002, the Commission started hearings in the Durban Magistrates Court which were due to last for five weeks.<sup>9</sup> Advocate Vas Soni, who was leading evidence for the Commission, stated that three prisons in KwaZulu-Natal were part of the initial enquiry. They were the Durban Westville Prison, the Ncome Prison in northern KwaZulu-Natal, and the Pietermaritzburg Prison. It was at the Ncome Prison that a senior correctional officer, Siphon Khumalo, had been shot dead by a colleague in 1999, and at the Pietermaritzburg Prison that Thuthukile Bhengu had been murdered in 2001. It was also reported that Bhengu's killers were expected to appear in court in June 2002.<sup>10</sup>

## **2.2 Prison Corruption Debate Commences With Numerous Allegations Concerning Durban-Westville Prison: February 2002**

Press reports conveyed the seriousness of the situation confronting South Africa's penal system at this time in its history. For example, in addressing Mr Justice Thabani Jali at the start of the Commission on 4 February 2002, Advocate Vasi Soni was reported to have stated that the prison system needed a complete overhaul – so that the climate of fear, which allowed lawless behaviour to prevail within the system, could be eradicated.

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<sup>7</sup> *Natal Witness* 24 August 2001, 2. The Jali Commission of Inquiry was appointed in terms of Proclamation Number 135 of 2001, published in Government Gazette Number 22718 of 27 September 2001. See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 5.

<sup>8</sup> *Pretoria News* 1 February 2002, 3.

<sup>9</sup> *Daily News* 1 February 2002, 2.

<sup>10</sup> *Star* 5 February 2002, 5.

Referring to prison officials who saw themselves as “untouchable and above the law”, he stated that it was the task of the Commission “not only to touch (the untouchables) but also to bring them down”, and added that the Commission was “the last chance saloon” for the Department of Correctional Services.”<sup>11</sup> He referred to two specific instances of corruption. In one instance, an official allegedly extorted money from a former prisoner. The Department of Correctional Services was supplied with proof in the form of bank slips that payments had been made into the official’s bank account, but the only action taken against him was that he was transferred. In another instance, it was alleged that five officials had submitted fraudulent qualifications. While the cases against three of the officials were still pending, the other two had simply received a written warning. According to Soni:

“This is an invitation to other officials that they can do what they want without any action being taken.”<sup>12</sup>

The KwaZulu-Natal Commissioner of Correctional Services, Mr Patrick Gillingham, was cross-examined by Advocate Soni. He asked a number of questions based on allegations of corruption within the Durban Westville Prison – which had been published in the press. Among these questions were the following: How a convicted drug dealer had received parole without serving a day in prison; how a tycoon had served a two-year sentence while living in a palatial home and in various five-star hotels; why the prison employed people with criminal records; how a prisoner received a job as a warder at Westville Prison; and how the chairman of the Parole Board could say that child abuse was not a serious crime. Furthermore, with regard to a man who was referred to in the press as “Westville’s Mr Untouchable”, Soni asked the following:

“Who is this man who is untouchable at Westville Prison who is so highly placed that nobody can do anything to him? What action has been taken against him for

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<sup>11</sup> *Cape Argus* 5 February 2002, 5.

<sup>12</sup> *Cape Argus* 5 February 2002, 5.

what can only be described as criminal acts? Has he been arrested? Is he suspended?”<sup>13</sup>

The Commissioner said that he would reply to these questions at a later stage.<sup>14</sup>

On 5 February 2002 the manager of the elite Emergency Support Team (EST) at the Westville Prison, Hendrik van Heerden, gave evidence before the Jali Commission, which made for sensational reading in the press. He told the Commission he was certain that prisoners were being taken out of the prison in the boots of cars in order to commit crimes:

“It’s the perfect crime. The prisoner will never be convicted unless he is caught in the act because he is officially in prison when the crime takes place. They are usually back in time for the afternoon count. If you wanted a particular type of criminal for a particular crime, you could easily find that person in prison.”<sup>15</sup>

Van Heerden also alleged that vehicles were admitted to the prison without searches; that guards sold and rented their departmental residences to persons not employed by the Department of Correctional Services; and that guards ran shebeens from their quarters. He claimed that a high level of fear and intimidation existed within the Department of Correctional Services, and told the Commission that his office had been ransacked when it became known that he was due to testify at the Commission. He stated further that:

“I know guards who have information but are afraid for their lives. This commission will fail unless intimidation is addressed and people come forward. It is unfortunate that you can’t protect everyone all the time and ‘accidents’ will happen.”<sup>16</sup>

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<sup>13</sup> *Daily News* 5 February 2002, 3.

<sup>14</sup> *Daily News* 5 February 2002, 3.

<sup>15</sup> *Natal Witness* 6 February 2002, 1.

<sup>16</sup> *Natal Witness* 6 February 2002, 1.

Van Heerden claimed that a particularly high level of intimidation and fear pervaded the Pietermaritzburg New Prison:

“[People there] shoot first and ask questions later. There is a sense of people getting away with things in Pietermaritzburg. Intimidation is so high even the EST is scared of doing its job.”<sup>17</sup>

Van Heerden also informed the Commission that he suspected corruption among investigating officers at the prison. He told the Commission of an incident in which the Emergency Security Team (EST) had confiscated a batch of mandrax tablets from prisoners, which had been marked before being handed to a prison officer for investigation. The marked batch of tablets found its way back into the hands of prisoners, and was again confiscated by the EST during a subsequent raid. Van Heerden told the Commission that the main drug couriers in the prison appeared to be warders who were employed by drug syndicates which operated both inside and outside the prison. Several guards who had been caught with drugs had not been dismissed. The main route for smuggling drugs into the prison appeared to be through the kitchen.<sup>18</sup>

On the same day that Van Heerden gave his evidence, Michael Johannes Buitendag, a prison warder at Westville Prison, also appeared before the Commission. He stated that he had addressed 36 written complaints to the Department of Correctional Services to repair damaged scanners, X-ray machines and metal detectors, but without success. He stated that he had written the report so many times that he could “write it blind-folded”.<sup>19</sup> The equipment was necessary to check prisoners for illicit drugs and weapons. He stated that most drugs entered the Westville Prison through the kitchen. Another witness, Bongani Shadrack Gumede, who was an investigator in the Youth Centre, told the

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<sup>17</sup> *Natal Witness* 6 February 2002, 1.

<sup>18</sup> *Natal Witness* 6 February 2002, 1.

<sup>19</sup> *Daily News* 6 February 2002, 3.

Commission that drugs were a major problem in the prison and that he believed that about 90 members of the prison staff were involved.<sup>20</sup>

The following day, the Commission heard evidence surrounding the remark by the head of the parole board at Westville Prison, Bongani Magubane, that child abuse was not a serious crime like murder or rape. The remark had been made in court in support of a convicted child-molester's parole application. The prosecutor who had opposed the parole application, Vanshree Moodley, told the Commission that she had found Magubane's statement "incredible and disgusting".<sup>21</sup> The Commission recommended that Magubane be relieved of his duties as chairman of the parole board.<sup>22</sup>

On 7 February 2002, the *Natal Witness* commented on the testimony given before the commission, *inter alia*, as follows:

"Some alarming testimony is presently being given to the commission, and those who do so are also to be commended because of the risk they take of possible retribution ... It seems that civilised prison norms have yet to be achieved in this country."<sup>23</sup>

The next day, the Commission was in the news once again. It was reported that the provincial correctional officer for functional services, Innocent Zulu, told the Commission that Pietermaritzburg's New Prison was the most problematic prison in KwaZulu-Natal. The high number of escapes from the prison indicated that there was "definitely something wrong", and that the prison appeared to have a unique culture of intimidation. During the hearing, reference was made to a senior departmental investigator from the Department of Correctional Services Anti-Corruption Unit, who was forced to leave KwaZulu-Natal because his life was threatened. Zulu admitted that there were many people in the Department of Correctional Services with relatives also

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<sup>20</sup> *Daily News* 6 February 2002, 3.

<sup>21</sup> *Sowetan* 7 February 2002, 7.

<sup>22</sup> *Daily News* 7 February 2002, 2.

<sup>23</sup> *Natal Witness* 7 February 2002, 8.

working in the Department – but denied that he was instrumental in securing a job for his wife in the department during 1998.<sup>24</sup>

During February 2002, Police and Prison Civil Rights Union shop steward, Fanu Makhathini, told the commission that corruption, nepotism and favouritism were so rife at Westville Prison that warders were ashamed to wear their uniforms in public. Warders in uniform were pestered by members of the public, who offered them bribes in return for jobs or tenders.<sup>25</sup>

On 11 February 2002, further dramatic details concerning evidence presented to the Commission appeared in the press. It was reported that Claude King, a prisoner confined in Westville Prison, had asked the Commission for police protection before testifying against corrupt warders. He told the Commission that several threats had been made against him since it became known that he was cooperating with the commission. Prisoner Gregory Christensen told the Commission that he had paid two warders to take him home on a number of occasions to visit his wife. One warder had charged him R500 per visit and the other had charged him R100 per visit. Once this became too expensive for Christensen, one of the guards offered him money in return for Christensen's assistance in selling drugs inside the prison. The guard supplied R500 worth of cannabis for Christensen to sell every week. Christensen later began dealing in mandrax on behalf of the guards. He bought mandrax tablets for R20 each from the guards and sold them to other drug dealers inside the prison for R25 each, and directly to drug users for R30 each. He sold up to 50 tablets per week. Eventually he acquired a cell phone, which he would use to purchase drugs from dealers outside the prison. Guards would pick up the drugs and transport them to the prison, in return for R500. Many guards were involved in the scheme. Christensen eventually reported his activities, and those of the corrupt guards, to a senior warder, but by the time he returned to his section, two of the corrupt guards already knew that he had discussed their illegal activities. He told the Commission that he

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<sup>24</sup> *Natal Witness* 9 February 2002, 3.

<sup>25</sup> *Sowetan* 11 February 2002, 4.

had no confidence in the system.<sup>26</sup> Advocate Vas Soni later commented on Christensen's attempt to extricate himself from the drug syndicate as follows:

“The whole prison system crumbled and crushed a vulnerable man who wanted to get out of a vicious circle of drug dealing.”<sup>27</sup>

Press coverage of the dramatic evidence presented to the Commission continued the next day, when it was reported that Judge Jali had agreed to afford Claude King protection by having him removed from KwaZulu-Natal. King gave evidence in support of the evidence given by Gregory Christensen. He stated that he was present when a warder, Mr Karl Viljoen, gave Christensen mandrax tablets. He also told the Commission that warders Devan Maharaj, Devan Brijlall and Leon Pakiri, had given mandrax to Christensen. Christensen's wife Joanne also supported Christensen's testimony. She told the Commission that guards had brought her husband home on about 20 separate occasions for illegal visits. She was able to describe the car driven by one of the guards and told the Commission that her son was conceived during one of the illegal visits.<sup>28</sup>

On 13 February 2002, a prisoner sentenced to life for the murder of two young boys and confined in the Westville Prison, Kistensamy Govender, told the Commission that the kitchen area of the prison was the “nerve-centre for smuggling”. Prisoners and warders came together in this area for food. Prisoners sent to wash the warders cars retrieved drugs and alcohol, wrapped in black plastic bin bags, from the vehicles. These bags were then stored in the kitchen storeroom. Govender alleged that on one occasion he had opened a bucket of peanut butter in the kitchen storeroom and found that it was full of cannabis. He testified further that he had once seen a warder, Nhlanla Radebe, giving a prisoner three plastic bags of cannabis, which were later found in that prisoner's cell. This incident was never investigated. Govender stated that he sold surplus bread to the prisoners, and that for every R100 he made, he gave R80 to Andre Ntombela who ran the

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<sup>26</sup> *Natal Witness* 12 February 2002, 1; see also *Sowetan* 12 February 2002, 4.

<sup>27</sup> *Sowetan* 15 February 2002, 7.

<sup>28</sup> *Natal Witness* 13 February 2002, 2; *Daily News* 13 February 2002, 1.

kitchen.<sup>29</sup> X-rated movies, alcohol and drugs were readily available over the counter at the prison kitchen. A nip of spirits cost R20 and a full bottle cost R100. He told the Commission that he watched X-rated movies at least twice a week.<sup>30</sup> Govender was also reported to have told the Commission that:

“When I was transferred to Medium C, it was like walking into a casino. Warders and prisoners gambled together. Alcohol, drugs and sex were freely available. I became part of that.”<sup>31</sup>

Advocate Vas Soni later praised the prisoners who had testified and called for President Thabo Mbeki to appoint a “crack task team” to investigate charges against the warders who had been implicated in drug dealing. He stated that it would be a complete waste of taxpayers money to leave the criminal investigation to the prison authorities at Westville Prison – who had proved themselves to be hopelessly inefficient.<sup>32</sup> Advocate Soni also called for the dismissal or transfer of the deputy head of Westville Prison, Maduramuthoo Sigamoney – accusing him of ignoring the unlawful conduct of warders and inmates and turning a blind eye to the illegal activities within the prison.<sup>33</sup>

On 15 February 2002, the *Sowetan* commented in an editorial *inter alia* that:

“The shocking testimonies of prisoners, particularly about syndicates operating in cahoots with warders in the prison, are consistent with claims made by other inmates at other institutions in the past. Such evidence is not entirely unexpected but instead confirms long-standing suspicions that some of the country’s prisons have become dens of corruption in the iron grip of a coterie of powerful warders. Many of the prisoners have been known to act as middlemen in the chain of corrupt activities to protect their principles, who invariably are warders.

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<sup>29</sup> *Sowetan* 14 February 2002, 6.

<sup>30</sup> *Daily News* 14 February 2002, 3.

<sup>31</sup> *Sunday Tribune* 17 February 2002, 1.

<sup>32</sup> *Sowetan* 15 February 2002, 7.

<sup>33</sup> *Sunday Tribune* 17 February 2002, 1.

Essentially, as evidence before the commission has underlined, prisoners have becomes nothing more than a captive market for corrupt warders who peddle anything from drugs to blue movies with impunity.”<sup>34</sup>

Extensive press coverage of the evidence presented to the Commission continued in the days which followed. On 18 February 2002, the Westville Prison area manager, Terence Moses Sibiyi, gave evidence before the Commission. He stated that the prison had the highest number of staff assaults on prisoners in KwaZulu-Natal. He told the Commission about one incident, which involved six warders who had assaulted a prisoner by the name of Elvis Ngcobo. The prisoner died and the warders were found guilty of “causing the death” at a disciplinary hearing. Aside from a verbal warning, no other action was taken against the warders. According to Sibiyi:

“The outcome was not a reasonable outcome but policy does not allow us to take the matter further.”<sup>35</sup>

Judge Jali challenged Sibiyi, and asked him whether he needed policy documents to tell him that a murder investigation should be opened in this case. He stated that the matter should have been raised with the provincial or national Correctional Services Commissioner.<sup>36</sup>

Another incident involved a finding by an internal prison tribunal, to the effect that an official had allowed a certain prisoner to spend “more nights out of prison than inside”. The prisoner concerned was a certain Chicago Mtshali, who, according to the *Sowetan*, had “made newspaper headlines recently for his escapades outside prison while still a prisoner”.<sup>37</sup> The official concerned was let off with a mere warning, and although Sibiyi was dissatisfied with this sentence, he did not intervene. It emerged during the hearing that warnings were the standard sentence for crimes committed by warders at Westville

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<sup>34</sup> *Sowetan* 15 February 2002, 12.

<sup>35</sup> *Cape Argus* 19 February 2002, 5.

<sup>36</sup> *Cape Argus* 19 February 2002, 5.

<sup>37</sup> *Sowetan* 20 February 2002, 4.

Prison – no matter how serious these crimes happened to be. Commenting on Sibiya’s apparent inability to take positive action to prevent these abuses, Advocate Soni stated that:

“All these things pass before your eyes but like a spectator, you do nothing to stop them.”<sup>38</sup>

On 20 February 2002, a former leader of the Police and Prisons Civil Rights Union (POPCRU), Philemon Nutli, gave evidence before the Commission. He told the Commission of a plan called “Operation Quiet Storm”, which was designed to place appointees of POPCRU in high managerial positions throughout the penal system in KwaZulu-Natal. The aim was to bring about transformation in the operation of the prisons in the province. The plan was originally formulated in 1997 at a meeting in Pietermaritzburg, when it was decided that conservative white officials and their black “lackeys” should be replaced with “progressive” black officials. It was decided that Khulekani Sithole should become the National Commissioner of Correctional Services, and that Maxwell Ntoni should become the KwaZulu-Natal Commissioner of Correctional Services. It was also decided that Nhlanhla Ngubo should become the head of the inspectorate, while Nhlanhla Ndumo should become the personnel officer. According to Nutli, the implementation of the plan included engaging management in arduous meetings, frustrating management, making demands, taking officials hostage, preventing management from entering their offices, as well as engaging in protest action and go-slows. Nutli told the Commission that the plan had gone horribly wrong – resulting in murders and corruption within the prisons:

“Those who benefited from the plan have betrayed it and entrenched their power, resulting in corruption, nepotism, favouritism, bribery and murders.”<sup>39</sup>

According to Nutli, ordinary officials were terrified of those in power:

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<sup>38</sup> *Sowetan* 20 February 2002, 4.

<sup>39</sup> *Daily News* 21 February 2002, 3.

“People are too afraid and intimidated to challenge their actions, no matter how unlawful, irregular or improper. They rule with an iron fist.”<sup>40</sup>

Immediately after testifying before the commission, Ntuli was put into a police protection programme.<sup>41</sup>

On 21 February 2002, a senior warder at the Westville Prison, Rabson Hlabisa, testified before the Commission. He alleged that on one occasion during December 2001, the head of the Medium C section at Westville Prison, Bongani Ngcobo, was so drunk when reporting for duty that he could hardly stand. He told the Commission that Ngcobo regularly came to work drunk and was frequently absent from work. Ngcobo denied the allegations.<sup>42</sup>

On 26 February 2002, Ntombodumo Delubom, who was employed in the Employee Assistance Programme at Westville Prison, testified before the Commission. She complained that sexism was preventing promotions based on merit within the Correctional Services Department in KwaZulu-Natal. She told the Commission that black men with no training were promoted to powerful positions, but that women were ignored. She pointed out that even the head of the female section at the Westville Prison, was a male. Managers lacked both leadership and management skills, and were unable to inspire their subordinates. Supervisors were rigid and resistant to change. Supervisors were also guilty of favouritism, and there was a tendency for them to cover up disciplinary infractions by their family and friends. This favouritism went hand in hand with racism, with supervisors always favouring employees from their own racial or ethnic group.<sup>43</sup>

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<sup>40</sup> *Daily News* 21 February 2002, 3.

<sup>41</sup> *Daily News* 27 February 2002, 2.

<sup>42</sup> *Sowetan* 22 February 2002, 4.

<sup>43</sup> *Daily News* 27 February 2002, 2.

Further sensational reports appeared in the press on 28 February 2002. It was reported that the panel-beating workshop at the Westville Prison might have been used to “doctor” stolen vehicles. The chief investigator for the commission, Advocate Jerome Brauns SC, described the following startling allegation, which had been made to the Commission:

“We’ve been told that prisoners have been giving ‘shopping lists’ of desirable vehicles and then let out for the night by corrupt officials ... They return with stolen cars, and the chassis and engine numbers are doctored in the prison workshop while the cars are given a re-spray prior to resale. These are just some of the allegations we’ve had, but hard evidence is difficult to come by. We’ve been given the names of some of some of those allegedly involved, but they, of course, deny all knowledge. Intimidation is very high in these circles and people will talk to us in confidence, but are afraid to speak on the record.”<sup>44</sup>

### **2.3 Public Debate Over Corruption at Durban-Westville Prison: March to May 2002**

On 5 March 2002, evidence was led before the commission in relation to the employment of Thembi Zulu, the wife of Innocent Zulu – head of functional services of the Correctional Services Department in KwaZulu-Natal. It was alleged that Innocent Zulu had arranged for the transfer of his wife (who was also a member of the Correctional Services Department) from the Stanger Prison to the Westville Prison. It was irregular for a husband to sign the transfer form of his own wife. Furthermore, according to the evidence Thembi Zulu was not on the short-list of applicants for the Westville position, and there was doubt as to whether she was ever stationed at the Stanger Prison. The only time Thembi Zulu was seen at the Stanger Prison, was on the day of her “transfer” to Westville Prison. On that day, she arrived at the Stanger Prison in a car driven by her husband, and her name appeared on the prison register for that day; her name did not, however, appear on the duty list for that day. On the following day, it was recorded that she was absent on sick leave, after which it was recorded that she had been transferred to

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<sup>44</sup> *Mail and Guardian* 28 February 2002, 33.

Westville Prison.<sup>45</sup> It then emerged that Thembi Zulu had a previous criminal conviction for theft, and was ineligible to hold a post in any government department. However, the provincial head of human resources for the Department of Correctional Services in KwaZulu-Natal, Nhlanhla Ndumo, gave evidence that it was accepted policy to employ persons with minor criminal convictions. He stated that the policy did not exist in written form, but had been agreed upon by prison officials at a seminar.<sup>46</sup> Evidence was then put forward about a “letter of condonation” which had been written on behalf of Thembi Zulu – paving the way for her appointment. Innocent Zulu admitted that he had instructed a prison official, Ronnie Erasmus, to write the letter of condonation, which was then signed by the provincial commissioner of Correctional Services, Thembi Kgosidinsi, who was working in the same office as Innocent Zulu.<sup>47</sup>

A few weeks later, yet more sensational details of evidence presented to the Commission, appeared in the press. On 26 March 2002, it was revealed that the head of security at the Westville Prison, Tyron Baker, was the official who had been nicknamed “Mr. Untouchable” by the press. One of Baker’s alleged victims, Mrs Ray Miller, gave evidence before the Commission. She had spent 13 months in prison awaiting trial on charges of fraud, and alleged that she had paid R6000 into Baker’s bank account – after he had threatened that he could make her life in prison “either comfortable or terrible”.<sup>48</sup> She alleged further that Baker had asked her for R3000, which she had paid, before he would allow her to be taken to hospital outside prison. Baker told the Commission he had a problem testifying, since he was facing criminal charges and a departmental inquiry concerning the matter before the Commission.<sup>49</sup>

On 4 April 2002, prison officer Winston Naidoo gave evidence before the Commission. He alleged that he, together with a colleague by the name of Shabalala, had been bribed to ensure preferential treatment of a woman prisoner, Neethie Naidoo. Neethie Naidoo

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<sup>45</sup> *Sowetan* 6 March 2002, 4.

<sup>46</sup> *Daily News* 8 March 2002, 2.

<sup>47</sup> *Daily News* 7 March 2002, 3.

<sup>48</sup> *Daily News* 27 March 2002, 3.

<sup>49</sup> *Daily News* 27 March 2002, 3.

had been convicted of involvement in a cash-in-transit heist, and had been sentenced to three years correctional supervision. Winston Naidoo alleged that Neethie Naidoo's husband, Yegan Naidoo, was a friend of a certain "Vishnu", who allegedly supplied mandrax tablets to Innocent Zulu – the provincial correctional officer for functional services. Yegan Naidoo offered to pay a substantial bribe to ensure that his wife was given easy clerical work for her correctional supervision. Zulu allegedly urged Winston Naidoo to assist Yegan Naidoo. Winston Naidoo and his colleague Shabalala then arranged for Neethie Naidoo to be placed in an administrative capacity at the 'Wings of Love' institution during her correctional supervision – for which they were paid R19000 in bribes by Yegan Naidoo. Winston gave evidence that he had accepted a further bribe of R2000 from Yegan Naidoo, in order to arrange the transfer of Neethie Naidoo from Wings of Love to the Chatsworth Secondary School.<sup>50</sup>

Perhaps the most sensational details of all appeared in the press just under two weeks later. On 15 April 2002, a senior official and spokesman for the Department of Correctional Services in KwaZulu-Natal, Philemon Ntuli, gave evidence before the Commission. He alleged that managers in key positions in the prisons of the province, including himself, owed their promotions to "Operation Quiet Storm". Ntuli alleged that "Operation Quiet Storm" was a reign of terror orchestrated by Nhlanhla Ndumo, Russel Ngubo and Thami Memela – who were all senior officials in the Department of Correctional Services. At the time of Ntuli's evidence, these officials were in custody facing charges of murder, arising from the death during 1998 of Ernest Nzimande, an Induna at Impendle, as well as charges of the attempted murder of three of Nzimande's companions. Ntuli told the Commission that:

"I never knew that I was employed by a filthy department. I never knew that one was living at the mercy of certain people."<sup>51</sup>

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<sup>50</sup> *Natal Witness* 5 April 2002, 2.

<sup>51</sup> *Natal Witness* 16 April 2002, 1.

Ntuli made further allegations of corruption against senior members of the Department of Correctional Services. He told the Commission that Durban businessman Mari Mutho had been sentenced to three and a half years' imprisonment, but had never spent a day in prison, although he was given a prison number. The matter was investigated by an anti-corruption unit and referred to Raphepheng Mataka, who was head of human resources at the time – but no action was taken and the case was covered up. Ntuli also claimed that Mataka failed to act when anti-corruption members sent from Pretoria hurried back home without completing their work, after being visited in their hotel by persons wearing balaclavas. Ntuli claimed that Mataka was not suitably qualified for the position of deputy commissioner (human resources). Ntuli stated that, according to records, Mataka had a legal qualification – but no relevant experience when he was appointed to this important human resources position. Ntuli told the commission that Mataka had been promoted twice a year, which was against departmental policy. Ntuli also made allegations of nepotism within the Department. He claimed that the wife of the former national commissioner, Khulekani Sithole, was appointed by the Department of Home Affairs in exchange for the appointment of the wife of the former Home Affairs Director-General, Albert Mokoena, by Correctional Services. Ntuli claimed further that the head of the Pietermaritzburg female prison, Zodwa Dandile, was involved in the murder of Thuthu Bhengu, the director of provincial human resources – in that she (Dandile) lured Bhengu to the window of her residence by making a hoax phone call. Bhengu was then shot through the window and killed. Ntuli also alleged that Russel Ngubo and Nhlanhla Ndumo had been either directly or indirectly involved in the murder of Bhengu, as she had been investigating allegations of corruption within the Department. Ntuli alleged further that the former commissioner of correctional services in Mpumalanga province, Mr Zwi Mdletshe, had a falsified matriculation certificate, which he used to gain promotion to the department's head office. He alleged that Mdletshe was promoted to a position in head office although he was not in possession of a diploma or a degree – which was a requirement to occupy such a position. Ntuli alleged further that Lindi Mzimela, the daughter of the former minister of Correctional Services, Dr Siphon Mzimela, had been fraudulently appointed as a warder in the department at the time her father was still in office. He told the Commission that Lindi Mzimela was employed as a

warder without being in possession of the matriculation certificate when she was still 19 years old. According to Ntuli, it was a requirement that prospective warders be at least 21 years old and in possession of a valid matriculation certificate.<sup>52</sup> Mataka denied Ntuli's allegations – stating that Ntuli was bitter because he had failed to secure a position in the POPCRU national leadership and a departmental promotional post.<sup>53</sup>

The widespread publication in the nation's press of the shocking details summarised above must have been deeply worrying to the average South African. In an editorial dated 17 April 2002, the *Natal Witness* commented on the evidence given by Ntuli, *inter alia*, as follows:

“This testimony indicates that individuals (and possibly party-political) groups have been manipulating the affairs of the prison system in this province for their own ends and calls into question the viability of the KwaZulu-Natal prison system ... It reveals that Popcru had developed a long-term strategy of circumventing the principle of accountability to the minister of correctional services and had thereby turned prisons into petty fiefdoms accountable to no one ... The evidence for mismanagement and corruption and for violent criminal behaviour among senior management of the prison is growing, and, because the rot in such institutions starts at the top, it's impossible that this has not affected the running of the prison at every level.”<sup>54</sup>

Approximately a month later, an editorial in the *Natal Witness* summed up the public mood regarding the shocking evidence presented to the Jali Commission, as follows:

“The revelations of crime and corruption emerging from the Jali Commission investigations get worse and worse. Forging matric certificates is small beer compared to the use of prisoners to commit crimes. And some of those thefts and

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<sup>52</sup> *Natal Witness* 18 April 2002, 1; *Daily News* 18 April 2002, 1; *Sowetan* 18 April 2002, 4; *Sunday Times* 21 April 2002, 5; *Sunday Tribune* 21 April 2002, 8.

<sup>53</sup> *Natal Witness* 19 April 2002, 3.

<sup>54</sup> *Natal Witness* 17 April 2002, 8.

robberies (complete with ‘in-jail-at-the-time’ alibis) are in turn eclipsed by the use of prisoners to murder political opponents, or colleagues in the Prisons’ Service who don’t kowtow to the corrupt ruling clique ... The more one learns about the goings-on, the more obvious it seems that there must be a ruthless clean-up. The buck must stop somewhere; someone must take final responsibility for the web of evil that has been spun in the Correctional Services in this province. Someone must see that the guilty are removed and punished, and that decent officials can begin to rebuild a service whose credibility and reputation have been destroyed from within.”<sup>55</sup>

The sensational revelations in the press outlined above, which arose from dramatic evidence presented to the Jali Commission and which pointed to extensive corruption in the Durban-Westville Management Area, must have left few South Africans in any doubt that the reputation of the post-apartheid penal system was in tatters. Unfortunately, more sensational revelations were to follow. The media frenzy which surrounded the evidence detailing massive corruption in the Durban-Westville Management Area, was to be repeated in relation to evidence concerning the other eight Management Areas investigated by the Commission. Since it is beyond the scope of this article to examine in detail all nine Management Areas, only one further Management Area is examined through the lens of the public media – before turning to the final report of the Commission. The Management Area to be covered in the section which follows, is Bloemfontein - in particular the widespread corruption which was revealed at the Grootvlei Prison.

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<sup>55</sup> *Natal Witness* 11 May 2002, 6.

### **3. Seeing is Believing - Public Discourse and Corruption at Bloemfontein's Grootvlei Prison**

#### **3.1 The Making of the Corruption Video by the "Grootvlei Four"**

It is especially useful to examine corruption at Grootvlei through the lens of the South African public media – since the usual media frenzy which accompanied the hearings of the Commission was stoked by a "media event" which had been initiated by the prisoners themselves. This "media event" was the airing of a video which had been filmed in secret inside the prison in question, by four inmates. These inmates – Gayton McKenzie, 28, Moosa Mia, 30, Petrus Sekutoane, 52, and Samuel Grobbelaar, 43 – became known as the "Grootvlei Four". When the video was aired in June 2002 on national television, in the programme *Special Assignment*, South Africans exploded in outrage at what the video revealed of the widespread corruption inside Grootvlei.

The airing of the video gave rise to a wave of reports in all major South African newspapers. When the story broke in the national press, the "Grootvlei Four" told the *Sunday Times* that they had paid R146000 to make the video, which had taken five months to film.<sup>56</sup> Five mini-cameras and microphones were set up in a cell, the kitchen, two tuckshops and the prison petrol station. The camera in the cell was hidden in a box of tea, in order to evade detection in the event of a search by prison officials. McKenzie, who approached two friends for the money to hire the necessary equipment, masterminded the operation. Mia and Sekutoane helped to entrap certain corrupt warders, while Grobbelaar was responsible for smuggling the equipment into the prison, and for editing the video. The scenes were edited together by taping from one video machine to another.

The head of the prison was only informed about the sting operation after the four managed to film Mia, who was serving 30 years for two murders, buying a pistol and one

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<sup>56</sup> *Sunday Times* 23 June 2002, 7. Although Grobbelaar later told *Rapport* that the filming had taken place between 15 March 2002 and 14 May 2002. See *Rapport* 23 June 2002, 4.

bullet from a warder for R6000. Once the video was complete, one copy was handed to the head of the Grootvlei Prison, Tatolo “Champ” Setlai, and another to lawyer, Nico Naude, for safekeeping. According to the four prisoners, their motivation in filming the video was to help break the criminal rings which operated in the prisons; to force reform of the prison system; to show the public how their taxes were being misspent; and to secure a two-year reduction in their sentences – which they believed was given to all prisoners who exposed corruption. McKenzie told the *Sunday Times* that he was fed up with corrupt warders using prisoners as their “slaves” for everything from polishing their shoes to performing sex acts, and said that:

“You get paedophile prison warders who have sex with juvenile prisoners. I call it consensual rape. The Roman Catholic Church has now admitted that some priests molest boys but the Department of Correctional Services is afraid to come out in the open.”<sup>57</sup>

Sekutoane, who was shown on the video sodomising a 21-year-old prisoner, told the *Sunday Times* that he had only done so in order to trap the warder. The young man who was sodomised was allegedly paid R10 and some tobacco for his services – while the warder was paid R20 for arranging for Sekutoane to have sex with the young man. Sekutoane admitted that he had paid juvenile prisoners for sex many times, but claimed that he had stopped doing so some time previously. He stated that he had not wanted to be seen on television having sex with a man:

“I felt very bad about doing it because I’ve got a daughter who’s going to see it.”<sup>58</sup>

Grobbelaar told the *Sunday Times* that two attempts had been made to kill him after the video was shown on television. First he was hit on the back of the head with a sock filled with steel and was knocked unconscious. The attack was allegedly carried out by another

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<sup>57</sup> *Sunday Times* 23 June 2002, 7.

<sup>58</sup> *Sunday Times* 23 June 2002, 7.

prisoner, who had been hired by one of the warders incriminated in the video. While in hospital, a second attempt was allegedly made on his life. He claimed that one of the corrupt warders had provided a prisoner with poison with which to poison him (Grobbelaar) – but that the attempt had been foiled when the prisoner with the poison had been intercepted before he could carry out the plan. Grobbelaar stated that:

“We’ve encouraged so many prisoners to come out with the evidence. I’ve even spoken to some 14-year-olds who have been molested. I’d rather die in [this] prison than be moved.”<sup>59</sup>

In addition to the scenes referred to above – of warders selling a stolen pistol to Mia and a warder bringing a juvenile prisoner to Sekutoane for sex – the video also contained other incriminating scenes, including warders buying frozen chickens which had been stolen from the prison kitchen; warders selling mandrax and dagga to prisoners; and warders fraternising and drinking brandy and Coke with prisoners.<sup>60</sup> It was no wonder that the video was described in the press, as “explosive”.<sup>61</sup>

### **3.2 The Shocked Reaction of the South African Press and Others**

The South African press had a field day with the revelations – as well as the apparent failure of the Department of Correctional Services to deal promptly and decisively with the corrupt warders. Under the banner headline “Caught red-handed, still at large”, the *Star* posed the following question in bold and enlarged type on its page one:

“Prison warders gave a loaded gun to hardened criminals so that they could use it to escape. They produced young boys for adult prisoners to have sex with. They traded in hard drugs with the prisoners. They were caught on camera committing

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<sup>59</sup> *Sunday Times* 23 June 2002, 7.

<sup>60</sup> *The Star* 20 June 2002, 1; *Cape Times* 20 June 2002, 1.

<sup>61</sup> *Cape Times* 20 June 2002, 1.

these serious crimes. Their punishment? Suspension. We want to know: WHY HAVEN'T THEY BEEN ARRESTED.”<sup>62</sup>

The page one article went on to claim that the office of the National Commissioner of Police, Jackie Selebi, was unable to explain why the police had not arrested the 22 warders shown in the video. A spokesperson for the Commissioner, Senior Superintendent Selby Bokaba, was quoted as saying that:

“We are of the view that on one has laid a complaint or a charge, as we cannot act on a TV programme. If anyone comes forward to lay a charge, we will act. Correctional Services has suspended the warders and we must also wait for the Jali commission to conclude its investigations.”<sup>63</sup>

Statements such as that quoted above served to fuel the disappointment and anger felt by many South Africans at this time. The fact that the Department of Correctional Services had failed to take more decisive action in the wake of the exposé, was met with outrage in the press. The responses of several national newspapers are worth quoting at some length, since their opinions provide a clear indication of the shock and disillusionment which resulted from the events at Grootvlei. The following are extracts from editorials dated 20 June 2002, in *Business Day*, *The Citizen*, *The Pretoria News*, and *The Herald* respectively:

“Sadly, instead of offering kudos to Setlai and the four prisoners who literally risked their lives to expose the unsavoury goings-on at the prison, the authorities have seemingly chosen to discourage whistle-blowing and to threaten Setlai with suspension for sanctioning the operation. Worse still, none of the implicated warders have been suspended. It beggars belief. And there are reports that one of

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<sup>62</sup> *The Star* 20 June 2002, 1.

<sup>63</sup> *The Star* 20 June 2002, 1.

the prisoners who recorded the video was severely assaulted and poisoned in an attempt to kill him.”<sup>64</sup>

“Even if South Africans aren’t surprised by the corruption at Grootvlei prison, the expose on *Special Assignment* is a shocking indictment of the Department of Correctional Services. If confirmation were needed, the country now knows that life behind bars can be quite comfortable for murderers and their ilk. They have access to firearms, drugs, alcohol and sex, with the active connivance of jail warders. What a splendid advertisement to promote the outlaw life. The nation can see crime does indeed pay, for some. Just as disturbing as the goings on was the attitude of the department. It was wrong that so many warders with known dubious records were allowed to continue their duties before being caught on camera. But it is absolutely scandalous that they’re still on duty now, and the department displays virtually no interest in bringing them to book. In the panel discussion after the show, Correctional Services Commissioner Linda Mti seemed more concerned that the filming had taken place, rather than with the misdemeanours. Instead of rooting out corrupt staff, he gave the impression of wanting to punish Grootvlei prison head Director Totolo Setlai for allowing the surveillance. It was an inappropriate reaction. This country is already under siege by criminals, who are now running some of the prisons too. Instead of niggling about procedural niceties, or the working conditions of warders, what we need is firm, decisive action. Kick out the rotten staff immediately, and tighten up. If the wavering Mti is not up to the job he too must go.”<sup>65</sup>

“Sex, drugs, booze and rock ‘n roll – it’s all been happening in Bloemfontein’s Grootvlei Prison. Yet, National Correctional Services Commissioner Linda Mti appears to have missed the point completely. Reacting to the hair-raising video filmed in the prison showing warders selling prisoners alcohol, drugs, facilitating sexual services and even making available a loaded firearm, Mti’s stupefying

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<sup>64</sup> *Business Day* 20 June 2002, 15.

<sup>65</sup> *The Citizen* 20 June 2002, 16.

response was that his department was ‘not in the business of making videos’ and did not support the making of it. Good gracious! Does Mti believe that such goings-on in our jails – it is hardly likely Grootvlei is an isolated case – are better kept under wraps? ... The fact that Tatolo Setlai, director of Grootvlei, gave permission for the video to be filmed, is commendable, and shows his courage and concern at the extent of the corruption in his jail. Equally commendable is the speedy move by Correctional Services Minister Ben Skosana to suspend the warders involved until a decision either to charge or dismiss them is taken; they are not fit to continue their jobs. Whatever action is necessary must be taken where needed to root out this cancer in our jails ...<sup>66</sup>

“There can now be no doubt about why SA prison gates are about as secure as a well-oiled revolving door. An expose on corruption at Bloemfontein’s Grootvlei prison, flighted by SATV’s Special Assignment this week, revealed breathtaking corruption showing warders to be no more than messengers for inmates who have money for booze, drugs, sex and even a firearm. A video showing this has been in the hands of prison authorities for some time, but not one of the warders involved has been suspended. It can only be speculated that their roaring trade in vice, drugs and whatever else, continues to flourish ... When prisoners get worried about the level of corruption, it is time government sat up and took note. In case it doesn’t know, it has egg on its face.”<sup>67</sup>

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<sup>66</sup> *Pretoria News* 20 June 2002, 11.

<sup>67</sup> *The Herald* 20 June 2002, 4. Editorials expressing grave concern over the events at Grootvlei continued to be published in South African newspapers for some days following the initial flood of reports. For example, in its editorial of 22 June 2002 the *Natal Witness* commented on the Grootvlei Prison video as follows: “While the evidence being put before the Jali Commission of murder and mayhem in the KwaZulu-Natal prisons services has been shocking enough, the video footage of goings-on in Bloemfontein’s Grootvlei prison has provided positively astounding confirmation of what many outsiders have long suspected – that the country’s prisons are dens of unparalleled iniquity ... It goes beyond the levels of incompetence and corruption that have in recent years come to be regarded as normal in much of the public service. The public has been confronted with the terrifying reality that what goes on inside the prisons is the complete antithesis of what ‘correctional service’ is supposed to mean. It is all the more alarming, and all the more reprehensible, because these prison officers have been entrusted by society with the task of protecting the community by curbing crime. The individual offenders must now feel the full force of the law ... no doubt the reasons why things have come to this pass are many and complex, but poor management is certainly among them and there must be appropriate action at this level too. In fact, ministerial intervention is obviously overdue. The minister has reportedly commended the Grootvlei head

Seemingly bowing to public pressure, the Minister of Correctional Services, Ben Skosana, responded to reports that the head of the Grootvlei Prison, Tatolo Stelai, was to be suspended for allowing the filming of the video in his prison, by stating that he was opposed to any such suspension. He pointed out that, although procedures and regulations may have been abrogated, it would not be wise to suspend Stelai – because he had been a “facilitator for the greater good”. He added that he would not encourage exposure of this sort, since it was not “helpful” to publicise information of this type without “putting it into perspective”. The Minister also announced that the warders who appeared in the video would be suspended, and that the four prisoners who had filmed the video would be transferred to other prisons to ensure their safety.<sup>68</sup>

Civil society groups also began commenting in the press on the corruption at Grootvlei. For example, on 21 June 2002, the leader of the Southern Africa Methodist Church, Bishop Mvume Dandala, issued a statement in which he expressed his outrage at the criminal activities taking place in the prison:

“We are appalled that it took an illegal action to uncover the shocking malpractice of corruption, gangsterism and violence that is allegedly being freely perpetrated at the Grootvlei Prison. We unequivocally condemn the illegal activities highlighted in the video taken by inmates, desperate to bring justice to the system. Having to resort to this action also reveals an alarming lack of channels for complaints.”<sup>69</sup>

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for letting the video cameras into the prison, and rightly so. It is most unsatisfactory that this should be so, but (as with the filming of corruption in the post office a while back) it seems that only the public outrage sparked by graphic televised images has the force to galvanise officialdom into action.” *Natal Witness* 22 June 2002, 6.

<sup>68</sup> *Cape Argus*, 20 June 2002, 2.

<sup>69</sup> *Saturday Star* 22 June 2002, 2. Another body which issued a public statement around this time was the Law Society of South Africa. On 23 June 2002, the Law Society called for the immediate arrest and suspension of all the warders implicated in the video. A spokesman for the Law Society, Vincent Saldanha, stated that there was enough evidence on the video-tape, coupled with the affidavits, to ensure that immediate action was taken: “The police should consult with the National Director of Public Prosecutions and if they cannot (take action) hand it over to the Scorpions to investigate.” *Diamond Fields Advertiser* 24 June 2002, 2.

At the same time that the story of the Grootvlei video was raging in the nation's press, the Jali Commission was hearing evidence about the events depicted in the video. It was reported that warder A Tlakudi, who was shown on the Grootvlei video buying chicken and drinking brandy, told the Commission that he had bought the chicken to give to an inmate, Wilson Mohodi, who had not eaten all day, and had merely tasted the brandy to determine whether it was alcohol or tea. On 19 June 2002, Wilson Mohodi gave evidence before the Commission and claimed that Tlakudi had threatened that “a gun would be used” if he did not corroborate Tlakudi’s story.<sup>70</sup> Moosa Mia also gave evidence before the Commission on 19 June 2002. He stated that he would sell chickens stolen by a warder, with 70% of the proceeds going to the warder and 30% retained by him. He also stated that six warders often bought brandy from him and that they had accounts with him which were settled on the 16<sup>th</sup> of each month – which was the day after they were paid. He told the commission that a single tot sold for R15.<sup>71</sup>

### **3.3 Unfolding of the Debate Over the Last 10 Days of June 2002**

Three days later, further explosive evidence, which was widely reported in the press, was presented to the Commission. Tatolo Setlai, the head of Grootvlei, told the Commission that the Commissioner for Correctional Services in the Free State, Willem Damons, had asked him to destroy the Grootvlei Prison tape. After he (Setlai) had refused to destroy the tape, Damons allegedly asked him to hand the tape to the National Intelligence Agency. Setlai had also refused to do this, since he suspected that the National Intelligence Agency would destroy the tape. Setlai told the Commission that he had received a letter linking his possible suspension to the video tape. Setlai was reported as having stated *inter alia*, as follows:

“During the apartheid era, if a prisoner was found with two grams of dagga it was like a terrorist action, it never happened. In those days prisoners made means

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<sup>70</sup> *Cape Times* 20 June 2002, 1.

<sup>71</sup> *Cape Times* 20 June 2002, 1.

themselves, but nowadays members are deeply involved in such activities. They [i.e. prison officials] take democracy as a laissez faire government. They think they can do as they wish and some of them, when they take prisoners rations, they say they are eating their taxes. It is as if some black members don't fear black management as much as they feared white management.”<sup>72</sup>

On the same day that Setlai was giving his evidence to the Commission, the "Grootvlei Four" launched an application in the Free State Provincial Division of the High Court in Bloemfontein, to prevent their transfer to the Mangaung prison.<sup>73</sup> The reason they gave for their application was that they feared their lives would be in danger in that prison.

Two days after the above events, an article in the *Sunday Tribune* asked a number of provocative questions of the role of Tatolo Setlai in the sting operation. In the first place, why did Setlai allegedly retain an illegally obtained firearm in his possession for just over a month, without informing the police? Secondly, why did he not involve the police in setting a trap for the warders? Thirdly, was it legal and/or moral for Setlai to allow warders and prisoners to commit crimes in order to prove that corruption was rife in Grootvlei Prison? The writer of the article made this final point, as follows:

“Did the head of the prison allow drugs to be peddled inside his institution so that can (sic) prove a point? The prisoner who was filmed sodomising a youngster said he arranged the filming himself. Which begs the question, did the head of prison know and allow a juvenile prisoner to be taken from his section to a prison cell where he would be sodomised by an older inmate so that it can (sic) be proved that corruption happens?”<sup>74</sup>

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<sup>72</sup> *Saturday Weekend Argus* 22 June 2002, 5; see also *Sunday Tribune* 23 June 2002 13.

<sup>73</sup> *Rapport* 23 June 2002, 4; *Sowetan Sunday World* 23 June 2002, 2.

<sup>74</sup> *Sunday Tribune* 23 June 2002, 13.

Although Setlai's role was questioned by some, he seemed to have considerable support within the South African press. For example, on 23 June 2002, the *Sowetan Sunday World* editorialised, *inter alia*, as follows:

“One can understand the desperation of the prison head in colluding with prisoners to rid himself of corrupt officials. Commissioner Linda Mti’s threatened action against Tatolo Setlai, Grootvlei Prison’s chief, is reprehensible but not surprising. It is similar to Henry Blazer’s treatment when he blew the whistle on deputy speaker Baleka Mbete-Kgositsile’s instant driver’s licence. He was hung out to dry. This is the typical knee-jerk reaction of bureaucrats who think they are impervious to public censure. We applaud the cabinet ministers’ quick action on the matter. Ben Skosana, correctional services minister, has placed the prisoners under his protection and Penuell Maduna, justice minister, has pledged his support for Setlai.”<sup>75</sup>

The *City Press* also voiced its support for Setlai, and called on the authorities not to suspend him:

“The suspension of Setlai, as suggested this week by Mti, would amount to punishing a whistle-blower while simultaneously protecting those who want to cover up corruption in the South African civil service, which is already rotten with corrupt elements ... We ... believe the suspension of Setlai would be a heavy blow for honesty and a betrayal of the many anti-corruption campaigners in this country. Mti must be stopped!”<sup>76</sup>

With public pressure building, a team of correctional services directors was dispatched to Bloemfontein on 22 June 2002, to lay departmental as well as criminal charges against all the prison officials at Grootvlei who were involved in the corruption scandal.<sup>77</sup> In the

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<sup>75</sup> *Sowetan Sunday World* 23 June 2002, 17.

<sup>76</sup> *City Press* 23 June 2002, 8.

<sup>77</sup> *City Press* 23 June 2002, 9.

face of all the negative media attention, Linda Mti began to engage in "damage control", claiming that his alleged call for Tatolo Setlai to be suspended had been quoted out of context. He defended his actions, as follows:

“First and foremost I commend and hail all efforts that anybody makes to expose prison corruption, whether it’s committed by the warders or by the prisoners. But it is important not to be overzealous and compromise themselves and the law in the process of exposing the culprits. There are rules and regulations that cannot be ignored under any circumstances. We are a security entity and the rule of law is primary. Otherwise we will end up being a law unto ourselves ... How is it possible that hardcore criminals who are serving 102 years among themselves can produce such high-quality video material over three months without outside help? Overcrowded as our prisons are, officials are expected to uphold the rule of law at all times. That is why there is a thorough investigation on how this happened.”<sup>78</sup>

The following day it was reported that Tatolo Setlai had received death threats as a result of his role in exposing corruption within Grootvlei Prison. Setlai believed he was being victimised by officials in the department. He stated, *inter alia*, that:

“I do not regret helping those prisoners ... It is strange now that instead of the content being the subject of discussion, I am being questioned.”<sup>79</sup>

The *Sowetan* made the following telling comment on the infighting that was taking place between Setlai and his colleagues:

“Though Setlai has received high-level backing from the minister for his role in blowing the whistle, some of his colleagues in Correctional Services have not only questioned his motives for exposing the corruption, but are also baying for

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<sup>78</sup> *City Press* 23 June 2002, 9. The article in *City Press* noted that Grootvlei Prison had been designed to accommodate 800 prisoners – but was forced to accommodate 1800 prisoners at the time the video was made.

<sup>79</sup> *Sowetan* 24 June 2002, 1.

his blood... The death threats on Setlai and other whistleblowers are likely to reopen the debate about the adequacy of the legal protection granted to those who expose corruption in the country.”<sup>80</sup>

The press continued to report on the high drama being played out at the hearings of the Jali Commission. On 25 June 2002, the “Grootvlei four” appeared before the Commission and claimed they had been roughed up and abused by the prison task force.<sup>81</sup> One of them, Gayton McKenzie, told the Commission that he had often been sent, by warder K J Mvubu, to buy meat which had been stolen from the prison kitchen. He told the Commission that since Mvubu had started working in the prison he had eaten more meat than any person who had been in prison for years. He also told the Commission that prisoners drank brandy in front of Mvubu without any action being taken. Moosa Mia (another of the “Grootvlei four”) told the Commission that he regularly paid “toll fees” to warder Ranketse Sephaka for the warder to take him to other parts of the prison. The video showed Sephaka taking Mia to a cell so that he could buy dagga from Mr Petrus Sekutoane. Mia had paid R10 to Sephaka for taking him to the cell. At Mia’s request, Sephaka carried the dagga for Mia by inserting it in the front of his pants. Mia also told the Commission that Sephaka had sold mandrax to him over a period of eight months. In return, Mia had regularly given Sephaka free meat. Mia further told the Commission that warder Tsietsi Mokhitli regularly borrowed money from him. He had lent amounts of R20 to R600 to Sephaka on approximately 12 occasions this year.<sup>82</sup>

Evidence that at least some concrete action had been taken against the warders suspected of corruption at the Grootvlei Prison, emerged on 25 June 2002, when it was reported that 22 warders had been suspended and refused entry to the jail until investigations had been completed. Despite this, press reports indicated that the matter was still not being treated as seriously or urgently as was required. Of concern was that the Free State Police continued to claim they had no grounds on which to arrest any of the suspended

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<sup>80</sup> *Sowetan* 24 June 2002, 1.

<sup>81</sup> *Star* 26 June 2002, 2.

<sup>82</sup> *Volksbald* 26 June 2002, 2.

warders.<sup>83</sup> Of further concern was that the delay on the part of the Department of Correctional Services in suspending the warders, could have negatively affected the investigation into their alleged corrupt activities. The *Sowetan* complained as follows:

“... we must ... register our concern that it had taken almost a week before the warders were barred from returning to duty ... We can only speculate on the impact this evident lack of urgency might have had on investigations. After all, prison authorities had argued the suspensions were necessary to ensure that no one interfered with the probe into allegations of corruption.”<sup>84</sup>

The *Sowetan* also expressed its concern that none of the warders had, as yet, been charged:

“Police have yet to arrest anyone in connection with the allegations. Suggestions by police that evidence at hand was insufficient to warrant any arrest is nothing but a cop-out.”<sup>85</sup>

On 26 June 2002, it was reported that Setlai had been informed that he was to be transferred to another post against his will. He told *Volksblad* that he was informed by his area head that he was being transferred to the provincial head office of correctional services in the Free State. He said that he was waiting for a letter confirming this, and that it would break his heart to be transferred.<sup>86</sup> The Department of Correctional Services denied that it intended to transfer Setlai, stating that there had been a misunderstanding.<sup>87</sup> The ongoing uncertainty surrounding Setlai resulted in the press becoming even more

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<sup>83</sup> *Sowetan* 25 June 2002, 3. It took another four days before any criminal charges were laid against the warders. On 29 June 2002, it was reported that 16 criminal charges had been laid against certain Grootvlei prison warders after a special police investigation unit had studied the video made by the “Grootvlei four”. *Volksblad* 29 June 2002, 1.

<sup>84</sup> *Sowetan* 26 June 2002, 12.

<sup>85</sup> *Sowetan* 26 June 2002, 12.

<sup>86</sup> *Volksblad* 26 June 2002, 2.

<sup>87</sup> *Beeld* 27 June 2002, 14; *The Citizen* 27 June 2002, 5.

suspicious of the motives of the different role players in the affair. For example, the *Sowetan* stated that:

“The contradictory statements from authorities about the position of the corruption-busting head of Grootvlei Prison in Bloemfontein, Tatolo Setlai, are unfortunate and leave a rather sour aftertaste. In fact, viewed from the embattled whistle blower’s perspective, these statements could well be interpreted as intimidating instead of reassuring and supportive ... In view of the Government’s commitment to cleanse society of anti-social behaviour as well as its attempts to rid the public service of image-implosion corruption, nothing short of a clear and unequivocal support for whistleblowers will instill confidence in authority. The Government needs to move quickly to clear the doubts.”<sup>88</sup>

Another example of the extent to which suspicions had been aroused, is to be found in an editorial published in the Afrikaans press on the same day as the extract quoted above appeared in the *Sowetan*. *Volksblad* characterised the corruption in the Grootvlei Prison as “net die oortjies van die seekoei” (literally “just the ears of the hippopotamus” – i.e. just the tip of the iceberg). It railed against the possible transfer of Setlai, characterising it as a gross injustice (“skreinende onreg”).<sup>89</sup>

By this point, public concern surrounding this matter had reached such significant levels that it required attention from the highest reaches of government. On 26 June 2002, the Cabinet issued a statement *inter alia* welcoming the fact that the corruption at Grootvlei Prison had been exposed. Although the government did not necessarily agree with the manner in which the information had been obtained, the Cabinet stated that it was critically important that the evidence be placed before the Jali Commission.<sup>90</sup>

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<sup>88</sup> *Sowetan* 27 June 2002, 20.

<sup>89</sup> *Volksblad* 27 June 2002, 10.

<sup>90</sup> *Beeld* 27 June 2002, 14.

On the same day that the Cabinet issued its statement, it was reported that – at the request of the Democratic Alliance – a snap debate was being held in the National Assembly on the situation in prisons, with specific reference to the Grootvlei Prison.<sup>91</sup> During the debate, Mrs Pauline Cupido of the Democratic Alliance asked the Minister of Correctional Services, Mr Ben Skosana, to consider installing security cameras in all prisons. Skosana stated that the possibility of establishing an anti-corruption unit for the Department of Correctional Services was being investigated. Members of the Scorpions would possibly form part of this unit. The chairperson of the portfolio committee on correctional services, Mr Ntshiki Mashimby of the African National Congress, asked why the head of the Grootvlei Prison kept a revolver, which had been illegally sold to a prisoner, in his possession for longer than a month.<sup>92</sup> The National Commissioner of Correctional Services, Linda Mti, appeared before the portfolio committee and admitted that the Department of Correctional Services was “beleaguered by the corrupt and criminal activities of a component of staff”.<sup>93</sup> He told the committee that:

“... the legal mandate of DCS remains unachievable while there are staff members in our prisons whose criminal behaviour keeps the wounds of corruption, substance abuse, sexual violence and crime in our prisons festering.”<sup>94</sup>

The drama in Parliament was mirrored by even more drama at the hearings of the Jali Commission of Inquiry. On the same day that the corruption at Grootvlei was being discussed in Parliament, it was reported that the head of the Grootvlei Emergency Support Unit, Mr Rassie Erasmus, was to be prosecuted departmentally, criminally and civilly – following allegations he had made racist comments about members of the Jali Commission. It was alleged that he had called one of the Commissioners, Esther Steyn, a “teef tussen n klomp kaffers” (a bitch among a group of kaffirs). It was further alleged that he had called Mr Samuel Grobbelaar (one of the “Grootvlei four”) a “kafferboetie” (roughly translated as “a kaffir lover”). Judge Thabane Jali ordered that a special

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<sup>91</sup> *Volksblad* 26 June 2002, 2; *Cape Times* 26 June 2002, 5.

<sup>92</sup> *Burger* 27 June 2002, 10.

<sup>93</sup> *Cape Times* 26 June 2002, 5.

<sup>94</sup> *Cape Times* 26 June 2002, 5.

investigative unit of the Scorpions should investigate a charge of defamation against Erasmus.<sup>95</sup>

On the same day as the dramatic events described above were being played out, Petrus Sekotoane (one of the “Grootvlei four”) gave evidence before the Jali Commission. He told the Commission that not only did warder Ranketse Sephaka sell dagga and mandrax to prisoners, but he sometimes allowed them into his home within the prison precinct, to buy dagga. Sometimes Sephaka’s wife sold dagga to prisoners when her husband was not at home. Moosa Mia (another of the “Grootvlei four”) told the Commission that warder Johnny Thoabala regularly joined him when he went to buy dagga from, or deliver it to, other prisoners. In doing this, Mia could avoid paying “tollgate fees” of R2 to R5 to other warders manning internal prison gates. Mia also told the Commission that he had drunk brandy with warder TJ Leseba. Warder Mike Ramalefane allegedly ate chicken stolen from the prison kitchen and drank brandy with prisoners. Prisoner William Smith told the Commission that he used to earn approximately R450 a month by selling mandrax for warder Leon Visagie.<sup>96</sup> Smith told the Commission:

“I sold a packet of dagga inside the prison for R50; R40 of which went to Visagie. The mandrax tablets went for R20 each.”<sup>97</sup>

The following day, 27 June 2002, the long awaited showdown between Free State Provincial Commissioner for Correctional Services, Willem Damons, and head of the Grootvlei Prison, Tatolo Setlai, took place before the Jali Commission. According to *Sowetan*:

“Setlai maintained that his senior, Free State Correctional Services commissioner Willem Damons, had repeatedly insisted that the damning videotape – allegedly showing corruption in the prison – be destroyed. The beleaguered prison chief

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<sup>95</sup> *Volksblad* 26 June 2002, 2.

<sup>96</sup> *Star* 27 June 2002, 2; see also *Volksblad* 27 June 2002, 2.

<sup>97</sup> *Sowetan* 27 June 2002, 2.

was forced to face down Damons before the commission, repeating his assertions that Damons wanted him out of the Department of Correctional Services and had accused him of being a drug dealer ... In a dramatic development in proceedings, Damons vehemently denied telling Setlai that he would be transferred to the Correctional Services' provincial office after the videotape was made public ...”<sup>98</sup>

According to further press reports, Damons also denied that he had ordered Setlai to destroy the video tape. Setlai, on the other hand, maintained that not only Damons, but also Grootvlei's deputy head, Mrs Moira Dooling, wanted the video tape to be destroyed. According to Setlai, Damons was worried about the video tape and wanted it burned. It was dangerous for Setlai's future and would damage the image of the department and the government, and would scare off investors. According to Setlai, Damons also requested him to influence the prisoners not to cooperate with the Jali Commission. He told the commission that Damons had that week decided that he (Setlai) was prohibited from setting foot in Grootvlei from 1 July 2002.<sup>99</sup> Damons undertook not to investigate, suspend or transfer Setlai – although he told the commission that he believed that Setlai had contravened practices of good governance. He told the Commission that a national investigation unit was at Grootvlei, at his request, to investigate Setlai's part in the video.<sup>100</sup> According to a report in the *Saturday Star*, Advocate Vas Soni, accused Damons several times of lying to the Commission and of giving contradictory evidence. According to this report:

“He (Soni) said he would submit to the commission by the end of the day that Damons had been telling one lie after another. ‘You lead us into every avenue except the main road. I am lost in your answers’, Soni said. He also warned the provincial commissioner that he could lose his job and face charges of defeating the ends of justice if it were found that he had lied to the commission.”<sup>101</sup>

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<sup>98</sup> *Sowetan* 28 June 2002, 3.

<sup>99</sup> *Volksblad* 28 June 2002, 1.

<sup>100</sup> *Volksblad* 29 June 2002, 1; *Saturday Star* 29 June 2002, 2.

<sup>101</sup> *Saturday Star* 29 June 2002, 2; see, also, *City Press* 30 June 2002, 9. One newspaper columnist, William Saunderson-Meyer, commented bluntly on the affair as follows: “Correctional Services Commissioner

The drama continued the following day, 28 June 2002, when prisoner Marius Engelbrecht told the commission that members of the “26” prison gang had put out a “number 1” (i.e. had issued a sentence of death against) on the “Grootvlei four”. According to Engelbrecht, who was a “major” in the “26” gang, and the four would not be safe in any prison in South Africa, since corrupt warders would be used to get to them:

“They will die in prison, violently at the hands of gang members. There is no safe place in any prison in South Africa for such a prisoner. The saying is that you can run but you cannot hide ... Their number is up. There is no discussion. This is the end. No escape. One way in, one way out.”<sup>102</sup>

With the storm surrounding events at Grootvlei raging in the press, the political and administrative leadership of the Department of Correctional Services went into full "damage limitation" mode. On the same day that Engelbrecht was presenting the dramatic evidence detailed in the previous paragraph to the Jali Commission, the Minister of Correctional Services, Mr Ben Skosana, and the National Commissioner of Correctional Services, Mr Linda Mti, were holding a workshop against corruption at Grootvlei Prison.<sup>103</sup> Emotions ran high and Mti, broke down emotionally and began to cry – as he was about to address provincial managers and warders at the workshop. He stated that the anger and heartache of what he had seen on the video was just too much for him. Skosana, announced that a campaign was to be launched against all acts and forms of corruption. The reasons for corruption would be established, and strategies would be developed to restrict the spread of corruption.<sup>104</sup> The Premier of the Free State, Ms Winkie Direko, also addressed the workshop. Speaking to a crowded hall in the prison,

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Willem Damons wanted him [Setlai] to destroy the embarrassing video, Police Commissioner Jackie Selebi incorrectly claimed that the miscreants would not be arrested and prosecuted and the initial response of the correctional services ministry was the threat of a disciplinary inquiry against Setlai to establish whether he had followed ‘internal procedures’. What a star-studded cast of morons.” *Independent on Saturday* 29 June 2002, 8.

<sup>102</sup> *Citizen* 29 June 2002, 6; see, also, *Volksblad* 29 June 2002, 1 and 2.

<sup>103</sup> *Volksblad* 28 June 2002, 1.

<sup>104</sup> *Volksblad* 29 June 2002, 1.

she stated that the Free State, South Africa and Africa had been let down by corrupt warders at the prison. These warders had broken the trust placed in them by the national commissioner, Mr Linda Mti, the minister, Mr Ben Skosana, the president, Mr Thabo Mbeki, and the people of South Africa. A furious Ben Skosana stated that South Africans had been knocked off their feet by waves of anger and disbelief after watching the Grootvlei video. The country was in a state of shock, and the damage done to the department would take a very long time to repair. He said that he was not surprised to see the national commissioner overcome by his emotions. He said that it had been a long hard two weeks since the screening of the video, and he then placed his hand on Mti's shoulder.<sup>105</sup>

### **3.4 The Saga Continues to Smoulder Throughout July 2002**

Not everyone was convinced by the display of contrition and emotion described above. On 1 July 2002, columnist Mathatha Tsedu of *The Star* commented somewhat pessimistically on how he saw the saga surrounding Setlai playing itself out:

“In the nature of how the system operates, Setlai is bound to lose; he is bucking the system, and the system never forgets or forgives. If, right now, with the national spotlight on him and his prison, we are able to witness the kind of harassment he is undergoing, what will happen when the TV lights move away and we all forget about him? It is disappointing that Mti has come across as not too keen to take action against the warders who were caught breaking the law. He has tried to say he was just pointing out that the evidence might yet be proved to be useless. That is a legitimate concern, but I personally would like to see him defending Setlai against Damons. I would like to see him call Damons in and ask tough questions about the need to destroy the tape, unless this was Mti's instruction. There is a stink coming out of the Free State prison which needs to be allowed to air, and Correctional Services is currently on a path to stem the

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<sup>105</sup> *Volksblad* 29 June 2002, 2.

revelations ... One can only hope that Skosana will continue to provide sound leadership on this matter and that we are not going to wake up one day and find Setlai gone and the warders back on duty.”<sup>106</sup>

A week later, on 7 July 2002, a special report in the *Sunday Tribune* entitled “Just how deep is the rot?”, provided South Africans with a broad overview of what had been going wrong within the penal system, as a whole. The report set out the views of Advocate Vas Soni on the reasons for the endemic corruption within many South African prisons. According to the report, Soni believed that the political tensions and battle for power between the old white power structure and new officials appointed after 1994, had contributed greatly to the rot. “Operation Quiet Storm” resulted in prison management being undermined, with Police, Prison and Civil Rights Union (POPCRU) officials concentrating more on gaining power than on running the prisons. According to Soni:

“The old guard, mostly the whites, sat back and watched the rot fester and the system crumble ... What we saw at Grootvlei happens at all the prisons we have been to. Warders turn a blind eye to criminality. There is a sense of shamelessness among them ... When we saw what was on the video tape it was a case of *déjà vu*. It confirmed what we already knew ... There is nepotism in recruitment. It’s like a family business for many. At New Prison in Pietermaritzburg, for instance, a warder had eight relatives working under him. He had the audacity to say that they were the best candidates from more than 2000 applicants.”<sup>107</sup>

Two days after the publication of the special report referred to in the previous paragraph, the Setlai saga once again attracted attention in the press. The pessimistic assessment of Setlai's future by newspaper columnist Mathatha Tsedu, in his column of 1 July 2002 – discussed above – appeared to be depressingly accurate, when, on 9 July 2002, it was reported that Setlai had been “temporarily” transferred from his post as the head of Grootvlei Prison to the post of chairman of the prison’s parole board. This was despite

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<sup>106</sup> *Star* 1 July 2002, 8.

<sup>107</sup> *Sunday Tribune* 7 July 2002, 4.

the assurance of Provincial Commissioner Willem Damons to the Jali Commission that Setlai would not be transferred or moved. According to the *Sowetan*:

“The transfer has been widely viewed as part of an attempted cover-up after Setlai allowed four long-term prisoners to record alleged acts of corruption by up to 22 Grootvlei warders and inmates on videotape.”<sup>108</sup>

Setlai submitted a complaint to the Jali Commission to the effect that he had been victimised because of his struggle against corruption.<sup>109</sup> The South African Police Union issued a statement to the effect that moving Setlai out of his post sent a message that whistleblowers were not protected within the Department of Correctional Services. The Union called on the Minister of Correctional Services, Mr Ben Skosana, and the Jali Commission, to come to Setlai’s rescue.<sup>110</sup> The fact that Setlai was being deliberately targeted seemed to be borne out by evidence presented to the Jali Commission a few days later, on 14 July 2002, by Grootvlei prisoner Kenneth Kunene. Kunene alleged that a group of warders belonging to POPCRU had formulated a plot to get rid of Setlai. In terms of the plan, unlawful items like dagga would be planted in the cupboards of Setlai’s monitors – to show him in a bad light. Setlai would be worked out of the system. It was reported that Setlai was reconsidering his charge of victimisation against the Department of Correctional Services, after being removed from his post as head of the Grootvlei prison.<sup>111</sup>

In addition to the Setlai saga, the South African press continued to give wide coverage to other shocking revelations made by witnesses who appeared before the Jali Commission. On 14 July 2002, one of the "Grootvlei Four", Gayton McKenzie, told the Commission that Grootvlei warder F.V. Mostert ran a shebeen in the prison, from which the warder earned more than R9000 per month. Up to 20 bottles of brandy were sold to prisoners per week at a price of R200 or R300 per bottle. McKenzie alleged that liquor was smuggled

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<sup>108</sup> *Sowetan* 9 July 2002, 3.

<sup>109</sup> *Beeld* 9 July 2002, 2.

<sup>110</sup> *Volksblad* 10 July 2002, 1.

<sup>111</sup> *Volksblad* 16 July 2002, 1.

into the prison hidden in sand or cement – or in paint tins. McKenzie told the Commission that pornographic films were so freely available in the prison that one did not even have to pay to watch them. He told the Commission that he had seen all the newest pornographic films on the market. Evidence was led before the Commission to the effect that warder Frans Molejane, who had been caught with 23 bags of dagga in the Virginia prison, had been reassigned to Grootvlei Prison by Damons. It was alleged that Molajane sold food, brandy, dagga and ecstasy in the prison.<sup>112</sup> McKenzie told the Commission that the "Grootvlei Four" had been so badly victimised as a result of the video, that at one point they had decided to cease cooperating with the commission.<sup>113</sup> Two days later, on 16 July 2002, McKenzie told the Commission that the four had been dismissed from their positions as monitors without reason, and were locked in their cells for 23 hours per day. He said that their cells were searched daily and that they had been forced to live on bread and cool-drink for the past 10 days, since they were afraid to eat meat from the prison kitchen. He alleged that an attempt had been made to poison Samuel Grobbelaar, one of the "Grootvlei Four", with "Two Steps".<sup>114</sup>

The Setlai saga returned to the news on 17 July 2002, when the acting head of the Grootvlei Prison, Langa Bikane, gave evidence before the Jali Commission. He admitted that Setlai's transfer to the parole board was unfair. Bikane had signed both the letter informing Setlai of his suspension in May, as well as the letter informing him of his transfer to the parole board, in July. Bikane told the Commission that he did not want to suspend Setlai in May, but had to sign the letter informing Setlai of his suspension, as Provincial Commissioner Damons and his advisory team had decided to suspend Setlai. He had also had no choice but to sign the letter from the task team in July, informing Setlai that he was being transferred from his position as head of the Grootvlei Prison, to the Parole Board in Bloemfontein.<sup>115</sup> The following day it was reported that Setlai

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<sup>112</sup> *Volksblad* 16 July 2002, 1.

<sup>113</sup> *Volksblad* 16 July 2002, 1; see, also, *Citizen* 16 July 2002, 7.

<sup>114</sup> *Volksblad* 17 July 2002, 2.

<sup>115</sup> *Citizen* 18 July 2002, 7; *Volksblad* 18 July 2002, 2; *Afrikaner* 18 July 2002, 3.

intended to launch an urgent application in the Free State High Court to be allowed to remain in his position as head of the Grootvlei Prison.<sup>116</sup>

On 19 July 2002, heartrending evidence was presented to the Jali Commission by a 20-year-old juvenile inmate of Grootvlei Prison. He alleged that he had been sodomised 11 times in the prison by a warder and other prisoners. The juvenile alleged that on his second day in Grootvlei Prison, a prisoner sodomised him for the first time. Within his first week in the prison a further two prisoners sodomised him. He sought help from a warder, Sam Mohanoe, who proceeded to sodomise him as well. He alleged that he was sodomised seven times by the warder in the warder's office and in a storeroom. The juvenile was eventually detained in a single cell for his own safety, but was allegedly "put on auction" and "sold" by a warder to another prisoner for sex. After this, he twice tried to commit suicide. Advocate Vas Soni stated that it was "a sad day for the prison system in South Africa" and he apologised to the prisoner "on behalf of all decent human beings".<sup>117</sup>

A few days later, on 23 July 2002, one of the Grootvlei four, Petrus Sekutoane, told the Commission that one of the warders regularly left a 25 litre tin full of dagga in his cell overnight. Sekutoane would then sell the dagga to other inmates. The cost of a tin of dagga was R1000, and this was sold to inmates for R2500. Sekutoane alleged that profits from the sale of dagga had been deposited into his bank account by the warder who had supplied him with the drugs.<sup>118</sup> On the same day, further heartrending evidence was presented to the Commission about the frequent occurrence of prison rape. Grootvlei prisoner Wilson Mohodi told the Jali Commission that a Grootvlei warder known as "Daddy" sodomised young male prisoners in his office on a daily basis. Mohodi told the Commission that the warder, a certain Sam Mohanoe, had been sodomising juveniles since 1985. Mohanoe was facing criminal charges for allegedly sodomising a 20-year-old prisoner eight times. According to Mohodi, he and Mohanoe sometimes took turns to

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<sup>116</sup> *Volksblad* 18 July 2002, 2; *Afrikaner* 18 July 2002, 3.

<sup>117</sup> *Sunday Independent* 21 July 2002, 5; *Beeld* 20 July 2002, 4.

<sup>118</sup> *Volksblad* 24 July 2002, 2.

sodomise juveniles in Mohanoe's office. Mohodi also told the Commission that he sometimes supplied Mohanoe with a young man in return for cannabis. Mohanoe would reward the juveniles with cannabis, Vaseline and toiletries in a plastic bag. Sometimes Mohodi paid a warder R20 to bring a juvenile to his cell for the weekend. Mohanoe's legal representative denied that his client had sodomised juvenile prisoners.<sup>119</sup> In further evidence, a 20-year-old Grootvlei prisoner testified before Commission that he was promised All Star running shoes and food by an older prisoner – in return for sex. He testified that he had been repeatedly sodomised by warders and older prisoners.<sup>120</sup>

Finally, to end off this overview of the public discourse surrounding events at Grootvlei Prison in 2002, a brief comment on the fate of Tatolo Setlai is made. On 24 July 2002, it was reported that Setlai had been transferred back into his post as head of the Grootvlei Prison, presumably as a result of legal pressure he had brought to bear.<sup>121</sup> Unfortunately, this was not to last. On 16 January 2003, Setlai appeared in the regional court on charges of corruption. He claimed that he was framed and that the charges were a “payback” by officials of the department, for what he had told the Jali Commission.

It is clear from the above that any ordinary South African who bothered to read the newspapers during June and July 2002, would have been under no illusions as to the seriousness of the problems confronting the Department of Correctional Services, in relation to corruption. Any illusions as to the supremacy of human rights in the post-apartheid period would likely have been dashed. But if one is looking for a single date on which it may be said that the dream of a South African penal system characterised by human rights ultimately expired, it will fall during the month of December 2005, when the final report of the Jali Commission was published. This is discussed in the section which follows.

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<sup>119</sup> *Volksblad* 23 July 2002, 1.

<sup>120</sup> *Star* 24 July 2003, 3; *Volksblad* 24 July 2002, 2.

<sup>121</sup> *Volksblad* 24 July 2002, 1; *Star* 24 July 2003, 3.

## **4. The Final Report of the Jali Commission of Inquiry**

### **4.1 General Overview of the Final Report**

The Jali Commission furnished its Final Report to the President in December 2005.<sup>122</sup> It makes for grim reading. The Report paints a picture of a government department on the brink of collapse, riddled with corruption and beset by criminality and other forms of malpractice. The Final Report had been preceded by a series of Interim Reports, which the Commission explained were necessary because the Department of Correctional Services was "experiencing a total breakdown in the disciplinary system, which required recommendations for immediate intervention ..."<sup>123</sup> The Commission noted that the interim reports dealt with "illegal drug dealing, medical aid fraud, favouritism in appointments, extortion, unlawful financial transactions with prisoners, fraudulent matric certificates, unlawful visits, theft, fraud, assault of prisoners, irregular appointments, irregular transfers and parole transgressions amongst other things."<sup>124</sup> It went on to deliver the following damning indictment of the institutional culture within the Department:

"The most noticeable feature of the institutional culture the Commission observed was that corruption and maladministration were rife in most of the Management Areas investigated. There is a large group of employees within such Management Areas who featured in almost all the incidents of corruption and maladministration and who are predominantly driven by greed and the need to make easy money. This became apparent in the nature of the corruption that is endemic within the Department ... The investigations also revealed that many employees consciously and systematically disregard Departmental rules and regulations. The failure or refusal to comply with rules and regulations of the Department became apparent in the manner in which these employees consciously and deliberately flouted

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<sup>122</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1 at ii.

<sup>123</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 16.

<sup>124</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 16.

regulations relating to security, searching of members, searching of visitors, visitation rights, procurement of goods for the prisoners, the relationship between prisoners and warders, recruitment and appointments, promotions, merit awards, transfer, parole, disclosure of private work, treatment of prisoners, use of State assets and others. This appeared to be done with impunity in that there was little evidence of disciplinary action being taken against the transgressors."<sup>125</sup>

The Commission was just as scathing in its condemnation of the work ethic, competence and discipline of members of the Department of Correctional Services. The Commission's comments in this regard are worth quoting at some length, if only to give a sense of the depths to which the Commission believed the Department had sunk:

"The Commission's general observation was that there appeared to be a poor work ethic prevailing in most of the Management Areas investigated. There is a general breakdown of organisational standards and norms. Many correctional officials are not dedicated to their duties with a high level of absenteeism and truancy being a major problem ... There also appears to be a general culture of violating prisoners' constitutional rights with prisoners being deprived of their full visitation rights, being served lunch and supper together at midday and thereafter being locked in their cells often merely because members want to leave work early to attend to their own private affairs ... It is also clear that many officials occupy responsible senior positions without having the necessary competence and experience for such positions. This lack of competence leads to a situation where the senior official is unable to command the respect of subordinates, which ultimately results in a general breakdown of discipline, law and order ... The lack of discipline is of serious concern to the Commission as it is the Commission's view that unless disciplinary issues are addressed urgently and dealt with as recommended by the Commission, the Department faces the prospect of anarchy in its work place ... The anarchy has manifested itself in the prevalent abuse of power by senior officials towards junior

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<sup>125</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 17.

officers, female staff members and those who are vulnerable ... The lawlessness and failure to respect any form of authority is not only confined to the failure to respect colleagues but also the Commissioner and the Minister of Correctional Services. It is also evident that Departmental officials do not respect orders of the High Court of South Africa and the Supreme Court of Appeal."<sup>126</sup>

The Commission made it clear from the start of its Final Report that its investigations had not been made easy by the Department of Correctional Services. Many serious obstacles had been placed in the Commission's way, including efforts by certain senior officials of the Department "to discredit the Commission and its investigators."<sup>127</sup> There had been death threats against certain of the Commission's investigators, as well as a "number of disparaging and defamatory press statements", which had been "released with the intention of discrediting the Commission."<sup>128</sup> Most worryingly, the Commission found that intimidation and fear were rife within the Department of Correctional Services, stating, *inter alia*, that:

"Intimidation and fear is prevalent in the Department of Correctional Services, including Head Office. As a result, even the people holding management positions are not completely committed to the enforcement of the Department's regulations because they fear reprisal from other members. This is the case even if they are not corrupt because fear drives them to avoid enforcing the rules and regulations ... The prison staff is in dire need of urgent intervention to give them direction and support. Morale is very low and members are disillusioned."<sup>129</sup>

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<sup>126</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 18 and 19.

<sup>127</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 25.

<sup>128</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 25.

<sup>129</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26. The Commission commented specifically on the climate of fear which had been created by the murder of Thuthukile Bhengu: "Besides the generally known violence and intimidation associated with the Department of Correctional Services, the one incident which put the fear of death into a number of members in the Department was the murder of a senior departmental official, Ms Thuthukile Bhengu ... This shocked most of the law abiding members in the Department because, even though the sinister forces operating in the Department had been violent towards male and female members previously, at no stage had a female member been murdered. In the eyes of the ordinary law abiding members, it gave the impression that the sinister forces within the Department were prepared to go to any extent to achieve their objectives. As a

Before proceeding to discuss certain of the central areas of focus in the Commission's Report, it is useful to highlight a series of short extracts from the Report, dealing with each of the nine separate Management Areas investigated. What these extracts clearly reveal, is the significant extent to which corruption and other forms of maladministration had penetrated the Department of Correctional Services – across the length and breadth of the country:

*Durban-Westville Management Area:*

"[T]he Commission investigators found drug dealing, medical aid fraud, sexual harassment, abuse of power and nepotism ... Whilst there was intimidation of members and witnesses, as expected, there were also unexpected threats, which surfaced in the Commission hearings, like the threat to kill the Chief Investigator of the Commission. There was even an attempt to bribe the Commission investigators so as to suppress evidence. This was a clear indication of the culture which feeds into corruption within the Management Area."<sup>130</sup>

*Pietermaritzburg Management Area:*

"From the Commission's investigations, it became apparent that the general level of intimidation and political climate made the Management Area almost ungovernable. Furthermore, the said level of intimidation and fear had been exacerbated by the killing of Ms Thuthukile Bhengu, who was murdered for refusing to appoint one of the warder's girlfriends during one of the recruitment drives, allegedly because of a fraudulent matric certificate. Her killing resulted in members being scared to testify and disclose corruption to the Commission ... While Pietermaritzburg Prison suffered from many of the same issues of mismanagement, corruption and

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result, very few members were prepared to risk their lives and co-operate with the Commission." See the Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 26.

<sup>130</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 30-31.

overcrowding seen in the other prisons investigated, it was unique in the way in which it had been rendered unmanageable as an intended or unintended consequence of Operation Quiet Storm."<sup>131</sup>

*Bloemfontein Management Area:*

"Investigators of the Commission were threatened to the extent that they had to have police escorts into the prison for the first time since the Commission began ... The Commission found that the following factors contributed to the corruption and maladministration in the Bloemfontein Management Area: drug and alcohol trafficking and other illegal sales, sodomy, recruitment practices, abuse of prisoners, management malpractices and management rivalry."<sup>132</sup>

*St Albans Management Area:*

"The investigations in this Management Area were prominently around the secret meetings, which senior managers held to decide the fate of various members outside the formal management structure, the abuse of power by senior officials against junior officials, fraud, filling of jobs, ethnicity etc ... For the first time during the Commission hearings, senior management staged a walk-out when they had to testify to refute serious allegations which had been made against them by a witness who was a former member of the cabal that was making decisions. The evidence of the witness was also corroborated by a number of other witnesses, who had been, one way or the other, victimised by this clique of senior management of the province. The individual members of the Commission were openly attacked in the media. It then became clear to the Commission that it had touched 'the untouchables'. These senior managers had never been asked to account for their actions. Their abuse of power had never been challenged. In fact, they were feared

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<sup>131</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 31.

<sup>132</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 32.

by the entire Department in the Eastern Cape ... The institutional culture, as elsewhere, is one that is rife with corruption and maladministration."<sup>133</sup>

*Pollsmoor Management Area:*

"The Commission's investigations at Pollsmoor Management Area concentrated mostly on ... two ... recruitment drives, which had been riddled with irregularities, procurement practices, maladministration at the workshop, gangs, sexual abuse in the female prison and other general problems within this Management Area ... It was apparent to the Commission that Pollsmoor had a major drug problem, which was influenced by the general gang culture within Pollsmoor and the Western Cape generally. However, penetrating and breaking through the code of silence within the gangs in the Western Cape was very difficult ... Pollsmoor Management was one of the most difficult areas to investigate. At best, the Commission can describe it by reference to a 'laager'. Whenever the investigators got close to penetrating a problem, a shroud of silence was drawn around the person or the issue that was being investigated."<sup>134</sup>

*Leeuwkop Management Area:*

"The Commission found a lot of corruption relating to the dealings between prisoners and warders and other transgressions."<sup>135</sup>

*Johannesburg Management Area:*

"Corruption and maladministration were apparent to the members of the Commission, which heard of corrupt members trying to make easy money, all compounded by a lack of discipline which meant transgressions were carried out

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<sup>133</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 33.

<sup>134</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 34-35.

<sup>135</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 36.

with impunity. Prisoners were in agreement that 'money talks at Johannesburg Prison'. With money, a prisoner can get whatever he or she wants ... Allegations of serious drug and alcohol smuggling at the prison were confirmed during the Commission's hearings by inmates."<sup>136</sup>

*Pretoria Management Area:*

"The institutional culture the Commission observed was the high levels of corruption and maladministration ... The Commission also observed tribal or ethnic tensions in the Pretoria Management Area ... Depending on the tribal group to which you belong, the treatment you receive as a prisoner might be influenced by the tribal background of the member dealing with you ... C-Max, the super maximum prison, forms part of this Management Area. Here the Commission was shocked to hear of members abusing inmates and particularly that new inmates were being subjected to an 'initiation ritual' of running the gauntlet while several members assaulted them as well as being shocked with electric shields."<sup>137</sup>

*Ncome Management Area:*

"Several incidents of misconduct and maladministration were discovered at Ncome Prison, including unlawful pecuniary dealings with prisoners, the illegal taking out of prisoners from prison, poor controls of the Ncome arsenal and the absence of any control whatsoever over prisoners' private cash."<sup>138</sup>

Having provided a general overview of the findings set out in the Final Report of the Jali Commission, the following sections examine certain of the Commission's central areas of focus – starting with the corruption, violence and intimidation surrounding the infamous "Operation Quiet Storm".

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<sup>136</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 36-37.

<sup>137</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 37.

<sup>138</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 1 at 38.

## 4.2 Operations "Quiet Storm" and "Thula"

In its Final Report, the Jali Commission identified "the main catalyst for the general breakdown of law and order" which had occurred within the Department of Correctional Services during the post-apartheid period, as being: "the operations that certain organisations or renegade members of such organisations within the Department [had] embarked upon."<sup>139</sup> By far the most influential such "operation" was a so-called "strategic initiative" of POPCRU, known as "Operation Quiet Storm".<sup>140</sup> According to the Commission, this "operation" involved secret meetings at which decisions were taken about certain positions to which POPCRU members were to be appointed.<sup>141</sup> Strategic senior positions were targeted, so as to increase the influence of POPCRU within the Department of Correctional Services. According to the Commission, this led to "a sudden upsurge in violence and intimidation within the Department", as well as to a crisis in management, which was experienced first in KwaZulu-Natal and later throughout the rest of the country.<sup>142</sup> The Commission summarised the devastating effects of Operation Quiet Storm, as follows:

"Operation Quiet Storm has had a wide-ranging and negative effect across the entire spectrum of the Department of Correctional Services. It is the Commission's view that this operation provides answers to earlier allegations made before other Commissions that union affiliation influenced the appointment of staff. It also gives insight into what went wrong in the province of KwaZulu-Natal and later [in] other provinces where prisons were plagued by problems ... Instead [of being able to identify the cause of the problems], the various inquiries and investigators were 'sent

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<sup>139</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 54.

<sup>140</sup> The acronym "POPCRU" stands for "Police, Prison and Civil Rights Union". This Union was founded in 1989 in the Western Cape. During the apartheid period, it operated illegally – but in October 1994 the Department of Correctional Services signed a Recognition Agreement with this union. The Commission blamed "the influence that Popcru is able to wield" for many of the problems cited in its report. See the Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 44 and 47.

<sup>141</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 55.

<sup>142</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 55.

around in circles' without reaching any root cause as to why there was so much lawlessness in the Department."<sup>143</sup>

The Commission concluded that "Operation Quiet Storm" was a plan hatched in 1996 by POPCRU officials in the province of KwaZulu-Natal. It was aimed at fast-tracking affirmative measures in such a way that members of the union could take control of all the top positions within the Department of Correctional Services, under the guise of "transformation".<sup>144</sup> In the words of one witness who gave evidence before the Commission – a certain Philemon Ntuli, who had been the Provincial Liaison Officer in KwaZulu-Natal and an office bearer of POPCRU – Operation Quiet Storm aimed to target "certain strategic and influential posts" and, once the incumbents of those posts had been forced out, POPCRU members would be "deployed" to the vacant positions.<sup>145</sup> According to Ntuli, the following were among the strategies to be employed:

"We would engage in long and arduous meetings with management – making certain demands. The idea was to frustrate management to the point where they would simply cave into our demands ... In certain instances, we would take management personnel as hostages – refusing to allow them to leave the rooms in which we would detain them ... In other instances, we would prevent management from entering their offices: we could lock the doors and ban entry by the use of doorstoppers ... We would embark on protest action and go-slows ... Some members would woo the secretaries of senior officials so that we would gather inside information."<sup>146</sup>

The POPCRU plans were nothing, if not ambitious. According to Ntuli, among the candidates identified to fill top positions within the Department of Correctional Services, were Mr Khulekani Sithole, who was earmarked for the position of National Commissioner of Correctional Services, and Mr Maxwell Ntoni, who was earmarked for

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<sup>143</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 55.

<sup>144</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 56.

<sup>145</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 57.

<sup>146</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 57.

the position of KwaZulu-Natal Provincial Commissioner. Furthermore, the plan was ruthlessly and efficiently executed. The Commission pointed out that: "Within a day of the plan being hatched, POPCRU members began to force officials to leave the Provincial Office and to hold senior officials hostage, among other things."<sup>147</sup> The success of the plan was evidenced by the fact that, according to Ntuli, most senior staff who were unlucky enough to be targeted by POPCRU "simply never returned to work and were then replaced by Popcru members."<sup>148</sup>

As could have been predicted by anyone with a passing acquaintance of the dangers which violent revolutions often give rise to, while "Operation Quiet Storm" was very effective in elevating certain POPCRU-aligned officials into positions of influence and authority, it was not at all effective in curbing the power of those officials once they had become entrenched in their positions. The Commission cites the following chilling evidence given by Ntuli:

"[S]ome of those who benefitted from the implementation of 'Operation Quiet Storm' have entrenched their power. With no foil to keep this unbridled power in check, not surprisingly, *corruption* is rife. So is *nepotism*, *favouritism* and *bribery*. So powerful are these persons that the entire work force serves in absolute *terror* of them. People are too afraid and intimidated to challenge their actions – no matter how unlawful, wrongful, irregular or improper. They rule with an iron fist. No one dares challenge them."<sup>149</sup>

Among the findings of the Commission in relation to Operation Quiet Storm was that it was "spearheaded by senior Correctional Services members, Mr Russell Ngubo and Mr Nhlanhla Charles Ndumo"; that it was "carried out with the full knowledge and support of Popcru"; and that the "illegal nature" of the operation "was known or foreseeable to all

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<sup>147</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 58.

<sup>148</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 58.

<sup>149</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 60.

those who were involved, including Popcru."<sup>150</sup> As to the impact of the Operation on the Department of Correctional Services, the Commission found, *inter alia*, that "there was a lot of violence or threats of violence against employees of the Department in all the Management Areas"; that the plan approved by POPCRU "was not only highly risky in its implementation but also criminal in nature"; that the objectives of the campaign "were to be achieved by calculated action intended to render the prisons ungovernable"; that "unwanted personnel were systematically targeted and hounded out of office by either intimidation or violence"; and that, in certain cases, "the unwanted individuals were removed by force from their offices and never again allowed to enter the prison premises."<sup>151</sup>

The Commission quoted a media release dated 18 October 1996 by the Department of Correctional Services, in which the Department described the actions of POPCRU as "nothing less than mutiny" – stating it was "astonishing that POPCRU members can arrogate to themselves the right to remove the legitimate management and replace them by (sic) persons enjoying union favouritism."<sup>152</sup> The Commission pointed out that, despite resistance from the Department of Correctional Services, "the will of the union [POPCRU] eventually prevailed."<sup>153</sup> The Commission found that Operation Quiet Storm had "introduced a culture of lawlessness in the Department, in that it became the norm for unwanted members to be forcibly removed from their positions and for unlawful actions to occur with impunity."<sup>154</sup> This led to a breakdown of law and order in the Department, since "neither senior management nor the Department took decisive action against those who transgressed the law."<sup>155</sup> The Commission commented on "the naked barbarism and violence to which those who were victims of Operation Quiet Storm were subjected by the members of Popcru" – including "being threatened and spat upon" and having the carpets of their offices urinated and defecated upon.<sup>156</sup> With heavy irony, the

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<sup>150</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 71.

<sup>151</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 71.

<sup>152</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 72.

<sup>153</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 72.

<sup>154</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 73.

<sup>155</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 73.

<sup>156</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 74.

Commission commented that: "It should not be forgotten that all of the aforesaid was done in the name of appointing 'progressive people' into the Department."<sup>157</sup> The Commission pointed out that: "Hostage taking of senior officials by junior members of the Department was another by-product of Operation Quiet Storm."<sup>158</sup>

In addition to "Operation Quiet Storm", the Commission also commented briefly on another operation named "Operation Thula". This latter operation was a POPCRU-driven campaign in the Bloemfontein Management Area, aimed at "influencing management and rendering the prison ungovernable."<sup>159</sup> The Commission pointed out that very few witnesses had been prepared to give evidence on either Operation Quiet Storm or Operation Thula. It ascribed this to fear on the part of witnesses – to be seen as crossing the powerful union:

"This [i.e. the refusal of witnesses to testify] confirmed to the Commission that Popcru had instructed that a code of silence be maintained around these operations, as the witnesses had informed the Commission. The Commission's attempts to corroborate the evidence were met either by denial or refusal to discuss the operation. Many of the members/informants who wanted to divulge information became unwilling when they heard that their identity would have to be revealed in order to act against those implicated. Vital leads were lost in the process."<sup>160</sup>

In its findings, the Commission commented on the failure of the Department of Correctional Services to discipline any of the perpetrators of the many illegal acts committed during operations Quiet Storm and Thula. One example related to the reign of terror in KwaZulu-Natal by Russell Ngubo, Nhlanhla Charles Ndumo and Thami Memela

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<sup>157</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 75. As to the decisions taken at "secret meetings" to allocate senior posts to specific persons based upon their loyalty to the union, instead of their qualifications and experience, the Commission pointed out that: "Appointees who are the outcome of clandestine meetings and whose appointments are based on union loyalty or any other patronage will never enjoy authority or the respect of those under them." See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 77.

<sup>158</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 75.

<sup>159</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 76.

<sup>160</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2, at 76-77.

– who were among the original organisers and supporters of Operation Quiet Storm. In the words of the Commission:

"The fear engulfing the Department also extended to the national level. When the Minister of Correctional Services called a meeting to try and resolve the KwaZulu-Natal problems, he was intimidated and was forced to hold the meeting dealing with the problems of Pietermaritzburg outside the district of Pietermaritzburg. The three (3) men were thus effectively running the Department in the province with impunity and had clearly become a law unto themselves with even the Minister not being welcome in the Departmental premises at Pietermaritzburg."<sup>161</sup>

Furthermore, the Commission pointed out that the Department of Correctional Services had made no effort to recompense the victims of the actions described above. While those who had been responsible for the victimisation remained employed in their posts within the Department, there was no evidence before the Commission "to indicate that there was any form of apology or counselling or any acceptable form of social or restorative justice or any humanitarian gesture by the Department to the victims of the aforesaid actions."<sup>162</sup> In a telling paragraph, the Commission explained the failure of the Department to deal with the situation created by Operation Quiet Storm – as due to what it termed "investigation paralysis":

"Decisive action to address the general lawlessness that was clear to everyone was avoided by the Department, which chose rather to appoint Commissions of Inquiry or Investigative Boards whenever there was a crisis that required tough decisions. In total there have been more than twenty (20) investigations into the Department in the last ten (10) years. Of these twenty (20), this Commission has identified that seven (7) were concerned with issues that arose because of undue union influence ... The paralysis in the Department fuelled the corruption and criminal conduct taking hold,

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<sup>161</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 96.

<sup>162</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 96-97.

as the Department failed to send out a clear message to the perpetrators that they needed to respect law and order and that they were not above the law."<sup>163</sup>

Among the reasons identified by the Commission for the "emasculatation of Departmental management", were the "appointment of not suitably qualified personnel ... which was the product of interference with a fair recruitment process"; appointments which were "based on loyalty to the union instead of competency for the job"; the "failure to recruit and bring in outside skills at management level"; the transformation process being perceived as being simply about "the replacement of white officials with black officials", instead of a process incorporating a "human rights culture"; and the lack of an "effective disciplinary system."<sup>164</sup>

#### **4.3 "Amagqugula" and "CORE"**

Operations "Quiet Storm" and "Thula" were not the only "dirty secrets" to emerge from the investigations conducted by the Jali Commission. In its Final Report, the Commission also discussed the existence of two "secret structures" which had been making key management decisions within the Department – "Amagqugula" and "CORE".<sup>165</sup>

The "Amagqugula" were "secret or garage meetings" which were held in the St Albans Management Area at the homes of various shop stewards – "to discuss ... vacant posts that had been advertised and their allocation to the various members of the union ..."<sup>166</sup>

This meant that the formal selection processes for those posts were made redundant, since

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<sup>163</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 97- 98.

<sup>164</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 99-100. In a telling statement as to the malign influence of POPCRU, the Commission stated, *inter alia*, that: "Unions were apparently in control of the day to day running of the Department of Correctional Services, with Popcru being the most powerful and influential. The power of the Department's management had been successfully emasculated by the union, which had succeeded in ensuring that union sympathisers were appointed to almost all strategic positions ... As a result of this distribution of power, the entire management system of the Department, including the capacity to exercise discipline, was ineffective. Employees did not have to comply with the rules and regulations of the Department. Instead, their survival in the Department depended merely on currying favour with the union." See the Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 98.

<sup>165</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 78.

<sup>166</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 78.

they amounted to "a mere rubber-stamping of decisions already taken elsewhere."<sup>167</sup>  
According to the Commission:

"They held secret meetings where policy and practice was resolved and the fate of individuals determined. They removed people from positions by intimidating them or manipulating the disciplinary process to ensure that some people were protected while others were targeted. When they did not like someone who was occupying a position and they could not get the person out by manipulating the system, they simply sent in their 'storm troopers' and bypassed any legitimate process to achieve their own ends."<sup>168</sup>

In a shocking indictment of the extent to which corruption had infected the Department of Correctional Services at the highest levels, the Commission stated that:

"It is clear that the lawlessness had now penetrated all the provinces and had become the order of the day within the Department. The Head Office of the Department was not isolated from the activities taking place at the various Management Areas in the provinces. In fact, the evidence points to the fact that the then National Commissioner was sometimes consulted about these discussions."<sup>169</sup>

In relation to the structure known as "CORE", the Commission explained that it was "a powerful group of senior officials who effectively took control of the Department of Correctional Services."<sup>170</sup> This group was so powerful that most witnesses were only prepared to give evidence about it to the Commission on condition of anonymity – since they were afraid of being killed if their identities became known. The group was established in late 1997, with the aim of driving the "transformation process" forward.<sup>171</sup> The National Commissioner of Correctional Services was identified as a member of this

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<sup>167</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 78.

<sup>168</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 78.

<sup>169</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 81-82.

<sup>170</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 82.

<sup>171</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 82.

group.<sup>172</sup> The Commission spoke of "a process in which key appointments, promotions and removals were determined" at secret meetings of CORE, which extended to the creation and abolition of posts – if this was necessary to achieve the aims of the group.<sup>173</sup> The Commission commented on the fact that: "Not only were the members of Core intelligent, they were also scheming and ruthless."<sup>174</sup> The result was that anyone who disagreed with the group was victimised:

"The *modus operandi* followed was that any progress in the careers of the dissenting individuals, would be brought to an immediate halt. They would be punitively transferred or they would be disciplined and inevitably dismissed from the Department."<sup>175</sup>

The Commission regarded CORE as a ruthless body which engendered a great deal of fear within the Department of Correctional Services, and concluded that its members were "master strategists and manipulators."<sup>176</sup> It mentioned that some Correctional Services staff members had described CORE as being "akin to the 'Broederbond'".<sup>177</sup> As to the close links between POPCRU and CORE, the Commission stated that, while both bodies had similar aims as far as "transformation" was concerned, POPCRU operated as a public body – whereas CORE operated in secret.<sup>178</sup> In a disturbing insight into the ruthless nature of those running CORE, the Commission noted the following:

"As often happens with secret organisations, cracks began to appear in Core. Envy, resentment and other vices no doubt played a role. The original Core no longer operated as a unit. In fact, a different Core, which took over the real decision-making, was formed but the pretence was maintained that the original Core was still intact and in control. This charade could, however, not last. Those excluded from the

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<sup>172</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 83.

<sup>173</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 85.

<sup>174</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 86.

<sup>175</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 86.

<sup>176</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 89.

<sup>177</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 85.

<sup>178</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 90.

new Core soon got a taste of their own medicine. They were hounded out of the Department over a period of time after being removed from their positions of power."<sup>179</sup>

#### **4.4 The Malign Influence of Certain Trade Unions and Irregularities in Recruitment**

In a separate chapter dealing with the influence of certain trade unions within the Department of Correctional Services during the post-apartheid period, the Commission confirmed and reiterated many of the conclusions it had reached in those sections of its final report dealing with the various secret operations and structures discussed above. The Commission began by pointing out that:

"Trade unionism, coupled with the concept of affirmative action, led to a situation in the Department where members who had been ordinary warders were promoted to senior management positions in extraordinary ways... [T]rade union membership was 'the ticket' to a senior management position."<sup>180</sup>

In a damning indictment of the malign influence exercised by POPCRU over the Department of Correctional Services during the first ten years of the post-apartheid period, the Commission stated, *inter alia*, that:

"The union influence within the Department of Correctional Services has had such a profound effect that even the appointment of senior, critical and technical staff has been affected. Some of those appointed do not qualify to be in their positions, while

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<sup>179</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 90. The extract quoted brings to mind the following chilling quotation: "The inhabitant of Hitler's Third Reich lived not only under simultaneous and often conflicting authorities of competing powers, such as the civil services, the party, the SA, and the SS; he could never be sure and was never explicitly told whose authority he was supposed to place above all others. He had to develop a kind of sixth sense to know at a given moment whom to obey and whom to disregard." See Arendt, H (1951) *The Origins of Totalitarianism* New York: Harcourt: at 399. The Commission recommended that "a thorough investigation of Core, its strategies and its role be done so as to bring the Department back under the control of the legal decision making body, its Management Board and not some secret structure." Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 2 at 92.

<sup>180</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 3 at 104.

those who might assist in the effective management of the Department are sidelined or, if appointed, made to carry out menial duties that have nothing to do with their specific qualifications. The strategic and influential positions are left to those people loyal to the union."<sup>181</sup>

The Commission gave the example of ordinary warders who ended up "playing the role of various specialists and technical people, such as medical doctors, psychologists, dieticians, human resources specialists, lawyers, accountants, strategic planners etc."<sup>182</sup> This had the effect of demotivating the legitimate professional staff within the Department. The Commission reached the extraordinarily disturbing conclusion, that "the Department was, at one stage, generally under the control of the union" and that the offices of the Minister and Commissioner of Correctional Services had "lost total control of the Department."<sup>183</sup> The situation deteriorated to such an extent that certain members of the Department were convinced that "trade unionism" no longer existed in certain areas, since it had been replaced by "gangsterism". In the words of the Commission:

"The reference to trade unionism as gangsterism has everything to do with the role the union has played in the various violent and illegal activities in the Department. This, unfortunately, has been the trend to date where there has been a clear disregard for the law and the union carries on trying to influence the manner in which the Department is run through, sometimes, unlawful means."<sup>184</sup>

An issue closely related to that of the malign influence of certain trade unions, was the issue of the recruitment and retention of staff. On this issue, the Commission painted the following disturbing picture: "Recruitment drives, appointments, promotions and merit awards are constantly tainted with allegations of malpractices, irregularities, nepotism and even corruption."<sup>185</sup> The Commission examined in detail the recruitment practices of

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<sup>181</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 3 at 115.

<sup>182</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 3 at 115.

<sup>183</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 3 at 116.

<sup>184</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 3 at 116-117.

<sup>185</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 5 at 189.

various Management Areas. Although it is impossible to summarise in any detail the extensive findings of the Commission in relation to this issue, it is possible to provide a few highlights which serve to indicate the general tenor of the Commission's findings:

*Durban-Westville Management Area:*

"As in all the other Management Areas the Commission has investigated, the recruitment of staff in KwaZulu-Natal and, in particular, officials in managerial positions, has been affected by Operation Quiet Storm, which was primarily aimed at replacing white managers with black managers. The issue of skill or potential to do the job was immaterial. Patronage was the only consideration ... Officials appointed to occupy senior positions within the Province of KwaZulu-Natal were identified at secret meetings and this resulted in the appointment of unskilled and incompetent managers ... In the Durban-Westville Management Area, the Commission heard evidence that senior officials of the Department employ their wives, relatives and friends in circumstances that amount to nepotism ... "<sup>186</sup>

*Pietermaritzburg Management Area:*

"The Pietermaritzburg Management Area was the most problematic area in terms of the recruitment of staff, with many of the problems being the consequence of Operation Quiet Storm ... The intimidation and violence which prevailed made the ground fertile for corruption and maladministration ... The Commission ... heard evidence to the effect that the appointment of managers' wives was the order of the day in the Pietermaritzburg Management Area. Out of 17 Area Managers, fewer than five did not have their wives working in prisons ... It was also noted by the Commission that a significant number of employees in the Department in the Pietermaritzburg Management Area were related to one another ... The Commission also heard evidence that Mr Russell Ngubo received a merit award whilst on

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<sup>186</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 5 at 221–223.

suspension. It also heard evidence that Mr Ngubo was promoted whilst he was in police custody facing a murder charge during the year 1997 ... In the Pietermaritzburg Management Area a total of 14 members submitted fraudulent matric certificates to gain employment in the Department or to receive promotion and other related benefits ... One member, Mr Thamsanqa Memela, submitted two fraudulent matric certificates, one in 1997 and the other during the year 2000."<sup>187</sup>

*St Albans Management Area:*

"[T]he affairs of the Department in the Eastern Cape Province, at the time of the Commission's investigations, were effectively run by a group of people closely associated with Popcru. The Department appeared to have lost total control in this region ... As in all other areas the Commission has investigated, recruitment is a huge problem in the Eastern Cape. The Commission heard evidence from various witnesses on how appointments and promotions were manipulated by certain members in the St Albans Management Area ... The manipulation took the form of: interference with the short-listing process; the removal from and inclusion of certain names on the short-list; the appointment of senior members' wives, relatives and girlfriends; the removal or transfer of members who were viewed as obstacles ... "<sup>188</sup>

To sum up, the Commission found that the recruitment process was riddled with irregularities. Among the findings of the Commission in relation to this issue, were: in all the Management Areas it had investigated, recruitment processes were "characterised by corruption, maladministration, nepotism, favouritism and non-adherence to departmental policy"; a "common feature" in the "malpractices and irregular practices" had been "the manipulation of the processes by senior officials in the Department"; "[i]nexperienced, unqualified and incompetent officials" had been appointed at Heads of Recruitment; and the appointment of staff had been "influenced by trade union affiliations."<sup>189</sup>

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<sup>187</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 5 at 224-226, and 228.

<sup>188</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 5 at 230- 231.

<sup>189</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 5 at 251-252.

## 5. Conclusion

There can be no doubt that, following the publication of the Final Report of the Jali Commission of Inquiry in December 2005, the dream of a South African penal system based on humane treatment and respect for human rights had officially turned into a nightmare. As discussed in this article, evidence led at the hearings of the Commission – as well as various shocking events surrounding those hearings – were widely reported on in the national press. This meant that, by the time the Jali Commission published its Final Report, the South African public must have been well aware that the country's penal system was riddled with corruption. Nevertheless, it must have been a shock to those who read the Final Report – to learn of the full extent of the corruption and the precise manner in which it had taken hold and flourished during the first decade following the demise of apartheid.

Problems of cruelty, corruption and maladministration within the South African penal system did not start with the fall of apartheid. These problems dated back to colonial times.<sup>190</sup> Furthermore, in terms of its stated aims of reducing crime and reforming criminals, the punishment of imprisonment has been a failure from the very beginning. From the time that this form of punishment rose to prominence in South Africa during colonial times, right through to the post-apartheid period – it failed to fulfil these aims. For a brief time after the country's miraculous transition from apartheid to democracy, it may have seemed that South Africa's penal system could break the long-established patterns of cruelty and disrespect for basic human rights laid down during the colonial, post-colonial, and apartheid periods. As this article has shown, however, this did not turn out to be the case in practice. Instead, there is a strong case to be made in support of the

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<sup>190</sup> With regard to the colonial era, see, for example, Peté, SA (1986) Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal *Natal University Law and Society Review* 1(2): 99-114. With regard to the apartheid era, see, for example, Peté, SA (2015) Apartheid's Alcatraz - The Barberton Prison Complex during the Early 1980s - Part One *Potchefstroom Electronic Law Journal* 18 (2):273-304, and Peté, SA (2015) Apartheid's Alcatraz - The Barberton Prison Complex during the Early 1980s - Part Two *Potchefstroom Electronic Law Journal* 18 (2): 305- 330.

view that the publication of the Final Report of the Jali Commission of Inquiry marks the point at which this particular dream of the 'rainbow nation' finally died.

In serving to uncover the scale of corruption within the penal system of post-apartheid South Africa, the Jali Commission undoubtedly played a positive and reformatory role. A number of years after the Commission published its report one commentator, Johan Burger, stated as follows:

"Had these recommendations been implemented properly, it is possible that the incidence of corruption in the department would have been addressed, and the treatment of prisoners by warders improved. The Commission did have the effect of stimulating the Portfolio Committee on Correctional Services to take their oversight role more seriously and to hold regular reporting meetings with the department to monitor progress in respect of the recommendations of the Commission and the reports by the Auditor General. While many of the recommendations by the Jali Commission have not yet been acted upon, the Commission did serve an important function of bringing to light the extent of the problem within prisons and providing the basis for advocacy to address these problems."<sup>191</sup>

As the guarded tone of the above comment indicates, when seen within the broad scope of South Africa's penal history, it is clear that simple reform has never been sufficient to cure a penal system which is inherently flawed. Michel Foucault's conception of imprisonment as a form of punishment characterised by repetitive 'failure' seems clearly applicable in the South African context.<sup>192</sup>

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<sup>191</sup> Burger, J (2011) To Protect and Serve: Restoring Public Confidence in the SAPS *SA Crime Quarterly* 36: 18.

<sup>192</sup> Foucault, M (1979) *Discipline and Punish: The Birth of the Prison* London: Peregrine Books at 264-272.

## 5. Conclusion

## 5. CONCLUSION

### 5.1 General Overview

As stated in the introduction to this thesis, the general aim of this work has been to conduct a detailed analysis of the public and political discourse surrounding imprisonment in South Africa – during specific periods within the colonial, apartheid and post-apartheid eras. A number of objectives were set out apart from this general aim. What follows in this sub-section is a brief overview of these objectives, including certain preliminary comments on the manner in which each of these objectives has been achieved. The rest of this concluding chapter then proceeds to deal separately with a number of themes – providing a more detailed account of the different conclusions which may be drawn from this thesis.

The first objective of the thesis was to establish whether the discourse surrounding imprisonment in South Africa followed a similar pattern to that described by the philosopher Michel Foucault, in his seminal work on the origins and development of this form of punishment in Eighteenth Century Europe.<sup>1</sup> According to Foucault, from the very beginning of its rise to prominence, this form of punishment was denounced within public discourse as being a failure. The punishment of imprisonment was never able to reduce crime and, far from rehabilitating offenders, the prison served the opposite function of producing a class of delinquents, who were unable to escape from a life of crime and repeated incarceration.<sup>2</sup> And yet, despite regular and repeated public acknowledgements of the prison's failure to reduce crime or rehabilitate criminals, this form of punishment continued – and still continues – to dominate the penal landscape in Europe. Foucault believed that the very failure of the prison system proved to be an advantage to the development of industrial capitalism, in that it served to manufacture a class of delinquents who could be separated from the working class, and effectively controlled by those in power.<sup>3</sup>

In answer to the question of whether penal discourse in South Africa followed a similar pattern to that described by Foucault in the European context, this thesis responds broadly in the affirmative. In general terms, and for almost two centuries, South African penal discourse has been characterised by an endless cycle of shock public "revelations" about the failure of the penal

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<sup>1</sup> In particular, Foucault, M (1979) *Discipline and Punish: The Birth of the Prison* London: Peregrine Books.

<sup>2</sup> Foucault, M (1979) *Discipline and Punish: The Birth of the Prison* London: Peregrine Books at 264.

<sup>3</sup> See Foucault, M (1980) *Power/Knowledge: Selected Interviews and Other Writings, 1972-1979*. Gordon, C (Ed). Brighton: Harvester Press. See, also, Foucault, M (1979) *Discipline and Punish: The Birth of the Prison* London: Peregrine Books.

system, coupled with suggestions for "reform" – which remain similar from one decade to the next. This thesis contends, however, that while penal discourse in South Africa has followed a similar general pattern to that pointed out by Foucault, the reasons for this pattern being followed – i.e. the overall "function" performed by South Africa's perpetually "failing" penal system, as well as the ideology underpinning that system – are distinctive to a society characterised by racial divisions, massive economic inequality, and openly coercive mechanisms of social control. Thus this thesis confirms Foucault's basic analysis, but adapts this analysis and takes it forward to better explain penal ideology and social control within the context of an unequal, racially divided society, with colonial roots. The basic contention of this thesis, which is set out in more detail in the subsections which follow, is that imprisonment in South Africa has traditionally performed a much more openly coercive and political role than may have been the case in Europe. Furthermore, this thesis contends that the ideology which underpins the South African penal system, has always been strongly influenced by fear on the part of insecure elites. Historically, these elites were based primarily on race, but class has become increasingly important during the post-apartheid period. South African penal discourse has generally been dominated by a focus on retribution, deterrence and incapacitation, rather than on rehabilitation. The idea of imprisonment as a mechanism for reforming criminals, and thereby achieving social consensus and peace, has been far less important within South African penal discourse than the idea of punishment as a mechanism for preserving the political order and "civilised" values within a "savage" country. These general points concerning the distinctive ideology underpinning South Africa's penal system, as well as the manner in which imprisonment in this country has been used as a method of political and social control, may be linked to the second and third objectives set out in the introduction to this thesis – which are discussed briefly below.

The second general objective of this thesis, was to trace the evolution of penal ideology in the South African context and to examine the emergence of a unique set of ideas and perceptions which underpin the punishment of imprisonment in this country. In other words, the thesis set out to reveal the process in terms of which penal ideologies originating in Europe were shaped and moulded over time by the social, political and economic realities of Southern Africa – to become a distinctive ideological construct shaping a form of punishment which is uniquely South African. As discussed in more detail in the subsections which follow, this thesis has traced the development of penal ideology in South Africa over time – from the emergence of a unique system of racially defined punishment in colonial Natal; to the development of a form of punishment, which, in many ways, reflected the racist ideology of the apartheid state; and, finally, to the evolution of punishment by neglect in post-apartheid South Africa, driven by the insecurities of a brittle middle class endlessly

giving voice to its fears – real and imagined – in a shrill discourse on crime, which continually emphasised the need to punish criminals more harshly.

The third broad objective of this thesis was to trace the broadly political role played by imprisonment over time – within the social, political and economic structure of South Africa as a whole. The thesis has highlighted the use of imprisonment in South Africa as a mechanism of social control, from the colonial era right through to the post-apartheid period. The use of prisons to achieve overtly political ends related to social control, has coloured much of South Africa's penal history and contributed greatly to the unique "flavour" of imprisonment in this country. As will be discussed in more detail below, this thesis illustrates the manner in which, throughout South Africa's penal history, thousands of ordinary South Africans on the wrong side of racial and class divides, have been swept up into a penal system operating, in part, as a mechanism for the control of an unequal and deeply divided society. From the subjugation of the Zulu people during the colonial period; to the enforcement of the infamous "pass laws" during the apartheid period; to the confinement of huge numbers of petty offenders too poor to pay bail during the post-apartheid period; the South African penal system has never been focused solely on punishing and reforming "criminals" in the true sense of the word. An element of "social control" has always been present in the operation of the system.

The final objective of this thesis, as articulated in the introduction, was to examine a range of different themes and sub-themes providing insights into life in South African prisons at various times in the country's history. In pursuing this objective, this thesis has highlighted the widespread abuse of the basic human rights of prisoners in South Africa during each of the periods examined. It has provided a close-up look at the suffering of inmates in South African prisons over time, and has endeavoured to convey to the reader a sense of the "smell and feel" of South African prison life. From the extensive use of harsh corporal punishment in the overcrowded gaols of colonial Natal, especially against black offenders; to the brutal beatings meted out at the Barberton prison farm during the apartheid period; to the gang violence and unsanitary living conditions experienced by many inmates during the post-apartheid period; this thesis has traced a litany of suffering which covers significant portions of South Africa's penal history.

In the sub-sections which follow, various themes and sub-themes which have resonated over the decades within South African penal discourse, are examined in more detail. These themes and sub-themes provide definition and nuance to the broad conclusions which may be drawn from this thesis as a whole. In unravelling this complex set of intertwined themes and sub-themes, it is useful to

start with a distinction put forward in Chapter 4.2 of this thesis. In that chapter it was suggested that prisoners in South Africa may be divided into three conceptual categories: the "Good", the "Bad" and the "Warehoused".<sup>4</sup> Throughout South Africa's penal history, the vast majority of prisoners have fallen into the last of these categories - the "Warehoused". The first of the three subsections which follow, deals with various themes relating to this category of prisoners, including the most dominant theme within South African penal discourse – overcrowding. The second of the three subsections which follow deals with various themes relating to the second of the categories mentioned - the "Bad". This subsection is concerned with the prominent role played by various "folk devils" – such as prison gang members – within South African penal discourse, as well as the manner in which the penal system has responded to such prisoners over the decades. The third of the three subsections which follow deals with various themes relating to the first of the conceptual categories mentioned – the "Good". This subsection is concerned with the symbolically important role played by a small category of prisoners within South African penal discourse – i.e. those select few considered worthy of "rehabilitation", including the white prisoners of colonial Natal; the white female prisoners – the "fallen angels" – of the apartheid period; and certain high-profile prisoners during the post-apartheid era.

## **5.2 The Warehoused**

This subsection deals with a number of the central themes discussed in this thesis which concern "The Warehoused" – the vast bulk of South African prisoners who have almost always been confined in chronically overcrowded conditions, resulting in serious violations of their basic human rights.

In order to situate the South African penal system within its unique ideological framework, this subsection will begin with an examination of three prominent ideological themes covered in this thesis – the evolution of a penal ideology driven by racist paternalism and fear; developing

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<sup>4</sup> Referring, in particular, to the period leading up to South Africa's second democratic election, this thesis explains the distinction between these three conceptual categories as follows: "[A] 'two-pronged' approach was initiated. On the one hand, certain 'high risk' offenders (the 'bad apples') were removed from 'normal' prisons and placed in Pretoria's ultra-secure 'C Max' facility. This facility provided maximum security with minimum comfort, bordering on a serious abuse of human rights. On the other hand, several new facilities were built which were dubbed 'five star hotels' by the newspapers. These facilities were designed to cater for prisoners at the other end of the inmate spectrum, who were provided with every opportunity to rehabilitate themselves ... In practice, the two-pronged' approach was only relevant to a small proportion of the prison population. Sandwiched between the 'good' prisoners in their 'five star hotels' and the 'bad' prisoners in 'C Max' were the bulk of the prison population, 'warehoused' in chronically overcrowded facilities throughout the country." See Chapter 4.2 of this thesis at v.2 p.373.

conceptions of race within the context of changing prison dietary scales; and the social meanings attached to prison labour in a racially divided economy.

Discussions on each of the above themes will be followed by an examination of a central issue which has bedevilled imprisonment in South Africa – i.e. its use by successive ruling elites as a mechanism for imposing and maintaining social control over the indigenous population and the poor. This theme illustrates the fact that, from the very beginning, imprisonment in South Africa has been tied up with issues of race, class and social control.

The final theme to be discussed in this subsection – prison overcrowding – is linked to the theme of social control. The continued abuse of the penal system for essentially political purposes – straightforward racial domination in the early days, increasingly turning to class domination in post-apartheid South Africa – is an important reason for the continued overcrowding in South African prisons, throughout their history. Chronic overcrowding is the most enduring and prominent theme identified by this thesis within the broad scope of South African penal discourse. It has resulted in the "warehousing" of prisoners and all that this entails – an inability even to attempt the rehabilitation of prisoners; huge inroads into the basic human rights of prisoners as infrastructure is put under unbearable strain; the facilitation of brutal gang activity; a massive strain on prison personnel; and many other evils.<sup>5</sup>

### **5.2.1 Penal Ideology Driven by Racist Paternalism and Fear**

As pointed out in Chapter 1.4 of this thesis, penal incarceration was rare in pre-colonial Africa.<sup>6</sup> Imprisonment as a form of punishment – in the sense it is understood today – was essentially a construction of early industrial capitalism, as it developed in Europe and North America. The transplantation of this form of punishment into the "foreign soil" of Africa transformed the penal ideology underpinning it – as ideas originating in the rapidly industrialising capitalist political economies of the colonial metropolises were shaped by social, political and economic forces at play

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<sup>5</sup> For example, Lukas Muntingh states as follows in relation to imprisonment in post-apartheid South Africa: "The detrimental effects of the physical environment prisoners have to endure year after year cannot be underestimated. Conditions, especially overcrowding, are such that it is nearly impossible to create an environment conducive to preparing someone for life outside prison. The strain on resources is enormous and one cannot expect to see good citizens emerging from an environment that cannot take care of the basic needs of prisoners. The Department of Correctional Services does not, at this stage, have the capacity to deal effectively with the number of prisoners entrusted in its care. If reintegrating ex-prisoners stands any chance of succeeding, the first and foremost task is to reduce prison overcrowding to achieve manageable numbers that are in line with the resources at the disposal of the Department of Correctional Services." See Muntingh, L (2002) Talking Recidivism - What is Needed for Successful Offender Reintegration" *Track Two* 11(2):20-24 at 23.

<sup>6</sup> See Chapter 1 of this thesis.

within the colonies.<sup>7</sup> This thesis has traced various aspects of this ideological transformation process, certain of which will be discussed briefly in the paragraphs which follow.

Starting with the penal ideology of the colonial metropolises, this thesis has noted that an important idea supporting the emergence of the modern prison as the central mechanism of punishment within the developing industrial capitalist political economies of Europe and North America, was that it was thought to be possible to achieve social consensus between the emerging proletariat and bourgeoisie. Imprisonment – with its stated goal of reforming and rehabilitating criminals – was regarded as a form of punishment which could contribute to social cohesion during a period of economic instability and social upheaval. As postulated by Michael Ignatieff:

"The reformatory ideal had deep appeal for an anxious middle class because it implied that the punisher and the punished could be brought back together in a shared moral universe"<sup>8</sup>

As this thesis has pointed out, however, social consensus was not a high priority in the colonies of Africa. Social control within the colonies was built on a foundation of racial division and open coercion. Penal ideology in the colonies was more concerned with the maintenance of white sovereignty and authority, than with social consensus. In particular, it was much more concerned with the race of the offender and with the appropriate penal response to offenders of this or that particular racial group, than with the rehabilitation of offenders in general. The maintenance of white sovereignty and the centrality of race are enduring themes within colonial penal ideology, and resonate well beyond the colonial period. These central themes gave rise to a range of important sub-themes discussed in the body of this thesis – certain of which are illustrated in the discussion which follows.

In the case of black offenders, at an ideological level, crime was seen as a challenge to white sovereignty and authority. To prevent a challenge turning into open rebellion, punishment had to communicate a message of strength, power and control on the part of the white settler ruling class in general, and the colonial authorities in particular. To many colonists, the whip or the cat-o-nine-tails

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<sup>7</sup> In Chapter 2.2.1 of this thesis, referring to the Colony of Natal in particular, this idea is expressed as follows: "[T]he extension of the punishment of imprisonment to all parts of the colony of Natal in the 1860s should be seen as part of a rather complex process, whereby the penal ideologies of the colonial power were twisted, adapted and supplemented to suit local conditions, within the context of an ongoing struggle between the colonizers and the indigenous population." See Chapter 2.2.1 of this thesis at v.1 p.88.

<sup>8</sup> Ignatieff, M (1978) *A Just Measure of Pain* London: MacMillan at 213, cited in Section 2.1 of this thesis.

was a much more effective mechanism for dealing with black offenders than the prison.<sup>9</sup> With the defence of white sovereignty being such a priority, it is no wonder that reform-oriented penal ideas such as the need to introduce the "separate" or "silent" systems or "strictly penal labour" on the treadmill, seemed so out of touch and so often failed to be properly implemented in the colonies.<sup>10</sup>

Of course, reform-oriented penal ideas were still of interest to the white settlers when it came to the punishment of white offenders. During colonial times, however, these prisoners usually formed such a small group that the major ideological concerns surrounding the punishment of this racial group – in colonial Natal at any rate – seemed to centre on the need to keep white prisoners hidden from the indigenous population, so as not to undermine white authority in the minds of the "natives".<sup>11</sup> Once again, the obsession of the white settler ruling class with maintaining white sovereignty – the illusion that the white master race was infallible and in absolute control – coloured penal ideology and gave it a nasty racial twist. Furthermore, as has been noted in this thesis that the dialectical interplay between a warped colonial penal ideology on the one hand, and the social, political and economic conditions which contributed to the "warping" on the other, could give rise to considerable irony. At the turn of the Nineteenth Century, for example, it is ironic that colonists in Natal could point to the complete absence of employment opportunities involving physical labour for white men, as justification for the perceived need to provide only white prisoners with training in industrial skills, tucked away in a separate "industrial prison" and safely out of sight of the black population.<sup>12</sup>

As to why penal ideology in the colonies – in particular colonial Natal – was so focused on the brutal punishment of black offenders, this thesis has suggested that it is partly the result of the particular make-up of the white settler psyche. As pointed out in Chapter 2.1 of this thesis, white attitudes towards black offenders in colonial Natal were shaped by a peculiar and often ambiguous combination of racist paternalism and fear.<sup>13</sup> On the one hand, the white settlers were driven by their fear of being surrounded and vastly outnumbered by hundreds of thousands of indigenous Zulu tribesmen, who they regarded as being "primitive" and "savage". White fear of black offenders in particular had a major effect in shaping the "tone" of punishment administered in colonial Natal, and is an important element to be borne in mind when assessing the shape of penal ideology in the

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<sup>9</sup> See below at 5.3, for more on the role played by corporal punishment in the African and, particularly, the South African context.

<sup>10</sup> See Chapters 2.2.1 and 2.2.2 of this thesis on the failure of strictly penal labour in colonial Natal.

<sup>11</sup> See Chapter 2.1 of this thesis at v.1 p.77.

<sup>12</sup> See Chapter 2.1 of this thesis at v.1 p.79.

<sup>13</sup> See Chapter 2.1 of this thesis at v.1 p.72.

colony. On the other hand, the colonists were also motivated by a deep racist paternalism, which led them to regard the indigenous inhabitants of the colony as being helpless children, in need of being uplifted to a higher plane of civilisation. This too, had an important effect on the shaping of penal ideology in the colony. On the one hand, white fear insisted upon harshly punitive forms of punishment – corporal punishment and imprisonment with hard labour – and on the other hand, racist paternalism maintained that all efforts at rehabilitation would be wasted on the "childlike natives" and, what was worse, they were particularly susceptible to the corrupting influences of the prison. This strange mixture of racist paternalism and fear resonates within the penal ideology of the colonial period, as well as within South African penal ideology long after the colonial period.

Moving forward to a discussion of the penal ideology of the apartheid period, this thesis has traced in some detail the racist attitudes which permeated the South African penal system during the early 1980s. In significant ways, the ideological landscape of apartheid South Africa – at least in relation to issues of punishment – was similar to that of colonial Natal. By and large, during the apartheid era the ruling white elite regarded itself as an embattled minority, with a sacred duty to uphold Christian values and Western civilisation in the "dark continent" of Africa. This "laager mentality" – a feeling of being greatly outnumbered by myriad dark forces and misunderstood by the rest of the "civilised" world – was apparent within South African penal ideology at this time. White anxiety and anger reached particularly high levels during the early to mid 1980s, shortly before the declaration of a nationwide state of emergency by the National Party government, in response to what it perceived as being a communist-inspired "total onslaught" on the country. Fear of the so-called "*swart gevaar*" – the "black threat" – and "*rooi gevaar*" – the "red (communist) threat" – permeated much of the thinking of the white elite during this period. This goes some way towards explaining the brutal racism which characterised much of the South African penal system at this time.<sup>14</sup> During the apartheid period, as had been the case during colonial times, the South African penal system was deeply preoccupied with the protection and maintenance of white power and authority. A major function of the South African penal system at this time was to act as a mechanism for the enforcement of apartheid social control legislation, such as the infamous pass laws. Even when not acting in this quasi-political capacity, the main focus of the penal system was on retribution and deterrence, rather than on rehabilitation. The vast majority of (black) prisoners in apartheid gaols had a simple lesson to learn – if you break the law laid down by the (white) apartheid authorities, you will face brutal punishment and will be shown little mercy.

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<sup>14</sup> See, for example, the discussion of the Barberton Prison Complex in subsection 5.3.4 of this Conclusion, and in Chapters 3.2.1 and 3.2.2 of this thesis.

Turning to the end of apartheid and the dawn of South Africa's democracy, it is apparent that the fears of the white elite did not simply disappear overnight. On the contrary, these fears seemed to become even stronger, although they were no longer expressed in openly racist terms – at least not in public. All the old nightmares of being overwhelmed by hordes of "godless savages" – the spectres of the "*swart gevaar*" and the "*rooi gevaar*" – as well as new nightmares of being pushed aside by a rising black middle class, were subsumed into the single category of "Crime". In the "new" South Africa, "Crime" became the lightning rod for middle class fears in a country characterised by rapidly changing social, political and economic conditions. Even as a black middle class began to develop and change the complexion of the South African elite, the issue of "Crime" remained a point on which all in the evolving middle class could focus their fears. The brittle nature of an insecure middle class – in the process of rapid transition and reformation – tended to reinforce and heighten, rather than allay, deep-rooted fears. All in all, it may be argued that middle class fear was "off the hook" during the immediate post-apartheid period, which had a profound effect on the penal discourse of the time. As stated in Chapter 4.1 of this thesis in relation to this period:

"Public opinion was dominated by fear and concern at the high level of crime in the country. The perception that the country was in the grip of an unprecedented crime wave hardened public opinion against the early release of prisoners by means of amnesty or parole. There was very little public debate on the question of rehabilitation of prisoners or their reintegration into society. Instead, the emphasis was on retribution, incapacitation and deterrence. The public mood was a mixture of anger and fear. Public anger was directed at the fact that many prisoners were released after serving only a fraction of their sentences and were not adequately punished for their heinous crimes. Public anger was combined with the fear that large numbers of hardened criminals were being allowed back onto the streets to prey on innocent citizens."<sup>15</sup>

To sum up, a strong theme which emerges from this thesis is the significant extent to which, from colonial times to the post-apartheid period, South African penal ideology has been driven by fear. Historically bound up with coercive racism and racist paternalism, this fear is ever present within

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<sup>15</sup> See Chapter 4.1 of this thesis at v.2 p.338. Chapter 4.3 elaborates on the extent to which South Africans were preoccupied by rising levels of crime during the years following the demise of apartheid, as follows: "Negative sentiment [towards government efforts to reduce crime] began to mount in late 1996 and skyrocketed in mid-1998. By September 1998, only 17% said the government was doing a good job and a massive 81% gave it a negative rating. While it recovered slightly as the election neared, crime (along with jobs) remained one of the ANC's biggest electoral headaches." Mattes, R, Taylor, H & Africa, C (1999) Chapter 3: Public Opinion and Voter Preferences 1994-1999. In Reynolds, A (Ed) *Election '99 South Africa: from Mandela to Mbeki* Claremont: David Philip 37- 63 at 44. See Chapter 4.3 of this thesis at v.2 p.430.

South African penal discourse – sometimes bubbling on the surface and at other times simmering just beneath. It is clear that over the years fear has played a significant role in warping South African penal ideology into the distinctive shapes and contours explored by this thesis.

### 5.2.2 'You Are What You Eat' - Changing Conceptions of Race within Penal Ideology

An important aspect of the emergence of a colonial penal ideology dominated by the desire to uphold white sovereignty and driven by a combination of fear and racist paternalism, was the development of conceptual categories to divide prisoners according to race. This thesis has traced the gradual development of systems of racial classification in the prisons of colonial Natal – connected to prison dietary scales – showing how the amorphous concept of race began to take ideological shape from very early on.<sup>16</sup> During the nineteenth and early twentieth centuries, the social meanings attached to prison food in colonial Natal were shaped and re-shaped within a developing penal ideology struggling to come to terms with a system of racially defined punishment. Ongoing debates concerning prison dietary scales in the colony serve as a lens through which to observe emerging ideological conceptions of race. The struggle of prison authorities during the colonial period to develop workable conceptions of race, together with the emergence of a system of racially defined punishment, was to set the tone for the evolution of penal ideology in South Africa. During both the colonial and apartheid periods, material and ideological struggles were waged within South Africa's penal system around the issue of prison food. As pointed out in Chapter 2.4 of this thesis, these struggles serve to illustrate both the evolution of a system of racially defined punishment in South Africa, and resistance to that system:

"Eating in a South African prison during both the colonial and apartheid periods certainly amounted to more than *just eating*. On the one hand, it was tied up with the assertion of power, dominance and control on the part of the prison authorities. On the other hand, it was linked to resistance and the assertion of solidarity and identity on the part of the inmates. The assertion of power and dominance through the manipulation of dietary scales within the prisons of colonial and apartheid South Africa was not unique to these penal systems. The

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<sup>16</sup> As stated in Chapter 2.4 of this thesis: "It was in the area of prison diet that colonial authorities first adopted a formal system of racial classification. From a very early stage in the development of the penal system of the colony, the colonial authorities accepted that the dietary scales of prisoners needed to distinguish between different racial groupings. It was taken for granted that white prisoners should be provided with a superior diet ... In subsequent years, thorny problems of race classification were discussed in terms of diet, and changing conceptions of race were reflected in the prison dietary scales, which were altered regularly in accordance with these changing conceptions. A problem which arose time and again over the years was how to classify prisoners who fell on the borderlines between the established racial categories of the time." See Chapter 2.4 of this thesis at v.1 p.142-143.

extent to which the twisted logic of racial segregation and apartheid seeped into the food which inmates were allowed to consume, however, was certainly distinctive. Likewise, resistance on the part of inmates by means of hunger strikes and other food-related activities are common to the histories of many penal systems, but the manner in which food played its part in the struggle for liberation within South Africa's apartheid penal system has a flavour all its own."<sup>17</sup>

### **5.2.3 Prison Labour and its Role in South African Penal Ideology**

A sub-theme which is inextricably linked to the distinctive racially-fixated penal ideology which developed in South Africa over time, concerns the social meanings attached to prison labour. This thesis has explored the obsession of white settlers in colonial Natal with securing and then controlling the labour power of the indigenous population.<sup>18</sup> As pointed out in Chapter 2.3 of this thesis, "the colonial period was characterised by a long and bitter struggle on the part of the colonists to gain control of the power of African labour, since such control was crucial to the consolidation of their position as the ruling class in the colony."<sup>19</sup> This thesis has traced the economic roots of this struggle, and the narrative need not be repeated here.<sup>20</sup> What is of interest to this particular discussion is the importance attached to African labour at the ideological level. As this thesis has noted, the general failure, in the prisons of colonial Natal, of strictly penal labour aimed only at the reformation of prisoners – in the form of "useless" labour performed at the treadmill and the crank – was not at all surprising.<sup>21</sup> The white settler ruling class was not interested in reforming and rehabilitating black offenders. What they were interested in was sending a strong and unambiguous message that white sovereignty and authority was not to be flouted, which meant that punishment had to be primarily punitive as opposed to reformatory. Furthermore, as part of this message, that the white man's word was law, they wanted to convey the idea that the role of the white man was to be the "master" and that of the black man was to be the "servant". The role of the "servant" was to work tirelessly for the "master", as well as to respond to the orders of the "master" with unquestioning obedience.<sup>22</sup>

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<sup>17</sup> See Chapter 2.4 of this thesis at v.1 p.140.

<sup>18</sup> See, in particular, Chapter 2.3. See also, in general, Chapters 2.1, 2.2.1 and 2.2.2.

<sup>19</sup> Chapter 2.3 of this thesis at v.1 p. 119.

<sup>20</sup> See, for example, Section 2 of Chapter 2.3.1 of this thesis.

<sup>21</sup> See Chapters 2.2.1 and 2.2.2 of this thesis.

<sup>22</sup> As stated in Chapter 2.3 of this thesis: "The colonists were ... concerned with controlling the power of African labour and directing that power towards their own interests. They were not interested in reforming criminals. What they wanted was 'tractable and docile servants'." See Chapter 2.3 of this thesis at v.1 p.120.

The use of prison labour to perform productive work in public for the colonial establishment – for example, the prison labour gangs which toiled at the Durban harbour works – conveyed an important ideological message to the population of the colony at large. In addition to this ideological function, of course, it also helped to alleviate the problems caused by severe labour shortages. As pointed out in Chapter 2.3 of this thesis – in the context of colonial Natal at any rate – the dividing line between African labourers on the one hand and African convicts on the other, was ideologically indistinct. To the colonial mind in colonial Natal, the need to perform hard labour in service of the white establishment was inextricably bound up with what it meant to be African, as well as with what it meant to be an African convict.<sup>23</sup>

As discussed in detail in this thesis, Natal's white colonists were perpetually on the look-out for ways in which black convicts could be put to work for the colonial establishment. A good example was the proposal of the 1906 Natal Prison Reform Commission to establish "movable prisons", which would enable African prisoners to perform hard labour on the colony's roads. The significance of this proposal is described in Chapter 2.5.2 of this thesis, as follows:

"With regard to the proposed sentences of forced labour on the roads, the Commission recommended the establishment of 'movable prisons'. These movable prisons would be similar to road construction camps, but would be designed to ensure the safe custody of shorty-sentence black prisoners when they were not working on the roads. Clearly education, reform and scientific treatment were not priorities in the case of black prisoners. To the white colonists, this category of prisoners had two important lessons to learn: firstly, fear the white man and give him due respect as your natural 'master' and, secondly, acquire the habit of docile, obedient manual labour in service of the white man. The first lesson could be taught by the cat-ò-nine-tails and the second by forced labour."<sup>24</sup>

The symbolic importance, as well as the direct economic benefits, attached to penal labour – particularly that of African prisoners – during colonial times, was to resonate within the South African penal system well into the apartheid era.<sup>25</sup> As pointed out by Dirk van Zyl Smit, it was only in the late 1980s that penal labour became less important within the South African penal system:

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<sup>23</sup> See, in general, Chapter 2.3 of this thesis.

<sup>24</sup> See Chapter 2.5.2 of this thesis at v.1 p.184.

<sup>25</sup> One stark – although clearly unusual – example of historical resonance between forms of penal labour employed during the colonial and apartheid periods, involves the use of stone breaking. As pointed out in Chapter 2.3 of this thesis, stone breaking was a form of punitive labour introduced into the gaols of colonial Natal from around the mid 1880s onwards. [See the discussion in Chapter 2.3 of this thesis at v.1 p.208-209.] Almost a century later, as discussed

"Historically, black South African prisoners in particular were subject to notorious forms of hard labour both in stone quarries within prisons and on private farms for farmers who bought 'units' of prison labour from the Prisons Service. Both these forms of labour were abolished in the late 1980s. Some prisoners are still employed on prison farms and in prison workshops but they are a small percentage of the sentenced prisoners. The dramatic effect of the change can be seen by the estimate that in 1973, 88 per cent of sentenced prisoners were employed ... As against this, 29.6 per cent of prisoners were working in 1998."<sup>26</sup>

In an ironic twist, it is the absence of various forms of prison labour and other activities available to the majority of prisoners confined within the South African penal system, which has become an issue of contention during the post-apartheid period:

"The pervasive idleness characterising South African prison life is often described by prisoners as “ ” (eating and sleeping) and the research discussed above has demonstrated that keeping prisoners actively engaged in meaningful programmes, services and education is, to date, the only empirically proven measure to reduce violence and disorder. The number of prisoners involved in work opportunities in prison is frighteningly low, despite the requirement in the Correctional Services Act that at least sentenced prisoners should as far as is practicable be engaged in performing work."<sup>27</sup>

#### **5.2.4 South African Prisons as Mechanisms of Coercive Social Control**

The purpose of imprisonment in Africa has never been limited to reducing crime and reforming criminals. From colonial times, the enforcement of various measures of social control has always played an important role in shaping both penal ideology and the "lived reality" of imprisonment in the continent. As pointed out in Chapter 1.4 of this thesis, imprisonment was central to the

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in Chapter 3.1.1 of this thesis, this same primitive form of penal labour was still being employed in parts of the South African penal system. [See the discussion in Chapter 3.1.1 of this thesis at v.1 p.130-135.] The sad irony of certain "black" and "coloured" prisoners being confined in wire cages and being forced to perform stone breaking during the 1980s, just as certain of their colonial antecedents had been forced to do a hundred years before – requires no further comment.

<sup>26</sup> Van Zyl Smit, D (2001) National Report - South Africa. In Van Zyl Smit, D & Dünkel, F (Eds) *Imprisonment Today and Tomorrow - International Perspectives on Prisoners' Rights and Prison Conditions* 2<sup>nd</sup> Ed The Hague: Kluwer Law International 589- 608 at 599.

<sup>27</sup> Muntingh, L (2009) Reducing Prison Violence: Implications from the Literature for South Africa *Civil Society Prison Reform Initiative Research Report Number 17* Cape Town: Community Law Centre, University of the Western Cape at 34.

establishment and consolidation of colonial control in many parts of Africa.<sup>28</sup> Prisons in Southern Africa were no exception to this general trend. For example, from the 1870s onwards, prisons in Southern Africa formed part of a wider set of institutions – including mine compounds and hostels for migrant labourers – which were designed to confine and control the African population – especially workers.<sup>29</sup> The same was true of colonial Natal in particular, where prisons played an important part in establishing and consolidating colonial control. As stated in Chapter 2.5.1 of this thesis: "Natal's gaols were, in general, overcrowded with offenders against social control legislation – such as the Masters and Servants Ordinance; the Pass Laws; and the Borough Bye Laws rather than with "criminals" in the true sense of the word".<sup>30</sup> As was to happen a century later during the apartheid period, countless numbers of ordinary black residents in the Colony became victims of the petty rules and regulations designed by the white colonists to keep control over the black population. Persons swept up in this dragnet of petty rules and regulations were often unable to pay the stipulated fines, and so ended up in the colony's overcrowded gaols. Many prisoners were not criminals but victims of economic forces beyond their control, and were forced to seek wage labour in towns or on farms controlled by the white colonists – before falling foul of the restrictive legislation designed to keep a tight rein on the black labour force or some other petty measure aimed at the "prosperity" of white society."<sup>31</sup>

In addition to accommodating members of the indigenous population caught in the dragnet of petty and restrictive social control legislation, colonial prisons were also forced to accommodate persons arrested for engaging in open rebellion against the colonial state. The strain placed upon the already

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<sup>28</sup> As stated in Chapter 1.4: "[C]olonial authorities resorted to the widespread use of administrative sentences, which entailed short arbitrary periods of detention affecting a high percentage of the indigenous adult male population. According to Florence Bernault, the purpose of administrative imprisonment was to act 'as an economic incentive to enforce tax collection, forced labor, or cultivation, and to provide colonial companies with a constant influx of cheap labor.'" See Chapter 1.4 of this thesis at v.1 p.46.

<sup>29</sup> In support of this point, the following observations by Johnny Steinberg, which are quoted in Chapter 1.4 of this thesis, bear repeating: "During the early years of the new century, in the aftermath of the great South African War, the new British administration developed a tight labour regime, enforced by a host of laws restricting the urban movement of black migrants. The result is that thousands upon thousands of working-class men lived their urban lives being shepherded from prison to compound, compound to prison. In the jails of early Johannesburg, these nominal criminals, their only offence to have been caught walking the streets without papers, were housed in the same cells as career criminals."

<sup>30</sup> See, in general, Riekert, J (1983) *The Natal Master and Servant Laws* LLM Thesis, University of Natal, Pietermaritzburg. Similar processes were at work in other parts of the country. C van Onselen makes the following perceptive comment about the close inter-relationship between the mechanisms of economic coercion – in his example the mine compounds of the Witwatersrand – and the mechanisms of social coercion – namely the prisons: "[Economic forces] prised black South Africans off their land, separated them from their families, reduced them to the status of workers, and then ruthlessly reallocated them to the towns. There, on the bureaucratic leash of the pass laws, they were soon exposed to two sociologically similar institutions which served the rapidly industrialising economic system particularly well – the prisons and the mine compounds": see Van Onselen, C (1982) *Studies in the Social and Economic History of the Witwatersrand 1886 to 1914* Johannesburg: Raven Press at 171.

<sup>31</sup> See Chapter 2.5.1 of this thesis at v.1 p.158.

vulnerable penal systems could be considerable, as this thesis notes in relation to the penal system of colonial Natal:

"Sometimes low-level strife erupted into all-out war or rebellion – for example, the Langalibalele Rebellion of 1873; the Anglo-Zulu War of 1879; the Anglo-Boer War of 1899; and the Bambata Rebellion of 1906. Each of these events delivered a shock to the penal system of colonial Natal, and led to an influx of prisoners into already overcrowded prisons."<sup>32</sup>

The use of South African prisons as mechanisms of social control did not decrease with the passage of time. Turning to the apartheid period, a major theme within South African penal discourse during the early 1980s concerned the deleterious effects of using the prisons as mechanisms to enforce draconian social control legislation – such as the infamous pass laws which were designed to regulate the free movement of South Africa's "non-white" population.<sup>33</sup> Among the many examples cited in this thesis in support of this point, are the following:

"The *Pretoria News* pointed out that apartheid had 'made statutory criminals of too many people' and stated that this had 'overburdened and slowed down the administration of justice and swollen our jails to a dangerous degree.' *The Argus* stated that the effect of the apartheid social control laws was to 'manufacture prisoners from a generally respectable population' and to 'make criminals of tens of thousands of decent South Africans.' ... [A]n editorial in the *Evening Post* called for the practice of 'sending blacks to prison for minor technical offences under the pass laws' to be stopped. The *Eastern Province Herald* called the pass law system enforced by the apartheid regime 'unique to South Africa in the Western world' and pointed out that: 'Laws based solely on skin colour and stipulating where a person may live, move or

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<sup>32</sup> See Chapter 2.5.1 of this thesis at v.1 p.159.

<sup>33</sup> Although the number of persons confined in South African prisons for offences against social control legislation varied over time, it is clear that they made up a considerable proportion of the total prison population. For example, in relation to the 1960s and 1970s, Chapter 4.5 of this thesis states as follows: "The report of the Truth and Reconciliation Commission set up after the demise of the apartheid system, notes that pass law offenders constituted as many as one in four inmates confined in South African prisons during the 1960s and 1970s. The report states that prisoners of all races experienced 'overcrowding and harsh conditions' but notes that conditions were 'particularly brutal' for black prisoners." [Truth and Reconciliation Commission of South Africa Report, Volume 4, Chapter 7 "I s i u i o a Hearing: Priso s" (Kenwyn: Juta 1998) at page 200 paragraphs 8 and 9. See Chapter 4.4 of this thesis at v.2 p.434.] In relation to the early 1980s, Chapter 3.3.1 of this thesis cites the following statistics provided by the Minister of Justice at the time: "In his response to the furor over prison overcrowding, the Minister of Justice, Mr Kobie Coetzee, pointed out that, whereas social control offenders had made up 32,5 percent of the South African prison population during the period 1 July 1978 to 30 June 1979, this percentage had subsequently dropped to 24 percent." [*Die Burger* 6 February 1981 *Minister oor oorvol tronke*, 11. See Chapter 3.3.1 of this thesis at v.1 p.307.]

work can make of a black man a criminal within minutes. These laws, lacking any moral force and bitterly resented by blacks, are one of the worst manifestations of apartheid."<sup>34</sup>

As pointed out in Chapter 3.3.1 of this thesis, it was clear to most liberal commentators at this time that "the legal and structural edifice put in place by the apartheid regime in order to control the movement of 'non-white' South Africans, was built on sand."<sup>35</sup> These commentators pointed not only that apartheid social control legislation was reprehensible from a moral point of view, but also that the entire system was prohibitively expensive.<sup>36</sup>

This thesis has further isolated and analysed a number of separate themes within the penal discourse of the early 1980s – illustrating the negative effects of using the South African penal system to enforce apartheid social control legislation.

The first such theme concerned the legacy of hatred caused by using the penal system in this way. Apartheid social control legislation was deeply resented by ordinary South Africans, since it targeted normal people who were simply struggling to find employment in the land of their birth. To brand such people as "criminals" by sending them to prison, was deeply unfair. Furthermore, the legislation was openly discriminatory and racist, since it targeted only "non-white" South Africans. By the early 1980s, it was clear to all concerned that continuing to use the penal system to enforce apartheid social control measures would lead only to more bitterness and more hatred.<sup>37</sup>

The second theme concerned the manner in which the practice of using the penal system to enforce apartheid social control legislation cheapened the law and reduced the deterrent effect of imprisonment. Because a very large number of ordinary people were constantly being imprisoned

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<sup>34</sup> *Pretoria News* 5 February 1981 *Crisis in our prisons must be resolved*, 20; *The Argus* 5 February 1981 *The prisons crisis*, 18; *Evening Post* 5 February 1981 *Prison overcrowding: Govt must act now*, 6; *Eastern Province Herald* 6 February 1981 *System that clogs the prisons*, 12. See Chapter 3.3.1 of this thesis at v.1 p.304.

<sup>35</sup> See Chapter 3.3.1 of this thesis at v.1 p.304.

<sup>36</sup> For example, in February 1981 the *Sunday Tribune* commented that: "It is estimated that in the decade 1965 to 1975 there were more than six million prosecutions under the pass laws. The cost of prosecution and imprisonment was R200-million and the cost of policing and patrolling more than R100 000 000. No other country in the world has to bear such a crippling burden of expenditure to maintain what are blatantly discriminatory laws ... It is inconceivable that in the year 1981 we are trying to maintain a system of population control that just will not work any more. What is more it fills with deep resentment the majority of people, and it helps to intensify a dangerous world hostility. Lastly, but by no means least, it gives many blacks a contempt for these particular laws, and an acceptance of imprisonment as an inevitable feature of black life. In some it generates a contempt for all law and order. We are dealing here with a social problem of the gravest kind." *Sunday Tribune* 5 February 1981 *Overhaul our jail system*, 22. See Chapter 3.3.1 of this thesis at v.1 p.313.

<sup>37</sup> See Chapter 3.3.2 of this thesis at v.1 p.314. For example, the Afrikaans language newspaper *Rapport*, summed up the effect of imprisoning thousands of ordinary African breadwinners because of technical violations of social control legislation, as follows: "This is how we cultivate hate. This is how we cultivate rage. This is how we cultivate contempt for authority." See Chapter 3.3.2 of this thesis at v. p.314.

for what were, essentially, ideologically motivated political offences, the punishment of imprisonment lost its stigma and therefore its deterrent effect, in the eyes of ordinary members of society.<sup>38</sup>

The third theme concerned the oft-repeated assertion that, by imprisoning so many ordinary citizens alongside "real criminals" in very overcrowded conditions, South African prisons had become "universities of crime". A negative self-reinforcing cycle was created, in which the prison served to turn petty offenders, who did not really belong in prison at all, into hardened criminals who then went on to corrupt the next wave of petty offenders.<sup>39</sup>

The final theme concerned anxieties on the part of the ruling elite that the image of the country would be tarnished by the practice of using the penal system to enforce social control legislation, and by the chronic overcrowding which resulted. This theme speaks to the 'laager mentality' which, to a certain extent, influenced penal discourse during the apartheid period.<sup>40</sup>

Turning to the post-apartheid period, South African prisons continued – to a certain extent at least – to act as mechanisms of social control. While the hated apartheid social control legislation had been repealed, large numbers of petty offenders continued to be caught up in the prison system.<sup>41</sup> Over

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<sup>38</sup> See Chapter 3.3.2 of this thesis at page. As stated in the *Natal Mercury* at the time: "[I]mprisonment - one in four adult blacks being arrested each year on technical offences - no longer carries much stigma in the black community at all. The law, therefore, has been brought into contempt." *The Natal Mercury* 6 February 1981 *Prison Time Bomb*. Chapter 3.3.2 of this thesis at v.1 p.314.

<sup>39</sup> See Chapter 3.3.2 of this thesis at v.1 p.315. As stated in the *Citizen*: "Courts jail more and more people, who go into more and more overcrowded prisons. Petty offenders come into contact with hardened criminals and become more prone to crime rather than chastened by their incarceration. Instead of prisoners being rehabilitated, more and more are recidivists, people who commit further crimes and return to jail. We cannot blame the prison authorities. They do their best. The system is such that jail is not a deterrent, but helps increase crime rather than reduce it ..." *The Citizen* 6 February 1981 *Out not in*, 6. Chapter 3.3.2 of this thesis at v.1 p.315.

<sup>40</sup> As explained in Chapter 3.3.2 of this thesis: "An interesting strand in the discourse surrounding chronic overcrowding in South African prisons ... in the early 1980s, was the concern expressed by some commentators as to how his revelations would be perceived by the outside world. *The Natal Mercury*, for example, called the chronic overcrowding a 'sickening blot on the country's image'. An editorial in the Afrikaans language newspaper *Beeld* stated, *inter alia*, that the overcrowded conditions in South African prisons could not be allowed to continue if South Africa wanted to avoid being accused of running a prison system which could not 'pass the test of civilised norms'. Clearly, ideological pressure against the apartheid system had been building, worldwide, for many years, making the perceptions of the outside world a particularly sensitive point for those (white) South Africans who supported the *status quo*." *The Natal Mercury* 6 February 1981 *Prison Time Bomb* and *Beeld* 6 February 1981 *Gevangenis-les*, 8. See Chapter 3.3.2 of this thesis at v.1 p.316.

<sup>41</sup> During the years immediately following the collapse of apartheid, the number of awaiting trial prisoners ballooned, leading to overcrowding and unrest in the prisons. For example, as noted in Chapter 4.1 of this thesis: "In Durban, the long periods which prisoners had to wait before being allocated a trial date led to a extended strike by awaiting trial prisoners at Westville prison. Prisoners refused to attend court until the wheels of justice were speeded up. A similar protest action by awaiting trial prisoners took place at the Vryheid prison during July 1996." *Weekly Mail and Guardian*, 26 April - 2 May 1996, 11; *The Citizen*, 7 June 1996, 9; *The Star*, 24 July 1996, 9; *Beeld*, 24 July 1996, t 4; *The Natal Witness*, 24 July 1996, 3. See Chapter 4.1 of this thesis at v.2 p.369. Further instances of protest by awaiting trial prisoners are noted in Chapter 4.2 of this thesis, including the use of hunger strikes: "Another tactic used by

and over again, the penal discourse of the post-apartheid period highlighted that South African prisons had been turned into "universities of crime".<sup>42</sup> Precisely the same argument that had been made during the apartheid period, was thus repeated during the post-apartheid period. This is but one example of the sterile recycling of penal debates, from one decade to the next.

### **5.2.5 Chronic Overcrowding and the Perpetual Warehousing of Most Offenders**

Of all the themes which emerge within the penal discourse surrounding imprisonment in South Africa from the time this form of punishment – in its modern sense – was introduced into this country during the colonial era, right through to the post-apartheid period, there is one which dominates all the others. That theme is chronic overcrowding.<sup>43</sup> Throughout most of their history, most South African prisons have typically been chronically overcrowded. This means that most South African prisons are – and always have been – "warehouses" for the "storage" of offenders. These "warehouses" have always been much too crowded for any effective form of rehabilitation to be implemented.<sup>44</sup> As pointed out in Chapter 3.3.1 of this thesis:

"What is most interesting about the many discussions and debates that have taken place over many years in the public media on the issue of chronic overcrowding in South African

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awaiting trial prisoners was the hunger strike. During December 1997, for example, twelve prisoners embarked on a two-week hunger strike in the run-up to Christmas, to protest that fact that they had been held in Pollsmoor prison for several months without trial ... During May 1998 it was reported that 54 prisoners in the Pretoria Local Prison had embarked on a hunger strike to protest the long delays experienced before their matters came to trial." *Cape Argus* 2 January 1998, at 1 and Beeld 15 May 1998, at 4. See Chapter 4.2 of this thesis at v.2 p.389.

<sup>42</sup> For example, in July 1995, the Cape Times reported: "It costs the taxpayer R5,8 million a day to maintain South Africa's 117 000 prisoners in jails that have been described as 'universities of crime'. ANC MP and chairman of the Transformation Forum on Correctional Services Mr Carl Niehaus said in an interview yesterday: 'Millions of rands are being poured down the drain. It is the wrong way to fight crime and the country cannot afford it. We have turned our prisons into universities of crime which produce more serious criminals in the end.' ... 'I have seen massive overcrowding at Pollsmoor, Diepkloof in Johannesburg and at Pretoria Central. In Butterworth awaiting trial prisoners are so overcrowded that they cannot all lie down to sleep at the same time.' Mr Niehaus said he would like to see magistrates and judges make more use of community service for first-time offenders and people convicted of less serious crimes. Keeping them out of jail would save the country massive bills as community service was far cheaper. It would also keep minor criminals out of contact with prisoners convicted of serious crimes ..." [*The Cape Times*, 26 July 1995, at 5. See Chapter 4.1 of this thesis at v.2 p.343.] The same opinion is expressed by Lukas Muntingh, who, writing in 2002, states that: "The reckless use of imprisonment as a sentencing option has in fact created a section of the population that is caught in a repetitive cycle of crime and imprisonment, from which it is extremely difficult to escape." [Muntingh, L (2002) *Talking Recidivism - What is Needed for Successful Offender Reintegration Track Two* 11(2):20-24 at 24.]

<sup>43</sup> The importance of this theme is reflected in the fact that no fewer than four separate chapters of this thesis – 2.5.1; 2.5.2; 3.3.1; 3.3.2; 4.4 – are devoted entirely to the topic of overcrowding, and that many of the other thesis chapters contain significant discussions on this crucial theme.

<sup>44</sup> Many quotations could be extracted from different parts of this thesis in support of the point that chronic overcrowding made the rehabilitation of prisoners difficult – if not impossible. To cite but one example from the early 1980s: "By June 1982 overcrowding in South African prisons was at a sufficiently serious level to cause Judge JPG Eksteen to state that it was one of the most important factors which prevented the rehabilitation of prisoners in South Africa." See Chapter 3.3.2 of this thesis at v.1 p.320.

prisons, is the remarkable similarity of these discussions and debates. The points made and the concerns expressed have remained the same over an extraordinarily long period of time. Over and over again, year after year, the same problem is identified, the dreadful consequences of overcrowding are spelled out in lurid detail, similar reasons are put forward as to its cause, and similar solutions are proposed. The debates seem, somehow, to be stuck in a loop, destined to be repeated from year to year, decade to decade, and even from one century to the next."<sup>45</sup>

Before turning to a discussion of this theme as it relates to various periods of South African penal history, a preliminary point worth noting is the strong link between this theme and the theme discussed in subsection 5.2.4 above. To a greater or lesser extent, South African penal discourse has always linked chronic overcrowding in South African prisons to their use as mechanisms of coercive social control. Therefore, it is to be expected that what follows in this subsection will overlap somewhat with what was discussed in subsection 5.2.4 above.

Turning to the theme of overcrowding in the prisons of Natal during the colonial period, Chapter 2.5.1 of this thesis notes that:

"An important reason for overcrowding in the prisons of colonial Natal was an explosive growth of the prison population over the years of the colony's existence. One of the main reasons why Natal's prison population grew so rapidly, was the coercive nature of social relations ... between the indigenous inhabitants of the region and the white colonists. Resistance on the part of the indigenous inhabitants led to the imprisonment of large numbers of Africans for petty offences. A significant reason for this was that, throughout the colonial period, prisons were used as a means of exercising social control over the indigenous population of the colony."<sup>46</sup>

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<sup>45</sup> See Chapter 3.3.1 of this thesis at v.1 p.291.

<sup>46</sup> See Chapter 2.5.1 of this thesis at v.1 p.158. The use of imprisonment during colonial times to exercise social control over the indigenous population, was not unique to the Colony of Natal. This practice was common to many African colonies. Citing Florence Bernault, Chapter 4.4 of this thesis points to the widespread use of "administrative imprisonment" in African colonies, the purpose of which was to act: "as an economic incentive to enforce tax collection, forced labor, or cultivation, and to provide colonial companies with a constant influx of cheap labor." [See reference at end of the quotation which follows.] The following quotation from Bernault makes it clear how common this practice was: "In the Upper Volta in 1932, during the peak of the farming season, the administrators pronounced at least 1,900 monthly disciplinary sentences of imprisonment – an average of one imprisonment for every 140 persons annually ... In Tanganyika, one decade later, the state enforced regulations on soil erosion by imprisoning recalcitrant peasants on a large scale. In Kenya, the thirty prisons ... received approximately 28,000 detainees in 1931 – 36,000 in 1941 and 55,000 in 1951, or one detainee for 146, 136 and 109 Africans, respectively. The highest figures come from the Belgian Congo, where, in the late 1930s, the administration evaluated the number of annual detainees at 10 percent of the male population. In 1954, in the province of Kivu, almost 7 percent of the adult males spent some time in prison."

Over the years of the colony's existence, not only were thousands of ordinary people – members of the indigenous population – caught in the dragnet of petty and restrictive social control legislation, but a series of open revolts against colonial rule caused a regular influx of "rebels" into the penal system of the colony.<sup>47</sup> These, as well as other reasons for the perpetual overcrowding in the prisons of colonial Natal, are summed up in the following extract from Chapter 2.5.1 of this thesis:

"Starved of adequate financial resources, the colonial state was unable to provide sufficient prison accommodation to cater for the number of inmates confined within the system. The problem was aggravated by the fact that the prisons were used as a method of social control over the indigenous population of the Colony. Furthermore, as illustrated by the Langalibalele Rebellion, the penal system was vulnerable to external shocks caused by war and civil strife, which greatly increased the number of prisoners requiring accommodation. Finally, the problem of overcrowding in the prisons of colonial Natal came with a nasty racial twist. Due to socio-economic circumstances prevailing in the Colony and the peculiar nature of the racist ideology which dominated white colonial society, most white colonists did not regard imprisonment as a particularly suitable form of punishment for black offenders, preferring harsh corporal punishment combined with forced labour in service of the colonial state and/or white society in general. The result was that conditions were always considerably more overcrowded for 'non-European' prisoners than for 'European' prisoners in the gaols of colonial Natal."<sup>48</sup>

The following extract, drawn from Chapter 2.5.2 of this thesis, sums up the extent to which the problem of prison overcrowding was entrenched within the penal system of colonial Natal during the colonial period, and describes the suffering caused by this intractable problem:

"Chronic overcrowding remained a pressing problem in the gaols of colonial Natal throughout the period of the colony's existence. Like the proverbial bad penny, the problem reared its ugly head over and over again. Colonial officials commented time and again on the poor and

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Bernault, F (2003) *The Politics of Enclosure in Colonial and Post-Colonial Africa*. In Bernault, F (Ed) *A History of Prison and Confinement in Africa* Portsmouth: Heinemann 1-53 at 12. See Chapter 4.4 of this thesis at v.2 p.483.

<sup>47</sup> As stated in Chapter 2.5.1 of this thesis: "An infrequent yet important factor contributing over the decades to chronic overcrowding in the prisons of colonial Natal was the outbreak, from time to time, of war or serious rebellion within the colony." See Chapter 2.5.1 of this thesis at v.1 p.164. See, also, subsection 5.2.5 of this Conclusion, as well as Chapter 2.5.1 of this thesis at v.1 p.164. The "open revolts" referred to included the Langalibalele Rebellion of 1873; the Anglo-Zulu War of 1879; the Anglo-Boer War of 1899; and the Bambata Rebellion of 1906.

<sup>48</sup> See Chapter 2.5.1 of this thesis at v.1 p.168.

unhygienic living conditions caused by overcrowding in the gaols. The result was decade after decade of unnecessary discomfort and suffering on the part of those unlucky enough to be on the receiving end of a sentence of imprisonment during the colonial period. Furthermore, reading between the lines of the various reports and despatches cited in this article, it is almost certain that overcrowding resulted in an unnecessary loss of life, although it is unlikely that the numbers of prisoners who died because of this scourge will ever be fully known. Both black and white prisoners suffered due to overcrowding in the prisons of colonial Natal but, of course, those who suffered the most were the black prisoners."<sup>49</sup>

Turning to the apartheid era, it is clear that prison overcrowding remained as prominent an issue within the penal discourse of the time, as it had been during the colonial period a century before.<sup>50</sup> During the early 1980s, the issue of prison overcrowding received more coverage in South African newspapers than any other issue related to South African prisons. As has been argued in Chapter 3.3.1 of this thesis, debates in the public media on the issue of prison overcrowding played a significant role in the ideological struggle which led to the demise of the apartheid system. These debates "acted as kind of mirror, reflecting clearly for those who wished to see, the early cracks which were beginning to appear in the edifice of the apartheid system."<sup>51</sup> Prisons filled to bursting point with embittered inmates, many of whom were not real criminals but ordinary people caught up in the Kafkaesque cruelties of apartheid social-control legislation, acted as a menacing and constant reminder of a political system which was morally bankrupt and which was starting to fall apart. As stated in this thesis:

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<sup>49</sup> The deeply rooted nature of the problem of prison overcrowding is explained in Chapter 2.5.2 (at v. p.171) of this thesis, as follows: "The fact that prison overcrowding first emerges around the start of the colonial period in Natal and becomes increasingly 'entrenched' within the penal system, indicates the deep social, political and economic roots of the problem within the South African historical landscape. It may even indicate, thinking along the functionalist lines suggested by Michel Foucault, that chronic overcrowding is a structural feature of imprisonment in South Africa." [See Chapter 2.5.2 of this thesis at v.1 p.171.] It is interesting to note that overcrowding was by no means a problem restricted to the prisons of colonial Natal. As noted in Chapter 4.4 of this thesis, throughout the colonial period, chronic prison overcrowding was common to many prisons in Africa. Chapter 4.4 provides a range of examples to illustrate this point. [See Chapter 4.4 of this thesis at v.2 p.482-484.]

<sup>50</sup> It is worth noting that prison overcrowding remained a problem throughout much of African during the post-colonial period. Chapter 4.4 of this thesis states, as follows: "Chronic overcrowding in the prisons of Africa continued into the post-colonial period. For example, during the period 1953 to 1964, the prisons of Ghana were overcrowded by between 125 and 164 percent. Robert Seidman notes that: 'Complaints about the seriousness of overcrowding permeate the reports since 1949, as they had perennially before that.' Seidman goes on to point out that the average Ghanaian prisoner in the late 1960s was confronted by 'conditions of almost animal overcrowding' and states that: 'The impact upon the convict admitted to the prisons must be the same as it was in 1876.' Writing in 1972, R. E. S. Tanner points out in relation to the penal systems of Africa as a whole that 'overcrowding of prison buildings is widespread' and, referring specifically to prisons in Ghana, states that 'it has been officially admitted that many have held double the authorised number.'" [See Seidman, RB (1969) *The Ghana Prison System: An Historical Perspective*. In Milner, A (Ed) *African Penal Systems* London: Routledge & Kegan Paul 431-472 at 449; and Tanner, RES (1972) *Penal Practice in Africa – Some Restrictions on the Possibility of Reform* *The Journal of Modern African Studies* 10: 447-458 at 453. See also Chapter 4.4 of this thesis at v.2 p.483.]

<sup>51</sup> See Chapter 3.3.1 of this thesis at v.1 p.290.

"[During the early 1980s] it was becoming increasingly clear that the stresses and strains brought about by the various measures of apartheid social control (such as influx control and the infamous pass laws) were not sustainable and would eventually lead to the demise of the system. Since the prisons were the ultimate instrument of social control in the apartheid system, it may be argued that what was happening in the prisons during this period served as a kind of 'canary in the mine' for the apartheid system as a whole."<sup>52</sup>

The significant attention focused on the role of apartheid social-control legislation within South African penal discourse during the early 1980s, has been discussed in Section 5.2.4 above. In relation to the theme of overcrowding, commentator after commentator pointed out the folly of using the South African penal system to enforce ideologically-driven policies of social control which were, in the long run, unworkable and doomed to failure.<sup>53</sup> As pointed out in Chapter 3.3.1 of this thesis, the material and ideological consequences for the penal system were profound:

"[I]n addition to accommodating a large number of convicted criminals, South African prisons were forced to accommodate thousands of ordinary citizens whose only "crim" was to have fallen foul of one or other of the social control measures (such as the notorious "pass aw's") put in place by the apartheid regime ... [It is] clear that, by the early 1980s, most thinking South Africans were fully aware of the fact that using imprisonment as a method of enforcing 'social control' was not only morally unacceptable, but gave rise to a host of social problems. Foremost among these problems was the fact that it contributed to the chronic overcrowding in South Africa's prisons, with all the negative consequences for the day to day lives of prisoners. From the start, it was clear to all concerned that the scale of the problem was so great that it could not be solved by simply building more prisons."<sup>54</sup>

Typical of sentiments expressed in public debates at this time, is the following extract from an editorial in the *Natal Witness*:

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<sup>52</sup> See Chapter 3.3.1 of this thesis at v.1 p.290.

<sup>53</sup> As stated in Chapter 3.3.1 of this thesis: "Over and over again, commentators in the public media pointed out that South Africa's prisons were filled with ordinary citizens who had fallen foul of apartheid laws designed to control the black population. It is worth quoting *The Sowetan* ... on this point: 'Las week's revelations of overcrowding in South African jails came as no surprise to us and a great number of blacks who have had the misfortune of falling foul of the law. Being black in itself can make sure that you get a taste of jail. The reason is not difficult to find: Thousands of people are daily being arrested and locked up for what are in fact technical offences related to the pass laws. We know the majority of those people who are forced to populate our jails are not criminals.'" *The Sowetan* 5 February 1981 *Why jail people who are not criminals?*, 6. See Chapter 3.3.1 of this thesis at v.1 p.303.

<sup>54</sup> See Chapter 3.3.1 of this thesis at v.1 p.302.

"As long as Blacks can be sent to jail in their thousands for technical offences under the pass laws, our prisons will continue to be over-populated. To streamline procedures, expand prisons, and employ more warders is to address the symptoms of the problem, but not the underlying causes."<sup>55</sup>

The granting of amnesty to certain categories of prisoners became a measure of last resort to relieve the pressure caused by chronic overcrowding. This indicated the severe strain under which the apartheid penal system was operating during this period.<sup>56</sup> Certain commentators at the time were aware that, apart from emergency measures such as the granting of amnesty which could deal with the problem of chronic overcrowding in the short term, there were no easy long-term solutions to the problem. To some extent at least, there was appreciation that prison overcrowding was a long-standing, deeply-entrenched and intractable problem which lay at the heart of the South African penal system.<sup>57</sup>

As pointed out over and over again in this thesis, the problem of prison overcrowding was not restricted to the apartheid period: "Similar debates about chronic overcrowding in South African prisons had been taking place since colonial times, and were to continue well into the post-apartheid

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<sup>55</sup> *The Natal Witness* 6 February 1981 *Prison crisis looming*, 10. See Chapter 3.3.1 of this thesis at v.1 p.305. This thesis cites many other newspaper reports and editorials published in the early 1980s, which advanced essentially the same argument. What follows are just two of many examples. Both examples appeared in *The Natal Mercury* in 1983: Example 1. "Much of our prison is due to the arrest of thousands of blacks for influx-control offences and other technical infringements which are not regarded as crimes elsewhere in the world. Meanwhile there are thousands of awaiting-trial prisoners who may wait weeks behind bars before being acquitted or sentenced to a few days in jail." *The Natal Mercury* 29 April 1983 *"Our overflowing jails"* at 10. Example 2. "[M]uch of the prison congestion is due to the arrests of thousands of blacks for influx control offences and other technical infringements which are not regarded as crimes elsewhere in the world. This has led to the unhappy situation where many blacks regard a spell 'inside' more as an acceptable hazard of life than a stigma. Meanwhile there are thousands of awaiting-trial prisoners who may wait several weeks behind bars before being acquitted or sentenced to a few days in jail." *The Natal Mercury* 5 October 1983 *Crowded jails*, 14. See Chapter 3.3.2 of this thesis at v.1 p.321.

<sup>56</sup> As pointed out in Chapter 3.3.1 of this thesis, in relation to a proposal for amnesty put forward by the Minister of Justice in the early 1980s: "The proposal that prisoners be granted amnesty in order to relieve pressure on the system is indicative of the strain on the apartheid penal system at the time, as well as the absence of any proper plan to deal with the problem. It should be noted at this point that the granting of amnesty to certain categories of prisoners as a means of relieving the pressure created by chronic overcrowding, was not only used during the apartheid period, but also became an enduring theme of the post-apartheid period, when the practice became known as 'bursting'." See Chapter 3.3.1 of this thesis at v.1 p.307.

<sup>57</sup> This is well illustrated by the opinions expressed in the following extract from an editorial which appeared in May 1981 in *The Natal Mercury*: "[O]ne cannot help feeling that the establishment of ... [the] working group ... [into prison overcrowding] is more a measure of the Government's desperation than a promising excursion into new territory. For more years than we care to remember, the prison authorities, lawyers, politicians, academics and other concerned bodies and individuals have been voicing their alarm over the country's ever-growing prison population ... The departmental working group ... may turn up something new in this exhaustively tilled field, but what is really needed is not more information and opinions but some urgent Government action on the glaring facts already known." *The Natal Mercury* 25 May 1981 *Crowded Jails*, 14. See Chapter 3.3.2 of this thesis at v.1 p.317.

period, without any resolution to the problem."<sup>58</sup> The optimism of certain commentators during the early 1980s that the removal of apartheid social control legislation would automatically solve the problem of prison overcrowding, was clearly misplaced:

"[I]t is clear that apartheid social control legislation did play a significant role in prison overcrowding at the time. It is equally clear, however, that apartheid social control legislation was not solely to blame for the problem. It should have been obvious to all concerned in the ideological debate that the roots of prison overcrowding lay much deeper than apartheid social control legislation. Deep economic inequalities, as well as gaping social and political divides, stretching back decades and even centuries had an equally important role to play. As bitter experience during the post-apartheid period was to prove, simply removing influx control and the pass laws would not magically solve the deep-seated problem of prison overcrowding."<sup>59</sup>

Turning to the post-apartheid period, the first and most salient point to be noted, is that the demise of the apartheid system, together with its draconian methods of social control, did not end the problem of prison overcrowding.<sup>60</sup> The penal system of post-apartheid South Africa has been plagued by overcrowding since the dawn of the democratic period, and the problem is still stubbornly intractable.<sup>61</sup>

As pointed out in Chapter 4.1 of this thesis, penal discourse during the period immediately following South Africa's first democratic election in 1994, was dominated by concern over continuing chronic overcrowding in South Africa's prisons, and its effects. The extent of overcrowding was such that considerable pressure was brought to bear on prison authorities to relieve the situation by granting a general amnesty or by early release on parole – known as

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<sup>58</sup> See Chapter 3.3.2 of this thesis at v.1 p.317.

<sup>59</sup> See Chapter 3.3.2 of this thesis at v.1 p.330.

<sup>60</sup> Chapter 2.5.1 of this thesis notes as follows: "Many must have hoped that the end of apartheid would bring an end to chronic overcrowding in the prisons, but as is indicated by the following comment in Feb 2013 by the Minister of Correctional Services, Sbu Ndebele, this was not to be: "That our offender population has remained constant, whether you remove pass laws, group areas, or apartheid laws, should make us search more urgently for answers to the high prison population in South Africa." [*Mail and Guardian Online* available at <http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele> (Accessed 12 Feb 2013)]. See Chapter 2.5.1 of this thesis at v.1 p.155.

<sup>61</sup> Chapter 2.5.1 of this thesis cites the most recent annual report of the Judicial Inspectorate for Correctional Services in South Africa, which states that: "The inmate population in South Africa has been characteristically one of the highest per capita in the world as has been written about in numerous publications including in the Inspectorate's Annual Reports. It is accepted that the over-population of inmates per available infrastructure is a problem in certain centres and then, within such centres, largely in the communal cells and, in some instances, single cells where inmates are "doub d-up" or even "rip d-up". These conditions are unacceptable and have been found to be so during our inspections around the country." [*Annual Report of the Judicial Inspectorate for Correctional Services for the period 1 Apr 2013 to 31 Mar 2014* at 37. [http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20\(2\).pdf](http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20(2).pdf) (Accessed 22 Jan 2015)].

"bursting". Of course, this did not go down well with an anxious and insecure middle class, whose anxieties were centred on rising levels of crime.<sup>62</sup> To make matters worse, tensions within South African prisons at this time were running high, due to the after effects of the massive unrest which had taken place around the issue of whether or not prisoners would be entitled to vote in the country's first democratic election.<sup>63</sup> The penal discourse of the time reveals considerable stresses and strains, leading to conflict between three different interest groups – the public at large; the government authorities; and the prisoners themselves. In Chapter 4.1 of this thesis the dilemma facing the South African penal system at this time is summarized as follows:

"The conflicting views of the three interest groups referred to ... formed a volatile mix which was bound to explode in conflict and heated debate. Public anger and fear impelled the person on the street to oppose vigorously any policy or proposal aimed at the early release of prisoners. Chronic overcrowding impelled the government authorities in precisely the opposite direction. In the middle of this conflict were the prisoners themselves, their expectations raised by the democratic reforms in the country, forced to live in a system still struggling to break with its apartheid past."<sup>64</sup>

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<sup>62</sup> Two good illustrations of the public anxiety caused by the threat of "bursting" during the early post-apartheid period, may be found in the following extracts from Chapter 4.1 of this thesis. The first extract relates to a six-month remission of sentence granted to certain categories of prisoners in April 1995: "The government found itself in a Catch 22 situation. On the one hand, overcrowding in the prisons had reached intolerable proportions, and the situation had to be alleviated by the general release of prisoners ('bursting'). On the other hand, the public was clearly in no mood to respond positively to the release of prisoners. *Beeld* commented as follows on 1 May 1995: 'When women are attacked at filling stations, kidnapped and raped, when old people (particularly in rural areas) are still the targets of criminals and when even expensive household security systems do not protect one from assault and murder, the release of criminals leads to loss of hope.'" [*Beeld*, 1 May 1995, 8. See Chapter 4.1 of this thesis at v.2 p.344.] The second extract relates to a proposed general remission of sentence in March 1996: "By the end of March 1996 the chronic overcrowding in South African prisons had reached crisis proportions. Part of the reason for the crisis was a significant increase in the number of awaiting trial prisoners. Thirty thousand such prisoners were clogging the prisons and were not being processed quickly enough by the justice system. The Commissioner of Correctional Services warned that the Cabinet might have to be requested to authorise the release of prisoners before their sentences had been completed. The prospect of such a general release of prisoners, known as 'bursting', was greeted with alarm by the newspapers, as evidenced by the following headlines: 'JAILBIRDS FLYING TO FREEDOM - There's no more room, our jails are bursting at the seams, say officials.' [*The Saturday Paper*, 30 March 1996, at 6] 'JAILS IN TURMOIL - 'Prisons may burst' - warning that overcrowding could force general release of criminals.' [*Weekend Argus*, 31 March 1996, at 1.]" See Chapter 4.1 of this thesis at v.2 p.345.

<sup>63</sup> As explained in Chapter 4.1 of this thesis: "During 1994 frustration amongst prisoners on the issue of amnesty erupted into violence which lasted from April to June of that year. The unrest began with a programme of mass action organised by the South African Prisoners' Organisation for Human Rights on the issue of voting rights for prisoners during the country's first democratic general election. This issue was soon broadened into a demand for a general amnesty for prisoners following the election. As a result of the unrest 37 prisoners were killed and 750 were injured. Hostages were taken and large numbers of prisoners escaped. The violence only came to an end in June 1994 after the government granted a six-month remission of sentence to all common law prisoners." See Chapter 4.1 of this thesis at v.2 p.349.

<sup>64</sup> See Chapter 4.1 of this thesis at v.2 p.340.

During the period leading up to South Africa's second democratic election, chronic overcrowding remained a central theme within South African penal discourse. The many public comments which were made at this time on the issue, have been traced in detail in Chapter 4.2 of this thesis. The following opinion expressed by the Minister of Correctional Services in October 1997, is representative of the deep anxiety, with which many viewed the issue at this time:

"In the majority of our prisons conditions are inhumane because of overcrowding. We have cells which were built to house 18 inmates and they contain 65, where every spare inch is taken and people spill over to sleep in the toilets because there is absolutely no space ... that is inhumane. It is cruel. Single cells at Pollsmoor were built to house one person, but they have six each. At Durban's Westville Prison it is overcrowded by 200 per cent. People have no room and absolutely no privacy. This brings other problems like murder and constant sodomy, which stem from overcrowding. Those are conditions which offend the very constitution we are trying to uphold."<sup>65</sup>

As intimated in the above quotation, a major concern among prison authorities at this time was that the overcrowding in South Africa's prisons was bad enough to amount to a serious violation of prisoners' constitutional rights. The detailed descriptions – in Chapter 4.2 of this thesis – of the awful conditions to which prisoners were exposed due to chronic overcrowding at this time, indicate clearly that the prison authorities were not wrong in their assessment of the severity of the situation. The picture revealed in the penal discourse of the period is one of considerable suffering of thousands of prisoners within the South African penal system.

Chapter 4.2 also makes clear the negative role played by the massive increase in the number of awaiting trial prisoners during this period.<sup>66</sup> Tighter bail laws – due to ever increasing public concern over crime – as well as the inability of poverty-stricken inmates to pay bail (even small sums under R1000) were among the reasons cited in the public discourse for this increase.<sup>67</sup> Once again, therefore, two themes – well established within South African penal discourse – combined to create the conditions for chronic overcrowding in South Africa's prisons. On the one hand, deep

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<sup>65</sup> *Sunday Tribune* 19 October 1997, 10. See Chapter 4.2 of this thesis at v.2 p.383.

<sup>66</sup> See Chapter 4.2 of this thesis at v.2 p.384.

<sup>67</sup> The following is just one of several examples relating to the inability of awaiting trial prisoners to afford bail, cited in Chapter 4.2 of this thesis: "In August 1998 the results of yet another study into bail were reported in the press. The Bureau of Justice Assistance, a joint initiative of the Ministry of Justice and the New York-based Vera Institute of Justice, produced a report in which it was stated that more than 20 000 awaiting trial prisoners had been granted bail but were forced to remain in jail because they could not afford to pay their bail." *Saturday Star* 29 August 1998, 6. See Chapter 4.2 of this thesis at v.2 p.391.

insecurity among the country's elites, expressed as fear of crime. On the other hand, massive poverty and inequality resulted in large numbers of petty offenders being caught up in the penal system. Faced with the seemingly intractable problem of prison overcrowding, the authorities seemed at a loss – even suggesting the conversion of disused ships into prisons, in order to accommodate the excessive number of inmates awaiting trial.<sup>68</sup>

Yet another important theme related to chronic overcrowding at this time, concerns the considerable stress to which prison staff were subjected over long periods. The negative consequences of this stress, both for the prison officials concerned and the South African penal system as a whole, have been traced in Chapter 4.2 of this thesis.<sup>69</sup> One of these negative consequences concerned regular reports of corrupt activity on the part of prison warders.<sup>70</sup> Unfortunately, in the years which followed, the theme of corruption on the part of state officials was to become an ever stronger strand within the South African public discourse as a whole. Another negative consequence of the excessive stress to which prison officials were subjected, was that it became impossible to direct any effort towards reforming or rehabilitating prisoners. As emphasised over and over again in this thesis, South Africa's chronically overcrowded prison "warehouses" simply did not allow for proper rehabilitation.<sup>71</sup> This problem was exacerbated by the fact that overcrowding and understaffing continued to impact negatively on the basic care of prisoners – once they were released on parole.<sup>72</sup>

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<sup>68</sup> See Chapter 4.2 of this thesis at v.2 p.393.

<sup>69</sup> The following extract from the *Cape Argus* provides a good illustration of the high degree of stress to which prison officials were subjected at this time: "Overcrowded Pollsmoor Prison's admission centre is in crisis with 3 300 inmates living in inhumane conditions and dozens of warders on stress-related sick leave ... Mike Green, supervisor of internal security at Pollsmoor, said the centre was designed to take only 1 650 prisoners and strain was taking a huge toll on staff and inmates ... Frustration had built up among staff and there were up to 40 warders a day on sick leave, which was frequently stress-related. "We are hopelessly overpopulated and understaffed," said Mr Green." *Cape Argus* 2 January 1998, 1. See Chapter 4.2 of this thesis at v.2 p.395.

<sup>70</sup> The following is just one of several examples cited in Chapter 4.2 of this thesis: "During January 1998 it was reported that inmates in the Johannesburg prison were able to purchase prostitutes, alcohol and even weekends at the Sun City gambling resort with the help of corrupt prison warders. The report also alleged that prisoners and corrupt warders had formed criminal syndicates which were involved in smuggling and theft of state property." See Chapter 4.2 of this thesis at v.2 p.396.

<sup>71</sup> The following are just two of several examples cited in Chapter 4.2 of this thesis: Example 1: "Demoralised psychologists working at Pollsmoor say rehabilitation is 'a joke' and that they had already applied for severance packages, but were turned down because they were sorely needed at the prison. Head psychologist for the Western Cape Mr Fred Borchardt said that most of the prisoners up for parole had never seen a psychologist ... Ms Petra Badenhorst, the only psychologist working in Pollsmoor's maximum security section, said she saw less than 10 prisoners a day, sometimes none. This is because much of the time she was called away to other prisons to sort out problems ... 'Most of the prisoners leave here without a single day of evaluation and having had no rehabilitation at all,' she said. On top of the heavy case loads, the psychologists worked in bad conditions for bad salaries." *The Cape Times* 25 February 1997. See Chapter 4.2 of this thesis at v.2 p.399. Example 2: "In July 1998 *Die Burger* newspaper approached certain academics for their opinions on the question of rehabilitation in South African prisons. According to Professor Wilfred Scharf of the Institute of Criminology at the University of Cape Town, only 2 per cent of prisoners in South African prisons were ever exposed to any form of rehabilitation." *Die Burger* 29 July 1998, 2. See Chapter 4.2 of this thesis at v.2 p.419.

<sup>72</sup> As pointed out in Chapter 4.2 of this thesis: "The problems associated with chronic overcrowding and shortage of staff were not restricted to the management and control of the prisons themselves. The system of parole and community

The situation did not improve during the period following South Africa's second democratic election. This period has been characterised in this thesis as a "time during which the inhabitants of Mandela's 'rainbow nation' began to realise that the honeymoon of the immediate post-apartheid period was over."<sup>73</sup> The topic of chronic overcrowding in South Africa's prisons continued to dominate penal discourse during this period. Chapter 4.3 of this thesis traces the extent of the overcrowding, and provides many examples of the manner in which prison overcrowding led to the serious abuse of the basic human rights of thousands of inmates. One of the most poignant of such abuses was the clear role of overcrowding in exacerbating the spread of HIV/AIDS in prisons at this time. The spread of this terrible epidemic in the overcrowded prisons caused untold human suffering – which is separately documented in Chapter 4.3.<sup>74</sup> The following extract from this chapter sums up the horror which resulted when South Africa's HIV epidemic was exacerbated by the perennial problems of prison overcrowding and gang activity:

"The appalling conditions in many prisons allowed the HIV epidemic to spread like wild fire, with the main culprits being chronic overcrowding and rampant gang activity. The most basic human rights of many prisoners were seriously compromised as the nightmare of the epidemic unfolded before the eyes of the South African public and prison officials."<sup>75</sup>

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corrections, which operated in tandem with the punishment of imprisonment, also suffered as a result of excessive numbers of offenders to be processed, lack of resources, and too few staff. This resulted in large numbers of offenders breaking the conditions of their parole or sentence to correctional supervision." See Chapter 4.2 of this thesis at v.2 p.399-400. The following is just one of several examples cited in this thesis indicating the severity of this problem in the period leading up to South Africa's second democratic election: "In November 1997 the Commissioner for Correctional Services, Khulehani Sitole, told the Parliamentary Portfolio Committee on Correctional Services that community supervision in South Africa was a joke. There were only 1 100 staff members to supervise 46 000 offenders and the situation would become even more serious if more petty offenders were released into community supervision." *City Press* 2 November 1997, 4. See Chapter 4.2 of this thesis at v.2 p.402.

<sup>73</sup> As explained in Chapter 4.3, South Africans began to appreciate that "the end of apartheid did not mean an end to the abuse of prisoners' basic human rights, in poorly maintained and chronically overcrowded prisons, with significant levels of gang activity and high rates of HIV infection." See Chapter 4.3 of this thesis at v.2 p.431.

<sup>74</sup> See Chapter 4.3 of this thesis at v.2 p.454. To cite but one of the many examples of the suffering of prisoners detailed in Chapter 4.3: "Prisoners say HIV status can be used as a means to assert power and obtain favours through the threat of rape, while some prison gangs practise sodomy as part of their culture. Infection is also spread through sharing needles used for tattooing gang members ... Prison doctors see only a small proportion of the rape survivors because of feelings of shame or threats of further violence." [*Mail and Guardian*, 28 July - 3 August 2000, at 15. See Chapter 4.3 of this thesis at v.2 p.454.] As to the frequency of prison rape, Chapter 4.3 quotes the following shocking statement allegedly made in October 2000 by Gideon Morris, the Secretary of the Office of the Inspecting Judge: "It is hard to say precisely, but it is estimated that between 70% and 80% of all arrested suspects are being sodomised by fellow prisoners before they are even officially charged. Many of the suspects are raped within the first 48 hours of being detained." [*Pretoria News*, 17 October 2000, at 5. See Chapter 4.3 of this thesis at v.2 p.456.] In February 2002, the South African Prisoners Organisation for Human Rights confirmed that a high incidence of sodomy and gang-rape contributed to increasing numbers of HIV/AIDS infections in South African prisons. [*Sowetan*, 1 February 2002, 9. See Chapter 4.3 of this thesis at v.2 p.460.]

<sup>75</sup> See Chapter 4.3 of this thesis at v.2 p.461.

The extent to which South African prisons were overcrowded during this period, is truly shocking. One example put forward in Chapter 4.3, is that, in June 2000, the South African penal system – which had been designed for a maximum of 100 384 inmates – was being forced to accommodate no fewer than 172 271 prisoners.<sup>76</sup> The problem of massive numbers of awaiting trial prisoners – 63 970 of the afore-mentioned 172 271 prisoners – remained an important talking point within penal discourse at this time.<sup>77</sup> Chapter 4.3 of this thesis tracks the struggle during the opening years of the new millennium of prison authorities and other role players to combat the scourge of overcrowding – which remained a seemingly intractable problem. As noted in Chapter 4.3, the period following South Africa's second democratic election was to mark a high point in the numbers of unsentenced prisoners clogging up South Africa's prisons. Unfortunately, as further noted in Chapter 4.3, a steady rise in the number of sentenced prisoners during subsequent years kept the problem of prison overcrowding very much alive.<sup>78</sup>

Chapter 4.4 of this thesis traces, *inter alia*, the persistence of the problem of prison overcrowding during the period leading up to South Africa's third democratic election in 2004. For example, as at 31 March 2003, South African prisons were overcrowded by 71% – which meant they were forced to house 78 507 prisoners more than the number they had been designed to accommodate.<sup>79</sup> The extent of overcrowding in South African prisons during this period meant that it was impossible to

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<sup>76</sup> See Chapter 4.3 of this thesis at v.2 p.437. The massive overcrowding in South African prisons at this time clearly impacted very negatively on the basic human rights of prisoners. This is well illustrated by the following extract drawn from the report of the Inspector of Prisons for the period 1 April to 31 December 2000, which is set out in Chapter 4.5 of this thesis: "Our prisons are severely overcrowded. Reports from Independent Prison Visitors described the awful treatment that some prisoners had to endure due to overcrowded prisons. Visits to prisons bore this out. Built to accommodate 100 668 prisoners, the prisons housed 172 271 prisoners in April, which meant that approximately 72 000 prisoners were kept in prisons without the necessary infrastructure such as toilets, showers, beds, etc. being available to them. This was worsened by the uneven distribution of prisoners resulting from the need to separate different genders and categories. Whilst some prisons had an occupancy rate of 100%, many were over 200% with one reaching an astonishing 393%. There was gross overcrowding in numerous prisons, which led to detention under horrendous conditions, especially for awaiting-trial prisoners." [Para 8.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000. See Chapter 4.4 of this thesis at v.2 p.492.]

<sup>77</sup> *Sowetan*, 8 June 2000, 2. See Chapter 4.3 of this thesis at v.2 p.437.

<sup>78</sup> As stated in Chapter 4.3: "Although the focus of concern during the post-apartheid period has "see-sawed" between the numbers of sentenced and unsentenced prisoners confined within the South African penal system at any one time, one factor has remained constant - i.e. concern about the overall problem of prison overcrowding and its effects. South African prisons were to remain overcrowded throughout the post-apartheid period - although the degree of overcrowding fluctuated – from the first democratic election right up to the present date." See Chapter 4.3 of this thesis at v.2 p.447.

<sup>79</sup> The Department of Correctional Services Annual Report for the period 1 April 2002 to 31 March 2003, Programme 2 Incarceration - at page 31 of the report. [See Chapter 4.4 of this thesis at v.2 p.496.] As noted in Chapter 4.5: "The Inspecting Judge of Prisons confirmed that overcrowding in South Africa's prisons was worse than it had ever been and provided the following bleak assessment of the situation: 'The problems that we have in our prisons can virtually all be attributed to overcrowding. We now have the highest number of prisoners we have ever had in our country and it is placing an unbearable burden on the Department of Correctional Services.'" [Para 1 – Annual Report of the Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003. See Chapter 4.4 of this thesis at v.2 p.492.]

implement any meaningful programmes to rehabilitate prisoners.<sup>80</sup> Chapter 4.4 also traces the problem of prison overcrowding during the period immediately following South Africa's third democratic election. As during previous periods, the problem remained acute and constituted a serious abuse of the basic human rights of South Africa's prisoners.<sup>81</sup>

In rounding off this subsection on the important theme of overcrowding in South African prisons, it is worth briefly examining two important studies, which were conducted around this time on the issue. In 2004 Jonny Steinberg conducted research – on behalf of the Centre for the Study of Violence and Reconciliation – into prison overcrowding and the constitutional right to adequate accommodation in South Africa. At the outset of his paper detailing the results of his research, he gave the following sobering assessment:

"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."<sup>82</sup>

Steinberg went on to examine the space available in South African prisons as at 31 July 2004, and pointed out that just under 2.1 m<sup>2</sup> of floor space was available to each prisoner confined in an average communal cell. 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

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<sup>80</sup> As stated in Chapter 4.4 of this thesis: "In his annual report for the period 1 April 2003 to 31 March 2004, the Minister of Correctional Services referred to the continuing efforts of the Department 'to reduce the ever-increasing challenge of overcrowding which, like corruption, constitutes a serious stumbling block to successful realisation of the objective of rehabilitation.'" [Foreword to the Department of Correctional Services Annual Report for the period 1 April 2003 to 31 March 2004, by the Minister of Correctional Services, Mr Ngconde Balfour. See Chapter 4.4 of this thesis at v.2 p.497.]

<sup>81</sup> For example, Chapter 4.4 notes the following shocking comments by High Court Judge Bertelsmann, which were quoted in the report of the Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005: "During September 2004, our prisons that were built to house 113 825 prisoners, had 186 546 inmates, which meant that they were overcrowded by more than 63%. Most of our prisons are therefore forced to house prisoners in conditions which are indubitably in conflict with the aspirational values of the Constitution. In most prisons, inmates are crammed into cells designed many years ago for virtually half their number. Beds are placed bunk-style on top of one another, with only a few inches separating them. Prisoners are locked up for 23 hours per day, with sanitary facilities which are by definition overburdened and consequently in a regular state of disrepair. The same holds good for the warm water supply, electricity and other creature comforts ... It is no exaggeration to say that, if an SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell, the SPCA would be prosecuted for cruelty to animals. The crisis in our prisons has huge constitutional implications for the whole criminal justice system, and urgent steps need to be taken to address our entire sentencing and prison regimes." [Para 6.2 – Annual Report of the Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005. See Chapter 4.4 of this thesis at v.2 p.500.]

<sup>82</sup> See Steinberg, J (2005) *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* (Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005) Johannesburg: CSV at 1.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – had set 4 m<sup>2</sup> per prisoner in a communal cell as a bare minimum standard. This meant that, at the time in question, "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."<sup>83</sup> Steinberg pointed out that, although the constitutionality of prison accommodation could not be judged simply on the basis of available floor space, "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."<sup>84</sup>

Steinberg blamed the rapid increase in South Africa's prison population during the period leading up to 2004, on poor policy decisions by the legislature. Anxious to respond to public perceptions of an unacceptably high crime rate in the country during the immediate post-apartheid period, in 1997 the legislature focused on increasing the severity of prison sentences, *inter alia* through the enactment of minimum sentencing provisions. As Steinberg pointed out, however, many studies had shown that it was an increase in the certainty of punishment, as opposed to an increase in its severity, which led to an increased deterrent effect.<sup>85</sup> His conclusion was that:

"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 ... 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."<sup>86</sup>

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<sup>83</sup> Steinberg, J (2005) *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* (Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005) Johannesburg: CSV at 2.

<sup>84</sup> Steinberg, J (2005) *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* (Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005) Johannesburg: CSV at 2.

<sup>85</sup> See Von Hirsch, A, Bottoms, A, Burney, E & Cederström, PO (1999) *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*. Oxford: Hart at 45, cited by Steinberg. For confirmation in the South African context, see Sloth-Nielsen, J & Ehlers, L (2005) Assessing the Impact: Mandatory and Minimum Sentences in South Africa *SA Crime Quarterly* 14: 15-22.

<sup>86</sup> Steinberg, J (2005) *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* (Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005) Johannesburg: CSV at 7.

In a 2006 report commissioned by the Open Society Foundation for South Africa, Chris Giffard and Lukas Muntingh of the Civil Society Prison Reform Initiative, summarised the reality of prison overcrowding in post-apartheid South Africa, as follows:

"South Africa has a serious prison overcrowding problem. The total number of prisoners has grown steadily and dramatically over the last 11 years. The cause of the increase has changed during this time. Between 1995 and 2000, the major driver of the prison population rise was a massive increase in the size of the unsentenced prisoner population. After 2000, the number of unsentenced prisoners stabilised, and then began to decrease. But the prisoner population continued to grow, now as a result of an increase in the number of sentenced prisoners."<sup>87</sup>

For many decades, it would appear that the only workable solution to the problem was for the authorities to resort to special amnesties to relieve the unbearable pressure caused by severe prison overcrowding. Giffard and Muntingh provide the following useful description of various amnesties granted since the early 1970s:

"In conditions of severe overcrowding (180%) in 1971, about 13 000 sentenced prisoners were given between three and six months amnesty. A further 28 000 sentenced prisoners were released in 1981, and in total, nearly 88 000 more between then and the first democratic elections in 1994. Between 1994 and the end of 2000, a further estimated 49 000 prisoners were released, including 8 000 unsentenced prisoners who had been granted bail of less than R1000, and there were also amnesties for certain politically motivated violent offences ... In 2005, a special remission of sentence was granted to prisoners who were serving sentences for non-violent offences. This eventuated in the release of nearly 32 000 sentenced offenders, reducing the total prisoner population from an all-time high of 187 000 to a more manageable 155 000."<sup>88</sup>

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<sup>87</sup> Giffard, C & Muntingh, L (2006) *The Effect of Sentencing on the Size of the South African Prison Population* (Report 3) Newlands, Cape Town: Open Society Foundation for South Africa. Shortly before this, the severity of the problem of prison overcrowding and its consequences had been commented on by the Jali Commission of Inquiry, which delivered its Final Report in December 2005. In its report, the Commission stated, *inter alia*, that: "It was found that the ten (10) most overcrowded prisons in South Africa were overcrowded by 285% to 386%. It was also noted that the overcrowding results in the inability of the Department to provide effective security to prisoners and exacerbates the spread of gangsterism within prisons, which has a ripple effect on staff morale and stress levels leading to high absenteeism." See the Final Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4, at 179.

<sup>88</sup> Giffard, C & Muntingh, L (2006) *The Effect of Sentencing on the Size of the South African Prison Population* (Report 3) Newlands, Cape Town: Open Society Foundation for South Africa at 56-57.

A final point to be made, before concluding this discussion on the ongoing problem of chronic overcrowding in South African prisons, is that, throughout the post-apartheid period, fear of crime has remained a prominent and enduring theme within South African public discourse.<sup>89</sup> Politicians have been under immense pressure to appear tough on crime – making it particularly difficult to deal effectively with the problem.<sup>90</sup>

To sum up, it may be stated that, from colonial times to the present day, overcrowding constitutes the most prominent and enduring theme within South African penal discourse. As illustrated above, this theme runs through many chapters of this thesis. What is revealed is a problem which is so deeply entrenched that, in many important respects, it defines what it means – and has always meant – to be imprisoned in this part of the world.<sup>91</sup>

### **5.3 "The Bad" – The South African Penal System and its "Folk Devils"**

This subsection deals with the various "folk devils" discussed in this thesis, and who played a part in South African penal discourse over the years. Stanley Cohen famously coined this term to refer to a class of offenders who, through the eyes of a society in the grip of what he called a "moral panic" over the perceived increase in a particular type of crime, came to be seen as posing what may be termed as an "existential" threat to that society.<sup>92</sup> The higher the levels of public panic, the more attention would be focused on the particular "folk devils" concerned – which would lead to even higher levels of panic. This thesis makes use of the concept of a "folk devil", but has adapted it to fit the peculiar context of South African penal ideology. South African society has always been deeply divided along racial lines and has been characterised by persistent fear, on the part of the white

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<sup>89</sup> For example, referring to the period from the mid to late 1990s, Chapter 4.3 notes as follows: "Negative sentiment [towards government efforts to reduce crime] began to mount in late 1996 and skyrocketed in mid-1998. By September 1998, only 17% said the government was doing a good job and a massive 81% gave it a negative rating. While it recovered slightly as the election neared, crime (along with jobs) remained one of the ANC's biggest electoral headaches." [Mattes, R, Taylor, H & Africa, C (1999) Chapter 3: Public Opinion and Voter Preferences 1994-1999. In Reynolds, A (Ed) *Election '99 South Africa: from Mandela to Mbeki* Claremont: David Philip 37-63 at 44. See Chapter 4.3 of this thesis at v.2 p.430.]

<sup>90</sup> In support of this point, note the following quotation from Chapter 4.4 of this thesis, which refers to comments made in September 2000: "The Human Rights Commission, in the person of Jody Kollapen, commented on the large numbers of prisoners awaiting trial at this time ... The problem, Kollapen pointed out, was that because of the high levels of crime and violence in the country, the South African public was in no mood to listen to arguments in favour of prisoners' rights. This meant that the issue of prison overcrowding was not one which lent itself 'to reasonable and unemotional public debate.'" [*Mail and Guardian*, 4-10 August 2000, 14. See Chapter 4.4 of this thesis at v.2 p.492.]

<sup>91</sup> As stated in Chapter 4.3: "Persistent overcrowding in South African prisons may be linked to the fact that imprisonment in this country has always been used as a mechanism of social control, rather than simply a means of combatting crime. Overcrowded prisons may be the inevitable consequence of efforts to keep order in a chronically unequal society – in which millions live in appalling conditions below the poverty line." See Chapter 4.3 of this thesis at v.2 p.447.

<sup>92</sup> Cohen, S (2011) *Folk Devils and Moral Panics* London: Routledge Classics.

minority, of being overwhelmed by the indigenous black population. Fear is a vital ingredient in the construction of any "folk devil". This makes the concept useful in understanding "white" perceptions of "black" offenders – particularly during the colonial and apartheid periods. It is also useful in understanding the nightmares of an increasingly multi-racial post-apartheid middle class – terrified by crime and by reports of brutal prison gangsters capable of unspeakable acts of cruelty.

### 5.3.1 The "Folk Devils" of Colonial Natal

As pointed out previously in this conclusion, the white settlers of colonial Natal viewed the indigenous inhabitants of the colony with a mixture of racist paternalism and fear.<sup>93</sup> The settlers regarded white colonial society as constituting a tiny speck of civilised values – surrounded by an ocean of cruelty and ignorance. They felt that they were in constant danger of being overwhelmed by the surrounding black masses. Black offenders, in general, acted as a lightning rod for white fear. Deep down in the white colonial psyche was the ever-present fear of the primitive, uncivilised and brutal black savage, who was capable of committing the most barbaric and violent crimes against innocent white victims. In a general sense, therefore, all black offenders were "folk devils" in the context of South African penal ideology.

In a more specific sense than that referred to above, certain offenders stood out as particularly good examples of "folk devils" in the South African context. One of the best examples of an African "folk devil" was the black rapist of a white woman. To the colonial mind, white women represented the pinnacle of white colonial civilisation. For a black man to assault or rape a white woman, was the ultimate challenge to white sovereignty and authority. As stated in Chapter 2.1 of this thesis:

"Any black challenge to white authority or civilisation had to be swiftly and severely dealt with to prevent it from developing into open rebellion. The kind of siege mentality displayed by the colonists may perhaps best be illustrated by reference to the periodic waves of public hysteria that swept through white ranks following assaults on white women by black men. The rape of a white woman by a black man was possibly the ultimate denigration of white authority and civilisation, and public reaction to such 'outrages' reached fever pitch on numerous occasions over the years. Again and again the colonists condemned imprisonment as far too lenient a punishment for the perpetrators of 'outrages'."<sup>94</sup>

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<sup>93</sup> See 5.2.2 above.

<sup>94</sup> See Chapter 2.1 of this thesis at v.1 p.105.

The existential threat posed to society by a "folk devil", means that a particularly robust form of punishment is required to combat the supposed threat. In the case of South African penal ideology, this involved a reversion to essentially pre-modern forms of sanguinary punishment – in the form of harsh corporal punishment.

### 5.3.2 Corporal Punishment as a Defence Against "Folk Devils"

An interesting theme to emerge within the penal discourse of colonial Natal, was the fixation of white settlers on whipping as being the most suitable form of punishment for black offenders. As pointed out in Chapter 2.1 of this thesis, the use of the infamous "cat-ò-nine-tails" was so frequent in the colony, that the 1906 Prison Reform Commission dubbed the practice the "cult of the cat". This thesis has traced the prominent role played by whipping in the Colony of Natal throughout the colonial period.<sup>95</sup> It has also pointed out that Natal was by no means the only colony to make use of harsh corporal punishment. During colonial times, this form of punishment was widely used – to a shocking degree – throughout Africa.<sup>96</sup> As Florence Bernault, points out in a key passage cited in Chapter 2.2.1 of this thesis:

"[C]ontrary to the ideal of prison reform in Europe, the colonial penitentiary did not prevent colonizers from using archaic forms of punishment, such as corporal sentences, flogging, and public exhibition. In Africa, the prison did not replace but rather supplemented public violence ... [T]he principle of amending ... criminals was considerably altered in the colonies, and largely submerged by a coercive doctrine of domination over Africans, seen as a fundamentally delinquent race."<sup>97</sup>

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<sup>95</sup> See Chapter 2.1 of this thesis at v.1 p.102.

<sup>96</sup> As is stated in Chapter 1.4 of this thesis: "In the Belgian Congo, Florence Bernault notes that 'the famous *chicotte* whipping administered by agents of the Force Publique – became so widespread that it later remained as an icon of colonial punishment in the memories of contemporary Zairians.' In relation to German East Africa, James Read describes the 'widespread and frequent use of corporal punishment as a summary punishment' during the German administration of the colony. Furthermore, David Killingray's work points to the extensive use of corporal punishment in British Colonial Africa." See Chapter 1.4 of this thesis at v.1 p.48.

<sup>97</sup> Bernault, F (2003) *The Politics of Enclosure in Colonial and Post-Colonial Africa*. In Bernault, F (Ed) *A History of Prison and Confinement in Africa* Portsmouth: Heinemann 1-53 at 3. I make a similar point in certain of my own previous work. In commenting on the differences between prisons in Europe and Africa during the colonial period – in particular prisons in England as compared to those in the Colony of Natal – I point out that: "[In] Natal there was no need for the rigid discipline and clockwork regularity of an institution such as E g a d's Pentonville prison, since the colony possessed no large scale capitalist industry requiring a well-disciplined work force. The black farm labourers of Natal had a far simpler lesson to learn than that taught by such a finely tuned institution as Pentonville. That lesson was that the white ma 's word was law, since it was he who held the whip in his ha d." See Peté, SA (1986) *Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal* *Natal University Law Society Review* 1(2): 99-114 at 101-102.

Among the reasons put forward by this thesis for the popularity of corporal punishment as a means of punishing black offenders, was that it catered to each of the two main elements which characterised white perceptions of black offenders – i.e. black offenders were regarded as being "simple" and "childlike", but also as "brutal" and "savage". In regard to the first of these elements, this thesis points out that:

"Deprivation of liberty was a rather abstract form of punishment which was difficult for the childlike "Native" to understand, much less respond to in a positive and reformatory way. The black man's faculties of reason were not sufficiently developed to allow him to be punished without at least some degree of physical coercion. Like a child the black man was very impressionable and could easily fall victim to the corrupting influences of the prison. Corporal punishment was both quick and effective, and insured that the offender's contact with the penal system was kept to a minimum."<sup>98</sup>

With regard to the second of the elements mentioned above, this thesis states that:

"While the deprivation of liberty was severely felt by the civilized (white) man, this punishment had no effect upon the uncivilized (black) savage who could only understand physical pain. Imprisonment was thus too civilized a punishment for the black man, who received better food, clothes, treatment, and accommodation while inside prison, than during his normal life as a free man. Whereas the white prisoner was tormented by the shame of his degraded position, no stigma was attached to imprisonment in the eyes of the black prisoner himself, or the black community at large. Upon discharge from prison the black ex-convict was not discriminated against with regard to employment opportunities as was the case with the white ex-prisoner. The only way in which the punishment of imprisonment could be made

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<sup>98</sup> See Chapter 2.1 of this thesis at v.1 p.104. Corporal punishment could consist of a savage whipping with the notorious cat-ò-nine-tails or of less severe punishment such as "birching". Corporal punishment of the less severe kind was traditionally regarded as a suitable form of punishment for juvenile offenders. To punish adult petty offenders in this way – particularly Africans who had offended against colonial social control legislation – was to add deliberate insult to injury. Such punishment was deliberately designed to be humiliating in order to send the message that white sovereignty and authority was not to be trifled with. For example, Chapter 3.1.2 of this thesis states that: "[I]t is interesting to note the [1906 Natal Prison Reform] Commission's recommendation that black adults be birched across the buttocks in a similar manner to juveniles, in order to make the punishment more humiliating and thus more effective: 'The Native has a strong sense of humour, and sees the ludicrous in many things; and, if no distinction were made between manhood and youth, the man who was treated as a boy would be subjected to much banter by his fellows, and would be less likely to forget it.'" See *Natal Government Gazette* of 5 June 1906 *Government Notice* 344: Report of the Prison Reform Commission - Paragraph 71, cited in Chapter 3.1.2 of this thesis at v.1 p.222.

sufficiently punitive of black offenders was by the inclusion of a significant element of corporal punishment along with the prison punishment."<sup>99</sup>

It may be concluded from the two extracts quoted above, that, from the perspective of the ruling white settler class in colonial Natal, corporal punishment was the ideal form of punishment with which to confront black offenders – taking into account both the childlike simplicity and brutal savagery which characterised the basic nature of such offenders as seen through colonial eyes. There was also a further reason why corporal punishment was often preferred to imprisonment when dealing with black offenders. This was related to the status of corporal punishment as being a pre-modern "sanguinary" type of punishment. It was a savage form of punishment which resonated with the power and authority of the absolute monarch of pre-modern times. It was thus the ideal form of punishment with which to confront a challenge to white sovereignty and authority, on the part of a "folk devil" who had committed a heinous crime against white colonial society.

Judicial corporal punishment retained its popularity within the South African penal system well after the colonial period. This antiquated form of punishment continued to be applied right up to the end of the apartheid period, although, by that stage, it was only applied to juvenile offenders. The tenacity with which this essentially pre-modern form of punishment remained embedded in South Africa's penal system throughout most of the Twentieth Century, is a clear indication of its ideological power in this part of the world. Another indication of this power is that, every so often, serious calls were made for the re-introduction or extension of this form of punishment. For example, this thesis has traced the public debate which took place in the early 1980s around a proposal to extend the application of corporal punishment to older prisoners – as a way of combatting chronic overcrowding.<sup>100</sup> Even though the proposals were eventually rejected, the fact that they were made at all is significant. As stated in this thesis:

"Even though ... the arguments in favour of the extension of corporal punishment were firmly rejected by most commentators in the mid 1980s, their re-appearance more than seventy years after the end of the colonial period is significant. Firstly, it illustrates the

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<sup>99</sup> See Chapter 2.1 of this thesis at v.1 p.105.

<sup>100</sup> The proposal, which was put forward by a Department of Justice working group, suggested an increase in the number of offences for which whippings could be imposed, as well as an increase in the age limit beyond which whippings were not permitted. The new age limit suggested was 29. See Chapter 3.3.2 of this thesis at v.1 p.331.

ideological power of whipping as form of punishment. Secondly, it indicates a dis-functional penal system characterised by the endless repetition of sterile debates."<sup>101</sup>

### 5.3.3 South African Prison Gangs and their Role as Modern "Folk Devils"

From the perspective of more recent South African penal discourse, the role of the modern "folk devil" is most often associated with being a member of one or other of South Africa's prison gangs – particularly the notorious "numbers" gangs.<sup>102</sup> Narratives surrounding South African prison gangs and their violent activities played a prominent role within South African penal discourse during the apartheid and post-apartheid periods.<sup>103</sup> This thesis has traced many of these narratives in detail.

One such narrative was the upsurge in public interest, during the early 1980s, in the workings of the prison "numbers" gangs – following the publication of Nicholas Haysom's well-known and oft-cited study entitled "Towards an Understanding of Prison Gangs".<sup>104</sup> The shocking details revealed in this study about the origins and activities of South African prison gangs were seized upon by the South African public media at the time. As noted in Chapter 3.1.1 of this thesis, publicity around the details revealed in the study, was to mark the beginning of a period of intense public fascination with these gangs – which continued well into the post-apartheid period. The deeply entrenched nature of the problem and the discourse surrounding it, is described thus:

"What is revealed by ... [an] examination of the public discourse on prison gangs [during the early 1980s] ... is that this problem was both severe as well as deeply entrenched within South Africa's penal system ... The discourse consists of one shock revelation after the other, with

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<sup>101</sup> See Chapter 3.3.2 of this thesis at v.1 p.333. As this thesis notes in relation to certain of the opinions expressed during this debate: "Reading these extracts – even taking into account that the debate took place during the brutal apartheid years – one may be forgiven for thinking that the article relates to a discussion of penal policy which took place in 1884, as opposed to 1984." See Chapter 3.3.2 of this thesis at v.1 p. 333.

<sup>102</sup> As stated in Chapter 3.1.1 of this thesis dealing with the early 1980s: "Prison gangsters were the "demons" of the story – cruel, sadistic, violent and savage – who generated intense anxiety on the part of the white middle class and were surrounded by a discourse of retributive punishment." [Chapter 3.1.1 of this thesis at v.1 p.209.] For a contemporary account of life in one of the prison "numbers gangs", see Steinberg, J (2005) *The Number - One Man's Search for Identity in the Cape Underworld and Prison Gangs* Jeppestown: Johathan Ball.

<sup>103</sup> Of course, prison gangs have never been responsible for every instance of violence in South African prisons. As Lukas Muntingh states in relation to the post-apartheid period: "Prison gangs are often singled out as the main architects of prison violence in South Africa and there is no doubt that they are often responsible for the most deadly violence in the prison system. However, not all violence in prison is committed by gangs and it must also be acknowledged that the prison gangs have, particularly in prisons where they are powerful, an important governing function over the prison population and will, to some measure, regulate the use of violence." See Muntingh, L (2009) *Reducing Prison Violence: Implications from the Literature for South Africa* (Civil Society Prison Reform Initiative, Research Report Number 17) Cape Town: University of the Western Cape. Community Law Centre at 15.

<sup>104</sup> Haysom, N (1981) *Towards an Understanding of Prison Gangs*. Cape Town: University of Cape Town. Institute of Criminology.

the problem remaining firmly in place from one year to the next. In fact, the theme of extreme violence caused by entrenched prison gangs, was to extend way beyond the 1980s and well into the post-apartheid period. The sadistic and violent prison gangster – the "demon" or "folk devil" who could not be safely contained – was to remain a prominent figure within South African penal discourse for many years to come."<sup>105</sup>

This thesis discusses many reports and articles which appeared in the South African press over the years concerning the activities of prison gangs. The following – to cite just one example from the early 1980s – was a response by the *Rand Daily Mail* to a report by the Van Dam Committee of Inquiry into a number of violent incidents which had occurred in and around the Barberton Prison Complex, and which resulted in at least 12 deaths and many injuries:

"Alarming evidence of the existence of violent gangs in South African prisons has been uncovered by the Van Dam Inquiry into the Barberton prisons. It said the gangs, which were 'very strong', were mainly found in maximum security prisons. The committee found evidence of violence, assaults, murders, homosexuality and gangs specialising in escapes ... The committee described as 'frightening' the 'merciless cruelty' of the gangs and their members who could, in exceptional circumstances, take action against prison personnel. Often gangs sentenced members to death for the flimsiest of reasons and the death penalty was carried out with a variety of brutal methods."<sup>106</sup>

Turning to the penal discourse of the post-apartheid period, it is clear that prison gangsters continued to perform the role of "folk devils" within the South African penal system. However, the end of the apartheid period certainly did not bring an end to the activities of South Africa's notorious prison gangs. Enmeshed in complex social practices stretching back many decades, these gangs were far too deeply entrenched within the South African penal system to be dislodged by a

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<sup>105</sup> See Chapter 3.1.1 of this thesis at v.1 p.206.

<sup>106</sup> *Rand Daily Mail* 17 May 1984 *Report details brutal prison gangs*, 11. See Chapter 3.2.2 of this thesis at v.1 p.269. The response of *The Star* to the same report provides another good example of the anxiety-filled flavour of the public discourse surrounding South African prison gangs in the early 1980s: "The report refers to a merciless brutality with which gang members acted against each other and, in exceptional cases, against prison staff. Cold-blooded murders were committed for rumours or transgressions of the gang codes. Innocent people were often assaulted simply as a show of force or to take revenge for a misdemeanour. Many weapons, including knives, were made in prison to use against prisoners. A favourite weapon was the heavy metal mugs in which prisoners received coffee or tea. Tied to a half-metre belt of towel, they formed a dangerous weapon. Six gangs were identified in the prison. In some of them, sodomy was prevalent and younger members were known as 'wyfies'. Members of such a gang did not hesitate to murder if members of their own or of other gangs interfered with their 'wyfies' ... The committee said authorities had to be wary of explosive gang situations." *The Star* 17 May 1984 *Horror gangs a key factor in prison riots*, 5. See Chapter 3.2.2 of this thesis at v.1 p.270.

political revolution which had taken place outside prison walls. Inside South Africa's prisons, many inmates were subject to an alternate reality – a reality shaped by generations of gang members, which controlled every aspect of their lives. In relation to gang activity during the early post-apartheid period, Chapter 4.1 of this thesis notes that:

"The problem of gangsterism within South Africa's prisons was acknowledged by the Minister of Correctional Services in August 1996, when he proposed the construction of "super maximum security prisons" to be located in remote areas. The aim of these new gaols would be to break the cycle of gang related violence within South African prisons: 'We want them far away from their families, away from their theatre of operations and in a place where they will be under constant guard, in single cells, and with little if any contact with other prisoners.'"<sup>107</sup>

Despite the efforts of the prison authorities to curb their activities, the reign of terror conducted by South Africa's prison gangs continued in the period leading up to South Africa's second democratic election. Chapter 4.2 of this thesis details the corruption and violence perpetrated by the prison gangs during this period, as follows:

"Prison gangs were responsible for a continuing reign of terror within South African prisons during the period under review. Not only did the gangs make life for many of their fellow inmates a living hell, but they also played a significant role in corrupting prison staff. In some cases they seemed to be vying with prison management for the control of certain prisons. Furthermore, the influence of the gangs extended beyond the prison walls, and there were increasing links between prison gangs and community street gangs."<sup>108</sup>

The pattern continued in the period following South Africa's second democratic election. Chapter 4.3 of this thesis tracks the continued reign of terror by South African prison gangs at this time.<sup>109</sup>

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<sup>107</sup> *The Cape Times*, 23 August 1996, at 3. See Chapter 4.1 of this thesis at v.2 p.368. Particular mention was made in this thesis of serious gang-related violence which broke out in August 1996 at the Waterfall Prison near Utrecht. This violence involved 600 prisoners, 35 of whom were injured, and with three suffering serious injuries. *The Natal Witness*, 23 August 1996, a 3. See Chapter 4.1 of this thesis at v.2 p.368.

<sup>108</sup> See Chapter 4.2 of this thesis at v.2 p.411.

<sup>109</sup> Among the acts of almost unbelievable savagery committed by prison gangs at this time, was an attack committed in September 2000 on a prisoner, Charles Philander. Chapter 4.3 describes this particular attack in the following graphic terms: "The assault allegedly began in a prison truck, which was returning to Pollsmoor from the Cape Town Magistrate's Court. Gang members allegedly requested Philander to help them to smuggle a dagga parcel into the prison. When he refused, they forced the parcel into his rectum. On their return to the prison, Philander was unable to get help from the warders and was locked in a cell along with 50 other prisoners. He was then overpowered by gang members, who wanted to retrieve the dagga parcel. He was allegedly jumped on and punched in the stomach in an effort

The following conclusion, reached in Chapter 4.3, on the entrenched nature of South African prison gangs, was to remain relevant long after the specific period to which this chapter refers:

"The South African penal system was unable to free itself from the fear and violence engendered by prison gangs. The gangs continued to conduct a reign of terror within the prisons, which impacted negatively on the basic human rights of ordinary prisoners. The problem continued to be highlighted within public discourse, as it had been for many decades, but the numbers gangs continued to operate as an entrenched part of the South African penal system."<sup>110</sup>

It is perhaps fitting to end this subsection on South Africa's prison gangs, with a few brief references to the Final Report of the Jali Commission of Inquiry published in December 2005 – and which confirm the conclusions reached in this thesis in relation to the effects of gang activity. In its chapter on prison gangs, the Commission made it clear that gangs were a very powerful force within the prisons and that corruption would "never be eradicated in these institutions unless a better way is found to break the power gangs exert inside prisons and to control them."<sup>111</sup> Not only did the gangs "make the lives of many inmates a living hell", but they also played "a significant part in the corruption of some Correctional Services officers".<sup>112</sup> In a series of shocking revelations concerning the extent of corruption among prison staff members, the Commission stated, *inter alia*, that:

"The Commission has found that members often took bribes to turn a blind eye to sexual abuse, gang violence and thefts taking place in prison. In some cases, members of the Department acted as the 'pimps' of the awaiting trial prisoners, who were sold to the older prisoners ... There was also ample evidence of correctional services officials assaulting inmates and depriving them of their most basic liberties. One of the prisoners told the

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to dislodge the parcel. According to Philander the gang members then tried to give him an enema with a bottle of water, and eventually retrieved the parcel using a bent wire coat hanger and a white toothbrush. Philander claimed that he was assaulted throughout the night but that his constant screams of pain were ignored. The next morning he was transported to hospital, where it was discovered that the extent of his injuries were so severe that he would require reconstructive surgery. According to the *Cape Argus*, the dagga was eventually recovered from his abdominal cavity." *Cape Argus*, 19 September 2000, 8. See Chapter 4.3 of this thesis at v.2 p.476.

<sup>110</sup> See Chapter 4.3 of this thesis at v.2 p.478.

<sup>111</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 141.

<sup>112</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 141. With regard to making the lives of prisoners a "living hell", one of the shocking findings of the Jali Commission was that prison gangs employed prison rape, involving the intentional transmission of HIV/Aids, as a brutal form of punishment. In the words of the Commission: "This form of punishment is common to errant members or inmates who refuse to join gangs and is applied by using those gang members who are HIV positive to rape those who fall foul of the gang." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 168.]

Commission how he was repeatedly sexually abused in prison, by not only the gang members but also by correctional services officials, the very custodians entrusted to ensure his safety. One twenty (20) year old told the Commission how both inmates and warders repeatedly sodomised him. The same inmate testified that warders gave him over to other inmates and that one of the warders, who abused him and wanted him to be his 'baby', gave him dagga and toiletries."<sup>113</sup>

Commenting on the problem of sexual violence in South African prisons, which was, of course closely bound up with the activities of prison gangs, the Commission referred to the problem as a "horrific scourge ... that plagues our Prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners".<sup>114</sup> The Commission's Final Report stated that "the number of cases the Commission heard all point to the fact that sexual abuse in South African Prisons is rife and that sexual abuses should be curbed in order to uphold the basic rights of those in detention."<sup>115</sup> In the words of the Commission:

"The evidence of the victims who testified before the Commission underlined the fact that sex is nothing more than a tradeable commodity in Prison and that vulnerable, young Prisoners become mere possessions or sex slaves whilst incarcerated. Prison warders sell them to the highest bidder despite the fact that they are dependent on these very same Prison warders to secure their safety whilst in Prison."<sup>116</sup>

The Commission also pointed out that – during that particular period – the number of HIV-infected prisoners was escalating, and "that incoming prisoners face the grim and real prospect of contracting HIV from other inmates unless they are sufficiently protected by those whose duty it is to uphold their rights."<sup>117</sup> Pointing out the obvious, the Commission stated that:

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<sup>113</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 159. Furthermore, the Commission found that: "Warders' involvement with either the 26s or 28s can also extend to the smuggling of food, weapons, cigarettes, drugs, and other items as well as prostitution of juveniles to other prisoners. Warder involvement is especially rife where the Big 5 gang is involved. The Big 5 gang, like the 28s, participates in sodomy and is heavily responsible for much of the pimping that occurs in prisons." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 160.] The Commission also found that prison officials played "an important role in most of the escape attempts by prisoners." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 160.]

<sup>114</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 8 at 393.

<sup>115</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 8 at 397.

<sup>116</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 8 at 394.

<sup>117</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 8 at 446.

"Being violently raped and infected with a fatal disease is a cruel and unusual punishment that is disproportionate to any sentence that a prisoner has to face. Being sentenced to imprisonment should not result in an unwritten death sentence ... [I]f the Department keeps on ignoring the fact that sexual abuse is rife in our Prisons and that there is an extreme likelihood that prisoners who are exposed to violent unprotected sex will in all likelihood contract Aids, then it is effectively, by omission, imposing a death sentence on vulnerable prisoners."<sup>118</sup>

An important general conclusion reached by the Commission with regard to gang activity in South African prisons, was that the level of influence exerted by prison gangs effectively meant that it was highly unlikely that rehabilitation would take place in prison.<sup>119</sup> In the words of the Commission: "The reality is that most prisoners will have become more hardened criminals by the time they are released and that the skills that they acquired during their imprisonment will return them to a life of crime on the outside."<sup>120</sup> As this thesis points out, similar sentiments were expressed over and over again – over decades and even centuries – by persons and bodies concerned with prison reform in South Africa.

#### **5.3.4 Dealing with the Modern Folk Devil - Barberton, C-Max, Super-Max**

Only the harshest of institutions is capable of dealing with a "folk devil". During the apartheid period, the Barberton Prison Complex was one such institution. As stated in Chapter 3.2.1 of this thesis:

"The importance of Barberton is that, in many respects, it represents the worst of what the South African penal system had to offer at the height of the apartheid era. Through a series of widely publicised, shocking and violent incidents which occurred within the Barberton Prison Complex in the early 1980s, the term 'Barberton' came to epitomise brutality, racism, cruelty, and endemic violence – qualities which, to a greater or lesser extent, were to be found within all apartheid prisons."<sup>121</sup>

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<sup>118</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 8 at 446-447.

<sup>119</sup> In its Final Report of December 2005, in a telling comment on the lack of effective rehabilitation programmes in South African prisons, the Jali Commission of Inquiry stated that: "The balance between the safety of prisoners and their rehabilitation is ... almost non-existent in the state-run correctional facilities." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 143.]

<sup>120</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 158.

<sup>121</sup> Chapter 3.2.1 of this thesis at v.1 p.230. The lack of basic human compassion on the part of warders at Barberton, is epitomised by events which occurred in December 1982 at the Barberton Prison Farm – fully described in this thesis – which resulted in the deaths of three prisoners due to heat exhaustion, as well as injuries to many others. The following extract from this thesis illustrates the cruelty which was characteristic of Barberton: "Complainant Adam Gys, one of

This thesis has traced the harsh quasi-military style punishment meted out at the Barberton Prison Farm during the early 1980s, as well as the tragic consequences. The narrative strives to convey vividly and accurately the "look and feel" of Barberton as being a place of harsh apartheid-style punishment – a place where empathy and human compassion were stifled by fear and hate.<sup>122</sup> The strong racist overtones within the penal discourse surrounding Barberton have been traced, as well as the considerable ideological pressure which was brought to bear on the apartheid authorities due to adverse publicity caused by violence and death which occurred within what this thesis has termed "Apartheid's Alcatraz".<sup>123</sup> This pressure may well have widened the cracks which were beginning to show in the edifice of the apartheid system at this time. As stated in Chapter 3.2.2 of this thesis:

"[T]he events at Barberton during the early 1980s were symptomatic of what was happening to the apartheid system as a whole. The South African penal system – in particular at its harshest extremity – acted as a kind of barometer, revealing both the cruelty of the system, as well as the considerable constraints and pressures under which it was operating."<sup>124</sup>

The following extract from an editorial in the *Pretoria News*, cited in Chapter 3.2.2 of this thesis, is a good example of the type of public pressure brought to bear on the apartheid government – by liberal newspapers in particular – over violence at the Barberton Prison Complex during the early 1980s:

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the prisoners allegedly beaten by warders at the dam, told the court that at one stage he had pleaded for mercy and asked for a drink of water. According to Gys, Warrant Officer Smit replied: 'This is Barberton. Prisoners don't drink water. The sun drinks wa r.'" *Rand Daily Mail "Prison doctor tells of plot to beat inmates"*, 3. See Chapter 3.2.1 of this thesis at v.1 p.236.

<sup>122</sup> A good example of the sheer brutality which characterised the punishment meted out at the Barberton Prison Farm, may be found in the following extract from Chapter 3.2.1 of the thesis: "According to ... [a] report in the *Rand Daily Mail*: 'The court also heard that Mr Zulu was instructed by his superior to keep his Alsatian dog in the shade of a tree, so that the animal would not get sick or die from the excessive heat, while injured prisoners were left lying in the blazing sun after being beaten, some of them unconscious.' The judge hearing the trial was understandably shocked by this evidence and was reported to have asked: 'If a dog can't stand it, how are human beings supposed to stand it?'" See Chapter 3.2.1 of this thesis at v.1 p.235.

<sup>123</sup> The following extract from Chapter 3.2.1 of this thesis illustrates the overt racism which was rampant within the South African penal system during the apartheid era: "An insight into the racial dynamics between between black and white prison warders at the Barberton Prison Farm can be glimpsed from evidence given ... on 31 August 1983 ... by a black prison-dog handler, a certain Mr John Zulu. Explaining why he did not respond to pleas from one of the inmates who subsequently died, he is reported to have said: 'I could see the prisoner, Ernest Makhatini couldn't take it anymore, but what could I do, I am a black man and the white warden had already made a decision [to ignore the prisoner's complaints].'" See Chapter 3.2.1 of this thesis at v.1 p.235.

<sup>124</sup> See Chapter 3.2.2 of this thesis. Further, as stated in Chapter 3.2.1: "The extent of the adverse publicity surrounding events at Barberton must have shocked the authorities at this particularly sensitive time, during which the first major cracks were beginning to appear within the edifice of apartheid. In a way, Barberton reflected the unstable and rotten core of the apartheid system itself. The massive jolt delivered by the press to its readers in response to events at Barberton must have shaken the confidence of many middle-class South Africans – weakening their resolve to support the *status quo*." See Chapter 3.2.1 of this thesis at v.1 p.251.

"What the Van Dam committee uncovered at Barberton Prison is enough to make the hair stand on end ... homicidal gangs of prisoners, warders so brutalised by the environment that they rely mainly on baton and boot, idleness and overcrowding among the convicts leading to the most horrendous excesses, plans for a mass escape by some 400 of South Africa's toughest outlaws ... It is as well that the Commissioner of Prisons in a memorandum attached to the Van Dam report says he is shocked by the findings. To be anything less would be a travesty. It has long been suspected that conditions at some of South Africa's prisons are not all that they might be but confirmation of that has mostly been stifled by the tough secrecy provisions of the Prisons Act which, hitherto, have been rigorously applied. Now that the matter has been dragged into the light (and praise to the authorities for permitting that at least) it is the time for the authorities to set about the problem once and for all..."<sup>125</sup>

Turning to the post-apartheid period, there may have been some who hoped that the end of the apartheid era would also bring an end to the cruelty which characterised the experience of many South African prisoners – at Barberton in the early 1980s and in many other South African prisons throughout the apartheid period. Unfortunately, the penal system of post-apartheid South Africa was to devise cruelties of its own. The "new" democratic South Africa still had to deal with its "folk devils" in the form of prison gangsters capable of seemingly inhuman cruelty – as well as high-profile killers like the notorious Eugene de Kock, dubbed "Prime Evil" by the press. During the post-apartheid period, two special categories of prisons were developed to deal with such prisoners – the notorious "C-Max" and "Supermax" prisons. In a certain sense, these prisons were the ideological heirs of Barberton, designed to deal with South Africa's most hardened criminals. But they were very different to Barberton in their mode of operation. The cruelty of these special prisons did not lie in the infliction of physical pain – like that inflicted by the cat-o-nine-tails during the colonial period or the boot and baton during the apartheid period – but in the infliction of mental suffering caused by silence and isolation.<sup>126</sup>

Silence and isolation played a central role in the penal ideology which underpinned the construction of "C-Max" and "Supermax" prisons in South Africa. It is worth noting that silence and isolation were originally regarded as being "reformatory" – conditions which were necessary for prisoners to

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<sup>125</sup> *Pretoria News* 17 May 1984, *Prison shocker*, 20. See Chapter 3.2.2 of this thesis at v.1 p.277.

<sup>126</sup> Of course, silence and isolation had been used extensively by the apartheid regime as a weapon against political prisoners. Its use against "normal" as opposed to "political" prisoners, however, was perfected during the post-apartheid period.

engage in a process of self-reflection and eventual "reformation".<sup>127</sup> As mentioned previously in this conclusion, throughout history most South African prisons were chronically overcrowded – which meant that the vast majority of prisoners never experienced such conditions. "C-Max" and "Supermax" prisons were the exception. Ironically, however, the silence and isolation which characterised the experience of inmates in these special prisons, was not the result of a desire on the part of prison authorities to enable reform. Rather, it was the result of a desire to incapacitate and render harmless those prisoners regarded as being particularly dangerous. In other words, the isolation and separation of prisoners within "C-Max" and "Supermax" prisons was designed to neutralise the "folk devils" of the time. In an era when harsh corporal punishment was no longer considered acceptable, solitary confinement in a "C-Max" or "Supermax" prison was the equivalent, perhaps, of the cat-ò-nine-tails of colonial times or the boot and baton of the apartheid era. Isolation and separation were now instruments of retribution rather than reform. In the words of the Minister of Correctional Services himself, speaking in October 1997 shortly after the first C-Max prison in South Africa had become operational:

“We have to separate those who do not want to be rehabilitated from those who want to change their lives and go back into the community. We cannot rehabilitate while the criminally violent and dangerous prisoners are mixed with the others. They pollute the environment.”<sup>128</sup>

The Minister's words clearly indicate the ideological framework which informed the construction of C-Max and Supermax prisons in South Africa during the post-apartheid period. As stated in this thesis:

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<sup>127</sup> For a detailed discussion of the failure to introduce the "separate system" into the goals of colonial Natal, see Chapter 2.5.1 of this thesis at v.1 p.160-163. With regard to the debate surrounding the proposed introduction of the "separate system" into the goals of colonial Natal, it is remarkable that, more than a century later, the Jali Commission of Inquiry engaged in the very same fruitless debate. In its Final Report published in December 2005, the Commission recommended that awaiting trial prisoners be divided into three categories, each of which should be confined separately. The categories suggested were: first offenders; repeat offenders; and gang members. The Commission suggested that the "separation policy" could be extended to sentenced prisoners in due course. It also suggested that consideration be given "to dedicated correctional facilities or even portions thereof, being used to house members of a particular gang." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 181.] As had been the case with the proposed "separate system" in the Colony of Natal, however, the Commission seemed to realise that it might not prove practicable to implement such a system in the context of South Africa's chronically overcrowded prisons: "The Commission is mindful, however, that the implementation of such a policy [of separation] will be dependent on a whole host of practical and logistical considerations and that the implementation of such a policy may only be possible in certain prisons." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 4 at 181.]

<sup>128</sup> *Sunday Tribune* 19 October 1997, 10. See Chapter 4.2 of this thesis at v.2 p.376.

"Clearly, the minister regarded these prisoners [i.e. those referred to in the above quotation] as akin to an infectious virus, which needed to be isolated from the rest of the prison population. He went on to note that those confined within the super maximum prisons would only feel a human touch once a day (when they were handcuffed before being taken to a cage for an exercise period) and conceded that it was a type of 'purgatory'. The minister predicted that by January 1999 at least half of South Africa's 7 000 most violent prisoners would be safely locked up in C Max and Supermax prisons."<sup>129</sup>

As noted in Chapter 4.2 of this thesis, South Africa's first "C Max" prison was opened in September 1997, having been constructed by converting the old death-row cells in the Pretoria Prison.<sup>130</sup> Designed to house 95 high-risk prisoners, the apartheid-era hit squad killer Eugene de Kock was one of this prison's first inmates.<sup>131</sup> This thesis has noted the extreme isolation which was to be a hallmark of imprisonment in a "C-Max" prison.<sup>132</sup> The horrified reaction of human rights campaigners at the time, has also been noted.<sup>133</sup> Two years after the opening of the first "C Max" prison, plans for the building of a new "Super Maximum" prison at Kokstad were announced. These plans met with a similar reaction from human rights bodies to that which had greeted the opening of the first "C Max" prison. The planning, building and commissioning of the Kokstad Super Maximum Prison, between 1999 and 2003, is tracked in Chapter 4.3 of this thesis. The following

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<sup>129</sup> *Business Day* 4 December 1997, 6.

<sup>130</sup> As late as March 1997, the truly medieval idea of converting disused mine shafts into prisons for the accommodation of dangerous prisoners, was being seriously discussed in public. The following extract from a report in *The Daily News* is cited in Chapter 4.2 of this thesis, and illustrates the public mood at the time: "The view that disused mine shafts be used to house dangerous criminals conjures images of people being thrown into dungeons populated by man-eating lions and other predators. For many who have had their loved ones summarily taken away, little ones deprived of bread-winners who were to have raised them, that is precisely what those who have shown no respect for life or limb deserve." *The Daily News* 18 March 1997, 10.

<sup>131</sup> See Chapter 4.2 of this thesis at v.2 p.376.

<sup>132</sup> For example, the following extract which appeared in September 1997 in *The Daily News* is cited in Chapter 4.2 of this thesis: "Prisoners will be forced to live without human contact for 23 hours a day and will only be allowed out for an hour's exercise a day in a cage ... Prisoners will live in concrete and steel cells measuring 4 m by 2 m under constant surveillance by warders who can observe them through wire mesh ceilings ... When leaving their cells to exercise, they will be handcuffed and escorted individually." *The Daily News* 25 September 1997, 3. See Chapter 4.2 of this thesis at v.2 p.377.

<sup>133</sup> For example, the following response by Sheena Duncan, chairperson of the human rights organisation 'Black Sash', is cited in Chapter 4.2 of this thesis: "We did not think we would ever have to fight this battle again, but ... [t]he conditions of imprisonment in the new ... prison in Pretoria are as bad, if not worse, than anything which preceded them before 1994 ... It seems our minister of correctional services has absolutely no understanding of the fundamental human rights enshrined in South Africa's constitution ... Complete isolation for 23 hours out of 24 is torture on its own, but add to that a wire mesh ceiling to every cell, which means no privacy at all, and one hour or 'exercise' in handcuffs in a small cage and it is enough to drive people out of their minds – as we know from past experience ... We are challenged by the fact that Eugene de Kock is one of the first to be confined in this section ... He represents everything we abhorred in the past; but we must defend his rights because to let them go by default is to relinquish the very idea of rights which can protect all the people in this country." *The Citizen* 27 September 1997, 11. See Chapter 4.2 of this thesis at v.2 p.377.

poignant reaction by the South African Council of Churches to the plans for that prison, is worth repeating:

“ protested vigorously in the apartheid years at the use of solitary confinement as an instrument of torture. We are angry that the present government appears to have adopted this means of torture as part of its plan to control crime. We do not expect that the members of the new government, many of whom suffered this particular torture in the past, can agree to its imposition in the new South Africa.”<sup>134</sup>

To conclude this subsection, it may be noted that the Jali Commission of Inquiry was similarly opposed to incarceration of prisoners in super maximum prisons. In its Final Report of December 2005, the Commission expressed the opinion that "continued incarceration of inmates in such institutions cannot be justified in terms of the Constitution, the Correctional Services Act, the Regulations or Departmental Policies."<sup>135</sup> In support of its opinion, the Commission stated *inter alia* that:

"The Commission has pointed out ... that it is commonly accepted that detention in isolation is one of the worst forms of torture. The trauma caused by such detention has been described repeatedly before the Commission and has been highlighted in our hearings. It needs to be addressed as a matter of urgency."<sup>136</sup>

Among the findings of the Commission in relation to super-maximum prisons, were that correction and rehabilitation were impossible in such institutions; that such institutions were "designed to break down the spirit of prisoners and make them suffer"; that such institutions could not "be justified in terms of the Constitution, the Correctional Services Act, the Regulations or the policies of the Department of Correctional Services"; that such institutions were "not consistent with the basic common law right of prisoners to be released with their physical and mental health unimpaired"; and that "[p]risoners incarcerated in these institutions are subjected to indefinite solitary confinement, contrary to the Department's policy."<sup>137</sup>

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<sup>134</sup> *The Citizen*, 1 October 1999, 8. See Chapter 4.3 of this thesis at v.2 p.450.

<sup>135</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 7 at 352.

<sup>136</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 7 at 368.

<sup>137</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 7 at 379-380. In relation to the use of solitary confinement within South African prisons in general, it is worth noting the following finding of the Commission: "The Commission finds that the Department uses *de facto* solitary confinement without adhering to the safeguards of the Act, which has severe implications for the psychological well-being of prisoners. Having considered all the evidence and the trauma suffered by prisoners detained involuntarily in isolation once convicted for a

### **5.3.5 The Scourge of Corruption**

Any discussion of the various 'folk devils' to emerge at various times within South Africa's penal history would be incomplete without mention of the scourge of corruption. Within the post-apartheid period in particular, corrupt prison officials have emerged as a unique type of 'folk devil'. Chapter 4.5 of this thesis has traced in detail the public discourse surrounding various hearings of the Jali Commission of Inquiry, as well as examined the findings set out in the final report of the Commission.<sup>138</sup> It may be argued that the publication of the final report of the Jali Commission marks the point at which the dream of a South African penal system based on humane treatment and respect for human rights, officially turned into a nightmare.

### **5.4 "The Good" – "Penitents", "Angels", "Innocents" and "Hotel Guests"**

From colonial times to the present, South African society has always been deeply divided along the lines of race, class, and gender. This thesis has illustrated the manner in which these fault lines resulted in a form of penal ideology which was equally fractured and diverse. The diverse nature of South African penal ideology is well illustrated by particular debates surrounding certain "special categories" of prisoners. This subsection deals with certain "favoured" groups of prisoners examined in this thesis – as well as the penal discourse surrounding these groups.

#### **5.4.1 Defending White Sovereignty – Penal Ideology and the "Pale Male"**

Starting with the penal discourse relating to white male prisoners in colonial Natal, the following was noted in Chapter 2.1 of this thesis:

"Although white prisoners formed only a small percentage of Natal's total prison population they assumed a symbolic importance as representatives of the white master class. The white

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disciplinary transgression, the Commission can find no justification for such detention other than that the objective is to punish prisoners who transgress the rules of the prison. To allow the use of mechanical constraints when a prisoner has attempted to escape and then been placed in isolation is inhuman and reduces the person subjected to such constraints to the level of a hobbled animal ... Solitary confinement has a shameful past in South African history. The Commission recommends that the concept of solitary confinement be abandoned in order to recognise the trauma suffered by so many who were detained in this way. In its place the Commission recommends that the term 'restricted confinement' be used, but that it may only be ordered in very serious disciplinary cases." [See Report of the Jali Commission of Inquiry, December 2005, Volume 1, Chapter 7 at 379.]

<sup>138</sup> Report of the Jali Commission of Inquiry, December 2005, Volume 1.

colonists of Natal formed a small tightly-knit community and they perceived of themselves as the guardians of 'civilised' norms and standards in a savage and heathen country ... The closed, homogenous nature of white society meant that those who deviated from the norms of that society would be met with social ostracism ... The white prisoner did not only suffer the degradation of being branded as a criminal, however, but to this was added the humiliation of being confined alongside black prisoners and being subjected to the authority of black prison guards. There was thus a double stigma attached to imprisonment for a white person in Natal, and on leaving the prison the white ex-prisoner encountered extreme difficulty in obtaining employment as a result of this stigma."<sup>139</sup>

The fact that white prisoners needed to be reformed, rehabilitated and reintegrated into white colonial society, went without saying. Every white man was a representative of the white master class and could not be allowed to set a bad example in the eyes of the indigenous black population.<sup>140</sup> Furthermore, as mentioned previously in this conclusion, to allow white prisoners to be punished alongside black prisoners was regarded by certain sections of colonial society as being a potential threat to white sovereignty and control. The appearance of white prisoners and black prisoners together in public – for example, as part of a convict work gang – was regarded as being particularly undesirable. To the colonial mind, the obvious answer to these potential threats to white sovereignty, as well as to the particular challenges to reform and rehabilitation posed by the perceived "double-stigma" suffered by white male prisoners, was to separate white prisoners completely from black prisoners, and to provide the former with special training in industrial skills. In tracing various aspects of colonial discourse concerning the particular forms of punishment considered suitable for white as opposed to black prisoners in colonial Natal, this thesis has revealed certain of the ideological factors which underpin the idea of racially differentiated punishment in the context of a coercive, unequal and racially divided society like South Africa.

The theme outlined above resonates within the penal discourse of apartheid South Africa. This thesis has noted the manner in which penal discourse surrounding the punishment of white prisoners during the 1980s, was significantly different in tone to that surrounding the punishment of

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<sup>139</sup> Peté, SA (1986) Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal *Natal University Law and Society Review* 1(2): 99-114 at 106-107.

<sup>140</sup> As stated in Chapter 2.1 of this thesis: "It was particularly important that white prisoners as members of the white master class should not be seen by the black public in a position of subservience. The *Natal Witness* made this point strongly in its editorial of 15 June 1904, in which it condemned as a 'public and official contravention of decency', the practice of marching black and white prisoners for trial through the streets of Pietermaritzburg, from the gaol to the courthouse. The *Witness* warned that the public would 'no longer permit the degradation of Europeans before a black population', and asked why no 'Black Maria' had been provided 'to keep white prisoners from the inquisitive gaze of the crowd.'" See Chapter 2.1 of this thesis at v.1 p.79.

black prisoners. As pointed out in Chapter 3.1.1 of this thesis: "The language in newspaper reports describing the "white" prison experience is filled with references to introspection, self-discipline, honest hard work, skills-training and rehabilitation."<sup>141</sup> Therefore, by and large, white male prisoners assumed the role of "penitents" within the penal discourse of the time. Although not quite invisible, it should be noted that white male prisoners – excluding high-profile political detainees – only played a peripheral role within the penal discourse of this period.

#### **5.4.2 Fallen Angels - Penal Ideology and the White Female Offender**

As in the case of white male offenders, white female offenders have traditionally played a small but symbolically important role within South African penal discourse.<sup>142</sup> During the colonial period, in the case of colonial Natal white women did not enter penal discourse in the role of prisoners – for the simple reason that there were virtually no white female prisoners confined in the prisons of the Colony.<sup>143</sup> As pointed out in Section 5.3.1 of this conclusion, as well as in Chapter 3.1.2 of this thesis, however, during the colonial period white females certainly did play an important symbolic role, particularly as being perceived potential victims of black violence. As stated in Chapter 3.1.2 of this thesis:

"It is clear that, during colonial times, white women were regarded as representatives of all that was best in and most sacred to the 'white race'. As a category, white women played an important part in the formation of white identity – including the conception of whites as torch bearers of civilisation in a dark continent. The ideas surrounding white womanhood and what it stood for, formed the apex of a much larger ideological construction around what it meant to be 'white' or 'European' in the Colony of Natal."<sup>144</sup>

As pointed out in Section 5.3.1 of this conclusion, "outrages" committed by black men against white women were regarded as being the ultimate challenge to white sovereignty and authority in

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<sup>141</sup> See Chapter 3.1.1 of this thesis at v.1 p.194.

<sup>142</sup> As discussed in Chapter 3.1.2 of this thesis, it is interesting to note that black female offenders are virtually invisible within the South African penal discourse analysed in this thesis. As pointed out in that chapter, the "invisibility" of black female offenders is, in itself, significant. It would seem likely that the intersection of mutually reinforcing forms of discrimination and oppression, along lines of race, sex and class, contributed to this "invisibility".

<sup>143</sup> As pointed out in Chapter 3.1.2 of this thesis: "[A]t the time the Natal Prison Reform Commission delivered its report in June 1906, there were so few white female offenders that the Commission recommended that they be placed under the care of "approved private institutions" instead of being sent to gaol. See *Natal Government Gazette* of 5 June 1906 *Government Notice* 344: Report of the Prison Reform Commission - Paragraph 74(10).

<sup>144</sup> See also Morrell, R (2001) *From Boys to Gentlemen: Settler Masculinity in Colonial Natal 1880 -1920* Pretoria: Unisa Press at 160.

the colony. As noted in the above-mentioned section, this served to shape the ideological attitudes of the white colonists in relation to black offenders in general.

Turning to the early 1980s during the height of the apartheid period, this thesis has described the role of white female prisoners within the penal discourse of the time, as being that of "fallen angels":

"The patriarchal underpinnings of the apartheid system, as well as the political and ideological assumptions at work within powerful factions of the white elite, are often clearly on display in newspaper articles dealing with this category of prisoners in the early 1980s, particularly in articles which appeared in the conservative Afrikaner press. For example, *Die Volksblad* published an article in 1980 discussing the daily lives of white women in Kroonstad prison. Not afraid to 'wear its heart on its sleeve', the article is characterised by the use of highly emotive language. Just beneath the surface of the earnest discussion about the experiences of white female prisoners, lies the unspoken assumption that white women are the guardians of civilised values on a dark continent, the sacred keepers of the flame of Christian civilisation. The article is filled with empathy and pathos and one can almost hear violins playing in the background as the daily lives of these 'fallen angels' are described."<sup>145</sup>

As in the case of white male prisoners, rehabilitation constitutes a central theme within the discourse surrounding these "fallen angels". This stands in stark contrast to the discourse surrounding other categories of prisoners at this time – particularly "non-white" prisoners. As pointed out in this thesis: "[I]t would seem that the ideological assumptions surrounding the treatment of white female prisoners – the creation of a homely, caring and stimulating environment within which to rehabilitate these traumatised 'fallen angels' – were very different to the assumptions surrounding the treatment of other categories of prisoners in South Africa."<sup>146</sup> In crude terms, white female prisoners occupied a completely different world – both physical and ideological – to the vast bulk of South Africa's prison population. The overcrowded and often violent "warehouses" in which most South African prisoners spent their days were, quite literally, a "world away" from the one inhabited by white female inmates.

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<sup>145</sup> See Chapter 3.1.2 of this thesis at v.1 p. 214.

<sup>146</sup> See Chapter 3.1.2 of this thesis at v.1 p.216.

The ideological resonance between the penal discourse of the colonial and apartheid periods, as it relates to white women, is clear. In tracing and analysing significant parts of this discourse, this thesis has illustrated the durability of these entrenched ideological conceptions.

### 5.4.3 Innocents – Public Discourse on Children in Prisons

This thesis has traced certain strands in the public discourse surrounding children in South African prisons. In the Colony of Natal, it was only towards the end of the colonial period that juvenile offenders started to play an appreciable – although small – role within general penal discourse.<sup>147</sup> Even at this early point in South Africa's penal history, prison authorities seemed to agree on the fact that adult prisons were not suitable environments for juvenile offenders.<sup>148</sup> As pointed out in Chapter 3.1.2, the colonial "solution" was to propose separate strategies for white and black juvenile offenders, each of which would serve to keep children out of adult prisons:

"[W]hereas white juvenile offenders would be placed under reformatory supervision, black offenders in this category would either be subjected to corporal punishment or removed from the towns so that they could no longer constitute a threat to white society and 'civilisation'. At the very end of the colonial period, in terms of Act 23 of 1909, provision was made for the birching of juveniles convicted of petty offences instead of sending them to prison. Finally, on 23 November 1909, the Attorney General of Natal informed the Natal Parliament that an industrial establishment for boys was to be situated in the old Police Quarters at Estcourt, which was to be the first in a series of similar institutions."<sup>149</sup>

Turning to the apartheid and post-apartheid periods, perhaps the most remarkable fact about the penal discourse around juvenile offenders, was the extent to which such discourse remained 'stuck' over decades. Everyone seemed to agree that children did not belong in adult prisons, but despite continuous "hand-wringing" about the awful conditions to which South African juvenile prisoners

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<sup>147</sup> As stated in Chapter 3.1.2: "It was only after the turn of the century... at the time of the Natal Prison Reform Commission which delivered its report in 1906, that there seems to be any real interest in juveniles as a separate category of offenders." See Chapter 3.1.2 of this thesis at v.1 p.219.

<sup>148</sup> As stated in Chapter 3.1.2: "The Commission was of the opinion that prison was no place for black women or children, and recommended that petty offenders in these two classes be sent back to their kraals: 'Released from the restraints of parental control, Native boys and girls too often abuse the personal freedom permitted in the towns to such an extent that they are fast becoming a nuisance, and developing dangerous criminal tendencies.'" *Natal Government Gazette* of 5 June 1906 *Government Notice* 344: Report of the Prison Reform Commission - Paragraph 30. See Chapter 3.1.2 of this thesis at v.1 p.221.

<sup>149</sup> *Natal Government Gazette* of 5 June 1906 *Government Notice* 344: Report of the Prison Reform Commission - Paragraph 40. Act 23 of 1909 "To provide for boys being punished by whipping instead of imprisonment for minor offences". Natal Legislative Assembly Debates 1909 Volume 42 pages 512 to 513: Attorney General 23 November 1909. See Chapter 3.1.2 of this thesis at v.1 p.21.

were exposed, the problem continued well into the post-apartheid period. To cite just one of many examples quoted in Chapter 3.1.2 of this thesis dealing with the apartheid period, in particular the early 1980s:

"There have been many disturbing disclosures down the years about conditions in South Africa's overcrowded prisons. But those contained in the University of Cape Town's latest survey, 'Children in Prison in South Africa', are undoubtedly among the most shocking. In parts the report becomes a dossier of horror, with stories of juvenile inmates – 97 percent of whom are black – being raped by adult prisoners and terrorised by gangs. Overall it presents an appalling indictment of a system that would seem to be losing touch with its obligations to children in custody."<sup>150</sup>

The above quotation may be compared to the following extract from Chapter 4.2 of this thesis, dealing with the post-apartheid era – in particular the period leading up to South Africa's second democratic election:

"During February 1998 the Community Law Centre at the University of the Western Cape released the results of a study entitled Children in Prison in South Africa. The study revealed that South Africa fell far below international standards for the detention of children. Problems included the keeping of children with offenders over the age of 21; poor diet; lack of education and recreational facilities; gangsterism; rape; overcrowded sleeping quarters; lack of exercise and lack of health care."<sup>151</sup>

Fortunately, during the late 1990s, progress was made in terms of removing juveniles from adult prisons. This thesis has traced in some detail the race to provide separate secure-care facilities for juvenile offenders during this period.<sup>152</sup> This thesis has also traced the extent to which the problem of juvenile offenders in adult prisons continued to dog the South African penal system into the new millennium. The following extract from Chapter 4.3 of this thesis points to the appalling treatment of juveniles confined in Cape Town's Pollsmoor Prison, in the year 2000:

"The District Surgeon responsible for Pollsmoor Prison, Dr Paul Theron, described the conditions under which juvenile offenders were held in the prison as a catastrophe. He

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<sup>150</sup> *The Natal Mercury* 21 December 1984 *Shocking Story*, 10. See Chapter 3.1.2 of this thesis at v.1 p.225.

<sup>151</sup> *Sunday Tribune* 22 February 1998, 21. See Chapter 4.2 of this thesis at v.2 p.406.

<sup>152</sup> See Chapter 4.2 of this thesis at v.2 p.461-465.

claimed that the human rights of the children were being violated on a daily basis. There was overcrowding, a lack of basic amenities such as clean toilets and washing facilities, and general chaos in the daily existence of warders and prisoners ... Children were forced to sleep in shifts, since there was not nearly enough bedding. It was feared that more than half the children were infected with HIV. Theron prepared a report on the health of the juveniles imprisoned in Pollsmoor in which he concluded that one in every three prisoners suffered from a sexually transmitted disease. A third of offenders suffered complications arising from bullet and stab wounds, as well as old amputations. Smoking-related illnesses were common and many young prisoners used dagga, mandrax and cocaine. Most young prisoners suffered from depression, dizziness and aggression."<sup>153</sup>

#### **5.4.4 The "Hotel Guests" of the Post-Apartheid Period**

With the end of apartheid, it was no longer possible to discriminate openly in favour of white prisoners. This did not mean, however, that all prisoners confined within the South African penal system during the post-apartheid period, were treated equally. If the public discourse of this period is to be believed, certain prisoners – usually those with money and/or political connections – turned out to be "more equal than others" and were given special treatment.<sup>154</sup> For example, Chapter 4.1 of this thesis traces the considerable public controversy surrounding preferential treatment allegedly given to certain high-profile prisoners – i.e. "di Blasi", "Blank" and "Bhamjee" - during the years immediately following South Africa's first democratic election.<sup>155</sup> According to the penal discourse of the time, for prisoners with money, just about anything could be bought.

In addition to special treatment for a select few within the prison population of post-apartheid South Africa, a small number of model prisons were constructed – with the rehabilitation of prisoners specifically in mind. These model prisons showcased the very latest design principles, equipment and management methods thought to assist in the treatment and rehabilitation of prisoners. Although very few in number, these prisons were symbolically important – since they allowed prison authorities to boast that the South African penal system still subscribed to the rehabilitative ideal. The Malmesbury and Goodwood prisons opened in 1997 were good examples of what this thesis has termed the "Five Star Hotels" of the South African penal system:

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<sup>153</sup> *Die Burger*, 12 July 2000, 1. See Chapter 4.3 of this thesis at v.2 p.463.

<sup>154</sup> "All animals are equal, but some animals are more equal than others." See George Orwell (1945) *Animal Farm*.

<sup>155</sup> See Chapter 4.1 of this thesis at v.2 p.360-363.

"In complete contrast to Pretoria's 'C Max' prison, were two new 'model' prisons which came into operation towards the end of 1997. They were both situated in the Western Cape, one at Goodwood and the other at Malmesbury. The Goodwood medium security prison was built at a cost of R139 million to house 1 692 prisoners.<sup>156</sup> It became operational on 1 October 1997 amid much fanfare in the press. It was described as a 'five-star hotel' and the 'ultimate luxury prison in South Africa'. Everything in the prison was geared to the rehabilitation of inmates ... The Malmesbury prison, built at a cost of R173 million for 912 selected prisoners, was officially opened during December 1997. The Minister of Correctional Services envisaged that it would become a showpiece of prison reform in South Africa. It was to be reserved for prisoners serving two to four years with a good prognosis for rehabilitation. Each prisoner admitted to the prison would have to sign a contract declaring himself willing to undergo rehabilitation."<sup>157</sup>

As pointed out in this thesis, these "Five Star Hotels" were a world away both from the overcrowded "Warehouses" where the vast majority of South Africa's prisoners were kept, and from the "C-Max" and "Supermax" prisons where the "folk devils" were confined.

## 5.5 Final Remarks

This thesis set out to achieve an ambitious goal – i.e. to track in detail the penal discourse surrounding the punishment of imprisonment in South Africa, over substantial periods of time during the colonial, apartheid, and post-apartheid eras, and to gauge the effects of such discourse on the basic human rights of prisoners. What has emerged is a nuanced picture of a penal practice which originated during the Nineteenth Century in the developed political economies of Europe and the United States of America, but which evolved in a distinct manner within a uniquely African context.

The variety of themes touched on in this concluding chapter, attest to the distinctive character of the South African penal system. The emergence of racially defined punishment within the context of a penal ideology driven by racist paternalism and fear; the evolution of racial categories attached to prison dietary scales; the social meanings attached to prison labour and to the whipping of black prisoners and to the reformatory punishment of white male "penitents" and white female "fallen

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<sup>156</sup> *The Cape Times* 17 November 1997, 9.

<sup>157</sup> *The Citizen* 6 December 1997, 8; and *Saturday Argus* 6 December 1997, 3. Chapter 4.2 of this thesis at v.2 p.380-381.

angels"; the depredations wrought by various "folk devils", including the notorious "numbers gangs"; the role of South African prisons in the social control of poor and indigenous populations; and the constant chronic overcrowding resulting in "warehousing" and its attendant evils – are all themes which form part of a complex and unique larger picture.

Despite the distinctive character of imprisonment in South Africa, however, this thesis has shown that, as in most other countries, South African prisons have failed dismally at achieving their goals of reducing crime and reforming criminals. This has been the case from the time that this form of punishment was introduced into the country – and remains true today. Repeated public acknowledgements of the shortcomings of this form of punishment, as well as periodic well-publicised crises within the prison system itself, have done little to bring about substantial change. Penal discourse is recycled from one decade to the next, with the same problems being pointed out and the same solutions being offered, over and over again. In other words, this thesis has confirmed that the South African penal system has followed – and still follows – the pattern of repetitive failure described by Michel Foucault in his famous work *Discipline and Punish - The Birth of the Prison*.

Underneath it all, this thesis has revealed a litany of human suffering. From one era to the next, the basic human rights of South African prisoners have been abused due to the basic failure of imprisonment as a form of punishment. The human cost of such abuse – the unnecessary physical injuries and deaths, as well as broken spirits – is impossible to calculate.

## 6. Bibliography

## 6. BIBLIOGRAPHY

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