Administrative Justice Association of South Africa

AGM Thursday 4 March 2021, 18h00

Prisons – A call to action for post-apartheid administrative lawyers

Keynote

By

Justice Edwin Cameron

- Introduction

1. It is a pleasure and an honour to address your Annual General Meeting. My chosen topic is prisons. This is not only because, for the last fourteen months I've been Inspecting Judge of Prisons. It's also because the very concept of prisons is arrestingly forbidding, even alarming – and rightly so. Mass confinement of mostly adult males is a relatively recent phenomenon, about two centuries old.[1] It has overtones of horror which future generations may look back on with moral censure.
2. In South Africa, there is an additional concern – that, as under apartheid, our prisons are becoming dark, closed and punitive institutions.
3. The concept of prisons and our prisons practice in South Africa urgently need attention from public interest lawyers and academics. Yet public debate about prisons and the utility of our sentencing regime is conspicuously lacking.
4. Why do we turn our gaze away from the evident problems? Where, in particular, are the administrative lawyers? What role can they play?
5. There are some legitimate reasons.

[1] Other punitive methods, including execution, were used. And from 1788 to 1868, about 162 000 convicts were transported from Britain and Ireland to Australia. The British Government first transported convicts to American colonies in the early 18th century. See archives from the Australian Government "Convicts and the British Colonies in Australia" available at https://web.archive.org/web/20160101181100/http://www.australia.gov.au/about-australia/australian-story/convicts-and-the-british-colonies (accessed 5 March 2021).

(a) First, there is the Hannibal Lecter phenomenon: some human beings are seriously dangerous. They inflict terrible destruction. They should be incarcerated and kept away from society. This fact I regard as inescapable.

(b) Second, arising from this, but more broadly, all of us have a genuine fear of crime – a dread of how violent or other intrusions on our life interests may damage what is precious to us. South Africa has one of the highest rates of violent crime in the world: our murder rate 35.8 per 100 000, which means that 58 people are murdered in our country *every day*.[2] And gender-based violence is rampant.[3] Each of us has real and legitimate reason to be apprehensive. As Inspecting Judge of Prisons, protected by my status, the location of my residence, my mobility, even my whiteness, I must humble myself before the rage and fear that my fellow South Africans feel about crime.

(c) Third crime is politicised in South Africa. It is an issue of both race and class. There is a cruel and sad juxtaposition when it comes to how the criminal justice system treats those accused of monstrous acts of corruption as opposed to those accused and convicted of petty and serious other crimes (they experience the wrath of our criminal laws and a broken prison system as further punishment). It seems that poverty is often the determinant.

(d) Fourth, if society's institutions of governance do too little about crime, people will resort to vengeance themselves. As corruption and institutional

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[2] *BusinessTech* "South Africa Crime Stats 2020: Everything You Need to Know" (31 July 2020) available at https://businesstech.co.za/news/government/421424/south-africa-crime-stats-2020-everything-you-need-to-know/ (accessed on 22 February 2021) and Cohen and Vecchiatto "South Africa Murders Increase to Highest in More Than Decade" in *Bloomberg* (31 July 2020) available at https://www.bloomberg.com/news/articles/2020-07-31/south-african-murders-increase-to-highest-in-more-than-a-decade (accessed on 22 February 2021).

[3] Farber in *Times Live* "Shocking Stats on Gender-Based Violence During Lockdown Revealed" (1 September 2020) available at https://www.timeslive.co.za/news/south-africa/2020-09-01-shocking-stats-on-gender-based-violence-during-lockdown-revealed/ (accessed on 5 March 2021).
Gontsana in *GroundUp* "New Domestic Violence Helpline Gets More than 200 Calls in Four Days" (7 December 2020) available at https://www.groundup.org.za/article/over-200-calls-made-new-gbv-helpline-within-four-days-its-launch/ (accessed on 5 March 2021).

dysfunction have eaten away at our administrative justice institutions, vigilantism has become a crisis. Crime statistics indicate that, in 2019/20, vigilantism or mob justice was a causative factor in 1202 murders[4] – or more than three murders *every day*.

6. This evening, I get practical – I want to provoke a debate within your specific field of legal practice and theory – a debate that, until now, has been absent in South Africa. I do so by highlighting some major concerns about post-apartheid prisons. In addition, I stress that there are intriguing and urgent issues that go to the heart of administrative justice.
7. Behind this lies the troubling question: how do we practically, efficiently and meaningfully give effect to the constitutional aspirations of humane and dignified treatment and conditions for prisoners? How do we do so despite rightful anxiety about rampant crime in this country? There are no easy and simple solutions. And that is why I'm so pleased to be with you here this evening.

- <u>History of prisons in South Africa</u>

Prisons as colonial institutions

8. Prisons were introduced by Dutch colonists at the Cape in 1652 – in particular, Robben Island, in Table Bay harbour, later famous as the location for Nelson Mandela's decades-long imprisonment.
9. But it wasn't until the British occupation of the Cape (1795-1803; and after 1806) that systematised and institutionalised imprisonment began to take shape.[5]
10. In 1807, Parliament in London abolished the slave trade (though not yet slavery itself); the penal system began adapting to become a new source of labour.

[4] SAPS Crime Statistics for 2019/20 available at https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf (accessed on 22 February 2021) at 15.
[5] Singh "The Historical Development of Prisons in South Africa: A Penological Perspective" 50 *New Contree* (2005) 18.

11. The state later became a key provider of unskilled black labour for the mines.[6] In microcosm of society, prisons began segregating offenders along racial lines.
12. After much debate in London, and resistance locally, the Cape Colony unlike Australia did not become a penal colony for transportation of prisoners.[7]
13. Nevertheless, imprisonment became a tool increasingly directed against the poor, marginalised, and Black.[8]
14. Early critiques of the prison system were the 1945 Lansdown Commission on Penal and Prison Reform.[9] It found that the Prisons and Reformatories Act 13 of 1911 had not introduced a new era in prisons – but that it had in fact been instrumental in maintaining "the cruel and discriminatory prisons system". The Commission further noted increased incarceration without rehabilitation for Black inmates.[10] Sadly, nothing came of the Commission's report.[11]

Prisons as key sites for apartheid enforcement

15. The development of the prison system closely mirrored the increasing institutionalisation of racial discrimination – by the time apartheid began to be ruthlessly formalised, from 1948, the penal system was already premised on criminalising Black labour, leisure and resistance.

[6] Van Zyl Smit "Prisoners' Rights" in Louw (ed) *South African Human Rights Year Book 1994* 5 (1995) 268.
[7] See Anderson "Convicts, Carcerality and Cape Colony Connections in the 19th Century" *Journal of Southern African Studies* (2016) 42 (3) 429-442.
[8] Singh above n 5 at 22.
[9] Id at 23: "The Lansdown Commission found that the Prisons and Reformatories Act No 13 of 1911 had not introduced a new era in South African prisons but that it had in fact been a vehicle for maintaining the previous harsh and inequitable prison system that preceded it."
[10] Id.
[11] Which was presented in 1947. White Paper on Corrections (2005) available at https://acjr.org.za/resource-centre/White%20Paper%20on%20Corrections%20in%20South%20Africa.pdf (accessed 26 February 2021) at 26-7.

16. Black men were increasingly incarcerated for failing to pay taxes and for pass offences – with the objective, and result, that Black men became a source of labour – and thus a "labouring population criminalised by laws".[12]
17. A 'new' era for prison reform was ushered in by the Prisons Act of 1959. However, the Act enforced harsh apartheid policies, including racial segregation.
18. It became clear that the South African penal system was used to control perceived threats to the morals and well-being of the Afrikaner-Nationalist state (such as sex work, drug use, and the expression of sexuality) – those the state dispossessed were pushed into criminalised economies to survive.[13]
19. Prisons also became "closed institutions: all media and outside inspections were prohibited: that, is the reporting and publishing of photographs".[14] This created a "closed institutional culture within the prison service".[15]
20. Throughout white supremacism, prisons were employed to control political resistance (Gandhi, Mandela, Defiance Campaign, first Treason Trail, Rivonia Trial, use of unsupervised unchallengeable police detention from 1960; Durban labour uprising from January 1973; Soweto 1976).
21. Following the 1960 Sharpeville massacre, the apartheid government's militarised approach to carceral management became predominant. The primary objective was to quell political dissent (with political prisoners' reading materials strictly censored, they were deprived of all access to current news and developments).[16]

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[12] "De Beers Company went one step further by building a branch prison which was controlled by the company. Then, the role of the State as the provider of unskilled Black labour for the mines through the penal system had become manifest. In addition, the penal policy that emerged was the first attempt to segregate prisoners along racial lines. Mine owners treated white workers differently from Black workers." See further *South African History Online* "A History of Prison Labour in South Africa" available at https://www.sahistory.org.za/article/history-prison-labour-south-africa (accessed on 24 February 2021).

[13] De Vos "Prisoners' Rights Litigation in South Africa Since 1994: A Critical Evaluation" 2005 *Law Democracy & Development* 9(1) and Clarke "Twitter and A New Criminal Type" (18 February 2020) available at https://africasacountry.com/2020/02/twitter-and-a-new-criminal-type (accessed on 5 March 2021).

[14] Singh above n 5 at 24.

[15] White Paper (2005) above n 11 at 25.

[16] The then highest court declined, by a majority of 4-1, to intervene to overturn this restriction: *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A), Corbett JA dissenting.

22. Incarceration as a method to control large-scale political unrest was used increasingly after 1948 – and especially during the 1980s uprising and emergency rule of 1985 and 1986-1990 (including the death penalty against apartheid insurgents).
23. The apartheid prison population burgeoned, with overcrowding palpable:[17]

> "[B]etween 1975 and 1984, 1.9 million people, almost all of them [B]lack, were arrested for failing to carry their documents or for being in an unauthorised location".[18]

24. Recently, the Constitutional Court observed that:

> "Many incarcerated persons were political activists, who, as a result of their opposition to the apartheid system, were plucked from society, hidden from the national and international gaze and plunged into the horrifying darkness of human cruelty."[19]

25. These came to light most poignantly during the Truth and Reconciliation Commission's Special Hearing on Prisons.[20]

Administrative lawyers against apartheid crime and punishment

26. During this time, prison authorities were given wider discretion, ouster clauses excluded legal oversight, detention without trial was widely used, and gross human rights violations (including torture) became a feature of confinement.
27. This triggered challenges to the prison system especially by political prisoners.
28. Administrative lawyers were at the forefront. They strategically challenged apartheid laws through their very open texture – by employing principles of natural justice derived from our Roman-Dutch common law heritage.

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[17] White Paper (2005) above n 11 at 25 states that: "In 1984 the Judicial Inquiry into the Structure and Functioning of the Courts reported that the incarceration of prisoners as a result of influx control measures was a major cause of the overcrowding in prisons and it condemned these measures."
[18] Dissel and Ellis "Reform and Stasis: Transformation in South African Prisons" (2002) *Critique Internationale* 139. See further Ormond *The Apartheid Handbook* 2 ed (Penguin Books, London 1986) at 124.
[19] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26 at para 24.
[20] See selected quotes at id at paras 25-6.

29. This sought to provide judges a platform to develop the common law and review administrative action in light of libertarian principles.[21] In the realm of the penumbra, judges could opt to interpret statutes and regulations in light of individual dignity and freedom and even equality.[22]
30. In some, fairly rare, instances, this alleviated the harsh impact of apartheid laws.[23] (This was why Dugard and Mureinik urged that just judges should remain on post during apartheid – to play a mitigating role by applying a liberal approach).[24]
31. The role of administrative law during apartheid was accurately summarised by Professor Hoexter, who noted that—

> "the grounds of review in administrative law had to be made to function almost as a miniature bill of rights".[25]

32. The role of administrative justice principles in vindicating basic rights and shaping humane approaches in places of detention and incarceration is worth remembering.

- <u>Prisons in post-apartheid South Africa</u>

  Lofty aspirations: dignity, restorative justice and a culture of justification

[21] Dugard "Should Judges Resign – A Reply to Professor Wacks" *South African Law Journal* (1984) 101 (2) 286.
[22] For instance, Dugard notes at 291 that these include "[s]tatutory presumptions in favour of equality, liberty and reasonableness, the principles of natural justice by which the lawfulness of administrative actions are judged, and the standards of reasonableness for testing subordinate legislation enunciated in *Kruse v Johnson* [1898] 2 QB 91 are rules of positive law to be applied before the judge enters the uncertain terrain of principles, policies and tradition."
[23] Dugard refers to the following cases: *Komani N.O. v Bantu Affairs Administration Board* 1980 (4) SA 448 (A); *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A); *In re Duma* 1983 (4) SA 469 (N); *Mthiya v Black Affairs Administration Board, Western Cape* 1983 (3) SA 455 (C). However, this strategy was not always successful. There is, for example, a trio of cases in which the Appellate Division expressly declined to adjudicate in favour of individual liberty, see: *Laza v Police Station Commander Durbanville* 1964 (2) SA 545 (A); *Rossouw v Sachs* 1964 (2) SA 551 (A); *Schermbrucker v Klindt N.O.* 1965 (4) SA 606 (A).
[24] This was based on a debate between Professor Dugard and Professor Wacks. See further: Wacks "Judges and Injustice" *South African Law Journal* (1984) 101 (2) at 266 and Wacks "Judging Judges: A Brief Rejoinder to Professor Dugard" *South African Law Journal* (1984) 101 (2) at 295. That "history has vindicated Dugard" is aptly described in Cameron "Dugard's Moral Critique of Apartheid Judges: Lessons for Today" (2010) 26 (2) *South African Journal on Human Rights* 310 at 314.
[25] Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 (3) *South African Law Journal* 484 at 486 and fn 7 where she notes that in the context of the *ultra vires* doctrine.

33. Apartheid's human rights infringements and incarceration of political resisters underlay our post-apartheid approach to crime and punishment. We embraced a restorative approach – and, in particular, envisaged a penal system premised on human dignity enshrining protection for all in places of detention.

34. The Constitution rang an end to the severely punitive apartheid penal system:

- Its founding values include human dignity, the rule of law and the advancement of human rights and freedoms. The Bill of Rights includes justiciable rights to human dignity (section 10); life (section 11); freedom and security of the person (section 12); freedom from slavery, servitude and forced labour (section 13); with human dignity non-derogable, even in a state of emergency.
- The rights afforded arrested, detained and accused persons were a response to prisoners' treatment under apartheid. Section 35(2)(e) expressly includes a 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*".
- The right to just administrative action afforded to everyone (including prisoners) was enshrined in section 33 of the Constitution.

a. Mureinik envisaged that with the Bill of Rights as our "chief strut", it would "spearhead the effort to bring about a *culture of justification*" as a decisive break from apartheid's "culture of authority".[26]

[26] The insightful words of Mureinik in "A Bridge to Where – Introducing the Interim Bill of Rights" (1994) 10 (1) *South African Journal on Human Rights* 31 at 32. He went on to state that: "It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."

b. The Promotion of Administrative Justice Act[27] (PAJA) reinforces Mureinik's conception – the Preamble states that the statute's purpose is to "create a culture of accountability, openness and transparency."

35. The first hearing in the new Constitutional Court, later constructed, deliberately, on top of, and inside, the foundation of an apartheid-era pass-law prison, on 15 February 1995, entailed a challenge to the death penalty: *Makwanyane*[28] unanimously struck it down, as violating the guarantees of equality, human dignity and life.

36. The White Paper on Corrections (1994 and 2005) conceived corrections as a "societal responsibility"[29]—

> "people who leave correctional centres [should] have appropriate attitudes and competencies enabling them to successfully integrate back into society as law-abiding and productive citizens."
>
> And that—
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> "the period of incarceration should be used to nurture and rebuild the relationships between the offender, the community, and society at large."[30]

37. These views were embodied in the Mandela-era Correctional Services Act[31] (CSA): "prisoners" became "inmates" and "prisons" "correctional centres".

38. "Corrections" is defined as the "services and programs *aimed at correcting the offending behaviour of sentenced offenders in order to rehabilitate them*."

39. Critically, the CSA pierced the closed institutional culture of apartheid prisons system by requiring the establishment of an independent Judicial Inspectorate

[27] 3 of 2000.
[28] [1995] ZACC 3 (6 June 1995).
[29] See White Paper (2005) above n 11 at 35.
[30] Id at 7 and 14.
[31] 111 of 1998.

(JICS) tasked with monitoring, inspecting and reporting on the conditions of prisons and the treatment of detained and incarcerated persons.[32]

Grim reality – we over-incarcerate, in often appalling conditions

40. These lofty objectives, were not fulfilled. During the first decade of democracy, crime increased – a "post-apartheid crime wave"[33] – as did fear of crime.[34]
41. The Halcyon interlude of humane approaches and a "different calibre of a prison system"[35] was short lived. Public pressure demanded government action – and "tough on crime" policies offered the political leadership a plausible response.[36]
42. The democratic Parliament enacted signally harsh sentencing provisions.
    a. Minimum sentences were imposed for drug-related and other non-violent offences – conspicuously these included even offences "relating to" extortion, fraud, forgery and theft.[37] Bail and parole processes were stiffened.[38] Sold to

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[32] Section 85(2) of the CSA reads:

> "The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres."

[33] In fact, realistic comparative statistics to determine whether crime had actually increased are hard to come by. This is compounded by the fact that before democracy 'South Africa' excluded almost 10 million people in the supposedly 'independent' Bantustan homelands. In addition, statistics for pre-1994 'South Africa' related to a very different population. There is some indication, however, that, as civil dissent against apartheid grew, crime from the mid-1980s steeply rose. I am indebted for this point to Clare Ballard of the Lawyers for Human Rights.

[34] According to the SAPS, during 1994–2004, crime in fact increased by an alarming 30 per cent. See de Kock, Kriegler and Shaw "A Citizen's Guide to SAPS Crime Statistics: 1994–2015" UCT *Centre of Criminology* (September 2015) at 9.

[35] In the foreword, the Commission's chairperson, Professor Barney Pityana, said optimistically that the duty of the Commission is "to develop *a different calibre of prison system* that would be consistent with our new Constitution and with international norms and standards". See South African Human Rights Commission *Report of The National Prisons Project of the South African Human Rights Commission* (29 August 1998).

[36] The Minister of Safety and Security in 1999, Mr Steve Tshwete announced that:

> "[T]he criminals have obviously declared war against the South African public. . . . [W]e are ready more than ever before, not just to send the message to the criminals out there about our intention, but more importantly to make them feel that the tyd vir speletjies is nou verby."

Remarks at a Parliamentary Briefing, 28 June 1999, quoted in Ballard and Subramanian "Lessons from the Past: Remand Detention and Pre-trial Services' (2013) 44 *SA Crime Quarterly* 15 at 17-18.

[37] See further the Criminal Law Amendment Act 105 of 1997.

[38] See further Cameron "The Crisis of Criminal Justice in South Africa" (2020) 137 *South African law Journal* at 26.

the public and the political and intellectual elite as "a temporary solution to a temporary problem",[39] these remain in force nearly a quarter-century later.

43. The relics of the past have endured beyond 1994 – apartheid's institutional structures – both physical and in thought; a deeply-entrenched militaristic culture and approaches to incarceration in bureaucratic and public attitudes.

44. The numbers reinforce this. South Africa has the *highest prison population in Africa*; the 12th highest in the world.[40]

- Since 1995, the number of incarcerated persons has increased by one-quarter (25%).
- The remand population constitutes about one-third (34%) of the total.
- Lifers: Those serving sentences of life imprisonment have radically increased. In 1995, only 400 prisoners were serving life sentences; that number has ballooned monstrously to 16 856 in 2019-2020 today (a 42-fold increase), comprising 11.9% of the total.

45. The over-use of incarceration has led to *overcrowded, inhumane and degrading conditions* of detention. These conditions cripple our lofty constitutional aspirations and our vision of humane and dignified approaches to incarceration.

46. The Jali Commission expressed all these concerns.[41] It has been sadly forgotten.

47. The effects are far-reaching—

a. *intra-institutionally* (unhygienic conditions, sexual violence and general violence, risk of transmitting communicable and infectious diseases, mental health, dilapidated and decayed infrastructure) and

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[39] The minimum sentencing regime was initially stated to apply for a limited period of two years only, which could be extended from time to time

[40] See World Prison Brief: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All and https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=15 (accessed on 12 February, 2021).

[41] Department of Correctional Services, *Jali Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation in the Department of Correctional Services* (2005).

b. *extra-institutionally* (where degradation and violation of basis rights seeps into the community and is embodied in post-release experiences).

48. Equally, overcrowding thwarts good governance and administration. The closed, security-focused institutional culture of the Department of Correctional Services (DCS) persists. When security is the main priority, rehabilitation, education and social reintegration programs are de-prioritised[42] as luxuries, not necessities.

49. The cost is to our values and constitutional rights – but also to the taxpayer –

- on the 2019/20 DCS budget, daily cost per prisoner is roughly R447 (R163 155 per year).

50. Most troublingly, over-incarceration is no solution to combating crime. We have a high recidivism rate (perhaps 60 to 90%).[43]

51. The COVID-19 pandemic accentuated all these failings. That deadly contagion spreads dangerously in prisons, putting inmates and personnel and surrounding communities in profound peril, is a known fact of history and epidemiology.[44]

52. A recent *Lancet* paper advocated for the release of inmates (older inmates that at low risk of reincarceration; those immunocompromised; those incarcerated for non-violent offenses; those eligible for parole; and those unable to afford bail) in order to reduce overcrowding and stop the spread of COVID-19.[45]

53. On 8 May 2020, the President authorised a special dispensation to hasten the parole dates of approximately 18 000 to19 000 non-violent inmates (to alleviate

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[42] See DCA 2019/20 Annual Report at 27-8 accessible here**:** http://www.dcs.gov.za/wp-content/uploads/2020/11/DCS-Annual-Report-TABLING-FINAL.pdf:
In terms of rehabilitation, "A net decrease of R76,355 million was mainly under savings realised from item Compensation of Employees and Goods and Services to cover excess expenditure realised under Program Incarceration under Goods and Services for item Operating Leases for Accommodation Charges."
In terms of social reintegration, A net decrease of R10,418 million was mainly due to funds shifted from this program under item Goods and Services to fund Program Administration under item Goods and Services to fund Fleet Services."

[43] See Cameron above n 38 at fn 103.

[44] Lines et al "Gaol Fever: What COVID-19 Tells Us About the War on Drugs" (19 April 2020) *Health and Human Rights Journal* available https://www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/#_edn7 (accessed 5 February 2021).

[45] Macmadu et al "COVID-19 and Mass Incarceration: A Call for Urgent Action" *The Lancet* (9 October 2020).

overcrowding during the COVID-19 pandemic).[46] To date, 12 756 inmates have been identified to benefit from the early release – though only 9 346 have been released.[47] The impact of these interventions springs out in the most recent statistics – total prison population is 140 730 (48 441 remand detainees and 92 289 sentenced offenders).

54. But COVID-inspired releases put forth a more profound question – why were those released in prison at all?

- Strange bedfellows: DCS and JICS

55. While the Mandela-era CSA envisaged a robust and effective watchdog, JICS's legitimacy and key role in our constitutional dispensation is not secured.

56. First, the problem is well-illustrated in dysfunctional mandatory reporting:

56.1 The correctional services statute is unambiguous about what it demands. It states in clear peremptory language that: Every single death, natural or unnatural, *must* be reported to the inspecting judge. Every use of force *must* be reported. Every time an inmate is segregated or shackled with mechanical restraints, this *must* be reported.

56.2 But, over the last few years, the reporting system has fallen into shambles. Compared to the year 2018/19, 2019/20 saw a dramatic decline in the number of incidents reported. In some cases, the decline is as high as 84%.

56.3 This presents serious problems, take for example reporting on the use of force (inmate-on-inmate and inmate-on-official). In 2016/17, 724 cases of use of

[46] Proclamation No 19 of 2020 (8 May 2020) "Placement on Parole of Selected Categories of Sentenced Offenders". It stated that "I hereby authorise the placement on parole of qualifying sentenced offenders in terms of the criteria mentioned below, who are or would have been incarcerated on 27 April 2020 subject to such conditions as may be recommended by the Correctional Supervision and Parole Board under whose jurisdiction such sentenced offenders may fall." In addition, Mrs Gericke notes after 19 000 inmates were identified, the list was reduced to 18 000 but the regions have another total.

[47] Shared by Mrs Gericke on 22 February 2021.

force were reported. This peaked in 2017/18 with 994 cases, though in 2018/19 there were only 232 cases and 358 cases in 2019/20.[48] This is suspiciously low and makes it difficult for JICS and civil society[49] to actually know what is going on in our prisons.

56.4 In late 2020 a new e-corrections system became operational. The Department has assured JICS that this will resolve problematic underreporting.

56.5 Why does mandatory reporting matter?

- ❖ Intrinsically, mandatory reporting involves human values and interests, vital to vulnerable inmates, affecting both them and officials required to guard them.
- ❖ Functionally, it also serves as a vital warning signal or mechanism for trouble that might be brewing in the system.

56.6 The relationship between Inspectorate and inspected must be rooted in cooperation – and, mostly, this is what we receive from DCS – officials and the Minister show readiness to engage and to work closely with JICS on various issues (including reporting, parole and facilities).

56.7 Nevertheless, we cannot help but wonder: have our prisons become increasingly closed institutions – has the curtain from our apartheid penal system been closed again?

57. Second, JICS's independence:

57.1 This has been a long-standing issue, which the Constitutional Court recently resolved in *Sonke Gender Justice*.[50]

57.2 While the Court clearly affirmed JICS's independence, practical issues remain:

[48] Helpful numbers and graphs provided by Mr Mohlaba and Mr de Souza.

[49] The lack of general reporting and access to statistics from DCS was raised as a serious concern by civil society and other stakeholders during a webinar (16 February 2021) by the African Criminal Justice Reform (ACJR).

[50] See *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26.

- ❖ How will JICS's functional, operational and perceived independence improve its efficacy?
- ❖ Which challenges will it continue to face (budget cuts)?
- ❖ How to overcome the lack of political will to consider its reports and recommendations?
- ❖ How can a watchdog institution meaningfully survive with insufficient practical bite?

- <u>Prison inspectorates – what good can they do?</u>

58. JICS's relative powerlessness springs from two notable features of the CSA provisions creating it:

    (a) First, JICS has no operational, managerial or executive power over DCS's operations;

    (b) Second, DCS has no statutory based obligation to account to JICS, to implement its recommendation and findings, or even to respond to them.

59. These limitations raise a troubling question. What good can JICS do? What can any prisons inspectorate ever hope to do?

60. Michel Foucault, a famous crime-and-prison sceptic, was particularly scathing about prison "reform" and "humanisation". He scornfully stated that—

> "whether the prisoners get an extra chocolate bar on Christmas or are let out to make their Easter Duty is not the real political issue. What we have to denounce is not so much the 'human' side of life in prison but rather their real social function – that is, to serve as the instrument that creates a criminal milieu that the ruling classes can control".[51]

61. He derided prison reform projects in Europe – denouncing them in withering specificities – without offering any practical detail about how to tackle the issues

[51] Foucault on the Role of Prisons in *The New York Times* (5 August 1975) available at https://www.nytimes.com/1975/08/05/archives/michel-foucault-on-the-role-of-prisons.html (accessed on 5 March 2021).

of crime and incarceration. Instead, he contented himself with a radical postulate—

"*there can be no reform of the prison without the search for a new society*".[52]

62. In many ways, JICS's limitations underscore its impotence. Are we merely a Band-Aid on a cruelling dysfunctional system?
63. Do we merely legitimise the carceral project?
    - ❖ By forming part of the architecture of surveillance that produces docile incarcerated bodies?
    - ❖ By offering in our reports the <u>language</u> of human rights to a system daily offends human rights, and that is not obliged even to consider our recommendations?[53]
64. Unless they are binding, our reports' human rights language creates the appearance of respect for rights – without the obligation to enforce them.
65. We are concerned enough to inspect by not enough to press for real change.
66. We must recognise the tension within our role in the same way we recognise the tensions and contradictions inherent in human rights discourse itself.
67. Liberation will not come from any inspectorate – but an inspectorate can form part of an emancipatory project.

- <u>Administrative law – A call to action</u>

[52] Foucault, Montreal lecture.

[53] Section 90(4) of the CSA reads:

> "(a) The Inspecting Judge must submit an annual report to the President and the Minister.
>
> (b) The report must be tabled in Parliament by the Minister."

Like JICS, HM Inspectorate of Prisons for England and Wales (HMI Prisons) does not make binding recommendations, however, prison facilities must respond to the Inspectorate's reports with action plans, and secondary inspections are conducted to assess compliance. See further Nevin and Wasserman *Best Practices Research Report: A Comparative Analysis of Prison Oversight Bodies* (2019) 32-37.

68. In *The New Jim Crow* Professor Michelle Alexander points out that "mass incarceration tends to be categorised as a criminal justice issue as opposed to a racial justice or civil rights issue (or crisis)."[54]
69. While the US is the notorious global leader on mass incarceration,[55] at least serious challenges to incarceration are being publicly debated there, in both major political parties.
70. Reforms including the First Step Act (signed by Trump) are quite literally the first step to overhauling an iniquitous system of mass incarceration.[56]
71. Hence my talk seeks to provoke a debate (between lawyers, judges, politicians, academics, civil society and citizens).
72. So I call on administrative lawyers to use administrative justice, as they did during apartheid, to vindicate the rights of people in detention and incarceration.
73. From an admin lawyer's perspective, there are tempting main targets of litigious interest.

74. **FIRST**: our **parole** system is over-clogged, under-policed, inefficient and slow.
    - ❖ Many of those entitled to parole are left waiting;
    - ❖ while, at the same time, some terrible mistakes have been made, where released offenders quickly re-offend, on occasion murderously:
75. While it is true that some parolees commit violent crimes, one of the principal causes of recidivism remains the failure of rehabilitation programs in prisons and the lack not only of social support for parolees, but of oversight and control.

[54] Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2010).
[55] Notably, the number of inmates in the United States declined from around 2.3 million in 2008 to 2.1 million in 2019 and 1.8 million in mid-2020 and 1.25 million in late-2020. Brown et al *Vera Institute* "People in Jail and Prison in 2020" (January 2021) available at https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf (accessed on 10 February 2021).
[56] P.L. 115-391.

76. Even though parole can be applied as a mechanism to reduce the number of sentenced offenders, DCS does not appear to have the capacity to act efficiently to provide for effective parole.

77. The effect has been particularly marked in the case of inmates sentenced to life imprisonment ("lifers"). Between 1987 and 1994, lifers were required to serve 10 years before becoming eligible for parole; now only in exceptional circumstances can an inmate be granted parole before serving 15 years. Under the previous Prisons Act of 1959, lifers were eligible for parole after serving a minimum of 20 years. Under the CSA of 1998, however, a lifer is eligible for parole only once they have served a minimum of 25 years.

78. Section 136(1), the transitional provision, provides that inmates sentenced before 1 October 2004 are subject to the Prisons Act and must serve a minimum of 20 years, but inmates sentenced after 1 October 2004 are governed by the CSA and must serve a minimum of 25 years.

79. This created a dual system of assessment, consideration and placement on parole *determined by date of sentence*.

80. In 2019, the Constitutional Court in *Phaahla*[57] held that the use of the date of sentence, rather than the date of commission of offence, constitutionally invalid as offending against the right to equal protection of the law and the right to the benefit of the least severe punishment. The majority held that it amounts to retroactive application of the law (violating section 35(3)(n)) and the principle of legality).

81. *Phaahla* is a welcome development – but it underscores the need for a proper reconsideration of the parole system as a whole.

[57] *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18 (See further section 136(1) of the CSA).

82. And how long will it take for DCS to implement? (The order requires Parliament to amend the provision by May 2021.)

83. Processing of lifers' parole applications, specifically, has created a crisis. Since *only the Minister* can make the ultimate decision on lifers' parole (on recommendation from the Correctional Supervision and Parole Board through the National Council),[58] this is a backlog on the Minister's desk.

- ❖ With some 16 856-plus lifers,[59] the system must offer hope; without it the system faces dysfunction and even danger.[60]
- ❖ Does the Minister, who is hardworking and well-respected, but responsible for both Justice and Correctional Services, have the capacity to consider each individual parole application? (If the Minister were to consider each lifer's application for 10 minutes over the course of 7 hours a day every day, it would take 401 days.)
- ❖ Are there separation of powers concerns?
- ❖ It is politically feasible to delegate these decisions? Should a special Review Board, chaired by a Judge, be created (requiring further resources and political will)? (The Minister could be given a final veto.)

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[58] Section 78 of the CSA titled "Powers of Minister in respect of offenders serving life sentences" provides that:

"(1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a person sentenced to life incarceration, the National Council may, subject to the provisions of section 73 (6) *(b)* (iv), recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of section 52.

(2) If the Minister refuses to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole.

(3) Where a Correctional Supervision and Parole Board acting in terms of section 73 recommends, in the case of a person sentenced to life incarceration, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the Minister, on advice of the National Council, must consider and make a decision upon the recommendation.

(4) Where the Minister refuses or withdraws parole or day parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years."

[59] Mr de Souza notes that applications may take up to a year to reach the Minister.

[60] Section 75 of the CSA titled "Powers, functions and duties of Correctional Supervision and Parole Boards" empowers a Parole Board to place a sentenced inmate who is not a lifer under correctional supervision or parole.

- ❖ Currently, JICS is receiving an influx of complaints from "lifers". On 22 February 2021, we received a plea from "concerned lifers" at Witbank Correctional Centre. It was littered with administrative law issues (asking for clear requirements on parole and noting that PAJA dictates "the timeframe [for] any functionary acting in an administrative capacity").
- ❖ The signatories concluded their plea with the threat of a hunger strike, which they said was the only option left.
- ❖ The ministerial backlog appears to breach the "efficient administration and good governance" required by both PAJA[61] and section 237 of the Constitution ("all constitutional obligations *must be performed diligently and without delay*").

84. We clearly need to review and reform the parole system. But what can JICS do to assist? Does it fall within JICS's scope of duties, which is to report on "treatment of inmates" and "conditions in correctional centres"?[62]

85. Can JICS conduct an investigation, make enquiries and hold hearings to deal with parole dysfunction and backlogs?[63]

86. If JICS is indeed hamstrung when it comes to parole and lacks any operational powers, should this be amended and form part of broader reform?

87. **SECOND: Solitary confinement as "segregation"**.

[61] See further PAJA's Preamble.

[62] Section 85(2) of the CSA states that:

"(2) The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres."

[63] Section 90(5) of the CSA.

88. There is a dearth of reporting on segregations – JICS's 2019/20 report annual report indicates that only about 10% of all segregations are currently being reported.[64]

89. During the national lockdown, there were no segregation appeals at all.

90. Solitary confinement was much-used as a coercive tool during apartheid.[65]

91. Under the Constitution, the legislation in 2008 excised solitary confinement – section 30 now permits only "segregation".[66]

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[64] See JICS Annual Report 2019/20 available at http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf at 52.

[65] See further Foster and Davis *Detention and Torture in South Africa* (James Currey Publishers, 1987).

[66] Section 30 of the CSA "Segregations" provides:

"(1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7 (2) *(e)*, is permissible:
(a) upon the written request of an inmate;
(b) to give effect to the penalty of the restriction of the amenities imposed in terms of section 24 (3) *(c)*, (5) *(c)* or (5) *(d)* to the extent necessary to achieve this objective;
(c) if such detention is prescribed by the correctional medical practitioner on medical grounds;
(d) *when an inmate displays violence or is threatened with violence*;
(e) if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and
(f) if at the request of the South African Police Service, the Head of the Correctional Centre *considers that it is in the interests of the administration of justice*.

(2) *(a)* An inmate who is segregated in terms of subsection (1)*(b)* to *(f)*–
(i) must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day; and
(ii) must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.
(b) Segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.

(3) A request for segregation in terms of subsection (1)*(a)* may be withdrawn at any time.

(4) Segregation in terms of subsection (1)*(c)* to *(f)* may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of subsection (5), exceed seven days.

(5) *If the Head of the Correctional Centre believes that it is necessary to extend the period of segregation* in terms of subsection (1)*(c)* to *(f)* and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend the period of segregation for a period not exceeding 30 days.

(6) *All instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge.*

(7) *An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.*

(8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.

(9) Except in so far as it may be necessary in terms of subsection (1)*(b)* segregation may never be ordered as a form of punishment or disciplinary measure."

92. Yet, in reality, solitary confinement appears to continue under its sweeter name of "segregation"[67] – which is defined in wide enough terms to allow solitary confinement.

93. Three questions must be asked about statutory "segregation":

94. *First*, the provisions are extremely broad (segregation is permissible "when an inmate displays violence or is threatened with violence"; it may be extended if the Head of the Correctional Centre *believes that it is necessary*).

95. Although the Constitutional Court pronounced all jurisdictional facts objectively justiciable regardless,[68] this wide provision is troubling.

96. *Does this confer an unguided discretion?*[69] The rule of law requires that laws be stated in clear, accessible, predictable and certain manner.[70] *Dawood* required that legislation conferring broad discretionary powers must also specify constraints – otherwise, "those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse

[67] The Civil Society Prison Reform Initiative (CSPRI) Factsheet on Solitary Confinement and Segregation (2015) notes that initially there was a clear distinction between solitary confinement and segregation. The former refers to punishment following a different procedure and the latter deals with a broad mechanism that can be employed for an array of purposes. However, it seems that the two practices have collapsed into one.

[68] Hoexter (in *Administrative Law in South Africa* 2 ed (Juta and Co (Pty) Ltd, Cape Town 2017) at 301 notes that "the right to lawful administrative action in s 33(1) of the Constitution implies that the courts must be able to satisfy themselves as to the lawfulness of administrative action, including any factual assumptions on which that action is based" and second, in *Walele v City of Cape Town* [2008] ZACC 11 the Court noted at para 60 that:

> "In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decisionmaker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds."

At 302 Hoexter observes that: "Does this means that the use of subjective language now makes no difference at all – that the words chosen by the legislature are, in fact, irrelevant?" and her view is that "subjective language will still be capable of signaling the legislature's desire for deference on the part of the courts in particular cases".

[69] Section 30(5) of the CSA.

[70] In Fuller's 1964 book *The Morality of Law*, he formulated "principles of what he called 'the inner morality of law' — principles requiring that laws be general, public, prospective, coherent, clear, stable, and practicable — and he argued that these were indispensable to law-making." See further https://plato.stanford.edu/entries/rule-of-law/ (accessed on 27 February 2021).

decision".[71] It seems doubtful whether section 30 of the CSA complies with this desideratum. And does it invite abuse?[72] In addition, the overall discretion to instruct the termination of the segregation is left to the National Commissioner.[73] While these decisions are reviewable under PAJA, what practical recourse does this offer inmates?

97. *Second*, the CSA allows recourse to the Inspecting Judge.[74] *But <u>is this watered-down form of oversight adequate</u>*? Under the previous system, there was *mandatory* review of solitary confinement. The statute now affords only an *optional* review mechanism – which depends on the prisoner being aware of the review mechanism.[75] International and comparative law underscores the importance of independent reviews and appeals where human rights abuses are at stake.[76]

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[71] *Dawood v Minister of Home Affairs* [2000] ZACC 8 at paras 45-6.

[72] The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur) in the 2011 Report noted at para 70 that "[b]ecause of the absence of witnesses, solitary confinement increases the risk of acts of torture and other cruel, inhuman or degrading treatment or punishment".

[73] Section 4(c) of the CSA provides:

> "The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates of different categories."

[74] In addition to section 30(6) and (7) of the CSA, there is also an avenue for appeals in terms of section 31 "Mechanical Constraints" and subsection 5 provides:

> "An inmate who is subjected to such restraints may appeal against the decision to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof."

[75] Section 30(7) states that:

> "An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof."

[76] The Special Rapporteur at above n 74 at para 82 called upon states to "conduct regular reviews of the system of solitary confinement" and recommends that solitary confinement ought to be coupled with "minimum procedural safeguards" which include internal reviews by an independent body. See for further *AB v Russia*, Application No. 1439/06, ECHR (2010) at para 111 wherein the European Court of Human Rights stated that: "Lastly, the Court wishes to emphasise that it is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."

98. Activists and scholars point out[77] that the provision lacks clarity – does it mean that all segregations dealing are suspended pending the appeal to the Inspecting Judge? How can the Inspecting Judge effectively deal with the appeal in 72 hours and does this square with reality?

99. *Third*, do <u>*segregation practices at some centres violate domestic and international law*</u>? International law prohibits indefinite solitary confinement and prolonged solitary confinement (in excess of 15 days) – which it considers a form of torture or ill-treatment.[78] (Whether other types of segregations/solitary confinement constitute a form of torture is considered case-by-case.) But take Ebongweni super-maximum correctional centre. According to JICS's information, inmates are locked up for 23 hours a day for a minimum of 6 months (in the "first phase", which lasts for a *minimum of 6 months*).[79] Is this torture? If so, what can and should JICS do? Even if applied only to the most dangerous and recalcitrant inmates, is it lawful? Is it in accordance with international requirements? And does it deal with the problem in a humane and acceptable way?

100. In addition to our domestic laws, international law (through soft law mechanisms of the Mandela Rules and reports of the Special Rapporteur) prohibits indefinite solitary confinement and prolonged solitary confinement[80] –

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[77] Petersen et al "Solitary Confinement: A Review of the Legal Framework of Practice in Five African Countries" *Africa Criminal Justice Reform* (October, 2018) at 31.

[78] Rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) provides:

> "For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."

[79] Justice van der Westhuizen's Ebongweni report "From Security to Cruelty? Supermax Correctional Centres: Ebongweni" (19 December 2019). The report found that promotion from phase 1 to phase 2 is not automatic – an offender could remain in phase 1 for years.

[80] Rule 43 of the Mandela Rules provides:

"1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

(a) Indefinite solitary confinement;

(b) Prolonged solitary confinement;

which it considers a form of torture or ill-treatment and violative of the Convention Against Torture.[81]

101. Based on JICS's inspections and reports, correctional centres in South Africa may thus fall short of international law standards.

102. **THIRD: Bail**

103. As mentioned, remandees constitute one-third (34%) of the prison population. The JICS 2019/20 Annual Report found that of the people awarded bail, 74% can't afford bail of R1 000 or less.[82]

104. This is not a new problem. Almost two decades ago, my predecessor, Judge Hannes Fagan, lamented that many awaiting-trial detainees could not afford bail amounts of R1 000 or less.[83]

(c) Placement of a prisoner in a dark or constantly lit cell;
(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
(e) Collective punishment.

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.
3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order."

In addition, the Special Rapporteur has made it clear that prolonged or indefinite segregation/solitary confinement constitutes a form of torture prohibited by law (see 2020 Report at para 57).

[81] Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) reads as:

> "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[82] The DCS report reflecting the inmate population from 1 to 30 April 2020 indicates that of the 52 679 RD, 5 455 people are detained with an option of bail. Of the RD with bail, 4027 people (74%) have a bail amount of R1 000 or less. See DCS *Reduction of Remand Detention During Lockdown: Briefing of Judicial Inspectorate of Correctional Services* (2020).

[83] Fagan "Prison Overcrowding: Out of Our Biggest Challenges to Transformation" 2002 *Track Two* 11 (2) at 18.

105. The social and economic costs of the cash bail system and pretrial incarceration "are pervasive and corrosive"[84] and "[p]retrial incarceration on this scale has drained unfathomable amounts of human and financial capital from already marginalised poor communities".[85]

106. The cash bail system "allows income to be the determining factor in whether someone can be released pretrial".[86]

107. This is intolerable, disproportionate and unjust. It prompts an important question – if we perpetuate a system that detains people for their poverty, does it amount to a direct class/wealth-based discrimination on the ground of social origin[87] and indirect discrimination in terms of race?

108. Do these "prisoners of poverty" find themselves at intersecting axes of discrimination (race and class)?[88]

109. Would a class action suit be viable?

110. First, there are existing mechanisms. The Criminal Procedure Act,[89] through section 63A, empowering "release or amendment of bail conditions of accused on account of prison conditions," recognises that overpopulation poses a threat to prison conditions and that the lack of financial resources leads to continued incarceration.

111. This provision permits the Head of Correctional Centre if "satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health

[84] Columbia Law School discussing Professor Funk's paper "Cash Bail: Are Algorithms the Answer" (25 April 2019) https://www.law.columbia.edu/news/archive/cash-bail (accessed on 26 February 2021).
[85] Funk "The Present Crisis in American Bail" *The Yale Law Journal* (2019) 128.
[86] Prison Policy Initiative "Detaining the Poor" available at https://www.prisonpolicy.org/reports/incomejails.html (10 May 2016) and accessed on 26 February 2021.
[87] In Currie and de Waal *Bill of Rights Handbook* 6 ed (Juta, Cape Town 2018) at 236: "Social origins refers to concepts such as class, clan or family membership."
[88] For a clear example of courts employing intersectionality in discrimination cases see further *Mahlangu v Minister of Labour* [2020] ZACC 24.
[89] 51 of 1977.

or safety of an accused" to in terms of section 63A(1)*(a)* to *(c)*, apply to a lower court for either that accused's release on warning in lieu of bail or an amendment of the bail conditions.

112. Why is this provision not utilised enough?

113. There are various reasons: (i) correctional officials are reluctant to invoke the provision for fear of adverse consequences if they sponsor the wrong detainee; (ii) it requires an acknowledgement that prison conditions are substandard which may result in civil suits against the Department; and (iii) some prisoners are not aware of the provision and it is procedurally cumbersome.[90] In addition, in terms of section 60(12), a court may grant bail subject to discretionary special conditions beyond monetary amounts.[91]

114. Second, abolish the system of cash bail completely: there are various other ways in which to ensure that remand detainees (that do not pose a serious threat or danger) will stand trial. These include granting bail on non-financial conditions, risk-assessment algorithms, non-surety bonds, pre-trial diversion programs and pre-trial services.

115. To ensure abolition of cash bail is done correctly, we may need to be creative and innovative.[92]

116. This is not novel.

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[90] See further Cameron above n 38 at 62-3.

[91] Examples of this can be found in *S v Ramgobin* 1985 (4) SA 130 (N) at 132 and *S v Jacobs* 2011 (1) SACR 490 (ECP). Practical examples include: the accused must report to a specified police station one or twice a day; or must hand over a passport to the police; or may not leave a specified magisterial district without informing the police. The courts have recognised that appropriate conditions can be as effective as payment of money.

[92] See a cautionary tale from New York by Lartey at *The Marshall Project* (23 April 2020) https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states#:~:text=In%202019%2C%20the%20New%20York,many%20misdemeanors%20and%20nonviolent%20crimes (accessed on 28 February 2021).

117. During April 2020, California set a state-wide emergency bail schedule that reduced bail to $0 for most misdemeanour and some low-level felony offenses.[93]

118. Just weeks ago, Illinois abolished cash bail through the Illinois Pre-Trial Fairness Act – making it the first state in the US to do so.[94] Governor Pritzker justly called this "a substantial step toward dismantling the systemic racism that plagues our communities, our state and our nation and brings us closer to true safety, true fairness and true justice".[95]

- Conclusion

119. To return to where I started: the intractable social and conceptual issues of crime and prisons.

120. For the harshness of our penal policies, we cannot blame a crime-weary, crime-ridden public. Their anger and fear are well warranted. We must blame ourselves – the academic and intellectual elite, the politicians, the lawyers, the judges, the thinkers and leaders.

121. Hence my urgent plea to AdJASA this evening: *to get involved*

122. And that makes it apt to end by reflecting on the words of the late Dr Alex Boraine (at the Truth and Reconciliation Commission Special Hearings on Prisons)—

> "there may well be many in our society who feel that we ought to be talking much more about crime and about the victims rather than prisoners. That is very understandable

[93] California Courts Newsroom "California Counties Keeping COVID-19 Emergency Bail Schedules" (10 July 2020) https://newsroom.courts.ca.gov/news/california-counties-keeping-covid-19-emergency-bail-schedules (accessed 28 February 2021).

[94] Corley at NPR "Illinois Becomes 1st State to Eliminate Cash Bail" (22 February 2021) https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail (accessed 28 February 2021).

[95] See Cramer in *The New York Times* "Illinois Becomes First State to Eliminate Cash Bail"(23 February 2021) https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html (accessed 24 February 2021).

against the background of widespread crime but nevertheless *it would be quite tragic in our society if the pendulum swung so far so that we couldn't care about prisoners and about their protection*."[96]

123. As a rich constitutional democracy, we have indeed let this pendulum swing.

124. But administrative justice (buttressed by greater reforms) can play a key role and in guiding us towards freedom and basic human rights for *all* – as during the darkest days of apartheid.

[96] Truth and Reconciliation Commission Special Hearings – Prisons (21 July 1997) available at https://www.justice.gov.za/trc/special/prison/masondo.htm (accessed on 26 February 2021).