

The historical development of prisons in South Africa: A penological perspective

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Abstract

President Nelson Mandela commented during his time of incarceration¹

“Prison not only robs you of your freedom, it attempts to take away your identity. It is by definition a purely authoritarian state that tolerates no independence and individuality. As a freedom fighter and as a man, one must fight against the prison’s attempt to rob one of these qualities.”

Historically, the characteristic feature of the development of South African prisons was its resemblance to the mine compound. Such compounds housed mine workers, of whom many were convicts supplied by the prison system.

Even by 2006 these remnants of the past are distinct in the large communal cells crammed with rows of beds in which prisoners are housed.

It is currently assumed that institutional confinement has always been employed as the usual method of dealing with offenders throughout history. This has been assumed, almost universally, because presently offenders are confined within penal institutions, such as, prisons, reformatories, reform schools and jails. However, the use of institutions for the extended confinement of offenders, as the prevailing method of punishment, is a relatively contemporary innovation and was primarily a product of American influences.

The use of the prison as an institution for the detention of offenders for the period of their sentence is approximately two hundred and fifty years old. The suffering and anguish of living conditions to which inmates are subjected in overflowing prisons cannot be calculated in figures and graphs.

¹ Institute for Security Studies (ISS), “The Problem of Prisons” Correcting Corrections, Prospects for South Africa’s Prisons. Monograph No.29 October 1998. [Online]. Available at: <http://www.iss.co.za/Pubs/Monographs/No29/Prison.html> [14-01-03].

The consequences of housing too many people in too little space means that inmates are doubled-bunked in small cells designed for one, or forced to sleep on mattresses in unheated prison gyms, temporary housing, hallways, or basements.

In this article a review of the origin and development of prisons in South Africa will be given. A historical look into the Department of Correctional Services in South Africa and the change in direction of the penal system during the past century will also be reviewed. An assessment of the overcrowding of penitentiaries over the decades together with the problems experienced will be discussed.

The origin of the penal system

The idea of imprisonment as a form of punishment is relatively recent. Commencing with the reign of Edward I of Britain (1239-1307 AD) imprisonment was a common punishment.² The increase of prisons as an organization for punishing convicted offenders was a slow and ongoing process, which extended over numerous centuries, from rudimentary beginnings in the sixteenth century. A distinguishable feature of the earliest prisons is the lack of a systematic policy concerning imprisonment of convicted criminals. For decades, a large variety of buildings were used as prisons, for example, cellars beneath municipal buildings. These buildings as a rule were not fit for habitation. Individuals that the society wanted to get rid of were incarcerated in these 'prisons'. No consideration was paid to sanitary or moral welfare. There was no separation according to sex or age whatsoever, and the herding of men and women together into dayrooms made promiscuity inevitable. The sale of liquor by the warders guaranteed immoral behaviour, and prison fever was virtually widespread.

Not much has changed over the decades. If anything, the situation has worsened in terms of the conditions in prison due to overcrowding. The situation presently in South Africa is that prisons were built to accommodate criminals, to 'satisfy' the objectives of punishment, namely, retribution, rehabilitation, deterrence and protection of society; but this is far from being achieved. In protecting people in society, society must do what is required to discourage those who break its laws and punish those who do so in an appropriate manner. Incarcerating offenders in buildings that are not designed with the purpose, for which it is used in mind, will achieve little or no success. One can barely expect a prisoner to respond positively to the latest

² SS Terblanche, *The guide to sentencing in South Africa* (Butterworth: Publishers (Pty) Ltd., 1999), p. 543.

and most enlightened rehabilitation if a miserable environment surrounds this program.

In the history of criminal justice, as fear over crime grew, the concern with community protection reached a crescendo by 1996 worldwide, leading to rates of imprisonment previously unheralded. Prison populations quickly reached breaking point, although few realized that the use of prisons, as places where convicted offenders serve time as punishment for breaking the law, is a relatively new development in the handling of offenders.³

The development of prisons in South Africa

Expansion of Prisons: 1910

Significant developments of correctional law occurred in the period immediately after the Union of South Africa. The Department of Prisons formed part of the Department of Justice for a number of years. The British occupation for the Transvaal and the Orange Free State Republics in 1900 led to a major reorganisation of the penal systems in these provinces.

The Prison System of the Cape

Jan van Riebeeck, during his stay at the Cape, followed a policy in regard to the punishment of criminals that had its roots in 17th century Dutch judicial practice. The full panoply of penalizing measures was presented as a brutal and public demonstration. This judicial system inevitably had an influence on various aspects of judicial practice, the penal system and the administration of justice in South Africa. The kind of punishment used for offenders was directed at the body-public executions by firing squads and public crucifixion. The imprisonment of convicted persons and the use of such persons for manual labour did not appear to be prioritised. Convicted persons were occasionally held in chains in the Dutch East India Company's slave lodge and made to labour in public works... An attempt was made to extract labour from convicts deported to Robben Island. Deportation removed the criminal from a society which did not have much interest in his welfare.⁴

3 F Schmalleger, "Criminal Justice Today", *An Introduction Text for The 21st Century* (New Jersey, Prentice-Hall, Inc. 1997), p. 432.

4 D van Zyl Smit, *South African Prison Law and Practice* (Durban, Butterworths, 1992), p. 8.

Only after the Fort and the Castle were built in the Cape, was detention possible. Incarceration was reserved mainly for condemned, awaiting trial and judgement debtor prisoners.

Some of the cruel forms of punishment were abolished during the 18th century, which led to the expansion-however informal- of imprisonment. The small existing places of detention were overpopulated with people held for minor offences. Places of detention were also erected for people who had to serve longer sentences. During this period the whole prison system was extremely disorganised with no reference whatsoever to rehabilitation.⁵

The most significant reformations pertaining to punishment occurred after the British occupation of the Cape in 1795 to 1803. In 1795 the orientation of the penal system towards physical harm began to decline. Punishment that resulted in physical suffering was abolished and replaced with “incarceration for a fixed period proportionate to the heinousness of the offence”.⁶

In 1807, the slave trade was abolished and full emancipation occurred in 1834. Penal policy began to develop in the Cape. Slavery was a form of imprisonment, and the abolition of slavery caused the supply of labour to the farms to suffer. A rudimentary pass system for indigenous inhabitants-later to become a well-known feature of apartheid- was introduced. Those who abused the system were put to work as prisoners.⁷

The role of the State as the provider of unskilled black labour for the mines through the penal system had become manifest.⁸ Another aspect of penal policy that emerged in the 1880’s was the first systematic attempt to segregate prisoners on racial lines.

In 1888 the “Act to consolidate and amend the Law relating to Convict Stations and Prisons,” (Act 23 of 1888), was passed by the Cape Parliament. There was a shift to unite all places of confinement under a single prison system. There was also an introduction of gender-based classification and proviso for the separation of different categories of offenders, for example, awaiting-trial offenders.

5 CH Cilliers and J Cole, *Penology* PNL 199-C (Pretoria, Unisa Publishers, 1997), p. 111.

6 Institute for Security Studies (ISS), *The Problem of Prisons*. Correcting Corrections, Prospects for South Africa’s Prisons. Monograph No.29 October 1998 [Online]. Available at. <http://www.iss.co.za/Pubs/Monographs/No29/Prison.html> [14-01-03].

7 Ibid.

8 D van Zyl Smit. *South African Prison Law and Practice*, p. 8.

The Prison System of Natal

For a substantial period there was no prison in Natal in the true sense. In 1849 a brick building was established with the provision for ten communal cells. By 1907 due to the increasing offender population this had increased to 260 cells. A prison was completed in 1863 with an initial number of 25 cells. This had expanded to 158 by 1907.

The prison conditions were deleterious and unhygienic. Prisons were overcrowded and there were fundamental shortcomings in the system. A recurrent problem was that of escapes and attempted escapes. Due to the overcrowded conditions in prisons, there was no question of classification. Corporal punishment was common and included the use of the whip. Objections were raised against the use of this instrument, however, and the cane replaced the whip. There was no question of reform at this juncture because of the lack of scientific knowledge of crime causation and inadequate facilities in the existing institutions.⁹

In 1887 a tripartite classification system of 'Europeans' (coloured), 'Indian' and 'Native' (African) was adopted in a government notice. This had a ripple effect in terms of segregation of accommodation for prisoners. Prior to the Union in 1910 there was no major penal reform in Natal.

The Prison System of the Orange Free State and Transvaal

There is insufficient research into the development of the early prison system in both the Orange Free State (OFS) and the Transvaal. It emerged that in both the Orange Free State and the South African Republic (Transvaal) the early Republican periods were characterized by a low priority being given to the development of a prison system or a legislative framework to encompass it.¹⁰

In the OFS, the first prison was introduced in Bloemfontein after 1854. By the year 1873 there were thirteen other institutions. The prison system used in the Cape and Natal was also applied here after the British occupation in 1902.

The conditions in the prisons of the OFS were extremely inadequate. Although commissions were appointed to investigate prison conditions, nothing could

⁹ D van Zyl Smit. *South African Prison Law and Practice*, p. 8..

¹⁰ H Venter, *Die geskiedenis van die Suid-Afrikaanse gevangenisstelsel, 852-1958* (HAUM, Cape Town, 1959), p. 82.

be done about the matter owing to limited funds for this purpose and the widespread poverty prevailing in the Republic at that time.¹¹

The constitution at that time laid down that prisoners had to do hard labour in public. During the 1840s and 1850s, offenders were made to particularly build roads and later ships. These prisoners sentenced to hard labour had to be chained and further provisions were made for sentencing prisoners to work for a maximum of five years under contract to a civilian with or without remuneration and with or without prior imprisonment. Section 6 of the Constitution (*Constitutie van die Oranje Vrystaat*) stipulated that if a prisoner refused to comply with the discipline, they could be sentenced to corporal punishment of not more than 25 lashes.

The first prison in Pretoria was built in 1865 and by 1893 there were already 33 penal institutions in the Transvaal. The British system was also applied here. In 1894 the system of internal discipline was reorganised and the local landdrost was given exclusive jurisdiction to try infringements of prison regulations. He could impose corporal punishment of up to 25 lashes, imprisonment, with or without hard labour, of up to 12 months or solitary confinement, with or without reduced rations, of up to seven days.

The British occupation of the Orange Free State and the Transvaal in the mid 1900 resulted in a reorganization of the penal systems of both territories. A Commission of Inquiry into conditions at the Fort in Johannesburg, one of the main prisons in the Transvaal, revealed that the prison system was inadequate and needed necessary changes. The resultant change of prison law reform in the Orange Free State and the Transvaal was the introduction of the indeterminate sentences. Section 9 of the Criminal Law Amendment Act No 38 of 1909 made provision for the indeterminate detention as hard labour prisoners of persons who had been declared by a court to be habitual criminals.

Thus the early part of last century saw the prison system regulated mainly by various Provincial Ordinances. The British occupation of the Transvaal and Orange Free State Republic in 1900 led to major reorganisation of the penal systems in these provinces.

¹¹ CH Cilliers and J Cole, *Penology* PNL 199-C., p. 113

After the Union of South Africa

In the year 1910, the year of the unification of South Africa, there was an endeavour at creating a penal and prison policy for the country as a whole. An attempt at this was embodied in the Prisons and Reformatories Act, Act 13 of 1911, and in the institution of a Department of Prisons. This Act repealed, either wholly or in part, all the legislation concerning the penal systems, which had been in force in the four colonies before Union that is 1902-1910. As the title infers the Prisons and Reformatories Act, Act 13 of 1911, sanctioned the responsibility of the management of reformatories onto the prison system. Courts started playing an increasing role in the development of prison law, *inter alia*, with findings that it was unlawful to detain awaiting-trial prisoners in solitary confinement and the ruling that prisoners who felt they had been unfairly treated in prison had the legal right to approach courts of laws for intervention.¹²

A Prison Board was instituted under section 45 of the Prisons and Reformatories Act No13 of 1911, to guarantee more effective treatment of convicts and prisoners and to provide better direction concerning the conditions on which prisoners should be granted remission of sentence. Section 25(3) of the new Act made provision for the isolation of prisoner's awaiting-trial and their subjection to mechanical restraint 'if the isolation or restraint is requested by the police authorities in the interests of justice'.

This period saw the introduction of a system that allowed for the remission of part of a prison sentence subject to good behaviour on the part of the prisoner and the system of probation that allowed for the early release of prisoners, either directly into the community or through an interim period in a work colony or similar institution. It can be seen that certain elements contained in the Prisons Act have formed an integral part of the present prison policy.

With regards to rehabilitation, although there was much speculation, very little really materialised. Within the prison system, punishment for transgressions was extremely severe and harsh. It included whipping, solitary confinement, dietary punishment and additional labour. Law prescribed racial segregation within the prison and throughout the country it was rigorously enforced.

Prisons that were built in the last century are still operational. These prisons were not designed to cater for the rehabilitation of offenders but the more

12 Department of Correctional Services, *Annual Report* (Pretoria, Government Printer, 1999).

cardinal reason of prisons remaining foremost as places for punishment was that, to a considerable extent, the system set up by the 1911 Act remained captive of its legal and social history. It was designed to imprison offenders and efforts were made to segregate prisoners along racial lines. Undoubtedly, this led to the overcrowding of prisons because majority of the general population consisted of non-whites. In May 1910 there were 4 million Africans, 500 000 coloureds, 150 000 Indians, and 1 275 000 whites.¹³

Whenever imprisonment was employed, it was imposed disproportionately against the poor, the powerless, the marginalized or those whom the repressive government deemed expedient to eliminate from society.

The Prisons and Reformatories Act No 13 of 1911 consolidated earlier colonial legislation, and strict segregation was enforced throughout the system. Thus, some of the most punitive features of prison systems of the four colonies survived unscathed.¹⁴ The development of the prison system was closely linked to the progressive institutionalisation of racial discrimination in South Africa, from the time that widely enforced 'pass laws' were introduced for Africans in the 1870's, to the elaboration of an official theory and systematized practice of apartheid following the victory of the National party in the election of 1948.¹⁵

Latter developments in the South African prison system

The continued incarceration of Africans for failing to pay taxes and for pass offences meant that men were still available for work in the road camps. Prison populations continued to rise. Prior to unification of South Africa on 31 May 1910, each of the four provinces had its own prison system and own laws and directives regarding the control of prisons as well as the treatment of prisoners. On unification, a Union prison system was established. The Prisons Act has been amended from time to time to meet the demands of circumstances and to keep pace with modern developments in penal reform.

All the laws have been repealed and replaced by the Prisons Act, Act 8 of 1959. The Act was amended slightly by Prisons Amendment Act No 75 of

13 U.S. Library of Congress [n.d.], Formation of the Union of South Africa, [Online]. Available at <http://www.sur.org.za/papers/paparade.htm> [06-04-2004].

14 D van Zyl Smit. *South African Prison Law and Practice*, p. 24.

15 Human Rights Watch, *Prison conditions in South Africa : 11, Physical Circumstances*. [Online] Available at: <http://www.hrw.org/reports/1994/southafrica/4.htm> [6.1.04], 1994. p. 1.

1965. This meant that South Africa had a new Prisons Act, which was to a certain extent based on prior legislation but also incorporated new elements conforming to modern penological thought and the *Standard Minimum Rules for the Treatment of Prisoners* which was passed by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Geneva in 1955. A new, and more individualised system of classification of prisoners came into use in 1958. According to this system, prisoners were classified under four groups: a) ultra-maximum, b) maximum, c) medium and d) open prisons and observation centres were instituted.¹⁶

The principle of classification of prisons and the effective separation of prisoners according to levels of security risk is embodied in the present Correctional Services Act No 8 of 1959. It is generally accepted that a good security classification system forms the backbone of good prison administration. Due to overcrowding and the lack of resources, although the classification of prisoners is implemented, the overload of prisoners in the system makes it almost impossible to administer the system effectively.

The Lansdown Commission on penal reform - 1945

In 1945 progress of special significance was made with the appointment of the Penal and Prison Reform Commission - the Lansdown Commission. The impetus for its appointment had come from the Penal Reform Committee of the South African Institute of Race Relations (SAIRP).

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 instrumental for maintaining the cruel and discriminatory prison system that preceded. Africans continued to be incarcerated for failing to pay their taxes and for pass offences, which meant that imprisoned men were still available for work. An increased emphasis on rehabilitation also found favour with the Commission, which recognised the need for making a major effort to extend literacy, in particular to all blacks.¹⁷

The Nationalist Government, which came into power in 1948, had great hostility to the general approach of the Commission. At the same time the fragile social consensus around prisons was breaking down in other aspects.

¹⁶ JJ Naser, *Pentitentiary Penology* (Lexicon Publishers, Isando. 1993), pp. 70-71.

¹⁷ D van Zyl Smit, *South African Prison Law and Practice* (Durban : Butterworths. 1992), p. 28.

Defiance of the pass laws, of the kind that the Lansdown Commission had warned against, increased. It impacted directly on prisons.¹⁸

Due to the recommendations of the Lansdown Commission regarding alternatives to imprisonment through community-oriented sentences, section 352(1) of the Criminal Procedure Act, No 56 of 1955 came into being. These recommendations were made because of the severe overload and the deep-rooted state of affairs of the penal system.

Improvements in the Prison System since 1959

With the introduction of the Prisons Act, No 8 of 1959, the former South African government introduced legislation, which effectively provided for the application of the policy of apartheid in the then Prisons Service. On 1 September 1959 the new Prisons Act 8 of 1959 was amended and this resulted in a completely new dispensation.

New laws were introduced which were based on the policy of apartheid and entrenched the racial separation of prisons. This resulted in not only the segregation of whites and blacks, but also the ethnic separation of black prisoners. The Act not only implemented a two-stream correctional policy for Bantu and European offenders, but also (so far to a lesser extent), special arrangements for members of different Bantu nations in one institution. Placing the Bantu offender in a correctional institution for people of his own group and race not only recognises existing ethnological differences but also is in accordance with the national policy of differential developments.¹⁹

Prior to the establishment of the new Prisons Act No 8 of 1959, the department's most important purpose was the safe custody of prisoners. In the light of the essential social services, which were expected of prison, personnel, recruiting and training methods had to be changed drastically.²⁰ In addition, all prisons became closed institutions: all media and outside inspections were prohibited: that is, the reporting and publishing of photographs. The consequence of this was the entrenchment of a relatively closed institutional

18 D van Zyl Smit, *South African Prison Law and Practice* (Durban : Butterworths. 1992), p. 28.

19 Institute for Security Studies (ISS), *The Problem of Prisons. Correcting Corrections, Prospects for South Africa's Prisons*, Monograph No.29 October [Online]. Available at: <http://www.iss.co.za/Pubs/Monographs/No 29/Prison.html> , [14-01-03], 1998, p. 1.

20 JJ Naser, *Pentitentiary Penology*, p. 69.

culture within the prison service and as a consequence the norms of prison law were quite isolated from daily practice.

There were also attempts to gain international acceptance for the South African prison system. The Standard Minimum Rules, which was also supported by South Africa, was faced with the challenge of putting the newly accepted ideas on the treatment of offenders into action and bringing them into line, taking into consideration local conditions and the local prisons administration. The new Prisons Act 8 of 1959, made ample provision for implementing the new international ideas in the fields of criminology and penology, especially regarding the treatment of offenders. The parole system was introduced.

With regards to imprisonment, a shift in emphasis would now occur from retaliation and punishment to detention and reform or rehabilitation. The renewed emphasis on rehabilitation was reflected in the introduction of further indeterminate sentences in terms of the existing sentence under which the offender could be declared a habitual criminal. Thus the Criminal Law Amendment Act No 16 of 1959 made provision for imprisonment for corrective training and imprisonment for the prevention of crime. The Prisons Act followed suit as it did for the new sentence of periodical imprisonment.²¹

Post 1959, prisons were managed under the rules of apartheid and the militaristic approach increased. At first, prisons were not used on a large-scale to control political unrest. However, this soon changed in the post-Sharpville period of the early 1960's, when the incarceration of political detainees and sentenced political prisoners became a characteristic of South African prisons.²² Thus from the 1960s an even-larger number of political prisoners were added to the South African prison population. The written documentations and lawful protests to the authorities contributed to a global disapproval at penal conditions. This resulted in an increasing attack on the legitimacy of the prison system. The incarceration of high profile prisoners raised immense concern among international organisations such as the Red Cross, Amnesty International and the United Nations. The reaction of the government at the time was to award even wider powers to prison authorities.

21 D van Zyl Smit. *South African Prison Law and Practice*, p. 32.

22 Institute for Security Studies (ISS), *The Problem of Prisons. Correcting Corrections, Prospects for South Africa's Prisons*, p. 1.

In addition, there were gross human rights violations in South African prisons. Most prisoners were held in overcrowded communal cells, a situation which persists even today. The South African Government's policies, influenced as they were by the doctrine of apartheid, had a major impact on the budgetary allocations, which the department received. Limited funds and the disparity in the provision of services provided to 'white' and 'non-white' South Africans resulted in inadequate rehabilitation programmes being made available.²³

In 1976 the Viljoen Commission proposed another important "agent of legislative change", which had some impact on the evolution of prisons. The Viljoen Commission was appointed to inquire into the penal system of the Republic of South Africa and to make recommendations for its improvement, provided that the question whether the death penalty should be retained shall not be inquired into. The Commission had to devote considerable attention to the causes of the unhealthy condition in the penal system and make an effort to find solutions therefore and to advocate steps to be taken for the amelioration and reprieve thereof.

The Viljoen Commission pointed out the importance of section 352 of the Criminal Procedure Act No 56 of 1955 within the punishment sphere since it made provision for a number of alternatives to imprisonment and provided the sentencing officer an opportunity 'to exercise his inventiveness and ingenuity in devising alternative sentences'.

In addition, the system of releasing prisoners was recognised as a response to the Commission's proposals that a 'parole board' be introduced. However, the new system was not designed to limit the power of the executive to release prisoners to the extent that an independent parole board may have done.²⁴

Improvements in the Prison System in the 1980's

After the uprisings of the 1976-1977 and 1980, when youth protested against Bantu education, prisons were used to detain political activists. A vast majority of the prisons were filled with youths who were treated in the

²³ Institute for Security Studies (ISS), *The Problem of Prisons. Correcting Corrections, Prospects for South Africa's Prisons*, p. 1.

²⁴ D van Zyl Smit, *South African Prison Law and Practice*, p. 37.

same way as adult prisoners. This resulted in an even greater overload to the correctional system. The legitimacy of the prison system was further questioned in the 1980s. On 1 November 1980 the Department of Prisons once again became part of the Department of Justice. The prison service, with its assignment of protection and security service, its semi-military character and military ranks still continued to exist independently within the new and larger department.²⁵

In South Africa by 1981 the state acknowledged that drastic steps were necessary in order to restrict the prison population figures, which had grown disproportionately world-wide.²⁶ The Krugel Committee was appointed to examine the overcrowding problem, yet it took 10 years before correctional supervision could be legally implemented. There were amendments to the law for the imposition and implementation of correctional supervision in the Criminal Procedure Act, Act 51 of 1977, and the Prisons Act 8 of 1959 were approved during the 1991 parliamentary session. The amended Correctional Services and Supervision Matters Amendment Act 122 of 1991, which made provision for the treatment of sentenced and unsentenced offenders was approved by the State President in August 1991.²⁷

The Interdepartmental Working Group on Community Service was appointed in 1983 to investigate community service as an alternative sentencing option in South African Criminal Law and to establish community service orders as a meaningful and viable sentencing option.

The Krugel Working Group²⁸, paragraph 10.2 to 10.4 of its report highlighted the fact that in light of the Republic's overpopulated prisons; there was a need for alternatives to imprisonment. As a result of the Working Group's report and recommendations, the Criminal Procedure Act No 51 of 1977 was amended in 1986 to establish community service sentences as a viable sentencing option.

When the Abolition of Influx Control Act No 68 of 1986 finally abolished the pass laws in 1986, an auxiliary feature inhibiting the normalisation of the prison system was removed. Thus prisons were primarily regarded as overcrowded

25 JJ Naser, *Pentitentiary penology*, 1993, p. 72.

26 JJ Naser, *Pentitentiary penology*, 1993, p. 415.

27 JJ Naser and D Takoulas, "Bursting at the Seams : Prison Overcrowding – A brief overview" [Online] Available at: file:///A:\Busting at the Seams.Prison overcrowding A brief overview. htm. [29-06-01], 2001, p. 5.

28 Krugel Working Group, "Ondersoek na gemeenskapsdiens as alternatiewe beskikkingsmoontlikheid by vonnisoplegging in die Suid-Afrikaanse Strafrepleging", 30 Nov. 1984. Unpublished report of the Inter-departmental Working Group on Community Service, 1984, pp. 26-33.

places of security. Despite the many rehabilitative changes taking place, they were negligible.

In 1985 top management held a strategic planning session during which organizational planning and long-term strategies were formulated. It was decided that the prisons service should plan and create its own future. On 20 May 1988 management decided that the prisons service belongs to the security field rather than to the social field of the government sector. The purpose of the prisons service was adjusted accordingly to promote community order and security by dealing with prisoners according to statutory directives.²⁹ The mandate with which this objective was to be attained was described as the detaining of prisoners safely and with dignity until they are legally released and to run programmes to promote community integration.

These minor improvements in the penal system were nevertheless soon overshadowed by the announcement of the State of Emergency on 21 July 1985, which lasted until 1990. This resulted in the incarceration without trial of a large number of persons. The mass detention of political prisoners during this era further inflated the already problematic prison population.

During 1988 significant amendments were made to prison legislation. By excluding all references to race, a reversal of the almost total racial segregation of the prison population was brought about although it took a number of years before it was implemented. The legendary prison regulation that ruled that 'white' staff members automatically outranked all 'non-white' staff members was also repealed.

Improvements in the Prison System in the 1990's

During the late 1980s and the early 1990s there were extensive reforms in the prison system. The political changes, which began in 1990, had a direct impact on the prison system in South Africa. Reference to race was removed and prisons were desegregated. The gradual release of political prisoners during the course of 1990 and 1991 meant that the prison authorities could look forward to a period in which prison management would not necessarily be linked to major national political questions.³⁰

²⁹ JJ Nesor, *Pentitentiary penology*, (Lexicon Publishers, Isando, 1993), p. 73.

³⁰ D van Zyl Smit, *South African prison law and practice*, p. 40.

After the release of Nelson Mandela and the unbanning of the African National Congress in the early 1990s, steps were taken to restructure and reform the Department. The Criminal Procedure Act was amended in 1990 in order to restrict the imposition of the death penalty. There was also the lifting of the State of Emergency in 1990 and the Internal Security Act No 74 of 1982 in 1991, was modified. Amendments to the Prisons Act No 8 of 1959 to the (Prisons Amendment Act 92 of 1990) looked at the abolition of apartheid in the prison system. Most fundamental in this respect was the removal of the requirement that 'white' and 'non-white' prisoners had to be housed separately.

A key factor in change was the Police and Prison Officers Civil Rights Union (POPCRU). This organisation was committed to the recognition of the civil rights of all prisoners. The 1990 amendments to the Prisons Act, also outlawed strikes by members of the Prison Service.³¹

In the latter part of 1990 the Prison Service was separated from the Department of justice and renamed the Department of Correctional Services. The new Department was liable for the supervision of offenders in the community as well as operating the prison system. A significant milestone in this period was the introduction of the concept of dealing with certain categories of offenders within the community rather than within prison, a system known as non-custodial 'correctional supervision'.

In 1991, the Correctional Services and Supervision Matters Amendment Act No 122 of 1991 undertook a far-reaching revision of the Prisons Act No 8 of 1959. In October 1989 the government decided that all state departments should be managed according to business principles. These gave effect to the newly announced policy of running the prison system on business principles by removing many of the restrictions on the use of prison labour.³²

The Prisons Act No 8 of 1959 and the Criminal Procedure Act No 51 of 1977 were amended during 1991 to provide for the imposition and execution of correctional supervision. The Prisons Act was renamed the Correctional Services Act No 8 of 1959 in 1991. In 1991 a Probation Services Bill was prepared wherein provision was made for correctional supervision as a sentencing option. In striving towards greater efficiency and a more

³¹ D van Zyl Smit, *South African prison law and practice*, p. 42.

³² Ibid.

effective service to the community, the Department of Correctional Services did a critical analysis in respect of its mission and mandate in relation to results achieved. At the same time it made a study of the penological systems, which are applied in various countries abroad. In conjunction with this and in reaction to the Government's call for a more cost-effective Public Service a comprehensive study was undertaken into the increasing prison population and accompanying escalating detention costs.³³

Although the release of large numbers of prisoners to relieve the overcrowding in the prison system was welcomed in opposition circles, the release of security and other prisoners proved controversial amongst white South Africans. Moreover, when combined with the publicity about release of political prisoners, it provoked an outburst of discontent in the prisons themselves amongst prisoners left out of the process. In 1991, hundreds of prisoners went on hunger strike demanding political status and early release; various prisons were hit by severe rioting. Hunger strikes by prisoners claiming political status continued, although they reduced in frequency and determination after the last large group of security prisoners were released by the Government in late 1992.³⁴

Despite the release of these prisoners having brought about the restoration of some humanity and relief to the overcrowded prisons, the total prison population still remained unacceptable.

Transformation of correctional services in a democratic South Africa

In 1993 the Interim Constitution and the post- election Constitution introduced in 1996, personified the fundamental rights of the country's citizens, including those of prisoners. The consequence of this was the beginning of a human rights culture into the correctional system in South Africa. The planned direction of the Department was to ensure that incarceration entailed safe and protected custody in humane conditions.

The democratic elections of April 1994 brought with them the ANC's commitment to transform South African society at all levels. The Reconstruction

33 RSA, Department of Justice and Correctional Services, *White Paper on Extension of the Mission of the Department of Correctional Services and the Implementation of Correctional Supervision on an Alternative Sentencing Option*, 6 May (Pretoria, Government Printer, 1991), p. 5.

34 Human Rights Watch, *Prison Conditions in South Africa: Introduction*, [Online] Available at: <http://www.hrw.org/reports/1994/southafrica/4.htm> [6.1.04], 1994. p. 2.

and Development Programme (RDP), introduced in 1994, was the policy on which such a transformation would be based. Apart from the fact that the document highlighted the need for the implementation of non-racial and non-sexist principles, it also focused on human rights, the rehabilitation of offenders, as well as the effective implementation of demilitarisation.³⁵

Section 35 of the Constitution specifically provides for the rights of detained, arrested and accused persons to the extent that they have the right to:³⁶

- Be informed promptly of the reason for detention;
- Be detained under conditions that are congruent with human dignity;
- Consult with legal practitioner;
- Communicate with and be visited by a spouse or partner, next of kin, religious counsellor and medical practitioner of the prisoner's own choice; and
- Challenge the unlawfulness of his or her detention before a court of law.

The beginning of the Government of National Unity in 1994 meant that the Department of Correctional Services could look forward to a future where it will never again be misrepresented to further policies that are in conflict with the principles of the international community.

In October 1994, the Department released the White Paper on the Policy of the Department of Correctional Services in the New South Africa. Its aim was to "stimulate debate on correctional matters and redefines priorities that will eventually lead to where we should be, coming to grips with a correctional model for the new South Africa. "On 21 October 1994, a White Paper on the Policy of the Department of Correctional Services recognised the fact that the legislative framework of the Department should provide the foundation for a correctional system appropriate to a constitutional state, based on the principles of freedom and equality.³⁷ The transformation of the Department in the first five years of the new democracy entailed:

- Significant changes in the representativity of the DSC personnel and management;

35 Institute for Security Studies (ISS). "Alleviating the Crisis. Correcting Corrections, Prospects for South Africa's Prisons", Monograph No. 29 October, [Online], available at. [http://www.iss.co.za/Pubs/Monographs/No 29/Prison.html](http://www.iss.co.za/Pubs/Monographs/No_29/Prison.html) [22-07-03], 1998, p. 29.

36 RSA. Department of Correctional Services, *Annual Report* (Pretoria, Government Printers, 1999), p. xi.

37 RSA, Discussion Document: "Towards a Green Paper on Correctional Services in South Africa", Draft 4, April 2003.

- The demilitarisation of the correctional system in order to enhance the department's rehabilitation responsibilities on 1 April 1996;
- Progressive efforts to align itself with correctional practices and processes that have proved to be effective in the international correctional arena;
- The introduction of independent mechanisms to scrutinize and investigate its DCS activities, such as the appointment of an Inspecting Judge.

In 1995 the death penalty was repealed. On 1 April 1996 the correctional system was demilitarised, a step that was necessary for the department to be able to carry out its responsibilities with regard to the development and rehabilitation of offenders. The National Crime Prevention Strategy (NCPS) approved by Cabinet in 1996 adopted an Integrated Justice System (IJS) approach that aimed through Pillar 1 of the NCPS at making "the criminal justice system more efficient and effective. It must provide a sure and clear deterrent for criminals and reduce the risks of re-offending".³⁸

In 1996 the Constitution was passed and this provided the overall framework for governance in a democratic South Africa. It enshrined the Bill of Rights, and all Government Departments had to align their core business with the Constitution and their modus operandi with the framework of governance. The New South African Constitution embodies fundamental rights of citizens, including prisoners.³⁹

Transformation has occurred in various parts of the Department. The Transformation Forum on Correctional Services precipitated such changes. Focus areas were prioritised, including demilitarisation, prisoners' health, independent inspection, human resource management, and the establishment of a management team.⁴⁰

The forum's aim to influence the transformation process was a failure. Some of the recommendations made were: the establishment of an independent prison's inspectorate, a lay visitor's scheme and a change in management team. The forum ceased its operations in September 1996 because of withdrawal of the Department and conflict caused by political arguments.

The National Programme on Appropriate Community Sentencing indicated that existing correctional resources must be used in a targeted manner to deal

38 RSA, Discussion Document: "Towards a Green Paper on Correctional Services in South Africa", Draft 4, April 2003.

39 L Oliver and D McQuoid-Mason, *Human Rights for Correctional Services. A Resource Training Manual for Department of Correctional Services* (Centre for the Study of Violence and Reconciliation, Durban, 1998), p. 25.

40 Institute for Security Studies (ISS), *Alleviating the Crisis*, p. 2.

more effectively with serious offenders. The imposition of prison sentences on minor offenders reduces the possibility of re-integration into society and further burdened the criminal justice system. Increasing the availability of community sentencing options on conviction increases humane management of minor offenders and improves the effectiveness of corrections extensively by reducing the burden on the correctional services department.

A milestone in the history of the Department was the promulgation of new legislation in the form of the Correctional Services Act, Act 111 of 1998. According to this legislation, there had to be a total departure from the 1959 Act and it embarked on a modern, internationally acceptable prison system, designed within the framework of the 1996 Constitution.⁴¹ The most important features of this Act are:

- The entrenchment of fundamental rights of prisoners;
- Special emphasis on the rights of women and children;
- A new disciplinary system for prisoners;
- Various safeguards regarding the use of segregation and force;
- A framework for treatment, development and support services;
- A refined community-involved release policy;
- Extensive external monitoring mechanisms; and
- Provision for public and private sector partnerships in terms of the building and operating of prisons.

The Act recognises international principles on correctional matters and establishes certain mandatory minimum rights applicable for all prisoners that cannot be withheld for any disciplinary or other purpose.⁴²

The Correctional Services Act No. 111 of 1998 led to the establishment in 1998 of independent oversight of prisons through the Independent Judicial Inspectorate, which is headed by an inspecting judge. This office is mandated to inspect prisons and report on the treatment of prisoners and conditions in prisons. Mr Justice Fagan, the current inspecting judge, has prioritised the reduction of the population and instigated early releases in 2000.⁴³

41 RSA, Department of Correctional Services, *Annual Report*, 1999, p. xii.

42 A Dissel. "Tracking Transformation in South African Prisons", Track Two, 11(2), April 2002, [Online], available at: <http://ccrweb.ccr.uct.ac.za/two/11-2transformation.html>, [14.1.03]. 2002, pp. 1-2.

43 Ibid, p. 3.

The Department of Correctional Services since 2000

During the period 2000 and 2003 there has been continuous engagement with the Strategic Direction of the Department. Various role players have tried to interpret the purpose of the correctional system and decide on the policy direction, which was essential for successful delivery on rehabilitation and the prevention of recidivism.⁴⁴

On the 1 and 2 August 2000, the Department hosted a National Symposium on Correctional Services. The need to promote a collective social responsibility for the rehabilitation and re-integration of offenders into the community was recognised. The establishment of a 'Partnership Forum for Correctional Services' was also recommended. The National Symposium focused on the following objectives:

- To develop a clearly articulated national strategy to attain the desired fundamental transformation of correctional services;
- To create a common understanding of the purpose of correctional system;
- To create a firm foundation for coherent and cohesive role-playing by all sectors of society;
- To achieve national consensus on the human development and rehabilitation of all prisoners and their integration into community as productive and law abiding citizens.⁴⁵

Strategies practised to reduce overcrowding in prisons

On 22 and 23 January 2001, the Department committed itself to step up its campaign to put rehabilitation at the centre of all its activities, by identifying the enhancement of rehabilitation services as a key departmental objective for the Medium Term Expenditure Framework (MTEF) period. This was due to the re-examination of the Department's strategic role in the fight against crime within the broader context of the criminal justice system and in terms of the priority programmes presented by the Justice, Crime Prevention and Security Cluster to the Cabinet Lekgotla.⁴⁶

44 RSA, Discussion Document, "Towards a Green Paper on Correctional Services in South Africa", Draft 4 April 2003.

45 RSA, Discussion Document, "Towards a Green Paper on Correctional Services in South Africa", Draft 4 April 2003.

46 Ibid.

The Department acknowledged the development of rehabilitation services as a key starting point in the direction of a crime free South Africa.

In the year 2001, amendments were made to the Correctional Services Act 111 of 1998. The Correctional Services Amendment Act 32 of 2001 was instituted to fully implement the principal Act as well as be more compliant with the provisions of the Constitution. Central to the Amendment Act was:

- The treatment of prisoners;
- Accommodation of disabled offenders and gender considerations;
- Disciplinary procedures for prisoners;
- New parole systems;
- Treatment of child offenders; and
- Use of firearms and other non-lethal incapacitating devices.

The Mvelaphanda Strategic Plan for 2002-2005, adopted by the Department in October 2001, put rehabilitation at the centre of all DCS activities.

In South Africa, in addition to the various strategies undertaken to manage the challenge of 'overcrowding', which is an occurrence throughout the world, prototype designs for the construction of cost-effective new generation prisons were instituted. The so-called 'new generation prisons' would offer the Department the facility to effectively carry out the rehabilitation mandate within the principles of Unit Management.

Unit management was identified as the missing component in the transformation of the South African prison system. This is an approach that makes provision for:

- The division of the prison into smaller manageable units;
- Improved interaction between staff and prisoners;
- Improved and effective supervision;
- Increased participation in all programmes by prisoners;
- Enhanced teamwork and a holistic approach;
- Creation of mechanisms to address gangsterism.

It can be seen that this approach will not be a workable one while conditions of overcrowding persists.

Furthermore in 2001 the Department had a three-pronged Anti Corruption Strategy to tackle the problem of corruption and mismanagement within the Department' focusing on:⁴⁷

- The investigation of allegations of corruption and mismanagement;
- Disciplinary sanctions against corruption and mismanagement; and
- The prevention of corruption by adopting a style of management that creates an environment that is not conducive to either corruption, non-compliance with policy or indiscipline.

Upon the request of the Minister of Correctional Services, the President appointed the Honourable Mr TSB Jali as the chairperson and sole member of a Commission of Inquiry into allegations of corruption and mismanagement in the Department. The Jali Commission was duly constituted in terms of Proclamation 135/2001 dated 27 September 2001.⁴⁸

On the 26 November 2001, the Minister of Correctional Services, Mr Ben Skosana launched the Restorative Justice Approach to bring together the offender, the victim, families and the community into the mediation process for purposes of repairing the harm created by the crime. The aim for this was also to create an environment of reparation and forgiveness, thereby bringing along healing in the community and effective reintegration of the offender upon release.

In 2002, the Department recognised the incompleteness in the transformation of the Department, which resulted in a lack of coherence of paradigm, and the lack of a common understanding of the meaning of rehabilitation across the entire Department. A concept document called "Conceptualising Rehabilitation" was developed for internal discussion in all components of the Department.⁴⁹

The Department of Public Service and Administration began the implementation on a Public Service Central Bargaining Chamber Resolution, No 7 of 2002, which facilitated the general transformation and reorganization of all government departments within specific time frames. At the beginning of 2003, all of these have consolidated into an understanding of corrections not entirely as the prevention of crime, but as a holistic experience incorporating and encouraging social responsibility, social justice, dynamic participation in

47 RSA, Department of Correctional Services, *Annual Report, 2001/2002*, p. 11.

48 RSA, Department of Correctional Services, *Annual Report, 2001/2002*, p. 14.

49 RSA, Discussion Document, "Towards a Green Paper on Correctional Services in South Africa", Draft 4 April 2003.

democratic activities and involvement in making South Africa a better place to live in.

Government recognised the family as the fundamental unit of society and as the primary level at which correction takes place; the community, including schools, churches and other organisations as the secondary level at which correction takes place. The state was recognised as the driver and overall facilitator of correction and the Department of Correctional Services as the state's agency for rendering the final level of correction.

The Departmental approach to resolution of overcrowding has tended to move away from a reactive crisis management approach, such as bursting strategies that often contradict the essence of rehabilitation for release and re-integration, to concentration on crime reduction and expansion strategies, such as improved efficiency of the criminal justice processes, strategies to get those who are incarcerated by default through poverty and lack of legal access out of DCS facilities, and a capital works programme to build appropriate and cost effective facilities .⁵⁰

To further try and reduce overpopulation the Department adopted a new approach to a cost effective expansion strategy by building low cost "New Generation" prison facilities for medium and low risk prisoner categories, who are the majority of the country's prison population. Four new prisons; each housing 3000 inmates would be built. Judge Fagan pointed out that what was needed was not more prison but to get the number of prisoners down. Inspecting judge of prisons, Judge Hannes Fagan⁵¹ stated that reducing the 190 000 prison inmates by 70 000 was the answer to prison overcrowding-not building new prisons.

Some aspects of the prison system are unlikely to change in the short-term because South Africa has an extremely high rate of violent crime. Well over 20 000 people are murdered every year, roughly fifty for every 100 000 of the population (the figure for the United States is 17.2 per 100 000). Statistics for rape and other violent offences are at similar levels. These are unlikely to change until the economic and social crisis in the townships can be addressed-something that will take many years. In the meantime, there is little alternative

50 RSA, Discussion Document, "Towards a Green Paper on Correctional Services in South Africa", Draft 4 April 2003.

51 "More jails not the answer, says judge, Prison Population of 250 000 predicted for 2005", The Mercury, 8 July 2003. p. 6.

to incarceration for violent offenders. The prisoner-to-population ratio will remain high and overcrowding will remain the norm for most prisons.⁵²

Conclusion

Dutch colonists introduced prisons in South Africa, but it was after the British occupation that the penal policy, including incarceration, began to take shape. Historically in South Africa, as in England, the duty of the prison administration to reform criminals was interpreted in order to accommodate the economic needs of the age.⁵³

Over the decades, regardless of the changes and improvements in the prison systems of most countries, imprisonment has remained an instrument of retaliatory punishment rather than an instrument of rehabilitation. History has indicated that prisons that are resolute on punishment to the elimination of everything else are unsuccessful in their attempts to rehabilitate offenders.

While the political context has changed considerably, continued overcrowding, poor relations between wardens and prisoners and the availability of few alternatives to imprisonment, means that the mission and vision of the Department of Correctional Services regarding the rehabilitation of offenders will be far from realised.

Despite formal demilitarisation, the military culture is still evident in the Department. Prison officials do their work behind closed doors both literally and figuratively. Although the recent process of transformation enforces equality, transparency and democracy, it will take many years to dissipate such a deeply entrenched culture.⁵⁴

Dealing with change will be an essential aspect of the new South Africa and of the Public Service of today and the future. Many of the historical features of the South African prison system will continue to exercise an influence on the development of prison law in South Africa for many years to come.⁵⁵

52 Human Rights Watch, "Prison Conditions in South Africa: 11. Physical Circumstances" [Online], available at: <http://www.hrw.org/reports/1994/southafrica/4.htm> [6.1.04], 1994, p. 3.

53 Institute for Security Studies (ISS), "Private Prisons in South Africa, Issues Challenges and Opportunities. Correcting Corrections". No 64, September, *Imprisonment in South Africa* [Online] available at <http://www.iss.co.za/Pubs/Monographs/No64/Chap2.html> [27-07-02], 2001, p. 1.

54 Institute for Security Studies (ISS), "Alleviating the Crisis...", [22-07-03], 1998, p. 15.

55 D van Zyl Smit, *South African Prison Law and Practice*, p. 43.