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Views on the future of crime and imprisonment in Africa

[TOP](#)

by

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At the end of 2004, the three-year Rethinking Crime and Punishment project in the UK concluded that prison has a crucial but limited role. If it is to be used in accordance with international standards - sparingly and as a last resort- then there is a need for societies to develop alternative social policies and programmes to deal with the poor, the mentally ill, drug addicts, children beyond parental control or with no parents. There is a need for ways of responding to crime which are not simply based on punishment but on problem solving, ways which involve and do not exclude the wider community. This is a challenging agenda but a crucial one for prison administrators to engage with all over the world.

Based on experiences in the UK and elsewhere, this article makes three important points at the outset. First, it is not being suggested that Africa should follow the UK's example in criminal justice or prison management. In England and Wales the prison population is almost 80 000, up from 42 000 just 14 years ago. At well over 140 per 100 000, this incarceration rate is the highest in Western Europe. We have almost 3 000 children detained, mostly in prison establishments, albeit separately from adults. This has been roundly criticised by the Council of Europe's Human Rights Commissioner. As in Africa, our prisons also experience overcrowding with two or three persons in a cell built for one, some prisoners held in police stations rather than jails and the government recently looking to buy a ship on which to accommodate surplus prisoners. We have a large number of prisoners with mental health problems. Not surprisingly suicide and self harm is a serious problem for both male and female prisoners. Last but not least, our experience of private prisons has been very mixed.

The second key point is that despite the very serious issues of congestion, conditions and disease in African prisons, there are many strengths and possibilities too. Many Europeans have been surprised to stand in a yard with hundreds of prisoners and a few staff but not to have felt threatened. There is in some prisons, despite awful conditions, an atmosphere and set of relationships which you would struggle to find in the developed world. What many systems aspire to achieve is unarguable: for instance ICPS quotes the Uganda Prison Service Mission Statement in our Handbook as a model, with its emphasis on prison as a last resort, human rights and public involvement. Implementation is of course a huge challenge but African prisons have developed innovative programmes not only in prisons (particularly farms) but also to divert people from prison. The diversion programmes in South Africa, in which first time young offenders and their parents talk about how they have got into trouble, the shame of being caught and how to recompense the victim and prevent a recurrence are, are in this author's experience more open and constructive than in similar initiatives in the UK. In Malawi, the system of paralegals providing legal advice to pre-trial prisoners and the kind of camp courts in which justice is dispensed within the setting of the jail has much to teach the rest of the world, let alone Africa.

There are models too for involving civil society in scrutinising prison conditions and improving them. The African Commission on Human and People's Rights and the Special Rapporteur on Prison Conditions in Africa have made an impact and will play an important role in African human rights jurisprudence. In Europe, the Court of Human Rights has been a major force for change in the prisons of the 46 member countries of the Council of Europe, recently ruling for example that the UK's total ban on voting by prisoners serving sentences is a breach of the European Convention on Human Rights.[2] At a national level, civil society plays an important

role, such as the commissions for strengthening the legality of detention in Mozambique, the work of *Prisonniers Sans Frontières* in Burkina Faso, or the NGO's in Mali who enabled juveniles to be detained in a separate wing of a prison. At a political level, there is an admirable commitment to reform, not only expressed in the declarations from meetings in Kampala and Ouagadougou, but also the common position adopted by African countries at the 2005 UN Crime Congress "*Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*". This stressed the need to raise public awareness about the disruptive effect of retributive justice compared to restorative justice, and advocated the adoption of a fundamental charter of prisoners' rights.

Following from the preceding, the shortcomings of criminal justice in the developed world and the potential in African systems need to be placed under the magnifying glass. As the continent develops, there is the opportunity to plot a different and better course in responding to crime. This will not be easy. The UNODC Report on Crime in Africa (June 2004) makes for disturbing reading. It found the high rate of crime having a serious negative impact on development. There are more homicides than in other regions. Other contextual factors do not bode well either - African populations are very youthful with 43% under the age of 15 years, rapid urbanisation at 4% per year, which is double the rate for the rest of the world, and high rates of civil conflict and firearm possession. Alongside this, criminal justice systems are underperforming, with the lowest rate of crime reporting to the police of any region in the world. There are also fewer police officers per capita than anywhere else (180 per 100,000 half of the rate in Europe and Asia), and fewer judges (3 per 100,000). There are fewer convictions, with 11% of murders leading to a conviction compared to more than 50% in America and Europe.

Increasing the resources of the criminal justice system is necessary so that the basic rule of law is enforced. For example, increasing the number of judges could do much to bring cases to justice more speedily and reduce pre-trial overcrowding pressures. But closer analysis shows it is the countries with the highest numbers of police officers per capita which have the highest imprisonment rate- Botswana, Swaziland and South Africa. The challenge is not simply to build up the criminal justice infrastructure so that more offenders can be caught, convicted and imprisoned. The answer must be in finding an alternative approach that does not allow offenders impunity but holds them to account in ways which observe human rights, are cost effective and enjoy public confidence.

Key to this alternative approach must be the use of prison as a last resort. The ICPS Prison Population list shows that in most countries prison populations are on the increase; in 64% of African countries prison populations are growing. There is however substantial variation – most notably between West Africa which locks up on average 52 per 100,000, and Southern Africa which locks up 324 per 100 000 of the population. Pre-trial detention is the main problem with remanded prisoners representing a third of Africa's one million prisoners (but with proportions over 50% in most countries). This leads of course to substantial congestion with 150 prisoners for every hundred places in the continent as a whole. The *ICPS Guidance Notes* include material on dealing with overcrowding and the specific problem of pre-trial prisoners. It boils down to increasing prison capacity or reducing the number of prisoners. Conditions can be improved by making better use of space in the system as a whole or in individual prisons and short term respites can be achieved through amnesties, pardons or early releases. Sustainable change must be based on a comprehensive set of measures which might include time limits, reviewing cases, flexible bail, limiting remands for petty crimes. These changes will however not happen by themselves and more judicial activism and better legal access are required. Penal Reform International (PRI) has produced an excellent index of pre-trial practices with examples from all over the world which provides a valuable resource to criminal justice administrators.

All reform must however be based on a human rights approach. The fundamental principles of international law make it clear what prisons must be like to ensure that prisoners are treated with dignity. They must not be places of brutality or unnecessary coercion. People in prison are not enemies of the state. Prisons are a civilian public service accountable to the public through parliament, and if the state locks up a citizen, it takes on a duty of care for that person, to feed and clothe them and protect their right to life. Poverty is not an excuse for not doing so. Prisons around the world are of course in very different places. In Western Europe and North America they are imbued with notions of guilt and atonement. In Russia they are more about banishment and exile, while in Eastern countries they are about remoulding prisoners into conforming citizens. In Africa and South Asia, prison sits uncomfortably as part of a colonial legacy. But despite these differences, the principles based on our common humanity make it clear that we must retain respect for the inherent dignity of the human person. Prisons must be managed within an ethical context, with us asking the question "*is what we are doing the doing the right thing to do?*"

This human rights approach is as true for non-custodial as it is custodial measures and three reflections will conclude this article. First, as far as alternatives go, more is not necessarily better. The *UN Rules on Non-custodial Measures* (the Tokyo Rules) call for a variety of measures and they should indeed be available as alternatives to prosecution, remand, prison sentences and to long prison sentences. In the UK the result has been paradoxical. The number of

alternative options has increased with fines, discharges, bind overs, community service orders with 12 requirements, intensive supervision, drug testing, curfews, anti-social behaviour orders, and weekend prison. More and more offenders have been given these orders but crucially, not always as an alternative to prison. They have become *alternatives to alternatives*, and even worse is that they are sometimes feeding prison numbers when offenders do not comply with the orders and are sentenced to imprisonment for breach. In some US states, almost half of admissions to prison result from probation or parole breaches rather than sentences themselves. As Eric Kibuka has put it "*the introduction of community service and other measures as alternatives to prison may not be sufficient to reduce overcrowding. What is critical is the change of attitude of key players.*" [3]

The second point about alternatives is that chief among those key players are judges. While some may be reluctant to send people to prison for short periods because of the conditions, in the long term, more will need to have confidence in the alternatives. Despite efforts in the African model of community service orders to engage the senior judiciary fully, evidence about displacement from prison is mixed. There is simply not reliable evidence to indicate that alternative sentences have had the desired effect of reducing prison population numbers over time. Recently the Lord Chief Justice of England went undercover to spend a day doing unpaid work alongside convicted offenders. In interviews afterwards he reflected on the real restriction on time which the punishment involves while using that time to benefit the community.

Finally, there is the question of public confidence. Without it, alternatives will not be accepted and worse, people may take the law into their own hands. Although prison may be a colonial legacy, evidence from international surveys suggests that people in Africa may have relatively punitive attitudes. In a case of a man who steals a TV from a house, 70% of Africans thought imprisonment the right sentence. Fewer than half thought so in America and Europe. There community service was a preferred option but in Africa only 10% chose this as the appropriate sentence. This apparent punitiveness perhaps reflects that a TV is worth more in Africa than elsewhere but there are other suggestions of a need to be realistic about current attitudes. The UNODC Crime Report argues that traditional justice can sometimes lead to vigilantism and protection rackets.

The challenge is to find models of community involvement which respect rights and find win-win solutions. ICPS is piloting a project in the UK where local community members decide what form of community work offenders do. Of course there are models in Africa where members of the community play a central role. The Gacacca system in Rwanda is recognised as a very innovative and courageous way of dealing with the aftermath of the terrible events there. In the DRC Congo mediation and defence committees have been set up to resolve disputes in South Kivu, while the church has set up arbitration committees in other areas. In South Africa, the peace committees offer a further model developed in the townships, which seek to provide safety and justice in a more accessible form than criminal processing can provide.

The prospects for Africa may well be better now than for some time. There will no doubt be an increased focus on how crime, corruption and conflict act as barriers to development. There may be a temptation to follow wholesale a criminal justice route which has not served the developed world as well as some like to think. Prison administrators have a key role in arguing that something else is needed. Not a system that is second best but an alternative much better suited to the needs and aspirations of the continent.

The International Centre for Prison Studies

The International Centre for Prison Studies (ICPS) is based at the School of Law at King's College, London University. The ICPS has two main aims: firstly to build a body of knowledge about how prison is used and the principles underlying its use, and secondly to create resources that can be used in practical prison reform work in different countries. All of the work is based on international prison reform work in different countries. All of the work is based on international human rights instruments. ICPS is well-known for its on-line world prison brief (www.prisonstudies.org) and have recently published a *World Prison List* with populations from 211 countries and a further list with data about women in prison. Two other major tools of the Centre are *A Human Rights Approach to Prison Management*, now translated into 14 languages and widely used as a training resource and guide to reform, and the *Guidance Notes on Prison Reform*, which sets prison reform in the wider context of efforts to reform criminal justice.

On 15 December 2005 Judge Thabani Jali handed the final report of the *Commission of Inquiry into Prison Corruption and Maladministration* (Jali Commission) to President Mbeki. Since then observers have been eagerly awaiting the release of the full report, apparently some 3 500 pages in total. On 17 October 2006 the Minister of Correctional Services, Ngconde Balfour, released the first 61 pages of the 184-page executive summary, stating that neither the full report nor the remainder of the executive summary could be released as these made reference to individuals implicated in misconduct and criminal offences, and that the investigations had not been completed. Portfolio Committee Chairperson, Dennis Bloem, immediately expressed his dismay in respect of this partial release of the executive summary stating: *Having only a summary would make matters difficult for the Portfolio Committee to exercise its oversight role. It is the duty of the Portfolio Committee on Correctional Services to assist in the implementation of the Jali Commission recommendations . . . It is the duty of the Committee as an oversight parliamentary structure to be well informed so as to participate in the debate. The Committee is at a disadvantage in engaging with the Report; there is a need for the comprehensive Report. If the Committee did not have the full details, it would be difficult for it to facilitate the implementation of recommendations of the Jali Commission of Inquiry.* [4] Before long former Judge Jali (who resigned from the bench in early 2006) entered the debate essentially affirming what Dennis Bloem had said, but also emphasising that to understand the recommendations made by the Commission, it would be important to have access to the information that the Commission based them on: *"A lot of information has been lost in the process [the partial release]. A lot of reasoning behind some recommendations has been swallowed in the process."* [5]

With pressure mounting on the Minister from civil society and the Commission itself, the full executive summary was released a week later, after having removed the names of officials implicated in corrupt, dishonest and criminal activities. On 6 November 2006 the full report, including the 11 interim reports submitted to the DCS since 2001, was released by Minister Balfour. What prompted this turnaround is not entirely clear, but it can be postulated that to release the findings of a judicial inquiry only in part, is a dangerous course to embark on and one that would reflect extremely negatively on government. It is also highly unlikely that it will withstand judicial scrutiny.

The full report is available on <http://www.info.gov.za/otherdocs/2006/jali/index.html>

New CSPRI publications available on the website

TOP

Prisons in a Democratic South Africa - a Guide to the Rights of Prisoners as described in the Correctional Services Act and Regulations

By Lukas Muntingh

The Correctional Services Act (CSA) was promulgated in 2004 creating a human rights based framework for South Africa's prison system. In a sense the prison system was delayed in its transformation compared to other government functions in the justice and protection services cluster. Whilst the CSA was passed by Parliament in 1998 it was only in part promulgated and the final and full promulgation took place in October 2005, nearly seven years later.

With a new legislative framework in place, the following questions can then rightly be asked: What does a constitutional democracy mean for prisoners? How are the rights of prisoners described in the new Act? What are the rights of children, women, and Aids patients in prisons? How does overcrowding affect prisoners' rights?

The purpose of this resource book is to describe in an accessible and user-friendly format the human rights framework for prisoners in South Africa based on the Constitution, the Correctional Services Act and the Regulations accompanying the legislation. Where appropriate, reference is made to other legislation that has a direct bearing on the rights of prisoners.

It is not a legal text and it is not aimed at lawyers and persons studying prison law, although they may find it useful as a first introduction to a particular topic. The guide is aimed at practitioners who may need to have some knowledge of prison law and the rights of prisoners. Non-governmental organisations, faith-based organisations, advice offices and individuals may sometimes have to answer questions from prisoners, their families and ex-prisoners, and the legislation and Regulations are not user-friendly or accessible. This guide is aimed at addressing primarily this need. As such it is a human rights education tool.

Corruption in the prisons context

By Lukas Muntingh

The point of departure of this paper is that corruption is a human rights issue, which is accentuated in the prison context given the nature of imprisonment. Three factors create an intrinsic risk for corruption in prisons. Firstly, the all-encompassing nature of imprisonment regulates every aspect of prisoners' daily lives: from having the most basic necessities to having access to luxury items, or even illegal items and activities. Secondly, the state as the controller, establishes a highly unequal power relationship between the prison bureaucracy (represented by the warder) and the prison population. Thirdly, the closed nature of prisons and their general marginalisation from the public eye and political discourse do not assist in making prisons more transparent. Against this backdrop, poor management, weak leadership or organised crime can have a devastating impact on the overall operation of a prison system and, ultimately, on the human rights of prisoners.

The paper seeks to clarify key concepts relating to prison corruption. By means of defined relationships, for example between individual warders and individual prisoners, or prisoners and warders as collectives, the nature of prison corruption is described. It concludes that there are fundamental differences between prison corruption and corruption found in other sectors of the public service. The research was done prior to the release of the Jali Commission Report Executive Summary and relied on publicly available documents.

Investigating prison corruption

By Lukas Muntingh

Who investigates corruption, what is investigated and who makes these decisions are important considerations in the fight against corruption. Investigating corruption is one component of anti-corruption strategies. Investigations can be done in different ways, can be based on different assumptions and be driven by different motivations. These assumptions and motivations are reflected in their respective mandates and terms of reference. Some investigations are fact-finding missions with fairly broad and open mandates, while others may be very specific with the intention of bringing about prosecutions and recovering state assets. There are also a number of institutions that have permanent Constitutional mandates to investigate corruption, such as the Public Protector (PP) and the Public Service Commission (PSC), whose roles and functions in investigating prison corruption also need to be reviewed.

When reviewing these mandates and the different approaches that can be adopted in investigating prison corruption, the central question is: *What is the impact being sought when investigating corruption in prisons?* Finding facts in order to understand the problem is a legitimate pursuit as is identifying and prosecuting individual perpetrators. However, apart from finding the facts and even identifying perpetrators and prosecuting them, the question of intended impact runs deeper. It pertains to the principles of an anti-corruption strategy and its underlying assumptions, such as the importance attached to investigations as a component of the strategy and the contribution of investigations to achieving the strategic objectives, which should ultimately be adherence to the principles of good governance.

Addressing prison corruption ineffectually or failing to do so not only holds severe risks (for taxpayers and victims), but also undermines the very integrity of the penal system by eroding the intended just and morally justifiable punishment of the offender. The prison serves a particular moral function in society and should therefore execute its task to the highest possible standard, untainted by dishonesty or even impressions of impropriety if there is to be hope that the prisoner will perceive his punishment as justly administered.

The paper reviews existing structures with investigative mandates and also draws on international experience in respect of investigations. The paper concludes with a number of recommendations on how the impact of investigations, when conducted, can be enhanced.

The impact of sentencing on the size of the prison population

by Chris Giffard and Lukas Muntingh

This report was commissioned by the Open Society Foundation for South Africa (OSF) and recently presented at a conference on sentencing held in Cape Town. South Africa has a serious prison overcrowding problem. The total number of prisoners has grown steadily and dramatically over the last 11 years. The cause of the increase has changed during this time. Between 1995 and 2000, the major driver of the prison population rise was a massive increase in the size of the unsentenced prisoner population. After 2000, the number of unsentenced prisoners stabilised, and then began to decrease. But the prisoner population continued to grow, now as a result of an increase in the number of sentenced prisoners. This growth continues, despite the fact that the number of offenders admitted to serve custodial sentences is decreasing. The bulk of this increase consists of prisoners serving long sentences. Thus, the rate of release of sentenced prisoners is slowing down.

Much of the blame for the increase in the size of the prisoner population has been placed at the door of the so-called minimum sentences legislation, enacted in May 1998. However, the minimum sentences legislation had a delayed impact, and prisoners sentenced under these provisions did not begin to swell the prisoner population until early 2000 at the soonest. Although there was a significant increase in the size of the sentenced prisoner population at this time, the increase had in fact begun earlier, largely as a result of public and political pressure. As yet, the minimum sentences legislation has not had a major impact on the size of the prison population. The full impact will be felt in the years to come when those who would otherwise have been released, remain in prison due to the stipulated minimum sentences with longer non-parole periods.

The exception to this trend was sentences for sexual offences. Longer sentences for sexual offences only began to increase substantially at the same time that the minimum sentence legislation could be expected to have an impact. The legislation had a visible impact on sentences for sexual offences, by compelling the courts to impose more severe sentences than had previously been the case.

Whilst attention was focussed on the minimum sentences legislation, it appeared that the increase in the jurisdiction of the Magistrates' Courts played a far more important role in contributing to the rapid growth in the prison population from 1998 onwards. In late 1998 the jurisdiction of the District Courts was increased from one to three years imprisonment, and that of the Regional Courts from ten to 15 years imprisonment. From precisely that time, the sentence categories which include the three and 15 year sentences increased markedly. The more significant of the two is the >10-15 year sentence category. This category is the most substantial contributor to the sentenced prisoner population. It is also expected that this sentence category will be the major contributor to the growing prison population for the years to come.

Prisoners sentenced in terms of the minimum sentences legislation (the majority of prisoners serving more than 10 years) may be considered for parole only after they have served a minimum of four fifths of their sentence, while prisoners serving life sentences are obliged to serve at least 25 years. This increased the non-parole period for these two categories significantly from one-third and 20 years respectively.

Prisoners serving longer sentences make up an increasing proportion of the prisoner population. Mathematical projections show that the longer sentences are driving up the total prisoner population rapidly. These projections suggest that if current trends are maintained, the growth in the number of long-term prisoners will increase the prison population to over 226 000 by 2015. Half of these will be prisoners serving sentences of between 10 and 15 years, and nearly 90% will be serving sentences of longer than 7 years.

The implications of this changing nature of the prison population for prison management are serious. More prisoners are classified as maximum security prisoners, and are thus restricted in terms of their work opportunities as well as their daily lives. This has negative implications for facility provision and also for rehabilitation and development possibilities.

This report is also available on the OSF website at
<http://www.osf.org.za/Publications/default.asp?PubCatID=30> .

[1] This newsletter contribution is based on a paper delivered by the author at the 7th CESCA Conference in Nairobi (Kenya), August 2005. rob.allen@kcl.ac.uk

[2] *Hirst v. United Kingdom* (no. 2), (N° 74025/01), 6 October 2005 [Grand Chamber]

[3] World Prison Population: Facts, Trends and Solutions: Prisons in Africa, UN Programme Network Institutes Technical Assistance Workshop Vienna 2001

[4] PMG Minutes of Correctional Services Portfolio Committee meeting of 17 October 2006, <http://www.pmg.org.za/viewminute.php?id=8351>

[5] The Sunday Times 22 October 2006 "Jali slates handling of report"

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