

Prison Oversight in South Africa

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Introduction

When the Correctional Services Act was drafted in 1996/7 emphasis was placed on drafting prison legislation that would give tangible effect to the 1996 Constitution. Given the history of South Africa's prison system, it was also important to make the prison system structurally more transparent and to bring it under some form of judicial oversight. This objective saw the creation of the Judicial Inspectorate of Prisons (JIP), headed by the Office of the Inspecting Judge. Over the years the JIP has recorded hundreds of thousands of complaints from prisoners regarding their treatment. The Independent Prison Visitor (IPV) system, established by the JIP, remains unique across the world and is testimony to what

can be achieved with progressive legislation.

Since 2004 we have also witnessed increased involvement of Parliament in the prison system through the Portfolio Committee on Correctional Services (the Committee). Under Mr. Dennis Bloem as Chairperson, the Committee has undergone a metamorphosis; from being one of the most passive committees in Parliament to one of the most engaging and active committees. Frequent visits to prisons, heated discussions in the Committee with both the Department of Correctional Services (DCS) and the Ministry, and a number of spats in the media have done much to elevate the status of this portfolio.¹

Post-1994, there have also been two judicial enquiries into the prison system. The first headed by Judge Kriegler into the unrest in prisons in 1994 (the Kriegler Commission), and the second by Judge Jali into prison maladministration and corruption (the Jali Commission). While the Kriegler Commission's report has unfortunately been relegated to obscurity, the same cannot be said for the Jali Commission's report. Both the Committee and civil society have taken a keen interest in the Jali Commission's findings and recommendations.²

The developments described above leave one with the impression that oversight over the prison system, as exercised by the Committee and the JIP, has become more robust after 2004. A more thorough assessment is however required to assess firstly if such an impression is indeed based on facts, and more importantly, to assess how sustainable this apparent improvement in oversight is. In a young democracy, it can therefore be asked if oversight over the prison system has come of age. To answer this question, three factors will be assessed, namely independence of oversight, transparency of the prison system, and the accountability of officials. The analysis will focus on the two abovementioned structures, although there are also other oversight structures such as the Auditor General and the Standing Committee on Public Accounts (SCOPA).

Independence

Headed by a judge of the High Court, the JIP is defined by law as an independent structure.³ An attempt by the DCS to amend the Correctional Services Act to remove the requirement that the Judicial

Inspectorate must be headed by a judge attracted fierce resistance from both the Committee and civil society. In the light of this reaction, the DCS withdrew the proposed amendment.⁴ Although the JIP made no submission to the Committee on the Correctional Services Amendment Bill, there were strong indications that it was not supportive of removing the requirement that a judge heads it. While the DCS was at pains to explain that the proposed amendment in no way intended to erode the independence of the JIP, there was little evidence supporting a different interpretation.

A further indication of the JIP's independence relate to the content of its 2006/7 annual report. Whereas previous annual reports emphasised the problems created as a result of overcrowding, a problem that DCS feels comfortable in explaining as 'it is at the receiving end of the criminal justice process', the latest annual report takes a different tack and emphasises systemic problems:

*During our national inspections, we identified problems which exist in most of the prisons inspected. Problems such as a lack of staff, poor infrastructure, prison overcrowding, lack of rehabilitation programmes, lack of vocational and recreation facilities and inadequate health care were prevalent. These issues are not isolated problems experienced by some Heads of Prisons but clearly systemic. We must guard against isolating these issues in seeking "quick fix" solutions, which are bound to fail when pitched against such complex problem situations. A greater understanding of the complexity of the challenges within the correctional system is called for, in order to effectively combat these problems.*⁵

A large part of the 2006/7 annual report describes these systemic problems in a questioning and critical manner. The section on health care to prisoners reflects this well, stating that "*Health care in most of our prisons is in crisis.*"⁶ The JIP holds, by implication, the management of the DCS responsible for the health care crisis, as well as the other problems described. This approach is a significant departure in style from previous annual reports, supporting a view that the Inspectorate is able to formulate analytically critical and independent opinions on the treatment of prisoners and the management of the DCS. Similarly, the Committee has become more vocal about problems in the DCS and have not backed down from challenging it on a number of these. The prison construction programme, health conditions in prisons, the budget vote and the suspension of departmental officials are recent examples. The desire for

greater independence and not to be used as a rubber stamp by the executive, is a sentiment increasingly heard from Members of Parliament. The emerging synergy between the Committee and the JIP in exercising oversight, albeit with slightly different areas of focus, is reflective of a growing but healthy distance between the DCS and its two primary oversight structures.

Of concern regarding the independence of the JIP is the term of office of the Inspecting Judge. The first Inspecting Judge, Judge Trengove, served a few months before stepping down. He was succeeded by Judge Fagan, the longest serving Inspecting Judge to date. Following Judge Fagan, Judges Erasmus and Yekiso have been appointed as acting Inspecting Judges. For an institution such as the JIP it is important to have stability in leadership in order to develop its own character, find long term solutions for strategic challenges, and build institutional memory and knowledge. By comparison, during the same term that the Committee had one chairperson, the JIP had three judges at the helm. Effective judicial control over the prison system does require some minimum level of stability in the leadership in order to sustain in-depth engagement with the subject matter. Given the limited number of High Court Judges and their work load, it appears that leadership turnover will remain a persistent problem in the JIP for the foreseeable future.

Transparency

Independence in oversight means little without information and for information to be available, there needs to be transparency. The advent of democracy in South Africa did, however, not see a sudden opening of the prison doors to public scrutiny and oversight structures often stood at the prison gates, exasperated at the culture of silence and secrecy.⁷ In a constitutional democracy prisons must function in a transparent manner - it means that officials in the prison system have a duty to act **visibly**, **predictably** and **understandably**.⁸ Nothing must be hidden from public scrutiny, especially when human rights and governance concerns are at stake. It needs to be known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer. However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.⁹

Transparency not only hinges on information being available, but should be read together with the quality and depth of information made available. Assurances such as 'a thorough investigation was conducted' or 'appropriate action was taken' does little to inform the public whether an investigation was indeed conducted or any action taken.¹⁰ Even close observers and oversight bodies often find it difficult to penetrate the fog of the prison system.¹¹

In this regard a number of positive developments are noted. The first is the improving quality of the Departmental annual reports, and in particular the closer alignment of the annual report with the strategic plan of the DCS. In preceding years, the changing of objectives from one year to the next in the Strategic Plan and subsequent annual reports not aligned to these changes, made it difficult to compare plans with results; an issue raised by the Committee and civil society on a number of occasions during the annual reviews of the DCS Annual Report. Requests by the Committee to align these are starting to bear fruit. Secondly, and as noted above, the 2006/7 Annual Report of the JIP brings a substantial amount of new information to the prison reform discourse. Importantly, it is not only the information but also the interpretation of the information that improves transparency. The JIP devotes a large part of its 2006/7 annual report to the results of an inspection of nearly all of South Africa's prisons. An inspection of this scale and intensity had not been conducted in the past. Whether it will be repeated and whether the results from individual prisons will also be made public remains to be seen. Third, the Committee has been conducting frequent visits to prisons and reports on these visits are available on the website of the Parliamentary Monitoring Group. In the past 12 months the Committee conducted visits to prisons in the provinces of KwaZulu-Natal, Western Cape, Gauteng and the Eastern Cape.¹² The Committee's programme of visits for the first term of 2008 is already scheduled and visits to six prisons are planned.¹³ Four, the Jali Commission's final report was released in November 2006 after it completed its work in December 2005. The 1800-page report provides a comprehensive and credible description of what was happening in South Africa's prison system, but more importantly, it makes more than 110 recommendations on how to address key problems. The Jali Commission's report remains the bottom line against which the performance of the DCS must be measured. Five, civil society has not remained passive and both prison reform organisations and the media have since 2001 paid increasing attention to what is happening in the prison system. A number of civil society organisations and academics have

produced a substantive volume of research on prisons and prison reform. In short, it would be safe to conclude that there has been an information explosion on prisons in South Africa over the past five years and this bodes very well for transparency and accountability.

Accountability

Accountability is understood to mean the relationship 'between the bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right'.¹⁴ A government must therefore be able to explain how it executed its mandate. Whilst the normal features of a democracy, such as multi-party elections and universal suffrage are necessary, they are not sufficient to ensure healthy accountability between the citizens and government.¹⁵ It is therefore not surprising that new democracies remain haunted by human rights violations, nepotism, and corruption which do not disappear with the advent of democratic elections. More is required than accountability at the ballot box.¹⁶

In the first instance, the State must be willing 'to restrain itself by creating and sustaining independent public institutions to oversee its actions, demand explanations, and when circumstances warrant, impose penalties on the government for improper and illegal activity'.¹⁷ The accountability that the state imposes on itself and on governments is commonly referred to as horizontal accountability. Vertical accountability, on the other hand, refers firstly to the control the electorate exercises over a government, and also includes accountability through the media and civil society.¹⁸

A review of Committee meetings of 2007 indicate that it has called on the DCS to 'come and explain' on a number of occasions. On the agenda of these meetings were, amongst others, escapes from prisons, the lengthy suspension of officials subject to disciplinary action, deaths in custody, and progress on investigations into deaths in custody. In some instances, the Committee gave the DCS a deadline to report back on specific issues; the latest concerning the lengthy suspension of officials.¹⁹ A similar approach was proposed in respect of the asset management register; an issue commented on by the Auditor General every year for the past five years.²⁰ Perhaps most telling was the Committee's rejection of an investigation report on the escape of Annanias Mathe from C-Max Prison in Pretoria.²¹ In this

decision, the Committee showed parliamentary courage that was absent in the years prior to 2004.

Although this approach taken by the Committee may not be popular with the senior management of the DCS, it has undoubtedly won it respect from the public and fellow parliamentarians. Holding the executive accountable is, after all, a key function of Parliament. It is still too early to assess, based on facts, whether the DCS's performance has improved, but there are at least some encouraging signs in respect of improved services, financial management, recruitment practices, planning and reporting.

While the Committee has attracted a fair amount of public attention in respect of its accountability function to the DCS, the JIP has maintained a rather low profile, save for the annual report. Mandatory reporting by Head of Prisons to the JIP provides a good example of how the accountability relationship between the JIP and the DCS is strengthening. Reporting on deaths is reportedly at 95%, whereas there remains substantial underreporting in respect of solitary confinement, segregation and the use of mechanical restraints (63%). It is reported that a list of non-complying Heads of Prisons had been drawn up and training provided where requested.²²

The JIP annual report has also taken a more analytical approach and, as noted above, identified systemic problems in the DCS and warned against attempts at 'quick fixes'; advice that cannot be ignored by the DCS. According to Judge Erasmus, in his capacity as Acting Inspecting Judge of Prisons, addressing systemic problems is the responsibility of management through effective strategic planning and that monitoring the progress or lack thereof, is the responsibility of oversight structures.²³ From this is emerging a more enunciated view of how the JIP sees itself in relation to the DCS, reflecting a greater sense of independence and entrenching its mandate to hold the DCS accountable. Perhaps the attempt (through the Correctional Services Amendment Bill) by the DCS to remove the requirement that a judge must head the JIP, was an important signal compelling the JIP to critically assess itself; a process from which it appears to have emerged stronger.

Conclusion

The description above commenced with the question whether prisons oversight in South Africa has come

of age; whether it has attained a certain maturity, character and stability. The answer is not a simple yes or no, but rather the satisfying conclusion, based on events of the past four years, that the fundamentals are in place for effective oversight. While the two structures focussed on above, the Committee and the JIP, have been in place for many years, they have both demonstrated an increased willingness to engage with the substantive challenges facing the South African prison system. Increased transparency, effective independence and a stronger accountability relationship with the DCS have been demonstrated. Numerous challenges remain but importantly, a particular character of effective prison oversight is developing.

Endnotes

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1. An exchange in the media in November 2006 between the Chairperson and the Minister of Correctional Services, Mr. Ngconde Balfour, about the release of the Jali Commission's final report, remains indicative of the changed relationship between the Department of Correctional Services and Parliament
2. See Van den Berg, A. (2007) *Summary and comment on the Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - "The Jali Commission Report"* CSPRI Research Report No. 13.
3. S 85(1).
4. PMG Minutes of Portfolio Committee on Correctional Services meeting, 4 September 2007, <http://www.pmg.org.za/viewminute.php?id=9414>
5. Office of the Inspecting Judge of Prisons (2007) *Annual Report of the Judicial Inspectorate of Prisons 2006/7*, Cape Town, p. 7.
6. Office of the Inspecting Judge of Prisons (2007) Note 5, p. 25.
7. Jali Commission Report, p.944-945.
8. Transparency International 'What is transparency?' http://www.transparency.org/news_room/faq/corruption_faq
9. De Maria, W. (2001) 'Commercial-in-Confidence: An obituary to transparency?' *Australian Journal of Public Administration*, 60(4), p.92.
10. Gennaco, M. (2006) 'Towards Increased Transparency in the jails and prisons: Some Optimistic Signs' *Journal of Law and Policy*, 22, p.197
11. The Jali Commission's final report reflects on progress reports from the DCS in respect of Commissions' recommendations in the Interim Reports. It appears that the Department did not report in detail on progress in a number of instances, or on the reasons why they chose not to implement certain recommendations (Van Den Berg, 2007, p.42-45). A second example is from a Committee meeting on 22 May 2007 where a Ministerial briefing on five proposed fully private prisons were given by the appointed transaction advisor. A document outlining the plan was circulated to Committee members but the media and members of the public attending the meeting were not given copies and a few days later Committee members also had to return their copies (Author present at meeting of the Portfolio Committee on Correctional Services meeting of 22 May 2007.)
12. PMG Minutes of Portfolio Committee on Correctional Services, <http://www.pmg.org.za/minutes.php?q=2&comid=4>
13. PMG Minutes of Portfolio Committee on Correctional Services meeting, 20 November 2007, <http://www.pmg.org.za/docs/2007/071120program.htm>
14. U4 Anti-Corruption Resource Centre Corruption 'Glossary' <http://www.u4.no/document/glossary.cfm>
15. Schacter, M. (2001). When Accountability Fails - a framework for diagnosis and action. *Isuma* 2 no 2, p.1.
16. Muntingh L (2007) *Prisons in South Africa's Constitutional Democracy*, CSV, Johannesburg, p. 16.
17. Schacter, M. Note 15 p. 2
18. Ibid.
19. The meeting was held on 13 November 2007 and the DCS must report back to the Committee by the end of February 2008. PMG Minutes of Portfolio Committee on Correctional Services meeting, 13 November 2007, <http://www.pmg.org.za/viewminute.php?id=9755>
20. PMG Minutes of Portfolio Committee on Correctional Services meeting of 30 October 2007, <http://www.pmg.org.za/viewminute.php?id=9813>
21. PMG Minutes of Portfolio Committee on Correctional Services meeting of 6 March 2007, <http://www.pmg.org.za/viewminute.php?id=8749>
22. Office of the Inspecting Judge of Prisons (2007) Note 5, p. 47.

23. Office of the Inspecting Judge of Prisons (2007) Note 5, p. 6.

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