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Conditions of detention and prison overcrowding: a few lessons from abroad

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Introduction
This newsletter discusses the problem of prison overcrowding in South Africa in light of recent foreign and international jurisprudential developments. It further explores the possibility of similar reform litigation in South Africa.

The situation in South Africa
A considerable number of African countries are classed as having some of the world's most overcrowded prisons.1 In South Africa, the occupancy rate is 137.8 per cent (February 2011), well below Benin, for example, which, at 307.1 per cent, has the second highest occupancy rate in the world.2 Averages can be misleading, however: a significant number of South African prisons are between 200 and 300 per cent full, while some are well below maximum capacity.3 It is important to mention at this stage that "capacity" is determined according to the Department of Correctional Services' own space norm of 3.334m^2 per prisoner in a communal cell,4 an amount below that of many other jurisdictions, but above the "international minimum."5 This norm was developed in the late 1980's6 and has not been reviewed since then.7

Despite the existence of legislative measures intended to alleviate the burden on correctional facilities8 and the Office of the Inspecting Judge having consistently raised the problem of prison overcrowding since its first published annual report in 2000,9 the Department of Correctional Services itself admits that "overcrowding remains high."10 Overcrowding, although undoubtedly a problem in itself, also gives rise to numerous other concerns, such as the personal safety of prisoners and staff, demands on health care, staff capacity, and the effective management and administration of the prison and the care and rehabilitation of the prisoners themselves. Moreover, in as much as overcrowding can be measured in quantitative terms, the real impact is felt on a qualitative level.

Section 35(2)(e) of the Constitution states:
"Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise, and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

The section provides a range of basic rights to which a prisoner, whether sentenced or in remand

detention, is entitled. Prison conditions which fall below this standard are a violation of the standards expressed in section 35(2)(e) and may well amount to "inhuman or degrading" treatment or punishment, a violation of section 12(1)(e) of the Constitution.11 It is difficult, however, to envisage a violation of section 35(2)(e) that does not amount to a violation of section 12(1)(e). Prison overcrowding, in addition to its adverse effects on the rights enumerated in section 35(2)(e) of the constitution, frustrates an important purpose of a sentence of imprisonment, namely, to promote the "social responsibility and human development of all sentenced offenders"12 and ensure that the offender leads a "crime free life in the future."13 Moreover, prison overcrowding presents an even greater affront to a prisoner's rights to privacy, dignity and personal and bodily security than what is envisioned by the imprisonment experience. In the 1979 case of *Goldberg and others v Minister of Prisons and others*,14 Corbett JA described what is now referred to as the "residuum principle":

"It seems to me that fundamentally a prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. [T]here is a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress."15

This principle is now captured in section 4(b) of the Correctional Services Act 111 of 1998 (the Act), which states:

"the duties and restrictions imposed on inmates to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the inmate to a greater degree or for a longer period than necessary."

The Act also requires that the "minimum rights of inmates entrenched in the Act must not be violated or restricted for disciplinary or any other purpose."16 The suffering caused by prison overcrowding serves no legislative purpose and cannot be considered a "necessary consequence of incarceration."17

The Law

The Correctional Services Act 111 of 1998 (the Act) and its regulations require the following in respect of accommodation:18

- cell accommodation must have sufficient floor and cubic space to enable the prisoner to move freely and sleep comfortably within the confines of the cell;19
- all accommodation must be ventilated according to regulation;20
- cells must be sufficiently lighted by natural and artificial light so as to enable the prisoner to read and write;21
- there must be sufficient ablution facilities available to prisoners at all times which include hot and cold water and such facilities must be partitioned off from sleeping areas;22 and
- each prisoner must have his or her own separate bed.23

DCS's own standing orders stipulate that the minimum permissible cell area per prisoner, excluding areas taken up by ablution facilities, walls and pillars and personal lockers (not built in) in the cell, must be 3.344m^2 in respect of ordinary communal cells and 5.5m^2 in respect of ordinary single cells.24 Based on the current occupation rate, this means that prisoners at the most crowded facilities have between 1.3m^2 and 1.7m^2 of floor space. Although adjudicatory bodies around the world have expressed a range of acceptable floor space standards, as Steinberg notes, "when floor space drops to as little as 2.1m^2 per prisoner the grey areas in international jurisprudence narrow considerably."25 Admittedly, however, measurements like these will never be an entirely accurate reflection of prison conditions, even at the most crowded facilities. The nature of prison accommodation varies considerably, not only between prisons, but also within each prison itself. For example, for security or disciplinary reasons, a number of prisoners may be grouped together in a communal cell rendering it severely overcrowded, whilst the remainder of the prison population remains well below maximum capacity. A situation like this would not reflect, statistically, as problematic. Nevertheless, in order to compel a court to declare any level of overcrowding constitutionally unacceptable, statistical information is significant because it provides an objective and verifiable measurement of cell occupation.

To date, there is no domestic case law directly relevant to the problem of prison overcrowding. Rather, the issue has arisen indirectly. For example, in the recent Western Cape High Court judgment of *Dudley Lee v Minister of Correctional Services*,26 the plaintiff was detained for four and a half years while on trial, during which time he contracted tuberculosis (TB). The Court found that the Department of Correctional Services, given their apparent awareness of the overcrowding and poor ventilation in Pollsmoor prison, had failed to take measures to prevent the spread of TB. The judgment relates the evidence of expert witnesses describing the conditions of detention:

"the average overcrowding in 2003 was around 234% to 236%. Overcrowding meant that disease could be spread more easily and, as far as TB was concerned, the more people were packed into a cell, the greater the prospects that bacteria which were coughed up would infect other inmates. [The medical expert] regularly saw overcrowded cells in the maximum security prison and testified that his first impression was one of dinginess and squalor, because blankets are often used to protect or cover up places within a cell. He described the situation as dehumanising."27

By contrast, a recent, much publicised United States Supreme Court decision dealt with the consequences of overcrowding directly. This case, along with various others from regional and international forums, is discussed below.

Foreign Case Law

In *Brown v Plata*28the United States Supreme Court, in a 5-4 opinion, ruled that California's prisons were so overcrowded that they violated the Constitution's ban on cruel and unusual punishment. The majority decision describes a prison system failing to deliver minimal care to prisoners with serious health needs, and producing "needless suffering and death."29 Justice Kennedy states:

"Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the primary cause of the violation of [the ban against cruel and unusual punishment]."30

The remedy, in brief, was an order directing that approximately 36 000 prisoners be released or relocated within a two-year period. Put differently, the order required a reduction in prison occupation from 200 per cent to 137.5 per cent.

Closer to home, in 2009, the High Court of Malawi handed down *Masangano v Attorney General*.31 The Court insisted that overcrowding - which was, according to official figures, at approximately 200 per cent at the time of the court case - , coupled with poor ventilation, had contributed to the deaths of 259 inmates in a space of about 18 months. It held, consequently, that the severely overcrowded conditions of detention in certain Malawian prisons amounted to a violation of the right to be free from inhuman and degrading treatment. The Court directed the State to reduce overcrowding by half within 18 months of the judgment and, with time, to eliminate overcrowding altogether. Notably, there was no supervisory element to the Court's order, making it difficult to determine how well the order was implemented. A recent report indicates, however, that overcrowding in Malawian prisons remains a serious problem.32

Regional and International Case Law

In *Kalashnikov v Russia*,33 the European Court of Human Rights (ECHR) considered the impact of overcrowding on the applicant at a certain Russian prison in which the applicant had been detained. At any given time, the ECHR observed, "there was 0.9-1.9 square metres of space per inmate in the applicant's cell." Compared to the approximate guideline of 6 square metres per prisoner, a standard set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, the ECHR held that the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being amounted to degrading treatment, a violation of article 3 of the European Convention on Human and People's Rights. The ECHR noted that poor sleeping conditions as well as the "general commotion and noise from the large number of inmates," all of which were caused by acute overcrowding, constituted a heavy physical and psychological burden on the applicant. Similarly, the Human Rights Committee, has found that overcrowding constitutes a violation of Article 10(1) of the International Covenant on Civil and Political Rights, which requires that "all persons deprived of their

liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[34]

A Case for South African prisoners?

There is a strong case to be made that the extent of overcrowding in South African prisons is unconstitutional. The Correctional Services Act, which, in effect, gives effect to the standard of conditions of detention required by the Constitution, states specifically that a prisoner is entitled to an amount of cubic capacity space sufficient "to enable the prisoner to move freely and sleep comfortably within the confines of the cell." Notably, the Act states specifically that "under no circumstances may there be departures in respect of sleeping accommodation."[35] Accordingly, overcrowding, per se, is a constitutional violation. The case is all the more stronger, however, given that the consequences of overcrowding result in a number of other violations: lack of sufficient ventilation, poor physical and mental health, ineffective rehabilitative services and the threat to the safe custody of prisoners. Cases like *Brown v Plata* and *Dudley Lee* illustrate this well.[36] A prisoner's right to health is therefore crucial to the case against overcrowding, for the Constitution places a negative obligation on the state, which means, in effect, that the state cannot negatively affect the right to health.[37] Accordingly, the state's failure to remedy the problem of overcrowding, amounts to its active derogation of a prisoner's right to health. The High Court, in *Van Biljon*,[38] a case in which the right to 'adequate' health care of HIV prisoners was considered, stated the following in respect of the relationship between health and overcrowding:

"As far as HIV prisoners are concerned, there is another factor which should, in my view, be borne in mind, namely that they are more exposed to opportunistic viruses than HIV sufferers who are not in prison. It is applicant's case that tuberculosis and pneumonia are prevalent in prison. Although respondents deny the prevalence of these particular opportunistic infections, they do admit that the overcrowded conditions in which prisoners are accommodated exacerbate the vulnerability of HIV prisoners to opportunistic infections." [39]

The success of this case, however, is likely to turn on the likely effectiveness of the available remedies. Given the courts' understandable reluctance to quantify constitutional minimum standards,[40] the most likely and effective remedy would be a declaration, in broad terms, that the current state of prison overcrowding is a violation of constitutional standards, and thus amounts to violations of the rights to health and not to be not to be treated or punished in a cruel, inhuman or degrading way. The Court, ideally, could grant a supervisory order directing the Ministers for Correctional Services and Justice and Constitutional Development to remedy the problem within a certain time-frame, failing which, a certain number of suitable prisoners would be released to bring the accommodation capacity within an acceptable range. An "acceptable range" could even be the DCS's own benchmark of $3.344m^2$ per prisoner, at least as a start. Importantly, as long as the litigation does not attempt to improve on DCS's standard of $3.344m^2$, the state will not be able to justify the overcrowding under section 36 of the Constitution as there will be no "law of general application" that limits the right. If, however, the DCS's own standard of $3.344m^2$ were challenged as being unconstitutional for failing to meet constitutional standards, the DCS would be at liberty to raise resource constraints, budgetary shortages and so on as justifications for failing to provide more space per prisoner. Given the state of overcrowding, however, in many South African facilities, $3.334m^2$ would be an acceptable start.

The purported "release" of prisoners is not, in our opinion, as controversial as it sounds. For example, all remand detainees who are unable to afford monetary bail of a certain amount could be released, or all those who have been detained for a lengthy period of time for a non-violent crimes. Regarding sentenced prisoners, those with only a few months of their respective sentences left could be released, or those nearing their parole date. There are currently 55 038 prisoners accommodated in 34 prisons that are 175 per cent or more full. These prisons have an average capacity of 773 beds, the median being 557 beds. Of this group, 49.9 per cent are sentenced and 50.1 per cent are unsentenced. If the capacity of all prisons with an occupancy rate of 175 per cent and more were to be added and spread over the entire group, the occupation rate would be 206 per cent. If releases were to be targeted at prisons that were 175 per cent or more full, it would require the release of 27 976 prisoners to bring them to 100 per cent occupancy. If the aim were to bring the occupancy rate down to 175 per cent, it would require the release of 8253 prisoners, 150 per cent occupancy would require the release of 14 828 prisoners, and 125 per cent would require the release of 21 402 prisoners.[41] A targeted release program may indeed provide

some immediate relief to the problem of overcrowding.

It would make little sense, however, to release prisoners only to let the prison population numbers rise all over again. It is essential, therefore, to propose policy measures that will be applied consistently so that the prisoner population remains stable. Accordingly, the key prison population drivers must be taken into account. These are: the size of the unsentenced population, the duration of pre-trial detention, the size of the sentenced population, and the effective duration of sentence lengths.42 Regarding the unsentenced population, in addition to building additional remand facilities, an anticipated measure which the DCS has recently endorsed,43 a mandatory bail review period could be imposed - a mechanism which has been successful in reducing the remand population in other jurisdictions44 - as well as renewed efforts to reinstate projects such as the 1997 Vera and Bureau of Justice pre-trial services initiative and the 2007 Pre-trial Services initiative.45 To the extent that overcrowding is driven by the sentenced population, it is perhaps time to revisit the mandatory minimum sentences legislation, especially in light of the fact that it was intended to operate as a temporary, two-year measure.46

1 See World Prison Brief, International Centre for Prison Studies, available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_occupancy , accessed on 27August 2011.

2 Ibid.

3 Department of Correctional Services Management Information System, available at http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx , accessed on 29 August 2011. See also Annual Report of the Judicial Inspectorate for Correctional Services 2009 / 2010, 11.

4 Clause 2.1 of Chapter 2 of Department of Correctional Services' Standing Orders.

5 Figures are discussed in more detail below.

6 Personal communication with Mr. G Morris, former Director in the Office of the Inspecting Judge, 31 August 2011.

7 For ease of description, the two-dimensional norm will be used, notwithstanding that space is also measured in cubic terms.

8 Section 63A of the Criminal Procedure Act 51 of 1977, states, *amongst others*
(1) If a Head of Prison contemplated in the Correctional Services Act?is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused . . . that Head of Prison may apply to the said court for the . . . release of an accused?"

9 For example, in his 2004 Annual Report, Judge Fagan described the the problem of overcrowding as "an on-going breach of prisoners' rights to adequate accommodation." Annual Report of the Judicial Inspectorate for Correctional Services 2004, 21

10 Department of Correctional Services Annual Report 2009/2010, 68.

11 Section 12(1)(e) of the constitution states: "Everyone has the right to freedom and security of the

person, which includes the right - not to be treated or punished in a cruel, inhuman or degrading way."

12 Section 2(c) of the Correctional Services Act 111 of 1998.

13 Section 36 of the Correctional Services Act 111 of 1998. See also 'The Social Reintegration of Ex-prisoners' (2011) The Quaker Council for European Affairs. Available at http://www.quaker.org/qcea/prison/social-reintegration/rprt-reintegration-noexecsumm-en-may-2011.pdf , accessed 5 September 2011.

14 1979 (1) SALR (AD).

15 *Goldberg* supra at 39D-E.

16 Section 4(c) of the Correctional Services Act 111 of 1998.

17 Steinberg J 'Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa.' (2005) CSVR publication, available at http://www.csvr.org.za/wits/papers/papjonn2.htm , accessed on 29 August 2011.

18 These provisions echo Rule 10 of the UN Standard Minimum Rules for the Treatment of Prisoners, which read: "[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."

19 Section 3(2)(a) of the Correctional Services Regulations.

20 Section 3(2)(b) of the Correctional Services Regulations.

21 Section 3(2)(c) of the Correctional Services Regulations.

22 Section 3(2)(d) of the Correctional Services Regulations.

23 Section 3(2)(e) of the Correctional Services Regulations

24 Clause 2 of Chapter 2 of Department of Correctional Services' Standing Orders. See also para 80 of *Dudley Lee v Minister of Correctional Services* (10416/04, 1 February 2011, as yet unreported)

25 Steinberg, supra.

26 (10416/04, 1 February 2011, as yet unreported)

27 *Lee* supra at para 78.

28 563 U.S. (2011).

29 *Brown* supra at 3.

30 *Brown* supra at 3-4.

31 *Masangano v Attorney General & Others* (15 of 2007) [2009] MWHC 31 (9 November 2009).

32 Muntingh L and Redpath J 'Pre-trial Detention in Malawi: Understanding case flow management and conditions of incarceration.' (2011) Open Society Initiative for Southern Africa publication.

33 *Kalashnikov v Russia*, No. 47095/99, 15/07/2002, paras 102 and 103. Available at http://www.echr.coe.int , accessed on 30 August 2011.

34 *Girjadat Siewpersaud v Trinidad and Tobago*, Communication No. 938/2000 of the Human Rights Committee, para 6.3.

35 Section 7(3) of the Correctional Services Act 111 of 1998. Admittedly, however, the meaning of this subsection is open to interpretation.

36 See also the European Court of Human Rights judgement of *Orchowski v Poland*, No. 17885/04, 22/01/2010.

37 Section 7(2) of the Constitution states: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

38 *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (2) SACR 50 (C).

39 *Van Biljon* supra at 64.

40 See for example *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC). There is, however, international precedent for this approach. As Steinberg (supra) notes:
"The Council of Europe's CTP has established four square metres per prisoner as a minimum in a communal cell, six square metres in single cells. In the United States, both the American Correctional Association and the American Public Health Association have set standards requiring a minimum of 60 square feet (18.18 square metres) for prisoner. These latter standards have found their way into United States federal regulations; the Bureau of Prisons has used them to establish the rated capacity of its prisons.(In the United States, rated capacity reflects the number of inmates that can be housed safely in a facility.) Courts have used these standards to establish judicially enforceable minima. In the state of Florida, for instance, it is illegal for a prison to exceed its rated capacity. A similar situation prevails in Norway and Holland. In these jurisdictions, the size of the prison population is directly determined by available space."

41 Statistics are sourced from the Office of the Judicial Inspectorate.

42 See L Muntingh and C Giffard 'The Effect of Sentencing on the size of the South African Prison Population' (2006) Open Society Foundation for South Africa Report.

43 Speech delivered by the Minister of Correctional Services, Wits Justice Conference, 10 August 2011.

44 C Ballard 'Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform.' (2011) CSPRI Publication, available at http://www.communitylawcentre.org.za/publications/copy2_of_ser-esr-review/ , accessed on 31 August 2011.

45 Pre-trial services initiatives are discussed in V Karth 'Between a Rock and a Hard Place: Bail decisions in three South African courts.' Research paper, Open Society Foundation for South Africa.

46 Muntingh and Giffard supra.

The Social Reintegration of Ex-Prisoners in Council of Europe Member States

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The Quaker Council for European Affairs recently published its report on the social reintegration of ex-prisoners. The report argues that whenever prison is used, it must be rehabilitative. Most offenders sent to prison will eventually be released. It is therefore incumbent on prison systems to invest adequately in rehabilitative programmes, so that prisoners have a better chance of reintegrating into the community after their sentence is finished. Such a policy respects the human rights and human dignity of those who break the law, but this is not the only reason to favour rehabilitation in prison management. An effective rehabilitative prison system can bring financial benefits too. Policing, investigating, and administering criminal justice systems are all expensive, as is imprisonment itself. This is not to mention the negative effects of crime on the community. Justice systems which can successfully rehabilitate offenders will save money and better meet the needs of society, since the alternative (longer and longer sentences) produces an unsustainable solution.

The main challenge for prisoners remains how they will readapt to life in the community after their release. Preparation for this should begin immediately after their admission to prison. This is a huge adjustment for the prisoner and their families to make, especially after a longer sentence, and one where a number of factors come into play. Education is vital; if successfully completed it can have benefits both by offering prisoners employment skills they may not have had before and by allowing prisoners a different perspective on their lives. Preparation and support for prisoners to help them with the search for housing and employment are also important, as is the availability of training to improve their financial skills and thereby plan for the financial uncertainty and period of unemployment that may follow release. Current policies and best practice in these areas are explored in the report. Prisons should also try as far as possible to ensure that prisoners are able to stay in close touch with their families. Families provide the kind of motivation and support that official agencies simply cannot, and prison administrations must therefore make sure that they do not break family ties.

The executive summary and full report is available at http://www.quaker.org/qcea/prison/social-reintegration-ex-prisoners.htm

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