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Parole, and the separation of powers: the implications of S v Botha (Case no 318/03)

by Julia Sloth-Nielsen

For most members of civil society, the workings of the parole system is a mystery. Some believe that prisons maintain a revolving door policy, with prisoners regularly granted whole scale remission of their sentence. Others confuse parole with Presidential pardon, amnesty or reprieve, which is a prerogative accorded the executive in terms of s 84(1)(j) of the Constitution, read together with the applicable provisions of the Criminal Procedure Act. The President, as the Head of State, has the supreme power to pardon certain prisoners, or grant amnesties, or special remission of sentence. But this is not equivalent to parole. Parole, as currently regulated by sections 55 and 70 of the Correctional Services Act 8 of 1959, entails only a conditional release from within the confines of the prison walls a parolee remains subject to being having parole revoked for infringement of any of the conditions set (such as the obligation to stay free of crime). Should this occur, the parolee is liable to serve any remaining portion of his or her sentence inside prison walls again. It is well established, too, that there is no right to parole, and that factors as diverse as adverse behaviour in prison, or failure to take up rehabilitative opportunities, may influence the outcome of a parole hearing. However, there does have to be administrative fairness in the parole process. [1]

Much publicity has surrounded the minimum period that an offender has to serve before parole can be considered, particularly in high profile cases. In 1993, the Correctional Services Act 8 of 1959 was amended to introduce a complicated and ill-understood system of credits for good behaviour [2] which would determine when parole could be granted. It was controversial from inception. In response to the findings of the Kriegler Commission of Inquiry into the prison riots that followed the 1994 elections, when no general amnesty for prisoners was announced (contrary to their expectations), a new prisoner release policy was developed. This was encapsulated in legislation in 1997 (in the Parole and Correctional Services Amendment Act 87 of 1997). The new provisions provided in essence for a minimum period - that half of the prisoners sentence would have to be served before his or her possible release on parole could be considered, or a minimum period of 25 years in the case of prisoners sentenced to life. However, this legislation was never brought into force, as it was overtaken by the development of the new Correctional Services Act 111 of 1998, which took on board the provisions of the 1997 amendments.

If the provisions of the Correctional Services Act 111 of 1998 were to be implemented, a situation similar to that sketched above would become law. As far as prisoners serving run of the mill terms of imprisonment are concerned, parole could only be considered after a prisoner had served half of his or her sentence. However, insofar as sentences imposed in terms of the legislation [3] providing for minimum prescribed sentences are concerned, the minimum period which must be served before parole could be considered is four fifths of the sentence or 25 years, whichever is shorter. [4]

The new legislation does not only provide expressly for the minimum period which a prisoner must serve before being considered for parole: it fundamentally changes the composition of parole boards, to provide for the establishment of Correctional Supervision and Parole Boards which will by law have to include representatives from the community. This was designed to ensure that parole decisions are made with due cognisance being taken of the wishes and concerns of the community but also to provide for greater public insight into parole processes. It is obviously envisaged that the community representatives will be able to facilitate a broader community awareness of the function of parole in our society. In terms of the new Act, Correctional Supervision and Parole Boards will also have decision-making powers, [5] as opposed to the recommendatory function that current parole boards enjoy at present.

It must be noted with some concern, however, that the new provisions concerning parole generally, and the establishment of Correctional Supervision and Parole Boards, have not yet

been promulgated. The situation in legal terms continues to be regulated by the 1993 amending legislation. In practical terms though, Van Zyl Smit notes that the credit-based parole system has been abandoned by administrative fiat, [6] and replaced with the system envisaged in the 1997 and 1998 legislation. Evidence of this new arrangement is supported in a departmental policy document dated March 1998, which is quoted (in part) in S v Segole and another. [7] Van Zyl Smit suggested that the legality of this shift was doubtful. [8] It would certainly be illegal for the DCS to continue to implement a new policy without a legislative basis for it.

There is an obvious need for the policy and legal framework to be aligned at this stage, preferably by implementation of the chapter of the 1998 Act, which governs this area. Certainly the establishment of parole boards that are independent of the DCS should do much to increase the legitimacy of parole. [9]

At first blush, it may appear that the granting of parole constitutes an unfair intrusion into the sentencing powers of the judiciary, as the parole boards can alter at will the actual period of imprisonment that a prisoner serves. However, incentives for good behaviour, credit for efforts at self- improvement and the existence of disincentives for negative conduct are powerful management tools for those who are tasked with administering the prisons on a daily basis. Also, the institution of parole can contribute to the reintegrative ideal, and mitigate unnecessarily harsh effects of continued imprisonment upon offenders and their families. It gives concrete effect to the potential of exercising that all important element of sentencing itself: mercy.

Within the overall context of the historically long- recognized power of executive authorities to alter judicially imposed sentences, the question arises whether the sentencing officer can, at the time of imposing sentence, prevent the early release of an offender on parole. This question came squarely before the Supreme Court of Appeal in the recent case of S v Botha, [10] an appeal based on an alleged irregularity in the proceedings of the court that imposed sentence (which allegation was held to be unfounded). The case was a high profile one, involving one of the ringleaders in the Noordelikes Rugbyklub murder, which entailed the brutal killing of a young boy and the concealment of his body in a dam. No doubt influenced by both the facts of the case and the public outrage that the act inspired, the sentencing Judge stated that the accused should serve at least two thirds of his sentence before being considered for parole. This drew the attention of the Supreme Court of Appeal, who made the following comment:

The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of the State, which is bound to cause tension between the judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. [11]

Albeit just a recommendation, its persuasive force is not to be underestimated. It, no doubt, was intended to be acted upon. In making the recommendation which he did, the trial court may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities. [12]

The above statement confirms the constitutionally justified place of parole in our judicial and correctional system. No doubt, a careful balance should be sought when determining the respective roles of the judiciary and of the executive in the administration of punishment. In this context, the clearly set out views of the Supreme Court of Appeal underlining the separate functions of each sphere must be welcomed.

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1. D van Zyl Smit Sentencing and Punishment in Chaskalson et al Constitutional Law of South Africa Juta, 1999.
2. D van Zyl Smit in van Zyl Smit and Dunkel (eds) Imprisonment Today and Tommorow (2nd ed, Kluwer Publishers) at 602. Different provisions and less formal procedures apply to short-term prisoners, defined as those serving sentences of less than 2 years.
3. If sentences imposed in accordance with section 52 (2) of the Criminal Law Amendment Act 105 of 1997, which range from a prescribed sentence unless substantial and compelling circumstances exist which warrant deviation - of 5 years to life imprisonment for the specified offences. This amendment was effected at the instance of the Justice Portfolio Committee in 2001, subsequent to the adoption of the 1998 Act.
4. Unless the court which imposes this kind of sentence orders that the prisoner be considered for placement on parole after he or she has served two thirds of the term imposed: section 73 (6)(b)(v).
5. Except insofar as the release on parole of prisoners serving life sentences is concerned: these

cases have to be referred back to court (section 73(5)(a)(ii)).
6. D Van Zyl Smit, note 2 above.
7. [1999] JOL 5349 (W).
8. D van Zyl Smit, note 2 above.
9. The downside, however, is that the legislation has some serious flaws. Requiring that sentences imposed for certain offences are automatically enforced for longer than sentences of the same length imposed for other offences distorts the scheme of proportionality between sentences, which the courts implicitly follow for different offences. There is the further danger that the restrictions on parole in the 1998 Act will lead to further overcrowding, as arguably, it restricts the powers of early conditional release more drastically than the current system does.
10. Case 318/03. Judgement was handed down on 28 May 2004.
11. Par 25.
12. Par 26. The registrar was ordered to forward a copy of the judgement to the Department of Correctional Services with a request that the remarks in this paragraph be taken account of in relation to this case.

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