CIVIL SOCIETY PRISON REFORM INITIATIVE

Solitary confinement and segregation

July 2015

INTRODUCTION

Recent media reports (July 2015) of prisoners being held in effective solitary confinement at Kgosi Mampuru II Correctional Centre in Pretoria in an unlit underground cell with limited human contact, one hour outside exercise per day and for extended periods, necessitates a closer look at the legal provisions in this regard. This is indeed reminiscent of the so called Donkergat (dark hole) found at the Cape Castle, a small lightless cell used by the Dutch colonial administration for detaining rebels and criminals.

The Istanbul statement on the use and effects of solitary confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. [1] In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.

HISTORY

Even though the disciplinary punishment of solitary confinement has been removed from the legislation in 2008, it is necessary to describe it as there is reason to conclude that it still occurs under the guise of segregation. Originally the distinction between solitary confinement and segregation was clear: solitary confinement was a punishment following a disciplinary procedure, while segregation was a mechanism used for a range of other purposes. Segregation is permissible under the following conditions: if a prisoner requests to be placed in segregation;[2] to give effect to the penalty of the restriction of amenities; if prescribed by a medical practitioner; when a prisoner is a threat to himself or others; if recaptured after escape and there is reason to believe that he will attempt to escape again; and at the request of the police in the interests of justice.[3]

Left: Single cells at Constitution Hill where political prisoners were detained during apartheid

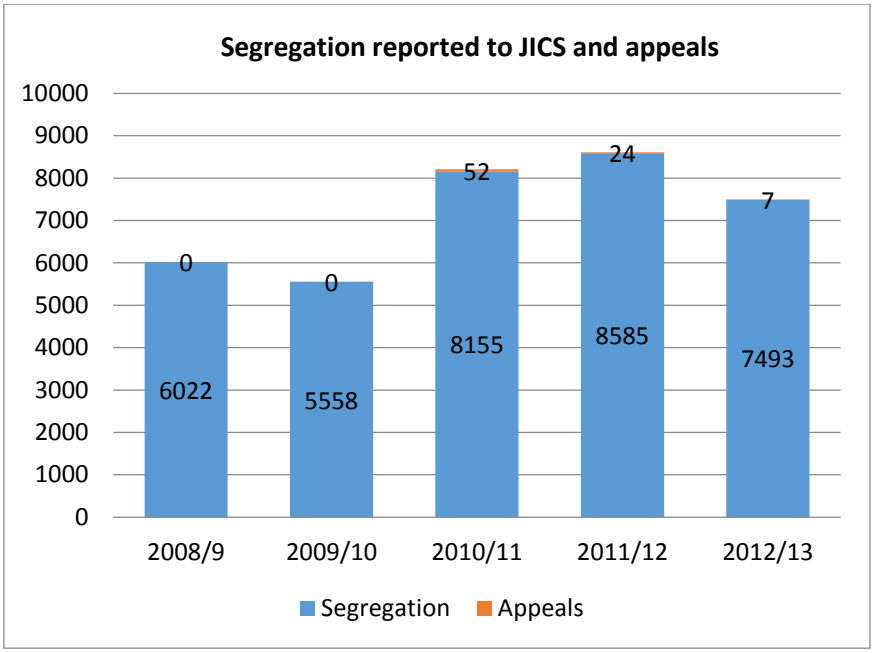
A WEAKENING OF OVERSIGHT

While the difference between effective solitary confinement and segregation appears now to be one only in name, an important distinction has nevertheless crept in under the noble mantle of correcting offending behaviour. Prior to the amendment, the Correctional Services Act was clear that the limit for solitary confinement was 30 days and there was no possibility of an extension.[4] Following the amendment, the Correctional Services Act states that in the event of serious and repeated transgressions, a prisoner may be placed in segregation "in order to undergo specific programmes aimed at correcting his behaviour", with a loss of gratuity[5] up to two months and a restriction of amenities[6] for up to 42 days.[7] What exactly constitutes a programme is not clear, nor are minimum requirements laid down in the Correctional Services Act. Moreover,

segregation should be used only "as far as it may be necessary" with the aim of giving effect to the restriction of amenities and should not be ordered as a form of punishment or disciplinary measure.[8] In short, detaining a prisoner in a single cell for punishment is permitted when done with the purpose of restricting his access to amenities, and if necessary this could be done for 42 days. While the practice goes by a different name, it is evident that it can be used in exactly the same manner as solitary confinement. This vagueness has created the space for super-maximum security prisons and their hard and austere regimes.[9]

Prior to the amendment, the Inspecting Judge had either to confirm or set aside the penalty of solitary confinement before it could be implemented, but this mechanism has been weakened. Prisoners subjected to segregation may refer the matter to the Inspecting Judge, who must make a decision thereon within 72 hours.[10] Instead of the mandatory review of solitary confinment, there is now a voluntary review mechanism which relies on the prisoner having knowledge of this review mechanism, being able to lodge such an application (e.g. by having access to writing materials or telephone), and being permitted to do so. Less than 0.5% of reported segregation cases between 2008/9 and 2012/13 we referred to the Inspecting Judge for review, as shown in Fig. 1 below.[11] It must therefore be assumed that segregated prisoners are not informed of their right to refer their case to the Inspecting Judge or that they are prevented from doing so.

When solitary confinement was still a punishment option and required mandatory reporting, the Judicial Inspectorate for Correctional Services referred to it as "a case of chronic under-reporting". In 2007/8 the Inspecting Judge received 159 solitary confinement review applications but 1 528 reports of prisoners undergoing segregation for displaying violence or being threatened with violence.[12] The implication was that many prisoners were being held in solitary confinement under the guise of segregation, but with few of them accorded the due process of a disciplinary hearing as prescribed by the Correctional Services Act.[13] After the 2008 amendment, under-reporting in respect of segregation continued even though the situation improved somewhat as shown in Figure 1 below.[14]



Left: Inside Ebongweni Supermaximum Prison. The door is solid steel with a shoebox-size slot through which food gets passed. (Image: Timeslive)

INTERNATIONAL LAW

The amendment to the legislation rid the prison system of the stigma associated with the concept "solitary confinement", a practice questioned (if not condemned) internationally.[15] Nonetheless, the status of solitary confinement is recognised in international human rights law and has been the focus international instruments and commentaries by treaty monitoring

bodies. This status is important for controlling its use. For example, Principle 7 of the UN Basic Principles for the Treatment of Prisoners states that "efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged", while the Human Rights Committee stressed that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Art. 7 (prohibition of torture)".[16] The revised UN Standard Minimum Rules for the Treatment of Prisoners (2015) prohibits in Rule 44 solitary confinement in excess of 15 consecutive days. Regional instruments have also prescribed that "solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible."[17] Following the 2008 amendment to the Correctional Services Act, detention in a single cell for punishment purposes continues but with a weaker oversight regime than what was the case with solitary confinement, where all instances were subject to mandatory review by the Inspecting Judge. Solitary confinement possessed a particular legal status which has now been lost, given that confinement in a single cell for punishment or disciplinary reasons is grouped together with a host of other reasons for segregation. It was because solitary confinement posed such risks to the individual's well-being that it was tightly controlled and safeguards built into the 1998 Correctional Services Act. However, segregation, accompanied by programmes to correct offending behaviour, appears to be terminologically less ominous and protective measures have been diluted.

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[1] Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul, A/HRC/13/39/Add.5 para 55.
[2] See also s 7(2)(e) Act 111 of 1998.
[3] s 30(1).
[4] s 24(5)(d) prior to the amendment by Act 25 of 2008.
[5] Gratuity is a small monetary payment made to prisoners who are performing certain labour, such as working in the prison kitchen.
[6] Amenities refers to recreational and other activities, diversions or privileges which are granted to inmates in addition to what they are entitled to as of right and in terms of the Correctional Services Act, and includes exercise; contact with the community; reading material; recreation; and incentive schemes (Correctional Services Act, Definitions).
[7] s 24(5)(d) read with 24(5)(b and c)
[8] s 30(9).
[9] Buntman, F. and Muntingh, L. (2012) Super-maximum prisons in South Africa. In Ross, J. (ed) *Globalization of Supermax Prisons*. Chapel Hill: Rutgers University Press.
[10] s 30(7).
[11] Office of the Inspecting Judge (2013) p. 62.
[12] Office of the Inspecting Judge (2008) *Judicial Inspectorate for Correctional Services Annual report 2007/8*, Cape Town: Office of the Inspecting Judge, pp. 28-29.
[13] s 24. Office of the Inspecting Judge (2009) *Judicial Inspectorate for Correctional Services Annual report 2007/8*, Cape Town: Office of the Inspecting Judge, p. 28.
[14] Office of the Inspecting Judge (2010) p. 27. Office of the Inspecting Judge (2013) p. 62.
[15] General Comment 20 on the ICCPR para. 6.
[16] General Comment No. 20: Replaces General Comment 7 concerning the prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992. CCPR General Comment No. 20 para. 6. See also the Istanbul Statement: 'As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort.'
[17] Art. 60.5, European Prison Rules (revised 2006). See also *Prisons in Cameroon - Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*. The African Commission on Human and Peoples' Rights, Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa, From 2 to 15 September 2002, ACHPR/37/OS/11/437; Communication 54/91, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000)(Annex V) para 115. African Commission on Human and People's Rights Communications: 64/92: *Krishna Achuthan (on behalf of Aleke Banda)* / Malawi; 68/92: *Amnesty International (on behalf of Orton and Vera Chirwa)* / Malawi; 78/92: *Amnesty International* / Malawi.