

# **PRISONS IN SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY**

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**CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION**  
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# 1. INTRODUCTION

Prisons and prisoners are at the margins of society and even democracies tend to be parsimonious in giving real expression to prisoners' rights. Popular notions of how prisoners should be treated gravitate towards increased suffering, but these are generally knee-jerk reactions fuelled by frustrations about the lack of public safety and the high rate of violent crime. It is often said, citing both Churchill and Dostoevsky, that the state of a democracy is measured by the way it treats its prisoners. But the relationship is indeed more interactive. What happens inside prisons does not stay there; it goes home with released prisoners and the staff who work there: "When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them" (Gibbons and Katzenbach, 2006: 11). Ultimately it affects the overall state of democracy: rights violations, corruption, impunity and a host of ills associated with prisons spill over into the domain of free citizens on an ideological level. The way prisoners are treated, and their experience of their rights, shape and reflect on constructs of offenders, punishment, use of force, dignity and the duty of the state to provide care. These constructs are not static; they are continuously moulded and reshaped by the current discourse. This fluidity cannot be left unchecked in a constitutional democracy – the Constitution is indeed there to provide anchorage.

What should prisons in a constitutional democracy look like, then? Prisons serve a set of complex, mutually conflicting and hard-to-achieve goals. Prisons must house people in a humane manner but simultaneously appeal to the punitive nature of prisons – order and security must be maintained while providing an effective deterrent, and appease political opinion. It is in this "inherent policy vagueness" that stakeholders (for example, politicians, bureaucrats and civil society) must find a compromise (Boin, James and Lodge, 2005: 7). Can a constitutional democracy, such as South Africa, find an acceptable compromise, and what would "acceptable" mean under the rules of a constitutional democracy?

At the outset it must be accepted that prisons are in themselves not democratic institutions; they are institutions of coercion reflecting the state's legitimate ability to deprive people of their liberty. Given this acceptance, the benchmark is, however, that prisons should at least not offend the values of a constitutional democracy. The question being posed here about prisons in a constitutional democracy is a normative one, rooted in the belief that prisons will be better off if the values underpinning democracy find clear and tangible expression in the prison system: the rights of prisoners will be better protected, prisons will achieve better results, adherence to the rule of law will be maintained, and ultimately society will benefit through increased safety. The opposite of this position is that prisons are an enclave hidden from the reach of the Constitution – an intolerable position under the current South African constitutional framework.

In this article it will be argued that to make prisons compatible with a constitutional democracy, as understood in South Africa, four requirements need to be met. Firstly, the prison system must have an underlying philosophical framework derived from the Constitution. Such a philosophical framework needs to set out the justification and purposes of imprisonment. Secondly, prisons must not violate the rights of prisoners listed in the Table of Non-Derogable Rights (section 37) and the rights enumerated in section 35 in the Constitution. These are the rights to equality (section 9),<sup>1</sup> to human dignity (section 10), to life (section 11), freedom and the security of the person (sections 12[d], 12[e] and 12[c]),<sup>2</sup> freedom from slavery, servitude and forced labour (section 13);<sup>3</sup> the rights affording special protection to children (section 28[1][d] and [e], 28 [1][g][i-ii], and 28[1][i]);<sup>4</sup> and the rights of arrested, detained and accused persons (section 35), with specific reference to section 35(2). The emphasis placed on the non-derogable rights and the rights in section 35 should not be regarded as an attempt to lower the standards in respect

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<sup>1</sup> The right to equality is non-derogable with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.

<sup>2</sup> Section 12(1)(d) provides protection against torture, and section 12(1)(e) against cruel, inhuman and degrading treatment or punishment.

<sup>3</sup> With reference to slavery and servitude.

<sup>4</sup> These are: protection from maltreatment, neglect, abuse or degradation, exploitative labour practices, to be detained separately from adults, to be treated in a manner and kept in conditions (when detained) that take account of the child's age, and not be used in armed conflict, if aged 15 years and younger.

of prisoners' rights, but is done for purposes of emphasis and in order to keep the analysis manageable in scope. It is accepted that all the rights in the Bill of Rights apply to prisoners unless a limitation is justified in respect of section 36.

Third, the executive must be accountable in respect of prisons. Such accountability refers at a horizontal level to the institutions and practices created by the state to hold governments accountable. Vertically, accountability is directed to the electorate, the media, civil society and international treaty bodies.

Four, prisons must function in a transparent manner. At minimum this means that those affected by decisions of officials in the prison system, as well as other stakeholders with an interest or mandate in respect of prisons, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials in the prison system (and related sectors) have a duty to act visibly, predictably and understandably (Transparency International, Internet resource).

For the purposes of this article, it is accepted that South Africa is a constitutional democracy, and that the Constitution reflects the set of political values and aspirations needed to protect liberty through the existence of internal and external checks and balances on the government in power (Heywood, 1997: 279). It is not within the scope of this analysis to assess the merits of the model of constitutional democracy chosen; it is accepted that these are the "rules of the game" reflected in a codified constitution, a bill of rights, the separation of powers, a bicameral and freely elected Parliament, and the decentralisation of power with designated oversight structures enshrined in the Constitution, or created by statute (Heywood, 1997: 279).

In the following, each of the four requirements will be explored. The intention is not to provide an overview of the South African prison system as others have done this eloquently (Sloth-Nielsen, 2007: 379-401), but rather to focus on the requirements of compatibility with a constitutional democracy and the stumbling blocks en route to creating a prison system meeting these requirements. It should also be borne in mind that when enquiring about the prison system in a constitutional democracy, the discourse is historically bound but also transient in its focus. The question of prisons in a constitutional democracy should thus be a continuous enquiry to enrich our understanding and knowledge of the challenges facing the prison system. Prison systems change and so must our understanding of them.

Lastly, there are theorists arguing for the abolition of the prison and credible arguments have been forwarded in pursuit of this objective (Wilson, 2005). This article will not address this question; it is accepted that prisons will, for the medium-term at least, be part of the South African landscape.

## 2. AN UNDERLYING PHILOSOPHY

There is general acceptance that imprisonment was used as a powerful tool of social and political control during the apartheid regime and that prisoners found themselves in an extremely vulnerable situation in the absence of stated rights, oversight and general protection against violations. The debate on prisons in a democratic South Africa should therefore be mindful of this history and the role that prisons played in a racist authoritarian regime, so as to ensure that the prison system's function is not again perverted into an ideological and political one, but remains one that is derived from and promotive of the rights in the Constitution. It is therefore with good reason that the Preamble to the Constitution emphasises the "injustices of the past" and "healing the divisions of the past". This is not unlike post-war Germany where the aim of the Constitution was to define the spirit (*Geist*) of the new state that was in total opposition to the one destroyed in May 1945 (Lazarus, 2004: 25). In the South African context it is also important to see these injustices and divisions not only from a strict race perspective alone, but to be inclusive of the range of violations and inequalities characterising South African history. The prison system therefore needs to be permeated with this "new spirit" reflecting the values of the Constitution and, more specifically, demonstrating the aspirations of a society emancipating itself from its own violent, authoritarian and dehumanising past. The prison system should thus be regarded as an arena for addressing the injustices and divisions of the past, and not for perpetuating exclusion, marginalisation and rights violations. The Constitution then sets the task of establishing a prison system that is fundamentally

different in nature, processes and outcomes than the prison system inherited from the previous regime. It is in this sense that a “historical mission” can be defined for the state.

As evidenced by events post-1994, it needs to be acknowledged that the process of law reform is not an autonomous process but reflects the culture of society in various contexts; these being legal, rights, constitutional, penal and political (Lazarus, 2004: 11). This then raises the question of what is the South African “culture” and, more specifically, how this culture shapes law and ultimately the rights of prisoners. Events of the past 10 years illustrate this well as the focus in prison law reform has swung from one driven by rights (as expressed in the 1998 Correctional Services Act) to a partially successful attempt at diluting oversight over the prisons system, as evidenced by the most recently proposed amendments in the Correctional Services Amendment Bill (32 of 2007).<sup>5</sup> Parallel to this was the introduction of the minimum sentences legislation emphasising punishment and retribution, as well as the increase in the sentence jurisdiction of the district and regional courts. Perhaps more telling of this punitive attitude was the attempt, in 2003, by the legislature to remove the right to vote from certain categories of sentenced prisoners.<sup>6</sup> What appears to be absent from the penal reform process is thus a *unifying thread*, derived from the duty to promote and uphold the rights described in the Bill of Rights. These apparently contradictory reform processes should be seen as a consequence of the South African rights culture and, more particularly, the historical mission in respect of prisons that post-1994 governments have defined, or not, in relation to the Bill of Rights.

Despite these challenges, it is possible to develop a number of principles that should shape the prison system in the South African constitutional democracy based on an underlying philosophy. Given the inherent risk of rights violations due to imprisonment, the point of departure is that *imprisonment should be used as a measure of last resort*, meaning that all other options, and not limited to penal sanctions, need to be assessed and exhausted before a person is deprived of his or her liberty. In respect of sentencing, it follows that imprisonment should be regarded as the most severe sanction to be imposed and that no other sanction would have been reasonably able to achieve the same results intended by the court in a less restrictive manner. In this the courts need to be guided by what can broadly be described as an “imprisonment policy” that defines the purpose of imprisonment in relation to other sanctions, the overall function of prison in society, the known risks of imprisonment, and what can realistically be expected as the outcomes of imprisonment. Imprisonment and, more particularly, imprisonment rates are determined more by political sentiments and penal policy, than by actual crime trends. The use of imprisonment as penal sanction should therefore not be seen as the unrestrained and uncontrollable result of the interaction between crime trends and law enforcement (Dünel and Van Zyl Smit, 2001: 811; Gardner, 2002; Tonry, 2006). The use of imprisonment is based on policy decisions emanating from particular philosophical positions, and policy must therefore be developed to regulate imprisonment.

Perhaps motivated by history, as well as the development realities of South African society, the Correctional Services Act describes in unusual detail (especially in chapter 3) the minimum standards for the detention of all prisoners under conditions of human dignity. In essence, the Act sets a standard for conditions of imprisonment that are not relative to what is happening in free society (Dünel and Van Zyl Smit, 2001: 825), but standards that are absolute and to be adhered to when the state chooses to imprison a person; it should therefore do this with caution. The duty of the state to provide such conditions is inescapable and the state is not an innocent and helpless bystander when conditions fail to meet these standards; the state is in the first instance responsible for the failure to meet such standards as it is the state that places people in conditions that adversely affect their rights to dignity and safety. The state’s *responsibility relationship* towards the dignity and safety of prisoners is thus a fundamental issue in understanding prisons in a constitutional democracy; how the state is held accountable is an issue explored further in section 4.

The Correctional Services Act (111 of 1998), in section 2, articulates three objectives for the South African prison system: to implement the sentences of the court in the prescribed manner; to detain all prisoners in safe custody while ensuring their human dignity; and to promote the social responsibility and human development of all prisoners and persons under community corrections. Safety, dignity, social responsibility and human development are values derived from the Preamble to

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<sup>5</sup> At the time of writing, the Bill has been discussed by the National Council of Provinces and it appears that the proposal to remove from the mandate of the Office of the Inspecting Judge the reporting on corrupt and dishonest practices was accepted.

<sup>6</sup> *Minister of Home Affairs v. Nicro*, Case CCT 03/04.



the Constitution and section 7(1) of the Constitution, and it thus follows that these should be given expression in the daily functioning of prisons. Section 36 of the Correctional Services Act defines the purpose of imprisonment: after having due regard that the deprivation of liberty serves the purposes of punishment, the purpose of a term of imprisonment is to enable the sentenced prisoner “to lead a socially responsible and crime-free life in the future”. It is in this formulation that the *constitutional justification for the rights limitations imposed* on sentenced prisoners is found (Lazarus, 2004: 38). This balancing of the limitation of a right (liberty) and the positive duty imposed on the state to assist individuals who, for whatever reason, requires assistance in their personal and social development encapsulates the constitutional dilemma of imprisonment. The deprivation of liberty can then only be constitutionally justified by the creation of opportunities and services for people to better themselves.

In a constitutional democracy prisons also need to be managed and administered in a manner based on principles supportive of the constitutional values, especially those facilitating the betterment of prisoners and giving expression to fostering social responsibility and human development. The following will deal with these requirements.

Rule 60(1) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) states: “The regime of the institution should seek to *minimize any differences between prison life and life at liberty* which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings” (author’s emphasis). Working from the position that the deprivation of liberty is the punishment, and balancing this with reasonable safety and security requirements, the minimisation of differences between life inside and outside of prison do not only become feasible but also desirable. Prison systems in northern Europe and Scandinavia that have given more tangible expression to this ideal, have demonstrated good results without compromising public safety (Gardner, 2002). The challenge therefore lies in creating a prison environment that inculcates the values and habits enabling released prisoners to fulfil their roles as constructive citizens. This requires a fundamental re-evaluation of how prisons function in South Africa in order to undo the legacy of the past. For example, the quasi-military character of the Department of Correctional Services (DCS) was reintroduced more in an effort to facilitate staff management and reinstall discipline, than to enhance the rehabilitative efforts of the prison system. This quasi-military management structure appears to have little justification in a system that should aspire to approximate life on the outside. Similar obstacles are presented by the super-maximum security prisons as well as the overemphasis of security concerns and the ensuing restrictive prison regime. On the contrary, every opportunity should be investigated, explored and experimented with to develop, strengthen and enhance a liberal prison regime (Dünkel and Van Zyl Smit, 2001: 838 and 843) for it is in this milieu that the values underpinning the Constitution can find expression; not in a repressive, paternalistic and quasi-military one.

In order for prisoners to better themselves and to meet the objective of promoting social responsibility and human development, it follows that services rendered to prisoners in this regard must have been *proven to be effective*, or at least, supported by evidence indicating their effectiveness. There is a growing body of empirical evidence of effective interventions with offenders (Muntingh, 2005: 32–39). Effective interventions are developed and implemented on the following principles:

- risk classification should determine the nature of programmes;
- targeting criminogenic needs, such anti-social attitudes and drug dependency;
- programme integrity is maintained by adhering to the plan and using appropriately skilled staff;
- responsivity by matching teaching styles with learning styles;
- treatment modality – interventions are skills-based, aimed at problem-solving, social interaction and includes a cognitive component to address attitudes, values and beliefs supporting offending behaviour; and
- community-based programmes (Dünkel and Van Zyl Smit, 2001: 822).

Research has similarly identified the characteristics of programmes that are not effective and these should naturally be avoided (Muntingh, 2005: 40–42). In building a prison system compatible with a constitutional democracy, it follows that services rendered to prisoners should be based on knowledge and evidence. Rendering services based on a common sense perception of “what works” or any other notion void of empirical proof, effectively deny prisoners their right to development and fails to meet the constitutional justification for imprisonment.

A closer look at the prison population profile reveals a great number of intersecting categories in respect of age, gender, sentence status, sentence length, health, sexual orientation, gang affiliation, disability, mental health and so forth. While all prisoners are vulnerable to rights violations due to their imprisonment, there are certain categories of prisoners where this vulnerability is more immediate and intense, and this is recognised in the Constitution and subsidiary legislation and policy. The measures in place, or not, to protect particularly *vulnerable groups and individuals* are thus of immense importance to ensure that their rights are protected.

The Correctional Services Act established the Office of the Inspecting Judge and it came into being in 2000. Its establishment gave expression to the important principle of *judicial control over the prison system*. The right to complain is a fundamental one and prisoners need to have the assurance that their complaints will be taken seriously. Judicial control renders this status to a complaints mechanism. Based on international comparisons, it appears that judicial control over the prison system is even more important in developing countries as it has the power to make additional resources available to the prison system (Dünkel and Van Zyl Smit, 2001: 828). The Office of the Inspecting Judge's mandate is limited in this regard, but can still make a number of binding decisions and in principle renders status, independence and impartiality to the complaints mechanisms implemented through the Independent Prison Visitors. Maintaining and strengthening judicial control over the prison system is thus key to emphasising a rights-based approach.

To summarise the main points of an underlying philosophy, it is argued that imprisonment poses inherent risks to the rights of citizens and following from its obligation to uphold and promote the rights in the Constitution, the state should only use imprisonment as a measure of last resort. In the South African context there is a further historical mission, namely to define and implement a prison system that is the anti-thesis of the prison system inherited. When imprisonment is used, the constitutional justification for the imposition of a prison sentence is derived from the opportunities and assistance rendered to offenders to better themselves and lead crime-free lives in the future. Lastly, there are certain absolute minimum standards of detention that are measurable and enforceable through judicial control over the prison system and the state is responsible for ensuring compliance with these standards.

### 3. THE RIGHTS REQUIREMENT

Prisoners occupy a special position in the rights debate despite their relatively small numbers compared to other larger vulnerable groups such as children. They are important because they are in “an unusually close relationship with the state” (Lazarus, 2004: 35) and at the receiving end of the state's ability to exercise coercion. The overall rights status of prisoners is thus an important starting point in this enquiry. This is followed by a description of these rights and how they are interpreted in the prisons context. The section concludes with highlighting a number of key issues in respect of prisoners' rights, indicating that the debate is far from settled.

#### 3.1 The residuum principle

In 1993 the Appellate Division, as it was known then, in *Minister of Justice v. Hofmeyer*,<sup>7</sup> gave a clear indication of the direction South African jurisprudence on prisoners' rights was taking. Given the change in political climate by then, the judges seized the opportunity to refer not only to the remarks of Justice Innes in the 1912 case of *Whittaker and Morant v. Roos and Bateman*,<sup>8</sup> but also to the minority judgment of Corbett in the 1979 *Goldberg* case.<sup>9</sup> Citing what became known as the Innes dictum, Justice Hoexter made the position of the court clear in what is now regarded as the seminal statement regarding the principle applicable to prisoners' rights, and dismissed the appeal with costs. The quotation below neatly summarises the court's position on a

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<sup>7</sup> 1993 (3) SA 31 (A).

<sup>8</sup> 1912 AD 92.

<sup>9</sup> 1979(1) SA 14.

complex human rights issue with far-reaching consequences, and remains a reflection of current jurisprudence on prisoners' rights in South Africa:

Mr. Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration.

Based on the above, it must be accepted, that imprisonment per se is not a justification for the limitation of rights, save for those rights that are absolutely necessary to curtail in order to implement the sentence (or order) of the court. The deprivation of liberty is the punishment and imprisonment is not an opportunity for the state to limit rights and increase punishment further than what the court had intended. The retention of rights status is important to protect, as public opinion often bays for an erosion of this basic position.

### 3.2 Dignity

In *August and Another v. the Electoral Commission and Others*,<sup>10</sup> in which the Constitutional Court was seized with deciding on of the right of prisoners to vote, Justice Sachs wrote: "The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that 'everybody counts' (para 17). Human dignity is in this case expressed as the right to participate in general elections, for it reflects the status of the individual as a person and that he or she is important; that he or she 'counts'." The Constitutional Court provided in this instance substantial clarification on the status of prisoners in society – they are not second-class citizens and that they remain, although physically restricted, members of a democratic society that can vote.

The Constitution, in section 1, identifies dignity as one of the founding values of the Republic and, in section 35(2)(e), provides for the right "to conditions of detention that are consistent with human dignity". The Correctional Services Act (section 2[b]) also requires that prisoners must be detained in safe custody "whilst ensuring their human dignity".

Acknowledging and protecting the right to dignity of prisoners is thus well articulated in various international instruments and domestic law. The South African Constitutional Court agreed in *S v. Makwanyane* (paragraphs 57 and 59) with the US Supreme Court in that "even the vilest criminal remains a human being possessed of common human dignity", and the German Federal Constitutional Court noted: "[R]espect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishment." Chaskalson concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner. Moreover, that the right to dignity as a foundational right, as is the case in the South African Constitution (section 1[b]), renders more weight to it than the enumerated rights (Chaskalson, 2002: 134).<sup>11</sup> For example, in *S v. Williams* the Constitutional Court concluded on punishment that:

The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.<sup>12</sup>

The right to dignity is not only there to protect individuals against conditions adversely affecting them, but also places a positive duty on the state. The purpose of imprisonment, as described in section 36 of the Correctional Services Act, renders further

<sup>10</sup> CCT 8/99.

<sup>11</sup> See also *S v. Makwanyane and Mchunu*, Case No. CCT/3/1994, paragraphs 144 and 329.

<sup>12</sup> CCT/20/94, paragraph 38.

expression to the right to dignity by acknowledging the inherent potential of each sentenced prisoner to contribute to society and be able to lead a “socially responsible and crime free life”. The state is therefore obliged to develop and put in place such measures that (sentenced) prisoners are able to receive the necessary assistance to fulfil their human potential, as noted above. The German Federal Constitutional Court articulated this well and required that the prison administration not only empower prisoners but also legitimise the limitations placed on prisoners through the services available to prisoners to enable them to lead socially responsible and crime-free lives (Lazarus, 2004: 44).

In the absence of such services and conditions, it is unlikely that prisoners will subscribe to the values of self-worth, respect for others, respect for the rule of law and so forth. Degrading and humiliating treatment and conditions do not create an environment supportive of the rehabilitative ideal; it actively undermines it. The right to dignity therefore lies at the core of prisoners’ rights in a constitutional democracy and should be understood in very tangible terms, emphasising the positive measures undertaken to give effect to personal worth and autonomy.

### 3.3 Freedom and security of the person

The right to freedom and security of the person is described in five subsections in the Constitution, two of which are non-derogable: the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>13</sup> The international ban on the use of torture also has the enhanced status of a peremptory norm of general international law,<sup>14</sup> meaning that as a peremptory norm, it:

... enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.<sup>15</sup>

The revulsion with which the torturer is regarded is demonstrated by the very strong judicial rebuke, condemning the torturer as someone who has become “like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”,<sup>16</sup> and torture itself as an act of barbarity which “no civilized society condones”,<sup>17</sup> “one of the most evil practices known to man”<sup>18</sup> and “an unqualified evil”<sup>19</sup> (Fernandez and Muntingh, forthcoming).

South Africa ratified the UN Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1998 and despite the status of the prohibition of torture as a peremptory norm, and the requirement under article 4 of the CAT that states parties ensure that acts, attempts thereto and complicity in torture are made offences under national law, torture has not been criminalised in South Africa. The UN Committee against Torture, in its Concluding Remarks on South Africa’s Initial Report, expressed its dissatisfaction in this regard.<sup>20</sup>

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<sup>13</sup> Section 12(1)(d)–(e).

<sup>14</sup> See the House of Lords decision in *A (FC) and others (FC) v. Secretary of State for the Home Department* (2004); *A and others (FC) and others v. Secretary of State for the Home Department* [2005] UKHL 71, paragraph 33. See also *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No. 3) [2000] 1 AC 147, 197–199; *Prosecutor v. Furundzija* ICTY (Trial Chamber), judgment of 10 December 1998 at paragraphs 147–157.

<sup>15</sup> *Prosecutor v. Furundzija* ICTY (Trial Chamber), judgment of 10 December 1998 at paragraph 153.

<sup>16</sup> *Filartiga v. Pena-Irala* [1980] 630 F (Second Series) 876 US Court of Appeals 2<sup>nd</sup> Circuit 890.

<sup>17</sup> *A (FC) and Others v. Secretary of State for the Home Department*, paragraph 67.

<sup>18</sup> Paragraph 101.

<sup>19</sup> *Ibid* at paragraph 160.

<sup>20</sup> Paragraph 13. “Notwithstanding the provisions of the Constitution and the fact that courts may consider torture as an aggravating circumstance, the Committee is concerned with regard to the absence of a specific offence of torture, as well as of a definition of torture, in the State party’s criminal law, more than seven years after the Convention entered into force” (Committee against Torture consideration of reports submitted by states parties under article 19 of the convention – conclusions and recommendations of the Committee against Torture – South Africa (advanced unedited version) CAT/C/ZAF/CO/1, 37th Session, 6–24 November 2006, 23 November 2006, Geneva).

Three immediate problems emanate from this. First, the definition of torture in CAT needs to be incorporated into domestic legislation reflecting that torture inflicts severe *mental* and *physical* suffering; it is done intentionally; it is committed by a public official or at the behest of a public official; and excludes pain and suffering inherent in or incidental to lawful actions. Torture is therefore not restricted to physical suffering and thus presents the second problem, namely the inadequacy of common law offences (such as assault and attempted murder) to prosecute perpetrators. Third, without a crime defined, the punishment of perpetrators becomes problematic. The CAT requires, in article 4(2), that states parties shall “make these offences punishable by appropriate penalties which take into account their grave nature”. Legislation criminalising torture therefore needs to reflect on the punishment of perpetrators of torture to the extent that punishment reflects the gravity of the offence and expresses the revulsion of torture.

To date, the South African Police Service (SAPS) is the only government department that has developed a policy on the prevention of torture, and no other government department, and specifically not the DCS, has taken such proactive measures; indeed the language of the CAT has not entered the jargon of DCS.<sup>21</sup> Article 10 of the CAT requires state parties to provide its officials with the necessary training and information regarding the prohibition of torture, and that the prohibition of torture must be included in the rules or instructions issued to officials working with persons who may be at risk of torture. This has not been done in the DCS and therefore represents a further failing in respect of the treaty obligations, but also a failure to develop enabling legislation to guarantee the protection against torture provided for in the Constitution.

### 3.4 Right to life

The right to life was accepted in the Interim Constitution (section 9) and ultimately in the 1996 Constitution (section 11), and when the Constitutional Court had to deal with the issue in *S v. Makwanyane* it did so eloquently and convincingly (Currie and De Waal, 2005: 280). The Court purposefully linked the right to life to the right to dignity and found that this linkage, seen together with the risk of arbitrariness and error, as well as the availability of life imprisonment as alternative, weighed more than the unproven deterrence value of execution and society’s assumed need for retribution. In short, “retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity” (paragraph 145). The current South African jurisprudence indicates that the right to life in respect of the death penalty appears to be settled for now, but it has to be acknowledged that public opinion is often far removed from the wisdom of the Constitutional Court.

The state also has a positive duty to protect citizens from life threatening attacks (Currie and De Waal, 2005: 285–286). The *Carmichele* case<sup>22</sup> pointed to this duty and the protection of prisoners against such attacks by both officials, as well as fellow prisoners, would then fall within the ambit of this positive duty. In *Mohamed v. President of the RSA*<sup>23</sup> the Constitutional Court had to deal with the extradition of a prisoner to a jurisdiction (the US) where the prisoner faced the risk of the death penalty. The Court found that the state had failed in its positive duty to protect the right to life by extraditing Mr Mohammed to the US where he could receive the death penalty, and, more specifically, that the state failed to seek assurances from the US government that Mohammed would be protected from the death penalty. The problem then appears to lie in the willingness and the ability of the state to meet its positive obligations in respect of the right to life. The high number of unnatural deaths and reported assaults on prisoners indicate that this right is violated on a significant scale (Department of Correctional Services, 2007: 38).<sup>24</sup> The high number of natural deaths of prisoners, presumably due to AIDS and the difficulties qualifying prisoners have in accessing antiretroviral therapy, further points to the state’s failure to protect the lives of prisoners.

<sup>21</sup> The word “torture” appears nowhere in the Correctional Services Act, the Regulations to the Act or the B-Orders. See Muntingh and Fernandez (forthcoming).

<sup>22</sup> 2001 (4) SA 938 (CC).

<sup>23</sup> 2001 (3) SA 893 (CC).

<sup>24</sup> In 2006–7, a total of 62 prisoners died due to unnatural causes, and 1 822 assaults on prisoners and staff were recorded.

### 3.5 Right to freedom from slavery and servitude

Freedom from slavery and servitude do not appear to have been the source of constitutional litigation in respect of prisoners to date. “Forced labour” is, however, excluded from the Table of Non-Derogable Rights, and only freedom from slavery and servitude enjoy non-derogable status. It is common practice around the world that prisoners are used to perform labour and South Africa is no exception (Gibbons and Katzenbach, 2006: 11).<sup>25</sup> The Correctional Services Act, in section 37(1)(b), attaches great value to labour performed by prisoners and regards its purposes as aimed at fostering habits of industry and to assist with the rehabilitation and training of prisoners. The Act requires in section 40(1) that for sentenced prisoners: “[S]ufficient work must as far as is practicable be provided to keep prisoners active for a normal working day and a prisoner may be compelled to do such work.” Prisoners may also receive a gratuity as prescribed by regulation, but labour may never be used as a form of punishment or disciplinary measure. Sentenced children enjoy additional protection in respect of labour, as they may only perform labour for the purposes of training aimed at obtaining skills and for the benefit of their development. Secondly, a child may not, in respect of section 40(3)(b)–(c), perform labour that is inappropriate to his or her age or places the child’s educational, physical, mental or social well-being at risk; wording taken directly from section 28(1)(f) of the Constitution.

That prison labour has not been a source of litigation is hardly surprising. After forced prison labour was abolished in the late 1980s, work opportunities had to be found for prisoners inside the prison system and these are increasingly scarce due to overriding security concerns. In 2005–6, only 9 965 out of approximately 120 000 sentenced prisoners were in fact placed in job opportunities (Department of Correctional Services, 2006: 30). What is perhaps more likely to be contested, is the pervasive idleness that prisoners are experiencing when serving their sentences. Such boredom must place a heavy burden on the mental health of prisoners.<sup>26</sup> Unlike the US, South Africa has not (yet) seen the type of public-private partnerships that uses prisoners to provide a cheap, resident, docile and unprotected labour force. Such partnerships may in fact bring a new dimension to this issue. Recent initiatives, reported on by the Deputy Minister of Correctional Services in her budget vote address, using prisoners in poverty-alleviation programmes to assist with community infrastructure development is treading a fine line and this relationship may be increasingly difficult to justify in the light of the prohibition of an employer-employee relationship between prisoners and the DCS, with reference to section 40(6) of the Correctional Services Act. This position leaves prisoners outside the protection offered to employees with reference to the Basic Conditions of Employment Act and the Labour Relations Act.

### 3.6 Special protection for children in custody

Children, including those imprisoned, enjoy the protection of a number of rights described in section 28 of the Constitution and linked to sections 12 and 35. As a general principle the best interests of the child are of paramount importance in every matter concerning a child. A full description of children’s rights will not be given here as this has been the subject of extensive research in recent years, and emphasis is placed on some critical rights issues. Importantly children may only be detained as a measure of last resort and then for the shortest possible period. Children are furthermore protected from maltreatment,

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<sup>25</sup> For example, the Commission on Safety and Abuse in America’s Prisons stated as a requirement that prisons must be “productive” (Gibbons and Katzenbach, 2006: 11).

<sup>26</sup> A five-year study at Lyon prison in France to assess the health conditions of prisoners, using the notion of health adopted by the World Health Organisation, found, among others, symptoms of the following (Gonin, 1993):

- The meaninglessness of time is disorienting, and 33% of prisoners were unable to concentrate.
- After one year of incarceration, 50% of prisoners could not control their memory adequately and 40% experienced sudden “mind voids”.
- Some 75% experienced dizziness that was sometimes described as a “menacing emptiness”.
- The feeling or experience of emptiness was linked to self-negation, with prisoners trying to make themselves invisible in an effort to avoid being under constant observation.
- Bodily functions and senses atrophied. For example, eyesight deteriorated as a result of the confined space and it took double the effort to focus (there is also no reason to look around).
- Prisoners’ sense of hearing was overdeveloped and they became hypersensitive to noise.
- Tactile senses tended to disappear in an apparent effort to deny the threatening environment in which prisoners found themselves.
- Many prisoners suffered from ulcers and fatigue.
- The suicide rate in prisons is six to seven times higher than outside.

neglect, abuse or degradation (Constitution, section 28[1][d]). They are also protected from exploitative labour practices and this protection is further enabled in the Correctional Services Act, as noted above. The rights that detention is a measure of last resort and for the shortest possible period of time, are not non-derogable rights, but that they must be detained separate from adults and under conditions that take account of the child's age, are (Constitution, section 28[1][1][g][i-ii]). Clarity on what such conditions are remains elusive, and neither the Correctional Services Act nor the Regulations to the Act provide comprehensive and detailed guidance in this regard (Sloth-Nielsen, 2004). In view of the above, more needs to be done at legislative and regulatory levels to ensure that children in prisons are indeed detained under conditions that take account of their age (Odongo and Gallinetti, 2005).

### 3.7 General rights of arrested, accused and detained persons

Section 35 of the Constitution describes the rights of arrested, accused and detained persons and section 35(2) extends a number of these rights to all sentenced prisoners. Of particular importance are the right: to be informed of the reasons for being detained; access to legal representation; to challenge the lawfulness of the detention (a non-derogable right); conditions of detention consonant with human dignity; and to communicate with and be visited by that person's spouse or partner, next of kin, religious counsellor, and a chosen medical practitioner. It is not within the scope of this paper to describe each of these in detail and others have provided adequate description in this regard (Schwikkard, 2005: 737-797). A review of recent case law indicates that in respect of prisoners the emphasis has been placed of the rights afforded in section 35(2)(e) and (f), relating to conditions of detention and access to medical care, among others. As noted above, the right to dignity is a founding value of the South African Constitution and in a number of cases the Courts have invoked this to support decisions in favour of prisoners.

This was well illustrated in *Stanfield v. Minister of Correctional Services and Others*<sup>27</sup> the Court had to consider the applicant's request to the Parole Board to be released on medical parole as he had been diagnosed with a terminal lung cancer and his life expectancy was extremely limited. In view of the provisions of section 79 of the Correctional Services Act, allowing prisoners in the final stages of a terminal illness to be released on medical parole to die "a dignified and consolatory death", the Court was astounded by the reluctance of the DCS to release the applicant:

To insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity. On the contrary, the overriding impression gained from the third respondent's attitude in this regard is that the applicant must lose his dignity before it is recognised and respected.<sup>28</sup>

A number of cases,<sup>29</sup> including *Stanfield*, have dealt with access to adequate medical treatment and noted the special duty that the state has to provide adequate medical treatment. In *B v. Minister of Correctional Services*, Brand J noted that prisoners are firstly dependent on the state to provide care as they are no position to seek alternative care, and furthermore, that especially in respect of HIV-positive prisoners, the state owed a higher duty of care due to the overall conditions in prisons and the increased risk of opportunistic infections (Schwikkard, 2005: 774).

The physical conditions of imprisonment were dealt with in *Strydom v. Minister of Correctional Services*<sup>30</sup> and focused on access to electricity, emphasising that access to electricity cannot be regarded as "a necessity of life" but that for prisoners spending long periods in their cells with little to provide stimulation, access to a television (for which electricity is required) becomes more than

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<sup>27</sup> 2003 JDR 0871 (C).

<sup>28</sup> Paragraph 124.

<sup>29</sup> In *B v. Minister of Correctional Services* 1997 (6) BCLR 789(C); *S v. Vanqa* 2000 (2) SACR 371 (Tk); *Van Biljon and Others v. Minister of Correctional Services* 1997 (4) SA 441 (C); *EN and Others v. The Government of South Africa and Others*, Durban High Court Case No. 4576/2006 (unreported).

<sup>30</sup> 1999 (3) BCLR 342 (W).

a comfort or a diversion; it can in fact make the difference between mental stability and derangement. The Court went further, stating that access to electricity in the prison context could materially affect prisoners' prospects of rehabilitation and denial of this amenity could result in prisoners being treated and punished in a cruel or degrading manner (Schwikkard, 2005: 775).

From the cases briefly dealt with here, it is evident that the courts have held progressive and liberal views in respect of prisoners' rights. The courts have also been willing to entertain the wider impact of the denial of a particular amenity, such as electricity and its link to rehabilitation. In the light of these positive outcomes for prisoners' rights, it is therefore somewhat surprising that there is in fact limited case law in recent years related to section 35(2) rights, especially in the light of the severely overcrowded conditions in some prisons in the country. It should also be noted that case law has focused on confirming basic rights and have not addressed the broader and constitutionally justifiable purposes of imprisonment as outlined in section 2 above, and more specifically with reference to section 36 of the Correctional Services Act.

### **3.8 Key issues in the rights requirement**

The rights afforded to prisoners in the Constitution and the Correctional Services Act are comprehensive, with the only immediate shortcoming being the criminalisation of torture. However, public opinion post-1994 has swung, in no small measure due to the high violent-crime rate and increasing public perceptions of being unsafe. Calls for the reinstatement of the death penalty remain, as do assertions that prisons are "five-star hotels". Perhaps of more concern are calls by the Portfolio Committee on Correctional Services to amend the so-called privileges of prisoners. Although these calls have not been much more specific than voicing frustration at prisoners lying idle in prison watching television, the message is as dangerous as it is vague when calling for measures that "make prisoners feel that they are in prison" (Portfolio Committee on Correctional Services, 1 September 2006).

Of more significance are the two attempts to limit prisoners' right to vote, and although both failed at the Constitutional Court, it was the Electoral Laws Amendment Act (34 of 2003) that signified the willingness of the legislature to limit the rights of prisoners. On the right to vote, Muntingh and Sloth-Nielsen conclude:

But it is equally critical to understand that the South African Constitutional Court has not, in fact, ruled out future legislative endeavors to disenfranchise prisoners. Indeed, were government to properly debate and motivate exclusionary provisions; carefully draft them taking due heed of the clues provided by the Court (e.g. exclude persons awaiting appeals); present them supported by detailed information about impact; and disenfranchise only targeted groups of inmates in order to link the limitation closely to the objective sought (even if that objective was necessarily abstract in nature), it is quite possible that future disenfranchising legislation could be found constitutional (Muntingh and Sloth-Nielsen, forthcoming).

A widening gap is emerging in the discourse between the statutory rights of prisoners, on the one hand, and, on the other, the social and political opinion on what rights prisoners should enjoy. In the "rhetoric about rights" (Lazarus, 2004: 15), it appears that the relative importance of rights are declining and that the invocation of rights is increasingly difficult. Public support for further limiting prisoners' rights and apparent parliamentary support for this is a threatening combination to building a prison system compatible with a constitutional democracy.

It should be asked what the relative importance is of prisoners' rights in framing, discussing and debating social policy, or the "rights rhetoric" (Lazarus, 2004: 16). Social policy can be driven by a number of concerns such as rights, managerialist concerns, or law and order objectives. In a constitutional democracy giving greater effect to rights and protecting citizens' rights should be the emphasis of social policy. In respect of prisoners in South Africa, this has been a fragmented discourse with often competing agendas. The Correctional Services Act provides a good example of this as it was passed by Parliament in 1998 but only promulgated in full in October 2004. Two-and-a-half years later, an amendment was tabled in Parliament proposing wide discretionary powers for the Minister in respect of sentence administration and proposing a substantive dilution of the powers of the Inspecting Judge of Prisons. It is thus cause for concern that prisoners' rights and the advancement of these rights through legislative and policy reform and the introduction of measures to give effect to their rights, appears to be, at best, just one of the drivers of strategy and implementation at the moment.



## 4. 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” (U4 Anti-Corruption Resource Centre). A government must therefore be able to, and in fact explain, how it executed its mandate. While 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 (Schacter, 2001: 1). 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.

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” (Schacter, 2001: 2). 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 (Schacter, 2001: 2). In the vertical accountability relationship, accountability to international mechanisms – for example, UN treaty bodies – are also included.

Effective accountability relies on three principles: transparency, answerability and controllability. Transparency will be discussed in more detail in section 6 below, and the emphasis in this section will be placed on answerability and controllability. Decision-makers must be able to justify their decisions and actions publicly in order to substantiate that they are reasonable, rational and within their mandate – they must therefore be answerable (U4 Anti-Corruption Resource Centre). Transparency and answerability will have little meaning if there are not mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions must therefore be able to exercise control over the institutions that they are overseeing (U4 Anti-Corruption Resource Centre). Failure to hold government and individuals accountable create the conditions for impunity to exist. In points 4.1 and 4.2 below, attention is paid to horizontal accountability with reference to governance and the treatment of prisoners.

### 4.1 Horizontal accountability and governance

The governance of the prison system and the treatment of prisoners are inextricably linked, but for analytical purposes the distinction is made as it relates to different oversight mandates.<sup>31</sup> On paper the horizontal accountability architecture in respect of the governance of the South African prison system is well developed and the DCS is accountable by means of its internal auditing and control procedures, the departmental investigative unit (aimed at investigating corruption), the Auditor-General, the Public Service Commission (PSC), the Department of Public Service and Administration (DPSA), the Standing Committee on Public Accounts (Scopa), and the Parliamentary Portfolio Committee on Correctional Services. There is little unusual or unique in this arrangement as it is similar for all government departments. These structures are there to hold the DCS accountable in respect of the budget, its strategic direction, management decisions and, to some extent, individual officials.

The history of the DCS post-1994 in respect of governance is a troubled one that ultimately led to the establishment of the Jali Commission in 2001, although there were very strong indications as early as 1996 that the state had lost control over the DCS (Portfolio Committee on Correctional Services, 14 March 2000). Despite Parliament being aware of serious allegations of corruption and criminal activities at the time, it failed to act. When the DPSA and PSC conducted investigations into the affairs of the DCS in 2000, and made numerous recommendations relating to overcrowding, corruption and human resources

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<sup>31</sup> Tapscott (2005: 3) describes the link aptly: “The notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected. This relates both to the manner in which offenders are treated in the prison system and the opportunities which they are afforded to re-orientate their lives towards a more constructive future in society.”

management, the Portfolio Committee did not hold the DCS accountable when it failed to implement these recommendations – a situation that the Jali Commission found utterly perplexing. From 2001–2 to 2005–6, the Auditor-General gave the DCS consecutive qualified audits (Public Service Commission, 2007: 44) and, despite strong rebukes from Scopa, little changed and the DCS was essentially allowed to continue with “business as usual”. There is good reason to believe that the larger political arena had much to do with the inaction or at least “ambiguous commitment” (Dodson and Jackson, 2004: 12) of the Portfolio Committee on Correctional Services at the time to hold the DCS accountable.<sup>32</sup>

A further factor that has undermined the potential effectiveness of the Portfolio Committee was a lack of knowledge by its members of how the DCS was being run, but, more importantly, what the committee’s function was in relation to the DCS (Portfolio Committee on Correctional Services, 19 April 2000). The list of issues discussed by the committee from 2000 to mid-2004 reflect a significant number of inputs from civil-society organisations and inputs by the DCS on technical innovations and new policies, but very few debates on holding the Department and its senior management accountable for the mess it found itself in at the time. Knowledge of the field and technical expertise evidently play an important role in providing oversight, without which the committee members had little basis for critically questioning what the Department was presenting to them. That the committee has been more active since 2004 is evident. It is also engaging a wider range of stakeholders and not only relying on presentations from the Department and other government institutions.<sup>33</sup> From June 2004 the Portfolio Committee became more vocal and has disagreed publicly with the department and the ministry on a number of occasions.<sup>34</sup>

At issue here is the integrity of parliamentary oversight: can the electorate trust Parliament to promote good governance and act decisively when good governance is at risk? Silence, aloofness and disinterest by the Portfolio Committee prior to 2004 contributed greatly to problems plaguing the Department. From the short description above on parliamentary oversight in respect of governance, the following principles to enhance democracy in the prison system can be identified. First, Parliament must be well informed and make efforts to ensure that it is well informed. This implies that Parliament must take proactive steps to find information and, if needed, make its own observations about what is happening at ground level in the prison system.<sup>35</sup> Related to this is the quality and extent of the DCS annual reports, an issue that has been raised by civil society on more than one occasion<sup>36</sup> and is now also raised by the Portfolio Committee in its budget report (Portfolio Committee on Correctional Services, 2007: 12). Secondly, while the DCS is the focus of its oversight, it cannot rely on information from the Department alone to inform its views and decisions. Hearing the views from governmental and non-governmental stakeholders is critical to performing its function effectively. Third, Parliament must communicate publicly regarding its views on the Department’s

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<sup>32</sup> With an Inkatha Freedom Party (IFP) minister at the helm from 1994 to 2004, successive ANC MPs as chairpersons of the Portfolio Committee, and commissioners aligned to the ruling party, against the backdrop of the Government of National Unity, politics were bound to play an important role in how Parliament would exercise its oversight function. The failure of Parliament to fulfil its role is perhaps best illustrated by the fact that, in the end, it was Minister Skosana of the IFP who must have conceded that the situation was out of control, that he was not receiving assistance from Parliament, and requested President Mbeki to appoint a judicial commission of inquiry.

<sup>33</sup> Between 1998 and 2003 the Portfolio Committee held on average of 15 meetings per year, but between 2004 and 2006 it held an average of 32 meetings per year. Committee minutes reflect that between 1998 and February 2004, the committee held no public hearings on any issue, and undertook one oversight visit to prisons (PMG minutes at <http://www.pmg.org.za/minutes.php?q=2&comid=4>). From 2004 to date the committee has held four public hearings and undertook more than 10 oversight visits to various prisons. The number of inputs from civil-society organisations and other government structures has also increased (for example, from the Special Investigations Unit, National Treasury, Human Rights Commission, Judicial Inspectorate of Prisons and the Jali Commission).

<sup>34</sup> Two recent examples are the release of the Jali Commission’s full report (*Sunday Times*, 22 October 2006) and the report on the escape of Ananias Mathe from C-Max Prison (*Die Burger*, 20 April 2007). Of a more substantive nature is the committee’s 2007 approval of the budget vote, where it approved the budget but made it clear that it would actively monitor particular issues. As of April 2007, the DCS has held monthly report-back sessions to the committee with regard to implementing the recommendations of the Auditor-General and the Jali Commission.

<sup>35</sup> Visits to places of detention have long been accepted by the UN Committee against Torture as well as the European Committee for the Prevention of Torture as an effective means to limit and prevent the mistreatment and torture of detainees. The value of the visits undertaken by the Portfolio Committee in recent years should therefore not be underestimated.

<sup>36</sup> See submissions by CSPRI on the Annual Report and the 2007–8 Budget Vote at <http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/publications/cspri-submissions/>.

performance. As Parliament represents the electorate, it must communicate with the electorate on its work through the media and various reports.<sup>37</sup> Fourth, Parliament needs to be engaged on current issues and events; it cannot be aloof to unfolding events in the prison system. Lastly, it appears that a more strategic and robust approach of the Portfolio Committee since 2004 has enhanced the accountability function and role of the committee leadership.

It is also necessary to reflect on the internal accountability measures of the DCS, and, more specifically, on its disciplinary system. Reading through the Jali Commission's full report, there is perhaps not one chapter that does not make reference explicitly or implicitly to the collapse of the Department's disciplinary system. While there were also other forces at work, this basic management tool was subverted and rendered useless. The Jali Commission concludes that the Department "failed in the very first steps [towards reaching its objectives] and that is to discipline those involved in corruption and those that were grossly negligent" (Jali Commission Report: 312). The commission found, among others, that the disciplinary procedures had not been adhered to; officials did not have the requisite capacity to conduct disciplinary processes in a fair and open manner; disciplinary processes were manipulated, undermined and frustrated by corrupt officials; and officials guilty of offences were never disciplined appropriately; the offenders were seldom punished (Van den Berg, 2007: 26).

When officials are not held accountable and disciplined for transgressions, it undermines in small and insidious ways the rule of law – it gives the message that "we are above the law". There is little more to say than that discipline must be enforced relentlessly, consistently and impartially by the managers of the department. The Jali Commission made extensive recommendations regarding the improvement of DCS disciplinary system and it is not necessary to repeat them here (Van den Berg, 2007).

While disciplining staff is the reactive measure to improve governance and management, the department has a duty to ensure that its staff is properly trained; that they understand their duties and that they receive feedback on their performance. The Jali Commission found evidence in numerous instances of officials not being trained in basic tasks such as proper record-keeping (Jali Commission Report, chapter 45). While staff training and performance appraisals may sound like basic management obligations, there is sufficient evidence to indicate that it is not yet occurring at the requisite levels.

## 4.2 Horizontal accountability and the treatment of prisoners

The treatment of prisoners needs to be appreciated at the level of daily operations in prisons and this is seldom reflected upon in the reporting of the DCS, as these reports are of a high-level strategic nature. There is, in fact, very little reporting available in the public domain, either as informal narrative or formal research, on "what is happening behind the prison walls" (Boin et al., 2005: 10).

The first level of horizontal accountability is the internal complaints and requests mechanism of the Department to which prisoners are entitled to have daily access.<sup>38</sup> By design it has to be accepted that this will not and cannot be an effective avenue for dealing with allegations of human rights violations. The Law Society of South Africa has described it as neither independent nor impartial, and the overall impression is that it is ineffective, discourages prisoners from making complaints, and there is seldom feedback on complaints lodged. It is also noted that when prisoners make complaints, they are in real fear of reprisals from warders and/or colluding prisoners (Law Society of South Africa, 2003: 6).

The Judicial Inspectorate of Prisons occupies a special position in the current oversight architecture, and its task is to "facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and conditions in prisons" (section 85[2]). The Inspecting Judge "inspects or arranges for the inspection of prisons in order to report on the

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<sup>37</sup> Reports by the Portfolio Committee following oversight visits are available to the public on the PMG website at <www.pmg.org.za>. Admittedly, the reports are made available through the Parliamentary Monitoring Group's website and are as such not a product of Parliament or specifically the Committee on Correctional Services.

<sup>38</sup> This is referred to as the "G365 Register".

treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons” (section 90).<sup>39</sup> Through the Independent Prison Visitor (IPV) system, large numbers of complaints (429 700 in 2005–6) are recorded annually and there is little doubt that the regular presence of IPVs in prisons promotes transparency. How effective the IPVs have been in addressing human rights violations is uncertain for the simple reason that the Inspecting Judge has not provided this level of detail in his annual reports. The Jali Commission raised a number of concerns regarding the Judicial Inspectorate, relating to its mandate and manner of working. Based on testimony from prisoners, the Jali Commission noted that there was widespread dissatisfaction among prisoners about the manner in which their complaints were being dealt with by IPVs.

The Jali Commission consequently raised three key concerns in respect of the Judicial Inspectorate. First, the Commission regarded the 2001 amendment of the Correctional Services Act, which removed the reporting on “corrupt and dishonest practices” from its mandate, as ill-conceived as it created an artificial separation between the treatment of prisoners, and corrupt and dishonest practices in prisons. Second, the Commission was concerned about the independence of the Judicial Inspectorate, at an institutional as well as a practical level. Budgetary dependence and the veto power of the commissioner over the appointment of special assistants undermined its independence institutionally. At a practical level, the Commission was concerned that the IPVs were too dependent on the cooperation and goodwill of DCS officials to resolve complaints, which compromised their watchdog function. Third, the Commission also found the mandate of the inspectorate limiting as it could only *inspect* and *report* on prisons and not on management areas or regions of the DCS, or even the whole department. While the Commission acknowledged the good work of the Inspectorate, it was looking for, and not finding, an expression of the controllability principle as the Inspectorate is not mandated to make binding decisions on the DCS.<sup>40</sup> Fourth, the Commission criticised the Inspectorate for not using its investigative powers and holding hearings, as it is mandated to do (section 90[5]).

However, even without changing its current mandate, the Judicial Inspectorate can conduct more focused inspections, on a per-prison basis and/or thematically. Given the large number of complaints recorded by the IPVs, it would be relatively easy to do a trend analysis and identify particular themes in complaints, or particularly problematic prisons. Since its establishment the Judicial Inspectorate has not published inspection reports of this nature, and has relied primarily on its annual reports to convey its findings to Parliament. Focused reports will assist greatly in bringing a deeper understanding to particular issues, such as access to health care or on particularly problematic prisons. Further legitimacy will also be given to such an approach if priority areas are identified with stakeholders such as the Portfolio Committee on Correctional Services and civil society. Such inspection reports will also serve as a baseline to monitor progress against and identify specific areas for improvement. There is also nothing in the current mandate of the Judicial Inspectorate preventing it from actively monitoring investigations conducted by SAPS, as well as disciplinary actions against staff members involving rights violations and to report on the outcomes to Parliament.

The next layer of institutions are the Chapter 9 institutions,<sup>41</sup> which have broad mandates that could include the treatment of prisoners and any of these institutions can deal with prisoner issues as it relates to their focus area. The South African Human Rights Commission (SAHRC) has a stronger association with the treatment of prisoners compared to the other Chapter 9 institutions. However, it appears that since the establishment of the Judicial Inspectorate of Prisons, all prisoner-related complaints received by the SAHRC are referred to the inspectorate (Dissel, 2003: 53).

The SAPS also serves an accountability function in respect of the treatment of prisoners as it is obliged to investigate all charges laid by prisoners, including charges laid against prison officials. The investigation of allegations involving criminal conduct in

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<sup>39</sup> Note that at the time of writing the Correctional Services Amendment Bill proposed to remove “corrupt and dishonest practices” from the mandate of the Inspecting Judge.

<sup>40</sup> There are a few exceptions in this regard, namely solitary confinement (section 25[1]), deaths in custody (section 15[2]), segregation (section 30[7]), use of mechanical restraints (section 31[5]), IPV access to prisons (section 93[4]), and prohibited publications (section 123[4]).

<sup>41</sup> These are the institutions created by the Constitution (in Chapter 9) designed to ensure transparency and accountability.

the treatment of prisoners is the domain of SAPS, an issue that the Jali Commission had strong opinions on and regarded the police as ineffective in investigating prisoners' complaints.<sup>42</sup>

Recent years have also seen increased use of litigation to address the treatment of prisoners in respect of access to services, the right to vote and parole. However, De Vos concluded that the use of litigation to address prisoners' rights had been of limited value, firstly due to prisoners' limited access to this recourse, and secondly, due to the lack of respect for the rule of law exhibited by the DCS (De Vos, 2004). Access to legal representation with a view to rights-focused litigation remains an avenue worth exploring, and the UN Committee against Torture emphasised this in its Concluding Remarks on South Africa's Initial Report (Committee against Torture, 2006: 5).

What appears to be lacking from the current horizontal accountability architecture insofar as the treatment of prisoners is concerned, is a mechanism to firstly *investigate* complaints regarding the treatment of prisoners, and secondly a mechanism to make *binding decisions* on the DCS. The Judicial Inspectorate has neither of these powers; it can only inspect and report, and make non-binding recommendations (with a few exceptions noted).

The need for investigative and adjudicatory capacities in respect of the treatment of prisoners has been raised in other jurisdictions as well. The Canadian Office for the Correctional Inspector (with a similar mandate to that of its South African counterpart) posed the question: "... whether some form of independent adjudication of the decisions affecting significant human rights and statutory entitlement will further the entrenchment of justice in the care, custody and reintegration of federal offenders" (Patrick, 2006: 287). The Jali Commission was also alive to this issue and compared the South African situation with the Netherlands, where the Complaints Committee is mandated to make binding decisions on the prison service (Jali Commission Report: 578). The Jali Commission went further to recommend the establishment of a prison ombudsman with full powers to investigate, although the commission placed the emphasis on the investigation of corruption and not human rights violations (Jali Commission Report: 604).

The overall impression is thus one of a weak investigative and adjudicatory regime pertaining to the treatment of prisoners. The proposals of the Jali Commission for either a new investigative agency and/or the expansion of the mandate of the Judicial Inspectorate are therefore not unwarranted. Such an agency would need to have the necessary expertise in the prisons sector and be mandated to actively investigate cases of human rights abuses with a view to make binding decisions and facilitate the criminal prosecution of perpetrators of rights violations.

As noted above, the state's accountability relationship to external institutions is described as vertical accountability and the focus in the discussion below will be placed on the electorate, the media, civil society and international treaty bodies.

### 4.3 Vertical accountability and the electorate

Democracy is based on the fact that the electorate can express its dissatisfaction with government's performance and vote it out of power in favour of another party. However, this is a fairly blunt instrument of control in the hands of the voter (Stanley, 2005: 72). That a voter's dissatisfaction will be interpreted in the intended way is doubtful, especially when a range of issues are on the election agenda. Political accountability exercised by the electorate is thus problematic for a number of reasons: it is not very discerning in pinpointing the source of the electorate's dissatisfaction; it does not articulate what the electorate would prefer; and it may be misinterpreted by political actors.

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<sup>42</sup> The Commission identified three obstacles:

- continuous interference by DCS staff in investigations;
- investigations not being done in confidence due to the presence of DCS officials and their knowledge of the prisoner and the complaint;
- intimidation of witnesses and victims by DCS officials (The Jali Commission Report: 424-425).

Prisoners form a very small constituency and their plight does not garner the same political support as, for example, access to education and health care. These are significant factors when assessing the utility of the electorate in supporting prison reform. Public perceptions about crime and violence may in fact fuel a tougher approach to law and order; one that may even indulge rights infringements against detained persons. It must therefore be conceded that the fate of prisoners is unlikely to be determined at the ballot box.

#### 4.4 Vertical accountability and the media

Most people will never see the inside of a prison or have a conversation with a prisoner regarding prison conditions, and are thus by and large dependent on media reporting to form opinions on prisons and prisoners. A closer look at media reporting in recent years reveals three stereotypes of prisoners. The first is that prisoners are dangerous criminals that deserve all possible punishments and that they are incorrigible – they are indeed the personification of South Africa’s crime problem. The second, more sympathetic, one is that prisoners are people suffering the injustices of the prison system, especially the appalling conditions due to overcrowding. This stereotype also includes references to individual prisoners who have been victimised in the prison system. The third stereotype is the rehabilitated prisoner – the one who has, despite everything, taken the opportunities that came his or her way and bettered him or herself. These stereotypes also reflect ambivalence on the part of the media in respect of prisoners’ rights and prison reform.

In addition to this stereotyping, reporting appears to be sporadic and scandal driven, with few investigative reports. For example, media reporting during the Jali Commission hearings was extensive, but reporting on the content, findings and recommendations of the Jali Commission was indeed scant.<sup>43</sup> The tabloid newspapers, which appear to be widely read by both DCS staff and prisoners, occasionally, feature prison-related stories, but these are dealt with in a superficial and once-off manner. Reporting on prisons remains incident driven and seldom relates to broader transformation challenges in the prison system. In what can be termed “atrophied reflection”, many individualised facts are presented (Filho, 2005: 3–4), but few reports transcend the immediate to deal with persistent problems critically in an in-depth manner.<sup>44</sup>

A number of issues can be highlighted to improve the role of the media in promoting a prison system compatible with a constitutional democracy. How the notions of prisons and prisoners are constructed and portrayed in the media is important, and it is therefore necessary to monitor media reporting in this regard in the same manner that some interest groups monitor reporting report on, for example, gender.<sup>45</sup> It is furthermore important to stimulate, support and reward investigative journalism on prison-related issues.<sup>46</sup> Moreover, it appears that the media can exercise an effective accountability function when interacting with horizontal accountability structures, and, more particularly, when exerting pressure on accountability agents with the powers of enforcement (Stanley, 2005: 87).

#### 4.5 Vertical accountability and civil society

For the purposes of this description, civil society is regarded as the range of institutions, placed on a continuum, between the state and the family. In the current prisons and rights discourse, this would typically refer to rights-focused NGOs, faith-based

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<sup>43</sup> Reporting on the release of the Jali Commission’s report focused more on the tension between the Portfolio Committee chairperson and the minister, and at one stage also drew Justice Jali into the fray.

<sup>44</sup> Reports on the recent (April 2007) deaths of three prisoners, allegedly at the hands of warders, at Krugersdorp prison did little more than state the basic facts and included extracts from the Minister of Correctional Services’ press release. There was indeed no mention of trends in unnatural deaths in prisons, the role of the Judicial Inspectorate in such cases, or the long history that the department has had with this problem, to name but a few issues.

<sup>45</sup> See Media Monitoring Project at <<http://www.mediamonitoring.org.za/Home/MonitoringMadeEasy/tabid/87/Default.asp>>.

<sup>46</sup> A recent bursary programme by the Open Society Foundation (SA) resulted in a number of print media articles on prison overcrowding (2006) and sentencing reform (2007). An investigation by journalists from *Die Burger* uncovered alleged irregularities in the awarding of tender contracts for security equipment and fences for which the journalists concerned received a national prize for investigative journalism.

organisations, service-directed NGOs, the private sector and organised labour. Interaction between these sectors in civil society is at present sporadic, if not non-existent, and driven by individual mandates and agendas. Organised labour and the private sector have not engaged in any meaningful way in the rights debate, and neither has the NGO sector focused on private sector interests, except for occasional research on privatisation. The destabilising role played by Popcru in the DCS is well-described by the Jali Commission, and the fact that this union has not been called to account for its destructive role continues to undermine perceptions of transparency and accountability in the prison system, placing a clear divide between Popcru and the rights-based organisations.

It should also be noted that even in the NGO sector (rights-based and services-orientated) there is not a strong sense of consensus on what the appropriate response is to the problems facing the prison system. Some propose and do use litigation, while others resist this approach and focus on a more supportive and engaging role in the prison system. Some organisations choose to ignore rights violations and continue to render therapeutic and developmental services to prisoners and their families. The overall impression is of a fragmented and segmented range of civil society structures associated with the prison system. This is not unique to the prison system and civil society involvement in the education sector exhibit similar features.

The immediate years post-1994 saw a fairly focused involvement of civil society in the prisons sector which led to the establishment of an inter-sectoral structure, the Transformation Forum on Correctional Services (TFCS) in early 1995 with representatives from NGOs, Parliament, the DCS and the Ministry. However, primarily due to the lack of participation from the then Minister of Correctional Services (Mzimela) and the lukewarm attitude of the DCS, the TFCS came to an end by September 1996 (Giffard, 1997: 33–34). In the years that followed civil society became by and large silent on what was happening in the prison system. With fewer organisations and fewer individuals<sup>47</sup> actively engaging in the debate on transformation of the DCS, and the Department resisting in-puts from civil society, the period 1996 to 2001 can indeed be regarded as the “dark middle ages”. The Jali Commission’s findings reflect on this period in detail and make numerous references to the collapse of discipline and a large part of Chapter 2 of the Commission’s final report is indeed entitled “Breakdown of law and order” (Jali Commission Report: 54–98). But perhaps the most telling statement on the relationship between civil society and the DCS is from the Jali Commission:

This is a sad state of affairs because it is this very attitude that discourages any input from people who might be experts in other areas, which would be of assistance to the Department. The Department cannot operate in isolation. It is not an island but an integral part of the South African society. The manner in which it conducts its affairs has a bearing on the lives of all South Africans, who expect the Department to consult and interact with experts and relevant stakeholders to ensure that correctional facilities in our country are competently run so that they compare with the best in the world (Jali Commission Report: 945).

The situation has changed somewhat since 2003 but there remain a limited number of civil society organisations engaging in research, lobbying and advocacy on prisons related issues. It was in particular the focus on prison overcrowding, largely driven by the previous Inspecting Judge of Prisons (Justice Fagan), that was able to attract broad-based government and non-governmental attention to the prison system. An example of this inter-sectoral cooperation is the Committee on Overcrowding, chaired by Justice Bertelsman and comprising of representatives from government and civil society. The discourse on overcrowding also stimulated more focused research on sentencing, and particularly on the minimum sentences legislation (Giffard and Muntingh, 2007; Redpath and O’Donovan, 2007). Access to healthcare by prisoners is also the source of on-going litigation by a group of prisoners (supported by the Aids Law Project and the Treatment Action Campaign) from Durban Westville Prison.<sup>48</sup> An attempt at litigating against prison overcrowding however failed to get out of the starting blocks in the Cape High Court.<sup>49</sup>

<sup>47</sup> Giffard asserts that during 1994–6 there were a number of former political prisoners who had a significant influence on the prisons discourse but after 1996 they had moved to other sectors and were thus lost to the debate on prison reform (Personal interview 28 May 2007).

<sup>48</sup> *EN and Others v. The Government of South Africa and Others* (Durban High Court, Case No. 4576/2006).

<sup>49</sup> *Christian Care Network and Another v. Republic of South Africa*.

Recent events warrant some observations in respect of the role of civil society in promoting a prison system compatible with a constitutional democracy. The fact that the TFCS failed in the mid-1990s to provide an acceptable forum for inter-sectoral dialogue, does not negate the need for such a forum. Whether the approach taken by the TFCS was the correct one is debateable, but the need for civil society, the DCS and other stakeholders to engage on substantive strategic policy issues, remains. For example, the manner in which the White Paper on Corrections in South Africa was scuttled through Parliament and the impact of inputs from civil society on the content of the White Paper remain indicative of the dialogue deficit between the DCS and civil society. Opportunities for structured, frank and public dialogue on the issues that shape and will shape South Africa's prison system need to be created.

While there are relatively few organisations focusing exclusively on prison issues, there are many civil-society organisations who share a constituency with those imprisoned and affected by imprisonment. Organisations focusing on women, children, education, unemployment, poverty, healthcare and so forth, need to be alive to the fact that at least part of their constituency is behind bars or are affected by imprisonment. The rights of women and children, or AIDS patients do not end at the prison gates and the involvement of the Treatment Action Campaign (TAC) in the Durban Westville case is a good example of a civil society organisation being inclusive of prisoners in its approach. There is thus a need for an expanding and potentially consensus-building discourse in civil society of prison reform.

Continued research and publications by civil society are needed to sustain and inform the debate on prison reform in South Africa. While there has been an increase in prison-focused research since 2004, substantive areas remain under-researched. The dissemination of reliable information is a key function of civil society and serves to counter the often emotive or poorly informed responses encountered in the current discourse.

## 4.6 Vertical accountability and the treaty bodies

Three binding international treaties are of particular significance to the prison system: the UN Convention on the Rights of the Child (CRC), UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (CAT), and the Optional Protocol to the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). In addition to these three international instruments, there is also a host of other instruments in the form of guidelines, minimum standards and principles.<sup>50</sup> A more recent mechanism is the Universal Periodic Review by the UN Human Rights Council, and South Africa will be reviewed in April 2008. The CRC and CAT require regular reporting from states parties and South Africa ratified the CRC in 1995 and CAT in 1998, but was late in reporting on both.<sup>51</sup> It is cause for concern that South Africa ratified these conventions but then failed to comply with the reporting requirements. The Committee on the Rights of the Child and the Committee against Torture were both appreciative in their concluding remarks on progress made to a peaceful transition in South Africa but did not hesitate to criticise the government for failing to meet key requirements of the two conventions (Committee on the Rights of the Child, 2000; Committee against Torture, 2006).

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<sup>50</sup> These are the Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Rules for the Protection of Juveniles Deprived of their Liberty; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Safeguards guaranteeing protection of the rights of those facing the death penalty; Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); Guidelines for Action on Children in the Criminal Justice System; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors; Declaration on the Protection of All Persons from Enforced Disappearance; and Basic Principles and Guidelines on the Right to a Remedy and Reparation.

<sup>51</sup> In the case of the CRC, the first report was due in 1998 and submitted in 2000. The next report was due in 2003 and is yet to be submitted. In the case of CAT, the first report was due in 1999 but an initial report covering the period 1999 to 2002 was submitted in 2005.



The third international instrument is OPCAT, which South Africa signed in September 2006. It is hoped that a stronger sense of commitment to the international community will be reflected in this case. OPCAT makes provision for two unique procedures in international law. Firstly, states parties are subject to unannounced visits and unrestricted access by the international Sub-Committee on the Prevention of Torture to any place of detention in the jurisdiction of signatories to the Protocol. Secondly, the Protocol obliges states parties to establish a National Preventive Mechanism (NPM) with essentially the same powers (Long and Boeglin Naumovic, 2004). To grant this level of unrestricted access to the detention places of sovereign states is indeed revolutionary. It should be emphasised that signing OPCAT is optional and therefore reflects a willingness of states parties to submit themselves to international, as well as domestic scrutiny insofar as places of detention are concerned.

As a readmitted member of the international community, South Africa entered into a number of international human rights treaties placing significant obligations on her. However, government's response has been rather lacklustre to date and it is concluded that the effect of international law has not been felt in any significant way in the prison system. The White Paper on Corrections refers to the requirements of international instruments in a number of instances (White Paper on Corrections in South Africa: 24, 38, 86 and 137), but it is apparent that the importance of CAT, for example, has not been grasped in the domestic prisons discourse (Muntingh and Fernandez, forthcoming).

Civil society has also shown more interest in using the accountability mechanisms of international law to improve the situation in prisons, as evidenced by the number of submissions and size of the NGO delegation to the UN Committee against Torture in 2006.<sup>52</sup> On the other hand, the Committee against Torture was not impressed with the quality and lateness of the South African report as it focused on the legislative framework and omitted to report on the actual measures that have been put in place, or not, to prevent and combat torture, cruel, inhuman and degrading treatment or punishment (Committee against Torture, 2006: 1). There appears to be limited awareness and knowledge of the international instruments and binding international law in the South African prison system. Government reports to treaty bodies should be regarded as key opportunities for civil society to provide additional and alternative information to the relevant monitoring structures. In order to make the CAT more accessible, the Committee against Torture has since 2004 separate and confidential sessions with NGOs prior to hearing the state party's report (Committee against Torture, 2004).<sup>53</sup> The Committee is also increasingly encouraging the submission of individual communiqués under Article 22 of the Convention. In effect, the Committee is being made more accessible to civil society and is de facto accepting that state party reports do not provide a full picture in respect of CAT obligations. At the same time, the Reporting Guidelines on CAT encourage governments and civil society dialogue in preparing country reports, something that did not happen in the case of South Africa's Initial Report.

Engaging the international treaty bodies and bringing the language of international law and obligations into the domestic discourse are important steps in expressing the global expansion of democratic values. If government is less enthusiastic about this, the responsibility rests with civil society to exert the necessary pressure to emphasise the importance of binding and international law. Engaging the international treaty bodies is, however, a relatively new avenue for South African civil society organisations and requires knowledge of international law and additional resources to attend treaty body monitoring committee meetings in some instances, although the latter is not an absolute requisite.

## 5. TRANSPARENCY

"The age of sobriety in sentencing had begun," was how Foucault described events at the beginning of nineteenth-century Western Europe with the disappearance of public floggings, torture and executions (Foucault, 1977: 14). The spectacle of

<sup>52</sup> Written and oral submissions were made by the Civil Society Prison Reform Initiative, Centre for the Study of Violence and Reconciliation, Children's Rights Project of the Community Law Centre, World Organisation against Torture (OMCT), Global Initiative to End All Corporal Punishment of Children, and Amnesty International <<http://www.ohchr.org/english/bodies/cat/cats37.htm>>.

<sup>53</sup> UN Committee against Torture (2004), summary record of the second part (public) of the 619th meeting, 12/08/2004. CAT/C/SR.619/Add.1, Geneva <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/21331962847fc9e5c1256ef5004c898b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/21331962847fc9e5c1256ef5004c898b?Opendocument)>.

punishment was removed from the public's gaze and hidden behind prison walls as imprisonment replaced the physical excesses on the body of the offender. The transformation in punishment and the development of the prison also resulted in certain costs for democracy, as punishment became an increasingly hidden part of the criminal justice system. The prison is one part of the criminal justice system that has been described as opaque to outsiders, run by bureaucrats and more concerned with efficiency and technicalities than with justice (Bibas, 2005: 2). South Africa's history also deepened the hidden and "opaque" nature of imprisonment – the military character of the prison system and the state security legislation under the previous regime made a transparent system impossible and deliberately kept it from public view. 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 (Jali Commission Report: 944–945).

In a constitutional democracy prisons must function in a transparent manner; in short, it means that officials in the prison system have a duty to act *visibly*, *predictably* and *understandably* (Transparency International). Nothing must be hidden from public scrutiny, especially when human rights and governance concerns are at stake. The actions of officials must be predictable as guided by policy, legislation, regulations, standing orders and good practice. Acknowledging that not all decisions can be prescribed in legislation and other regulatory documents, the actions and decisions of officials must be motivated, rational and justifiable. In sum, 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 (De Maria, 2001: 92).

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 (Gennaco, 2006: 197). Even close observers and oversight bodies often find it difficult to penetrate the fog of the prison system.<sup>54</sup>

Investigations into particular problems or incidents of human rights violations are areas of particular concern. As noted above, the Jali Commission encountered numerous problems in the course of its investigations, as they were often actively undermined and investigators threatened by officials (Van Den Berg, 2007). It is also apparent that the criminal investigations into prisoner deaths and escapes can take exceedingly long without clear answers being presented for the delays.<sup>55 56 57</sup> Even when investigations have been completed, perpetrators are often not prosecuted without the NPA having to present reasons for the decision not to prosecute (Muntingh and Fernandez, 2006). Reasons for the general lack of penetrative investigations have been given by neither the DCS, nor the Judicial Inspectorate. Incomplete investigations and half-hearted explanations only serve to create more tension and suspicion by widening the knowledge divide between the officials inside the system and those on the outside of the system (Bibas, 2005).

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<sup>54</sup> 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: 42–45). A second example is from a Parliamentary Portfolio 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.)

<sup>55</sup> More than two years later, seven deaths at Pollsmoor Prison that occurred during 2004 and 2005 remain unsatisfactorily explained (Portfolio Committee on Correctional Services, meeting on 29 May 2007, PMG minutes, <<http://www.pmg.org.za/viewminute.php?id=9069>>, author present at meeting.)

<sup>56</sup> Similarly, a female inmate, detained at Pollsmoor in solitary confinement, who set herself alight after being chained to the gate of her cell for two days without food, appear not to have been investigated by the police, and the acting head of prison received a written warning after a disciplinary hearing. (*Die Burger*, 2006).

<sup>57</sup> The escape of a prisoner, Annanias Mathe, from the C-Max Prison also remains unsatisfactorily explained as evidenced by the Portfolio Committee's reaction to the report submitted by the DCS (Portfolio Committee on Correctional Services, meeting on 6 March 2007, PMG Minutes, <<http://www.pmg.org.za/viewminute.php?id=8749>>; *Die Burger*, 2007).

Effective investigations into human rights violations are central to building a prison system that is transparent and accountable.<sup>58</sup> Investigations must clarify the facts and acknowledge state and individual responsibility. Furthermore, investigations must identify measures to prevent torture and ill-treatment of detainees, and must facilitate the prosecution and disciplining of perpetrators, as well as full reparation and redress of victims. Moreover, investigations need to be conducted in a prompt, open, inclusive and participatory manner by impartial, independent and competent authorities (Gennaco, 2006: 196–197). In order for investigations to enjoy legitimacy, they need to address the “concerns, perspectives, and contributions of outside agencies” (Gennaco, 2006: 196–197). The processes followed and results of investigations also need to be made public (Muntingh, 2007: 46–48; Gennaco, 2006: 198). Investigation reports also serve to educate officials and the public about what is happening inside prisons and thus promote transparency.<sup>59</sup>

A transparent prison system also requires regular and systematic reporting on key issues, such as assaults, deaths, solitary confinement, disciplinary action taken and progress on criminal investigations against officials (Portfolio Committee on Correctional Services, 5 June 2007). Apart from the focused investigations referred to above, it is important to have a regular “bird’s eye view” informed by experts in respect of key indicators of prison system performance and the measures applied to correct problems. Such a view should preferably not be provided by the Department itself but by an oversight structure, such as the Judicial Inspectorate of Prisons and the Portfolio Committee on Correctional Services. Frequent and regular reporting aimed at monitoring key issues need to be the basis for this approach. Reporting needs to reflect in particular on the measures put in place to address violations.<sup>60</sup>

Despite the more focused efforts in building transparency, such as improved investigations and strengthened oversight, as well as legislation facilitating access to information, there needs to be a culture of transparency and openness (Hammarberg, 2001: 140). Prison systems have a natural tendency to gravitate away from a culture of transparency and openness, perhaps because they have seldom experienced the benefits of openness and transparency. The investigations of the Jali Commission must have been a deeply unpleasant experience for many officials of the Department; there were very few immediate rewards for anybody. Whether the Jali Commission will prove to be the catharsis for the Department remains to be seen but it has nonetheless proven that there is more than enough reason to make the prison system more transparent.

## 7. CONCLUSION

The reform process of the South African prison system must at the outset accept that imprisonment has inherent risks to the rights of individuals and that the state has a constitutionally bound obligation to promote and protect the rights of citizens. The state has a further positive duty to create the opportunities, through services and the general prison administration, for offenders to attain their full human potential. It is indeed this duty that should guide law reform, policy development and the day-to-day administration of prisons. This does, however, necessitate a particular relationship between the state, government and the Constitution; one that at present seems to be oscillating between the extremes of rights-based law reform and regarding prisoners’ rights (and by implication the Bill of Rights) as encumbering government, or at least being a source of irritation by showing the failures of government to provide the necessary services derived from the Bill of Rights and the Correctional Services Act. There thus appear to be uncertainty in the role of the state and its relationship with society and also of its role in building democracy. The question is thus posed whether the state has defined a role for itself beyond class and organisational

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<sup>58</sup> *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading treatment or Punishment*, Recommended by General Assembly resolution 55/89 of 4 December 2000. See Principle 1.

<sup>59</sup> The public hearings of the Jali Commission attracted significant media attention and for the first time officials and prisoners were given a safe and legitimate forum of this stature to provide evidence on corruption, maladministration and rights violations in the prison system.

<sup>60</sup> Reporting on the measures taken to address human rights violations are of central importance in establishing a human rights regime in the prison system. For example, Article 19 of CAT expressly requires reporting on “the measures taken to give effect to [the state party’s] undertakings under this Convention”. This should be seen as distinct from creating a legislative framework aimed at promoting the protection of human rights, as noted by the Committee against Torture in its concluding remarks on South Africa’s initial report.

interests, one that is rooted in the Constitution and accepts the principles of a liberal democracy (Picard, 2005: 2). A prison system in a constitutional democracy must, above all, define its purpose as building democracy and advancing the rights of those entrusted to its care as a positive duty.

From the above discussion there emerge four challenges en route to creating a prison system in South Africa compatible with the values underpinning a constitutional democracy. These are the *condemnation* of prisoners as lesser citizens, *impunity* of the prison system and its officials, *opaqueness* of the prison system, and *ignorance* of what is effective and efficient in building a prison system advancing public safety. In essence, the task is to uphold the rights of prisoners by enforcing accountability, enhancing transparency and basing decisions on knowledge. This is indeed a formidable one and the following will propose priority measures towards this goal.

Compliance with the rights requirements is the first step to building a prison system compatible with a constitutional democracy and much depends on what is happening in the everyday interaction between prisoners and warders, but this is often far removed from the prescripts of the Constitution and legislation. The vision of the White Paper will remain only that, as long as prisoners are detained in inhumane conditions and they are victims of gross human rights violations. The existing subculture in the prison system undermines a rights-based ethos and changing the subculture of large organisations does not happen because policy or law has changed; it takes intensive and detailed efforts on the part of the leadership and management of organisations over a prolonged period. Human rights education and training of both staff and prisoners are central to building a prison system upholding the rights of prisoners. Achieving a prison system that will be more compatible with a constitutional democracy will require large-scale redefining of job functions and retraining of staff to ensure that they are not only aware of prisoners' rights, but that they are able, in their daily tasks, to promote and uphold such rights. Informing prisoners of their rights and responsibilities upon admission and continuous education in this regard are key measures to ensure that their vulnerability to violations is limited. The training of both staff and prisoners need to be continuous and sustained; it must be part of the core functions of the department and not an add-on dependent on external funding, as is often the case.

Of particular significance in the rights discussion is the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Criminalising torture by incorporating the CAT definition of torture into domestic law is required by CAT and is also a constitutional imperative. Following from this, it is necessary to incorporate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment into the various policies, regulations and orders of the DCS. The absolute prohibition of torture must be part of the day-to-day consciousness of officials working with prisoners.

The recent history of the prison system saw a culture of impunity flourishing, as described by the Jali Commission. Lack of accountability and half-hearted attempts at accountability have left prisoners vulnerable and the rule of law battered. Rights mean very little when perpetrators are not punished and there is indeed great urgency to strengthen accountability measures in respect of human rights violations against prisoners. In line with the objectives of the CAT, perpetrators of gross violations need to be investigated openly, criminally prosecuted and punished in a manner reflecting the gravity of the offence.

Since 2001 there has developed a greater sense of transparency in the prison system compared with the preceding five years, but challenges remain. A collective sense that "corrections are a societal responsibility" has indeed not been fostered and is not experienced by civil society stakeholders. The involvement of and cooperation with civil society is generally of an ad hoc and often strained nature. Symptomatic of this is that civil society organisations working inside prisons often exercise a measure of self-censure regarding rights violations fearing that they may be denied access to prisons and their clients if violations are reported. The bona fide access of civil society organisation to prisons must be guaranteed to ensure that rights violations are reported and investigated without fear of reprisal. There is a further need for regular, structured and formal dialogue between the DCS and civil-society organisations as a collective to address strategic issues of mutual concern. Transparency will furthermore be enhanced by the Judicial Inspectorate providing more detailed publicly available reports on challenges and achievements in the prison system, as well as using its powers to hold public hearings and publishing the findings and recommendations. Similarly, the findings of disciplinary and criminal investigations against officials need to be made publicly available by the DCS and the Judicial Inspectorate.

Current South African research on prisons, punishment and rehabilitation is limited and it is even more disconcerting that major legislative and policy changes were undertaken in recent years in this knowledge-deficit environment. There is a great need for large scale and well-supported research to establish “what works” in prisons, punishment and rehabilitation. Such research needs to be strategically aligned to the objectives of the DCS and provide scope for testing innovations, especially by civil-society organisations. Legislation and policy must be based on knowledge and not on a general common sense understanding of what appears to be best course of action, or even worse, what is regarded as what the public wants.

Prisons present a unique challenge to the constitutional democracy for the reasons outlined in the above. Despite these challenges, it is possible to have prisons that are compatible with the values of a constitutional democracy but, as was the case for South African society, this requires a fundamental rethink of what is expected of prisons in post-apartheid South Africa. Have the essential elements of imprisonment in South Africa changed? The answer to this question is not a resounding “yes” but rather one of conditionality and cautiousness. In order to transform the prison system to one compatible with a constitutional democracy, the best resource is the Constitution itself and the structures created to enable its expression. The question is whether these are being used effectively?

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