

CURB THE VENGEANCE

Laws on minimum sentencing and parole spell worsening prison conditions

Hannes Fagan, Inspecting Judge of Prisons

Since 1995, prison overcrowding has mainly been caused by the massive increase in the number of awaiting-trial prisoners. Attempts to reduce these numbers have met with some success. However these efforts are nullified by an increase in the number of sentenced prisoners. Legislation passed in 1997 providing for minimum sentences is now the main cause of overcrowding. The situation will be exacerbated by changes to the release policy as per sections 73 to 82 of the Correctional Services Act 111 of 1998 which came into effect on 1 October 2004.

Our prisons are grossly overcrowded. Currently 184,806 prisoners are crammed into cells designed to hold 114,747 – which means the prisons are 70,000 above capacity.¹ This leads to awful conditions in numerous prisons. Human rights deprivations are commonplace, and instead of functioning as rehabilitation centres, the overcrowding turns our prisons into institutions that promote crime.

Overcrowding is due to the huge prison population: four out of every 1,000 South Africans are in prison. When it comes to our use of incarceration, we are one of the worst countries in the world, and the worst in Africa.²

Less prisoners essential

Our immediate aim must be to reduce our total prison population from its current level of 184,806 prisoners to about 120,000. That will still keep us at almost double the world average, but will bring some relief.

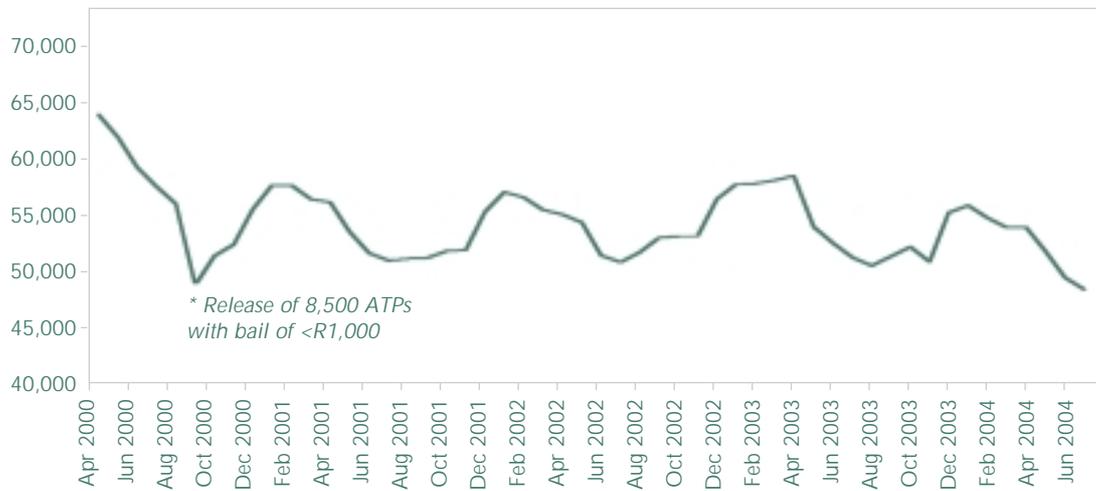
During the period 1995 to 2000 the growth in the number of prisoners was caused mainly by the

explosion in the number of awaiting-trial prisoners which increased from 24,265 in January 1995 to 63,964 in April 2000. The number awaiting trial has decreased since 2000 (Figure 1), owing to the concerted efforts of inter alia the police, prosecutors, magistrates, judges, legal aid lawyers, heads of prison and the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) with its diversion programmes.

The decline in the number of awaiting-trial prisoners from its level of 63,964 in 2000 to the latest figure of 48,345 in July 2004, has brought some relief in prison conditions. The praiseworthy efforts to reduce the number of awaiting-trial prisoners are however nullified by the increase in the sentenced prisoner population.

The growth in sentenced prisoners is being fuelled by a dramatic increase in the length of prison terms. The effects of the minimum sentence legislation are now the main contributor to the continued increase of prisoner numbers.

Figure 1: Number of awaiting trial prisoners, April 2000–July 2004



Source: DCS, 2004

Minimum sentences

The Criminal Law Amendment Act 105 of 1997 introduced minimum sentences of 5, 7, 10, 15, 20, 25 years and life for a range of offences including categories of theft, corruption, drug dealing, assault, rape and murder. It obliged a magistrate and judge to impose not less than the prescribed minimum sentence unless substantial and compelling circumstances justified a lesser sentence.

Because it was regarded as an emergency measure to combat high crime levels, the minimum sentence provisions ceased to have effect two years

after their commencement on 1 May 1998 unless extended by the president with the concurrence of parliament. The provisions have since been extended to 30 April 2005.

The effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences. It has resulted in a major shift in the length of prison terms as indicated in Figures 2 and 3. In January 1998 (prior to the implementation of minimum sentencing) only 24% of the sentenced prison population was serving a prison term of longer than ten years. This has since increased to 48%.

Figure 2: Length of prison sentence, 1998

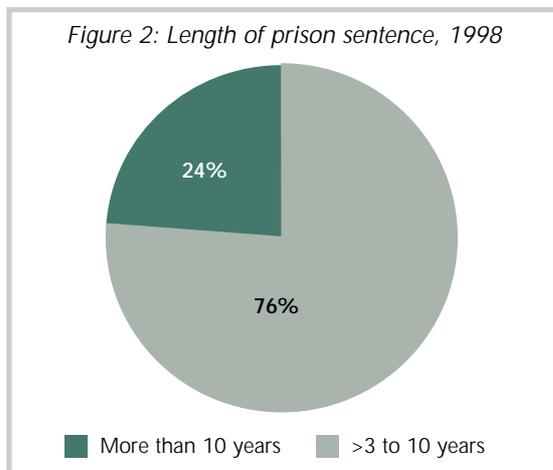
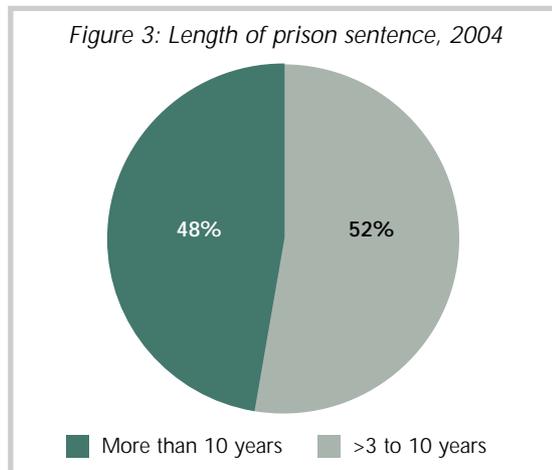


Figure 3: Length of prison sentence, 2004



Previous release policies

The Correctional Services Act 8 of 1959 provided that a prisoner could be placed on parole after serving half his sentence, less credits earned.³ The general rule was that prisoners could be released on parole after serving one third of their sentences.⁴ The decision would be made by the commissioner of correctional services on recommendation of a parole board.

In the case of prisoners serving life sentences, parole could be considered after they had served ten years.⁵ A parole board would report to the National Advisory Council who would make a recommendation to the minister of correctional services whether to place the prisoner on parole.⁶ In 1996/97 the policy changed and life prisoners, although they could still be released after 15 years, were generally considered for parole only after serving 20 years.

The Correctional Services Act 111 of 1998

The Correctional Services Act 111 of 1998 ('the Act') was passed by parliament in November 1998 but its date of commencement still had to be proclaimed (s138 of the Act). On 19 February 1999, sections 1, 83–95, 97, 103–130, 134–136 and 138 were put into operation. Sections 83 and 84 established the National Council for Correctional Services.⁷ Sections 85–94 established the Judicial Inspectorate. Sections 103–112 dealt with Joint Venture Prisons. Sections 113–129 dealt with offences.

Not retrospective

Section 136 provides that the release of prisoners already serving sentences shall not be affected by the Act, and would be dealt with in terms of the Correctional Services Act 8 of 1959 and the policy and guidelines formerly applied. Prisoners already serving life sentences are to be considered for parole after 20 years.

Sections 5 and 3 came into operation on 1 July 1999 and 25 February 2000 respectively. In 2001 the Act was amended. On 31 July 2004 sections 2, 4, 6–49, 96–102 and 131–133 came into operation. They set out in detail the manner in which prisoners should be held and treated. Further detail is

contained in the regulations which also took effect on 31 July 2004.

New release provisions

On 1 October 2004 the remaining sections of the Act, i.e. sections 50–82 came into operation. They deal with community corrections (ss50–72) and release from prison and placement under correctional supervision and on day parole and parole (ss73–82).

According to these provisions, a prisoner will have to serve half of his sentence before consideration for parole (s73(6)(a)). A life prisoner will have to serve 25 years and may then be granted parole by the court on the recommendation of the Correctional Supervision and Parole Board (ss73(6)(b)(iv), 75(1)(c), 78(1)).

A prisoner sentenced in terms of the minimum sentence legislation will have to serve four fifths of his sentence or 25 years before consideration for parole (s 73(6)(b)(v)).

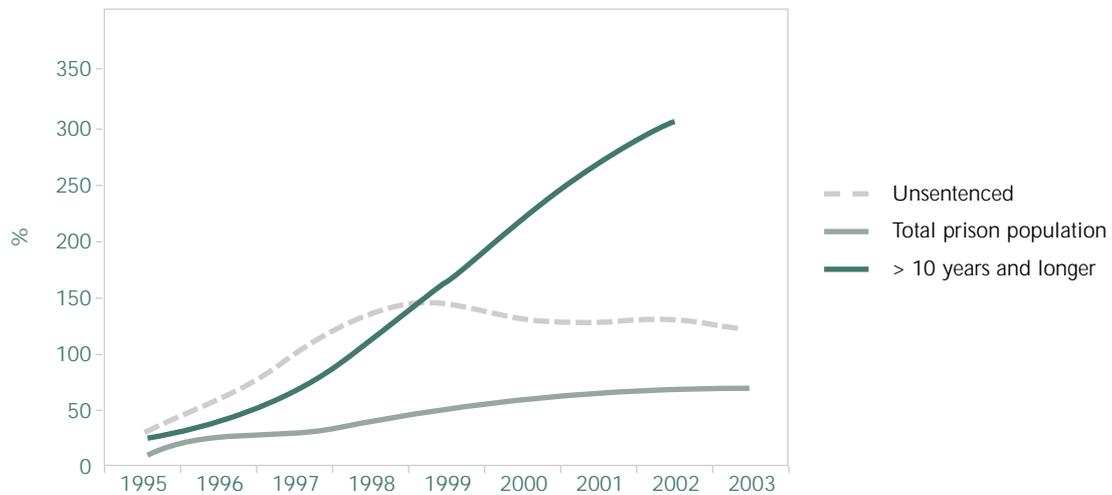
Accordingly, the earliest that parole can be considered has moved from one third to one half, and for many prisoners to four fifths of their sentences. For those serving life, the length of time before a parole hearing went up from ten to 20 years, and now 25 years. In addition, the court must now make the decision to grant parole rather than the National Council for Correctional Services.

An impossible state of overcrowding

Implementation of the new release provisions will lead to an even more intolerable overcrowding situation. The relevant sections of the Act mean that most prisoners will now need to serve half rather than a third of their sentences. For those convicted to life, the time that they must spend behind bars before being considered for parole has increased from ten to 20 and now 25 years. And by requiring the courts to decide on releases – which means further delays – these provisions will inevitably lead to many more prisoners in our already overcrowded prisons.

Already the trend for sentenced prisoners shows a worrying increase. The latest available figures

Figure 4: Growth in prison population



Source: DCS, 2004

(31 July 2004) indicate that there are 5,334 prisoners serving life sentences compared to an average of about 4,250 in 2003. Those serving terms of longer than ten years now stands at 46,743 compared to an average of about 35,250 in 2003 (Figure 4).

The vengeful attitude implied by these provisions is disturbing. The perception in 1997 that crime was out of control and that harsh punishments were called for to deter would-be offenders, led to the minimum sentence legislation and these provisions in the Act. With the incidence of crime considerably down and government's present emphasis on rehabilitation of offenders, several changes could ease prison overcrowding. These are outlined below.

Minimum sentence legislation should not be extended

The minimum sentence legislation should not be extended beyond 30 April 2005 for the following reasons:

- The legislation was brought in as a temporary measure because of the perception that crime was getting out of hand and the belief that the remedy lay in harsh sentencing. The latest figures produced by the South African Police Service (SAPS) indicate a considerable reduction

in crime and there is accordingly no justification for extending the legislation.

- The increase in the number of prisoners due to the minimum sentence legislation has made our prisons terribly overcrowded and the situation is worsening by the day. In numerous prisons the conditions of detention are truly awful and in clear breach of our Constitution and the requirements of Act 111 of 1998 and the regulations.
- The harsh sentences display a vengeful, uncaring and unforgiving attitude completely contrary to our famed national trait of understanding and forgiveness.
- There is no evidence that the increase in length of sentences has had a deterrent effect on would-be offenders. It is the certainty of detection and punishment, not the severity of the punishment that is the real deterrent.⁸
- Long sentences are not only failing to reduce crime, but are also causing more crime. The overcrowding precludes proper rehabilitation and turns prisons instead into places where criminality is nurtured.
- Long sentences also make reintegration back into the community more difficult as contact with families tends to be lost.
- Our huge prison population has turned us into one of the worst countries in the world when it

- comes to incarceration of offenders.
- Prescribing minimum sentences has the effect of generalising punishment instead of individualising it as is proper.
 - The effect of minimum sentences is to undermine the discretion of the courts and to create the perception that judges and magistrates lack the ability to arrive at appropriate sentences on their own.
 - The legislation is creating inordinate delays in the completion of cases including lengthy periods between conviction in regional courts and sentence in high courts.
 - It is preferable for the same court to conduct the trial and impose the sentence as it is already conversant with the facts concerning the offence which might affect sentence.
 - The cost of imprisoning more and more young men (60% of our prisoners are men under the age of 30) is tremendous. Such monies can surely be better spent on uplifting communities and preventing crime.

Amend Correctional Services Act 111 of 1998

The Act should be amended by:

- Deleting the provision for the serving of half the sentence before consideration for parole (preferably leaving it to the department of correctional services to regulate as before).
- Deleting the 25 year period before consideration for parole of those serving life imprisonment (preferably leaving it to the National Council for Correctional Services to regulate as before).
- Deleting the requirement that a court should consider parole for life prisoners and restoring the National Council for Correctional Services as the appropriate body to do so.
- Deleting the four fifths requirement for those sentenced in terms of the minimum sentence legislation.

Endnotes

- 1 Figures as at 31 July 2004 from the department of correctional services (DCS).
- 2 South Africa has 184,806 prisoners in a total population of 46.59m (mid 2004 estimates from Stats SA/SAIRR). See also International Centre for Prison Studies, World Prison Brief – Highest Prison Population Rates – September 2003.
- 3 Section 65(4)(a).

4 D Van Zyl Smit, *SA Prison Law and Practice*, 1992, p 362.

5 Ibid, p 379.

6 Section 65(5).

7 The minister appoints the National Council which consists of two judges, a regional magistrate, a director of public prosecutions, two members of DCS, a member of SAPS, a member of the department of social development, two persons with special knowledge of the correctional system and four or more representatives of the public.

8 "While punishment does have a deterrent effect, it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked." Prof D van Zyl Smit in *Justice gained? Crime and Crime Control in South Africa's Transition*, UCT Press, Cape Town, 2004, p 248.