

Alternatives to imprisonment in South Africa: A historical perspective, 1980's to present

Shanta Singh

School of Sociology and Social Studies

University of KwaZulu Natal¹

Samevatting

Sedert die afgelope twee dekades het Suid-Afrika alternatiewe metodes van straf en kriminele geregtigheid ondersoek. Alternatiewe vorme van straf vir gewone strawwe soos tronkstraf, boetes en opgeskorte vonnisse, is tot dusver op 'n klein skaal in Suid-Afrika gebruik. In Suid-Afrika duur die oorbevolking van gevangenes voort as een van die mees kwellende probleme vir die Departement van Korrektiewe Dienste. Aan die einde van Januarie 2007 het die Suid-Afrikaanse tronk 'n bevolking van 161 639 gevangenes gehuisves, terwyl hulle net in staat was van 'n kapasiteit om 46 376 gevangenes te akkommodeer. Die gevolg was 'n oorbevolking van 46 379 (139.46%) gevangenes. 'n Oorbevolking lei tot hindernisse in die proses van 'n implementering van rehabilitasieprogramme. Die gevolg is dat gevangenes ure lank in hul selle opgesluit is, wat 'n skadelike uitwerking op hulle geestelike en fisiese gesondheid het. Pogings om lewenstandaarde en tronkse gesondheidsdienste te verbeter, en om die verspreiding van MIV infeksie onder die medebewoners te verhoed, word daardeur verder bemoeilik. Terwyl minimale sukses behaal is die vermindering van getalle, bly die getal inkomende gevangenes ook steeds te veel. In hierdie artikel is die verskillende alternatiewe strafopsies wat beskikbaar is in die kriminele regstelsel in Suid-Afrika nagegaan en/of hersien. Strafdoeleindes, tronkstraf en tronk oorbevolking in die Suid Afrikaanse strafinrigtings is ook ondersoek.

Historical contextualization of alternatives to imprisonment

Historically the investigation of crime in South Africa, presented from the viewpoint of the Criminal Justice System, includes law enforcement officers,

¹ I would like to thank the National Research Foundation and the University of Kwa-Zulu Natal for their assistance.

the court system, the prison system and a variety of other organizations that deal with a range of issues from social justice concerns to rehabilitation. While the words 'crimes' and 'criminal' spontaneously conjures up images of behaviour that is injurious and unlawful, they are however subjective concepts that must take into account historical processes and contemporary realities. Legislative apparatuses have varied and undergone significant changes over centuries and often reflect the interests of controlling elite's at particular historical junctures. As political formations undergo adaptation and transformation under ever-changing global movements, laws on crime, criminal behaviour and punishment are equally subject to redefinition and change.

In South Africa severe overcrowding of prisons continues to be one of the most vexing concerns to the Department of Correctional Services. Since the early part of the past two decades, South Africa has been investigating alternative methods of punishment and criminal justice. Like many other countries in the world, (such as the United Kingdom and America), South Africa is faced with an ever-increasing number of offenders being held in overcrowded prisons.² At the end of January 2007 South African prisons had an in custody population of 161 639 with a capacity to accommodate 115 266 prisoners. This resulted in an overpopulation of 46 379 (139.46%) inmates. Overcrowding presents barriers to implementing rehabilitation programmes. The consequences are too many hours locked up in their cells, with harmful impact on inmates' mental and physical health. It is detrimental to efforts to improve prison living standards and prison health care services and to preventing the spread of HIV infection among inmates. While minimal success has been achieved in alleviating overcrowding, the number of incoming prisoners continues without respite. In 2007/2008, the prison population is projected to be 200 000 inmates.³ Despite the building of new prisons and renovations of existing prisons, overcrowding continues to place a heavy burden on prison infrastructure and the capacity of prison managers.

In Kwa-Zulu Natal, during February 2006, prisons had a capacity to accommodate 19 854 prisoners but in reality there was an in custody total

2 A Dissel, "The passing out parade: Demilitarisation of the Correctional Services", 1997 (available at: <http://www.sur.org.za/papers/paparade.htm>, as researched on 6 April 2004), p. 1.

3 W Roelf, "There are people here: South African prisoners" (available at: <http://prisonersoverseas.com/>, 3 January 2006 (as researched on 15 August 2006), p. 5.

of 26 359, which resulted in an overpopulation of 6 505 inmates.⁴ The present penal system with its horrendous prison population is not conducive to the improvement of the offender. Alternatives to imprisonment are constantly being sought of which the wider use of community-orientated punishments is just one example. The debate about alternatives to prison is a familiar one. The lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with negative implications, which results in:⁵

- Mass handling of individual needs;
- A reduction in rehabilitation programmes;
- The earlier release of criminal elements;
- Pressure on the Treasury for the supplementation and extension of personnel;
- An increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- Negative behavioural patterns in prisons; and
- An increasing burden on the Treasury for the support of the families and dependants of prisoners.

Many South African prisons are currently encroaching on fundamental rights of prisoners through overcrowding. From the increase of prison statistics over the past decade, the use of imprisonment has had little impact in terms of reducing or controlling crime. As opposed to imprisonment, community-based corrections, under which a person resides in his own community and maintains normal social relationships while under the control and guidance of a probation officer, has access to rehabilitative resources and services is considered a more efficient, economic, and humane move towards the treatment of the offender. Alternative methods of justice, for example, compensation and restitution, have been attempted through the formal justice system. However, new systems are being developed which aim to keep offenders out of the criminal justice system, looking instead to the community to resolve the problems.⁶

Innovative programs utilising community approaches to corrections as alternatives to incarceration and as a means of facilitating reintegration of

4 Department of Correctional Services, *Statistics on Prison Population, 2006* (available at <http://www.dcs.pwv.gov.za> as researched on 20 July 2006), p. 1.

5 Department of Correctional Services, *White paper on corrections in South Africa* (Pretoria, Government Printers, 1991), p. 8.

6 A Dissel, "The passing out parade: Demilitarisation of the Correctional Services", 1997 (available at: <http://www.sur.org.za/papers/paparade.htm>, as researched on 6 April 2004), p. 1.

the offender back into the community following release from an institution, can be more successful and less costly to society. In essence what is being advocated is a reduction of criminal justice processing for those offenders, who could probably be treated as well, if not better, in ways less costly to the state, with fewer negative implications; thus lightening the load for the criminal justice system and hence reducing the overcrowding in corrections.

Alternative sanctions include many different initiatives, such as victim-offender reconciliation programmes, restitution and compensation, day fines, community service, electronic monitoring, intensive supervision programmes and boot camps. These initiatives are not cheaper options of punishment because they require community involvement. On the contrary, such initiatives need a high number of trained personnel, as well as established administrative departments.⁷

Historical development of Community Service

Alternative forms of punishment to the usual penalties such as imprisonment, fines and suspended sentences, have up until now been used on a small scale in South Africa. Since the beginning of the eighties a start has been made in South Africa to investigate community-based forms of punishment and placing these alternative penalty options on the Statute Book.⁸ Community Service Orders (CSO) as a sentencing option was initiated at the Cape Town branch of the National Institute of Crime Prevention and Reintegration of Offenders (NICRO), a community based organisation, in 1980. A CSO is an order of a court that punishes offenders in the community. The court may order an offender to perform a specified number of hours of unpaid work for the benefit of the community instead of sentencing them to a term of imprisonment.⁹ Prior to that, the types of alternative sentences (i.e. sentences other than imprisonment) available to the courts were very restricted. Research

7 Institute for Security Studies (ISS), "The problem of prisons: Correcting corrections, prospects for South Africa's prisons", 29 October 1998 (available at: <http://www.iss.co.za/Pubs/Monographs/No 29/Prison.html>, as researched on 14 January 2003), p. 3.

8 Department of Correctional Services, *White paper on corrections...*, Pretoria, p. 21.

9 RM Ntuli & SV Dlula, "Enhancement of community-based alternatives to incarceration at the sentencing stage of the Criminal Justice process 121 International training course", reports of the course, *Resource Material Series No. 61*, Group 2. [n.d.], p. 328.

conducted on more than 1 400 cases was assessed by NICRO, Cape Town for CSO between 1980 and 1994. It is asserted that¹⁰:

South African prisons have been plagued by overcrowding for many years and this problem has not been adequately addressed. Community Service Orders was introduced as a sentencing option to firstly, in some way alleviate the pressures on the already overcrowded prisons and secondly, present magistrates with another sentencing option. Magistrates are continuously frustrated with the limited sentencing options available to them, although it must be said that the relatively recent introduction of correctional supervision has made an invaluable contribution to sentencing in South Africa.

In South Africa, NICRO, and other appropriate organisations, are in charge of the administration and execution of the CSO. The underlying principle of a CSO is to punish the offender in the community where the offence was committed, away from the prison. This enables the offender to make some compensation to the community and furthers the concept of community responsibility to offenders by being involved with correctional programmes.¹¹ A CSO can benefit the community because some form of reimbursement is paid by the offender, offenders benefit because they are given an opportunity to rejoin their communities as law-abiding and responsible members, the courts benefit because sentencing alternatives are provided and offenders sentenced to community service orders may be individually placed where their skills and interests can be maximised for community benefit.¹² A community service order can be a valuable alternative in cases where a monetary penalty such as a fine, restitution or compensation order is not practical due to the limited income of the offender.

Research carried out by Muntingh found that of a sample that was traced for re-offending, just below 26 per cent were convicted of at least one offence after they were sentenced to render community service. The “survival time” immediately after they were sentenced to perform community service was in the order of 30 months, which is substantially longer than the “survival time” for further convictions. This indicated that the rate of recidivism was reduced by the implementation of community service.¹³

10 L Muntingh, *Community service orders: An evaluation of cases supervised in Cape Town between 1983 and 1994* (Pretoria, HSRC, 1996), p. 1.

11 RM Ntuli & SV Dlula, Enhancement of community-based alternatives..., *Resource Material Series No. 61*, p. 260.

12 A Dissel & M Mnyani, “Sentencing options in South Africa”, 1995 (available at: file//A:\\Sentencing Options. htm, as researched on 29 June 2001), p. 6.

13 L Muntingh, *Community service orders...*, p. 49.

In 1983 the Interdepartmental Working on community service was appointed to investigate community service as an alternative sentencing option in South African Criminal Law and to institute CSO as a meaningful and viable sentencing option. The Criminal Procedure Act 51 of 1977 was amended in 1986 to establish CSO as a viable sentencing option. Section 297 (1)(a)(cc) of the Criminal Procedure Amendment Act No. 33 of 1986 provided clear guidelines regarding community service. The most essential guiding principles are:

- The server must be older than 15 years of age.
- A minimum of 50 hours of service should be performed.
- The server and the placement should be informed in writing about their respective duties and obligations.
- It is a criminal offence for the server to report for service whilst under the influence of drugs or alcohol.
- It is a criminal offence for somebody else to pretend to be a person who has been sentenced to perform community service.
- Damages resulting from the performance of community service can be claimed from the state.

Although community service sentences had increased they were still not being appropriately utilised. This could be ascribed to a lack of community involvement and suitable placement bodies and possibly to the fact that it was still a new sentencing option with which presiding officers were not entirely familiar. Due to the developments on the Krugel report regarding community service sentences, the question of further forms of punishment such as correctional supervision and supervision came to the fore.¹⁴

The purpose of imprisonment

Imprisonment represents the last resort for a criminal justice system that has exhausted all other alternatives. Although a first-time offender may be sent to prison for a serious offence, the majority of prison inmates have had previous experience with the criminal justice system.¹⁵ Some offenders have been afforded a 'second chance' through probation; others have served prior time. Whatever the offender's prior experience, it was obviously unsuccessful

¹⁴ Department of Correctional Services, *White paper on corrections...*, Pretoria, p. 21.

¹⁵ JB Stinchcomb, & VB Fox, *Introduction to corrections* (New Jersey ,Prentice-Hall, 1999), p. 217.

in changing long-term behaviour leaving the prison to attempt to accomplish what other sanctions failed to achieve. The philosophies behind punishment and imprisonment have changed over time, and different societies have varying conceptions, not only of what is proper punishment, but also what is an adequate prison.¹⁶ Goffman in Abadinsky refer to the prison as a 'total institution':

A place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.

These institutions have a penchant to mould persons into compliant and often shapeless forms to maintain discipline and a sound working order, or for less utilitarian reasons. The prison provides a tedious uniformity that leaves little room for self-assertion and decision-making, the requisites for living in the free community.¹⁷

The purposes of imprisonment are said to be mainly threefold:¹⁸

- To punish the offender.
- To prevent further crime.
- To rehabilitate the prisoner.

The Correctional Services Act, Act 8 of 1959 refers to the key functions, which relate directly to the purposes of imprisonment. Sections 2 (2) (a) and (b) provide that the Department shall:

- ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed there from;
- as far as practicable, to apply such treatment to convicted prisoners, as may lead to their reformation and rehabilitation and to train them in habits of industry and labour.

By the implementation of imprisonment, society is 'protected' from these offenders to some degree and for a specific period. Eventually the offender is released into society, and has to be reintegrated into society as a law-abiding citizen. The White Paper on the policy of the Department of Correctional Services in a new South Africa (1994), states that the goal of correctional services is to provide facilities, opportunities, services and conditions of

16 WB Sanders, *Criminology* (Westley Publishing Company, 1983), p. 430.

17 H Abadinsky, *Probation and parole: Theory and practice* (New Jersey, Prentice-Hall, 1997), p. 202.

18 SS Terblanche, *The guide to sentencing in South Africa* (Durban, Butterworth, 1999), p. 240.

incarceration that would be conducive to the rehabilitation and improvement of offenders. Unfortunately, due to the overcrowding problem, the reformation of the offender is hampered by the lack of appropriate facilities.

The formulation of the purpose of imprisonment facilitates the orientation towards the primary ideas of prison legislation and at the same time contains standards for the exercise of discretion by prison officials and for the judicial control of administrative decisions. Penologists, criminologists and sociologists, have debated the purposes of punishment extensively. There is no doubt that sentencing officers often impose imprisonment intending it to be a retributive punishment and that the persons serving it perceive it as punitive. However, the purpose of the imposition of the sentence of imprisonment cannot simply be regarded as a guide to how the sentence should be implemented.¹⁹

Penal objectives and imprisonment

The views of the public regarding the appropriate response to crime form the foundation for identifying the purpose of corrections. There is a great diversity of viewpoints over what should be done with law violators that it is impossible to identify any one mission or goal of corrections. At different times, correction has been charged with fulfilling society's demand for retribution, deterrence, incapacitation, rehabilitation, and reintegration.²⁰

The concept 'prisoners rights' was not often spoken of in the past as prisoners under the oppressive apartheid system were subjected to gross violations of human rights such as, hard labour for both common and political prisoners.²¹ The then perceptions about prisoners were based not on rehabilitation but on punishment to offenders who have contravened the law and deserve to be objects of ill treatment. In addition treatment of convicted persons to imprisonment regardless of the sentence duration or length implies that the type of treatment prisoners get in prison must be in such a way that it creates in such prisoners the will to be law-abiding and have self supporting lives after their release. If the treatment of convict's remains within human rights context as intended the outcomes should be twofold, namely; the establishment of prisoners' self respect and the development of the sense of accountability and

19 D van Zyl Smit, *South African prison law and practice* (Durban, Butterworths, 1992), p. 103.

20 JB Stinchcomb, & VB Fox, *Introduction to corrections*, p. 45.

21 LR Morodi, "The Constitutional rights of prisoners within South Africa", University of South Africa, 2003 (available at: [120](http://loww.unisa.ac.za/default.asp?(md=view as researched on 15 August 2003), p. 1.</p></div><div data-bbox=)

responsibility towards the broader society they harmed.²²

Increasing attention is being given to the personality and background of the criminal, rather than to the mere form of the crime. Although the idea of punishing particular crimes with a view to deterrence is still important, and although the concept of repairing injuries to the communal sense of justice cannot be ignored, punishment in the present era is directed towards the criminal himself; towards improving him and taking care of his future (rehabilitation), to a much greater extent than in the past. However, under existing conditions of overcrowding, rehabilitation is a difficult, if not impossible, aim to achieve.

The search for alternatives to imprisonment

In South Africa, correctional institutions are accommodating many more prisoners than their optimal capacity. Correctional services are supposed to promote a good ethic and provide prisoners with the skills necessary to return to society. However under the current conditions of overcrowding, an effective correctional service cannot be expected. Due to the adverse consequences related to imprisonment, both to the offender and society and whether the objectives of imprisonment can be realised, the implementation of alternatives is of paramount importance.

A community-based correction recognizes the importance of working with the offender within his home community, or near it where his ties with family and friends can be used to advantage in his rehabilitation. Community-service, as an alternative to imprisonment is an example of a non-custodial or community-orientated type of punishment.²³

In many cases, even alternative sentences that avoid incarceration initially may only set up offenders to still longer sentences in the future if they fail to, among other objectives, address the offenders' criminogenic behaviours. Klein states that if it is not absolutely necessary to safeguard the community, specific victim or vindicate social norms, long-term incarceration is extremely wasteful of precious state resources. Although many may take momentary pleasure when a judge pronounces a long sentence against an offender who has done something odious, their pleasure might be dulled if the judge also

²² JW Palmer, *Constitutional rights of prisoners*, p. 825.

²³ CH Cilliers & J Nesor, "Penology: Study guide for PNL100-C" (Pretoria, UNISA, 1992), p. 21.

spelled out the consequences of that same sentence. In order to sentence an offender to 30 years for being a habitual thief (or third-time offender), the state will have to deny 30 poor young men and women tuition at the state university. Thus the cost of incarceration is tremendous.²⁴

Community corrections

The post-1994 Department of Correctional Services inherited a prison system that was filled to capacity with inmates. Overcrowding in prisons represents a real threat to the safety and security of both the prison and the community. One of the ways in which the Department sought to resolve the problem of overcrowding in prisons and thus increase safety and security in prisons was to introduce the concept of community corrections.²⁵

Community corrections are a sentencing style that represents a movement away from traditional confinement options and an increased dependence upon correctional resources that are available in the community. It is the use of a range of court-ordered programmatic sanctions permitting convicted offenders to remain in the community under conditional supervision as an alternative to active prison sentences. Community corrections include a wide variety of sentencing options such as probation, parole and electronic monitoring.²⁶ The aim of community correction programmes implemented by the Department of Correctional Services, is to exercise supervision and control over offenders and persons who have been sentenced to or placed under correctional and parole supervision in the community, the two basic alternatives to incarceration. These alternatives fall under the umbrella of community corrections.

Cost implications of community corrections

The move to implement more community-based corrections will in due course reduce the need for maximum-security institutions. The majority of the prison population can be rehabilitated in less restrictive penal institutions

24 A Klein, *Alternative sentencing, intermediate sanctions and probation* (Cincinnati, Anderson Publishing Co, 1997), pp. 140-141.

25 Department of Correctional Services, *White paper on corrections...*, Pretoria, p. 12.

26 F Schmallegger, *Criminal justice today: An introduction text for the 21st Century* (New Jersey, Prentice-Hall, 1997), p. 403.

or under supervision in the community. A small number of facilities will be required for those offenders considered being dangerous and least responsive to correctional treatment. In South Africa, community corrections as a community-based alternative are more cost-effective than incarceration.²⁷ The cost of keeping an adult offender in a penal institution is excessive. The cost of incarceration at the end of January 2007 was estimated at R123.37 per day.²⁸ Not only is there loss of earning by the inmate, but the cost to taxpayers if his family goes on support and the loss of taxes he would pay contributes to the total cost of incarceration in a penal institution.

The purpose of community-based alternatives

There are many forms of community-based alternatives to incarceration, for example, probation, parole, correctional supervision, etc. The aspect that they all have in common however, is a belief that prison is not the best way to deal with many offenders, especially those who pose a low risk of re-offending. There are various purposes of community-based alternatives among which are:²⁹

- To reduce overcrowding in prisons and prevent escalation of detention cost;
- To ensure public safety and security through effective supervision and control over offenders who serve their sentences in the community;
- To prevent or reduce offender stigmatisation;
- To enhance rehabilitation and reintegration of offenders into the community in order to strengthen their ability to live peacefully with others in the community setting;
- To permit the offender to contribute towards his or her family in particular and to society by working instead of being confined in prison;
- To avoid an escalation in deviant behaviour when new offenders are mixed with hardened criminals; and
- To monitor and supervise offenders in order to ensure compliance with court-ordered conditions and programme requirements.

27 JJ Naser, *Pentitentiary penology* (Lexicon Publishers, 1993), p. 432.

28 Department of Correctional Services, *Incarceration Levels on 31 July 2007* (available at <http://www.dcs.pwv.gov.za/webstatistics> as researched on 15 August 2007), p. 1.

29 RM Ntuli & SV Dlula, "Enhancement of Community-based...", *Resource Material Series No. 61*, p. 324.

Is community service sentencing a punishment?

A pertinent question is whether a community service sentence can be considered to be a punishment.³⁰ Generally, criminal justice theory clearly recognises four recognized goals: retribution, incapacitation, deterrence and rehabilitation. Sentences to carry out community service are subject to the fundamental philosophy of just punishment.

Community service sentences and retribution

Retribution is an indispensable element in sentencing and sensible community service can do justice to this. One of the basic doctrines of retribution is that this justification of punishment brings about the reestablishment of the imbalance resulting from the violation of a law. This retributive objective could be accomplished by the implementation of community service.³¹ Community sentence should be used in such a manner so as to include justifiable penance: for example, a person who dumps rubbish in an unauthorised place may be sentenced to help remove rubbish, or a person who causes the injury of another human being while driving under the influence of alcohol may be asked to perform community work at an outpatients section of a hospital. An important consideration to be noted is that these community sentences should relate to the nature and seriousness of the crime. The suffering imposed on the offender by the sentence should not be out of proportion to the suffering caused by the crime.

Community service and the protection of the community

When a crime is committed and a sentence is imposed, the community is entitled to demand that its interests be considered and that it be protected by punishment. The question that arises is whether the community is not being exposed to needless danger if a community service sentence allows the offender to remain in the community? Section 297(1) (a) of the Criminal Procedure Act 51 of 1977, provides for community service as a condition of imposing a suspended sentence. The proverbial sword is thus suspended over the offender's

30 CH Cilliers & J Nesor, "Penology study guide for PNL100-C", UKZN, p. 5.

31 Krugel Working Group, "Ondersoek na gemeenskapsdiens as alternatiewe beskikkingsmoontlikheid by vonnisoplegging in die Suid-Afrikaanse Straffregpleging" (Unpublished report of the Inter-departmental Working Group on Community Service, 30 Nov 1984), p. 32.

head, and this, together with the fact that a community service is a sentence, which is accompanied by effective supervision, provides the community with a reasonable degree of protection. An important part of the system is proper selection of offenders for community service before sentencing. Thus if an offender does not comply with conditions of community service, referral back to the courts is an alternative.³²

As far back as 1976 the Viljoen Commission offered the opinion that compensation could be successfully used in cases of loss of means (theft) as in cases of pain and suffering (assault). A sentence of this nature not only answers the feeling of retribution in the offenders and the community but also serves as a rehabilitory, deterrent and preventive purpose.³³ If it is within the means of the offender an order for compensation in these cases may provide far greater satisfaction than an order for the offender to pay a monetary figure in the form of a fine to the State.³⁴

Community service and deterrence

In this instance the punishment (as an unpleasant consequence of or retribution for the crime) is executed in the community (the community service is related to the crime and to the sector of the community within which the crime was committed), and should thus have a definite deterrent effect on the offender as well as on the potential offender.³⁵ If the offender is expected to perform community service in the area, which he resides, the humiliation of this may be so profound that the offender refrains from further crime. Thus the community in which the crime occurred must figure prominently in the community sentencing.³⁶

Community service and rehabilitation

The test of rehabilitation can be found in the successful reintegration of the offender in the community. Community service sentences do not only indicate

32 J Nesor & CH Cilliers, "Penology study guide for PNL 304-N", UKZN pp. 6-8.

33 Viljoen Commission, *Commission of inquiry into penal system of the Republic of South Africa*, RP78 (Pretoria, Government Printer, 1976), p. 110.

34 CH Cilliers & J Nesor, "Penology study guide for PNL 100-C", UKZN p. 263.

35 J Nesor & CH Cilliers, "Penology study guide for PNL 304-N", UKZN p. 7.

36 A Klein, *Alternative sentencing, intermediate sanctions ...*, p.145.

prejudiced absorption with the problem's of the offender, but also takes into contemplation the crime committed and the interests of the community. The fact that the offender's positive assistance is necessary is in itself therapeutic, while positive community service can furthermore contribute to his sense of worth. Of paramount importance is that the nature of community service performed must be of assistance to the offender and contribute to the restoration of the interests of the community if the commission of the crime negatively affects the community.³⁷

Official alternative sentences in the reduction of overcrowding

Imprisonment should be imposed for severe crimes, for those criminals who offend regularly and are not deterred by other forms of punishment. It can be imposed for most crimes, but by and large those crimes should be of a serious nature. In practice, imprisonment is less ideal than it is often made out to be. Due to the fact that imprisonment is such a stalwart, other sentences have widely become known as alternatives to imprisonment. These alternatives are, of course, clearly punishment in their own right and exist independently of imprisonment.³⁸

Over the past two decades, community-based alternatives have come to imply excessive leniency-‘coddling criminals’, ‘wrist slapping’, ‘being soft on crime’; quite the opposite of the public’s demands for ‘just deserts.’ In fact, programs that are used to be called ‘alternatives to incarceration’ are now labelled ‘intermediate sanctions or punishments,’ presumably because society does not interpret ‘alternatives to incarceration’ as sufficiently punitive. Community-based approaches assume greater significance in achieving the goals of the justice system. This does not mean that community corrections are a panacea for solving the crime problem. Even if a community-based approach does not do anything to improve offenders, at least it is not doing anything to worsen them. It is highly unlikely that the same could be said of incarceration.³⁹ The spending of years in confined extremely small quarters, in a setting dominated by a toilet and possibly criminally aggressive cell-mates, can hardly be considered conducive to encourage socially acceptable

37 J Nesor & CH Cilliers, “Penology study guide for PNL 304-N”, UKZN p. 6.

38 SS Terblanche, *The guide to sentencing...*, p. 239.

39 JB Stinchcomb, & VB Fox, *Introduction to corrections* , pp. 129-139.

behaviour upon release.⁴⁰ On the one hand there are sizeable proportions of offenders whose crimes are so violent and whose behaviour so uncontrollable that prison is the only feasible option. There are others who are harmed more than helped by incarceration and therefore an alternative to incarceration should be implemented.

Community-based sentences

Community-based alternatives to imprisonment represent one of the most important developments in sentencing in the last few decades. Their development reflects the prison system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions. Community-based sentences are distinguishable according to the:⁴¹

- degree of State intervention which they involve;
- extent to which they envisage community participation.

If community service is intended as an alternative to imprisonment, then the following questions present themselves:

- Why is there a need to institute such an alternative?
- Is imprisonment inadequate as a form of punishment?

An alternative to imprisonment stems directly from the recognition that imprisonment should be avoided. Even as community-based alternatives to incarceration have expanded, prison populations have steadily increased.⁴²

Correctional supervision: A viable sentencing option

Correctional supervision is a community-based punishment to which a person is subject in accordance with Chapter VIIIA of the Correctional Services Act No 8 of 1959 and the regulations made under that Act.⁴³ On the

⁴⁰ H Abadinsky, *Probation and parole...*, p. 202.

⁴¹ Discussion Paper 33, *Sentencing community-based sentences*, Law reform commission publications. Lawlink NSW. 9, 1996 (available at: file://A:/LawlinkNSW9- Community-Based.Sentences.htm, as researched on 29 June 2001), p. 1.

⁴² JB Stinchcomb, & VB Fox, *Introduction to corrections*, p. 217.

⁴³ SS Terblanche, *The guide to sentencing...*, p. 329.

14 June 1991, Parliament approved the Correctional Services and Supervision Matters Act 122 of 1991; The Criminal Procedure Act 51 of 1977 as amended in 1991, included the following options:⁴⁴

- Section 276(1) (h) of the Criminal Procedure Act 51 of 1977 empowers the magistrate to sentence an accused person to a maximum of three years and a minimum of one year correctional supervision after receiving a report from a correctional official or probation officer.
- Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 authorises the court to impose a sentence of imprisonment not exceeding 5 years upon an accused person which sentence may be converted into correctional supervision by the Correctional Supervision and Parole Board, after serving at least 1/6 of the sentence.
- Section 287(4) of the Criminal Procedure Act 51 of 1977 the court may sentence an accused person to imprisonment with the option of a fine. If the offender cannot afford the fine imprisonment was the next step, which may be converted by the Correctional Supervision and Parole Board after serving at least 1/6 of the sentence.

In 1990 the Minister of Justice and of Correctional Services and senior officers of the Departments of Justice and Correctional Services went overseas in order to investigate, amongst others, ways in which correctional supervision is dealt with and addressed in other countries. The White Paper postulates that:

The implementation of community-based sentences is dependent on the community. The offender is subjected to various programmes over a period of time, for example, community service, correctional supervision and training. At the same time it affords the offender the opportunity to enhance his self-respect by being able to do something positive for the community, by being able to continue working and by being able to maintain family ties.

Thus courts were provided with a sentencing option to deal effectively with offenders who posed no threat to the community.⁴⁵ The purpose of correctional supervision has been described as to a reform through punishment and to improve the offender through supervision. This fits in well with the main advantages of correctional supervision, namely, that it offers punishment of high penal value, with above average potential for reform. It, therefore, stands to reason that correctional supervision would normally be an ideal sentence if

⁴⁴ RM Ntuli & SV Dlula, "Enhancement of community-based...", *Resource Material Series No.61*, pp. 253-254.

⁴⁵ Department of Correctional Services, *White paper on corrections...*, pp.22, 254.

the presiding officer has it in mind to reach these goals with the sentence.

The implementation of correctional supervision

An offender may be sentenced to correctional supervision by powers vested in judges and magistrates in the following cases:

- As an alternative to imprisonment.
- As a condition with regard to postponed sentence.
- As a condition with regard to a suspended sentence.

Section 84 (1) of the Correctional Services Act No 8 of 1959 is the most important provision as far as the content of correctional supervision is concerned. It reads as follows:⁴⁶

84 Treatment of probationers-(1) Every probationer shall be subject to monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court, the Commissioner or a parole board or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner or the parole board may determine after consultation with the social welfare authority concerned in order to realise the objects of correctional supervision.

During the period 1 January 2001 to 31 December 2002, a total of 4 228 awaiting trial persons were placed under community corrections. Had it not been for the introduction of the relevant legislation these persons would most probably have ended in prison and faced with all the negative consequences of imprisonment and would have added to the already overcrowded prison population.⁴⁷

Fines

A fine can be defined as a sentence by the court, which orders the offender to pay a specified amount of money to the state. Fines, which are specifically provided for in section 276 (1) (f) of the Criminal Procedure Act 51 of 1977 are the most commonly imposed sentence in South Africa. They are,

⁴⁶ SS Terblanche, *The guide to sentencing...*, pp. 330-344.

⁴⁷ Department of Correctional Services, *Annual report* (Pretoria, Government Printers, 2001/2002), p.100.

however, mainly directed at the lower end of the crime severity scale. Fines have quite a number of advantages; they are a considerable source of revenue, do not require any expensive public resources to execute, can be fixed so that they accurately reflect the blameworthiness of the offender, and can be used to withdraw some of the profits which the offender may have made through his crime.⁴⁸ Used by itself as a punishment, imprisonment transfers no money to the plaintiff but costs the defendant greatly. Imprisonment does not generate any revenue for the state though it poses great costs on the defendant. Imprisonment by itself is a lose-lose situation. The use of fines as a punishment should be encouraged for the imposition of fines allows the state to generate revenue off the disutility of criminals.⁴⁹

If a fine is imposed in order to keep the offender out of prison, the fine should be within the offender's means. Otherwise, the inevitable punishment will be imprisonment, which is invariably imposed as an alternative to a fine.⁵⁰ A major problem that is experienced with a fine in South Africa is the large number of fined offenders who cannot afford the fines imposed on them. This problem largely stems from the fact that the sentencing courts determine a point of departure fine, where the means of the offender is not yet taken into account. Fines as an alternative to incarceration defeats its purpose when large numbers of offenders are imprisoned because they cannot pay their fines.

Suspension of sentences

A suspended sentence is one where a specific sentence of imprisonment is imposed, but not put into immediate effect. The offender is released on specified conditions and is liable to serve the term of imprisonment in the event of breach of those conditions. The preconditions for, and operation of, suspended sentences vary according to the applicable legislation.⁵¹ The Criminal Procedure Act 55 of 1977 provides that:

A magistrate may impose an imprisonment sentence upon an accused found guilty of a crime and may also suspend the execution of the sentence. The

⁴⁸ SS Terblanche, *The guide to sentencing...*, p. 303.

⁴⁹ J Penn, "Alternative criminal punishments", December 2001 (available at: http://members.aol.com/_ht_a/mookie1510/myhomepage/index.html, as researched on 22 May 2002), p. 1.

⁵⁰ SS Terblanche, *The guide to sentencing...*, pp. 31,308.

⁵¹ Discussion Paper 33, *Sentencing community-based sentences*. Law reform commission publications. Lawlink NSW. 9, 1996 (available at: <file:///A:/LawlinkNSW9-Community-Based.Sentences.htm>, as researched on 29 June 2001), p. 11.

court may, when taking into consideration the age, the past record, behaviour, intelligence, education and training, health, condition of the mind, habit, occupation and environment of the offender or the nature of the offence or other extenuating circumstances, pass judgement, if it thinks fit, that the accused is guilty, but the determination of the punishment is to be suspended and then release him or her.

The conditions upon which a sentence may be suspended are very wide including compensation, community service, good conduct or even 'any other matter'. Community service is a favourite condition for suspension.⁵² It is stated that:

There is a growing interest in penology and a resultant appreciation of the problems of short-term imprisonment and of the necessity of finding a realistic alternative. It is submitted that a community-serving sentence that is related to the original crime and that could properly be supervised would be positive rather than negative and would serve more than one theory of punishment. It should have a deterrent effect, it accomplishes retribution in the good sense of the word and finally, it facilitates the rehabilitation of the offender by keeping him away from conditions in prison that are not conducive to rehabilitation and more importantly, by giving him a greater self-and community-awareness.

Ordinarily a suspended sentence has two beneficial effects: Firstly it prevents the offender from going to prison and secondly, the effect of a suspended sentence is of very great importance in that the offender has a sentence hanging over him. Therefore suspended sentences allow the offender to continue their normal activities in the community, maintaining family contacts and meeting social obligations. Offenders are also protected from possible negative effects of imprisonment and are given a chance of becoming law-abiding citizens. The offender remains in society and rehabilitation and reintegration is expected based on the offender's character and social resources.⁵³

Postponement of sentences

A postponed sentence is an order made by the court, which has the character of a sentence, but is not a sentence, since the imposition of the sentence is expressly postponed. The postponement can either be conditional or unconditional. Section 297(1) (a) of the Criminal Procedure Act 51 of 1977

52 P van der Merwe, "Korrektiewe toesig: 'n soepel vonnisopsie [Correctional supervision a flexible sentence option]", *Consultus*, Oct. 1991, pp. 43-44.

53 RM Ntuli & SV Dlula, Enhancement of community-based..., *Resource Material Series No 61*, p. 327.

makes provision for the postponement of sentences.⁵⁴

Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions...and order such person to appear before the court at the expiration of the relevant period, or unconditionally, and order such a person to appear before the court, if called upon before the expiration of the relevant period.

The possibility of postponing the passing of sentence presents a court with a device for holding a threat of punishment over an offender without actually having to implement it. If the postponement is unconditional there is no immediate sanction at all. If it is conditional the offender may be subject to conditions that amount in effect to some aspects of a sentence of community correction, while facing the possibility of an unspecified further punishment.⁵⁵

Postponement of sentence would be particularly apt in the case of youthful offenders, first offenders and all cases where an immediately effective sentence would not serve the aims of punishment. Thus postponed sentences were designed to avoid imprisonment and to provide the offender with an alternative. The negative consequences stemming from imprisonment are avoided through the non-imposition of a custodial sentence.⁵⁶

Compensation

Section 300 of the Criminal Procedure Act 51 of 1977, makes provision for the payment of compensation to certain victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property. For purposes of determining the amount of compensation; the court may refer to the evidence and the proceedings at the trial or hear further evidence. Compensation and restitution are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation.⁵⁷

54 SS Terblanche, *The guide to sentencing...*, p. 457.

55 South African Law Commission (SALC), Discussion paper 91 on sentencing, *A new sentencing framework*, 31 May 2000, p. 97.

56 P van der Merwe, "Korrektiewe toesig...", *Consultus*, Oct. 1991, pp. 4-50B.

57 P van der Merwe, "Korrektiewe toesig...", *Consultus*, Oct. 1991, pp. xxi, 91.

In practice, evidence relevant to compensation is often led during the criminal proceedings. Section 300(2) of the Criminal Procedure Act 51 of 1977 empowers the court to have regard to this evidence. During the inquiry the accused should be given an opportunity to challenge this evidence. The court should also investigate whether the accused can pay the amount of compensation. If the accused has no assets that can be sold in execution or if he has no income, a compensatory order cannot be enforced.⁵⁸ The South African Law Commission states that:

The Act, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. In practice South African courts seldom pay any attention to losses suffered by victims of crime. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complaints seldom make use of the provisions because they are either not present or they don't know about the provisions of the Act.

Crime has tremendous financial impacts on victims and compensation should be considered as the normal process of sentencing. As a result the principle of compensation may have some disadvantages. Firstly, as in the case of a fine, the more affluent offender may receive favourable treatment from the court because he is able to pay compensation (especially if he pleads that he should not be sent to prison in order to allow him to continue to earn the money with which to compensate the victim). Secondly, such schemes do not help all victims of crime. Only those who are the victims of crimes for which the offender is caught and convicted and has the funds to pay compensation, are likely to be recompensed. Even when an offender is ordered to pay compensation, it is in instalments over a long period.

Diversion

Diversion from the judiciary system can be defined as a method of relieving the judiciary of its load and at the same time of obviating the problem of recidivism among petty offenders.⁵⁹ Diversion programmes essentially try to prevent people who have offended from being imprisoned by providing alternatives to prosecution and convictions. The diversion of offenders from

58 P van der Merwe, "Korrektiewe toesig ...", *Consultus*, Oct. 1991, p. 93.

59 CH Cilliers & J Neser, "Penology study guide for PNL 100C", UKZN, p. 256.

the criminal justice system has a dual function:⁶⁰

- It prevents further exposure to negative influences of the criminal justice process.
- It attempts to avoid further offending by providing a variety of options, for example, community work sentences, referring offenders to drug and alcohol treatment programs, etc.

For a large number of offenders, corrections do not correct due to the fact that conditions under which numerous offenders are handled, especially in institutions, are frequently a positive detriment to rehabilitation. Diversion is used most frequently in juvenile justice systems, where historically offenders have been handled with less formality than is characteristic of adult criminal court systems.⁶¹ Proponents of diversion believe that criminal behaviour is more general than official statistics illustrate. In the analysis of official crime statistics, it is revealed that a considerable percentage of less serious offences entail no serious social consequences for society. Furthermore, majority of the serious offenders has become acquainted with the legal system as a result of less serious offences.⁶² Diversion from criminal procedure:

- does not imply that the authorities and community regard or condone certain crimes as less shocking;
- rests on the assumption that meaningful rehabilitation of the petty offender has more chance of success outside prison;
- is oriented to the prevention of overloading the legal system;
- is applicable to the less dangerous and petty offender who is a worry rather than a threat to the community and the cases that do not have to pass through the penal system in order to protect the community and
- implies that after diversion the offender will always be under the authority of the legal system until the conditions under which diversion was effected have been properly adhered with.

Contact with the criminal justice system should be avoided as far as possible by the diversion of juveniles, first offenders and less serious offenders from the legal process.

60 L Muntingh, *The effectiveness of diversion programmes - a longitudinal evaluation of cases* (Cape Town, NICRO, 2001), p. 5.

61 ST Reid, *Crime and criminology* (McGraw Hill, Education Group Inc, 1997), p. 585.

62 CH Cilliers & J Nesor, "Penology study guide for PNL 100C", UKZN, p. 256.

Conclusion

Community-based alternatives to incarceration were developed in an effort to deal more effectively with the offender's problems where they originated, to avoid breaking social ties, and to prevent exposure to the negative effects of custodial confinement. As prison overcrowding provided additional incentives to retain offenders under community supervision, much of what had previously been called 'community-based alternatives' became known as intermediate sanctions, reflecting more punitive attitudes and concerns that such programs assure the safety and protection of society.⁶³

Community corrections are an internationally recognised concept or method, meant for dealing with those offenders who could possibly be dealt with more effectively in the community than in prison. Therefore, the prison will always be there for those offenders who are considered a danger to the safety of the community and who, during the period of incarceration, continuously show no prospects of the possibility for dealing with them effectively in the community without endangering the safety of the community.⁶⁴ Correctional supervision does ensure that a significant number of offenders can be dealt with in a more balanced manner. This approach goes a long way to satisfy the need to limit the growth in the prison population and to provide a more affordable system, which will be to the benefit of everybody in South Africa.⁶⁵ To what extent community-based alternatives will be 'sold' to the public and maintained in the face of pressure for stiffer sentences will largely determine the shape of future public policy. In this regard, such programs cannot afford to be viewed as 'freedom without responsibility' or 'sanctions without accountability.' Rather, they must be seen as involving real penalties that are as stringent as incarceration would have been.

The effects of overcrowding not only reduce the availability and quality of inmate programs and services, but also pose serious health and safety risks. Responses to the crowding issue have ranged from expansion and new construction to 'front-end' alternatives designed to keep people out of prison, and 'back-end' approaches to release more of those already confined. Despite such efforts, the prison population continues to escalate.⁶⁶ One of

63 JB Stinchcomb, & VB Fox, *Introduction to corrections*, p. 165.

64 Ndebele, B. May 1996. p. 23. *Purpose and functions of community corrections* (Part 1) Nexus.

65 R Robilliard, *Correctional supervision: An alternative sentencing option in South Africa*, (SS130421.RR.IN, n.d.) p. 7.

66 JB Stinchcomb, & VB Fox, *Introduction to corrections*, pp. 130, 251.

the greatest obstacles to improvement in the correctional system has been the tendency of much of the public to regard and treat it as a rug under which to sweep difficult and disagreeable people and problems.

Community-based alternatives would enable the justice system to pursue a more balanced approach to reducing crime and its cost to society. They provide courts with more options to distinguish between serious offenders who should be removed from society and those who can be dealt with more effectively outside of prison. A sentencing scheme of this sort enables magistrates and judges to maintain expensive prison cells to incapacitate violent criminals. At the same time, less restrictive community-based treatment programs and restitution-focused sentences punish non-violent offenders, while teaching them accountability for their actions heightens their chances of rehabilitation. Such an approach treats prisons as a backstop, rather than the backbone of the corrections system.⁶⁷ These alternatives are among the varieties of programs that serve as intermediate sanctions. They are becoming increasingly attractive as society continues to explore mechanisms for dealing with prison overflow, keeping costs in line with what taxpayers will support, and providing help to those who can remain in the community without endangering public safety.⁶⁸

⁶⁷ V Notshulwana, "The economic foundations of crime: Thoughts on alternative sentencing regimes" (available at: Newsletter Fall 1997. The economic foundation of crime thoughts on alternative sentencing as researched on 14 June 2001), p. 3.

⁶⁸ JB Stinchcomb, & VB Fox, *Introduction to corrections*, p. 166.