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Perceptions of crime and violence in South Africa

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The findings of the latest Markinor opinion poll on government performance indicate that two thirds of all South Africans believe that government's ability to fight crime is at its lowest level since 2003 – despite the fact that official crime statistics are going down. But the survey also shows that many people are passive bystanders in the fight against crime and expect government to take full responsibility for bringing down the crime rate. It is argued that it will require a huge concerted and joint effort by government *and* the public to change the perception of South Africa as one of the crime hot spots of the world.

Research on crime in South Africa has proliferated over the past decade. Aspects that have been researched range from victimisation and the sociological causes of crime, to strategies for fighting crime. As government is integral to the fight against crime, its role is also often the focus of studies.

Markinor has been involved in public opinion studies on government performance since 1994, and various issues of delivery are probed twice a year. Currently a list of 23 'delivery areas' are probed every six months and respondents have to indicate whether government is handling the issue 'very well', 'fairly well', 'not very well' or 'not at all well'. These studies have consistently found that government's performance in terms of handling crime, as well as its handling of job creation and unemployment, are rated worse than other aspects by South Africans.

Survey methods

As in the past, the questions for the latest study (April/May 2007) were carried in the biannual Markinor KhayaBus – an Omnibus project involving a total of 3 500 respondents countrywide. A KhayaBus study is based on the internationally used omnibus methodology, where a number of smaller questionnaires are put together into one comprehensive questionnaire. The complete omnibus offering ensures that fatigue is limited, as the topics under discussion vary with regular interval. Respondents are interviewed in their homes, meaning that they are interviewed in a comfortable environment with as few distractions as possible.

The sample is selected on a probability basis, stratified according to the country's demographic information. The stratification is firstly done by province, and then within province by 'type of settlement' (metropolitan area, city, large town, small

town, village and rural area). By applying a process of cumulation to available demographic data, sampling points are chosen at random. These sampling points are then taken as starting points and four or six interviews are conducted in the vicinity of the sampling point.

Households are chosen randomly according to instructions. Within each chosen household, all qualifying respondents (adults 16 years and older) are listed and one is chosen, according to certain instructions on the questionnaire. Three efforts should be made (on different days and at different times of the day) to interview this chosen respondent. Substitution of the interview is only allowed if this proves to be impossible to interview the chosen individual. The substitution is also done according to strict rules – and nothing is left to chance. An equal number of males and females are interviewed. This procedure ensures that:

- The interviewer has no influence over the choice of respondent
- There is a random selection of respondents
- The findings are representative

In the final analysis results are weighted and projected to the universe, i.e. the adult South African population.

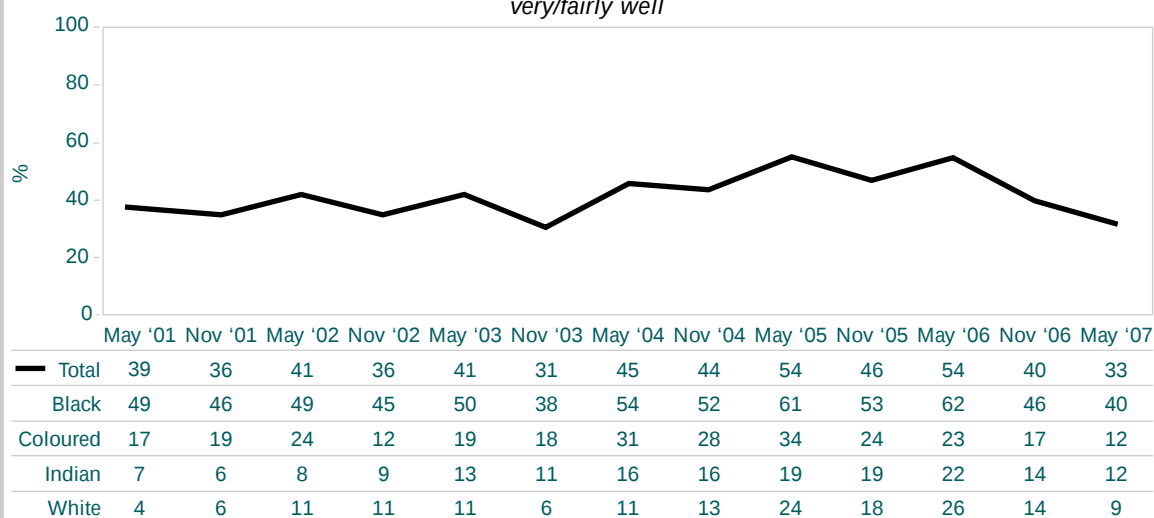
This article looks at the issue of government performance in the area of handling crime over the

last six years (since April/May 2001) and then focuses on some pertinent issues regarding views on crime in general and on certain crimes in particular, and probes experiences with crime. This is the first time that these questions were addressed in so much detail in the questionnaire. Although the question was pertinently asked whether respondents experienced crime first-hand, it is very important to remember that the issues probed mainly deal with perceptions and views. However, it is important to keep in mind that the perceptions of people constitute the reality of daily life.

Government's ability to handle crime

Currently only one third of the adult South African population (33%) believes that government is handling the issue of fighting crime well. South Africans of all population groups view government's ability to fight crime considerably more negatively since the last poll in November last year. Only one in every ten from minority groups (whites, coloureds and Indians) believes that government is doing very or fairly well in handling crime. The graph below shows the perceptions of different population groups regarding this issue. Indeed, in May 2007 the public's view on government's performance in reducing crime reached its lowest level since November 2003.¹

Figure 1: South Africans' perceptions of how well government is performing in reducing the crime rate²
very/fairly well



It is interesting to note that an inverse relationship exists between the respondents' level of education and their rating of government's performance in reducing crime: the more educated the respondent, the less likely s/he is to think that government handles crime effectively. Education allows an individual the opportunity to perceive the extent of crime, as s/he will be more exposed to scholarly journal results, newspaper articles and crime statistics. As a result the person will have a heightened awareness of crime. Education also allows people to get higher paying jobs, which may make them more vulnerable as a target of crime. Results commented on later in this article reveal that a personal experience of crime causes a person to believe that crime is more prevalent and out of control. Looking at the ratings of other delivery areas it is clear that better educated South Africans are also the most critical about various other aspects of government performance.

Is crime on the increase?

When asking South Africans whether they perceive the crime rate to be on the increase, about three in every five South African adults (59%) believe that this is indeed the case; the remainder believe that it has either decreased (15%) or remained the same (24%). A very small minority (2%) did not venture an opinion at all.

A correlation could also be found between respondents' age and their perceptions of the crime rate. The older the person, the more likely s/he is to believe that crime is indeed on the increase. Older people possibly feel more vulnerable and more exposed to crimes. In many cases they might feel

Table 1: South Africans' perceptions of crime

	Total %	16-24 years %	25-34 years %	35-49 years %	50+ years %
Increased	59	55	58	60	62
Stayed the same	24	24	25	26	23
Decreased	15	20	15	13	12
Don't know	2	1	2	2	4

responsible for the younger people or children in their care; they might also have more possessions that could possibly attract criminals.

Similarly, when looking at the perceptions by population group, it emerges that nearly four in every five Indian South Africans (79%) and more than three quarters of white South Africans (77%) believe that crime is on the increase. This by far exceeds the scores attained among coloured and black South African adults: two thirds of the coloured adult population (67%) and just over half of the black adult population (54%) share the view that crime is on the increase. (It is interesting to keep in mind that the minority population groups were more critical of the government's handling of crime – as discussed earlier.)

Victims

Following up this perceptual probe with a question about whether the respondent knows anybody who had been a victim of any kind of crime in the last six months, more than a third (36%) answered in the affirmative. Alarming, it seems as if more Indian South African adults knew someone who had been a victim of crime than respondents of any other race group did. It might, therefore, be construed that this minority group bears the brunt of criminal activities – a perception that might leave them feel disempowered or disregarded. This should also be seen against the background of their perception that crime is on the increase, as discussed earlier.

Table 2: The impact of crime on the community: Victims of crime in intimate circle

	Total %	Black %	White %	Coloured %	Indian %
Yes	36	32	56	31	66
No	64	68	44	69	34

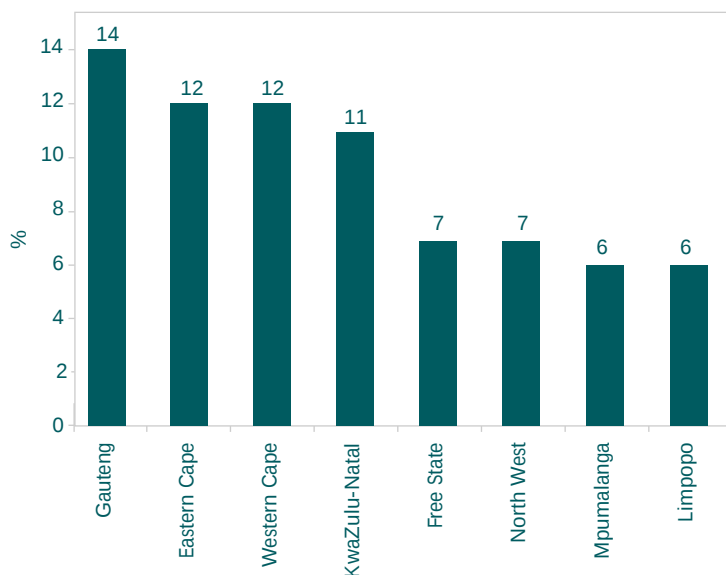
Taking this further, one in every ten South African adults (11%) indicated that they themselves have been victims of crime in the last six months. Again, the Indian minority seems the most affected by crime, closely followed by whites.

Table 3: The impact of crime on the community:
Personally been a victim of crime

	Total %	Black %	White %	Coloured %	Indian %
Yes	11	9	20	9	22
No	89	91	80	91	78

When looking at those people who have been victims of crime themselves, more Gauteng residents were victims of crime than residents elsewhere in the country – confirming that Gauteng is indeed the worst hit by crime, as reflected in the official crime statistics. The Eastern and Western Cape follow closely behind, with residents from the largely rural provinces of Limpopo and Mpumalanga the least likely to have fallen victim to crime in the last six months. The figures per province are illustrated in the graph below:

Figure 2: The impact of crime on the community:
Victims of crime – self



A significant finding that emerges is that South Africans would be more likely to believe crime to be on the increase if they had been personally affected by crime – if they knew somebody who was a victim, or had been a victim themselves. It is clear that a personal experience of crime does

make one more sensitive to crime and more likely to feel vulnerable.

What is being done about crime?

Although South Africans seem to complain incessantly about government's effectiveness in tackling crime, what is being done to address crime in our communities?

Almost two-thirds (63%) of South Africans have done *nothing* to address crime in their communities, even though only 5% think it is government's prerogative to look after its citizens. Just more than a quarter of white South Africans (28%) have done nothing about crime, compared to the majority of black, coloured and Indian South Africans who have done nothing about this problem.

The province in which people are doing most about crime is Gauteng. (This is understandable, as the crime rate is also the highest in Gauteng.) Of those provinces where residents are doing the least or nothing at all, Limpopo tops the list (78%), followed by the North West province (73%), KwaZulu-Natal (71%) and the Eastern Cape (71%). The most common way in which communities address crime is by taking charge of their own safety by burglar proofing houses and using private security services. The next best way to address crime – according to South Africans – is to be knowledgeable of one's surroundings and by avoiding dangerous areas.

Only 4% of adult South Africans have taken an active role against

crime, by either becoming a police reservist or by taking part in community policing forums. There should thus be a huge opportunity for these organisations to propagate the role they can play in curbing crime amongst the South African population.

Table 4: What are you, as an individual, doing to address crime in your community?

	Total %	Black %	White %	Coloured %	Indian %
Nothing	63	70	28	58	61
Only looking after myself and my family – burglar proofed house/use security services	16	11	47	17	19
I am vigilant/very aware of surroundings/avoid dangerous situations	8	5	18	15	9
Joined community watch groups	4	4	6	2	3
Joined as a police reservist/involved in a Community Policing Forum	4	4	6	2	3
I help the poor/work through my church or community organisation to try and do something to alleviate poverty	2	1	4	3	2
Did a self-defence course	2	1	4	0	5
Have a gun to defend myself/bought a gun	1	1	4	1	1
It is the government's job to look after its citizens	5	5	6	4	8
Other	4	4	3	5	2

It is also an interesting finding that such a low percentage of respondents in all population groups have sought to arm themselves. However, this can possibly be attributed to the stricter laws in terms of the ownership of firearms.

Just under half of South Africans believe that the police are doing enough to combat crime. Black South Africans were most positive about policing efforts, with 54% believing that the police do enough to combat crime. The minority groups are more critical of policing. Only a third of white South Africans (33%), just over a third of coloured South Africans (35%) and fewer than a quarter of Indian South Africans (23%) believe that the police are doing enough to combat crime. Northern Cape residents rated the police's efforts highest at 78%, followed by Limpopo (72%) and North West province (66%). Inhabitants of the Western Cape (31%) and Gauteng (39%) are least likely to believe that policing efforts are effective. These two provinces are also those with the highest crime rate, thus the efforts made by the police to combat crime are far more closely observed than in other areas.

What would we do if we knew or come across someone who is involved in crime? Nine out of every ten South African adults (92%) said that they would be very or quite likely to report such a person to the police, and, of the 8% who would not, almost three quarters would refrain from such action because they believe they are not adequately protected and might fall victim to such a criminal themselves, or might risk their lives and those of their families.

Pulling the strings together

From these findings it is clear that South Africans expect their government to address the crime situation in the country more effectively – the government rating on the handling of crime is very low and on a downward trend. Although official crime statistics show that the number of crime cases is lower than a few years ago, it is still perceived as a huge issue by South African citizens.

However, as almost two thirds of adult South Africans indicated that they don't do anything to protect themselves from crime, there must be an

opportunity to engage the public in addressing this situation. Only by involving government's best efforts *and* the public, will it be possible to change the perception of South Africa as the crime capital of the world.

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Endnotes

- 1 The November 2003 poll was conducted just a few months before the national election in April 2004 and delivery in all areas was rated rather poorly at that stage – the handling of crime was no exception. Fieldwork was done before the start of the election campaign for the 2004 election and government's huge effort to bring 'government closer to the people' was a characteristic of that campaign.
- 2 All graphs and tables taken from Markinor's *Government Performance Barometer* and a public opinion poll on crime-related issues, April/May 2007.

JOINING FORCES AGAINST CRIME

Potential for the private security industry to become proactive

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The extent to which the private security industry has a role in proactive policing is an issue that is receiving increasing attention. At present the industry performs reactive functions in relation to crime; these may include armed response, transporting cash and conducting investigations. This article reflects the debate and considers some of the issues that would need to be addressed if the industry were to be more proactive in combating crime.

Traditional reactive policing is primarily concerned with responding to calls and conducting follow-up investigations.

Similarly, security companies regularly respond reactively to crime that is underway or has already occurred. For example, an employee may press a panic button when robbers pull out firearms at a business, or a homeowner may phone her alarm company when she sees someone breaking into her garage.

Both police and security personnel do at times perform tasks which some may argue are proactive. For example, routine patrols involve driving around neighbourhoods in the hope that crime will be less likely to occur because of the visibility of a law enforcement officer. Similarly, a guard who is employed to patrol business premises could prevent crime from happening by being present and observing. This is visible policing.

Proactive policing, however, should be more concerned with conducting crime analyses, working together with the community to understand crime concerns, and strategising to address safety and security related issues. Proactive policing should be

concerned with specific targeting of criminal and disorderly behaviour.

Security companies that analyse crime statistics and trends and instruct their officers to park their vehicles at hijacking hotspots when not responding to calls are acting proactively and assisting to prevent crime from occurring. Similarly, a security company that is contracted to post guards at a shopping centre is acting proactively when it considers trends such as teenagers using drugs at night in unlit areas of the centre and conducts patrols that result in the youth removing themselves from those areas. Such activities can be an important part of efforts to prevent crime.

South Africa's private security industry

The role that the private security industry can play in crime prevention is certainly significant. Consider the resources of the private security industry: There are about three times as many security officers as police members on the streets and about three times as many armed response vehicles as police patrol vehicles. Ten years ago there were about 100 000 security officers, but this had grown to almost 300 000 by April last year, according to the Private

Security Industry Regulatory Authority (PSIRA). Seth Mogapi, the director of PSIRA, said last year that in addition to 296 000 active private security officers working for 4 763 companies, there were about 689 000 inactive officers (King 2006). The Security Industry Alliance estimates the overall industry to be worth about R40 billion annually.

The public also regards the private security industry as more efficient in crime control duties than the SAPS. Research conducted by professors Johan Prinsloo and Coen Marais of the University of South Africa's Department of Criminology found that the efficiency of security guards in controlling crime was regarded as 'very good' by 28% and 'fairly good' by 43% of the respondents. A total of 80.7% of respondents believed that it was a 'good thing' that the private security industry was increasingly taking up certain policing and public protection functions previously entrusted to the state police. In addition, people were more likely to come into contact with a private security officer than with the police (Oliphant 2006).

Types of security

Private security companies perform a number of different functions. The biggest aspect of the industry in South Africa is guarding. This function is concerned with the protection and safeguarding of property or persons. Although such visibility may result in crime being prevented, one can argue that a security company is not really acting proactively by simply posting a guard at a specific venue, particularly when the guard is primarily responsible for access control. This is not to say that these guards do not prevent crime, but rather that they are not involved in proactive initiatives, projects and measures that aim to reduce a particular crime or to deal with specific criminals.

Incidentally, there has also been much debate in the media in the last few years about private security companies being contracted to guard police stations and to assist the police at major events. Some argue that this relieves the police from performing more menial tasks and enables them to focus specifically on policing the community, while others contend that the police

should be able to protect themselves, rather than employing the services of outside companies.

Private security companies also play a role in guarding the gated communities and fenced-in residential areas that have rapidly increased in number over the past few years, particularly in Gauteng. These are established largely because residents feel unsafe in their homes, and result in these communities setting up their own systems of policing, with services provided by private security companies.

In addition to guarding, security companies also provide armed response or alarm response, by monitoring alarms and dispatching security personnel when the alarm is triggered. Although the guarding industry employs the bulk of security personnel, more clients are serviced through the armed response component of the security industry.

Armed escort services are also provided by private security companies who offer to transport cash, assets and confidential documents. Some security companies also provide services during sporting or entertainment events, conduct investigations and security training, and become involved in various aspects relating to the provision and installation of monitoring equipment and security devices.

Processes currently underway

Discussions between government and the private security industry are already underway on how the industry and the police can build better relationships. President Thabo Mbeki said in his State of the Nation address this year that one of his aims is for the police, together with the private security industry, to 'create an environment in which the security expectations of the public, in which huge resources are expended, are actually met.'

Safety and Security Minister Charles Nqakula said in his budget vote speech in May 2007 that talks between government and the private security industry regarding how the two could share information and resources were progressing well.

A project that will enable the security industry to share information with government so as to ensure a

better response to situations that look as if they may lead to a crime being committed, is due to be piloted later this year, according to the chairman of the Security Services Employers' Organisation, Kevin Derrick. He added that 'all parties are very eager to find solutions and work together to find ways to prevent crime'. (Goodenough 2007)

The focus, according to the chairperson of the Council of the Security Industry Alliance, Steve Conradie, needs to be on how private security officers can gather information and intelligence and utilise it to identify suspicious behaviour or people before criminal activities are perpetrated. In this way the security industry will be integrated into crime prevention processes, and as a result be more proactive in addressing crime.

Any initiatives aimed at establishing working relationships between the SAPS and the private security industry are regarded by the security authority's Mogapi as key to the development of a positive strategy to fighting crime. However, he emphasises the role of PSIRA in this regard:

The Authority aims to facilitate such partnerships and co-operation through proper regulation which will cause the private security industry to become and to remain a valuable partner to the public police in dealing with crime. Partnerships will include active participation in community police forums and the sharing of crime intelligence. (Mogapi 2007)

This is necessitated even more so, Mogapi points out, by the tremendous growth and increasingly important role of the private security industry - which has raised questions as to the ideal relationship between public policing and the provision of private security services in dealing with crime.

An example of creative thinking around the relationship between the private security industry and government was the assistance provided by security companies in Durban's business district and along the beachfront during the last Christmas holiday period. A total of 11 companies provided security officers free of charge to assist with security-related activities in this area.

According to the chairman of the Security Industry Association of South Africa, Shadrack Dladla:

It was a successful operation. Crime was minimal on the beachfront and in Durban generally. Policing in the eThekweni municipal area was more visible and the security guards were able to relieve police members from duties such as access control at boom gates (which restrict access by vehicles along the beachfront during the holiday season). (Goodenough 2007)

Inadequacies of the private security industry

Many roleplayers in the private security industry talk about the need to change the generally poor image that the industry has among the public. President Mbeki said in his State of the Nation address this year:

The increase in the incidence of particular crimes during the security workers' strike should have brought home to all of us the fact that the security industry cannot be handled simply as a private affair of the private sector. Quite clearly the regulatory system that we have in place is inadequate. This applies to such issues as wage levels, personnel vetting systems, enforcement of guidelines on cash-delivery vehicles, and so on. (Mbeki 2007)

According to Mogapi (2007), one of the objectives of PSIRA is to encourage and promote efficiency and responsibility with regard to the rendering of security services. This efficiency includes ensuring the service is rendered in the manner agreed on by the security service provider and client, and meets the client's expectations. He argues that the Authority needs to assist the industry to render a security service in a capable, productive and effective manner, and to operate responsibly, saying that appropriately trained security officers will contribute to an efficient security service being rendered.

Security practitioners agree. The national chairperson of the South African National Security Employers' Association, Cobus Bodenstein, argues that security providers themselves also need to be more proactive in ensuring that their guards are not

involved in perpetrating crime. This should be done by employing the right personnel and looking after them properly:

The mere fact that a guard entering the security industry is vetted via his fingerprints by PSIRA is in my view far from adequate. More stringent checks are needed in respect of the individual who wants to work in the industry, and although some of these are costly, I think it is money well spent. (Goodenough 2007)

In addition, Bodenstein suggests incentives be put in place by the security provider together with the client, to reward guards who go the extra mile:

Many guards are approached by criminal syndicates and are offered money for information or to look the other way. In some cases the amounts offered are substantial. I believe guards who are forthcoming with such information should be well rewarded. (Goodenough 2007)

Bodenstein also calls for the monitoring of the movement of guards between security companies, to reduce the 'bad apples' who are involved in criminal activities and who simply move from one security company to the next. His view is supported by Derrick, who warns that the private security industry needs to develop the right ethics and ensure compliance to gain the trust of the public. Only by doing so will they be able to play a more proactive role.

Another aspect that requires serious consideration is the training that security personnel receive, and the support that they obtain from their managers. These factors are particularly important when considering the potential of the private security industry to operate in a more proactive manner. Referring to a guard posted in the parking area of a business, a security consultant asks: 'Are criminals really deterred by one oke with two weeks of training?' (Goodenough 2007)

In many cases personnel are expected to guard properties at night without the area being properly lit or having access to working torches and radios. Guards expected to check the inside of vehicles at

exit points also need to be trained to recognise the company products that could be at risk. In addition, a high staff turnover means that regular training is critical, and if the security companies aim to be proactive in addressing crime, there also need to be opportunities for intelligence gathering and sharing of information about possible threats and trends.

Private security: a benefit only for the rich?

The private security industry exists because there are people who can afford to pay for it. However, is it only the wealthy that benefit from private security? Mogapi emphasises that the private security industry operates on a profit motive and is accountable only to its clients. eThekweni municipal manager Dr Michael Sutcliffe states:

Distances, both social and physical, then divide people even further and the more resourced group decides to spend more money on privatised security. The poor in turn become more reliant on a security force whose members are often paid less than that of the private sector...The myriad of measures often proposed and implemented (usually at higher cost with ever fancier CCTVs and gates) and which have as their aim the reduction of crime, often don't make things safer at all and sometimes feed the belief that higher walls mean there is more to protect. The sadder result, of course, is that the middle classes are removed even further from the society at large. This creates a cycle where two societies live in two different worlds and the possibility of creating a single society becomes more difficult to achieve. (Sutcliffe 2007)

Mark Shaw also addressed this issue in his book *Crime and Policing in Post Apartheid South Africa: Transforming under Fire*:

Private security could threaten citizens' rights and entrench a divide between those able to hire personal protection and those who cannot. In the suburbs, the likelihood that the former will be mainly white and affluent, the latter mainly poor and black may harden racial or social barriers and increase the possibility that security will

become, or at least be seen to become, a weapon used by the former against the latter, eroding a fundamental norm of democratic societies – that policing should be uniformly available to all, its powers exercised through uniformly-applicable laws. (Shaw 2002:103)

The view that the security industry benefits only those who can afford to pay for services, is reinforced by a security company owner:

We exist because our clients pay for our service. We can try to assist in general crime cases but this isn't really our role, and it can't be done at the expense of our clients. (Quoted in Irish 1999)

Shaw uses a similar quote, which he describes as one of the maxims of the industry: 'The client is always right, the criminal is always wrong.' He adds that since private security is a contractual agreement between the private security company and the client, it is generally more accountable to those who can afford it, than to the police. Furthermore, the primary concern of private security companies is the interest of the client. (Shaw 2002: 113)

However, the chairperson of the KwaZulu-Natal branch of the Professional Security Council, Margaret Kruger, says that where private security guards are employed at places such as shopping centres, government buildings, hospitals and clinics, police stations and schools, they are benefiting many people who would ordinarily not be in a position to afford to contract a security company to provide armed response services to their homes. She believes that when one considers the current levels of crime, and the limited number of police members, the private security industry should be seen as providing a role that is adjunct to the state police. Considering the findings of Prinsloo and Marais mentioned above, it is also worth noting that the private security industry also has the support of a significant portion of those surveyed.

Conclusion

Dladla is adamant that the security industry is a critical component of any efforts to address crime; without it there will be little success.

Unless government takes the security industry seriously and calls the security industry to be involved in developing crime prevention strategies, I believe there will not be any progress in the combating of crime. (Goodenough 2007)

Certainly there is little doubt that by working together in partnerships with other role players, the security industry has the potential to play an increasingly greater role in proactively preventing crime. Gauteng MEC for Community Safety, Firoz Cachalia, talked at the launch of the Gauteng Safety Strategy about the accomplishments that can be achieved through partnerships:

Examples include the partnership between the police and organisations such as Business Against Crime and the South African Bank Risk Centre (SABRIC) to tackle business related robberies. We have also used this approach to achieve success against the problem of taxi violence. We will be seeking to extend this approach to addressing other types of priority crimes such as house and business robberies. (Cachalia 2006)

The role of the private security industry in proactive crime prevention is already being explored. Such efforts should continue, because addressing crime is not only the responsibility of those in the criminal justice system. With the resources in its possession and the role that it plays in assisting to address crime in South African communities, the private security industry certainly has a critical role in any such partnership.

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CRIME DOES NOT CAUSE PUNISHMENT

The impact of sentencing policy on levels of crime¹

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If countries can learn from one another, South Africa can learn from the experiences of other countries that have re-organised their sentencing systems in recent decades. South Africa's correctional system has many similarities to America's – seriously overcrowded prisons, sentences that are too long, stark disparities, and therefore injustices, in sentences received for comparable crimes. American solutions – mandatory minimums, prison terms measured in decades not years – have neither reduced crime rates nor made streets safer. Nor will they in South Africa. Comparisons of countries with very different sentencing policies and punishment practices – Canada versus the United States, Finland versus the rest of Scandinavia, England versus Scotland – show that sentencing and punishment have little discernible effect on crime trends and patterns. Crime trends and patterns in most developed countries move in broad parallel, irrespective of national punishment policies.

Crime and imprisonment statistics from a number of First World countries over a 30-year period support Mark Mauer's (2006) proposition that 'crime does not cause punishment' – that incarceration rates are a matter of policy, and do not have significant effects on levels of crime.

Over the period 1960–1993, violent crime in the US went up four to five times and the incarceration rate went up three to four times, but the murder rate stayed fairly static (Figure 1). In Germany over a similar period (1961–1992), violent crime went up 3.5 times, the murder rate stayed at the same level, but imprisonment went down in the 1960s and stayed flat for 30 years (Figure 2). In Finland over the period 1965–1994, violent crime went

up, murder rose substantially, but imprisonment went down (Figure 3). In France (Figure 4), the number of people in prison per 100 000 population zigzagged because there is a fundamentally different political culture and philosophy about crime and punishment. In that country, you are primarily a citizen. Everybody celebrates national events, and large numbers of prisoners are released every time there is a French presidential inauguration or a significant national event.

During the period 1950–2000, the incarceration rates in Denmark, Norway and Sweden were similar, and the imprisonment rate in Finland dramatically dropped over the period to a level similar to that of its neighbours (Figure 5). This is

Figure 1: Imprisonment, violent crime and murder rates in the US per 100 000 population 1960–1993²

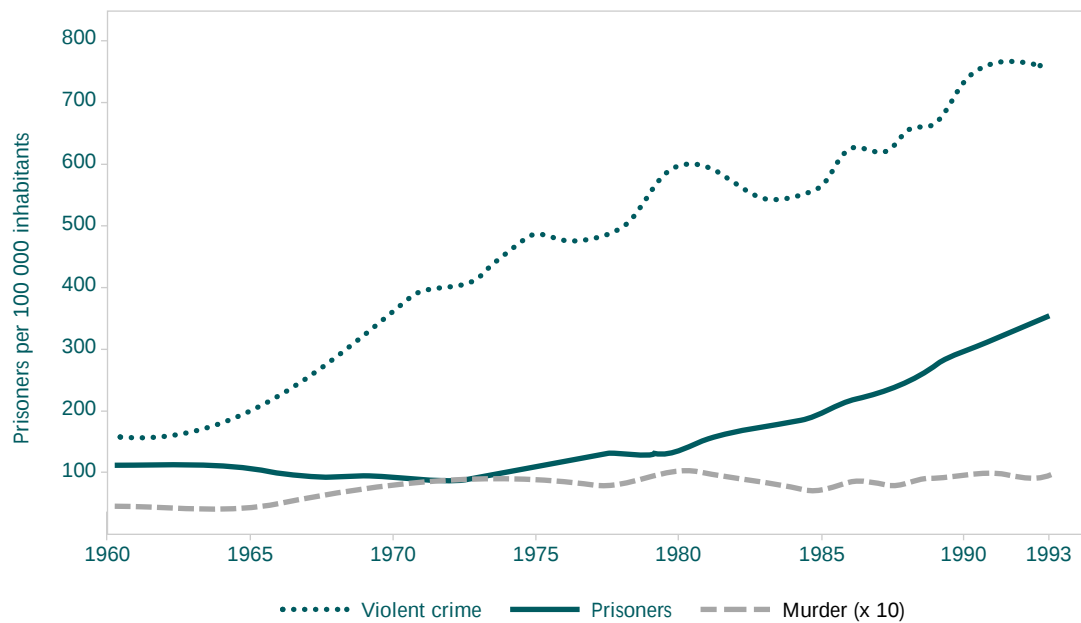
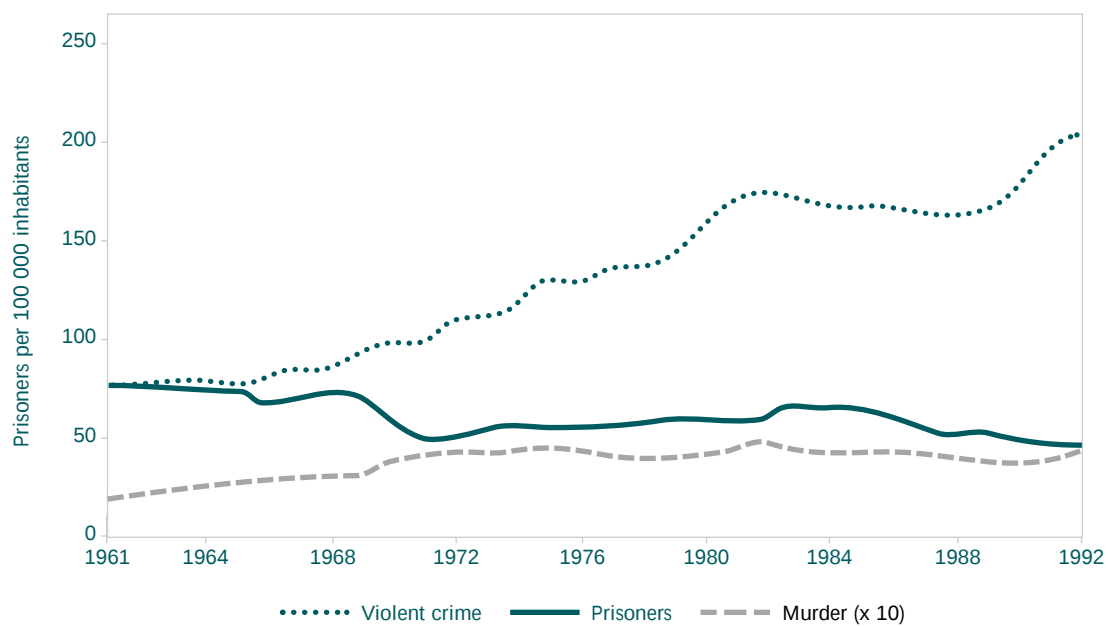


Figure 2: Imprisonment, violent crime and murder rates in Germany per 100 000 population 1961–1992



what the Finns wanted. They had been under Russian domination from the early 1800s to the mid-1900s, and had similar incarceration rates to the Soviet Union. By 1950, Finland decided it did not want to be eastern; it decided to look west instead, and wanted to demonstrate how Scandinavian it was by taking a deliberate policy decision to reduce the rate at which it incarcerated

people. There was an enormous outbreak of crime in Finland when this decision was taken.

However, if you look at comparative crime statistics across the four Nordic countries for the period 1960–2000 (assuming these are actual crime rates – crime definitions vary from one country to another), the curves are almost exactly the same.

Figure 3: Imprisonment, violent crime and murder rates in Finland per 100 000 population 1965–1994

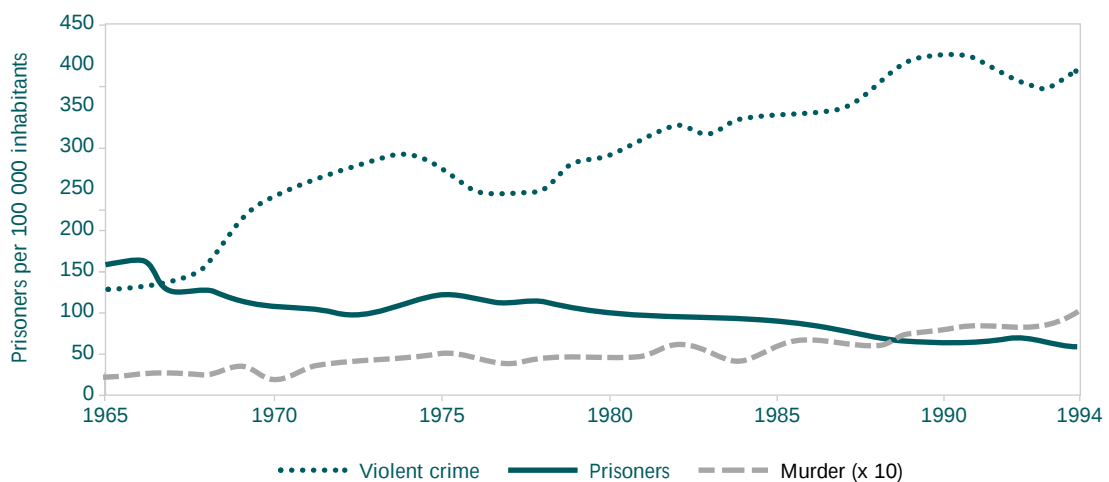


Figure 4: Incarceration rates in France per 100 000 population 1965–2005

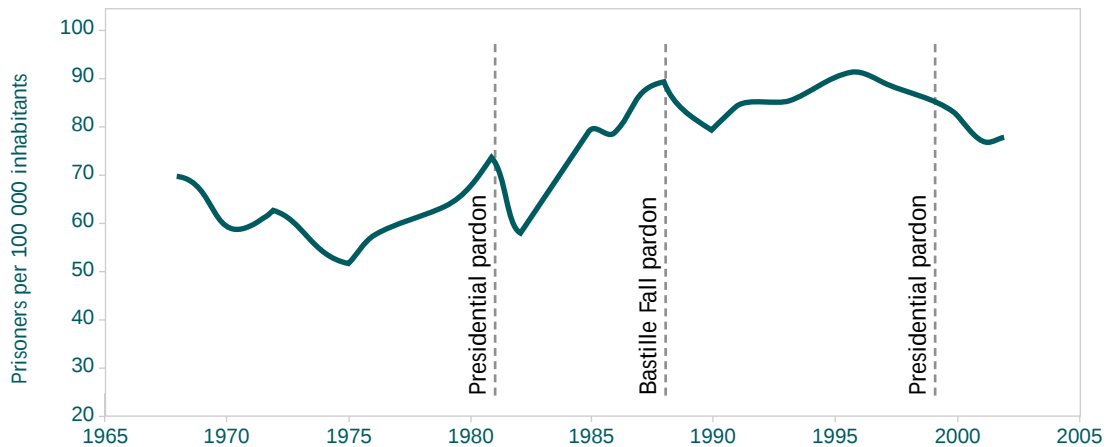


Figure 5: Incarceration rates in four Scandinavian countries 1950–2000 per 100 000 population

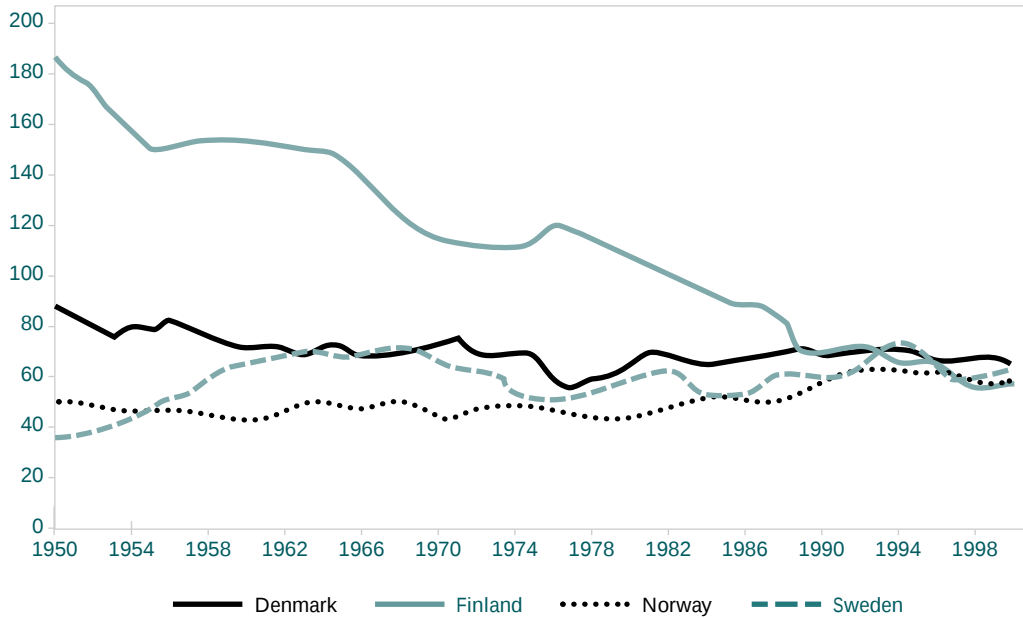
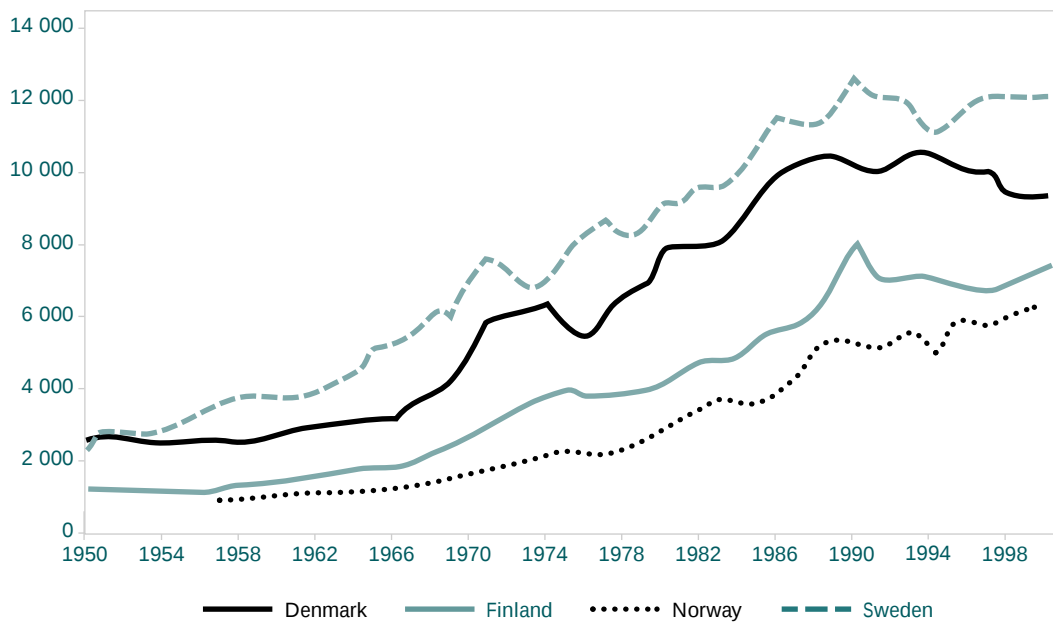


Figure 6: Offences against the criminal code in four Scandinavian countries 1960–2000 per 100 000 population



The US imprisonment rate has skyrocketed to about 4.5 times the Canadian rate, which has remained at about 100 per 100 000 since the 1950s (Figure 7). The homicide rates in the US over 40 years are far higher than those of Canada (Figure 8). But if one looks at the relative change in homicide rates in the US and Canada (with the rates standardised at 1), it is clear that the trends are very similar (Figure 9).

Again, this backs up the assertion that countries *choose* the rate at which their residents are incarcerated. France chooses from year to year what proportion of its people should be in prison. The US chose to increase its incarceration rate, but this has not affected its crime levels. The experience of Norway, Denmark, Sweden and Finland shows the level of imprisonment makes no difference to the

Figure 7: Violent crime and imprisonment rates for the US and Canada 1980–2000 per 100 000 population

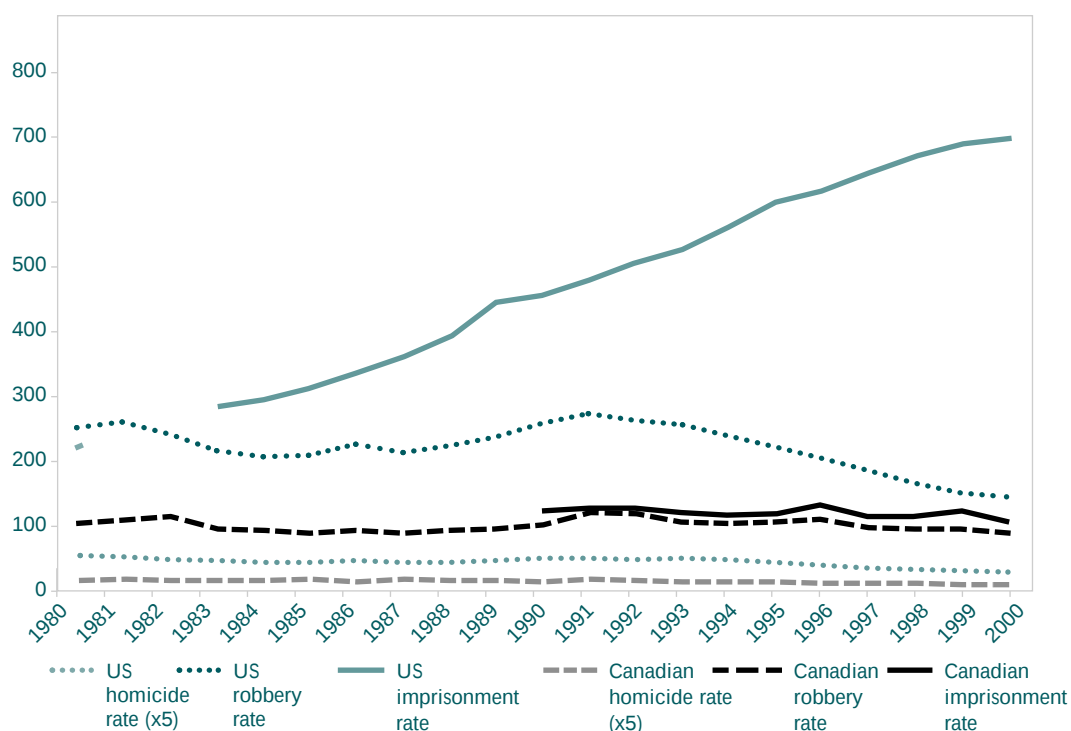
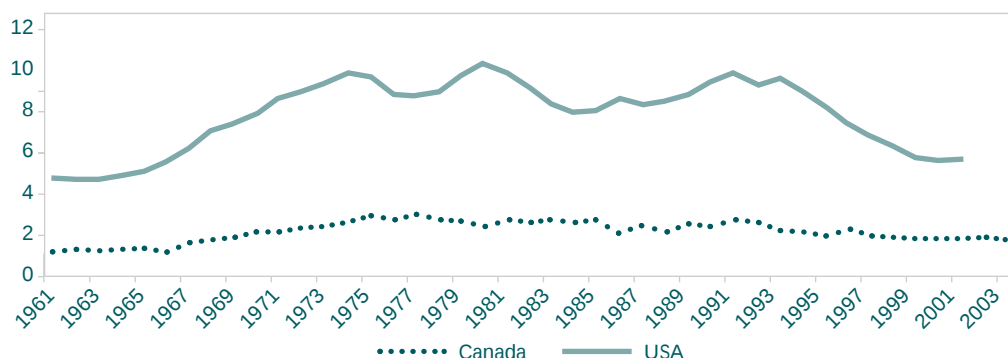


Figure 8: Homicide rates in the US and Canada 1961–2003 per 100 000 population



level of crime – the Finns decided to stabilise their imprisonment rate and steadily drop it to the level of their neighbours as a matter of policy, but their crime rate curves were the same as those of their neighbours.

Are minimum and mandatory penalties doing the job?

The advocates of minimum and mandatory sentences claim that they act as a deterrent, and that they promote consistency in sentencing, but this is not supported by available evidence. Studies show judges and juries tend to avoid having to impose minimum/ mandatory sentences, that such penalties have no deterrent effect (or a temporary one), and that sentences are not consistently applied. There are also cases where these sentences have led to profound injustices.

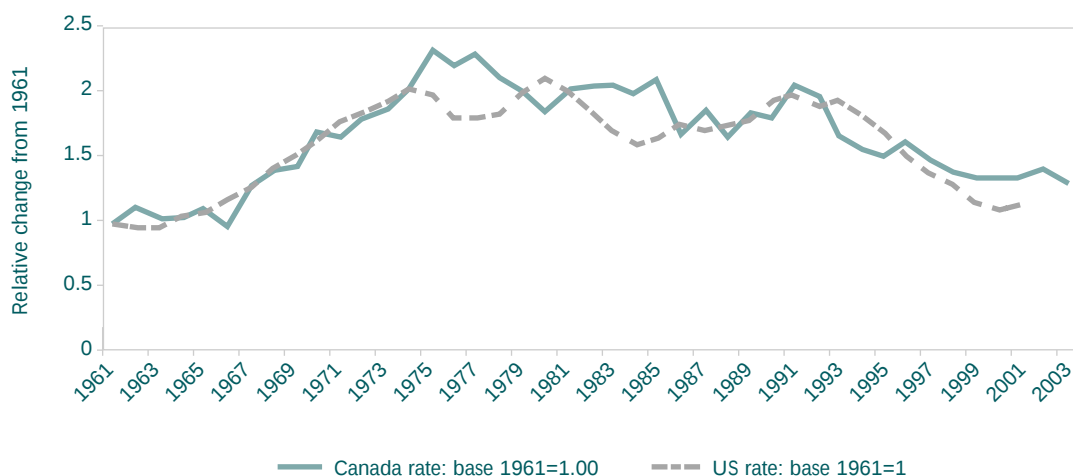
In 18th and 19th century England the death penalty was mandatory for about 150 crimes in the belief that this would reduce crime. Pick-pocketing was one such crime, but no deterrent effect was apparent – rampant pick-pocketing was reported at public executions of pick-pockets. Anybody found guilty of the theft of property worth more than £20 had to be executed. This was later reduced to theft of only £5. In practice, when judges and juries felt uncomfortable about having to impose such a harsh

sentence, they worked hard to evade minimum sentencing by finding thieves guilty of stealing only £4 and 19 shillings. Some thieves were pardoned.

The pleading rules for a valid prosecution became increasingly technical to make it more difficult for this kind of whole-scale evasion to take place, but with little effect. The belief that minimum/ mandatory sentencing would promote consistency in sentencing was also shown to be false. There was enormous inconsistency in what happened to individual thieves at that time. Some were convicted of stealing £4 and 19 shillings, some were executed, some were convicted and pardoned, and some convictions were overturned on technical grounds.

Mandatory penalties proliferated in the US over a long period of time for such offences as drug crimes, also motivated by the belief that this would act as a deterrent. The US experience indicates that these measures have no deterrent effect, and that large-scale evasion of having to impose such penalties has taken place. There have been cases where offenders have been imprisoned for 20 years on drug charges in circumstances where judges did not believe these sentences were appropriate. Several judges resigned in protest, including two from the Federal Bench.

Figure 9: Change in homicide rates in the US and Canada per 100 000 population



The evasion finding is pretty consistent, as is the finding that minimum sentencing has no deterrent effect, or that any short-term deterrent effect tends to wither away over time. Reducing particular crimes is a valid public objective, but minimum sentencing is not the way to achieve this goal.

Sentencing policy: a need for consistency, accountability and transparency

There have been five or six ways that countries have reorganised their sentencing systems over the last 30 years to achieve systems that are more just – consistent, accountable and transparent. Some work, some do not. The best evidence points in one direction for South Africa.

Finland and Sweden have radically changed their sentencing laws in the last 30 years. They have sentencing principles that provide judges with guidance on most of the questions they are likely to be faced with, including the weight that should be accorded to a prior record; the extent to which a person is dangerous or can be changed through rehabilitation; and what difference it makes if a person is not really an adult (in Sweden anyone below 15 is legally incapable of committing a crime). Verbal statements of principle seem to produce a system that is highly consistent and they provoke stimulating debates about exactly how to apply a principle in a certain kind of case. In those countries, sentencing guidelines seem to make a difference.

In the UK, and to some extent in Canada and Australia, high courts may issue guideline judgments, but the jury is still out on whether this makes any difference to sentencing practice. There is no empirical evidence that this has an influence on what judges actually do in the UK.

In some US states there are very detailed voluntary guidelines that tend to indicate sentences for every crime and every combination of prior record. Conscientious judges will look at these when considering a sentence. The evidence is that these have no demonstrable effect, although a major exception is in Delaware, where there are only 14 felony court judges, most of whom were involved in drafting the guidelines. Judges who disagreed with

the guidelines left the bench, and sitting judges influenced new judges. Presumptive guidelines, as applied in Minnesota, Washington, and Oregon, seem to increase the consistency of sentencing in general, and particularly in relation to race, gender, and geographical disparities.

Mandatory guidelines for sentencing have been part of the US Federal Court system for about 20 years. For example, robbery would receive more and more serious penalties if, for instance, there was a firearm involved, if the firearm was fired, and so on. The official policy of the US Sentencing Commission was that judges ought to impose a very specific sentence. This meant that a number of potentially mitigating circumstances, such as a convicted person having family responsibilities, being a drug user, having a deprived childhood or making a contribution to the community, were not ordinarily regarded as factors in sentencing.

Sentencing became progressively harsher, frequently driven by the prosecution. The judiciary resisted this set of guidelines for the entire period that they were in force, until 2004, when they were declared unconstitutional. The guidelines are now voluntary. Judges may impose what they consider to be an appropriate sentence, provided they give reasons for their decision.

The Finnish and Swedish systems of sentencing principles tend to recommend very short periods of imprisonment – rarely more than a year, and often only for a week or two. The number of prisoners in those countries sentenced to more than three years is a fraction of 1%. The maximum sentence for most crimes is 14 years. This means the potential for inconsistency and disparity is very small. Those countries have a high-prestige career judiciary – a cadre of highly talented professionals with a strong ethos about their duty to exercise justice. Students who want to be prosecutors or judges select their direction in law school (although they may move back and forth between the two professions).

The prosecution sees itself as a semi-judicial institution. The judiciary therefore puts strong professional and cultural norms into practice to

preserve just sentencing principles. No US state could adopt Scandinavian principles because the political character of the US courts is so strong. But voluntary guidelines in US state courts can make a huge difference when there is a professional cadre of prosecutors and judges who share a professional ethos.

Conclusion

Crime does not cause punishment. There is nothing inherent in South Africa that suggests its incarceration rate should be 350–400 people per 100 000. Imprisonment rates are chosen by politicians, they are not the result of increased crime. The transitional character of South African politics makes it different from Sweden or Finland, but there is no reason to think that it is any different to any one of the countries where it has been shown that the level of imprisonment makes no difference to crime.

There is no evidence for the claim that mandatory/ minimum sentencing has any impact on consistency of sentencing or levels of crime. The primary function of such sentences is for governments to symbolically say 'we are doing something about crime'. This does not seem to fool anybody. The percentage of people who say they are fearful to go out at night before and after the imposition of mandatory sentencing does not seem to change. The proposal of the South African Law Reform Commission for a structured approach is probably the only way to achieve reasonable consistency, predictability and transparency in sentencing. This also provides a potential mechanism for holding judges accountable i.e. to ensure they apply a sentence appropriate to the offender rather than reflecting the personal attitudes of the judge.

It is suggested that South Africa should decide to reduce imprisonment rates by 50%, persuade Parliament not to renew the minimum sentencing legislation, and follow Dirk van Zyl Smit's (2006) lead on a structured approach to sentencing.

Acknowledgement

This article is based on a keynote address delivered by the author at the Open Society Foundation SA's conference on sentencing in South Africa held from

25–26 October 2006 in Cape Town. The address was first published by the OSF-SA in 2006 in the conference report entitled *Sentencing in South Africa: Conference Report*, available at www.osf.org.za. The opinions expressed in this article are those of the author and not those of OSF-SA.

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Van Zyl Smit, D 2006. Notes on a new sentencing framework for South. *Sentencing in SA: Conference Report*. Cape Town: Open Society Foundation.

Endnote

- 1 This is the second article in a series on sentencing published by the SACQ. See Redpath, J & O'Donovan, M 2007. The impact of minimum sentencing. *SA Crime Quarterly* (19). Pretoria: Institute for Security Studies.
- 2 All graphs taken from M Tonry 2006. 'Conference on Sentencing in South Africa: Keynote Address,' in *Sentencing in South Africa: Conference Report*. Newlands, South Africa: Open Society Foundation: 4–9.

THE NUMBERING OF DAYS

Sentencing and prison population growth

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On 30 May 2007 the Criminal Law Amendment Bill (15 of 2007) was tabled in Parliament, proposing amendments to what has become known as the 'minimum sentences' legislation. The proposed amendments herald another chapter in the prison overcrowding debate in South Africa and will focus attention on the impact of sentencing on the size of the prison population.

Between 1995 and 2004 the South African prison population grew from 116 846 to 187 036, while available accommodation remained the same at approximately 113 000. But this is not simply the result of more people being imprisoned, or even, as is often argued, the large number of unsentenced prisoners. It is a widely accepted fact that South Africa's prisons are overcrowded and that this is unacceptable from a human rights perspective. However, there is far less agreement among Correctional Services stakeholders on the reasons for prison overcrowding.

This analysis focuses on the effect of sentencing on the size and profile of the sentenced prison population. This focus was motivated, at least in part, by important legislative amendments made in 1997 and 1998; namely the introduction of mandatory minimum sentences (Criminal Law Amendment Act 1997) and the expansion of the sentencing jurisdiction of the district and regional courts. (Magistrates' Court Amendment Act 1998) It is accepted that the size of the total prison

population is influenced by a number of factors or 'prison population drivers', for example macro-scale population trends, trends in crime, law enforcement, and sentencing. Sentencing emerges from this analysis as a critical driver of the prison population.

Using quantitative data (made available by the Department of Correctional Services) on the size and profile of the prison population over an eleven-year period, 1995 to 2005, the relationship between sentencing and the size of the prison population is explored. On closer inspection it appears that fewer offenders are sentenced to imprisonment, but for longer. It was also found that, apart from the dramatic change in the profile of sentence lengths, the offence profile of the prison population has changed significantly, and this has had a material impact on services rendered to prisoners, security issues in prisons, and infrastructural requirements. It is concluded that these three factors, working in tandem, resulted in the rapid change in size and profile of the sentenced prison population, especially after 1998.

Using basic mathematical projections, a projection is made of the size of the prison population by 2015.

This article is a summary of a more detailed research report commissioned by the Open Society Foundation (SA) and only the key findings are highlighted here.

Overview of the prisoner population

Figure 1 provides an overview of the total South African prison population for the period 1995 to 2005, and three trends are discernable. The first is the overall increase, as noted above, from less than 120 000 in 1995, to more than 180 000 by 2004. The second is the fairly rapid increase in the unsentenced prison population from 1995 to 2000,

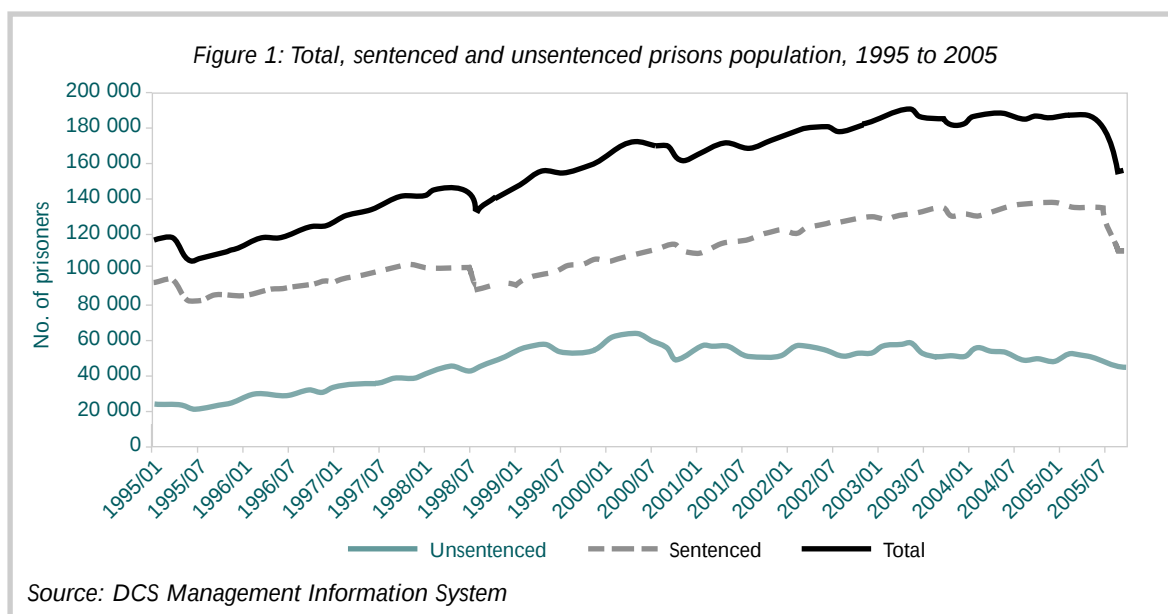


Table 1: Overview of the South African prison population

Sentence category	Average for January of each year			% increase		
	1995	2000	2005	1995-2000	2000-2005	1995-2005
Unsentenced	24 265	61 563	52 313	154	-15	116
0-6 months	5 831	5 717	5 674	-2	-1	-3
>6-12 months	6 374	6 598	5 416	4	-18	-15
>12-<24 months	3 765	6 156	5 763	64	-6	53
2-3 years	12 854	13 846	17 816	8	29	39
>3-5 years	21 066	16 162	16 731	-23	4	-21
>5-7 years	15 068	13 882	12 137	-8	-13	-19
>7-10 years	12 193	18 418	21 233	51	15	74
>10-15 years	6 168	10 442	23 139	69	122	275
>15-20 years	2 660	4 603	10 586	73	130	298
>20 years	1 885	4 919	9 197	161	87	388
Life sentence	443	1 086	5 745	145	429	1 197
Other sentences ¹	4 274	3 031	1 706	-29	-44	-60
Total sentenced	92 581	104 860	135 143	13	29	46
Total prisoners	116 846	166 423	187 456	42	13	60

Source: DCS Management Information System

that thereafter levelled and declined steadily until 2005. The third is the steady increase in the sentenced population that started in 1995, dropped as a result of two amnesties in 1995 and 1998, but then accelerated until 2005, when the Department of Correctional Services (DCS) implemented a remission of sentence programme. It is evident that post-2000, the sentenced prison population became the main driver of the increase in the total population, taking over from the unsentenced prison population.

From 1995 to 2005 the profile of the sentenced prison population showed remarkable changes, as presented in Table 1. The most significant trend was the rapid increase in the number of prisoners serving sentences of longer than seven years. For example, the number of prisoners serving sentences of 10-15 years increased by 275%, the 15-20 year category by 298%, and life sentences by a phenomenal 1 197%. The general trend was that the longer the sentence, the greater the increase. On the other hand, prisoners serving sentences of less than 12 months showed a decline, as well as prisoners

serving sentences of between three and seven years. Figure 2 shows very clearly how the proportion of prisoners serving sentences of less than seven years declined, while those serving sentences of longer than seven years increased from just less than 26% in 1995 to 52% at the end of 2005.

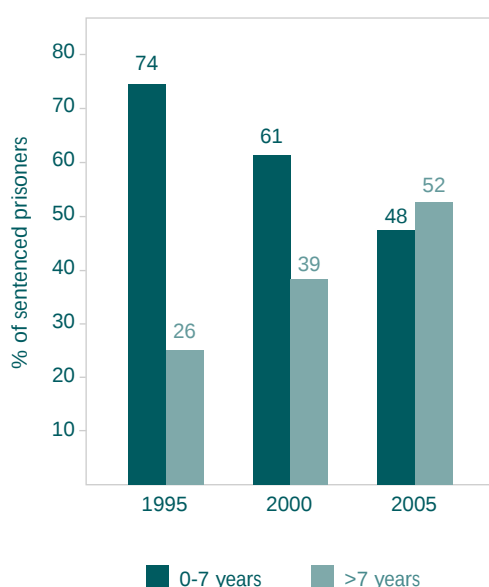
Legislative changes and their effect

Two key legislative changes were introduced in the late 1990s. The first was the Magistrates' Court Amendment Act (1998) that extended the sentencing jurisdiction of the magistrates' courts at both district and regional levels. In the case of the district courts, the maximum penalty that they may impose was increased from twelve months to three years' imprisonment, while the jurisdiction of the regional courts was increased from 10 years to 15 years' imprisonment.

The second was the Criminal Law Amendment Act (1997) that provided for mandatory minimum sentences for specific offences, and came into force in May 1998. The minimum sentencing legislation has a number of features to ensure that the intended severity of the prescribed sentences is not undermined by sentencing officers or by the executive. No part of the sentence can be suspended (Criminal Law Amendment Act 1997:S 51 (5)). Nor can the time spent in prison awaiting trial be deducted from the prescribed sentence (Criminal Law Amendment Act 1997: S 51 (4)). An offender sentenced in terms of the minimum sentencing legislation must also serve four fifths of the sentence before s/he can be considered for parole, whereas the majority of other offenders can be considered after serving half of their sentence (Correctional Services Act 1998:S73(6)(b)(v)).² Judicial officers may impose a lesser sentence than the prescribed minimum only if they find 'substantial and compelling circumstances' which justify a departure from the mandatory sentence. (Criminal Law Amendment Act 1997:S 51(3)(a). See Ehlers L & Sloth-Nielsen 2005:12-13)

As will be shown below, this legislation made a substantial contribution to changing the profile of South Africa's sentenced prison population. But while the impact of the legislation on prisoner numbers is likely to be felt for decades to come; its

Figure 2: Proportion of prisoners serving sentences of shorter and longer than 7 years



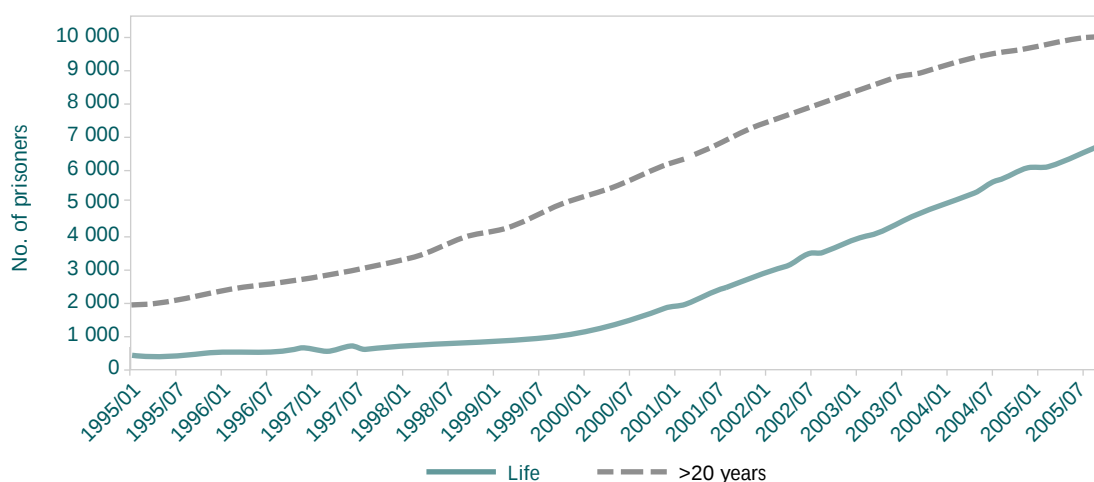
Source: DCS Management Information System

effects were not immediate. For the first two years of its operation, there was no impact at all, due to the time lag from the date of implementation of the minimum sentencing legislation, the commission of offences after that date and detection, prosecution, conviction and sentencing.

From 2000 onwards the combination of the Magistrates Court Amendment Act (1998) and the

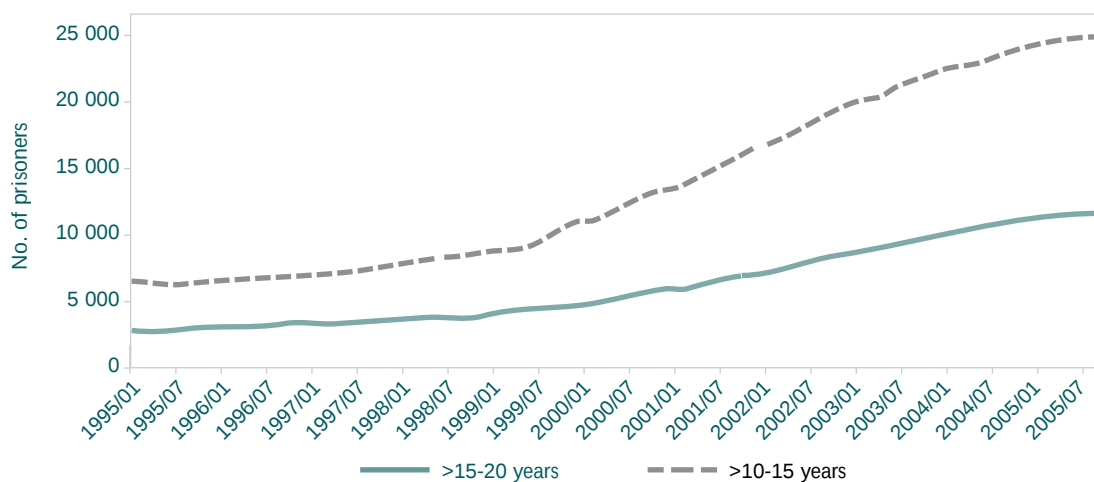
minimum sentencing legislation had a consolidation effect on trends that started pre-1998. A closer inspection of the data shows that sentence lengths started increasing prior to 1998; a trend that was interpreted as a more punitive attitude from sentencing officers. This is demonstrated in Figures 3 and 4, that show the increase in the number of sentences longer than ten years prior to 1998, and the acceleration from 2000 onwards.

Figure 3: Prisoners serving sentences of life and >20 years 1995-2005



Source: DCS Management Information System

Figure 4: Prisoners serving sentences of >10-20 years 1995-2005



Source: DCS Management Information System

An analysis of the data reveals that in early 2000 the number of prisoners serving life sentences began to increase dramatically. It is also apparent that the longer than 20-year category did not have as sharp an increase at that time. The increases look similar in the >10- 20 year sentences (see Figure 4). The >10-15 year category showed a far sharper increase, starting in May 1999. There are two probable reasons for the increase in this latter category. The first is the extension of the sentencing jurisdiction of the regional courts to a maximum of 15 years from the end of 1998. Secondly, a fifteen year sentence is mandatory for first offenders convicted of 'less severe' instances of murder, and robbery when aggravating circumstances are involved, or the taking of a motor vehicle (vehicle hijacking). Given the increase in these types of offences in the 1990s,³ it is probable that these offenders make up a significant proportion of the increasing numbers in this sentence category.

Figure 5 shows that offenders serving prison sentences of three to seven years decreased in terms of real numbers and proportional share.

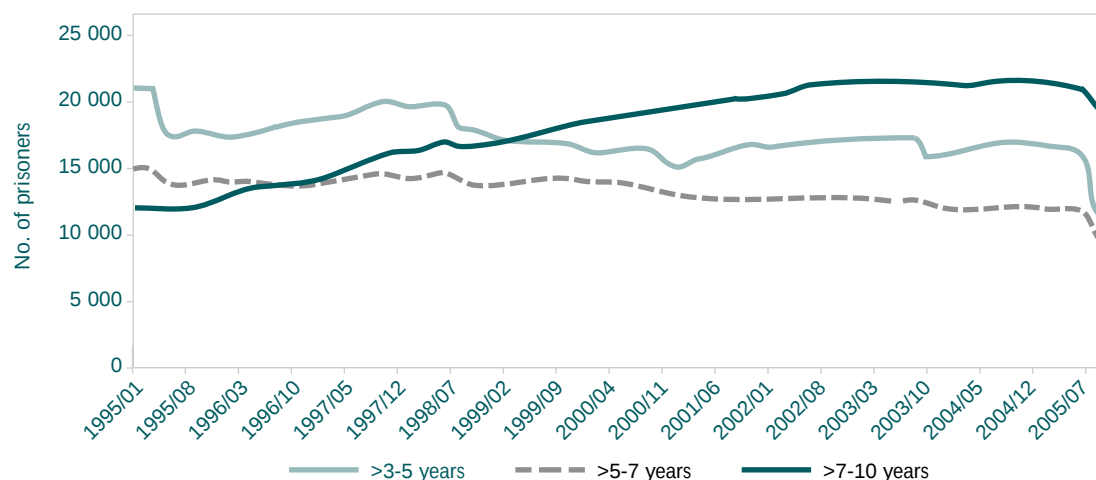
From the late 1990s to 2005, it is more specifically the increase in the general sentencing tariff that played the major role in increasing the size of the prison population. In general, the number of prisoners serving long sentences increased, while

the number of those serving shorter sentences decreased. The turnover of prisoners thus slowed down, and regardless of the fact that fewer offenders were being sentenced to imprisonment; they were staying there for longer.

It is also concluded that, at this stage, the increasing size of the sentenced prison population was not caused by the minimum sentencing legislation. The increase in the number of prisoners serving longer sentences preceded the promulgation of the minimum sentencing legislation and thus also its delayed impact from 2000 onwards. It is possible that this increase was facilitated and consolidated by the minimum sentencing legislation and the increase in sentence jurisdiction, but the initial impetus came from elsewhere. A combination of public and political pressure on the courts to increase the severity of sentences, and the increase in the jurisdiction of the magistrates' courts provided this impetus.

The increase in the number of prisoners serving two- to three-year sentences due to the increased jurisdiction of the district courts is clearly visible in the data. It is however the >10-15 year sentence category that made a greater contribution than any other to the rise in the prison population, and this is attributed to the increase in jurisdiction of the regional courts.

Figure 5: Number of prisoners serving sentences of >3-10 years, 1995-2005



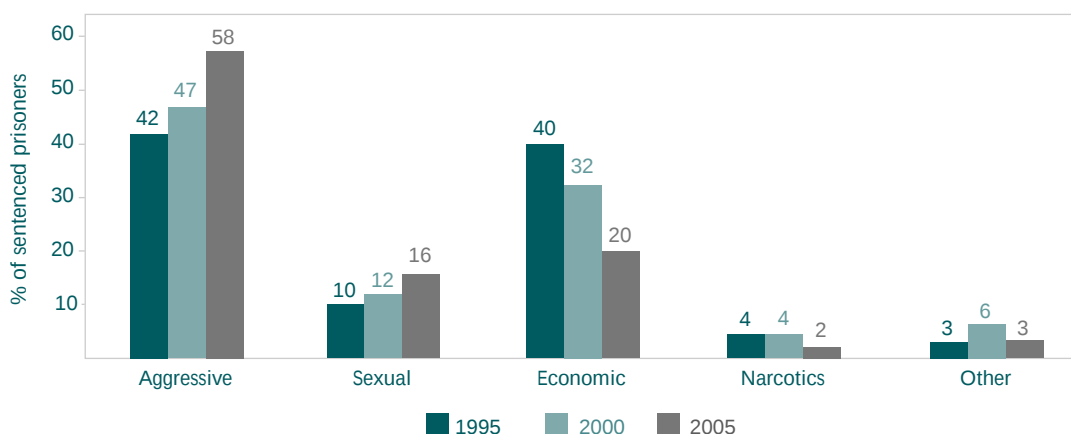
Source: DCS Management Information System

Changes in the offence profile

A study of the offence categories for particular sentence groups also indicates changing trends. The DCS currently uses five offence categories: the three major categories being economic, sexual, and aggressive, while the remaining two categories – narcotics and ‘other’ – are relatively insignificant. The minimum sentencing legislation is aimed primarily, but not solely, at sexual and violent offences.

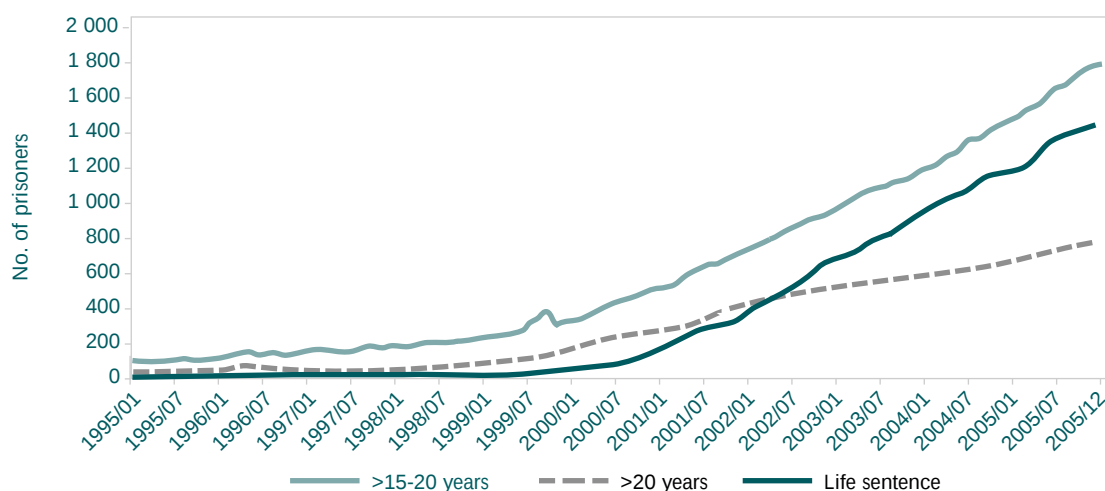
The first important trend is that while the number of offenders serving sentences for economic offences fell, the number of both aggressive and sexual offenders rapidly increased. In 1995, offenders serving sentences for economic offences made up 42% of the sentenced prison population, and sexual and aggressive offences 46%. By 2005, the figure for economic offences had fallen to 20%, while that for sexual and aggressive offences had increased to 75%. (see Figure 6)

Figure 6: Percentage shares of crime categories



Source: DCS Management Information System

Figure 7: Sexual offenders serving sentences of >15 years, 1995-2005



Source: DCS Management Information System

In particular, the number of offenders serving sentences for aggressive and sexual offences significantly impacted on the numbers in the longer sentence categories. The increase in both categories is directly related to the minimum sentencing legislation. Figure 7 shows that the increase in the total number of sexual offenders serving life sentences began in August 1999, 15 months after the introduction of the minimum sentencing legislation. This is as expected. But there is a significant difference in the timing of the increase in numbers of those serving life sentences for aggressive offences and those serving life sentences for sexual offences.

The numbers serving life for aggressive offences began to increase slowly from 1995, due to political and public pressure, and then increased more rapidly from 1999, as a result of the minimum sentencing legislation. The number of sexual offenders serving life, on the other hand, did not increase until in late 1999, when the legislation forced the hands of sentencing officers.

The impact on prisons

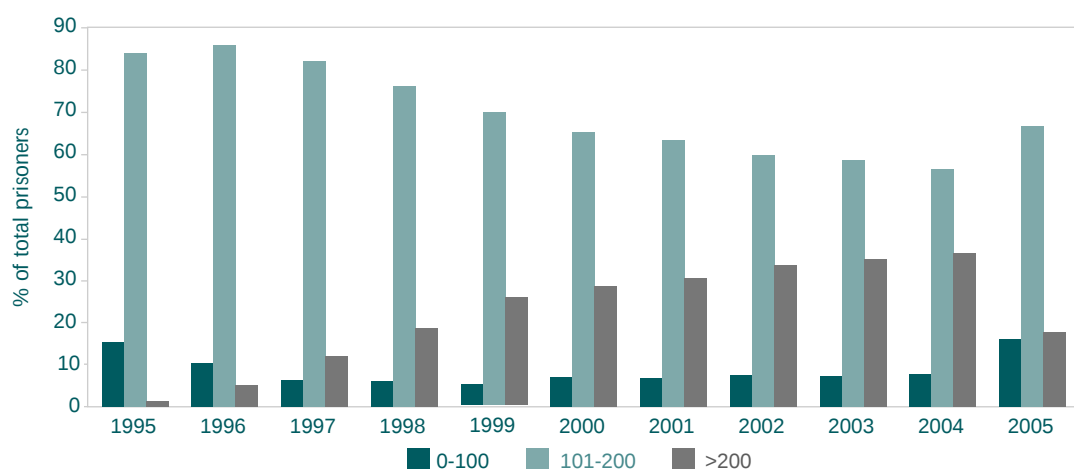
Such increases in prisoner numbers impact on prisons in a variety of ways. Prisoners themselves are of course most directly affected. The total number and proportion of prisoners living in prisons that are overcrowded have increased substantially

since 1995. Only the special remissions of 2005 brought some respite. Figure 8 shows that even though the proportion of prisoners living in conditions of between 100% and 200% occupancy⁴ slowly decreased from 1996 to 2004 (a trend ended by the remission), this decrease has been at the expense of others. The number of prisoners in prisons with occupancy rates of more than 200%, increased from just 1% in 1995 to 36% in 2004.

Of equal concern is the proportion of prisoners detained in institutions in which there are three times as many prisoners than capacity allows. There were no prisoners in this category until 1997, but by 2004 as many as 5% of all prisoners (a total of over 9 000) were held in such facilities. The special remissions reduced this number only slightly, to just less than 8 500. This is because it is largely long-term prisoners and unsentenced prisoners who experience these conditions, and neither of these categories benefited from the remissions.

Staff and prison management are also adversely affected by the increase in numbers of long-term prisoners – but it goes further than that. An increasing proportion of offenders are classified as maximum security prisoners, due to the length of their sentences being based on the formula used by DCS. The result was a sharp increase in the number

Figure 8: Prisoners living in different overcrowding conditions, 1995-2005



Source: DCS Management Information System

of maximum security prisoners, from 14 229 in 1995 to 38 663 in 2005 (see Figure 9).

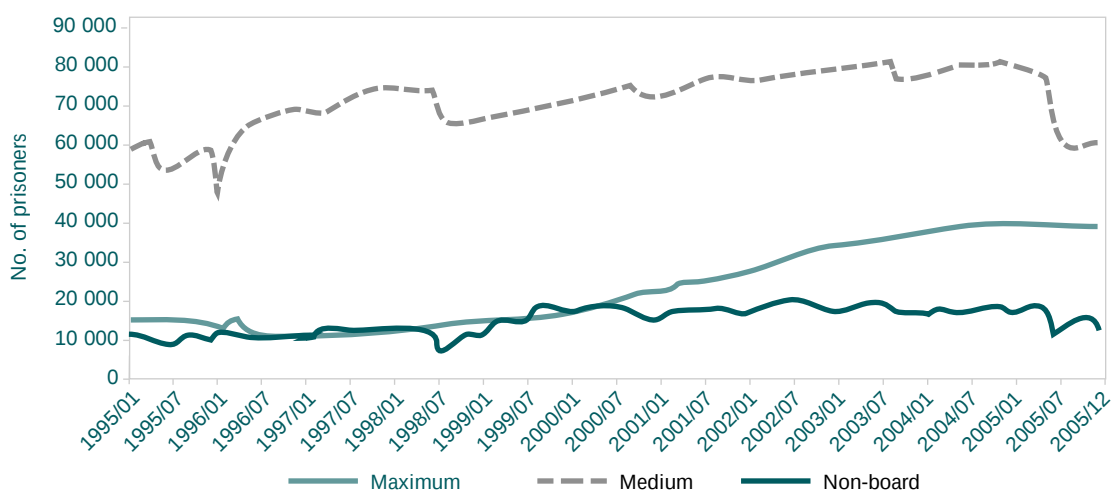
However, for the first five years, until 2000, the increase merely kept pace with the total number of sentenced offenders: in fact, until 1997, the total number of maximum security prisoners declined, as did this category as a proportion of total sentenced prisoners (11% for 1997). From 1998 maximum security prisoners as a category increased in

proportion by 2-3% each year, and by 2005, 30% of all sentenced prisoners were in this category (see Figure 10).

Projecting the prison population

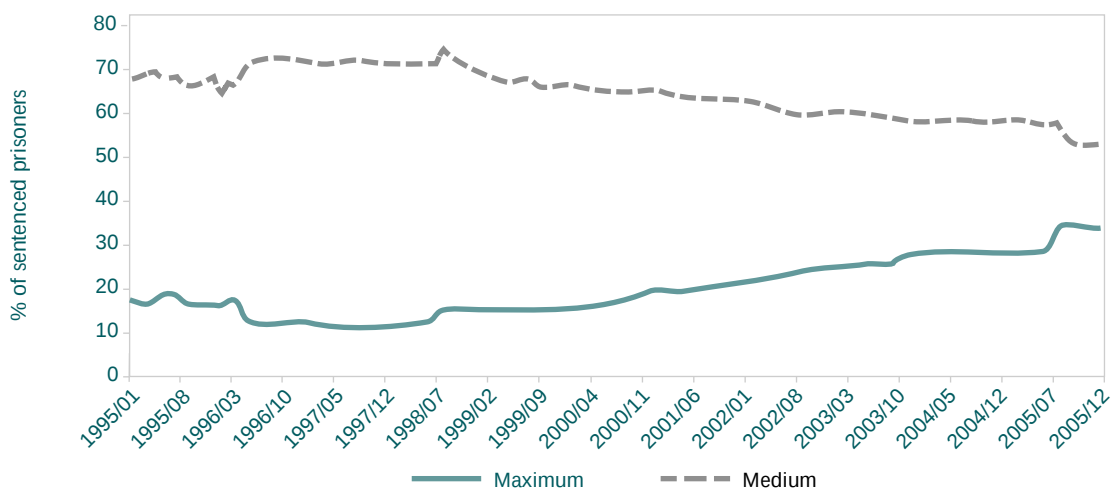
Projecting the size of the South African prison population is fraught with difficulties (Giffard and Muntingh 2006:39). The projection entails basic mathematical forecasting. Firstly, it assumes that all social, political, health and other variables are to

Figure 9: Major security classifications 1995-2005



Source: DCS Management Information System

Figure 10: Percentage share of major security classifications, 1995-2005



Source: DCS Management Information System

remain constant for the projection period. Secondly, only sentences longer than seven years have been forecast. Shorter sentences tend to be more variable over time, and thus projections are less reliable. Thirdly, the final projection assumes that sentences of seven years and less remain the same over the entire forecast period, as well as the unsentenced prison population.

Table 2 shows the projections for the entire prison population. The three columns on the left show the projection, if it is assumed that these totals are frozen from December 2005, after the special remissions. The three columns on the right show the projection based on the assumption that these sentence categories return to their pre-remission levels and then hold stable.

The difference is substantial, and reflects the total number of prisoners released during the special remissions. It would be extremely optimistic to expect that, in the absence of systemic solutions involving the entire criminal justice system, the total number of these short-term prisoners will not

increase again, as they have done after previous executive releases.

While the very long sentence categories seem to have experienced the most spectacular increases (with the total of those serving life more than doubling over a ten year period, for example), it is the >10-15 year sentence category that is providing the bulk of the increase. The projections suggest an increase of nearly 20 000 offenders serving >10-15 year sentences between 2005 and 2015.

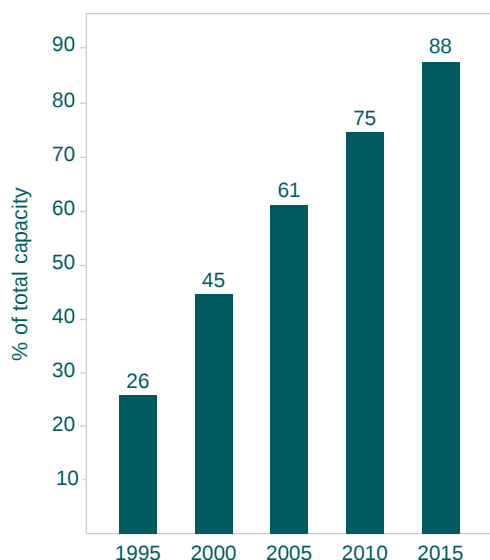
The increases in all the sentence categories of longer than seven years have serious implications for prison overcrowding. The projections suggest that, assuming 9 000 new prison places by 2010 and a further 9 000 by 2015, the proportion of prison places taken up by prisoners serving sentences of longer than seven years will increase from 61% currently to 75% in 2010 and 88% in 2015. In 1995, this sentence category took up only 26% of the available capacity, and in 2000, the corresponding figure was 45%, as shown in Figure 11.

Table 2: Projection of the total prison population 2005 to 2015, two scenarios

	Sentences of 7 years and less stable as from December 2005			Sentences of 7 years and less stable as from January 2005 (pre-remission figures)		
	Current	Projected totals		Current	Projected totals	
	Dec 2005	Dec 2010	Dec 2015	Jan 2005	Dec 2010	Dec 2015
Unsentenced	46 327	46 327	46 327	46 327	46 327	46 327
0-6 months	4 189	4 189	4 189	5 674	5 674	5 674
>6-12 months	3 812	3 812	3 812	5 416	5 416	5 416
>12-<24 months	3 089	3 089	3 089	5 763	5 763	5 763
2-3 years	9 654	9 654	9 654	17 816	17 816	17 816
>3-5 years	10 675	10 675	10 675	16 731	16 731	16 731
>5-7 years	9 089	9 089	9 089	12 137	12 137	12 137
>7-10 years	18 298	18 478	21 462	18 298	18 478	21 462
>10-15 years	23 740	33 743	43 489	23 740	33 743	43 489
>15-20 years	11 122	15 996	20 627	11 122	15 996	20 627
>20 years	9 486	13 103	16 884	9 486	13 103	16 884
Life sentence	6 615	10 441	14 050	6 615	10 441	14 050
Total	156 096	178 595	203 348	179 125	201 624	226 377

Source: DCS Management Information System

Figure 11: Projected percentage of total national capacity used by prisoners serving sentences of longer than 7 years



Source: DCS Management Information System

Conclusion

The Criminal Law Amendment Act (1997) has thus far had some impact on the nature of the prison population, but has not yet impacted on total prisoner numbers. The full impact of the longer sentences brought about by the minimum sentencing legislation is likely to be felt only in five to ten years from now, as these prisoners need to serve four-fifths of their sentence before being considered for parole. The Magistrates Amendment Act (1998), which extended the jurisdiction of the regional courts from 10 to 15 years, had a more immediate effect. Projections suggest that it is this category of prisoners, many of whom were sentenced in the regional courts, that is likely to provide an increasing proportion of the projected increase of over 40 000 sentenced prisoners over the next ten years.

Acknowledgements

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Endnotes

- 1 Over 80% of the category 'Other Sentences' consists of indeterminate sentences for 'habitual criminals'. Others include death sentences, day parole, periodic imprisonment, 'Other mental instability' and prevention of crime.
- 2 There are numerous provisions for different parole consideration dates, but for the majority of offenders not sentenced under Act 105 of 1997, the minimum period to be served is half of the sentence.
- 3 For detailed data see http://www.issafrika.org/index.php?link_id=24&slink_id=2797&link_type=12&slink_type=12&tmpl_id=3. See also Masuka, S 2002. 'Prevention is better than cure: Addressing violent crime in South Africa'. *SA Crime Quarterly* (2). Pretoria: Institute for Security Studies.
- 4 An occupancy rate of 100% refers to an institution that is operating at its intended capacity. An occupancy rate of 200% means that there is double the number of prisoners than originally intended (400 in a prison intended for 200 prisoners). In Figure 8, the category 0-100 refers to the number of prisoners living in institutions in which there is no overcrowding.

POSITIVE OR NEGATIVE?

Compulsory HIV testing of alleged sexual offenders

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Since 2003 the Portfolio Committee on Justice and Constitutional Development has deliberated on legislation providing for the compulsory HIV testing of accused sexual offenders. After having been approved by the National Assembly and submitted to the National Council of Provinces in May 2007, it seems likely that compulsory HIV testing of alleged sexual offenders will be enacted as part of the new sexual offences legislation. This article describes the development and content of the provisions on compulsory HIV testing and examines their practical utility against the background of the alleged offender's constitutional rights. It is argued that these provisions are unlikely to provide the relief sought by victims, and may result in an unconstitutional limitation of an accused's right to privacy.

South Africa is battling with an extremely high incidence of sexual offences. In the year 2005/2006 the South African Police Service (SAPS) received 54 926 reports of rape. (SAPS 2006) However, these figures do not reflect the true scope of the problem because sexual offences are highly under-reported. Besides the high number of rapes, South Africa is confronted with a very high prevalence of HIV/AIDS. The convergence of high numbers of both rape and HIV/AIDS creates a dangerous conjunction. In addition to various other traumatising effects, rape victims face the risk of being infected with HIV.

Penetrative forms of sexual assault bear a comparatively high risk of HIV transmission. Use of force and lack of lubrication, which are common features of sexual assault, often lead to tears and other micro-injuries in the genital organs, facilitating the transmission of sexually transmitted diseases like

HIV/AIDS. Women – disproportionately often victims of sexual assault – are more vulnerable to HIV transmission than men because of the physiological features of the vagina, the high viral load (infectiousness) of semen and the possibility of (other) unnoticed infections of their genital organs.

The law reform process

Pressured by mounting public concern about the coupled high prevalence of sexual offences and HIV/AIDS, the Portfolio Committee on Justice and Constitutional Development (hereafter: Portfolio Committee) asked the South African Law Reform Commission (SALRC) in 1998 to examine the possible enactment of legislation for the compulsory HIV testing of alleged sexual offenders. The SALRC investigation concluded that there *is* in fact need for a statutory intervention for compulsory HIV testing of alleged sexual offenders at the instance or on behalf of the victim. As a result the

SALRC laid out a first draft of a Criminal Procedure Amendment Bill in the Fourth Interim Report on Aspects of the Law Relating to AIDS, which envisioned compulsory HIV testing of arrested persons for non-evidentiary purposes. (SALRC 2000:8)

In 2003 the Portfolio Committee began its deliberations on the provisions that subsequently became the Compulsory HIV Testing of Alleged Sexual Offenders Bill. This Bill entitled a victim of a sexual offence who may have been exposed to the body fluids of the alleged sexual offender to apply for a court order directing that the offender be tested for HIV/AIDS. The purpose of the legislation was to afford the victim of an alleged sexual offence a speedy process to find out whether s/he might have contracted HIV.¹

In 2006, the Compulsory HIV Testing Bill was incorporated into the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (hereafter: Sexual Offences Bill). The provisions have since changed considerably. Since the inclusion, the provisions allow not only *victims* of sexual offences but also *investigating officers* to apply for a mandatory HIV test of the alleged offender. The latter may apply for testing of an alleged sexual or *any other* offender.²

Victims' application

Before the victim or a person acting on behalf of the victim can apply for a compulsory HIV test of an alleged sexual offender, the victim must lay a criminal charge with the SAPS. Another requirement for the application is that not more than 90 days have passed since the alleged commission of the offence. These requirements fulfilled, the victim may apply for the mandatory HIV test at the police station. Once the police have received the application they have to submit it to a magistrate as soon as is reasonably possible.

After considering the application, the magistrate must make an order for the alleged offender to be tested for HIV if s/he is satisfied that there is *prima facie* evidence that–

- A sexual offence has been committed against the victim by the alleged offender

- The victim may have been exposed to the body fluids of the alleged offender
- No more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place

The magistrate must furthermore ensure that the alleged offender has not yet been tested for HIV on application by a police official.

Detectives' application

An investigating officer can apply for an HIV test of an accused if such a test would appear to be necessary for purposes of investigating or prosecuting an offence. It is important to note that an investigating officer may make the application for the investigation of *any* offence, not only sexual offences.

After considering the application, the magistrate must make an order if s/he is satisfied that there is *prima facie* evidence that–

- The alleged offence has been committed by the offender
- HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence

The magistrate has to consider the application as soon as is reasonably practicable and may take into consideration evidence by or on behalf of the accused only if to do so will not give rise to any substantial delay. Discretion regarding the granting of applications is very limited ('the magistrate *must* make an order'). If an application is granted, the alleged offender will be notified by the police and must undergo an HIV test at a designated health facility; non-compliance with the court order constitutes an offence.

The outcome of the HIV test is disclosed to the victim, or the person acting on behalf of the victim, or to the investigating officer, as the case may be, and to the accused.

Concerns about compulsory HIV testing

During the drafting process, compulsory HIV testing of alleged sexual and other offenders was

commented on vigorously by criminal law experts, criminal justice personnel, human rights activists and victim advocacy groups. Those who supported the testing commented that it was necessary for the protection of victims' rights and that it balanced the rights of victims and those of suspects in an appropriate manner. Opponents of the legislation believed that the infringement of the alleged offender's constitutional right to privacy (s 14 of the Constitution) – among others – was unjustifiable and that compulsory HIV testing lacked practical utility.

Concept of privacy

The Constitution explicitly protects the right to privacy. Facts are considered private if the disclosure thereof will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence. A person's HIV status is medical information about an incurable disease. Due to the sexual transmission and the lack of a cure, HIV/AIDS – unlike other illnesses – is a condition related to sex, blood, death and disease. HIV status therefore needs to be considered an intimate affair that is protected under the constitutional right to privacy. This has recently been confirmed by the Constitutional Court in the judgment *NM and Others v Smith and Others* where Madala J held that 'private and confidential medical information contains highly sensitive and personal information'. The Court recognised that 'the disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure'.

Forcing an individual to undergo testing for such disease, and *disclosing* the subsequent test result without the individual's consent, severely collide with the constitutional pledge. The fact that the individual in this case is an alleged (sexual) offender does not make a difference. The alleged offender cannot be said to have forfeited his rights, having possibly committed a rape, because he is still an accused and not a convicted criminal.

The limitation clause

It is contested whether the limitation of the alleged offender's right to privacy is reasonable and

justifiable under the limitation clause of the Constitution (s 36 Constitution). To establish whether the restriction of a right is justifiable, the following factors need to be taken into account:

- The importance of the purpose of the limitation
- The nature and the extent of the limitation
- The relation between the limitation and the purpose
- Whether there are less restrictive means to achieve the purpose

The provisions on compulsory HIV testing would thus be justifiable if they had a significant purpose that outweighed the alleged offender's right to privacy.

Justifiability of detectives' application

According to the principles of the limitation clause, the major questions are:

- What is the *purpose* of the provisions allowing investigating officers to apply for a compulsory HIV test?
- Is this purpose achieved through the provisions?
- Is this purpose important enough to justify the limitation of the alleged offender's right to privacy?

The purpose of the envisaged provisions is to facilitate and enhance the investigation process of the police so as to enable the effective prosecution of criminals. The importance of thorough police investigations, including evidence collection, may not be underestimated. The ascertainment of bodily characteristics such as fingerprints and blood samples often forms an essential part of the investigation of a specific crime. Comprehensive police investigations are the basis for the successful prosecution of crimes. The prosecution does not have a strong case unless the police investigation has secured evidence that can be used in the court proceedings.

It could therefore be argued that effective policing, or more broadly, effective criminal proceedings, justify the limitation of the alleged offender's right to privacy. However, this argument fails. The envisaged provisions on compulsory HIV testing are not necessary to fulfil this purpose because it is, in fact,

already fulfilled by provisions of the Criminal Procedure Act No. 51 of 1977 (CPA). The CPA already provides for comprehensive police investigations and evidence collection through detailed provisions on blood tests. Section 37 of the CPA states that any police official may–

take such steps as he may deem necessary in order to ascertain whether the body of any person...has any mark, characteristic or distinguishing feature or shows any condition or appearance.

Under this provision of the CPA, the police may order a medical examiner to take a blood sample if this is necessary to obtain evidence. The legislation also provides for blood tests on convicted criminals. These can, however, only be ordered by the court before which the criminal proceedings are pending (s 37(3) (a) CPA).

The Portfolio Committee briefly discussed the overlap between the envisaged provisions and section 37 of the CPA during its deliberations on the Sexual Offences Bill. At a meeting of the Committee in 2003 a representative of the SAPS pointed out that s 37 CPA *does* provide for investigating officers and magistrates to apply for a blood test of an alleged sexual offender, and that this blood test could include an HIV test. The SAPS representative stressed, however, that the provisions in the CPA were ‘not written with HIV/AIDS testing in mind’, and that magistrates were reluctant to issue such orders. (Parliamentary Monitoring Group 2003)

Whether s 37 CPA was written with HIV/AIDS testing in mind is irrelevant, though. In 1977, when the provision was drafted, HIV/AIDS was not an issue. This does not *per se* exclude HIV/AIDS tests from the provision; what matters is the *applicability* of the provision. Section 37 CPA is phrased broadly enough to cover a wide range of blood tests – tests to determine substance abuse, tests for genetic information (DNA), etc. The provision does not entail any indication that it is not applicable to established conditions like HIV status.

Thus, s 37 CPA covers testing an alleged offender for HIV if this is necessary to investigate a crime, to

lead evidence and for sentencing. As the CPA provides for HIV tests, the provisions in the Sexual Offences Bill are completely redundant. Hence, the provisions do not serve an important purpose and are not justifiable under the constitutional limitation clause.

Utility of HIV test results as evidence

The *utility* of HIV tests for criminal proceedings is a different question altogether. The test result does not necessarily facilitate the prosecution of sexual offences. The only offence where HIV status is an element of the crime and hence is relevant for sentencing are rape cases where the alleged offender committed the crime knowing that he was HIV positive (Schedule 2 Part 1 Criminal Law Amendment Act 1997). In these rape cases, the prosecutor has to prove that the alleged offender was HIV positive and *knew* his/her HIV status when committing the crime. The outcome of an HIV test weeks or even months after the offence neither provides evidence that the offender was infected with HIV at the time of the commission of the offence, nor that the offender had specific knowledge regarding his/her HIV status.

Justifiability of victims' application

Whether the provisions that allow victims of sexual offences to apply for an HIV test are justifiable under the limitation clause is based on the same test. The provisions must correspond with an important purpose and this purpose must outweigh the interests of the alleged offender. It therefore needs to be assessed:

- What the *purpose* of the provisions allowing rape victims to apply for a compulsory HIV test is
- Whether this purpose is achieved through the provisions
- Whether this purpose is important enough to justify the limitation of the alleged offender's right to privacy

In their *Fourth Interim Report on Aspects of the Law Relating to AIDS* the SALRC stated that the purpose

of the HIV test is to enable victims to 'make life decisions and choices for themselves and people around them' and that such tests are 'profoundly beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life-threatening disease'. (SALRC 2000:175,312)

The latest version of the Sexual Offences Bill states that the test results are:

- to inform a victim or an interested person whether or not the alleged offender...is infected with HIV with the view to–
 - reducing secondary traumatisation empowering the victim to make informed medical, lifestyle and other personal decisions[.] (Section 34 (a) (i))

Presumably, 'medical, lifestyle and other personal decisions' refer mainly to the victim's choice about the use of post-exposure prophylaxis (PEP) and safer sex practices.

Post exposure prophylaxis

Post exposure prophylaxis is a 28-day programme of antiretroviral drugs, which may prevent the infection of HIV if taken within 72 hours of exposure to HIV. Scientific evidence suggests that the medication needs to be taken within 6 hours of exposure to be effective.

Unfortunately, testing the alleged offender for HIV cannot help the victim make these decisions. The main obstacle is the 'window period'. During the first three to six weeks after the initial infection, an HIV positive person does not show HIV antibodies in the blood. The virus cannot be detected through HIV antibody tests, which are the tests primarily used in South African health care facilities.³ The risk of transmission is, however, especially high during this period due to the high viral load at the onset of HIV infection.

This means that during the 'window period' the alleged sexual offender would test HIV negative,

although s/he could be HIV positive *and* highly infectious. It would be devastating if the victim were told that the alleged offender had a negative test result and on the basis of this information decided to stop taking PEP or practising safer sex - because, in fact, his/her risk of HIV infection might be extremely high.

Since a negative test result does not necessarily mean that the alleged offender *is* HIV negative, the test result neither provides clarity about the HIV status of the alleged offender, nor about the risk of infection for the victim and his/her sexual partner(s). As such, the test result does not achieve its purpose of empowering the victim to make informed medical and lifestyle decisions. On the contrary, the provisions may even be counter-productive in cases where victims misinterpret an HIV negative test result.

The other purpose of the provisions – affording the victim emotional relief – is doomed to fail for the exact same reason. The victim might take some comfort from an HIV negative test result, thinking that the chances of the offender being in the 'window period' are comparatively low. In reality there is a very real risk of the alleged offender being HIV positive and hence, a risk of the victim having been exposed to the virus.

Similarly, if the alleged offender tested HIV positive, this will be extremely distressing for the victim, even though the test result may not show that HIV was transmitted through the sexual assault. Due to its uncertainty, the test result cannot give the victim peace of mind. The only way to gain clarity and emotional relief is for the victim to undergo repeated HIV testing himself/herself.

This leaves the purpose of reducing secondary traumatisation. Compulsory HIV testing of the alleged rapist could emotionally empower the rape victim in the sense that s/he would, for a brief moment, gain power over the alleged perpetrator.

Victims of sexual offences have been brutalised and humiliated. It should also be noted that they have been neglected and victimised by the criminal justice system far too long. But are the proposed

provisions on compulsory HIV testing an appropriate answer to end the secondary traumatisation of rape victims? Probably not: the secondary victimisation of rape victims needs to be addressed more effectively through protective measures such as specialised sexual offences courts, as well as specific regulations on vulnerable witnesses and *in camera* hearings. HIV testing of the alleged offender is not an appropriate tool to fight secondary victimisation.

Overall, compulsory HIV testing of alleged sexual offenders is of no practical use for rape victims. The provisions fail to achieve the objects that were envisioned in the Sexual Offences Bill. In the absence of an important purpose, the limitation of the constitutional right to privacy is not justifiable under s 36 of the Constitution.

Conclusion

The provisions on compulsory HIV testing are meant to provide assistance and support to investigating officers and victims of sexual offences. In fact, they are more detrimental than beneficial. With regard to applications by the police, the provisions are completely redundant, because the CPA already provides for blood tests, including HIV tests.

With regard to applications by rape victims, the provisions lack practical utility. As the 'window period' makes it impossible to obtain reliable test results, neither the HIV status of the alleged offender nor the risk of transmission for the victim can be established through testing the accused. Thus, the victim cannot rely on such testing for vital decisions concerning antiretroviral therapy and safer sex practices.

The lack of utility means that the provisions fail to serve an important purpose outweighing the alleged offender's right to privacy. Moreover, the provisions might create a false sense of security, which could actually backfire on rape victims and their sexual partner(s). It is therefore strongly suggested that the provisions on compulsory HIV testing should be omitted from the Sexual Offences Bill before the legislation is finally signed by the President.

Acknowledgement

The findings of this article were drawn from a more comprehensive research report, 'HIV/AIDS and the right to privacy', which was prepared for the Canadian International Development Agency.

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Endnotes

- 1 Memorandum on the Objects of the Compulsory HIV Testing of Alleged Sexual Offenders Bill (B10-2003).
- 2 The inclusion of investigating officers as applicants has been one of the major changes since the incorporation of the Compulsory HIV Testing Bill into the Criminal Law (Sexual Offences and Related Matters) Amendment Bill; another important modification has been the creation of provisions allowing the test result to be admissible as evidence in ensuing civil or criminal proceedings.
- 3 Certain blood tests can detect HIV even during the window period. As these tests are extremely expensive and highly sensitive compared to HIV antibody tests, the author assumes that these tests will not be used for large-scale testing such as compulsory HIV tests of alleged sexual offenders.

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Cover photograph

By Joao Silva / PictureNET Africa

Sentry Security guards Jerry Ntsele (left) and Turnwell Nkosi look on as two suspects, whom they apprehended for attempted theft on private property, are taken away by the police.

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