



AORC-IOI



JICS
Judicial Inspectorate for
Correctional Services

Visiting Places of Detention

Online Seminar, Tuesday 20 April 2021

THE ROLE OF JICS, SHORTFALLS AND THE CALAMITY OF OVERCROWDING

Ms Ngema, Director: Legal Services

INTRODUCTION:

- The first democratic President of South Africa and the most famous prisoner, Nelson Mandela, said: “No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”
- South Africa has a supreme Constitution with a robust Bill of Rights. As a transformative Constitution, it seeks to redress the atrocities of apartheid, including how prisons were key sites for the enforcement of the harshest aspects of apartheid. The Constitution requires in section 35(2)(e) that all inmates are entitled to “conditions of detention that are consistent with human dignity”.
- Part of this transformative project was establishing the Judicial Inspectorate for Correctional Services (JICS) – a legislative watchdog body that oversees correctional centres in South Africa.

¹ Mandela Long Walk to Freedom (Little, Brown and Company, London 1994) at 115.

² See further Dissel and Ellis “Reform and Stasis: Transformation in South African Prisons” (2002) *Critique Internationale* and Ormond *The Apartheid Handbook* 2 ed (Penguin Books, London 1986).

AS A POINT OF DEPARTURE, I WILL PROVIDE SOME BACKGROUND ON JICS:

- JICS is established in terms of section 85 of the Correctional Services Act 111 of 1998 (the Act). The overarching role of JICS is “to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres.”
 - The Inspecting Judge inspects and reports on conditions in correctional centres as well as any corrupt or dishonest practices in correctional centres.
 - The Inspecting Judge may investigate matters and hold public hearings.
 - Pursuant to the National Inspection Plan, JICS will inspect 136 centres this year and report to the Minister through quarterly and annual reports.
- All correctional centres have an Independent Correctional Centre Visitor (ICCV) who acts as the Inspecting Judge’s eyes and ears to monitor inmates’ complaints. Section

85(2) of the Act.
Section 90 (1) of the Act.
Section 90(5) of the Act.

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- Section 7(2) of the Constitution obliges the state to promote and protect the rights in the Bill of Rights. The establishment of JICS was one of the steps taken by the state to give effect to the section in respect of the people in places of confinement. Recently, the Constitutional Court (the apex Court of South Africa) underscored two key features of JICS:
- First, it highlighted JICS's critical role in upholding human rights when it observed that: "Correctional centres remain fertile breeding grounds for autocracy and human rights abuses It is within this context that the Judicial Inspectorate carries out its mandate, with the constitutional rights of incarcerated persons hanging in the balance."

^[1] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (4 December 2020) at para 28.

AS A POINT OF DEPARTURE, I WILL PROVIDE SOME BACKGROUND ON JICS: Cont.....

- Second, it affirmed the necessity of JICS's independence when it noted that: "To effectively scrutinise correctional centres and remand detention facilities, an oversight body should maintain an arms-length relationship with the Department. It should be sufficiently insulated from undue influence or 'capture' by the very departmental officials whose conduct it is charged with monitoring. In addition, it must gain the confidence and trust of inmates. Inmates' confidence in the work done by a correctional centre oversight body will depend largely on the extent to which that body is perceived as being independent."
- JICS also gains some authority from the Optional Protocol to the Convention against Torture (Optional Protocol).
 - Article 17 provides that: "Each State Party shall maintain, designate or establish . . . one or several independent national preventive mechanisms for the prevention of torture at the domestic level."
 - As a result, JICS is part of the local National Preventative Mechanism which is coordinated by the South African Human Rights Commission. JICS accordingly reports in line with the OPCAT.

Next, I will identify some institutional concerns

- While JICS has an important and wide-ranging mandate, there are three overarching weaknesses:
 - First, despite being a watchdog body, JICS lacks operational, managerial or executive powers over the Department of Correctional Services (the Department). As a result, the Department has no obligations to implement the recommendations and findings of JICS.
 - Second, the Department fails to comply with the existing legislative obligations that it already owes to JICS.
 - For example, mandatory reporting. The Act requires the Department to report on the following issues: deaths; use of force; segregations; and mechanical restraints. But the Department continues to neglect these obligations.
 - In 2019/20, the Department only reported 10% of segregations and there was a 64% increase in the use of force cases, although it is likely to be higher.
 - But there is some hope – the Department is rolling out their e-corrections system.

See sections 15(2), 30(6), 31(3)(d) and 32(6) of the Act.

JICS will be hosting a seminar on the use of force in correctional centres.

During 2016, the DCS electronic reporting system crashed. DCS commenced developing a new E-Corrections system. In consultation with DCS GITO, JICS submitted their oversight statutory reporting requirements, which were integrated into the new E-Corrections system. The E-Corrections system, which is fundamental and operational, is currently being rolled out on a national scale. This E-Corrections reporting system will enhance JICS's reporting competence, especially when it comes to mandatory reporting (deaths, mechanical restraints, segregation and the use of force).

I will now flag a significant concern in correctional centres: **overcrowding**

- The overcrowding of correctional centres (for both remand detainees and sentenced offenders) is a central issue that has a negative spillover effect.
- As of 26 March 2021, there were 140 750 inmates in South African correctional centres for approved accommodation of 120 567 (overcrowded by 17%). Of these, there are 47 803 remand detainees; 132 state patients; and 92 815 sentenced offenders. It is noteworthy that remand detainees are a significant chunk of the prison population.
- Overcrowding has a three-fold impact.
 - First, it negatively impacts prison conditions as they become dilapidated, unhygienic and unsanitary places.
 - Second, it undermines possible good governance and administration in correctional centres. Correctional officials cannot properly oversee and manage all inmates, which creates breeding grounds for violence and sexual violence to occur with impunity.
 - Third, it undermines opportunities for rehabilitation in correctional centres to combat high recidivism rates. Despite the Act's emphasis on rehabilitation, the Department continues to treat rehabilitation and education programs as luxuries – and not necessities.

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- It is important to note that overcrowding in correctional centres is a systemic issue and is a product of various factors, which include:
 - Mandatory minimum sentencing;
 - The war on drugs;
 - Unaffordable bail amounts;
 - Dysfunctional parole processes; and
 - Lags in the court processes.
- These complex issues go to the heart of criminal justice reform and these changes require political will from various stakeholders.

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It is critical to consider overcrowding and COVID-19

- The COVID-19 pandemic has exposed the crisis of overcrowding in correctional centres.
- Correctional centres – especially overcrowded ones – are reservoirs for the spread of infectious and communicable diseases. In the context of COVID-19, inmates locked up in congregate settings with bad ventilation are unable to sanitize and socially distance. For these reasons, many jurisdictions have witnessed the pandemic spread through their prison populations.
 - For example, in the United States of America, one in five prisoners had contracted COVID-19.
- Given the potential for COVID-19 to spread rampantly in prisons, it has urged governments across the world to respond in extraordinary ways.
 - Many jurisdictions have taken steps to reduce the prison population by releasing inmates.
 - For petty non-violent offences or elderly inmates, some jurisdictions have provided pardons, remissions, diversion programs or suspension of sentences.
 - In South Africa, the Presidential remission of December 2019 and the early consideration of parole in May 2020 played a role in reducing overcrowding. As of 26 March 2021, 17 000 inmates were identified to benefit from the special dispensation program and 13 813 have benefitted thus far.
 - While these are welcomed developments, some may have been offset by the South African government's approach to deal with the pandemic through the blunt criminal law, which resulted in various arrests for violating the lockdown regulations.
 - The COVID-19 pandemic ushers in some important reflections:
 - If we are able to release or divert classes of inmates that are not considered a threat to society, should they have been behind bars in the first place?

Is it fair and just for bail to be based on monetary amounts?

Fazel and Baillargeon "The Health of Prisoners" *The Lancet* 2011 (377) 956-65.

See further *The Marshall Project* available here <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> (18 December 2020).

Luckily, in South Africa we are yet to see such numbers. Currently, the COVID-19 cases in South African prisons were 11 343 (Total cases) 11048 recoveries, 7424 were officials and 4101 were inmates. 171 officials died and 72 inmates died.

Please see various examples here: https://www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/#_edn7.

See further Cameron in *News24* <https://www.news24.com/news24/columnists/questcolumn/edwin-cameron-to-enforce-the-covid-lockdown-did-we-wage-a-war-on-the-people-of-south-africa-20210306>.


I would recommend we have the latest COVID numbers from Ms Sibutha in preparation for questions.

It is critical to consider **overcrowding** and **COVID-19** Cont.....


- At the beginning of the hard lockdown in South Africa, JICS was inundated with complaints in respect of bail money (some as little as R100).
- How can we take the lessons learnt from the COVID-19 pandemic and implement them in normal times?
- Should these measures be implemented to combat the spread of other communicable and infectious diseases like TB and HIV?
- Do we need to change our approaches to crime and punishment?

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TO CONCLUDE

- Ultimately, JICS is committed to the mandate of ensuring that inmates are detained and incarcerated in conditions consistent with human dignity.
 - It is a complex task but one that we are deeply committed to.
 - JICS welcomes any engagements from other stakeholders and interested parties.
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Thank you.