

# MINDFUL PUNISHMENT

## What to do about the South African penal system, and why

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Penal reform is crucial to South Africa's long term crime control and criminal justice agendas. This article shows how the penal system could respond more ethically without an overwhelming investment of new resources. There are two strategies South Africa can employ to create a 'mindful' penal system. First, the length of sentences must be reduced. Second, a viable new system of community based (non-prison) penalties must be created. Neither strategy will be easy, but doing one without the other will fail.

**I**t is generally believed that the South African penal system is broken. There is plenty of evidence for this view:

- Prisons are so woefully overcrowded that even an aggressive campaign to expand capacity will lag behind growth projections
- Gangs dominate much of prison life, and in some prisons they play a more profound role in daily prison life than anything else about the prison
- Staff are overwhelmed by the combination of poor prison conditions and unmanageable crowding, so that even a modicum of prison programming too often seems beyond reach
- Recidivism rates are very high, giving evidence that rehabilitation programmes do not work and prison serves as a kind of revolving door
- Imprisonment is about the most expensive 'service' offered by the criminal justice system, at about R125 per person per day<sup>1</sup>

A broken penal system is a problem for a young democracy such as South Africa. Human rights, the rule of law, and basic decency require a functioning, credible penal system. Anyone looking at the list of problems facing South Africa would be

correct to think that reforming the penal system must be a high priority for this democracy. They would likely assume, as well, that reform would be both difficult and expensive.

They would be very right on the first count, but wrong on the second – or at least, not so right. Penal reform is the *sine qua non* of a functioning justice system, and yet even today's most established democracies struggle to operate an effective correctional system. History shows that punishing people well is a difficult challenge. But it need not break the bank. This article explains why reform is crucial to South Africa's long term crime control and criminal justice agendas. The article then shows how reform can enable the penal system to respond more ethically without an overwhelming investment of new resources.

That is not to say that penal reform can be done on the cheap. Punishment costs money. But a much more scarce resource, when it comes to the penal system, is imagination and creativity – a willingness to forego failed ideas and try new ones. South Africa can punish more wisely without a massive shifting of resources from other priorities, such as

schools and health care. But it can do so only if it is willing to chart a new course for its penal agenda.

South Africa needs to be more 'mindful' in the way it punishes its criminals. By 'mindful', I mean punishments that reflect not only the humanitarian values of the new democratic state of South Africa, but are also consistent with its urgent need to focus its limited public resources on strategies that improve community life for the large subgroup of South Africans who struggle in poverty. A mindful strategic approach to punishment will also take account of what we know about the impact of different penal arrangements on public safety and on the poorest communities. The need for penal reform is apparent to anyone who looks, but the way out of the current mess is not so obvious.

#### **How the South African penal system got the way it is today**

There is a grand irony in the South African penal system. It has one of the largest prison systems per capita in the world,<sup>2</sup> yet one of the lowest conviction rates for violent crime of nations who keep that statistic. How can the prison system be so large if so many people escape being caught? Here is why: South Africa's judicial system hands out some of the longest sentences for violent crime in the world, and those who eventually get released return to prison at very high rates.

#### *Being tough*

This leads to at least one immediate conclusion. Leniency is not South Africa's problem. Her judges already impose very long sentences on the convicted — almost half get sentences ten years or longer. These people then experience harsh confinement conditions and, true to form of studies of harsh confinement in democratic states, return to prison at very high rates (Langan & Levin 2002). Doing more of this hardly seems to be a radical shift in thinking.

Presumably judges impose these long sentences to prevent crime, not by a promise of rehabilitation, but by incapacitating the person who will be behind bars for a very long time. But long sentences are known to be a particularly inefficient way to try to prevent crime through incapacitation. Crime is a

young man's game. The peak age of criminal arrest for men is late teens, and the peak age for incarceration is early twenties. The well known age-crime curve means that as men get older, their propensity for criminal activity decreases. On their own, then, long sentences are inefficient ways to prevent crime through incapacitation, because each additional year in prison prevents an ever decreasing amount of crime.

Moreover, the crime prevention effects of a person spending any time in prison are generally overestimated. Most crimes are committed in groups. When a person is arrested and removed from the group, the typical result is not the group's break-up, but rather its recruitment of a replacement for that person. Thus, the logical result is that when a person goes to prison on a long sentence, the impact on the criminality of the group is minimal — *and* there is now someone new involved in the group's crimes who might not have been, had the original group remained intact.

Add to this scenario two important facts. First, well over 90 per cent of those who go to prison are eventually released anyway. Second, stays in prison are criminogenic, even short ones: they increase rather than decrease the chances of a person returning to crime once released (Nieubeerta, Nagin & Blokland 2007). This explains why recent empirical reviews find that the incapacitation effect of imprisonment is small (Stemen 2007).

Of course, long sentences also tie up prison capacity. A prison capacity of, say, 100 000 cells can house 50 000 people serving two years each, but if the average person gets a ten year sentence, there is space for only 10 000 people.

No wonder that while South Africa's prison system is one of the largest in the world, crime appears to have been largely unaffected. Few criminals are caught; those who get caught are easily replaced. People who go to prison get out eventually, and most of them re-offend. None of this takes account of the stream of at-risk youth headed for lives of crime, ignored by a crime prevention policy that is heedless of them. (The void in strategies for at-risk youth is especially mindless, given the growing

mountain of evidence that such programmes are the most cost effective way to reduce crime.)

### *The centrality of prison*

There is another anomaly in South Africa's penal system. Unlike most other democracies, South Africa is far more committed to using prison as its main vehicle of punishment. Throughout Europe, in the United States, and in other Western democracies, the vast majority of sentences imposed by the court involve penalties carried out in the community: fines, community service, probation, and the like. It is not uncommon for these countries to have two or three people under community sanctions for every person confined. The pattern is reversed in South Africa, where there are ten people behind bars for every person on probation, and people in custody outnumber those in the community by more than three to one (Department of Correctional Services 2008).

Thus, South Africa's troubling penal system became the way it is by being different from the rest of the democratic world in three significant respects. First, its rate of violent crime is a notch higher than elsewhere. Second, it relies on prison as a penalty far more uniformly than other democracies. Third, while it prosecutes but a low percentage of those who are actively criminal, it imposes unusually long sentences upon the few it catches.

This in turn leads to a second obvious conclusion. Any meaningful strategy to improve the justice system will have as a very high priority a substantial increase in the rate of clearing crimes of violence. Today, well under five per cent of the violent crime of robbery, for instance, results in a conviction (Altbeker 2007:81). But any improvements in law enforcement efficiency will pose mind-boggling challenges to an already beleaguered prison system.

All things being equal, a doubling of the clearance rate for crimes such as robbery, from three per cent to a rate approaching that in other nations (10-20 per cent) would also more than double the demand for prison space. With prison demand already at 140 per cent of capacity, this is hardly sustainable without an enormous influx of new funding into the prison system. But even in the unlikely event that

such funding becomes available, in the absence of other changes, the only result would be a much larger version of the same, already failing, prison-centric system.

This is the final, unassailably practical reason why South Africa must reform its prison system. It cannot fight crime without making the police more effective, and a promise to make the police more effective is empty without a penal system to respond in new ways to the additional workload a more effective police practice will create. The current way of doing business at the back end of the system simply will not sustain a reinvigorated front end of the justice system. A new way of thinking about penal policy in South Africa is needed. What can be done?

### **Two penal strategies for South Africa**

There are two penal strategies South Africa can employ to create a mindful penal system. First, the length of sentences must be reduced. Second, a viable system of penalties operating in the community must be created. Neither strategy will be easy, but doing one without the other will fail.

#### *Reduce the length of prison sentences*

The average South African, living in a country where there is a general public perception that the system is lenient, will most likely find the idea that prison sentences should get shorter to be shocking, even silly. But the fact is that sentences in South Africa are not short. More than that, long sentences are counterproductive. A bevy of studies show that longer sentences do no better at preventing crime than short ones (Clear 2007:30-35), yet they tie up already scarce prison resources, water down the incapacitating effect of confinement, and contribute to overcrowded prisons that discredit justice.

Reducing sentence length will have important advantages for South Africa. First, it will automatically make more capacity available, much faster than any plan to build more prisons. In this way it will make the prison system more efficient, allowing a larger number of people to be processed through confinement and back into the community. Reducing sentences will allow South Africa to punish a growing number of people convicted of

crimes without a wholesale increase in expenditures on the prison system.

Moreover, a reduced set of penalties will be more consistent with the themes of humaneness and rights that are the hallmark of the South African constitution and political philosophy. Of course nothing should prevent the use of longer sentences in extreme cases, but when these sentences are reserved for extreme cases they will have much more symbolic value, because they will reserve unusual penalties for unusual cases.

Most importantly, reducing sentence length will provide the kind of reasonable ceiling on punishments, and will enable South Africa to focus new attention on what must be an equally high priority: a viable and innovative system of community penalties.

#### *Create a new system of community based penal strategies*

South Africa can afford to put a much larger proportion of its sentenced population into community based penal programmes. This is apparent by comparing South Africa's low rate of use of non-prison sentences to the much higher rate common in other democratic states around the world. It is immediately clear that South Africa could make much more profitable use of a range of community penalties: fines (including day fines), community service and house arrest, to name but a few.

By not having an extensive community based scheme of penalties, South Africa has (ironically) a great advantage over other places, however. It can develop a community based penal system largely from scratch, and as a result it need not suffer some of the problems that plague other systems in western democracies. Principal among these problems is an overemphasis on surveillance and control.

It may seem like surveillance and control are good ideas. After all, if a judge is going to put a serious criminal back on the streets, shouldn't we set high standards for his behaviour and watch him closely to make sure he meets them? This sounds right, but

the problem is that it does not get the desired results.

Surveillance strategies in community based sanctions have been well studied, and the consistent result is that when the core method of community supervision is surveillance with strictly enforced rules of conduct, failure rates for rules violations are high (Lipsey & Cullen 2007), even when arrest rates for new crimes do not increase (Haapanen & Britten 2002). In other words, a surveillance philosophy does not deter people from new criminal involvement, but it does turn up enough non-criminal misbehaviour to end up with high rates of return to prison for failure to abide by surveillance requirements.

So if South Africa is to do something different in its community based penalties, it will have a wonderful opportunity to avoid the usual mistakes, and instead to build something quite new, based on emerging ideas in community based penalties, tailor-making its own version of community and restorative justice. What would this entail?

Community justice is a philosophy of justice that holds as its highest priority the promotion of improved communities, places that are not only safe, but provide the kind of infrastructure that makes a community a good place to live, work, and raise a family (Clear & Karp 2000). At its core, those who believe in community justice (as contrasted with 'criminal' justice) recognise that people who commit crimes do wrongs not only against the specific victim, but against the entire community in which we live.

Indeed, one of the main reasons why criminality is so abominable is that it makes community so difficult to sustain. It creates fear, distrust, and isolation from one's fellow citizens, eating away at the very foundation of society. Daily life in South Africa is too often a kind of testimony to the hard validity of this view. So while people who commit crimes have wronged the victim of their crimes, they have also wronged all of us, taking away some of our capacity for society. They owe restitution to the victim, yes, but also to broader society.

At the same time, the philosophy of community justice is integrative, for it recognises that even when a person has been convicted of a crime, that person retains membership of his or her community. The only way that community can be valued is if all members of the community have equal value, even those who have transgressed against it.

Punishments under a community justice ideal, then, have as their core aim the restoration (and promotion) of community. There is a role for confinement – either when a person's crime against the community was so serious that it would be inconsistent with the idea of community to allow him (or her) to remain there, or when a person is such a continuing threat to a community that there is no justification to place that community at continued risk. But for the vast majority of those who break the law, penalties are designed with certain core ideas in mind:

- The person owes a debt to both the victim and the community, and that debt can (perhaps even must) be repaid through labour — if, for instance, a person works 36 hours a week on a community project, only some portion of that work (say, one-third) will be for compensation
- The kind of labour that community justice systems promote seeks to improve community infrastructure, especially the construction of housing and public facilities such as schools, meeting halls, and even sewage systems
- Local businesses provide the community development work and supervise the labour, hiring locally, developing local project priorities, and retaining profits locally – in this way the ideal of community is sustained by the system of penalties
- Community integration occurs when people who are repaying their debt work side-by-side with people who are not under community supervision, it is just that the latter receive wages for all their work, not just some of it
- After a person has demonstrated, through community justice labour and by living within the law, that he (or she) is a contributing member of the community, the person's full return to the community is promoted by helping that person to buy property and take a job that pays full wages

The strategy whereby penal budgets previously spent on imprisonment are diverted to fund community based penalties that are designed specifically to build community is called 'justice reinvestment' (Tucker & Cadora 2003). Rather than treating people who are convicted of crimes as social costs to be borne by society, they are seen as potential social investments that can be a part of community development.

Each person assigned to 'justice reinvestment' strategies not only costs but a fraction of what is spent on the equivalent prison penalty, but a consequence of the penalty is specific improvements in affected communities – making community justice not only far cheaper, per capita, but also far more productive.

Community justice is a socially optimistic ideal, but it is not a Pollyanna ideal. Systems of community justice take risk seriously, provide drug and alcohol treatment for those who need it, hold people accountable for obeying the law while they are under penal authority, and operate under a system of incentives that reward local business for being effective and for not placing the community at risk. Its proponents recognise the inevitability of errors when dealing with a penal population, but experience has shown that the rate and level of problems under a community justice mandate are not as troubling as the same problems that we now face under a punitive criminal justice regime.

### **Choosing the future**

This article started out suggesting that penal reform in South Africa need not break the bank. This is so, but only on two conditions. First, the political will must be found to break away from the current dysfunctional reliance on long prison sentences as the central way in which South Africa holds its fellow citizens accountable for the crimes they commit. Second, the creative imagination must be found to build a new community based penal system that has the credibility to be useful for a large percentage of those who violate the law.

These are not impossible aims, but they must be actively sought – there must be an ethic of mindfulness in the design and execution of a new

penal system. Without leadership, that cannot occur. But history tells us that if any nation has the vision to chart out a new future and the courage to set the bar high, it is this one.

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refinance education, housing, healthcare, and jobs. *Ideas for an open society*, 3(3).

#### Endnotes

- 1 Sources for these impressions and facts include Altbeker (2007); Giffard & Muntingh (2006); Steinberg (2004); The Judicial Inspectorate of the Prisons (2007) and the Department of Correctional Services (2008).
- 2 South Africa's incarceration per capita ranks first in Africa and in the top eighth of the world's nations, with the ninth most prisoners in the world (International Centre for Prison Studies 2008).