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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

SUBMISSION ON CORRECTIONAL SERVICES

8 MAY 1995

To Harris

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REPUBLIEK VAN SUID-AFRIKA
REPUBLIC OF SOUTH AFRICA

DEPARTEMENT VAN KORREKTIEWE DIENSTE
DEPARTMENT OF CORRECTIONAL SERVICES

POYNTONSENTRUM/CENTRE
WESBLOK/WEST BLOCK
KERKSTRAAT 124 CHURCH STREET
PRETORIA
0001

P/sak X136 P/Bag
Fax 323-3304/5
207-9111
"Teleks" 322 398

Verwysing Reference B.1.1
No..... 19.....

Enq : Brig Kaufmann

Tel : (021) 461-7713

Mr H Ebrahim
Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

CONSTITUTIONAL ASSEMBLY
09 MAR 1995

Dear Mr Ebrahim

DISCUSSION PAPER : CORRECTIONAL SERVICES AND ITS POSITIONING IN THE FINAL CONSTITUTION

With reference to your letter B.1.1 dated 1995/02/24 I hereby attach a discussion paper for your further attention please.

I would like to confirm that the Commissioner of Correctional Services, General Henk Bruyn is available to brief Theme Committee VI on the relevant matter.

Yours faithfully

05/03/08

Brigadier
For COMMISSIONER : CORRECTIONAL SERVICES
J C KAUFMANN
SENIOR STAFF OFFICER

CORRECTIONAL SERVICES AND ITS POSITIONING IN THE FINAL CONSTITUTION

INTRODUCTION

The Department of Correctional Services is one of three partners in the Criminal Justice System, the other two being the Department of Justice and the SA Police Service.

Although the functions, organisational structures and nature of the Police and Justice Departments differ markedly, there are very close links with both these departments.

In view of its main functions, namely safe custody and rehabilitation, Correctional Services or Prison Services in any country are unique entities in many respects. They have a unique position in all the Government economics throughout the world. The importance which a Government attributes to Correctional Services is often an indication of how serious that government is about this very sensitive function. Corrections is a very specialised field and care should be taken not to over simplify its functions in order to categorize it. Corrections is and has become a specialised profession with specific aims and objectives giving it a very definite existence in its own right, exactly as Justice and Police are entities in their own right.

On how ministerial portfolio's are made up is the prerogative of the Head of State and should not be included or stipulated in the constitution. The President should be in a position to allocate one or more portfolio's to any Minister of his Cabinet as and when he deems it necessary.

The international community and the UN, employing various international instruments and conventions, place a very strong emphasis on the relationships between the partners in the criminal Justice System although very few clear guidelines are given on the position that either of these arms of the criminal justice system should take in the national household of any country. This is for the country itself to decide.

When considering the position of Correctional Services the following need to be highlighted.

1. <u>POSITIONING OF CORRECTIONAL SERVICES WITHIN THE LEVELS OF GOVERNMENT</u>

The positioning of Correctional Services exclusively at national level was exhaustively debated prior to the finalisation of the interim Constitution, 1993.

The main reason for this decision was based on Constitutional Principle XXI(4) which reads as follows: "Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government."

Furthermore, the distribution of infrastructure, staff, training facilities and specialised care services are of such a nature that to duplicate it according to provincial boundaries will not only be a costly exercise, but will increase the risk of conflicting approaches, practices and norms for offenders who should all receive the same treatment in the Criminal Justice System (equality before the law).

However, as was already pointed out during deliberations leading up to the Interim Constitution, a number of Departments with which Correctional Services need to maintain close working relationships are currently placed at provincial level according to Schedule 6 of the said Constitution. In this regard, reference is made specifically to Departments such as Education and Health Services.

Bearing in mind that mutual co-operation and goodwill between Provincial Departments and those on National level are of vital importance, the Department of Correctional Services has already reorganised its regional structures along provincial boundaries. At the head of each provincial structure is a Provincial Commissioner, all of whom are in the process of being empowered, through the maximum delegation of executive authority, to work in close liaison with Schedule 6 authorities at Provincial level, while maintaining national norms and policy standards.

2. THE CORRECTIONAL SERVICES IN THE CIVIL SERVICE

Broadly speaking, all service Departments, that is Defence, SA Police Service, Correctional Services and the National Intelligence Service form part of the Civil Service but with very specific powers, functions and obligations derived either from the Constitution or specific legislation for each department such as the Correctional Services Act.

When the functions and responsibilities of the Department of Correctional Services is analysed there can be no doubt that its work differs totally from the day-to-day activities of a normal Civil Service Department.

For this very reason in any national household you will find that the Prison- or Correctional Service is regulated by a separate act clearly defining the functions, obligations and structure of the Department. This example should be followed.

The Commissioner of Correctional Services has powers and functions pertaining to the appointment, promotions, training, discharge, etc. of members of the Department based on the relevant stipulations of the Correctional Services Act and other legislation such as the Civil Service Labour Relations Act.

As stated above, the Department is administered in accordance with the Correctional Services Act, 1959 which stipulates inter alia in Section 2(2) that its functions shall be:

"a) to ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed therefrom;

b) as far as practicable, to apply such treatment to convicted prisoners and probationers as may lead to their re-formation and rehabilitation and to train them in habits of industry and labour;

c) to apply correctional supervision in respect of probationers;".

Taking the abovementioned into account it is clear that the Department has a multifaceted functional nature, some of which are related to the administration of Justice whilst the safe custodial function (with its concomitant powers of prevention of escapes, the re-arresting of escapees and the use of fire-arms and other restraining devices where absolutely required) is clearly within the ambit of:

- assisting the State in the maintenance of law and order; and

- protecting the community against further/ repeated crime and convicted criminals.

For the reasons cited above, it should be obvious that the Department of Correctional Services should be treated as a special category of State Department with ties and working relationships across a broad spectrum of Departments but with special emphasis on relationships with the partners in the Criminal Justice

System.

However for service benefits, broad personnel policy and personnel standards and administration the Department of Correctional Services, like the SA Police Service, for reasons such as uniformity, is dependant on the Public Service Commission (PSC).

This is however often problematic in more than one sense. A Commission on Service Departments, or a meaningful representation by the Service Departments such as Police and Correctional Services on the Public Service Commission (PSC) is very necessary if the goals of inclusive and consultative decision-making are to be met in respect of staff matters in Correctional Services and also the SA Police Services.

It is the Department's contention that due to its unique nature as already described, and the large measure of autonomy already embodied in its current Act (to be replaced in due course by a completely new Act pending further public debate on Correctional matters) it should be included under the list of institutions for which a Special Service Commission is to be established. The Department should preferably not fall under the Public Service Commission.

Over and above the reasons cited above, the placing of the Department of Correctional Services squarely under the Public Service Commission alongside purely civil organisations would lead to the creation of disparities in relation to other protectors of the community

such as the SA Police Service and have a severely detrimental affect on:

- the recruitment, selection and training of suitable personnel to serve in the often trying and potentially dangerous work situation of also being law enforcement officers;

- efficiency of staff rendering a 24 hour security service in the protection of the public; and

- maintenance of a staff contingent capable of dealing with functions inherent to prisoners and prison administration including rehabilitative services.

3. MILITARY CHARACTER

Currently the Correctional Service in South Africa is organised along military lines. This does not mean that in doing so the Department of Correctional Services forms part of the Defence Force or the Military. It is merely an organisational structure. It should also not be construed as being anti-rehabilitation or anti-specialised programmes for prisoners.

Viewpoints that the Department of Correctional Services should be demilitarised are not new. In fact, it formed part of the rationalisation process of former president P W Botha when he came to power. The then Prison Service was ordered out of its military ranks and put under Justice. This created a furore among the rank and file of the staff - not only

nior members as such, but also from the lower ranking staff in the Service who perceived it as a authoritative decision without consultation, robbing members of both sexes and all population groups represented in the Department of hard-earned status. Consequently, the Government of the time decided to leave the military ranking structure in place for the time being. Placing Corrections under the justice department created more problems and managerial deficiencies than can be mentioned in the scope of this document but which can be substantiated scientifically and comprehensively. This step had to be abandoned due to dictating realities and because it proved to be a step backwards.

The achievement of the goal of rehabilitation will not depend on whether the Department of Correctional Services falls under "Justice". It will depend on the mandate given to the Department by virtue of the Correctional Services Act and the infrastructure, manpower, budget and professionalism of its staff to achieve this goal.

The military ranking structure as an organisational structure plays a very important part in maintaining the morale of the members of the department and goes a long way towards promoting efficiency. However these goals can still be achieved without having military ranks.

When reconsidering military ranking, the following points should be considered very thoroughly:

* Taking away military ranking could mean organisation based on the ranking/post levels of the civil service. This could cost millions of rands and will have to be preceded by a very thorough investigation involving the Public Service Commission (PSC) and even State Expenditure.

* The decision as to whether or not to demilitarise should not be taken without preparing the staff beforehand as to what prompted the decision and what it will mean for every man and woman in the Service.

* Proper consultation will have to take place with staff, organised labour, etc. before any decision is made or at least before details are decided on.

* Taking away military ranks cannot and should not mean no visible alternative ranking structure or the loss of sound discipline, without which no Correctional Service in the world can operate.

* Taking away military ranks should not mean doing away with uniforms.

* There are staff benefits and legitimate expectations in respect of promotion coupled to military ranking structures which are bound to create job instability and labour unrest if members are not reassured and the matter addressed cautiously and with circumspection.

The view is supported that the Department should move towards demilitarisation but that the details should not be embodied in the constitution but rather in the Correctional Services Act which is presently under consideration via the relevant Portfolio Committee. The latter process was preceded by a White Paper, inputs from NGO's, consultation and debate with staff, interest groups, etc.

Political parties would therefore be able to direct/monitor and manage the process of demilitarisation and the role and functions of the future Department of Correctional Services very closely via the Parliamentary process and instruments.

4. THE PRISONER/OFFENDER IN THE CARE OF CORRECTIONAL SERVICES

It is important that the constitution gives content and meaning to the position and rights of offenders.

As stated in the Department's White Paper, the Department acknowledges the fundamental rights of offenders which are embodied in the Constitution. Therefore, it is necessary to incarcerate and treat prisoners in a humane manner and to create a climate which is conducive to rehabilitation.

In order to ensure a stable and orderly prison community, a specific set of rules and codes of conduct must exist for the regulation of behaviour of inmates and staff. Prisoners and staff have the obligation to adhere to these

rules and codes of conduct and a violation must have specific consequences for the transgressor.

Although some rights of prisoners are embodied in Section 25 of the Constitution, the Department already recognises other additional rights, such as:

- the right to be provided with food which has an adequate nutritional value according to a prescribed diet scale, and consisting of a reasonable variety which is well prepared and served;

- the right to receive a special diet where the medical officer deems it necessary for medical reasons or where religious beliefs dictate;

- a sentenced prisoner has the right to be provided with a complete set of clothing which satisfies hygienic requirements and is adequate in all circumstances;

- if not serving a sentence of imprisonment (awaiting trial), the right to wear suitable private clothing unless the prisoner's clothing is considered to be inadequate or improper or in an unhygienic condition, or when it is necessary to preserve such clothing in the interests of the administration of justice; or if the prisoner is unable to procure other suitable clothing from any other source. (In such instances prison clothing is issued);

- the right to have medical treatment at state expense; or to consult a private medical practitioner or physiotherapist chosen by the prisoner at own expense;

- if disabled or mentally ill, the right to have reasonable access to adequate medical or psychiatric care;

- the right to make representations regarding prison management to the Commssioner, Minister, an official visitor and the Public Protector/Provincial Public Protector;

- the right to communicate with and maintain contact with next-of-kin;

- the right of access to legal representatives;

- the right to an interpreter;

- the right to appear before the Institutional Committee at least annually in respect of all issues entrusted to such Committee;

- the right of access to the legal system of the country; and

- all rights stipulated in the Constitution or which may be conferred by, for instance, the Constitutional Court.

(It is not argued that these rights are exhausted and that more cannot be added or defined)

The limitation of certain human rights of prisoners by the Correctional Services Act is done in the spirit of the Constitution and internationally accepted practices and does not negate the essential content of the right in question but merely acknowledges the inherent realities of imprisonment. This principle will also have to be followed when a new Correctional Services Act is being drafted and legislated. Any prisoner who nevertheless feels that a constitutional right has been infringed upon by the Department, has the right and should in future also have the right of access to legal representation and litigation.

5. STAFF CODE

A specific staff and disciplinary code should be embodied in the Correctional Services Act.

SUMMARY

1. Correctional Services should remain a function of central Government. (The Department of Correctional Services should decentralise its functions as far as possible and organise itself on provincial level through delegation of powers).

2. The Department of Correctional Services is and should remain a Service Department with its own legislation dealing with its organisational structure (non-military ranking, etc.), staff

matters, code of conduct for staff, functions of the Department, etc.

3. The Public Service Commission (PSC) should be structured with representation from the Service Departments in respect of matters where central control is necessary for reasons such as uniformity or where the Correctional Services Act makes no specific provision - even better would be a Service Commission for the Security apparatus of the Country (the Department of Correctional Services can rightly be defined as a special department such as the SA Police Service).

4. The principle of a separate ombudsman for Correctional Services is underwritten. The exact functions and duties should be defined in the Correctional Services Act.

5. The relationship between the Department of Correctional Services and the Judiciary and especially in respect of releases and parole can also be defined outside the scope of the Constitution in separate legislation for instance in the Correctional Services Act as is the case at present. Correctional Services should be recognised as a Specialised Service Department with very unique functions related to safety and security but at the same time related to human development and rehabilitation.

6. As reported in "Die Burger" of 7 March 1995, Correctional Services is the "stepchild of the Committees". This need not be so. Care should be taken that Correctional Services does not once again end up being the stepchild in the

State household as it used to be decades ago. That would be a step backwards.

The Department has the knowledge, the expertise and the research capability to furnish information to any committee on the position of Correctional Services.

The Department would be happy to submit further inputs verbally or in writing on any of these matters or any other relevant matter should the need arise.

COMMISSIONER : CORRECTIONAL SERVICES
H J BRUYN

1995-03-08

Tel : (021) 461-7713

CONSTITUTIONAL ASSEMBLY

SEMINAR REPORT : CORRECTIONAL SERVICES

THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT SECURITY APPARATUS

TUESDAY, 7 FEBRUARY 1995

CORRECTIONAL SERVICES, PRISONS AND WHERE THEY SHOULD FIT INTO THE CONSTITUTION

Prof D van Zyl Smit addressed the members of the Subtheme Committee. The main aspects of his seminar are contained below:

1 Introduction

There has long been uncertainty about the place of Correctional Services and Prisons within the structures of the state. (This is analysed in the attached document which is an extract from Prof van Zyl Smit's book.)

2 The Interim Constitution

The Interim Constitution does not resolve the difficulties and tensions regarding the location of Correctional Services, and the practical effect of the Interim Constitution is that prisons and the implementation of correctional supervision are the responsibility of central government.

There is no reference to Correctional Services in Schedule 6 which lists the powers of provinces.

3 Correctional Services and the security apparatus

The implication of the above is that Correctional Services are part of the security apparatus and therefore should be dealt with specially in the Constitution. This is the case in Namibia where there is a Security Commission, compromised of senior representatives of the Police, Prisons and the Military. This is not the best way of looking at prisons and Correctional Services.

This is because Correctional Services do not have to be run on military lines. While a certain amount of paramilitary discipline is needed within the department of Correctional Services there is no reason why Correctional

Services should be conceptualised as a military institution. Once that mind shift has been made one can begin to question whether Correctional Services should be viewed as part of the security apparatus at all.

While Correctional Services do exercise coercive powers, they do not do so directly but seek only to implement decisions of the Court. The Department of Corrections implements sentences like a fine is implemented and there is therefore no reason why they have to be controlled in the same way as security forces.

4 **The relationship between Correctional Services and the Judiciary**

In the present Constitution there are no clear links between the system of Corrections and the judicial system. One needs to ask why Corrections are administered separately while other bureaucracies which have to carry out the decisions of the courts are not. There is no reason why officials should be able to upset the decisions of courts.

A solution to this is to make the execution of all forms of punishment, such as prison or correctional supervision, part of the administration of justice and to create a system in which the judicial arm can play an active role in the supervision of the sentence.

For example, in France a magistrate who is not part of the prison bureaucracy has an office in every prison and makes decisions about release and parole.

5 **Constitutional provisions relating to Corrections**

At Constitutional level there should only be limited reference to the broad scheme of Correctional Services. This would be spelt out in further legislation. In principle it should be located within the administration of justice.

There should brief reference in the Constitution to the oversight of the courts relating to the modification of all sentences.

The Constitution should preserve the right of President to pardon.

The Department of Corrections should be structured in way to ensure maximum co-operation at provincial level.

6 **Accountability and control of Correctional Services**

Implications of the suggestion that Correctional Services form part of the administration of justice is that it will be subject to controls such as the Public Protector and the Human Rights Commission. But further controls will

also be necessary. At a national level one might want to consider that instead of the current National Advisory Council a body called the Prisons Council or Prisons Commission like the Judicial Service Commission, be established.

This should be within the framework of the administration of justice and it should parallel bodies like Judicial Services Commission and the Magistrates Commission.

There is very little reference in the current Constitution to the independent administration of justice. This is a gap in the current Constitution.

7 **Summary**

* There is overlapping status between the administration, the Executive and judiciary.

* Correctional Services should not be seen as part of the security forces.

* There should be some reference to Correctional Services in the Constitution, there is nothing now outside the Bill of Rights.

DISCUSSION

In discussion the following points were highlighted:

8 **Conditions under which the Executive should be involved in commuting sentences**

All systems have a provision for Executive pardons and there is a need to retain some Executive discretion. However in South Africa problems have arisen in that the relationship between the courts and the outcome of some of the prison sentences is routinely disturbed, often in quite an erratic way. This is in principle undesirable because it undermines the judicial process.

There are ways of dealing with this, for example in Germany the Chamber of the Court makes representations about release. There is however a need for a 'backstop' for executive discretion.

9 **Correctional Services administered nationally or regionally**

In South Africa there is not a divided system of criminal law, all offences are national offences. On that basis it seems to make more sense to keep the administration of Correctional Services at a national level, assuming the administration of justice remains centralised.

10 **Accountability and control of Correctional Services**
Control of Correctional Services can operate in several ways:

1. The judiciary can exercise control directly or indirectly.

2. There can be mechanisms of Parliamentary control

3. Mechanisms can be built in for direct involvement of the public at different levels. At a local prison level a local board of visitors could be established, at a regional level members of the public can be appointed to represent various constituencies. When it comes to the release process you can establish parole boards with a mix of judicial representation, Department of Correctional Services officials and lay people. At the national level there could be a national body with a supervisory role, however there would be a need to look at the relationship between the national body, parliament and the Minister. These do not have to all be included in the Constitution. The Constitution needs to provide necessary points of contact for establishing such legislation.

11 **Demilitarisation of Correctional Services**
The Department of Correctional Services should be substantially demilitarised. There is no reason to have a department which is entirely military and it should not look like an army with a General in charge. However there is a need for some paramilitary character for reasons of security and efficiency.

12 **Involvement of society in correctional services**
The public can also be involved to a far greater extent in the implementation of Corrections. For example the public can be involved in the sentences of correctional supervision. A great deal can be done to achieve a more democratic and affordable system.

13 **Independent monitoring of the prisons**
There is a perception that Magistrates are part and parcel of the punishment process. There are a number reasons for this, one being a structural one, in that members of the judiciary had no specific role or prescribed responsibility in this regard. Bodies such as the International Red Cross should be able to play a monitoring role in South African jails and structures such as the Public Protector and the Human Rights Commission can also do this. The Constitution should possibly spell out an enabling clause on this but should not go into detail.

14 **Withdrawal of the franchise for prisoners**
In essence prison is a depravation of liberty and the prisoner only loses rights and privileges directly related to this. If the Court wants to take the

vote away as part of punishment, in fairness it should spell this out in sentencing.

15 **Right to organise**

Prisoners should be allowed a limited ability to organise. They should not be allowed to threaten the detention process itself, the parameters of this need to be set down.

2.3 Constitutional law

Hahlo and Kahn have defined constitutional law as the branch of law which

> is concerned with the legal structure of the State and its principle organs, the creation and distribution of legal power in the State and the fundamental relationship between the State and its citizens.[27]

From this broad definition can be extracted two areas of importance to prison law. The first concerns the location of the prison system within the State structure and more particularly within the three traditionally recognized branches of government, namely the executive, the judicial and the legislative branches. Related closely to this is the question of how legal power which impacts on the question of the prison system is distributed amongst these three branches.

The second broad constitutional question which has particular significance in the area of prison law, relates to the question of the fundamental relationship between the State and the citizen who has been incarcerated.

2.3.1 The structure of the State

The place of the prison system within the structure of the State is not merely of academic significance, for its location can determine the legal power which is deemed appropriate to operate and control it. How and by whom this power is exercised, varies according to the branch of government involved.

There is clearly a strong link between the prison system and the executive or administrative branch. Thus in *S v Nkosi (1); S v Nkosi (2); S v Mchunu*[28] Kriegler J distinguished between the judicial functions of the sentencing officer and the administrative functions of the Prisons Service which, in his view, was part of the State's administrative structure. As detailed below this means that administrative law is a central component of prison law. It also means that there is a tendency on the part of the executive arm of government to attempt to determine administratively what happens in various aspects of the operation of the parts of the prison system.

As far as the internal aspects of the prison system are concerned, this is relatively unproblematic, for there is clear line of authority from the political head of the Department, that is the Minister of Correctional Services, to the Commissioner of Correctional Services and members of the Department. However, in South Africa the executive plays a particularly active part in the 'external' aspects of imprisonment, for although the Correctional Services Act provides an elaborate administrative framework for the release of prisoners, these decisions are potentially open to executive manipulation.[29]

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27 Hahlo and Kahn 117-18.

28 1984 4 SA 94 (T) at 98C.

29 See ch 12 on the release of sentenced prisoners. De Wet and Swanepoel 209 describe the current position with characteristic bluntness:

> Die voltrekking van die straf berus by die uitvoerende gesag van die staat. By ons het die uitvoerende gesag onbelemmerde bevoegdheid om aan enige veroordeelde kwytskelding van straf, in die geheel of gedeeltelik, te verleen.

Cf s 6(3)(d) of the Republic of South Africa Constitution Act 110 of 1983 and s 325 of the Criminal Procedure Act 51 of 1977.

Louis Blom-Cooper[30] has argued that in the United Kingdom constitutional propriety requires executive restraint in releasing prisoners prior to the completion of their sentences, for otherwise the executive would be entering the legitimate sphere of the judiciary. Blom-Cooper explains:

> [T]he independence of the judiciary demands that the criminal process – including that part devoted to the sentencing of convicted persons – should not be interfered with by penal administrators. The judges are empowered to select the appropriate sentence; the penal administrators in executing that sentence have only very limited statutory powers to remit a part of it.[31]

In his view such intervention has remained within acceptable limits in the United Kingdom[32] where, as in South Africa, there are few formal limits on the executive in this regard. However, in South Africa the intervention of the executive in order to achieve the release of specific classes of prisoners has raised serious questions about the extent of judicial authority.[33] Certainly, unbridled intervention could undermine not only the separation of powers of the State but also public confidence in the criminal justice system if matters which should be the subject of a public judicial process are decided by secret administrative procedures.

Historically, the prison system, as part of the administration of justice, has enjoyed a close relationship with the **judicial** branch of government.[34] The location of the Prisons Service within the Department of Justice was therefore constitutionally sound, for it gave recognition to the fact that prisons have a key function within the administration of justice and in particular within the criminal justice system. However, the creation of a separate Department of Correctional Services in 1990 weakened this link.

This change in policy is symptomatic for it reveals a lack of conceptual clarity about how to deal with the inevitable overlap of administrative and judicial functions in the administration of justice as a whole. The Republic of South Africa Constitution Act[35] appears to allocate functions clearly: Section 68 specifies that "[t]he judicial authority in the Republic is vested in . . . the Supreme Court of South Africa"; while section 69 determines that "[a]ll administrative powers, duties and functions affecting the administration of justice should be under the control of the Minister of Justice". In practice though, on the one hand, the courts do regard aspects of the administration of criminal justice in particular as falling directly within their supervisory province.[36] On the other hand, judicial officers in the lower courts in particular, are burdened with administrative duties which go far beyond the administration of justice and which lead them to be subject to the authority of other parts of the State structure. What is required instead of this hodgepodge, is a coordinated strategy which would recognise that

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30 Blom-Cooper in Blom-Cooper 25-34.
31 Blom-Cooper in Blom-Cooper 25.
32 Blom-Cooper in Blom-Cooper 33.
33 See Mihálik 1988 *SALJ* 494. Mihálik's fears were justified in 1991 when, following the release of political prisoners as a result of a negotiated amnesty, many thousands of 'ordinary' sentenced prisoners were released as well. The action of the executive gave rise to a rare public objection from all the attorneys-general: *The Argus* 17 July 1991. See also ch 12.1.
34 See the historical discussion in ch 1.2.6 on the role of magistrates in supervising prisons.
35 Act 110 of 1983.
36 See *S v Gibson* 1979 4 SA 115 (D).

the fundamental doctrine of separation of powers demands that the relationship of the judicial branch to the administrative be clarified.[37] However, this separation does not necessarily mean that the judiciary should be excluded from all supervision of the administration of justice, for this aspect of its work might be regarded as constitutionally proper, unlike the multiplicity of other administrative functions performed by the magistracy. The residual powers of judicial officers to visit prisons without restriction from the administrators are therefore not constitutionally anomalous. Indeed, there should be no constitutional barrier to their extension. In other jurisdictions where the separation of powers is taken seriously, the judiciary has a far more extensive function in the day to day supervision of the running of prisons.[38]

Apart from its obvious function of providing the legislative framework of the prison system in the form of the Correctional Services Act, the legislature remains politically responsible for the supervision of the Department of Correctional Services. Structurally this is achieved by making the Minister of Correctional Services responsible to Parliament and answerable for the activities of the Department of Correctional Services. The form which this parliamentary control takes in practice, is that, in addition to parliamentary questions that may be asked about any aspect of the Department of Correctional Services, a separate debate is held annually on each government department. This takes place in each of the three houses of the tricameral Parliament when its budget is presented as part of the national budget debate. The debate is preceded by the publication of the annual report of the Department. Formal parliamentary control is an important constitutional guarantee of the legitimacy and efficacy of the prison system. Its legitimacy is reduced, however, by the unrepresentative nature of Parliament and its efficacy is limited by the secrecy which surrounds the prison system as a whole.[39]

2.3.2 The State and the citizen

There can be no doubt that imprisonment affects "the fundamental relationship between the State and its citizens"[40] and that it therefore raises issues of profound importance for this aspect of constitutional law as well. Indeed, the whole question of prisoners' rights can be cast as a debate about the extent to which imprisonment changes the relationship of citizens to the State, both by limiting the recognition of their fundamental rights by the State and by empowering them to claim that the State should fulfil the specific obligations which it has the legal duty to perform. In modern times the constitutional question is approached in many countries by postulating the fundamental rights of the citizen as specified in the constitution and then by asking how these rights are, or should be, modified by the law relating to imprisonment. The two countries in which this approach to prison law has been the most

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37 See the critical comments and recommendations of the *Hoexter Commission of Inquiry into the Structure and Functioning of the Courts* Fifth and Final Report 18 *et seq*.

38 This is particularly true in France and Germany: Cf Vagg 2-6.

39 See the (now relatively limited) restrictions on reporting on prison conditions discussed in ch 11.4.4.

40 Hahlo and Kahn 118.