Periodical imprisonment within a penological perspective

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Introduction

As the title denotes, in this article periodical imprisonment is explored penologically, and is done so on the basis of the unpublished research by Avery (1989). South Africa's prisons are overpopulated by 32 per cent (RSA 1987:88:68). Imprisonment has negative consequences. Alternatives to short-term continuous imprisonment (that is under two years) are sought. Within this context, periodical imprisonment, being non-continuous, could play a meaningful role.

As imprisonment, this form of punishment is under-utilised, such prisoners constituting a mere 698 out of 173 668 sentenced prisoners admitted to prisons during the latest reporting period (RSA 1987:88:145). Research at the fundamental, theoretical level is justified because periodical imprisonment has been poorly researched thus far. The wider utilisation of such imprisonment is the objective of the research.

The rationale of alternatives to imprisonment

Imprisonment as a form of punishment

Imprisonment involves the removal of the offender from society and his confinement within an institution under the Prisons Act, No 8 of 1959. As a form of punishment, imprisonment serves the penal objectives thus:

- retribution or the punitive aspect is manifested in the deprivation of liberty and regimen of prison life (Goldberg and Others v Minister of Prisons and Others, 1979(1) SA 14(A) at 37H);
- individual deterrence is realised through the unpleasant experience of imprisonment, whilst social disapproval furthers deterrence generally (Neser 1980:107);
- In the short term, society is protected by the removal of the offender and in the long term by his rehabilitation (Neser 1980:123); and
- section 2 of the Prisons Act, No 8 of 1959, creates the rehabilitative climate within which the offender is assisted towards normative adherence (Neser 1980:144).
The consequences of imprisonment

Imprisonment, especially for short terms, involves negative consequences. Such consequences most directly affecting the prisoner stem from the ‘otherness’ of the prison environment and include:

- contamination (S v Scheepers, 1977(2) SA 154(A) at 159 A–B);
- disruption of family life (S v Botha, 1970(4) SA 407(T) at 409A);
- loss of employment (S v Mutize, 1978(2) SA 911 (R, AD) at 915 B–D);
- stigma and disgrace (S v Scheepers, 1977(2) SA 154(A) at 159B); and
- lack of treatment opportunity (S v S, 1977(3) SA 830(A) at 839 A–B);

Short-term prisoners (85,18 per cent of the total prison population) (RSA 1987/88:146) clog the prisons. Overcrowding presents its own problems, including prison unrest (RSA 1983:580). As opposed to European countries, South Africa’s prison population is high (Nacro Information Document 1989:1). Imprisonment is costly. The unit cost per prisoner per day is R12,58 (RSA 1987/88:125). There are other incidental costs, including providing social and related services (S v Sakabula, 1975(3) SA 784(C) at 787H).

Alternatives advocated

Such negative features give rise to a search for alternatives to short-term imprisonment (Cilliers 1987:13), although such imprisonment is still imposed, for example, in S v Kelane, 1988(2) SA 206(O). Periodical imprisonment was created as a substitute for short-term imprisonment.

Statutory provision for periodical imprisonment

Creature of statute

Since periodical imprisonment was placed upon the statute book in 1959, it may only be legally imposed within the framework of the various enactments governing criminal procedure. It is a statutory creation (S v Bodima and Others, 1963(1) SA 265(T) at 266 B). Similarly, periodical imprisonment may only be implemented under the law governing prisons.

The Criminal Law Amendment Act, No 16 of 1959

The objective of this enactment was in general terms to bring penal practice into line with modern notions (Strauss 1960:161), including more stress upon reformation of the criminal (Hahlo and Kahn 1960:288). As to the specific reform measures introduced, the objective was to endeavour to keep the offender out of prison (Union of South Africa 1959a, vol 99, col 384 and col 610). The Interdepartmental Committee (RSA 1957:1) appointed to investigate the criminal justice system with a view to penal reform recommended that statutory provision be made for periodical imprisonment within this context (1956:29). Section 28 of the Criminal Law Amendment Act, No 16 of 1959 did so and provided for matters, including the maximum and minimum number of hours of such imprisonment and notice to the accused (Union Gazette Extraordinary, p 22) (Section 334 bis of the Criminal Procedure Act, No 56 of 1955). Judge-made law developed on principles regarding the imposition of periodical imprisonment or facet thereof, even from the early case of R v Wegkamp, 1960(2) SA 665(T).

The Criminal Procedure Act, No 51 of 1977

Mindful of the high prison population, the Penal Reform Commission (RSA 1976:3) went out of its way to create measures whereby continuous short-term imprisonment could be avoided (RSA 1977, vol 66, col 437). In promoting alternatives to such imprisonment, it recommended with regard to periodical imprisonment that:

- the statutory restriction upon its imposition for serious crimes be scrapped (1976:131); and
- recourse to a greater extent be had to such punishment (1976:132).

The former recommendation was adopted in the statutory provision for periodical imprisonment, enacted in section 285 of the Criminal Procedure Act, No 51 of 1977, materially identical to its forerunner. Case law developed apace, S v Kent, 1981(3) SA 23(A) being an example. The permanent Penal Reform Committee, heir to the Viljoen Commission, also took steps to promote the imposition of periodical imprisonment (Penal Reform Committee Documentation, file 8/2, part 1, minutes, p 9; Klopper 1979:203). In the applicable period, only 385 out of 274 001 sentenced prisoners were so punished (RSA 1980:24).

The Criminal Procedure Amendment Act, No 33 of 1986

The rationale behind this enactment was the need to streamline the alternatives to short-term imprisonment (RSA 1986, col 2236), of which periodical imprisonment was one (col 2239). This rationale of promoting such alternatives is true to that encountered in the statutory measures referred to thus far. Section 16 of the Criminal Procedure Amendment Act, No 33 of 1986, made further provision for the service of a notice upon an accused sentenced to periodical imprisonment (Government Gazette 1986:13). The Interde-
The Prisons Act, No 8 of 1959

Periodical imprisonment is implemented under Section 39(a) of the Prisons Act, No 8 of 1959, by periodically detaining a person in a prison in the manner prescribed by regulation thereunder, which is regulation 140 (Government Gazette Extraordinary 1959:68/69).

Periodical imprisonment as an alternative to continuous imprisonment

Nature

The nature of periodical imprisonment is derived from the enabling statute and includes the following aspects:

- it is imprisonment (S v Maharaj, 1962(4) SA 615(N) at 617H);
- it is interrupted, colloquially termed 'week-end' imprisonment (S v Botha, 1970(4) SA 407(T) at 409F) served in instalments, whereby the offender is admitted to prison, released and readmitted, which process continues until the sentence is completed (section 285 of the Criminal Procedure Act, No 51 of 1977, regulation 140 to the Prisons Act, No 8 of 1959);
- it may not be imposed for an offence in respect of which any law prescribes a minimum punishment (section 285 above);
- it may only be imposed in lieu of other punishment (section 285 above, S v Klopper and Another, 1966(3) SA 306(N) at 307C) and cannot be served concurrently with continuous imprisonment (S v Engelbrecht, 1964(1) PH, H 72(O) at p 182); and
- it may be suspended (section 297(1)(b) of the Criminal Procedure Act, No 51 of 1977).

Objectives

Whilst periodical imprisonment shares the overall objectives of imprisonment, it is a particular type of punishment with its own unique objectives (S v Klopper and Another, 1966(3) SA 306(N) at 307B), realised thus:

- retribution or the punitive aspect is manifested in the loss of leisure (S v Cox, 1963(4) SA 731(ECD) at 734H) and a prison regimen inter alia prohibiting smoking (Department of Prisons, p 296);
- individual deterrence is realised through the unpleasant but sanguine effect of periodical imprisonment upon the offender, whilst it serves as a telling deterrent to others (RSA 1976:131);
- society is protected by the removal of the offender, particularly the week-end offender, who is kept out of temptation's way (S v Ratau, 1976(4) SA 71(T) at 73A); and
- rehabilitation is achieved by reducing the negative impact of continuous imprisonment (Klopper 1984:8) and enabling individualised sentencing (Du Toit 1981:285).

Position in the hierarchy of punishment

Periodical imprisonment was intended by the Interdepartmental Committee (1957:28/29) to be positioned between the fine or suspended sentence on the one hand and continuous imprisonment on the other. It is stricter than the former, but less severe than the latter (Union of South Africa 1959a, vol 99, col 663, Union of South Africa 1959b, col 612). Case law confirms this position in the hierarchy, including S v Botha, 1970(4) SA 407(T) at 409D-410A and S v De Man, 1983(1) PH, H 63 (SWA) at pp 88/89, where the court considered the available punishments one by one. The maximum of 2 000 hours periodical imprisonment would usually have to be served over a period of several months (S v Uglietti, 1985(4) SA 108(N) at 112B). If longer imprisonment is warranted, periodical imprisonment would be inadequate and continuous imprisonment should be considered (S v Bothma and Others, 1963(1) SA 265(T) at 267F).

The consequences of continuous imprisonment overcome

Periodical imprisonment is designed to overcome the negative consequences of continuous imprisonment by especially enabling the offender to serve his punishment without disrupting his lifestyle (Union of South Africa 1959, col 621; RSA 1976:131). This benign intention includes:

- avoidance of contamination in that regulation 140(5) of the Regulations to the Prisons Act, No 8 of 1959, forbids association between prisoners undergoing periodical imprisonment and any other category of prisoner;
- avoidance of family dislocation (Penal Reform News, No 44:2; S v Botha, 1970(4) SA 407(T) at 409F);
- avoidance of loss of employment, which was a major advantage identified by the Interdepartmental Committee (RSA 1957:30, Parliament (Union of South Africa 1959a, vol 99, col 381), in case law (R v Wegkamp, 1960(2) SA 665(T) at 667A) and in that the offender's employment circumstances must be taken into account in implementing the punishment under regulation 140(1) of the Regulations to the Prisons Act, No 8 of 1959 (Department of Prisons, p 294);
avoidance of stigma (Penal Reform News 42:21);
• opportunity for treatment (S v Erwee, 1982(3) SA 1057(A) at 1065 G–H); and
• avoidance of reintegration problems (Terblanche 1986:149).

From a study of case law, including such judgments as S v Erwee above, it is apparent that periodical imprisonment has enabled the salvaging of valuable human material, especially in those cases where the accused had initially been sentenced to continuous imprisonment. Through periodical imprisonment, the swell in prison population could be localised to certain periods only and such imprisonment, being interrupted, should be less costly than continuous imprisonment.

The underutilisation of periodical imprisonment

Stating the problem

Periodical imprisonment as alternative to short-term imprisonment has not fulfilled its underlying objective, because since its inception (Kahn 1960:219) it has rarely been imposed. The Supreme Court has mentioned this fact from time to time, including in S v Botha, 1970(4) SA 407(T) at 409F and more recently in S v Ludick, 1987(4) SA 197(NCD) at 201D. Terblanche (1986:149) refers to periodical imprisonment as 'die afskeepkind van strafoplegging'. Furthermore, statistics reveal that almost half of offenders sentenced to periodical imprisonment are white males (Avery 1989:200) and that it is reserved largely for road traffic related offences only (Central Statistical Service 1987:16/17). Possible reasons for the underutilisation of periodical imprisonment emerge in the main from the Viljoen Commission Documentation, especially its questionnaire (Band Nos 13–22) and the research of Klopper (1979).

Fundamental issues

A positive approach by magistrates to periodical imprisonment was noted by the Viljoen Commission (Commission of Inquiry Documentation, band 9, p 234) and by Terblanche (1986:149). Likewise, the approach to this form of punishment by the agency responsible for implementing it, namely the Prisons Department, was positive (Commission of Inquiry Documentation, band 4, file S/K, part 1). The following fundamental areas of weakness, among others, relevant to periodical imprisonment emerged:

• imprisonment should not be served piecemeal (questionnaire 184 and others);
• the enabling statutory provision, including the then maximum of 1 000 hours, was inadequate (questionnaire 151 and others);
• the short period of a few hours imprisonment at a time renders the punishment ineffective (Klopper 1979:204);
• certain of the negative characteristics of imprisonment cannot be avoided, including stigmatisation, contamination and disruption of family life (Klopper 1979:204); and
• periodical imprisonment is not suitable for all categories of offenders or offences (questionnaire 265 and others).

Administrative difficulties

The following factors, among others, relevant to the implementation of periodical imprisonment emerged:

• in a number of rural magisterial districts there is no suitable prison accommodation for such prisoners (RSA 1976:131);
• the impression exists among magistrates that periodical imprisonment places an undue administrative burden upon the prison authorities (Klopper 1979:204), by including intoxicated offenders who present themselves to undergo their punishment (questionnaire 421 and others);
• offenders who undergo this punishment are merely detained and are not kept gainfully occupied (questionnaire 99 and others, S v Smith, 1971(4) SA 419(T) at 423B);
• offenders are permitted to serve their sentences, contrary to the intention of the legislator, in one uninterrupted period and are afforded remission and parole in respect of such sentences (RSA 1976:131, Klopper 1979:203); and
• especially in the case of Blacks, there is the risk of absconding and failure to undergo or complete the period of punishment is treated too leniently (questionnaire 88 and others; Terblanche 1986:150).

Perspective upon fundamental problem areas

Regarding the statutory provision for periodical imprisonment, the maximum number of hours is 2 000 under the Criminal Procedure Act, No 51 of 1977. In S v Botha, 1970(4) SA 407(T) at 409F, the court dismissed the allegation that periodical imprisonment is ineffective. The prison authorities admitted that it is not always possible to separate the different categories of prisoners (Commission of Inquiry Documentation, band 8, p 654). Terblanche (1986:151) is critical of unnecessarily limiting the application of periodical imprisonment.

Perspective upon administrative difficulties

The imposition of periodical imprisonment is not feasible if no suitable facilities exist for its implementation (RSA 1976:131). No insurmountable administrative burden is placed upon the prison authorities (RSA 1976:131; Klopper 1979:204). Whilst a strict
prison regimen envisages keeping the offender occupied (Department of Prisons, pp 294/295), it is not always possible to do so because of manpower shortages (Commission of Inquiry Documentation, band 8, p 887). The practice of allowing offenders to undergo periodical imprisonment in one continuous period has ceased (RSA 1976:131). Prisoners undergoing such punishment are eligible for remission (Department of Prisons, p 294). Adequate machinery exists under the Criminal Procedure Act, No 51 of 1977, to ensure that offenders sentenced to periodical imprisonment complete their punishment.

Looking ahead

The wider utilisation of periodical imprisonment may be promoted by addressing the following issues:

• the provision of adequate legislative guidelines for this form of punishment;
• the creation of an infrastructure for the imposition and implementation thereof;
• the improving of communication between the components of the criminal justice system involved therewith; and
• the conducting of research into several facets thereof.

To this end, Avery (1989:300-302) recommends:

• that after the necessary infrastructure has been provided therefor, amending legislation be introduced requiring the court, prior to imposing periodical imprisonment, to consider a pre-sentence report;
• that after the necessary infrastructure has been provided therefor, amending legislation be introduced requiring the court, prior to imposing periodical imprisonment, to satisfy itself that arrangements exist for the offender to undergo such punishment;
• that form PD160 pursuant to regulation 140(2) of the regulations under the Prisons Act, No 8 of 1959, be amended;
• that accommodation be provided at penal institutions for the undergoing of periodical imprisonment countrywide;
• that adequate institutional facilities be created for the implementation of periodical imprisonment at such prisons, including programmes whereby prisoners undergoing such punishment be constructively occupied;
• that in order to conduct a pre-sentence investigation, the probation services be extended and in this process the role of the volunteer in the system receive attention;
• that judicial officers avail themselves more of their statutory right of access to prisons in order to gain insight into the implementation of periodical imprisonment;
• that a permanent research body be created to undertake research and provide guidance in connection with all facets of the criminal justice system;
• that the means be investigated whereby research results may be made known to judicial officers, including through training and the provision of sentencing manuals;
• that qualitative research into periodical imprisonment also be conducted;
• that all aspects relating to periodical imprisonment be researched on an ongoing basis, including the following:
  – an amendment to the Criminal Procedure Act, No 51 of 1977, limiting the imposition of short-term imprisonment without first considering the suitability of periodical imprisonment;
  – the accountability of periodical imprisonment;
  – that an experimental project into periodical imprisonment be launched.

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