

The New Release Policy: Problems concerning its structure and implementation

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Introduction

The implementation of a new release policy by the Department of Correctional services is the subject of considerable controversy. Not only do prisoners find the system confusing and opaque, but allegations have been made that the system is being applied unfairly and unequally. Prisoners are traditionally concerned, if not obsessed with their release dates. Confusion and anxiety around release dates could easily escalate into real trauma, both for prisoners, and for the prison administration. The issue of early release has also become confused with prisoners demands for amnesty, and has become central to prisoners demands for an amnesty resolution committee.

This paper deals only with early releases in terms of parole in terms of the recent amendment, and not with special remissions (early releases granted as once off privileges for special occasions). The new release system is critically evaluated, and recommendations are made which should be taken into account in the refinement and implementation of the system.

The Old Release System

In response to overwhelming overcrowding of prisons and budgetary constraints, the Department of Correctional Services has from time to time granted special remission of sentence to prisoners (excluding certain categories of serious offenders). In the period between 30 March 1990 and 30 June 1994, 94 128 prisoners were granted special remissions. Goodwill and "bursting" remissions of sentence were also granted in December 1990, April 1991, July 1991, and January 1993.

The Department has been severely criticised by the public and the Judiciary for these early releases, particularly due to the recommittal of serious offences by some of these released prisoners. The Judiciary and Magistrates were particularly concerned with the interference with carefully planned and constructed sentences. The Department was also criticised for its routine policy of releasing prisoners unconditionally after serving a portion of their sentences. The communities were

concerned that prisoners should be subjected to harsher measures and discipline, and that they should serve the entire duration of their sentences.

Following the public's response, the Correctional Services Act No 8 of 1959 was amended in 1993 in order to restructure the release policy of prisoners. The policy applicable before this date meant that prisoners could earn remission of sentence for good behaviour, as well as having the opportunity of being placed on parole. In practice, up to 1/3 remission of sentence would be applied. The effect was that prisoners were released unconditionally on expiry of their sentence (once remission had been taken into account). In practice, prisoners were often granted remission of sentence on their admittance to prison, and the date of their release, taking into account the remission, was often written into their prison cards.

One of the aims of granting prisoner early releases, is to provide an incentive for good behaviour. However, given that remissions were often granted automatically, and that prisoners were not subject to the control of the Department after their release, these aims could not be fulfilled.

The New Credit System

A system of credits which had to be earned by the prisoner on merit was introduced in March 1994. These credits would then in theory be applied in the advancement of the prisoner's release. As a further measure, the prisoner, after having earned credits and being released into the community, would still remain under the supervision of the Department. Continued good behaviour would be a condition of the prisoner remaining on parole until the completion of his/her sentence.

The guidelines on how the credit system is to be applied is set out in The White Paper on an Amendment of the Release Policy of the Department of Correctional Services and Proposed New Disciplinary System for Prisoners (March 1993), and the amendment to the Act (Correctional Services Amendment Act 68 of 1993). According to the White paper, the system of credits implies that prisoners could earn credits by means of **their behaviour, discipline, adaptation, participation in specialised programmes, diligence and productivity**. (my emphasis) These credits would be converted into fixed periods which can accumulate as they are earned to advance the date on which the prisoner can be placed on parole.

The other factors outlined by the White Paper which play an important role in consideration of the award of credits are:

- Remarks by the presiding legal official upon passing of sentence;
- Previous convictions and their frequency if any;
- Type of crime;
- Support systems in the community;
- Victim;
- Motive;
- Age;

- Length of sentence;
- Crime pattern;
- Results of an evaluation of experts where relevant.

In order to give effect to the new credit system, the functions of the institutional committees were rationalised. In terms of S62(1) of the Act, an institutional committee shall –

... having regard to any remarks made by the court in question at the time of imposition of the sentence, and at such intervals (which shall not be longer than six months) as the Commissioner may determine, after consideration of the prisoners criminal history, sentence, personal circumstances, behaviour and adaption, as well as his co-operation in prison-

(a) make decisions with regard to the credits to be awarded to him ...

S 22A of the act further outlines that a prisoner may earn credits by-

... observing the rules which apply in the prison and by actively taking part in the programmes which are aimed at his treatment, training and rehabilitation: Provided that the Institutional Committee may, in allocating credits, take into account any other factor which may be relevant to the prisoner in question.

The Act attempts to give definition to the awarding of credits by setting out the maximum amount of credits which can be awarded, and sets out at which intervals credits shall be awarded. S 22A 1) of the Act stipulates that –

(a) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served;
(b) credits shall be awarded at intervals referred to in S62(1) (no longer than six monthly intervals)
a prisoner sentenced up to six months shall be deemed to have been awarded the maximum amount of credits.

and S 22A (3) –

In the calculation of credits, a fraction of a day shall be regarded as a full day.

Assessing the Credit System

At first glance the credit system appears to provide an equitable and fair system of awarding credits to prisoners, However, a number of problems can be foreseen in the application of the system.

- It is not stipulated in any regulation to the Act, in the Act itself, or in the White paper, exactly how the credits will be awarded to prisoners. Certain considerations are indeed outlined, but these do not provide sufficient certainty on how they will be applied in individual cases. For instance, if a prisoner has a record of a number of serious crimes, but during his present term of imprisonment, he has behaved well, has attended all the programmes available to him, and has co-operated with the prison authorities. Does his recent performance bear precedence over his prior convictions so that he is awarded the maximum number of credits, or does his criminal record prevent him from being awarded the maximum amount of credits?
- The documents refer vaguely to other factors which may be relevant to the prisoner and grants the Institutional Committee a very wide discretion. It is not stipulated exactly what other factors these may be, and in its very vagueness, potential is made for abuse of the system.
- Central to the tenets of the scheme is the prisoner's participation in "specialised programmes", participation in programmes aimed at "his treatment, training and rehabilitation", and his "diligence and productivity". The Department has acknowledged severe budgetary and manpower shortages which affects the number of specialised, training, educational and, other programmes which The Department can offer and which a prisoner can participate in. In the 1993, a total number of 2 304 prisoners participated in vocational programmes, 31 255 in social work programmes, 3 463 in psychological programmes, and 22 211 in life skills programmes.¹ Assuming that many prisoners participate in more than one programme, these numbers represent a small fraction of the total number of prisoners which pass through the system in one year.

If a prisoner's participation in such programmes is one of the considerations of the institutional committee in granting credits to prisoners, it would appear that the majority of prisoners would be at a severe disadvantage in the accumulation of credits. Programmes are not available at all prisons, and certainly not to all prisoners. Similarly, the Department recognised that the opportunities for work are limited, and are generally not available to prisoners serving sentences for serious offences, or accommodated in the maximum sections of the prison. These limitations prejudice a prisoner, especially a maximum offender from earning credits.

- The Department is presently understaffed, and it has one of the worst staff/prisoner ratios in the world. On the 1 April 1994 the staff/prisoner ratio was 1:5.58.² Since a number of personnel are employed in managerial, programme and administrative capacities, the number of personnel actually involved in the day to day care and management of the prisoner represents an even smaller ratio of staff to prisoner.

The Institutional Committee is based at each prison and is comprised of members in the Department who would come into contact with the prisoner from time to time, such as social workers, medical personal, and the head of the prison. In theory, the Institutional Committee should have an accurate reflection of the prisoners history and conduct in prison at the time of making its decision. However, a prisoner who does not, or is unable to participate in programmes would have to be assessed on his

"behaviour and adaptation", "diligence", and "discipline" in awarding credits to him. Given the Departments staffing limitations, it seems more likely that the Institutional Committee will have more information pertaining to conduct of the troublesome prisoner, than that of the well behaved prisoner who never comes to the attention of the Department. It is submitted that it would be immensely difficult under these circumstances to accurately access the behaviour and conduct of each and every prisoner.

- On occasion the Institutional Committee has failed to meet every six months as is required, and prisoners have not had the opportunity of having their cases considered and credits awarded on a regular basis.
- In practice, credits are awarded for time served. Prisoners sentenced prior to March 1994 received credits for one half of the time they had served. Prisoners sentenced after this date can earn up to three months credits for each six months served. This leads to the expectation that prisoners will be awarded at least half of their sentence in credits. There is however no guarantee that these credits will be awarded, and therefore calculations on expected release dates by prisoners, may well conflict with dates actually granted by the Department. Prisoners are sometimes advised by the Institutional Committees that they will only be advised of the number of credits awarded at a later stage, making it difficult, if not impossible for prisoners to determine their release dates.
- Prisoners serving sentences of less than six months are automatically granted credits in the amount of 3 months. It is questionable why the Department has not seen fit to apply the principle of rewarding good behaviour and punishing bad behaviour to these prisoners. Under the new system prisoners may only serve one half of their sentences, whereas previously they had been required to serve two thirds of their sentences. This further undermines the departments justification for introducing the new system.
- The credits awarded to the prisoner do **not** guarantee his release after attaining the allocated number of credits, but merely advance the date upon which he may be considered for parole. This will be explored more fully below.

The Credit System and Parole

The importance of a prisoner being awarded credits lies in S22A (2) –

The number of days earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such prisoner on parole.

The parole board's function is to report to the Commissioner or the Minister as to the conduct, training, aptitude, industry and physical and mental state of a prisoner and the possibility of his relapse into crime, **and to make recommendations regarding his placement on parole, or the conversion of his sentence into one of Correctional Supervision.** After submission of the report a prisoner may be placed on parole before the expiry of his term of sentence. A prisoner serving a determinate sentence shall not be considered for parole until he has served half his period of imprisonment (S65 (4)(a)), provided that –

the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner.

It can thus be seen how closely the credit system affects the interests and the experience of prisoners. It is for this reason, that the policy and application of the credit system must be made understandable for prisoners. Since the detail of the application of the system is not defined in the Act, Regulations or White paper, the actual functioning, and the exact criteria to be applied remains a mystery to the prisoner and the outside observer.

Under the new system, a prisoner can no longer earn unconditional discharge, except by order of the State President(S 65). His/her early release entails being under a period of parole under certain conditions. The credits which have been awarded to a prisoner are only one of the factors to be considered by the Parole Board. They still have the discretion not to release a prisoner if he does not fulfil the criterion laid down in the White paper for release on parole. Every prisoner who is released out conditionally on parole in the community must comply with some or all of the following conditions:

- A period of house arrest
- Restriction to a magisterial District
- Restriction on association with undesirable persons
- Restriction on visits to undesirable places
- The rendering of community service
- The attending of prescribed programmes
- Regular contact with parole officers
- Visits to the prison/office exercising supervisory control
- A prohibition on changing work or residential address without prior approval
- May not commit a crime during parole.

Central to the tenet of conditional parole is the criterion that the Correctional Services must be able to monitor the parolee to ensure that he is complying with parole conditions. Factors which determine the ability to monitor a prisoner include such things as whether he has a fixed address, whether it is safe for officials to enter into the parolee's residential area, and whether the parolee can be supported, either by himself or his family, upon his release. Quite clearly, given that the majority of prisoners are black, that a large proportion of them come from unstable areas, often squatter camps or areas of unrest, or do not have fixed addresses, it is unlikely that a large number of prisoners will meet this criterion of monitorability. In this respect, many prisoners will be prejudiced and will not be found suitable for placement of parole. In effect, such prisoners could have to serve their entire sentences, regardless of the number of credits awarded to them for good conduct, behaviour and adaptation.

The release of prisoners on parole appears to satisfy the Department's concern of early release of offenders, as well as the Department's very real problem of overcrowding. It also allows prisoners a period in which to re-adjust to life in the

community. Notwithstanding this, one can appreciate prisoners' frustrations with the ongoing supervision and control exerted by the prison authorities once he/she has effectively been released from prison.

The parolee can be rearrested and his/her parole withdrawn partially or in full for contravention of any one of his/her parole conditions. This represents the greatest departure from the previous release policy.

Problems with the Introduction of the Credit System

Many prisoners have complained that the credit system is not being applied properly, and as a result, they are having to serve a greater percentage of their sentences. Prisoners are also concerned that the system has not been properly explained to them.

The Department states that the credit system was introduced in a phased manner, so that prisoners who had already been granted release dates, would not be adversely affected, and their release dates would not be changed. (Provided that they maintained their good behaviour). However, numerous complaints have been received from prisoners who have had their old release dates erased from their prisoner cards. Since no new date is substituted into their cards, until their final release date is known, there is a great deal of uncertainty. Prisoners do not know on which date they will be released.

The erasure of dates given to prisoners in the past is of doubtful legal and administrative validity. Although there are attempts to justify the change by saying that the early release or remission of sentence is a privilege and not a right. In the past system, remission of sentence was granted subject to good behaviour, and was limited to one third of the prisoners sentence. Standard remission of sentence could be forfeited on the grounds of misconduct.

The fact that remission is not a right does not mean that prisoners are not affected by the loss thereof. A European Court has decided in *Campbell and Fell v United Kingdom*³ that

The Court, for its part, does not find that the distinction between privilege and right is of great assistance to it for the present purposes; what is more important is the practice of granting remission- whereby a prisoner will be set free on the estimated date of release given to him at the outset of his sentence unless remission has been forfeited in disciplinary hearings – creates in him a legitimate expectation that he will recover his liberty before the end of his term of imprisonment.

Dirk Van Zyl Smit⁴ suggests, and it is supported by the writer hereof, that similarly, the granting of a standard remission creates a legitimate expectation that the prisoner will be released on the date specified. This expectation is enhanced by the information

which prisoners receive from the Department and the Institutional Committee. In the past, remission of sentence could be forfeited on the grounds of misconduct, usually after recommendation of the Institutional Committee, but the order for forfeiture must have been made by the Commissioner.

The forfeiture of release dates already given to prisoners represents a deviation from this practice. The problem of retrospectivity of legislation is raised in relation to the change in release policy. Legislation is deemed not to be retrospective, unless specifically stated. In this respect, in view of the argument that prisoners had a legitimate expectation that they would be released on the specified date, a change in release policy should not be permitted to retrospectively affect their rights. In terms of this argument, the new credit system should not apply to prisoners sentenced prior to the implementation of the new system.

Prisoners also argue that magistrates sentencing offenders prior to March 1994 were aware of the old policy of remission of sentence, and consequently made adjustments to their sentences in terms of this. Magistrates have been concerned that the Department's release policies are in disregard of the sentences applied by magistrates. The concern that Magistrates sentence a prisoner to an additional length of imprisonment in order to compensate for remission given by the Department has been frequently reported. Prisoners sentenced prior to March 1994 may therefore be at a double disadvantage in that they are serving longer sentences than were really intended by the sentencing officials.

Recommendations

- In view of the ongoing complaints by prisoners, and the confusion between the credit/release system and amnesty for prisoners, it is recommended that the credit system be reviewed as a matter of priority.
- The credit system should not be applicable to prisoners who were sentenced prior to March 1994. Release dates, in the absence of misconduct, granted to these prisoners prior to March 1994, must be reinstated, except where this would be to their detriment.
- A clear and transparent set of guidelines on the application of the credit system should be made publicly available, and must be explained thoroughly to prisoners. The additional factors which the Institutional Committee can consider should also be spelt out.
- At each meeting before the Institutional Committee, the prisoner should be awarded the credits, if any, which he/she has earned during that period. These credits must be recorded in the prisoner's file and explained to him/her. The prisoner should have access to the file on request in order to determine the amount of credits awarded to him/her. Once the credits have been awarded, they can not be withdrawn.
- Long term recommendations are that the Department should make training, recreational, psychological and other special programmes available to all prisoners, so that all prisoners have the opportunity to earn the maximum amount of credits. In the absence of available programmes, a mechanism should be established whereby prisoners can earn credits on an equal basis to prisoners who have the opportunity to attend these programmes.
- Members of the Department, especially those serving on Institutional Committees must be fully informed of all the guidelines to be considered when allocating credits,

and efforts must be made to ensure that the same standards are applied at every prison.

Conclusion

It is recognised that each new procedure takes time to implement, and is often the subject of some resistance from those who must apply it, and those whom it affects. However, when the problem persists, cognizance must be taken of it, and the problems rectified so as to limit the extent of the damage as soon as possible.

South Africa has recently been the site of sustained prison unrest, and indications are that prisoners are ready and willing to renew protest action if their grievances remain unaddressed. Particularly when the grievance relates to such a central issue as the length of a prisoner's sentence, steps must be taken to speedily resolve the problem.

Notes:

¹ Department of Correctional Services, Annual Report, January 1993 to December 1993, Government Printer.

² Department of Correctional Services Submission to the Commission of Inquiry into Unrest in Prisons, 1994, p. 56. Unpublished paper.

³ (1984) 7 HRR 165.

⁴ Van Zyl Smit, *South African Prison Law and Practice*, 1992, Durban, Butterworths (355).

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