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**PRIVATE PRISONS: INTERNATIONAL EXPERIENCES AND
SOUTH AFRICAN PROSPECTS**

By

JULIE BERG BRGJUL002

Dissertation submitted in *fulfillment* of the requirements for the award of the degree of
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Faculty of the Humanities
University of Cape Town
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Compulsory Declaration

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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The issue of privatising prisons is a heated and very prevalent debate taking place worldwide within academic institutions, businesses, governments and amongst all those who stand to gain or lose from it. The debate is also multi-layered, as many have attempted to fathom its significance, its meaning and the consequences of its global development. It was the author's intention to expose this debate by analysing the nature of prison privatisation, discussing its origin and development in the First World countries that have advocated it and thereby relate international experiences to the South African situation. The dissertation focuses predominantly on the significance of the most controversial aspect of prison privatisation (also the focus of the global debate) – the management and operation of a secure adult correctional facility by a private business. This type of prison privatisation and its impact on South Africa as a developing country was assessed in a prospective manner, based on well-informed inferences and supported by the data collected.

The discussion on the origin of prison privatisation overseas was supported by a number of international secondary sources (such as books, reports and journal articles). A qualitative approach was adopted to research the significance of private prisons for South Africa in the future. Seven people were interviewed in-depth and the interview sessions were tape-recorded. The interviews were transcribed and then made use of in the course of the discussion on private prisons in South Africa. The questions were open-ended, allowing the interviewee to relate to the author his or her opinion on the matter of prison privatisation. The interviewees were chosen on the basis of their involvement in the field of prisons or private prisons specifically and the data gathered was thus interpreted in the context of the interviewees background knowledge and experience with prisons and private prisons. This method of data collection was again complemented by the theories and arguments posited by individual authors involved in the prison privatisation debate.

The findings of the author revealed two important aspects of prison privatisation that refute and at the same time complement one another. These are: the philosophical and constitutional connotations involved in allowing a private business to run a correctional facility versus the practical benefits and apparent money-saving abilities that private

prison companies are known for. The data collected supported both sides of the debate, for and against privatisation, and it was the author's conclusion that both aspects of prison privatisation had to be taken into account in order to arrive at an informed decision on whether private prisons should be advocated or not. Consequently the author came to the conclusion that private prisons could both benefit and hamper prison developments in South Africa. Thus the key question the author posited was whether prison privatisation will become an acceptable and established form of government delegation or whether the controversial nature of prison privatisation will hamper privatisation developments in South Africa.

University of Cape Town

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1. INTRODUCTION

The delegation of state services to private entities otherwise known as 'privatisation' can be viewed as a fairly recent phenomenon occurring in most countries throughout the world. Everyday service provision from garbage collection to the transportation of citizens has been considered for privatisation by the state in some form or the other. The privatisation of these services and the state's approval that these services be delegated to private entities is fairly uneventful when one considers the nature of these services. It is simply the provision of a service required by the public, the better the service the more satisfied the public. However, privatisation has progressed from mere public service delivery. Many states have considered and are considering the privatisation of key areas of the criminal justice system. Criminal justice is more than a mere public service. It is the key element of most democratic orders and incorporates aspects of the state's entire functioning.

Policing, the justice system and corrections form part of the criminal justice system and these are the areas which various states throughout the world have considered for privatisation. There seems to be a global trend towards privatisation in general, it may have been just a matter of time before core elements of the state's existence were also considered for privatisation. Which is exactly what happened, a gradual move towards criminal justice system privatisation occurred in one of the most influential and powerful countries in the world – the United States of America (USA). It is no mystery that key developments in the USA usually find a place in other countries fairly soon. And that's what happened with prison privatisation in particular. Initially the media reported on the privatisation of prisons, in the early stages of development. At this early stage prison privatisation was considered a joke, no one really believed that prisons – state punishing institutions – would seriously be 'given' to private companies to manage (Ryan and Ward, 1989). In spite of this, persistence from the private sector itself motivated various American states to take the plunge and begin prison privatisation initiatives. Ironically it was the American government's intolerance to crime that eventually led it to this point. Unmanageable prisons and overcrowding were too much for one of the strongest

government's in the world to handle. Other First World countries followed suit, adopting intolerance for crime and advocating prison privatisation initiatives. The use of prisons became the most viable and widely used solution to increasing offender populations.

This dissertation aims to relate the story of prison privatisation as a part of a general global criminal justice system privatisation. Starting from American experiences with privatisation one can discover what prison privatisation really entails and why it is viewed with disfavour by some and with enthusiasm by others. Initially an explanation of privatisation will be made in Chapter 2. The common features of those countries adopting privatisation will lead the reader to understand why the standardisation of criminal justice has taken place in the countries mentioned in the dissertation, also why privatisation has been adopted by these very same countries, including South Africa. South Africa's involvement in predominantly First World country developments leads one to a brief discussion of First World versus Third World state functioning. Chapter 2 will also attempt to explain the motivations for privatising aspects of criminal justice as well as highlight what branches of the criminal justice system have been delegated for partial or full privatisation in these First World countries. Chapter 2 will conclude with a brief analysis of what elements of South Africa's criminal justice system is being considered for privatisation and what has already been privatised.

The primary discussion will revolve around *prison* privatisation in particular – where it began, why it began and why it began in South Africa, a country that does not quite fit the mould of First World countries. Initially Chapter 3 will define *prison* privatisation or at least highlight the many definitions used and the various types of privatisation that can take place with respect to prisons. Following this a factual review of international experiences and developments with respect to prison privatisation will take place in the form of a country-by-country analysis. The three main countries involved with prison privatisation – the USA, the United Kingdom (UK) and Australia – will be discussed in-depth. Various aspects of prison privatisation experienced in each of the three countries will also be outlined. This will include, for example, the origin of prison privatisation, the political rhetoric underlying its development, corporate initiatives leading to its

expansion and opposition to its further development. Following this analysis of the leading countries involved, a brief update of prison privatisation developments in other countries will demonstrate the gradual spread of prison privatisation to neighbouring First World countries, such as Canada, New Zealand and various European countries.

Chapter 4 will be devoted to prison privatisation developments in South Africa specifically. Chapter 4, as with Chapter 3, will discuss and highlight key developments leading to the adoption of prison privatisation in South Africa. Thus chapter 4 will include the first origins of the prison privatisation ideal and the gradual expansion of this phenomenon to core aspects of South Africa's prison system as part of the South African government's general privatisation project. Chapter 4 will conclude with a summary of the opposition and criticism prison privatisation has generated so far.

No debate on prison privatisation is complete without some form of evaluation, and Chapter 5 will conclude the thesis with South Africa's possible hopes with respect to prison privatisation and what private companies may offer in the end. South Africa's Apartheid history will at times form the backdrop to a discussion of the problems and solutions, both practical and theoretical, that prison privatisation may create with its introduction into the correctional aspect of South Africa's criminal justice system. Chapter 5 can only provide a well-informed, speculative approach on the future prospects of private prisons in South Africa. Yet parallels can be drawn between South Africa and the First World countries involved which have already had years of experience with the prison privatisation phenomenon. South Africa's complete experience with private prisons is, as yet, lacking. Only once South Africa, too, has had years of experience can a full assessment of prison privatisation take place. This thesis is consequently a precursor to future research on the subject.

Chapter 6 will conclude the dissertation by reiterating aspects of the thesis so ensuring that the pertinence of the introduction of prison privatisation in South Africa and the validity of on-going world-wide debates is re-emphasised.

The content of the chapters aims to gradually introduce the prison privatisation phenomenon and debate to the reader in the end allowing the reader to make an informed decision on what the future holds for prison privatisation *in South Africa* and perhaps internationally. In order to reach this aim background information is vital and will provide an insight to why prison privatisation is what it is and why South Africa is suddenly a part of the prison privatisation debate. The dissertation thus aims to address the prison privatisation phenomenon by not only studying the practical reasons for its emergence but also to expose the underlying ideological reasons and philosophical concerns associated with the introduction of prison privatisation internationally and in South Africa. The following chapters will fully convey to the reader what these practical and philosophical aspects of prison privatisation are, especially in relation to the ongoing world-wide debate.

Research Methodology

Various means of data collection were used to complement the various sections of the dissertation. The largely informative aspect of the international history of prison privatisation was complemented by an extensive literature survey. This consisted of the collection of mostly international books, journals, reports and criminological works in particular on the subject of prison privatisation in the USA, the UK, Australia and various other neighbouring countries. Many Internet searches were also conducted to further expand the survey. Liaison with various international experts on the matter of prison privatisation took place by means of electronic mail and ordinary mail. The experts also allowed access to various web sites containing their particular works.

The contents of the South African chapters of the dissertation required a more extensive search for information due to the fact that not much has been written on the subject in South Africa as yet. Accordingly formal interviews were conducted with ten persons involved in various degrees in the privatisation of prisons (see 'Addendum' for listing of interviews conducted). Initially interviewees were contacted by telephone and electronic mail and seven interviews involved a personal meeting and a tape-recorded interview

session. The other three interviews were conducted via electronic mail due to the inability of the author to meet the interviewees personally. A number of informal interviews were also conducted whereby the interview would only consist of one or two questions or consist of a number of unstructured questions not tape-recorded. These interviews were conducted personally (on one occasion), and also by means of electronic mail and fax. The tape-recorded interviews were transcribed into a question-answer format and then referred to in the course of the thesis. Due to the early stages of prison privatisation in South Africa the formal interviews consisted of questions related to South Africa's recent past with respect to its prisons and to possible benefits and problems prison privatisation may incur. Personal opinions in relation to the interviewees' work in the field of South African prisons were encouraged. The formal interviews were conducted within a week during the course of writing the dissertation in a pre-arranged time schedule. The informal interviews were mostly conducted towards the end of writing the dissertation as certain aspects of prison privatisation needed to be clarified. Literature complementing the empirical study involved the extensive use of the Internet to search for the latest developments on prison privatisation in South Africa. Thus Budget Votes and Parliamentary Briefings from the Department of Public Works and the Department of Correctional Services were searched for and made use of in the course of the dissertation. References to parliamentary debates assisted in plotting the timing of prison privatisation decisions and plans. Subsequently legislation and the Constitution were referred to in many instances as well as policy documents relating to prison privatisation. The literature that has been written on the subject of prison privatisation in South Africa was also used (and most of the authors were interviewed as well). Unpublished works, books, newspaper articles, Department of Correctional Services Annual Reports as well as journals were used to provide *background* to the subject of prisons in South Africa. And the interviews complemented this area as well.

Due to the fact that prison privatisation is still in the beginning stages in South Africa very often aspects of the dissertation had to be postponed until permission was granted for the author to pose questions on the developments of prison privatisation. At times

additions were made to the dissertation soon after important developments had taken place, the dissertation was written at the time of these developments.

It must also be noted that the actual contracts formulated between the Department of Correctional Services and the private companies were not made readily available. This may be due to the government's reluctance to reveal the contracts at such an early stage of developments, since it is the government that ultimately decides when and how much of the contract can be made available to the public.

we [the private company] contract with the government and in some parts of the world all the conditions of the contract are free and available and open to anyone who wants to have a look...But [we] have to respect the commercial and confidential requirements of the party with whom we are contracting. So if I'm not allowed to divulge something I'm not allowed to divulge. (Interview 5).

This raises an important question on the issue of commercial confidentiality, even though the government may have full intention to reveal the contents of the contract it remains to be seen to what extent this is done.

Despite this, it is the author's belief that the denial of access to the contracts has not detrimentally affected the content of the dissertation, especially chapters four and five. This is due to the fact that *indirect* access (through informal and formal interviews) was granted and provided the necessary information and clarification needed to assess prison privatisation in South Africa.

2. PRIVATISATION OF CRIMINAL JUSTICE – A WORLD-WIDE PHENOMENON

2.1 What is Privatisation?

The term 'privatisation' does not have a straightforward meaning or application. 'Privatisation' may refer to the involvement of voluntary, *not-for-profit* (non-profit) organisations (such as religious organisations) or it can refer to the involvement of the commercial sector, in the form of private *for-profit* businesses or non-governmental organisations (some of which may also be non-profit organisations relying on donations and government funding) (Beyens and Snacken, 1996). These two components of privatisation (non-profit and for-profit) complement the state's role in providing services, however at this stage only the latter form of privatisation is relevant to the debate on prison privatisation in this dissertation. Consequently a definition should be sought for this type of for-profit privatisation as this type of privatisation itself entails a diversity of meanings, particularly when understood *in the context of business practice*. Privatisation in this sense can simply be defined as the diversion of work from the public to the private sector (although this broad definition may also be used to refer to the not-for-profit private sector) (Becker, 1988). Or the "reduction in the spending or regulatory activity of Government" (Barnekov and Raffel, 1990:136). More specific and complex definitions of for-profit privatisation illustrate the diverse commercial nature of privatisation taken in the broadest sense of the word:

[Privatisation] removes the relationship of employer and employee from one sphere of regulation consisting of civil service laws and constitutional restraints, and places it within another, governed by the rules of the marketplace...and other statutes applying to private employment. (Becker, 1988:89).

Matthews (1989) describes it as:

...a disparate set of processes ranging from the sale of public companies to contracting out as well as various forms of deregulation. (Matthews, 1989:1).

The fact is that (for-profit) privatisation is a complex term not easily reduced to a single definition. Barnekov and Raffel (1990) attribute this to the fact that the term is used in reference to many areas of policy initiatives, ranging from the shift of service provision from public to private, to the mere disengagement of government responsibility. And yet it also refers to the deregulation of service provision. All these terms (which will be discussed at a later stage) do have relevance when one attempts to understand the term 'privatisation', both on a for-profit and not-for-profit level. However, during the course of this process the various threads of *for-profit privatisation* will be more fully explained in relation to their use, particularly in the criminal justice system (and more specifically with respect to prisons).

In spite of all this, the adoption of the simplest definition will suffice in the meantime. Because there is a simple common thread, that for-profit privatisation is being adopted as a means to meet the needs of society without relying too much on the government (Savas, 1984). What confuses the issue is how this is set into practice – which can be in a number of ways (such as deregulation, the disengagement of government responsibilities, contracting out and the like). The definition that will best match the use of this term, 'privatisation' in terms of its adoption in the criminal justice system, is that used by Savas (1984):

I define privatisation as relying more on private sector institutions and less on government to satisfy societal needs.

(Savas, 1984:18).

This can imply that previous government activity is transferred to the private sector, also that any new activities that would have been the government's responsibility are now the responsibility of the private sector. The various forms that this privatisation can take are listed by Savas (1984) as contracting out, franchising, the use of vouchers, voluntarism and the free market. Contracting out is probably the most relevant when one considers the role of privatisation in the criminal justice system.¹

¹ For the sake of convenience *for-profit privatisation* will be referred to as 'privatisation' during the course of the dissertation, unless otherwise stated.

2.2 Privatisation as a 'Western' Phenomenon

At this point it is necessary to make a distinction between those countries which are *well-developed* and those which are not. The reason for this is that privatisation seems to be prevalent in 'Western' capitalist countries which are most notably *Anglo-Saxon* and are characterised by well-developed free market economies based on the capitalist ideal. These countries include the USA, Canada, the UK and Australia. It is not a co-incidence that privatisation has flourished in these countries and not in less-developed, or Third World countries.

Chabal and Dalaz (1999) provide an insight into the differences between the state in Africa and what they call the 'ideal' state – that based on the Western model. They concern themselves with what they call "Black Africa" – former European colonies south of the Sahara and north of South Africa (Chabal and Dalaz, 1999:xxi). These countries epitomise the African state, a state that is weak and largely undifferentiated from the rest of society. Whereas those states based on the Western model (or even the Asian "tiger" model) are very much institutionalised, they are structurally differentiated from the rest of society (Chabal and Dalaz, 1999:1). The African state is marred by political contests of a local and personal nature, based on an extreme patrimonial model, thus there is no differentiation between the civic and personal spheres. The fact remains that unless the African state can overcome this patrimonialism and differentiate itself from the workings of society, it will never live up to the Western model, a model well-suited to the privatisation ideal. Chabal and Dalaz (1999:5), who take on a Weberian approach, describe the situation as such:

...the modern state is the outcome of a process by which the realm of politics is gradually emancipated from society and constituted into increasingly autonomous political institutions. The key to such institutionalization is...the successful establishment of a truly independent bureaucracy.

Thus in order to become a modern state, the African state has to break with the idea that politicians have some (personal) claim over the resources they administer. They have to

distinguish between the public sphere and their own personal, private sphere. How can the state privatise aspects of public service if there does not already exist a differentiation between public and private? Also, without this differentiation there does not seem to be an urgency to privatise since aspects of the public and private spheres are already merged within the state (Beyens and Snacken, 1996).

Yet one must not lose sight of the fact that although Western countries do have independent bureaucracies as defined by the Weberian approach it is not always the case that there exists a complete differentiation between public and private and between politics and economy. Western countries do not epitomise the Weberian ideal, as Chabal and Dalaz (1999) suggest, they also fall prey to what is known as the 'revolving door syndrome' (Schichor, 1995). Whereby those involved in state functions may also become involved with private functions and in so doing a distinction between these two functions becomes blurred. But despite the fact that Western countries do not live up to the Weberian ideal as they should, they are still suited for privatisation as the blurred boundaries between public and private do not overtly or detrimentally affect state functioning as much as in the African model. The intertwining of public and private in the West is *more likely* on an individual, personal level since it is the case that *individual* members of the state may have jobs waiting for them in the private sector, but this is not the norm as it is not as widely spread as in many African countries *in contrast*. In other words it is the norm for state officials in many African countries to benefit from their positions in the state by having a personal claim over private resources. Thus whereas Western countries may experience *incidences* of the revolving door syndrome, many African countries have state systems which are run on these lines and are considered normal government functioning.

Yet, it has been claimed that the blurring of the private and public sectors in Western countries has become more and more prevalent to the extent that the distinction between commercial and political interest is not as clear-cut as it should be (Lilly and Knepper, 1992). Consequently should the overlap of private and public interests increase to an extent that government functioning is affected then the Western Weberian ideal will be

further marred. In this case the West will follow the path of many African countries and become a state unable to differentiate between private and public.

But this may not occur to such a drastic extent since there are other factors that determine a state's orientation, factors which may determine the extent to which the West may become like Black Africa. Consider the vast differences in history and culture between the Western countries involved in prison privatisation and the African countries characterised by an undifferentiated public and private sector. One must bear in mind the fairly recent decolonisation of Black Africa. The authors, Chabal and Dalaz (1999), would hold that colonial Africa, even though ruled at one stage by modern states, never overcame the strongly traditional aspects of African administration – which is highly personalised. This aspect of African administration is absent from Western administration – thus a key motivating factor for an undifferentiated state is absent in the Western countries involved in prison privatisation. This highly personalised aspect of the African countries / former colonies constituting Black Africa prevented them from ever being modern states, especially after their independence. In fact a disintegration occurred after the end of colonial rule:

...in most African countries, the state is no more than a décor, a pseudo-Western façade masking the realities of deeply personalized political relations. (Chabal and Dalaz, 1999:16).

Also, this factor, and the economic crisis in Africa increases the likelihood that the situation will not change. It is unlikely that prison privatisation will spread to these countries since foreign private companies may not wish to seek opportunities in African states that are culturally resistant to privatisation initiatives, considering also that the countries advocating prison privatisation are also Anglo-Saxon countries. (Harding, 1998). In this case language barriers coupled with differing world outlooks may prevent the success of prison privatisation in many African countries.

This brief analysis of the less-developed state only goes to show what type of state is most conducive to privatisation. Historically, the modern state has developed a free

market and free competition ideal, complemented by the government as watchdog. (Schichor, 1995). It is only in recent years that Western states have attempted to reduce the size of government in order to reduce the costs of maintaining so many services, provided exclusively. For a state to become minimal is not to imply that it is weak, on the contrary, a strong state is needed to monitor the conditions in which a free economy can thrive. Simply put: the African state is not strong enough to delegate services to the private sector, until it can differentiate itself from the private sphere of society, and act as a public mediator.

Nevertheless, the UK and USA have implemented privatisation initiatives which have in turn largely been adopted by neighbouring First World countries resulting in the *motivation* of less-developed countries to also adopt these privatisation policies. For example, the International Monetary Fund through its stabilisation policies has pushed countries to reduce their public expenditure, privatisation being a logical solution. The World Bank and AID (a US Agency for International Development) have created an environment conducive to privatisation by simply being open to partial / complete privatisation programmes. Thus encouraging other major international organisations to do the same. Multinational firms have thus become increasingly open to privatisation programmes in all countries, and thus a changed perspective on this phenomenon and an encouragement of the privatisation option has occurred. (Hanke, 1985).

But this really is the tip of the ice-berg, Western countries are not merely open to the idea, they are fully involved in the privatisation ideal, and it seems South Africa will be too. It is not a co-incidence that South Africa is absent from the discussion of the African state versus the modern state. The South African state is unique and seems to sit on the fence in this discussion. Despite it being an African state, and having characteristics thereof, it has become involved in privatisation in a way that only modern states can achieve. Perhaps the nature of the South African state can be revealed when one recalls its recent political developments.

Putting this aside for the moment it is interesting to note in more detail *why* Western states (characterised by the 'modern state' model) have made use of privatisation.

2.3 Why Privatise?

There seem to be a number of reasons why the private sector has been increasingly relied on, in many Western countries, to provide goods and services previously provided exclusively by the governments. One of these reasons has been the increasing lack of faith in the ability of largely monopolistic governments to effectively and efficiently provide these services. Consequently there has been an effort to reduce the size of government. To elaborate on this one must realise that only in the past fifty years have Western governments taken on greater and greater responsibility in their nations' economic affairs (Hanke, 1985). Macroeconomic planning and management essentially became the order of the day and consequently ever-increasing budgets for the public sector. These large budgets were, in effect, necessary to meet the needs of society in terms of welfare, infrastructure as well as a whole range of services and also for military needs (Hanke, 1985). With this constant growth in government responsibility came a growing concern about the size of government, and particularly in the increasingly high taxes being implemented to meet the needs of these budgets. As a result the 1980s brought with it a taxpayer revolt as well as a new faith in privatisation in the USA and the UK.

Also, the ever-growing power from those employed in the public sector, that is public employee unions, particularly in the late 1970s, provided incentive for the government to create a parallel system of privatisation to curb the power of the unions. As a result much of the resources of these unions were then used to fund political activities which attempted to maintain existing *public* provision of services and systems of monopoly as a response to government initiatives (Bennett and Di Lorenzo, 1983).

Complementing the practical incentive to privatise prisons was the ideological vision held by many key politicians. Margaret Thatcher, in particular, (along with Cabinet and Treasury members) created a privatisation strategy as part of the UK government's agenda. The privatisation programme was in effect fuelled by 'New Right' thinking –

free-market theorists advocating a reconstruction of public sector service delivery. 'New Right' influences became Thatcherite policy as:

...the Thatcherites saw the reconstruction of the public services as a key task in refashioning the British state and British civil society...a set of ideas for managing all institutions in the public sector and involving devices such as internal markets, contracting out, tendering and financial incentives...(Gamble, 1994 in James, Bottomley, Liebling and Claire, 1997:40).

Underlying ideological (and perhaps less overt) incentives cannot be overlooked as the privatisation of public services was also a part of a certain Conservative thinking based on free-market economics, libertarianism and the like, culminating in a reformulation of public service provision (James et al, 1997; McDonald, 1990). One must view the reasons for privatising in its entirety, with both practical and ideological factors influencing the privatisation of the public sector.

Consequently for *all* these reasons (both ideological and practical) privatisation became fashionable, driving politicians, in the USA and UK in particular, to implement privatisation programmes (Hanke, 1985).

It is however, the gradual privatisation of the criminal justice system that should be discussed in more detail, for it was with the proposals to privatise parts of the criminal justice system that the most extreme set of responses came about. Those opposing these proposals had assumed that the control and punishment of crime, and the provision of laws was naturally the sole responsibility of the government (Matthews, 1989). Under this assumption any move to privatise would threaten the State's impartial and universal nature with regard to law enforcement. Consequently privatisation of the criminal justice system elicited responses based on the symbolic implications of government distributing this responsibility. One then asks why the criminal justice system was nevertheless partially privatised? Matthews (1989) points out that there was a realisation that there already existed a large degree of privatisation within the criminal justice system anyway, albeit in a different manner. That is, non-profit private agencies and volunteer groups (as

opposed to strictly for-profit companies) rendered services in competition and in conjunction with the public provision of services. Private policing too had grown rapidly over the past years, even exceeding the number of public police (particularly in the USA, UK and Canada). Also there was a general recognition, according to Matthews (1989), that the *provision* and *administration* of criminal justice services were entirely separate. Consequently private companies could provide criminal justice services without hampering the State's legitimacy. The State would still take on the responsibility but at the same time would delegate certain services within criminal justice systems to private companies who would administrate these services.

Another important realisation was that privatisation had previously existed, (prior to the State's gradual and all-encompassing growth.) although in a somewhat different form. The fact that profit-making companies would take on key functions of the State only amounted to a *re-privatisation* of aspects of the criminal justice system.

Moreover, it was problems with the State's management of the criminal justice system and the public's increasing fear of crime that the thrust towards privatisation came about. Many Western governments were experiencing fiscal crises, Nina and Russell (1997) attribute this to neo-liberal programmes instituted in Western governments to cut back on public service spending. There simply were not enough funds to effectively and efficiently provide services. The State-sponsored criminal justice system was inefficient, ineffective, discriminatory and over centralised, forcing governments to move to privatisation not only in the hope of curtailing these problems, but to lower State expenditure while at the same time still maintaining control. This was the politically attractive thing to do and after all surely the private sector could do no worse? The rationale was that even though privatisation would not guarantee cost effectiveness, its flexibility, innovativeness, high level of competition and weak unions would guarantee at least some degree of efficiency and effectiveness (Matthews, 1989).

In fact some would argue that the very nature of the public sector hampers its efficiency and effectiveness in contrast to the private sector. Bennett and Johnson (1981) attribute

the differences in the public and private sectors to the differing incentives for public and private sector workers. It is the very incentives of these workers that determine that governments will be less effective, flexible, innovative and competitive than private companies. Bennett and Johnson (1981) in their assessment of government bureaucracies point out that since they are monopolistic, there is no competition to drive the public firm, therefore there is no fear of going out of business. The public employees are rarely ever seriously threatened by dismissal; an incompetent individual will usually be removed from his / her office by being promoted. Annually allocated funds are maintained or perhaps even increased by the spending of all funds – regardless of whether the spending is essential to the particular department or not. After all, if the entire budget is not spent, what incentive is there for the State to allocate the same budget the following year? As a result high taxation is the order of the day, to pay for the growing public sector and the costs associated with it – all the extra paperwork, regulations and red tape. Unfortunately the situation is catch-22, it is not in the interest of many politicians to attempt to reduce this inefficiency, it is a matter of getting elected, and in particular getting the votes of government employees by not threatening their allocated budgets. The increase of unionisation and threat of strikes within government bureaus also ensures that the budget is maintained.

The fact is that governments are not easily reduced, quite the opposite is occurring in many developed Western countries. Taxes cannot rise indefinitely without some sort of revolt by taxpayers, regardless of whether taxpayers' believe in the countries' crisis or not. Thus the private sector becomes a viable option for those wishing to reduce taxes and the size of government without hampering its inner workings, which in any case would be an extremely difficult and complicated process, most probably unsuccessful. The private sector encompasses everything the public sector does not. It has to – efficiency is imperative to ensure increased income, incompetence is severely dealt with as it could lead to falling profits and rising costs. There is competition between companies to keep their prices down, and to keep their customers, who so easily could switch to another company. An inefficient company is a failing company, therefore by its

very nature a private company will be efficient in comparison to the public sector (Bennett and Johnson, 1981).

Privatisation becomes a means to reduce government without actually altering it – it is simply a matter of monopoly versus competition. Government bureaus are by their very nature monopolistic, when a private company is exposed to competition it will necessarily ensure that it will produce to its fullest capacity, if not, risking losses. It therefore has little to do with actual public and private employees, whether one is inferior to the other. Their incentives differ according to the service they have to provide – a service based on a monopoly or a competitive one.

That does not mean that all government services should be allocated to private companies. There are inherent qualities in the State's functioning that may be imperative to the smooth provision of particular services, especially criminal justice services and in particular the management of prisons. Many government services are provided as monopolies when in fact they do not have to be, they can be better run by private companies (Savas, 1984). Still, there are services that are best run by the government especially those involving core public functions. *Peripheral government services* should be allocated to the private sector, or so the debate goes. The fact remains that private companies are increasingly becoming involved in these "core public functions" (Becker, 1988:93), that is within criminal justice services. But what exactly is meant by 'core public functions'? What is it within criminal justice that is being allocated to the private sector? This brings one to a new question that needs to be answered: what exactly is being privatised within criminal justice systems?

2.4 What is Being Privatised?

The use of privatisation as an alternative to the exclusive government provision of services has over the years been allocated more and more to "front-line" service provision as opposed to "backdrop services" as Matthews (1989:3) refers to it. This has taken place, generally along a wide range of services, from ship repair to weather

forecasting but also within the criminal justice system. More and more is being allocated to the private sector in developed Western States. The criminal justice system is a three-fold service provider – it provides safety and security, that is policing, it provides justice, that is the court system, and it provides a means of incarceration, that is the penal system. All three services have, to some degree been privatised in many Western countries – particularly the UK, USA, Canada, and also Australia. South Africa too has joined this list of countries.

Perhaps the most privatised area is the area of safety and security. Private security companies seem to be commonplace in many countries (not just the countries mentioned) and in many cases the private police outnumber the public police. The degree of privatisation has expanded over the years. This has included guarding a client's house, working for a major company wishing to protect its assets, patrolling a shopping centre and transporting prisoners. It is also into the realm of imprisonment that private policing has expanded (that is the transporting of prisoners). Thus private security companies have gradually been allocated duties previously handled by the public police (Schönnteich, 1999). Private security, as with private prisons, is a much-debated and controversial issue. Many problems with private security are similar to the problems associated with private prisons, especially in terms of ensuring that the private companies in both instances are accountable for what they do. In fact the similarities between private security and private imprisonment is such that the advantages and disadvantages of each largely relate to similar issues of government delegation, the power to inflict punishment / harm, accountability, legality, constitutionality and the like as one will realise in the course of evaluating private prisons.

The privatisation of the court system has been more obscure than both private security and private prisons with mainly non-profit organisations and volunteer groups handling peripheral / community cases, by means of mediation, counseling and arbitration (which is particularly made use of in the United States). Any expansion of this would relieve pressure on court systems already swamped with cases. Consequently this involvement of the private sector (although not strictly by for-profit agencies) should be encouraged.

Privatisation of the penal system has perhaps roused the most debates and it is the aim of the following chapters to assess the situation internationally and locally. What started off as private involvement in “ancillary functions within public prisons” (Becker, 1988:93) such as the preparation of meals, soon progressed to illegal alien detention, halfway houses and juvenile detention facilities. Today in the UK, Australia and the USA private companies are fully responsible for entire adult imprisonment facilities – even encompassing maximum security. But before an assessment is made of past and current practices in these countries’ penal systems (and South Africa’s penal system), a review will be made of the status of South Africa’s *policing* and *judicial* practices with regard to privatisation.

2.5 The Status of Privatisation in South Africa

- **The Judicial System**

It is common knowledge that the South African Department of Justice is struggling to keep up with the demands for effectiveness, considering the vast number of cases the court system has to process every year and the increase in the number of crimes being reported (Schönteich, 1999). The reasons for its problems largely relate to understaffing, badly trained detectives, lack of prosecutor experience and a general bottlenecking of cases due to procedural backlogs. Martin Schönteich (1999) suggests ways in which the private sector could greatly assist the smoother running of South Africa’s court system. At the moment private sector involvement is minimal in comparison to how deeply it could assist the judicial system. For example, arbitration and mediation is not altogether unknown but could be far more widely applied in South Africa. Arbitration and mediation programmes divert matters that the State-funded courts may not necessarily have to deal with. The expense and time incurred for these matters could ‘save’ the courts for more serious offences. However, an arbitration-mediation programme per se has not yet been implemented in South Africa to the *extent* that it provides a major alternative to criminal court cases. (Though there are commercial arbitration programmes in existence which do save a lot of time and money as they are diverted from

the courts). What *has* been implemented is legislation for private prosecution, but the restrictions and safeguards imposed prevent any real diversion from State-funded courts. Yet, the potential is there to develop this and many other ways of alleviating the burden on the courts. Schönteich (1999) provides ample, uncontroversial ways in which the private sector could be used, such as in matters of administration (for example clerical work, as well as in security and cleaning).

- The South African Police Service (SAPS)

Private security, world wide, is gradually taking on duties traditionally carried out by the public police. The relevance of this to South Africa is obvious, as policing and crime prevention have been on the State's list of priorities for the past few years, but not effectively dealt with. Apart from the growth of private security firms, the SAPS itself is in serious need of at least some degree of privatisation – once again on an administrative level. Schönteich (1999) reports that an American study revealed that 70% of the SAPS officers were involved in administration while only 30% on actual policing. So far little has occurred to alleviate this problem, except in 1998 when the chief executive of the SAPS made changes to 'free' approximately 1000 police officers a year to perform policing duties (as opposed to administration). The private sector is not being used to its full potential. Once again Schönteich (1999) recommends uncontroversial ways in which the SAPS could make use of the private sector. Such as administration, investigation – both criminal and forensic, and for use as a *supplement* to public police officers such as guarding crime scenes, persons, premises and government departments, also for transporting prisoners, training police officers and so forth. In this way the public and private sectors could work in unison. The private sector could thus alleviate burdens placed on the SAPS by 'freeing' police officers to perform serious on-the-street police duties as opposed to, for example, administrative work or the guarding of individuals.

Unfortunately as it is now the private security sector works independently of and parallel to the SAPS. Thus instead of providing much-needed assistance to the SAPS the private sector has created a dual system of policing. Only those who can afford the services of

the private sector are able to benefit from it, whereas the rest of society has to make do with an over-burdened public police force. Consequently the proposals would first have to be more deeply assessed in terms of the current dual system of policing that exists in South Africa which has created a problem amounting to the unequal distribution of the right to be protected. These practical proposals sound beneficial but should nevertheless be assessed in terms of ideological and constitutional issues, issues that affect private prisons also.

The private security industry meanwhile has grown rapidly since the 1980s and while the SAPS employs approximately 140 000 persons in its personnel, the private sector industry employs about 200 000 persons. At present South Africa's private security industry is responsible for guarding facilities such as malls, schools and businesses; for installing electronic security (such as surveillance equipment) and instituting investigations (and personal protection, that is private detectives and bodyguards) (Jensen, 1998). It seems then that the private sector is gradually entering the public policing and judicial arenas, although somewhat slowly. In contrast the private security industry is booming and apparently filling the void left by the SAPS (however, as mentioned, the industry still remains a tool only for those who can afford it). The use of private security companies also raises many key ideological issues that need to be investigated in South Africa.

The penal system is part of the criminal justice system and cannot be viewed in isolation. Policing and judicial activities often overlap with the functions of the penal system. As aspects of the public police and court system have been privatised so too is South Africa in the beginning stages of privatising its prisons. It is then to the arena of penology that an assessment of privatisation will take place – notwithstanding the necessary overlap of private policing and private judicial programmes. This brief assessment of private involvement in the criminal justice system was to contextualise the privatisation experience in this country to date, specifically as it has affected the public police and court system. The following chapters will focus primarily on *prison* privatisation, both internationally and locally.

3. PRISON PRIVATISATION INTERNATIONALLY

3.1 Definitions of Prison Privatisation

Previously it was mentioned that contemporary privatisation of aspects of the public sector was in actual fact a 're-privatisation'. Privatisation has existed prior to *contemporary* developments – developments over the past decade or so (since around the mid-1980s). But there is a difference between the privatisation of old and the privatisation of new, hence a re-privatisation. Prisons in the past were used as a coercive means to detain a criminal until that time in which the criminal was removed from the prison to be executed or transported or until a personal debt was re-paid. Therefore privatisation used in the past consisted mostly of the private sector being deployed simply to house inmates but at times the private sector would misuse the situation and sell inmate labour or make a profit in some other way. Today prisons are used as *punishment* for an offender thus prisons exist for punitive reasons rather than merely to coercively detain a prisoner. In the light of this privatisation was used in different contexts since the privatisation of the past was advocated at a time when prisons were used for different reasons as compared to the use of prisons today. What makes *privatisation of the past* controversial is the abuse of inmates (not the legal punishment) housed in private facilities. What makes *privatisation controversial today* is the fact that *punishment* of inmates is being delegated to the private sector. Perhaps the difference can be made more clearer when one reviews exactly what type of privatisation was taking place in the past and what abuses were being experienced by the inmates.

Harding (1998) emphasizes this difference by referring to the penal situation in the US after the Civil War. Around the early 19th Century the bankrupt Confederacy states had pursued a system of leasing out inmate labour. Inmates would be used to work as slaves on plantations and in factories (Borna, 1986). The highest bidder would purchase the state's inmates, prisons and equipment and make a profit by selling the inmate labour. Prisoners and / or their families would be charged for living and housing costs. Despite its success for the bidder and the state, the conditions for the inmates were appalling:

corruption and brutality were rife thus ensuring no hope of inmate rehabilitation or proper treatment. This arrangement lasted for approximately 50 years whereby the southern states accommodated the rising number of offenders – a consequence of the shattered economy and the recent abolition of slavery (Harding, 1998). As with the current debates on privatisation, the situation at that time had also raised questions concerning the state's role in relation to prisoners, since the state's role at that time was not clearly defined. Only in the early 20th Century were these abuses exposed due to prison reform initiatives taking place at that time. This resulted in many states in the USA taking control of the prison institutions (and thereby taking responsibility for them) and enforcing laws preventing private ownership of prisoners (Borna, 1986).

In the UK, more particularly in England, local gaols were privately managed during the 18th Century. A common abuse prevalent in these prisons was the extraction of fees from the inmates by prison officials. Inmates with enough money were thus far better off than those without. Accountability and monitoring of these facilities were minimal due to the relatively low cost of maintaining the prisons and the resultant lack of interest in them by the state. However, in 1810 when Jeremy Bentham offered to create a prison in the vision of a *Panopticon* and to run it himself as a private contractor, the parliamentary committee assigned to consider his offer realised the dangers of abuse and diminishment of state legitimacy. Moreover five years later the extracting of fees from inmates was abolished. In the mid-1800s convict labour was largely exploited by prisons run by the local government. At times private contractors would liaise with prisons to manufacture products. Private contractors would supply the raw materials and collect the finished products. The Prison Act of 1865 limited convict labour but many local prisons continued to make a profit. In 1877 local and county prisons were transferred to one central government in the form of the Prison Commission. This development greatly diminished the use of convict labour. After this slump in prison labour practices, subsequent efforts to legitimately make use of convict labour was largely unsuccessful. In the 1970s a government attempt to revive 19th Century labour practices also ended in failure, resulting in an abandonment of the programme (Ryan and Ward, 1989).

In Australia from the late 18th Century fleets carrying convicts from the UK to Australia were under contract from the British government. In this case penal transportation was privatised due to economic and administrative benefits. After delivery of the convicts many had to work for free settlers who would feed, clothe and house the convicts while the government provided a minimal fee. Despite condemnation of this assignment system, the arrangement went on until around 1849. The private transportation and assignment system was maintained for economic reasons, however, after the massive influx of convicts to Australia after the Napoleonic Wars, the sheer scale of the transportation needed forced the British government to end its joint venture with the private sector.

The re-emergence of prison privatisation took place in the late 20th Century (James et al 1997).

Today the wrongs of the past (with respect to the manner in which prisoners were treated and the improper use of the private sector) tend to shadow the complete acceptance of contemporary prison privatisation. This is despite the fact that the privatisation of old is different to the model of privatisation adopted in the present. The differing meanings of the term 'privatisation' demonstrate this difference. One meaning:

...involves removing certain responsibilities from the collective realm...[while] the second meaning [is] retaining collective financing but delegating delivery to the private sector. (Donahue in Harding, 1998:626).

The second meaning applies to contemporary privatisation – *delegation* is the key word. The former meaning involves the state relinquishing its responsibility (to incarcerate prisoners) to the private sector. It is easy to see how corruption could have resulted from this, as public accountability had been sacrificed completely for the sake of profit. The state had monitored the situation inadequately, if at all.² Modern methods are different: the state has retained its responsibility to humanely incarcerate offenders, it has simply delegated services which the private sector is contracted to perform, in the hope that cost-

² Once again it is important to emphasise that prisons were used for different reasons in the past and consequently privatisation was advocated in a different context as compared to the prisons today.

saving will be the result (Harding, 1998). This is the arrangement, in theory; assessments of a practical kind are to date still inconclusive.

Today the private sector may finance and construct prisons; operate juvenile facilities; operate adult facilities; provide work for prisoners and / or provide contractual services (such as education or health care) (Lilly and Knepper, 1992). The privatisation debate revolves around the ownership and management of *adult* facilities by the private sector. The private sector has been involved in juvenile corrections and service provision without noticeable criticism. It is only since the emergence of adult private prisons that the debate, worldwide, has flared. In the light of the above a definition (or definitions) of modern prison privatisation will be formulated based on the types of private involvement in adult corrections.

There are four types of private involvement in prisons: private involvement in prison industry; private sector design, finance and construction; contracting out services and private management of correctional facilities.

3.1.1 Private Involvement in the Prison Industry

Over the past few years the private sector has been interested in the use of prison labour. A private company or entrepreneur may be approached by the state to establish and manage prison-based industries. Prisoners may also be hired out as contract labour (Ryan and Ward, 1989). This is the most established form of private involvement considering its long tradition in American corrections specifically. Interest in it has been *renewed* due to the fact that inmates are trained and provided with work – not only encouraging rehabilitation but also reducing costs for both administrators and for the public at large³ (Saxton, 1988). The down side to this form of privatisation is that inmates may only receive a small percentage of pay, consequently threatening labour unions. This is according to Kinkade and Leone (1992:58) who also point out that:

³ Inmates are allowed to support their families and / or provide victim restitution.

...the economic concerns of maintaining such enterprise might come into conflict with penal purpose and institutional routine.

In other words occasional security problems arising as a result of productivity may in the end hamper it. Also training received for the prison industry may not be regarded as a factor when an inmate is released and seeking employment on the outside. Maintaining the labour supply for the prison industry may be favoured over and above rehabilitation programmes and / or vocational training (Kinkade and Leone, 1992). But despite these problems the USA has made provision for prison industries by lifting various restrictions for private sector use of prison labour. Many states in the USA contract out work of a number of convicts. For instance Best Western International began its prison labour programme in 1981, in Arizona. In 1985 inmate labourers had paid taxes to the amount of \$182,000, contributed \$187,000 to the government for room and board, and contributed to their families approximately \$112,000. This all by thirty prisoners over four years (Joel, 1993).

In general the correctional system of the state (in this case Arizona) will provide the private firm (Best Western International) with the working facility whereby the firm will manage and train the inmates. Their earnings are then released to the state's care and wages are usually negotiated between the firm and the state (Joel, 1993).

Recent debates with regard to prison labour have revolved around improving labour practices, not only for the inmates but also for the institutions involved. A recent Federal Constitutional Court decision in Germany laid down an ultimatum in which time the German legislator had to increase the remuneration for prison labour. This would provide a useful incentive for prisoners to not only work but to develop a better outlook on life. Previous remuneration was minimal, not worth the effort of labour, thus an increase of this would provide an incentive. The German debate also put forward the idea that prisoners could even receive benefits and wages of the same or similar bracket as wages earned in society. And deductions could be made, in effect charging the prisoner for the costs of imprisonment. Another incentive could be an early release for the inmate based on his / her working. This renewed interest in prison industries,

particularly in Europe, will probably involve the private sector since private companies have already been involved in this type of industry in the USA. In fact many European countries recognise the usefulness of the private sector in the revival of prison industries, since prison labour could be a means to modernise many penal systems (Dünkel, 1999). The downside to this revival of interest in prison labour is the functioning of prison industries *in practice*. Theoretically prison industries, on a large-scale, should contribute to the alleviation of the financial burden of prisons; reform and modernise prisons. In practice many prisons are not conducive to the needs of a market. In the USA, for example, many prisons are situated far afield in rural areas, they are old prisons with the incorrect infrastructure for manufacture. Most problematic of all is the large number of inmates who need to be employed, many times it is impossible to provide employment for all. In South Africa, too, training is minimal, remunerations not worthwhile and employment scarce. Therefore in order to successfully implement or re-implement prison labour on a large-scale many reforms have to be made. Perhaps private sector involvement could assist in this initiative (Jacobs, 1999; Van Zyl Smit, 1999).

3.1.2 Private Sector Involvement in Correctional Construction

This form of privatisation usually entails a private company building a prison with the possible aid of a construction company, and then renting it to the government. The government then provides its own staff and manages the prison like any other (Ryan and Ward, 1989). This is a lease-purchase arrangement; more specifically the private company builds the prison and the government signs a long-term lease. The initial rent the government pays will fund the construction. When the debt has been repaid the government will receive title to the building. From this arrangement the government will bypass voter approval, therefore benefiting from faster designed and constructed prisons (and possibly at a cheaper rate).⁴ The private company receives a cash flow from government payments and other tax advantages. The private sector is also at times called upon to *finance* the construction. So a private company may design, finance *and*

⁴ In the USA, a referendum is needed for voters / taxpayers to approve the building of new prisons by various jurisdictions.

construct a correctional facility. In this case private funds are used to finance the institutions – and quickly. As for the construction of the facility the government will once again be able to bypass voter approval this time for the funding of the construction. Funds will be received from a private source. The government is also able to avoid debt restrictions by approaching the private sector for funding. But avoiding public opinion and approval of new projects may thwart public scrutiny and reduce the government's accountability (Joel, 1993).

The speed of the creation of the new facilities is not the only advantage – the private company is less limited in choosing a site (government procedures in this regard may be hampered by red tape), and choice in building materials, construction companies, architectural companies and the like. In 1986, for instance, the U.S. Corrections Corporation opened an urgently needed security facility in Kentucky, only one week after the contract was signed with the state. Private companies also tend to be more flexible with regards to designs improving security (Joel, 1993). Private companies may choose a site, design and build a facility “on spec” in the hope that the building will be needed by the government and contracted for its use (Leonard, 1990:69).

Leonard refers to the financial ownership of a prison facility by the private sector as “nominal privatization” (p.69). Even though a private company may be responsible for all aspects of the facility's construction process, it will not be involved in the internal operations of the facility. That Leonard (1990:69) refers to as “operational privatization” whereby a private company *is* involved in operating the facility. Nevertheless designing and constructing a prison is an important contribution considering the importance of security. The design of a facility may determine the effectiveness of its security.

3.1.3 Contracting Out Services

This is the most common form of privatisation whereby the private sector may be called on to provide what Cavadino and Dignan (1997:153) call “ancillary services”, these services do not form part of the “core function” of imprisonment. These include catering,

education, medical and psychiatric treatment, drug treatment, counselling, staff training and administrative duties (Saxton, 1988). The private company, by performing these services, could free public officials from duties (such as administration) which could divert them from 'core public' functions. Also since it is claimed (and in some instances proven) that the private sector can provide the services more cost-effectively, the provision of these services could be improved without incurring needless expense on the side of the government. It is however, the duty of the public sector to monitor the performance of the private sector providers, to prevent the diminishment of quality.

3.1.4 Management and Operation of Correctional Facilities / 'Operational Privatisation'

A private company may be contracted by a government to build, staff and manage a prison – either a part of the institution or the entire institution. The government will relinquish the running of the prison to the private company but will be responsible for assigning the contract, monitoring the performance of the company and will retain its policy-making function (Cavadino and Dignan, 1997). The private company however will be responsible for day-to-day management. Leonard (1990:69) calls this “privatization of incarceration in the fullest sense” or “operational privatization”.⁵

- Levels of Private Sector Involvement:

A distinction must also be made between the varying “depth of penetration” by the private sector regarding prisons. A private company may manage and operate “shallow-end” institutions – low security prisons, usually juvenile facilities; and / or “deep-end” institutions – maximum security prisons with high-risk inmates (Cavadino and Dignan, 1997:154). As mentioned earlier the privatisation of juvenile facilities, immigration centres and remand centres have not roused many debates. This is because of the nature of these types of facilities. Juvenile offenders are awarded a different status in comparison to adult offenders; this is demonstrated by the fact that juveniles are placed in

⁵ The implications of nominal and operational privatisation will be made when an assessment of prison privatisation is made with regard to the South African situation.

facilities geared toward rehabilitation and welfare as opposed to punishment per se. Juvenile offenders are required by law to be separated from adult offenders and are *usually* placed in fairly low-security halfway houses, detention centres and the like as opposed to high-security correctional institutions / prisons. Illegal immigrants and remand prisoners, too, have a different status to convicted criminals as neither has been formally convicted and in both cases the facilities they are housed in are for custodial purposes rather than for punishment. Therefore these types of offenders usually constitute the shallow-end of corrections and are mostly welfare-orientated (especially juvenile offenders). Consequently these types of facilities are, at times, run by not-for-profit organisations (non-governmental organisations or NGOs), whereas the government runs maximum-security adult facilities almost exclusively. The running of a shallow-end facility by a for-profit organisation would not be as drastic as the taking over of a government institution by the same for-profit organisation since shallow-end facilities may be run by non-governmental organisations anyway because of their predominantly non-punitive nature. It is also still a novelty (especially in South Africa) for anything other than the government to run a *secure* correctional facility for adults. Most academics will agree then that it is the gradual privatisation of adult facilities (full-fledged prisons encompassing maximum security) that has raised the most controversy, mostly of a constitutional and ideological nature.

But before one exposes this debate, one needs to understand the historical conditions and context in which privatisation was adopted. One needs to know why, despite its apparent controversial aspect; privatisation was adopted in certain countries. The best means to do this will be to relay the historical background of those countries most intimately involved with operational privatisation – the USA, UK and Australia. Also to further contextualise the current debates on privatisation the current statuses or goings-on of these countries will be revealed to equip the reader with the background knowledge necessary for an objective analysis of operational privatisation with regard to prisons. The South African experience in particular cannot be viewed in isolation since overseas countries have largely influenced developments. Consequently by reviewing experiences in other countries one will not only be able to gain more insight into the nature of private prisons

(such as its origin and developments) but also then be able to pick up on the main controversial issues which South Africa now has to address.

3.2 Why Privatisise Prisons? – International History of Prison Privatisation

The 1970s and 1980s was a time during which the interest in prison privatisation emerged. It was also during this time that faith in the state began to diminish. The conservative governments of the USA, Canada, UK and Australia focussed on reducing the role of the state with respect to service provision. These countries were also trying to cope with their large and fast-growing prison populations. In this political climate the private sector became a means to alleviate the urgent prison situation.

What follows is a country-by-country historical review of how prison privatisation emerged. The three main countries advocating prison privatisation will be discussed, they are the USA, the UK and Australia:

3.2.1 The USA

▪ Ideological and Political Background to Prison Privatisation Developments: The Prison-Industrial Complex

Around the mid-1980s the USA was experiencing severe problems with its prison system. The prison population had been increasing rapidly since the mid-1970s, and overcrowding was a major problem contributing to unsatisfactory conditions within prisons.⁶ By 1986 the prison population was triple that of the population in 1973 and it was growing about fifteen times faster than the general population. To keep up with this surge approximately seven new 500-bed prisons were needed *each month* (ABT Associates, 1998).

Overcrowding has reached the stage where in many systems the fact of incarceration is in itself cruel and unusual punishment. (Fenton, 1985:42).

⁶ In June 1994, America's prison population was over 1 million (James et al, 1997).

Some would attribute this population surge to the prison-industrial complex prevalent in the United States, also known as the corrections-commercial complex. The prison-industrial complex is an alliance of interests, from the public and private sectors forming a sub-government influencing correctional policy. According to Schlosser (1998:54) the prison-industrial complex is:

... a set of bureaucratic, political and economic interests that encourage increased spending on imprisonment, regardless of the actual need. It is a confluence of interests that has given prison construction an unstoppable momentum.

Those who advocate the prison-industrial complex do so for the sole reason that the area of corrections is a lucrative market. Those profiting from this include politicians; those inhabiting rural impoverished areas; private companies and government officials:

Perhaps the first politician to benefit from the prison-industrial complex was the one who first created it, in a sense. In January 1973, the governor of New York, Nelson Rockefeller, advocated that illegal drug dealers be punished harshly – mandatory life sentence without parole. Shortly afterwards the Rockefeller drug laws were enacted whereby penalties were imposed for possession or selling of drugs, a mandatory prison term of 15 years to life. It was “the toughest anti-drug program in the country” (Rockefeller in Schlosser, 1998:56), and other states followed suit leading to a shift in sentencing policies.

Politicians had a lot to gain from this new approach to crime. Politicians nation-wide could gain votes from their harsh policies against criminals. ‘Truth in Sentencing’; ‘War on Drugs’; the ‘three strikes’ mandatory life sentence legislation (passed in 1992) and “tough-on-crime” legislation all contributed greatly to the soaring prison population, there was, in effect, a general ‘crackdown’ on violent crime (James et al., 1997:2; Schlosser, 1998:55).

Slogans like ‘hard time for armed crime’ characterized the public and political sentiments behind the fastest growth in the size of a prison population in history. (James et al., 1997:2).

Meanwhile Rockefeller's initiatives led him to being elected Vice President of the United States and his replacement Mario Cuomo was left with the consequences of the new legislation, namely the huge prison population leading to enormous overcrowding and the problematic fiscal condition of the state (Schlosser, 1998). Yet the call for harsher drug laws remained and Cuomo had to adapt to the situation by building more prisons. He's bid for a bond issue was turned down and so an alternative was sought. He used the Urban Development Corporation to build the prisons as they could issue state bonds without voter approval.

Over the next twelve years Mario Cuomo added more prison beds in New York than all the previous governors in the state's history combined. (Schlosser, 1998:56)

The cost – \$7 billion, naturally drew criticism from other politicians, especially since the financing scheme with the Urban Development Corporation was costing more in the long run due to the higher interest rates compared to normal state bonds. Also the Urban Development Corporation now legally owned the new prisons and leased them back to the Department of Corrections. Despite all this, the new development was a source of political capital, the main incentive for the interest groups within the prison-industrial complex. Cuomo made a move to locate his prisons to the rural areas of New York State to manage the rising numbers of new prisoners. Many rural towns competed for the new prisons since the corrections industry would create much-needed revenue in these economically depressed areas. \$1,5 million would be spent on building the facilities and a further \$425 million on the annual payroll and operating expenditures. Not only this but prisons were recession-proof, labour-intensive and non-polluting, encouraging the younger generation to stay in their hometowns, especially considering that the average income for a correctional officer was about twice as much as any typical salary in these types of towns (Schlosser, 1998). Not only could private involvement in prisons satisfy the call for longer sentences for criminals but it was now also becoming a big business and much was yet to be gained for those most involved in this business.

Private companies naturally make a profit from the business of incarceration. The Reagan and Bush administrations enthused over the possibilities open to them with regard to private sector involvement. In 1981 the US Attorney General's Task Force on Violent Crime recommended that states look into the prison privatisation option. In 1988 the President's Commission on Privatisation recognised the potential benefits of contracting out prisons and jails at all levels of government (Cox and Osterhoff, 1993). The Clinton administration took this a step further by openly encouraging illegal alien detention in private security facilities.

The general climate in the US favoured an alternative to public incarceration. Privatisation was becoming more and more popular for social, political and economic reasons. The Conservative government that opposed the ideology of the welfare state further compounded this and many more began supporting the privatisation option. As a result potential involvement of the private sector in various government services was sought out. Prisons were identified as a viable opportunity for private sector involvement. Private companies were supposed to be able to do it better for less, and over and above that offer training and work programmes to inmates for rehabilitative purposes. At this stage it should be noted that the use of the term 'rehabilitation' during the course of the dissertation (unless otherwise stated) will refer to the *modern* practices employed today which attempt to reduce the recidivism rate of offenders. These modern methods employed today are different to the 'coerced cure' rehabilitative methods used from the 19th Century onwards. Because of its failure these old practices were gradually phased-out in the 1970s by a 'nothing works' pessimism. The modern or 'facilitated change' rehabilitation adopted today consists of a wide range of programmes and activities that offenders are offered in order to (further) educate and train inmates and at times teach illiterate inmates to read. Social and psychological services are also provided (Correctional Services Act, No 111 of 1998). The private companies are thus offering means of rehabilitating offenders through *voluntary* programmes and workshops geared at equipping the offender with the means and knowledge to survive in society upon his / her release.

Considering the problems associated with the penal system in the USA the appeal of private sector involvement was obvious. It was thought that *costs* could be reduced by virtue of the competition the private companies would have to face (other private companies and the State itself). Therefore the financing, construction and operation of the prisons would be handled as cost-effectively as possible. Not only could the private sector bypass red tape and other delays in gathering finance, but it could also effectively manage prisons so as to reduce unnecessary expenditure. The private sector workforce would be more controlled, hired or fired according to productivity and without civil service constraints due to it being less unionised and less secure (James et al., 1997). Standards would be maintained through carefully deliberated contracts and in so doing possibly influence the public sector to perhaps improve performance. Private prisons would serve as a template to which public prisons could work towards – in theory.

Efficiency was another factor making the privatisation option more attractive than direct government provision. The private sector was purported to have more incentives to improve its *efficiency and productivity* – based on its competition with other companies. In other words not losing money and staying in business are incentive enough to ensure the constant stimulation of private enterprise (ABT Associates, 1998). Another reason for the support of private sector involvement was the fact that true imprisonment costs would be exposed – allowing for comparison and better management of costs. Therefore encouraging the use of expertise and skills to innovate and raise standards in both public and private prisons.

Yet these ‘advantages’ have not gone unchallenged by the opponents of privatisation. Critics have pointed out that maximising profits may lead to reductions in quality. Private companies may overcharge the local governments for poor quality services. The inmates themselves will stand to lose out if quality is neglected for the sake of profit.

It is bad news if the dollar becomes the main issue and the inmate becomes the non issue. (Flavell in Biles and Vernon, 1994:296).

Private companies are also “the most obvious, the most controversial, and the fastest growing segment of the prison-industrial complex” (Schlosser, 1998:64). But the involvement of private companies in the prison-industrial complex is essential, and the state has continued to support the privatisation of prisons.

Government officials would stand to gain with the advent of prison privatisation since they were the ones who had to endure the pressure of managing the surge of prisoners on meagre budgets. Alternative financing was a viable alternative to the pressures of maintaining the enormous prison population. A change in attitude towards old rehabilitation practices (mentioned above) in favour of deterrence and incapacitation marked a “negative shift in penological and public thinking” relative to a perceived increase in the crime rate and the public’s fear of victimisation (James et al., 1997:5; Cox and Osterhoff, 1993). In fact the rate of violent crime had been decreasing since 1991 – by 20%; yet the prisoner population had risen by 50%.

If crime is going up, then we need to build more prisons; and if crime is going down, its because we built more prisons – and building even more prisons will therefore drive crime down later. (Said by an attorney who headed the National Criminal Justice Commission, in Schlosser, 1998:54).

Improvements to the situation were thwarted by lack of public resources. Staff and inmates had to make do with insufficient facilities and services. Prisoner health was deteriorating, death rates in custody were on the rise (including suicide) leading to Eighth Amendment challenges of ‘cruel and unusual punishment’ (Harding, 1998). Prisoners often petitioned and rioted, and lawsuits were often filed to attempt to improve the situation. Court mandates for improvement were the result providing even more pressure on government officials to remedy the situation.

Plagued by facilities that are crowded, costly, dirty, dangerous, inhumane, inefficient, and subject to riots and lawsuits, many officials are looking to the private sector as an alternative source of supply. (Logan, 1990 in James et al., 1997:1).

Despite these problems, the public in the USA was not pleased with the huge budgets necessary to achieve the improvement of the quality of services and new construction of prisons even though this is what they demanded from the government.⁷ The system was not working and the taxpayer was paying the price for an ineffective penal system, consequently a tax revolt followed (Fenton, 1985; Camp and Camp, 1985). Correctional agencies had to improve the situation and do it quickly to keep up with the constant flow of new inmates; however, the work of government officials to raise the necessary funds to build more facilities was mostly in vain. For a large project to be funded (especially a new prison) money had to be raised on the market by bond issues. However, voters have to first approve bond issues. For example, in 1981 New York voters rejected a \$500 million Prison Construction Bond Issue and in Colorado, a \$30,2 million budget for a new jail was twice rejected by voters. Yet the most popular way of raising funds for prison construction is long-term borrowing on the market (Ryan and Ward, 1989). Out of necessity financially burdened states opted for an alternative – that is private sector finance and operation (Borna, 1986).

As Harding (1998) puts it, raising so much money for prison development was political suicide; very few states were willing to go against a public outcry. Therefore the hazards of raising prison bonds for prison construction had to be avoided by avoiding public scrutiny. According to Lilly and Knepper (1992) one of the features of the prison-industrial complex is the fact that the public is largely excluded from its operations. (Schlosser, 1998; Lilly and Knepper, 1992). State / local authorities were subject to debt limitation to prevent them from creating too much debt against the available resources. The amounts they could borrow from the state revenues for new projects were therefore limited (Ryan and Ward, 1989).

State and local authorities were under immense pressure to conform to the will of the public, not only to build more prisons but also to do it for less. Following the normal procedure of funding a new prison proved impossible as public outcry prevented further use of state funds. Consequently the private sector was called in to raise the funds as part

⁷ The total expenditure of the state on prisons was \$6 billion in 1984 and \$20 billion in 1990 (James et al., 1997).

of a leaseback and management contract (the private company would buy and manage a new prison and lease it back to the state). States would avoid legal problems by issuing “certificates of participation” or shares to the private firms – and in so doing various financing methods were created, otherwise known as “creative financing” (Harding, 1998:629; McDonald, 1996:32). Initially a state or government would issue a RFP or request for proposal that stated exactly what criteria and qualifications would be expected of the private firm. The private firms wishing to take on the contract would be assessed by the state according to previous experience, staff qualifications, previous programmes implemented and financial history. After the bidding process the state would select a firm and negotiate a contract and settle the amount to be paid to the firm – a per diem fee for each inmate in the prison the company would be responsible for managing (Joel, 1993).⁸

States could also contract a private firm to design, construct, finance and manage (DCFM) an institution. Legislation enabling private sector involvement to this degree was passed in the main states advocating the privatisation option.⁹ Wall Street investment banking firms also recognised the investment opportunities in corrections (Cox and Osterhoff, 1993). Operational privatisation was a practical solution to the prison population crisis – financially and politically. Entrepreneurs took advantage of the existing conditions to canvas support for their business ventures with respect to contracting prisons.

- Corporate Developments

So it was during the mid-1980s that *operational* privatisation had emerged (or rather re-emerged) although other forms of privatisation (that is, nominal privatisation) had existed for years before. Nominal privatisation was already underway in the late 1960s whereby services were provided by private firms to correctional facilities. These services included

⁸ A sliding scale may be added whereby the price is lowered as more inmates are admitted into the private prison (Joel, 1993).

⁹ These states include Texas, Florida, Tennessee, Arizona, Louisiana, Kentucky, New Mexico and Virginia (Harding, 1998).

education, maintenance, health care, food services, counselling and the like (ABT Associates, 1998). In the 1970s the private sector was contracted to establish halfway houses, community centres, drug treatment programmes and group homes. Although mainly on a non-profit basis the initial involvement of the private sector at this time has led to a firm private sector foothold in these types of non-secure facilities – facilities that are outside the mainstream of corrections. Similarly juvenile facilities, as part of the shallow-end of corrections, were also contracted out (Borna, 1986). Initially juvenile facilities were operated by churches and charitable groups – the first case of *for-profit* private sector involvement (or re-privatisation) in the juvenile sector took place in 1975. The private company, RCA Service Company (a subsidiary of RCA Corporation) established the Weaversville Intensive Treatment Unit in Pennsylvania for approximately 120 juveniles. Although RCA's involvement was only minuscule, this is probably the first example of for-profit involvement in corrections, albeit not mainstream corrections (Borna, 1986; McCrie, 1993). Okeechobee School for Boys was then opened in 1982, in Florida, to house approximately 400 juveniles. Little attention was focussed on these contracted-out facilities; yet, in 1979, a move closer to mainstream corrections took place when the U.S. Immigration and Naturalisation Service (INS) contracted private firms to detain illegal immigrants temporarily until their hearing and / or deportation was finalised (ABT Associates, 1998).¹⁰ The most prominent players in the industry started out in this branch of corrections mainly because illegal immigrants were only housed for short periods of time, they did not require rehabilitation, they were a low-security risk and involved small numbers. Therefore private companies only had to provide minimum security in warehouse-type complexes (Ryan and Ward, 1989).

It is no surprise then that the Corrections Corporation of America (CCA) was founded by Thomas Beasley (a lawyer and businessman), and T. Don Hutto (a former correctional official), in January 1983 in Nashville, Tennessee (Borna, 1986). These 'fathers' of the correctional privatisation movement had timeously taken the opportunity to use their advantages (their access to working capital, experienced administrators, and their

¹⁰ Following this, the US Marshals Service (USMS) contracted out detention facilities (400-bed maximum security) in 1989 and the Federal Bureau of Prisons (FBOP) in 1991 (a 1,000 bed medium security facility).

“charismatic leadership”). They created a company modelled after HCA – Hospital Corporation of America (which had facilitated the emergence of privately operated hospitals) (Thomas and Logan, 1993 in James et al., 1997:6). CCA, immediately upon its inception, began to take on DCFM contracts and so became the leading private company in the private prisons industry. CCA initially opened its first detention centre in Houston, Texas to house illegal immigrants in April 1984. Following that, virtually every year since, CCA has opened a correctional facility ranging from juvenile and women’s detention to maximum-security adult detention. CCA was also first amongst its competitors to design, build and operate these types of facilities. CCA demonstrated its ambition by offering to take over the entire prison system of Tennessee for a 99-year period. It was willing to pay \$250 million and would house the inmates for a per diem payment. More importantly since Tennessee’s prison system was in violation of the US Constitution, CCA offered to meet the standards set by a federal judge. Even though the offer was refused CCA’s initiative was widely noted by the press and public alike. (ABT Associates, 1998).

Another private firm, Wackenhut, also entered the prison privatisation arena around this time. It was contracted to build a detention facility for the INS near Denver, Colorado. The Correctional Services Corporation (formerly known as ESMOR) won a contract in 1989 to operate a detention centre for immigrants in Seattle, Washington. Once again little notice was taken of these developments until governments contracted private firms to operate county jails and state prisons. In 1985 and 1986 respectively CCA contracted out Bay County, Florida and Santa Fe County, New Mexico to operate their jails. In 1986, US Corrections Corporation opened a 350-bed prison in Kentucky. However, uproar followed when the District of Columbia government transferred 55 inmates from its state to a small, rural, privately owned facility in Pennsylvania. The residents of the small town, Cowansville, openly resisted this move and consequently a prison reform group (in Philadelphia) petitioned for the state legislature to declare a moratorium on privately operated prisons in Pennsylvania (ABT Associates, 1998). This incident sparked a nation-wide debate on the issue of prison privatisation.

- Opposition to Prison Privatisation

Proponents of privatisation recognised the growing potential of private sector involvement as facilities were being established significantly faster and cheaper than government correctional facilities. Quality, too, was claimed to be equal or better than the government. However an anti-privatisation movement emerged. Public sector employees feared job security and benefit losses and the National Sheriffs' Association, in particular, was grievanced by the lack of proper financing made available to local jails. Local politicians were now employing the private sector to solve the problems caused by the initial lack of finance.

Lower staffing levels, poor conditions of service and poor quality recruits were bound to result from any such search for both improvement *and* profit. (James, et al., 1997:7).

A president of the National Sheriff's Association once denounced the fact that:

...private enterprise holds any magic potion for the solution of jail problems not already available to the public sector. (Immarigeon, 1985).

Concern was also expressed over the increase of private sector involvement in traditional state responsibilities – possibly increasing private sector leverage in state affairs (Cox and Osterhoff, 1993). Congress held hearings in 1986, and a conference was held by the National Institute of Justice. Opposition also came from local townspeople; the American Bar Association; the American Jail Association; the American Civil Liberties Union; the American Federation of State, County and Municipal Employees (AFSCME);¹¹ and criminal justice organisations (James et al., 1997). Opposition pointed out the constitutional problems associated with prison privatisation.

Despite the faults with prison privatisation pointed out by the opposition the private sector demonstrated qualities that the public sector could not. Private companies were

¹¹ AFSCME is perhaps the most effective and powerful critic of prison privatisation. Its effect has been seen in the areas where labour unions are the strongest (Joel, 1993).

more flexible, responsive to government needs and goal-orientated. Operational privatisation began to flourish, by 1991 private companies operated 60 secure adult facilities in 12 states, already a \$200 million industry. These facilities housed 20 000 prisoners, 3% of the prison population in the United States. By 1994 the number had reached 30 000 prisoners out of a total of over 1 million (Cox and Osterhoff, 1993; James et al., 1997). By late 1996 the number reached 78 000 – 5% of the total prison and jail population (Harding, 1998). The range of facilities private companies operated was also broadened. For example, in 1990 the private sector competed with the public sector to operate a maximum-security prison. As a result Leavenworth Detention Centre in Kansas was opened in 1992 after CCA won the bid. Since then maximum-security private prisons have become the norm (not only medium- and minimum-security prisons) (Harding, 1998). By the end of 1997 private companies operated 142 secure adult facilities, totalling 64 086 prisoners. This indicates the rapidity of private sector involvement in corrections; also private sector revenues have risen from \$650 million in 1996 to \$1 billion in 1997 (ABT Associates, 1998). In October 1997 CCA's shares had reached about \$3,5 billion.

3.2.2 The UK

- The Penal Crisis in Great Britain

Margaret Thatcher began her terms as Prime Minister in May 1979. The Conservative victory in the 1979 general election was a turning point in Britain's political history. The Conservative government had replaced a government weakened by changes in the world's politics – leading to unemployment, wage restraint, economic instability and industrial unrest (James et al., 1997). The Conservative government, with respect to the previous penal policy, immediately began to dismantle the Welfare State, opposing the rehabilitative ideal and intervention in the name of treatment. Focus was placed on individual responsibility and the social contract, a feature of a Conservative ideology (James et al., 1997). This 'New Right' government focussed too on the authority of the state, epitomising a law and order approach to criminal justice yet at the same time

rolling back the state with regards to everything else. This policy was in tune to the public's desire for law and order and their support for the Conservative Party, especially considering their manifesto on crime. This included a focus on the victim rather than on the offender and on deterrence (harsher penalties) rather than on rehabilitation or treatment. However, enforcing this ideal created problems for the Conservatives – maintaining a policy of order through force and thereby increasing the power of the force (by strengthening the police and imposing harsher penalties) would necessarily place more demands on available resources. At the same time, the law and order move created an increased tension between the Conservative Party and the Labour Party, yet the tougher stance adopted by the Conservatives “ha[d] proved a congenial, and electorally rewarding, task for the Conservative Party” (Aughey and Norton, 1984 quoted in James et al., 1997:39). What emerged from this context was a ‘Conservative criminology’:

The overall shape of penal policy was necessarily determined by the over-arching and far-reaching political and economic philosophy...anti-statism, libertarianism, free-market economics and penal policy became inextricably intertwined and shaped the emerging Conservative criminology. (James et al., 1997:39).

As a result innovative ways were sought to maintain this penal policy and this led to an eventual growth in private sector involvement in Britain's prison system especially from the late 1980s. The move towards prison privatisation (as part of a broader privatisation plan) was therefore based on the ideological need for a certain penal policy just as much as it was based on the practical need for the improvement of the current public prison system.

Great Britain's conservative government had already been instrumental in privatising many industries (such as British Gas, British Airways and British Telecom). The privatisation option was a strategy employed by Cabinet and monitored by the Treasury. This purposeful deliberation and planning of the privatisation option had enabled:

...the Thatcherites...to move swiftly and decisively to build up the necessary coalitions for privatization and to concentrate on the weak points of the potential opponents (Stuart Butler of the Heritage Foundation in Rutherford, 1990:43).

Many other services have been contracted out, so much so that:

As a result of the deification of the private sector in Britain since the early 1980s, very little remains that is regarded as being safely out of bounds. (Rutherford, 1990:43).

In the context of this “anything goes” environment prisons became targets for privatisation, developments were very much influenced by US developments and the climate created by other countries also contracting out their prisons (Rutherford, 1990:44; James et al., 1997). The penal crisis in Britain was also a major influential factor. As with the developments in the United States, trends towards harsher sentencing and longer prison terms occurred in Britain, although over a longer period. The increasing prison population in the UK was becoming a problem as it was in the USA. Since 1960 the daily prison population had been increasing. In 1988 the daily prison population rate for England was 96 per 100 000 inhabitants – exceeding the rates of all the other countries in Western Europe. Similarly the pre-trial prisoner rate had risen from 8% to 22% of the total prison population (Rutherford, 1990). Around the late 1960s the Home Office began to do something about the size of the prison population by shortening the average time served. However, in the 1970s the prison population grew steadily. In the 1980s a larger proportion of convicted criminals were receiving custodial sentences, in general longer sentences were once again being imposed and delays in trial dates were increasing the prison population. To manage this growing prison population the government increased spending on the prison system by 72% between 1980 and 1987. This did not alleviate the overcrowded facilities and resultant squalid conditions.

The present state of our prisons, blighted by age, severe overcrowding, insanitary conditions and painfully slow progress in modernisation makes it necessary to consider urgent new ways of dealing with these problems which at present seem almost insoluble (Home Affairs Committee statement, 1987, in Rutherford, 1990:56).

The Home Office Affairs Committee was particularly concerned about these problems, it was their responsibility to monitor the operation of prisons. The committee was one of

many others that were established by the Thatcher government in 1980 to increase parliamentary scrutiny of the executive. Pressure groups (such as the Adam Smith Institute) would identify key national problems and would bring them to the attention of these committees. The committees would in turn force the issues and problems onto the political agenda. The state of prisons was one of these key issues brought to a parliamentary session in 1986/7 (Ryan and Ward, 1989). The government attempted to alleviate the overcrowded conditions by increasing community-based alternatives, limiting the use of custody through various legislation¹² and reducing the period spent in custody by awaiting-trial defendants. These attempts did not work, as the major problem with the prison system was the rising remand population. The prison system was most suited for *sentenced* prisoners, for their custody and treatment. Awaiting-trial prisoners were not subject to this type of treatment and were thus placed in increasingly overcrowded local prisons (James et al., 1997). Therefore Home Office attempts to eliminate the overcrowding problem were to no avail since they could not keep pace with the rate of prison population growth. The government prison building programme initiated in 1979 could not alleviate the immediate problem, as construction usually took about ten years. It was realised that the necessary separation of the convicted and the unconvicted would entail a large-scale expansion of the prison system. But, instead of re-assessing the existing sentencing policy the government turned to the private sector for advice on how to accelerate prison construction (Rutherford, 1990). Conservative members of the government realised the necessity of transforming the present system and believed that commercial companies constructing and managing aspects of the prison system could achieve that aim. Contractual arrangements could then include minimum standards to be monitored by the Home Office. In July 1988 the Green Paper, *Private Sector Involvement in the Remand System*, was published, since the remand population had increased by 76% from 1979 to 1988. The remand population had been a cause of concern since its increase, especially once unconvicted males were being held for longer periods in squalid conditions (James et al., 1997). The Green Paper not only called for private sector involvement in remand centres but also that some form of monitoring

¹² By the introduction of the Criminal Justice Act, 1982 and its extension – the Criminal Justice Act, 1988 (James et al, 1997).

system be established to ensure contractor accountability. It also proposed limits on the number of prisoners a contractor could house and further that safeguards be created to avoid contractor refusal of high-cost prisoners (James et al., 1997).

In 1991 Lord Justice Woolf published a report as a consequence of the disturbances which had taken place in 26 prisons – starting in Strangeways, Manchester in April 1990. Remand centres played a part in these disturbances, as five of the six most serious disturbances took place in these types of facilities, involving remand prisoners. The Woolf Report was a thorough and detailed review of the underlying failures of the prison system and the problems with how prisons were being run. The Report proposed future developments to improve the system, including the establishment of minimum standards, more visits for prisoners and greater access to families, and a contract between the prisoner and prison management to lay out expectations of each other. The European Committee for the Prevention of Torture paid a visit to the British prisons and concluded that at least three of them were unacceptable. As a result of the Woolf Report and the visit, a White Paper was published in September 1991 pointing out the need for improvements in prison conditions – including the recognition of the status of remand prisoners. In December 1991 Admiral Sir Raymond Lygo made an inquiry into the management of the Prison Service and it was concluded that the managerial framework of the prison system be amended, comment was also made on the contracting-out of Wolds Remand Prison. The combination of the reports and the European Committee visit led to increased pressure on government to improve its prison system (James et al., 1997).

As with US developments one of the main reasons for the inclusion of the private sector into the sphere of corrections was the need to improve standards relative to the government's inability to do so. On the other hand, opponents of prison privatisation pointed out that the need for greater accountability would probably worsen if management were to be contracted out:

...privatisation may provide a means for the State to further avoid making prisons publicly accountable. (Stephen Shaw, director of the Prison Reform Trust, Rutherford, 1990:57).

- The Emergence of the Prison Privatisation Option

Before mid-1986 little notice was given to the option of privatising aspects of the British prison system. Due to lobbying of pressure groups the idea of prison privatisation slowly became a reality. One particular pressure group first put the question of prison privatisation on the political agenda: An important think-tank for the Conservative government, as James et al (1997) refers to it, was the Adam Smith Institute, on the liberal side of the New Right. Two British intellectuals affiliated with the Heritage Foundation (an American New Right pressure group) created it in Virginia, 1978. In 1981 the Adam Smith Institute was registered as a charity in Britain (Ryan and Ward, 1989). Working in the background, the Adam Smith Institute's policies had largely influenced the Conservative government. Many of its policies had been set into practice such as electronic tagging,¹³ community involvement in punishment, and alternatives to probation, just to name a few (James et al., 1997). Realising the problems inherent in the prison system, the Institute pointed out the developments occurring in the United States with regard to private companies owning and managing prisons. They therefore encouraged the widespread acceptance of private prisons and detention centres as a viable option for the government. They also advocated private sector involvement in all types of correctional facilities – from youth detention to various levels of adult security. Despite this, a report by Eamonn Butler and Peter Young¹⁴ of the Adam Smith Institute received little interest. The report was part of the *Omega Project* that the Institute had launched in 1984. The *Omega Report on Justice Policy* was where the idea of prison privatisation first made its appearance. At that time private prison developments in the United States were at their earliest, as noted by the Omega Report (Ryan and Ward,

¹³ Which interestingly enough private contractors became involved in enforcing (Cavadino and Dignan, 1997).

¹⁴ Young was the former head of research at the Institute and had worked at the Institute's American office (Ryan and Ward, 1989).

1989). The Institute put the idea forward to government the following year, but despite their enthusiasm and determination the government was not ready to accept the idea of privatising its prisons. Yet ties between the Institute and the government were beginning to form, for example, Michael Forsyth, a soon-to-be junior minister at the Home Office with responsibility for prisons, who also had an interest in private prisons, had close ties with the Adam Smith Institute (James et al., 1997).

It must be noted that the Institute was not the only influence on government and its privatisation policy. Interested businesses, Conservative politicians and “free-market theorists” also played a role, not only for ideological purposes but also for business interests (James et al., 1997:42). In fact the business sector was active in trying to influence and persuade the government to endorse prison privatisation. For example, the Director of Corporate Communications of UK Detention Services (UKDS) and Racal Chubb Security Systems both actively lobbied for prison privatisation.¹⁵

A key political player who also influenced the privatisation initiative was Lord Windlesham. As a proponent of privatisation he emphasised the necessity of improving the conditions of remand centres – the circumstances of unconvicted prisoners allowed for greater private sector involvement than with convicted prisoners. The remand centres were run for different purposes, since they housed those presumed innocent, as yet unconvicted, therefore Lord Windlesham proposed that private-sector involvement in this area of corrections would not raise as many questions or issues of principle as privatising mainstream prisons would. He put his argument forward to Margaret Thatcher in July 1987 and to Douglas Hurd, the then Home Secretary. Lord Windlesham’s arguments were also reflected in the Green Paper published in July 1988. By mid-1986 the Home Affairs Committee of the House of Commons (responsible for the monitoring of the prison system) decided to examine the prison experience in the United States to attempt to find alternatives to custody. This would be part of an enquiry into the state of prisons in England and Wales. The trip turned into an investigation into the *privatisation* experience in the United States.

¹⁵ And as a result UKDS won the Blakenhurst contract (James et al., 1997).

The committee visited two privately operated prisons in the United States run by CCA and two facilities for youth offenders. In May 1987 a report entitled *Contract Provision of Prisons* was published by the Committee (under the auspices of Sir Edward Gardner, a proponent of prison privatisation¹⁶). It recommended that

...the Home Office should, as an experiment, enable private sector companies to tender for the construction and management of custodial institutions. (Rutherford, 1990:47).

This would be directed specifically at remand or awaiting-trial facilities that were the most overcrowded. The committee was made up of four Conservative members supporting the privatisation option and three Labour members against it and was thus not united in its ideas about prison privatisation. This report (and subsequent reports) was problematic in that assertions were made *not* based on hard evidence. The American experience was not described fully. Mention was only made of CCA, just one company. And yet, from this, inferences were made about what privatisation might look like in Britain (Ryan and Ward, 1989).

Following this, the opposition to prison privatisation voiced their opinions. The Prison Officers' Association, in particular, had carried out their own investigation, also visiting privately run institutions in the United States. Their conclusion was that the privatisation of prisons was not a viable option. A representative of the Howard League for Penal Reform, and the then chairman of the Prison Governors' Branch of the Society of Civil Servants both pointed out the irrelevance and diversion that privatisation was in relation to the problems the British prison system was facing.

Proponents of privatisation, too, voiced their beliefs. In November 1986 the chairman of the committee initially sent to the United States, Sir Edward Gardner (Conservative Member of Parliament), stated to the Home Office Minister, responsible for prisons, that:

¹⁶ Sir Edward Gardner retired from politics to become a chairperson for Contract Prisons PLC, a company owned by Prisor, a US corporation (Ryan and Ward, 1989).

...those of us who went to America and saw these private prisons...were profoundly impressed by what we saw. Far from thinking that these prisons might be something in fantasy rather than something we could use in practice, I think we all felt that they are in fact institutions of a very high standard indeed. (Rutherford, 1990:48).

The Home Office Minister responded positively and in March 1987, two reports further supported the privatisation option. Peter Young of the Adam Smith Institute criticised the government for its “passive, unimaginative attitude to [the] disintegrating prison system”. He strongly advocated privatisation for humanitarian reasons and due to the necessity for reform and a “fresh approach” (Rutherford, 1990:49). He also extolled the virtues of prison privatisation in the United States, pointing out the cost savings made (although making rather crude comparisons between public and private facilities) and the rapidity of prison construction. He recommended that five existing British prisons be privatised experimentally, and a new private remand prison be established in London. Depending on the results, the rest of the prison system could then be gradually privatised (Rutherford, 1990). It must be noted that Young’s analysis of the situation in the United States was not free from his own subjective beliefs:

Just as Young will hear no evil about the private sector he will see no good in anything done by government. His stereotype of the public sector as ‘costly, insensitive and resistant to innovation’ ignores the innovative record of the Federal Bureau of Prisons...(Ryan and Ward, 1989:47).

The other report came from two *liberal* criminologists – Maxwell Taylor and Ken Pease, who heavily emphasised the rehabilitative potential of privatising prisons, even advocating contracts with a “no reconviction” bonus – a conviction-free two-year period after release (Rutherford, 1990:49).

Meanwhile the third Thatcher term had commenced after the June 1987 election. In July 1987 Douglas Hurd, the British Home Secretary, announced to the House of Commons that the government would not include the private sector in its privatisation plans (James

et al., 1997). In September the Home Office Minister, Lord Caithness, along with three Home Office officials, went to the United States to further examine the evidence. The Corrections Corporation of America offered their company plane to fly them to CCA's jail in Panama City, Florida. At the same time two British construction companies announced their decision to join the CCA thereby forming a consortium to further promote the privatisation option in Britain. Lord Caithness stated that the contracting-out of prisons "would represent a complete abdication of one of our most important responsibilities". However, he did advocate the involvement of the private sector in *remand* facilities. Thus an important distinction was made between private sector involvement in institutions for convicted prisoners and institutions for remand prisoners (Shaw, 1992:31).

In response to the Home Affairs committee's proposals on privatisation the government formally replied in 1988 approving the likely contracting out of the management of *remand* centres to the private sector. The government appointed management consultants who also advocated the feasibility of the privatisation option. In March 1989 an announcement was then made by Douglas Hurd that investigations on the matter would take place and that the private sector would build and manage remand centres (James et al., 1997; Rutherford, 1990). Despite opposition from Hurd's successor the Criminal Justice Bill was amended to include the power to contract out remand prisons. This was applied due to the intervention of the Prime Minister, Margaret Thatcher,

In a relatively short period of time a "policy U-turn" had taken place as Conservative backbench MPs had enthusiastically promoted and lobbied for prison privatisation (Cavadino and Dignan, 1997:155)¹⁷. In 1989 the Remands Contract Unit was set up and it was announced in 1990 that tenders for contracts would be invited (Shaw, 1992). In May 1991 it was announced that nine contractors had been invited to tender for Wolds Remand Prison. In November of that year Group 4 Remand Services were contracted to operate Wolds for five years (McDonald, 1996).

¹⁷ Backbench MPs consisted of those, in this case, on the Home Affairs Committee who were not picked by the Prime Minister to serve on her governing team (Ryan and Ward, 1989).

At that stage all that had been achieved was the contracting out of remand centres on a *trial* basis. Nevertheless, during the course of the Bill's progress through Parliament small amendments were made one of which included section 84 of the Act, which made it possible to contract-out *any* prison (not only remand prisons). Lord Windlesham refers to this amendment as being a "sub-plot...to which at least one Home Office junior minister was sympathetic, and which only came to light as the Bill progressed" (Windlesham, 1993 in Cavadino and Dignan, 1997:157). In consequence the Home Secretary was given the power to make an order by Statutory Instrument – requiring parliamentary approval. Reassurances were made to the House of Commons by a junior Home Office Minister that use of the private sector would only take place if the contracted remand centre was a success (Cavadino and Dignan, 1997). Despite this, the power to contract mainstream prisons was made use of in December 1991.¹⁸ Tenders were invited by the Home Secretary for Blakenhurst, a 650-bed mixed remand / sentenced prison – "which seemed to have been launched in advance of the necessary Parliamentary approval to extend the power to contract out" (Windlesham, 1993 quoted in James et al., 1997:57). The contract was given to UK Detention Services in 1992, a consortium of CCA and British construction firms (McDonald, 1996). Pragmatic necessity overruled principle and the Home Office, "[c]arried away by the heady new wine...had laid itself open to the charge of acting first and thinking afterwards" (Windlesham, 1993 quoted in James et al., 1997:58). Not long after the bid for Blakenhurst, an announcement was made that Strangeways (which was rebuilt after the 1990 riot) would be contracted out. The Prison Service, through its own in-house bid won the tender out of seven tenders. Through a service agreement it was to run the prison for five years with £79 million to fund operation (McDonald, 1996).

In September 1993 an announcement was made that the government was planning that 10% of the prisons in England and Wales be contracted out. This would be the 'initial phase' whereby increased involvement of the private sector would sustain the necessary competition between the companies. The government was hoping to contract out at least

¹⁸ Also in December 1991 tenders were received by government to contract out court escort services. In 1993 a contract was signed with Group 4. (McDonald, 1996).

seven existing prisons, and so launched a 'market-testing' programme involving 20 prisons (Cavadino and Dignan, 1997:157). This would force the Prison Service (involved in the bid) to re-evaluate its labour practices and its performance and to encourage reforms throughout the prison system (McDonald, 1996).

The process of privatisation experienced a setback due to the intervention of the Prison Officers Association (POA) in October 1994 whereby the whole process was delayed and later abandoned, only to be taken up at a later stage. Also European provisions established to safeguard the jobs and conditions of workers, especially during take-overs and mergers, hampered the process. The European Commission's Acquired Rights Directive seriously stifled the profitability private contractors could expect, since workers' rights were to be respected, consequently disallowing contractors to reduce their workforce and wage bill.

Yet by January 1996, four prisons had been contracted-out, two new prisons to add to Wolds and Blakenhurst were Doncaster in June 1994 and Buckley Hall, December 1994. Fazakerley, Bridgend and Salford were next in line to be financed, designed, built and run by the private sector. Further legislative amendments were made when the Criminal Justice and Public Order Act, 1994, section 96 included that *parts* of public prisons could be contracted out. Section 99 of the Act stated that any functions and activities of public prisons could also be contracted-out (such as private staff undertaking previously public staff duties in public prisons). Only in April 1996 did the promised evaluation of the 'trial' Wolds Prison take place, only after three other institutions had already been privatised. No evidence pointed to whether Wold's achievements were related to its contractual status.

By January 1996 many other aspects of the penal system had been contracted-out, court escort services, education, catering services and the like. Further privatisation initiatives were planned to include the refurbishment of whole prisons, ancillary service functions and the creation of new projects (Cavadino and Dignan, 1997). This completed the process of involving the private sector into the English and Wales prison systems.

Contracting-out was extended to Scotland by a provision of the Criminal Justice and Public Order Act, 1994 (James et al., 1997).

In 1997 the Labour Party won the British Election, many maintained that the years of opposition to prison privatisation would reach fruition. The Labour Party spokesman announced that no further privatisation would take place and subsequent projects would be cut back, a feat that would cost hundreds of millions of pounds. Within three weeks the Labour Party, considering the enormous fiscal strain such a move would entail, decided to alter its views on prison privatisation. The Home Secretary both endorsed it and even extended it by renewing a contract with a private contractor (Harding, 1998).

According to Harding (1998) the present growth of private prisons will result in approximately 6 800 prisoners being held in private prisons in the UK by the year 2000. This would constitute one ninth of the prisoner population and would involve eleven prisons.

- Corporate Developments

Despite the relatively late development of prison privatisation into the mainstream of British corrections and the strong opposition to it, the non-profit sector had long before involved itself in the penal system, specifically with troubled youth.¹⁹ Before the involvement of for-profit organisations / companies the corrections system (including shallow-end facilities) was largely run either by the state or by not-for-profit organisations or NGOs. Actual for-profit involvement in illegal immigration detention took place around July 1970 although not as yet in the mainstream and not rousing any interest.²⁰ Any involvement by for-profit private companies at that time was on a small-scale. The for-profit sector became involved in the outright *management* of a correctional facility when the Home Office contracted with Securicor. Securicor was to

¹⁹ This involvement can be dated back to the mid-1800s; the re-emergence of private sector involvement has taken place over the last two decades or so (James et al., 1997).

²⁰ Although by 1988 about half of all illegal immigrants were detained in private facilities (Cavadino and Dignan, 1997).

staff and operate immigrant detention centres at airports and perform escorting duties. Although the Securicor contract was a momentous occasion, involvement in the prison system was not a new phenomenon since the private sector was involved (voluntary or otherwise) with juvenile and illegal alien detention facilities before this

...a large number of facilities, from juvenile homes and probation hostels to immigration detention facilities, were actually operated by private companies or voluntary organizations. What was being proposed was a change in scale; with contracting-out becoming a core rather than a peripheral feature of criminal justice (Vagg, 1994 quoted in James et al., 1997:34).

Securicor was established in 1935, at that time it was known as Night Watch Services. Securicor and other private security companies were employed by airline companies to detain illegal passengers. As with developments in the United States, Securicor was accountable to the Immigration and Nationality Department of the Home Office.²¹ It would hold detainees for short periods of time (about five days) at the airports. Longer terms would take place at Harmondsworth (accommodating 66 detainees) adjacent to Heathrow Airport; however, little is known about the operation and staffing of the facilities. What is known is that the employees, trained by Securicor for about a week, were instructed to treat the detainees appropriately, with kindness, courtesy and respect.

Harmondsworth provides accommodation for both sexes and may also hold children. Detainees are in general free to go where they will within the centre, and may spend their time as they choose. (Description given in 1983 by Home Office in Rutherford, 1990:51).

Detainees were given access to television, a recreational area and public pay phones, and could be visited daily.

Securicor facilities were not closely scrutinised by parliamentary committees, but Harmondsworth was visited in 1978 by a House of Commons Committee and questions

²¹Securicor lost its contract in December 1988 to Group 4, who took over in January 1989 (Rutherford, 1990).

were put forward to Home Office officials. The committee was assured of the monitoring of the facility by an Immigration Service inspector who visited the centre approximately six times per day. Rules governing Securicor staff behaviour were set out in a document which was drawn up in 1970, although not included in the contract. The contract was also monitored occasionally to account for rising costs and could be terminated by either party. Questions by the committee regarding the low level of training were appeased when told that the level of security at Harmondsworth did not warrant extensive training. Nevertheless, the committees and representatives of prison governors (or wardens) were uneasy about the involvement of the private sector (Rutherford, 1990). The government accepted a recommendation by the committee to allow a chief inspector of prisons to inspect Harmondsworth. The committee had commented on the absence of complaint procedures and the lack of public accountability. Detailed information on costs could not be released due to a possible "breach of commercial confidence" (Rutherford, 1990:53). In fact the inability of the committee to review actual costs incurred may have greatly diminished the success they had in ensuring Securicor's accountability. In an attempt to counter this (by identifying possible cost cutting on the part of Securicor) a new Inspectorate of Prisons was established in 1981 with its first inspection of Harmondsworth taking place in November 1988.

In April 1988 Securicor detention centres detained 12 802 people. One such detention centre was a ferry called *Earl William*. It has been leased from a privatised shipping company called Sealink by the Home Office. The ferry was made use of until May 1988 and housed 198 detainees. Its use as a long-term residence was questioned many times by inmates due to the lack of proper facilities (Ryan and Ward, 1989).

From this one can gather that the Securicor facilities drew mixed responses, on one side the praise of its relaxed, easy-going, more favourable conditions as compared to other Immigration Service detention centres. On the other hand, the criticism of the high operational costs, low staff quality and lack of independent inspection, as well as claims of staff harassing the detainees (Rutherford, 1990; Ryan and Ward, 1989).

In May 1988 the Home Office, in an attempt to alleviate the overcrowding, took over the Alma Dettingen military barracks near Camberley as a temporary prison. Military police guarded the facility, but the catering for the 300 prisoners had been contracted-out to a company in Surrey. This was the first example of what Shaw (1992) calls a “breach in the state monopoly” (p.30).

So far four private sector companies are prevalent in the UK – an associate of the Corrections Corporation of America (CCA); an associate of Wackenhut; Securicor and Group 4 (a British-Swedish consortium), the dominant company and market leader in the UK (Harding, 1998).

- Opposition to Prison Privatisation

Opposition came from many, but none more so than the Prison Officers’ Association (POA), the largest employees’ union. As mentioned earlier the POA conducted its own tour of the USA. As the union’s chairperson, John Bartell, said at that time:

We and the committee appear to have been on different continents. (Ryan and Ward, 1989:51).

The POA did visit different prisons and made an effort to expose aspects of the prisons through a degree of subterfuge. What they discovered definitely contrasted to the rosy picture painted by the committee (Ryan and Ward, 1989). They came back with anxieties over the effect of privatisation on its members. Especially since private companies would make their savings in their operating costs which was largely made up of employees’ salaries and benefits. The POA thus feared that their members would lose their jobs and those operating new private prisons would make agreements with less experienced and less militant unions. This in actual fact occurred at Wolds Prison (Ryan, 1994). The relationship between POA and the Home Office was unstable and many industrial disputes occurred yearly, especially between 1976 and 1980. The POA constantly challenged the Home Office’s authority to manage the prison system, and had virtually obtained control of the prisons since the mid-seventies – some would say that they had

become a monopoly (Ryan, 1994). Various clashes between the POA and the Home Office led to disturbances at 40 prisons for three days when the POA instructed its members not to work overtime. The Home Office had been working on a new pay and conditions structure for the POA called the "Fresh Start" as a means to organise working arrangements in an attempt to alleviate high staffing costs (Rutherford, 1990:61; James et al., 1997). Despite this initiative, relations between the POA and Home Office remained tense. Some have even claimed that privatisation was a means to bypass the powerful POA.

The National Association of Probation Officers (NAPO), also opposing privatisation initiatives, disapproved of the use of electronic monitoring due to the nature of their duties as probation officers. NAPO voted to boycott it as an infringement of defendants' civil liberties. The government, avoiding confrontation, turned to the private sector to take over the tagging (the private companies involved were Marconi and Chubb). NAPO was also threatened by the contracting-out of areas of work delegated to its members (which the government viewed as low priority work, for example voluntary aftercare). NAPO thus entered into partnership with five major voluntary organisations, which agreed to negotiate with NAPO first before agreeing to any projects. This alliance was called *Framework for Partnership*. Despite its apparent success, not all voluntary groups signed it; for-profit organisations were not subject to it and the militant leadership style of NAPO was not actively followed by some in local branches.

The Howard League was another opposition group. They had submitted written evidence against privatisation after the initial Select Committee had returned from their trip to the United States. They did a large amount of research on the matter, amassing American literature in particular. Not only did they put forward the main issues against privatisation, but also pointed out that prison privatisation was still at a fledgling stage in the United States. They emphasised the lack of real evidence that was gathered at such an early stage by the Committee. Yet the Select Committee ignored their submission. *Young People in Custody* was another paper submitted by the League, this time endorsing the involvement of private agencies in the supervision of young offenders but only on a

non-profit basis. Notwithstanding the approval of this type of contracting-out, the League insisted that the state not abdicate its responsibility for young offenders (Ryan and Ward, 1989).

Other liberal opposition came from pressure groups in the British penal lobby; they included the Prison Reform Trust and the National Association for the Care and Resettlement of Offenders (NACRO). They were the registered opposition however, some academics have claimed that their arguments could have been more forceful (Ryan and Ward, 1989).

In general, the liberal opposition was intense. The rough estimates and untested assumptions of the proponents of privatisation were fuel to opposition arguments. Especially since proponents of privatisation had difficulty in proving the cost effectiveness of private sector involvement (due to difficulties in comparing the costs involved in private and public institutions). The opposition emphasised that the Home Affairs Committee only visited one mainstream adult private prison in the United States and they refuted the Committee's claim that conditions in American prisons were better because of private sector involvement. Notwithstanding this, the opposition was also guilty of misrepresentation. Propaganda and false allegations were used to rally for their liberal cause. Also their criticism of the lack of accountability in private prisons was unjust considering the lack of accountability in public prisons in any case (Ryan, 1994). Despite the intense opposition the prison privatisation option was pushed through parliament and has become a feature of the British prison system today.

3.2.3 Australia

- The Emergence of the Prison Privatisation Option

Australia was the second major country to advocate the re-privatisation of its prisons (the United States being the first). It came about a little later than in the United States but speedily and to a large extent. In fact Australia has the highest proportion of prisoners in

private prisons. In 1996 2 500 prisoners were in private prisons, 15% of the national prison population, and the percentage is increasing, to an estimated 20% (an enormous percentage even though the actual numbers of prisoners are quite small as compared to the enormous prison population in the United States) (Harding, 1998).

The reason for the introduction of prison privatisation was that states in Australia were facing similar political, social and economic developments as had occurred in the US. This resulted in rising prison populations due to the change in political stance with the adoption of the 'Truth in Sentencing' legislation. Financial problems arose and prison staff became more and more politically hostile. The government sought out better prison programmes due to the increase of court intervention. As with developments in the US, privatisation became a viable solution to these problems. The US had involved itself with developments in Australia. Consortia had been developed with links to the US and many American individuals were recruited to key management positions in Australian private prisons (James et al., 1997).

Out of the seven states in Australia, four states have privately managed prisons in operation – Queensland, New South Wales, and more recently Victoria and South Australia which contracted out the management of Mt Gambier prison for women to Group 4 Securitas in 1996. As with the US (which is also a federal nation), each jurisdiction has its own criminal justice system and corrections service (James et al., 1997). Three of these states will be mentioned briefly, and special mention will be made of Western Australia, which was influenced by private prison developments in other states of Australia.

Queensland

Queensland was the first state in Australia to contract-out prison management. Borallon prison was opened under private management in January 1990. It houses 244 male medium-security prisoners. \$22 million was spent on its construction and the contract fee was \$9.7 million for 1991/2. Corrections Corporation of Australia was awarded the

contract for a three-year period including a two-year option. Corrections Corporation of Australia is a consortium of Wormald Security Australia and John Holland Holdings and the Corrections Corporation of America. The Corrections Corporation of Australia is responsible for prison management, administration and the provision of healthcare staff and instructors. Wormald provided the correctional staff. Since Borallon five more private prisons have been opened (Harding, 1998).

The Prison Officers' Union in Queensland (like the POA in the UK) was a powerful and influential union. At that stage it was resisting new working practices advocated by the Queensland Corrections Service. The Corrections Service was operating its prison service more cheaply than any of the other states in Australia. It introduced competition as a mean to undermine the Union. In 1988 Jim Kennedy carried out a report of correctional facilities in Queensland called the *Commission of Review into the Corrective Services in Queensland*. This led to the creation of the Queensland Corrective Services Commission or QCSC in the same year. Kennedy recommended that QCSC allow one prison to be operated and managed by the private sector. It would be under contract to the QCSC. At that time the term 'contract management' was used instead of 'privatisation', as the latter was still "highly emotive" (Foley-Jones, 1994:71). In any case the term 'contract management' more accurately described the situation whereby the private company was contracted to run a government facility. The motivation for this was to introduce competition to provide a measure with which to test QCSC's performance and costs and thus speed up public prison reform. Also a market for corrective institutions would be created. It was also hoped that management would change its attitude and become more culturally acceptable, while focussing more on rehabilitation and prison programmes (Macionis, 1994 in James et al., 1997). After the Commission's acceptance of the report, Borallon Correctional Centre near Brisbane was contracted-out. What is noticeable about Borallon is that unit management (which was considered a bold experiment at the time) was introduced as a diversion from the traditional approaches:

The essence of unit management is a more interactive and personal approach to inmates. The diversion of inmates into small, stable groups enables officers to develop a direct knowledge of the people in their care and calls for skilful

decision making in balancing security and welfare functions (Dickson, 1994:40).²²

After Borallon, Arthur Gorrie Remand Centre was opened in June 1992, holding 380 prisoners (and of these some were illegal immigrants). Australasian Correctional Management (ACM) won the five-year contract (also with a renewable two-year option). The private management of Arthur Gorrie Remand Centre had been a result of a breakdown between the Commission and the labour union that was representing the future staff of the newly constructed Remand Centre. Due to a lack of agreement between the two on work rules and procedures, tenders were called by the Commission to run the centre (McDonald, 1996). Queensland now has about a third (1 050) of its prison population in private facilities (Harding, 1998).

New South Wales

The New South Wales Corrections Service had been having trouble with its prison system due to disturbances and even deaths in custody. In fact it experienced a 'near collapse' in the late 1970s (James et al., 1997:13). Privatisation was employed to solve its problems of inadequate facilities, a shortage of staff, lack of staff training and the need for improved management practices. In 1988 the government first considered the privatisation option after a meeting with the Corrections Corporation of America. The meeting was chaired by the Minister for Corrective Services at that time, Michael Yabsley. Around this time of political and corporate co-operation the imprisonment rate in New South Wales rose from 101 per 100 000 to 129 per 100 000 between 1988 and 1991. Unlike developments elsewhere there *was* finance to increase prison construction. The involvement of the private sector was more due to the growing client state relationship between Australia and the United States. The Corrections Corporation of America was experiencing a loss, and investigations of poor management in the United States and breaches of contract were resulting in a slump in business. American private

²² Brian Dickson had managed Borallon for three years.

companies began to look elsewhere to improve business – one such place was Australia (James et al., 1997).

A consultant's report emphasised the privatisation developments overseas and due to the increasing prison population recommended that the private sector be employed to build and operate prisons. Especially since it was reported that they could do it more easily, efficiently and effectively. The involvement of the private sector could also introduce a new management style; release funds from the government's budget to be used elsewhere and private prisons could become a benchmark for the New South Wales prison system. Along with these developments and the Prisons Act, 1990 the New South Wales Corrections Service opened the privately managed Junee Correctional Centre in 1992. Australian Correctional Services (ACS) won the contract, and was part of a consortium with Thiess Contractors, ADT Security and Wackenhut Corrections Corporation. Junee houses 600 medium and maximum-security prisoners. As mentioned earlier, American senior managers were recruited to Australia, three to Junee.

Victoria

As with New South Wales, Victoria also experienced difficulties with its prison system. A conservative Liberal government replaced the previous 'anti-privatisation' government in 1992. The new government strongly supported the contracting-out of its prisons. Consequently the Contract Management Act, 1993 was passed. However, opposition in the form of the Prison Officers' Union in Victoria resulted in prison officers taking industrial action to resist the government's plans to start a large-scale privatisation programme to include half of the state's prison population. In October 1995 a contract was nevertheless signed with Australasian Correctional Services, who were to finance, design, construct and manage a prison in Fulham (a 600-bed, medium-security facility). Victoria holds about a half of its prisoners (1 350) in private facilities (Harding, 1998).

Western Australia

Western Australia's prison system was the most expensive of all the states, costing \$55,000 per prisoner per annum, compared to Queensland's \$39,000 per prisoner per annum. Western Australia's prison population was 2 100, held in 16 facilities. In the 1980s its prison system experienced a period of modernisation and change with the opening of new prisons. In 1993 the Ministry of Justice and the Corrections Service of Western Australia were incorporated and the Prisons Department incorporated with the Parole Board to become the Department of Corrective Services. Over the next couple of years the Western Australian prison service was streamlined due to the reduction of excesses. For example, 130 staff were shed, overtime and other privileges were abolished, holiday entitlements and sick leave was cut back. Staff was deployed more economically and modern management practices were introduced. The privatisation of prisons in other states had been used as a benchmark for prisons in Western Australia and improvements were thus made to reduce the expenditure on its prisons (James et al., 1997).

Due to the rapidity of private sector involvement in Australia there has been much feedback from academics and other commentators. Some have argued that privatisation has "so far been positive in terms of costs, conditions and prisoner programs" (Harding, 1992 in James et al., 1997:17). They argue also that the public prison system has failed to accomplish what it should have in Australia, by not delivering adequate programmes as is evident in the recidivism rates. Others have been hostile to the development of prison privatisation in Australia especially in the way that it was introduced. There was not enough time for public debate and investigation of American companies infiltrating Australian corrections. Some have even argued that this expansion of American trends has been an example of 'colonialism', 'economic imperatives' overriding the well being of society (James et al., 1997:18).

3.2.4. Other International Prison Privatisation Developments

Other countries – most notably Anglo-Saxon and Western European countries – have also incorporated various degrees of privatisation into their prison systems. France and Belgium have done so primarily with prison services (ancillary services) while Germany has allowed private financing of prison construction. The Dutch government has not approved actual private management of a correctional facility but, as with France, Belgium has contracted-out ancillary services. Yet the influence of prison privatisation is growing, as the rest of Europe, influenced by private company presentations, seems to be in various stages of involvement. Either monitoring the progress of other countries or being in various stages of consideration. However, as prison populations throughout Europe seem to be rising for various reasons (especially in Russia) the privatisation option seems to be growing in influence despite resistance from European governments to outright private management of prisons (James et al., 1997; Beyens and Snacken, 1996).

Canada, too, seems to be in the same situation as the European countries mentioned, allowing private sector involvement in shallow-end facilities and the provision of ancillary services. So far there has been growing favour for the privatisation of Canada's prisons (Lilly and Knepper, 1992).

New Zealand initially rejected the *full* privatisation of correctional facilities but a Bill passed in 1994 has paved the way for the establishment of privately managed prisons (James et al., 1997).

The spread of prison privatisation in these countries has largely been due to the ambitious nature of firms like the Corrections Corporation of America, Wackenhut and Group 4. They have actively been seeking potential clients throughout the world – such as Brazil, Mexico and China to name a few. The President and Chief Executive of CCA said of his company that it intends:

...to make a significant impact on the global corrections market at a time when every criminal justice system is seeking fiscally sound, technically innovative ways to solve their corrections problems. (In James et al., 1997:20).

South Africa, too, is now becoming part of this global market and will be discussed in the following chapters.

3.2.5. Concluding Remarks

When reviewing the countries involved in prison privatisation, the similarity between many of the countries is noticeable. For example, the three major countries involved in prison privatisation – the UK, the USA and Australia – have experienced similar developments in their prison systems (especially the expansion of their prison system to accommodate the rise of the prison population). These developments have provided a lucrative market for private for-profit companies to privatise prisons. In fact all the countries mentioned have been sought out by private for-profit companies as a means to expand this corrections market. It would seem that the international trend of incarcerating offenders (despite international symposiums to promote the development of alternatives to incarceration) has paved the way for prison privatisation. Corrections has become a lucrative business for all involved. The USA, being the first to make use of prison privatisation, is also the country with the largest prison population. The UK may not have as large numbers of prisoners as in the USA but its proportion of offenders to the general population is still higher than in the rest of Western Europe. Australia has the highest proportion of inmates detained in privately managed prisons. Prison privatisation seems set to stay in these three countries but the speed of its development may be relative to the nature of their governments. It is possible that prison privatisation in the USA and Australia is slowed by their federal nature: the USA, for example, is composed of 3 400 counties and 50 states each with its own system and with little co-ordination between the systems. Australia, too, is divided. It consists of eight jurisdictions and seven states each with their own criminal justice system and corrections (McDonald, 1996; James et al., 1997). Furthermore, in the USA there are three levels of authority in the correctional

system. There are federal prisons (funded by general taxation); state prisons; and local prisons (the latter two are funded by local revenues and other types of taxes). In the United States a local town, for example, would have to raise the funds for a new prison locally. In the UK, in contrast, no local authority has to take on this responsibility and government officials are responsible for running jails, not democratically elected sheriffs (as in the United States). The UK's prison system is very centralised, the Home Office (which replaced the Prison Commission) is responsible for all prisons and the prisons are centrally funded out of general taxation. Australia, in this case, is similar to the British system, as prisons are financed by the government through funds specifically collected through general taxation (Foley-Jones, 1994).

The three countries also pose different advantages and disadvantages to private corporations. In the United States for example, its fragmented and diverse governments pose a difficulty for corporations who want to become involved in the corrections market. Yet the need of local authorities for funding has opened the door to corporate involvement. Similarly in the UK, its centralised system is favourable to corporations, yet the same opportunities found in the United States do not exist as the corrections system in the UK is funded by public revenues (not fund raising by local authorities). Therefore corporations are not needed *as much* for financing prison construction (Lilly and Knepper, 1992; James et al., 1997). Australia falls between these two countries. It may be fragmented but since the government is responsible for prison funding, private companies approach it to systematically become involved in the various states.

Despite these differences in their correctional systems, the developments and policies directed at corrections are very similar in all countries. The involvement of the private sector in their corrections has run along the same lines – adapting to their varying systems of authority. The United States is diverse in its penal practice and its prison guards are not as organised and powerful at a national level as in the UK, again due to the fragmented, federal nature of America's prison system. Yet these two countries in particular have a very similar history of private sector involvement in their prisons. If prison privatisation is open to such diverse correctional systems it is no wonder that many

more countries (some akin to each other, some vastly different) are entering the international prison privatisation market. There is also pressure to expand corrections in many countries partly because of steadily rising prison populations. New construction of prisons is needed by many countries and alternatives to incarceration are being sought (another lucrative business opportunity for for-profit companies). The USA, UK and Australia are involved in a corrections market whereby corporations making profits from correctional services and the like, are continually influencing the international arena. A crossover of corporations marketing their skills in corrections has prompted a transfer of policies and developments between the US and the UK (and lately between Australia and South Africa).

At the centre of the international privatisation movement are transnational corrections corporations. The future of private prisons abroad will be determined by what these companies do more than by the transfer of corrections policy (Lilly and Knepper, 1992:183).

Also the United States has been influential in promoting a certain type of punishment that has been adopted in all countries mentioned and more. The United States “*internationalised* confinement as the chief legal sanction” (Lilly and Knepper, 1992:185). Similarly it has taken the lead in many correctional developments which other countries have witnessed and at times adopted. The USA has taken the lead in the privatisation of its corrections and a world-wide market has been created (Lilly and Knepper, 1992). This market is also extending to Third World countries of a similar Western industrial mould as that of the major First World countries involved in correctional privatisation. Amongst these countries is South Africa, which is experiencing major problems with its correctional facilities and is in dire need of some form of reformation.

4. PRIVATE PRISONS IN SOUTH AFRICA: INITIAL DEVELOPMENTS

4.1 South Africa's Prison System

In the preceding chapter an analysis was made of the events that took place in a few First World countries which led to them adopting the privatisation of prisons as a means to alleviate the problems inherent in their public prison systems. One could therefore witness the similarities between these countries in terms of when, how and why prison privatisation emerged. Now it seems South Africa is adopting the prison privatisation option. What makes this development noteworthy is the fact that South Africa is a *developing* country, new to the democratic ideal and the first African country to privatise prisons. Today South Africa's prison system is in serious need of reformation, no other country mentioned has had or probably will have such a critical problem with its prison system. All the problems experienced by these countries are magnified in South Africa – our overcrowding is *more* critical, our conditions *more* squalid and some of our prisons are completely inadequate for any sort of prisoner development. Where some countries are able to modify their existing prisons, South Africa may have to do away with many of its old prisons as they are beyond modification. That is what makes South Africa's situation unique – a recently transformed country experiencing all the problems associated with a transformation (one of which is an increase in the crime rate) and yet adopting a First World solution to the problems experienced by a developing country.

What follows is a brief review of the main changes that have taken place over the past few years. This brief review will provide some background for the reader and lead to a better understanding of what has been done so far to improve our prison system. One must also bear in mind that many international private companies refused to become involved in South Africa during the Apartheid era. Only since the government has adopted a rights-based correctional policy has it even been considered by international groups to take on business in South Africa (Interview 5). In light of this, the reforms that have taken place have been an important step to realising the possibility of privatised prisons in South Africa.

One can use the April 1994 elections in South Africa as the official end of the Apartheid Regime and the start of South Africa's democratic government. Using that event as a symbol of the transformation one can refer to the period before the 1994 elections as that of the Old Regime and the period after this as the New South Africa. Still, it must be noted that the transformation process was a gradual one and was already taking place before the 1994 elections. As far as South Africa's penal system is concerned the Old Regime prevented any monitoring or effective transparency of the correctional system. Consequently the many human rights abuses went on without effective opposition or reformation. The running of the prisons by the military reinforced the institutional nature of the Apartheid dogma. The prison managers had wide discretionary powers and many incidents of racism and violence against prisoners (and amongst prisoners) took place, even up to the 1994 elections. Fortunately the Prisons Department, as it was known up until 1991 when it was renamed the Department of Correctional Services, slowly undertook reforms since the mid-1980s. These ranged from changes in attitude towards previously harsh policies to the acceptance of prison unions (Giffard, 1997). Eventually, in 1993 the Interim Constitution (the Republic of South Africa Constitution, Act 200 of 1993) was introduced. Both this Constitution and the 'final' Constitution, adopted in 1996 (Constitution of the Republic of South Africa, No. 108 of 1996) contain a Bill of Rights that pertains to the rights of society and also to prisoners. Issues dealt with by the Bill include greater access to courts, equality before the law, the right to life (thereby negating the death penalty); the right to proper treatment and the right not to be subject to forced labour. Other rights outlined include the right to privacy, the freedom of association and therefore the right to petition, the right to vote²³ and to gain access to information. Other rights are included in Section 35 (1), which is directly pertinent to *detained persons*. These rights are therefore related to the conditions within prisons such as the provision of nutritional food, medical attention, reading material and so forth. In addition to the granting of rights, the Constitution also includes a provision that allows the Limitation of Rights, whereby constitutional justification is given for the restriction of certain constitutional rights in virtue of the conditions of incarceration. For example, freedom of movement and the right to privacy would necessarily be reasonably limited

²³ This would exclude certain categories of offenders.

by the fact that prisoners are incarcerated and may be searched at any time. These restrictions must be consistent with dignity, equality and freedom (to the degree possible when considering conditions of confinement) (Kalinich and Clack, 1998). The promulgation of the Interim Constitution encouraged developments within the Department of Correctional Services, most of which occurred after the 1994 elections (Kollapen, 1995; Constitution of the Republic of South Africa, 1996). For example, on one day, the 1st of April 1996, the demilitarisation of the Department was enforced. By June 1996 it was announced in Parliament that the demilitarisation *process* had been successfully implemented. Despite the symbolic removal of the military from the penal system, the actual process of demilitarisation took considerably longer. It was a gradual process, as the institutional nature of the military structure had to be replaced by a civilian one (Dissel, 1997; Hansard, June 1996). The reasons for the removal of the military were based partly on international laws and because the militarised way in which the prisons were managed was not in line with the Department's plans.

Someone once wrote that military-style organisations are resistant to change, that they are extremely hierarchical, that they are secretive, and that they do not permit either creativity or criticism (Hansard, June 1995: 2566).

Also, in August 1995, a programme for affirmative action was established for the Department of Correctional Services. The Interim Constitution had already made it clear that the community would be more fairly represented in the public service sphere. The goal of running an affirmative action programme in the Department was to break with past traditions by replacing old leadership. In this way the new philosophy of the Department could be accepted and enforced by new members (Ministry of Correctional Services, 1997).

Another important development that took place was when the Correctional Services Amendment Act (No. 102 of 1997) was published in December 1997. The Act is an amendment of the Correctional Services Act of 1959. The purpose of the Act was, amongst other things, to enable the Minister of Correctional Services to contract out prisons to private companies. The Act also makes provision for the establishment of a

Judicial Inspectorate, the appointment of an Inspecting Judge and Independent Prison Visitors. Thus increasing the degree of accountability and monitoring of prisons. On the 19th of November the President approved the Act, marking an important milestone on the end of the Department's road to transformation.²⁴

On the 27th November 1998 the Correctional Services Act (No. 111 of 1998) was published, incorporating amendments made and re-affirming prisoners rights based on the Constitution and in line with international standards.

4.2 The Emergence of the Prison Privatisation Option

- Its Origin

Perhaps one can pinpoint the emergence of the prison privatisation option to one person, Dr Sipo Mzimela, the previous Minister of Correctional Services, who was replaced in July 1998 by Mr. Ben Skosana. The Correctional Services Portfolio had been granted to Dr Sipo Mzimela, a member of the Inkatha Freedom Party (IFP) and opposition to the ANC. Mzimela took up the reigns and made known his ideas of reform. He focussed on staff training, overcrowding and the education of prisoners in light of the need for reintegration after release. Most notable was his interest in privatisation. Before becoming Minister he was a prison chaplain in the United States. His vision of prison privatisation in South Africa was therefore most likely based on and influenced by developments in the United States (Giffard, 1997). He not only advocated nominal privatisation but also full operational privatisation, thus involving the finance, design, construction and management of South African prisons. He pointed out that the inclusion of the private sector in South Africa's prison system would not only save money but also improve future prison designs and security.

What I have seen in the United States is very good. The prisons that are run by the private companies are far more efficient in every sense because they are run by business people, unlike those in the Department of Correctional Services who are not necessarily trained to run businesses. (Mzimela in Nina, 1996:25).

²⁴ <http://www.gov.za/yearbook/justice.htm>

In June 1996 it was announced to Parliament by Minister Mzimela that the Department of Correctional Services was “looking for alternative ways of providing suitable accommodation to inmates”. And that the private sector had been approached in this regard “which would lead them to finance, design, construct and maintain new facilities, and lease them to the Government over an agreed period” (Hansard, June 1996:3663). The Departments of Finance, Public Works and Correctional Services, as well as the Treasury had already co-operated in creating a prison privatisation plan to be presented to the Cabinet. According to this plan the facilities would be leased for approximately 15-20 years instead of the Department of Correctional Services footing the bill for a new facility. After the leasing period the facility would then belong to the government. The advantages of private sector involvement was outlined by Dr Mzimela in his address to Parliament. It was hoped by the Correctional Services Department that not only would the private sector provide workshops, factories and the relevant training to the inmates but also build a facility within 15 months as opposed to seven years. It was further announced by Dr Mzimela that a youth centre (Ekuseni) was to be opened in September 1996 after being *financed* by the private sector.

Those witnessing the speech did not wholeheartedly accept the proposal for prison privatisation. Carl Niehaus (who had been chairman of the Portfolio Committee on Correctional Services in 1995) pointed out the possible difficulties with seeking private sector assistance. Apparently the Correctional Services budget had not accounted for this new plan, also, as pointed out by Carl Niehaus, the government would have to pay a higher interest rate after borrowing from the private sector. What also should have been taken into account by the government was highlighted by a document from the Department of Finance, which pointed out financial difficulties that could arise in the future. These difficulties include the rise of inflation over the lease period and the subsequent costs for the government borrowing from the private sector.

[The document] comes to the conclusion, on a particular suggestion presented by the Department of Correctional Services... that that particular proposal was too costly and hence unacceptable. (Hansard, June 1996:3677).

It is interesting to note that the Correctional Services budget was increased from R2.5 billion to R3.3 billion for the 1997/1998 year (Hansard, 1997).²⁵ Also in that year the relevant enabling legislation was being drawn up. The Correctional Services Amendment Bill and the subsequent Correctional Services Amendment Act (No. 102 of 1997) were published in 1997 which included the empowerment of the Minister “to contract out prisons to private contractors” (Ministry of Correctional Services, 1997). The Correctional Services Bill of 1998 refers to the product of contracting-out as *joint venture* prisons. Finally on the 27 November 1998 the Correctional Services Act (No. 111 of 1998) was published. In Chapter 14 it states that:

The Minister may subject to any law governing the award of contracts by the State with the concurrence of the Minister of Finance and the Minister of Public Works enter into a contract with any party to design, construct, finance and operate any prison or part of a prison... (Correctional Services Act, No. 111 of 1998, section 103(1)).

Although the government had been investigating private prisons since 1994 the legislation has enabled the government to privatise its prisons for at least a few years already; the plans to do so have been tentative. For example, in 1997 at which time the enabling legislation was being prepared it was announced in parliament that despite popular belief the government had not yet privatised prisons. At that time the government had only made use of the private sector to finance new ventures, bring in expertise and construct new facilities (Hansard, 1997).

- Lindela Detention Facility

Although no prisons had been privatised at that stage of developments, another type of facility had been privatised since 1996. The Lindela Detention Centre is located in Krugersdorp and is a centralised detention centre for the Gauteng Province to house

²⁵ Around the middle of 1998 the Department of Correctional Services received financial assistance from the UK foreign office, this can be attributed to the Labour Party’s more friendly foreign policy in comparison to the previously governing Conservative Party (telephone conversation with Alistair Papps, Associate Director International Consultancy Group).

illegal immigrants. In August 1996 it was opened solely to ease the overcrowding problem in Gauteng. The Department of Home Affairs had contracted out the facility to Dyambu Trust, and the Lindela facility is the only one of its kind in South Africa. According to the Home Affairs Department it is unlikely that other facilities like it will be built. Prominent African National Congress (ANC) women members created and own Dyambu Trust with two of them registered as trustees.

Illegal immigrants (not housed at Lindela) are taken to police stations, prisons or Home Affairs offices, while their status is being confirmed (usually resulting in deportation). They therefore only remain at these facilities for a few days. Those who are *imprisoned* become the responsibility of the Department of Correctional Services while those in other facilities are the responsibility of the Home Affairs Department or the police (in the case of local police stations temporarily detaining suspected undocumented migrants) (Human Rights Watch, 1998).

Unfortunately the Lindela Facility is a bad example of privatisation and puts any private company in a bad light. The Lindela detention facility accommodates about 1 010 persons. Yet the daily population ranges from 1 200 to 1 800 persons, this leads to sharing of beds – a factor that the United Nations Standard Minimum Rules for Treatment of Prisoners disallows. Apparently the Dyambu Trust receives approximately R22, 75 per detainee per day from the Home Affairs Department (this was the amount paid in early 1997). This amount of money is to house and feed the detainees – compare this to the Correctional Services Department's approximately R80 per prisoner per day. But like most prisons the detainees at Lindela receive two meals per day at 6am and 3pm. The Human Rights Watch after visits to the facility had interviewed many detainees who complained adamantly about a large number of abuses and mistreatments. The quality of food according to their statements would often cause illness. The guards (notably wearing the Dyambu trust symbol on their uniforms) were reported to have been responsible for beatings, assaults, negative behaviour towards detainees, the acceptance or forcing of bribes, the robbing of inmates and at times, the withholding of constitutional rights as a means of punishment. The lack of accountability and lack of concern for these

abuses had led the Human Rights Watch to contact the local police station – who were “very reluctant” to get involved and, according to the Human Rights Watch, delayed proper investigations (Human Rights Watch, 1998:81). Also reports were produced by Human Rights Watch and the South African Human Rights Commission commenting on the abuses and suggesting reforms, particular criticism is leveled against Mangosuthu Buthelezi (Minister of Home Affairs) and relevant Cabinet members (Mail & Guardian, 1998).

The similarities to developments in other countries mentioned earlier are obvious. The USA had started off with the privatisation of facilities housing illegal immigrants. The private sector had chosen a branch of corrections that required minimal security and the straightforward housing of detainees for short periods of time in warehouse-type complexes. Lindela itself used to be a compound for migrant workers, therefore its design is also of a warehouse-type nature (Human Rights Watch, 1998). The UK also has a history of private involvement in illegal alien detention. Illegal immigrants were held for short periods of time in contracted-out facilities and in one case a privatised shipping company made use of a ferry to accommodate detainees (something which the South African government was considering doing). Despite the similarity in developments South Africa’s private sector involvement in this type of detention is perhaps on a smaller scale, considering that only one illegal immigrant detention facility in the whole of South Africa is privatised. Also, the marks of a developing country emerge when one compares the running of the facilities in the various countries. Although overcrowding and abuses may have occurred in the facilities in the USA and the UK, these problems were relatively minor compared to the severe overcrowding and completely unacceptable human rights abuses suffered by the migrants in Lindela. The private facilities for illegal immigrants in the UK were criticised for low staffing quality, staff harassment and at worst lack of proper facilities. The Human Rights Watch and the South African Human Rights Commission have actively condemned Lindela after interviews with detainees. This is due to alleged occurrences of severe beatings and assaults (with detainees, at times, requiring hospitalisation), complete lack of

accountability and not only poor sanitary conditions but the withholding altogether of the right to make use of the provided facilities.

Ironically it is the fact that many migrants only stay for a few days that makes prosecution difficult. Undocumented migrants come and go as they are deported or released, evidence of abuse is available but not many undocumented migrants will prosecute their abusers as they would then have to remain in the facility while waiting for their time in court. Approximately 15 000 immigrants pass through Lindela every 5-6 months (Mail & Guardian, 1997).

It is interesting to note that the detainees at Lindela seem to lack any constitutional safeguards. It may be because they are not taken seriously or because the enabling legislation and subsequent built-in safeguards was only confirmed after Lindela's opening and the Department of Correctional Services is not responsible for Lindela. Consequently the Human Rights Watch and the South African Human Rights Commission had to suggest the placing of an independent ombudsperson at Lindela. The Correctional Services Act of 1998 now requires this and other independent inspections in prisons to ensure accountability and effective monitoring of private prisons (Human Rights Watch, 1998). It is however, the responsibility of the Department of Home Affairs to improve Lindela and comply with international standards and the South African constitution.

Lindela is the worst case scenario of private sector involvement gone wrong. The Department of Home Affairs' lack of responsibility and ineffective monitoring of Dyambu Trust is what many critics of prison privatisation fear. But despite the bad start recommendations made by the South African Human Rights Commission has been favourably accepted by the Department of Home Affairs and Lindela's current owners, this may lead to changes taking place in the facility.²⁶

²⁶ <http://www.niza.nl/uk/hrc/>

4.3 Corporate Developments: Government Initiatives and Private Sector

Involvement in Corrections

- APOPS and POPS

Since 1997 the South African government has approached a number of national and international companies in the prison privatisation field or related fields (for instance the field of rehabilitation). In late 1996, Cabinet approved APOPS and POPS (Interview 5; Department of Correctional Services, 1997). APOPS, the Asset Procurement and Operating Partnership System, is a joint venture project between the Department of Correctional Services, the Department of Public Works and the private sector. The Department of Public Works is the Procuring Agency through APOPS while the Department of Correctional Services is the user Department on whose behalf the Department of Public Works acts.²⁷ The Department of Correctional Services has contracted three private companies to operate prisons in *partnership* with it. The *sole operation* of a prison by a private company in the strictest sense of the word is therefore not being implemented in South Africa as yet, since the Commissioner of Correctional Services will have *ultimate* control over the operation of private prisons. To make this distinction clearer, in an earlier chapter the explanations of the various types of privatisation was made. The full privatisation of a facility, sometimes called operational privatisation, was described as the private company financing, designing, building, *staffing* and *managing* all or part of a prison. Also that the government would relinquish the running of the prison to the contracted company and only be responsible for allocating the contract, monitoring the company's performance and continuing its policy-making function. In the case of APOPS the private company will finance, design, operate and maintain the prison; as well as provide and train its own staff. But the government will not relinquish control of the facilities and services to the private sector. The day-to-day management will still be in the hands of the Director – who may be appointed by the private company, with the commissioner's approval (Schönleich, 1999). Thus *full* privatisation in the strictest sense of the word has been avoided, and replaced by

²⁷ http://www-dcs.pwv.gov.za/Media_Release.htm

a lesser privatisation but nevertheless one in which the private sector still has a very large role to play. As one Correctional Services Department official said:

...the bidders [will] "run the whole show" with their own staff, under department supervision.²⁸

Also there is a slight difference between APOPS and POPS: In the APOPS programme the private sector will *finance* the building of a prison on government property. The Department of Correctional services will pay the company a fee per inmate per day during the term of the contract. After a partnership of 25 years the building will automatically become States property. If however, the private sector should commit a breach of contract the Department may end the contract and take over the private prison and supply its own staff to replace existing staff. Yet, in doing so the Department of Correctional would have to pay, in full, the outstanding fees owed to the private company for the financing of the prison construction.²⁹

POPS, Procurement and Operating Partnership System operates like APOPS except that it requires that the private sector *build* (not merely *finance*) a new prison or modify an existing one. By using POPS the Department may end up paying less to the private sector since it will be paying a *rent* for using the building for accommodating inmates instead of paying for the building itself. The Department will never own the building when in a POPS agreement and if a termination of contract should occur the Department would not have to pay additionally for the cost of the building. The private company, after the end of the 25 year contract period, may either use the building for another contract or do with it whatever it wishes since it will always own the building (Nexus, 1998; Oppler, 1998; Schönreich, 1999; Luyt, 1999).

By using the APOPS and POPS programmes the government essentially alleviates its budget deficit by making use of private sector services and funds. Also it is the desire of the government to provide essential services (like inmate accommodation, nutrition, and

²⁸ <http://www.publicworks.gov.za/docs/news/1999/nz03106.html>

²⁹ Whether the Department will have the resources to suddenly take over a prison will determine when the Department will occupy the private prison.

the like) more quickly and at a higher quality all in the hope of reducing and perhaps even ending the chronic overcrowding problem in South Africa's prisons.

At this stage it is important to realise that the government refers to the prison privatisation projects as Public Private Partnerships or PPPs and that the resultant private prisons are actually called *joint-venture* prisons. This terminology has been used by the government to describe the situation as a private prison technically involves the selling of government assets, that is the prison building becomes privately owned, hence a private prison. Joint-venture prisons are contracted prisons not *private prisons* per se (Fax Transmission from the Department of Correctional Services). However, as with international developments the private company will still be responsible for managing and operating the prisons, which is the key definition used to describe both private and joint-venture prisons. The difference between joint-venture prisons and private prisons is thus so slight that it seems likely that the government has made use of the former, less controversial term to disguise the nature of these prisons. The fact is that in both cases the main controversial aspect of the prisons is that they are to be operated by the private sector regardless of whether assets are sold or not (that is, regardless of which sector actually owns the building). The government is using the term 'private' in this context to refer to the selling of state-owned assets whereas, in academic circles, the term 'privatisation' generally refers to the provision of private services and the management of facilities previously and exclusively provided by the state. The government may be downplaying this, possibly to appease those who are not in favour of *private prisons* in this country (such as police and prison guard unions) and / or to avoid political tensions amongst those in Parliament (opposing parties). Consequently the so-called *joint-venture* prisons will be referred to as *private prisons* in the following chapters.

- The Contractual Process

After approval of the APOPS and POPS programmes it was announced by the Minister of Correctional Services in Parliament in April 1997 that seven prisons would be built including super-maximum prisons, maximum security prisons, a juvenile prison and a

remand prison (Hansard, 1997; Oppler, 1998). The government then put out a tender for four correctional facilities.³⁰ They are: two maximum-security prisons, one in Louis Trichardt, Northern Province, the other in Bloemfontein in the Free State, both to accommodate 1 500 inmates. The other two are an awaiting-trial / remand jail (which is to hold 1 500) in Boksburg and a Youth Development Centre in Barberton for 800 youths (Department of Correctional Services, 1997). In 1998 the capacities of the four prisons were increased, the two maximum-security and the awaiting-trial prison were increased from 1 500 to approximately 3 000 beds. (The Bloemfontein private prison will hold exactly 2 928 prisoners while Louis Trichardt will have 3 024 prisoners). The juvenile centre was increased to approximately 1 600 beds (Department of Correctional Services, 1998).³¹ The prisons were extended in size due to the cost-effectiveness of having a larger prison that results in a lower cost per prisoner per day (Interview 9). The two areas – Bloemfontein and Louis Trichardt – were sites chosen by the Department of Correctional Services due to the land available in the areas and also due to specific Departmental needs (Interview 8).

A number of private companies put in bids for the four facilities: Initially the companies submitted Requests for Qualifications (RFQ) in June 1997 and were evaluated by a selection committee. The committee was composed of representatives from the Departments of Public Works, Correctional Services, Finance, State Expenditure and Trade and Industry. Included also in this committee were local and international specialists (Giffard, 1997). The number of bids was, however, reduced after the Request for Qualifications (RFQ) was finalised in July 1997 leading to the *successful* bidders going on to the next stage of negotiations – they were short-listed to the Request for Proposal (RFP) stage after the approval by an Evaluation Panel. The RFP document is quite important as the government details what it requires the contractor to do; standards of performance may be included in this document to provide contractors with a useful benchmark with which to assess their capabilities. For example, the RFP may include

³⁰ The granting of a tender to a private company is determined by the company's experience, financial capabilities and previous track record of management and performance. Tenders were granted to companies most likely to provide value for money and benefit society (Schönteich, 1999).

³¹ <http://www-dcs.pwv.gov.za/annualreport98/resource.htm>

requirements for inmates' safety, security and service provision. Operational standards the government expects may be stipulated as well as the financial rewards / incentives for maintaining these standards. Finance and management personnel and prison authorities may specify the standards, even the bidders themselves may contribute. The RFP may also include negative incentives or penalties to ensure contractor compliance with the goals they have to accomplish (Keating, 1990).

Ultimately the public sector decides who is the successful bidder. At least that is the system used in South Africa, other methods of deciding who is the successful bidder(s) include employing the services of an outside agency to decide. Or, if the public sector also puts in a bid, the 'Chinese Wall' method is used, whereby the public sector personnel putting in the bid are quarantined from the public sector personnel evaluating the bid (Harding, 1997:74).

In South Africa at the time of the RFP stage five companies were on the short-list, they were SA Custodial Services (Wackenhut), Ikhwezi, Lungisa, Themba La Afrika and Siyakha Youth. Themba La Afrika, SA Custodial Services and Ikhwezi contended for the two maximum-security prisons, while the Youth Centre was contended by Ikhwezi, Siyakha Youth and Lungisa; and the awaiting-trial facility by Themba La Afrika and SA Custodial Services. The RFP documents were prepared by the Departments of Public Works and Correctional Services and after various information exchanges between all involved, the final draft was presented to the companies in November 1997. By the end of 1997 the RFP tenders had closed and an evaluation period began in January 1998 (Giffard, 1997). At this time recommendations had to be made to the State Tender Board to decide on the appropriate tenders and approve them. Only after approval could the recommendations be put before Cabinet for a final stamp of approval (Department of Correctional Services, 1998). And the State Tender Board had recommended that SA Custodial Services and Ikhwezi Correctional Contracts be appointed to the Louis Trichardt and Bloemfontein projects respectively. Another company, Lungisa, was also approved.

After extensive discussions with the government (since 1997) Ikhwezi and SA Custodial Services entered into a Project Development Agreement or PDA (Nexus, 1999). Ikhwezi signed a PDA for the Bloemfontein prison on the 2nd July 1999, and SA Custodial Services signed their PDA for the Louis Trichardt venture on the 27th July 1999. The PDA is, in effect, a Pre-Cursor Agreement to the contract, called the Concession Contract.³² The purpose of the PDA is to allow for preliminary works to take place and / or safeguard any preliminary works already performed by the private companies (that is, any constructions that were taking place while negotiations were still underway). In this way if the government were to decide not to sign the Concession Contract the private companies, by signing the PDA, would not have to take the risky financial consequences of the government's decision. The State Attorney and State Tender Board also approved the PDAs before they were signed. And so too, the Concession Contracts had to be approved by the State Attorney and State tender Board before the contractual agreement was made thereby finalising the public-private arrangement. The contracts are usually for a period of 25 years (Department of Public Works, 1999).

Recently the government decided to continue only with the two maximum-security private prisons (run as the APOPS pilot project) due to fiscal restraints. Also an existing prison (Emthonjeni Youth Centre at the Baviaanspoort Prison) is being contracted-out to the private sector as part of the POPS programme, however progress on this has been slow.

The signing of the first APOPS contract took place in Pretoria on the 24 March 2000 between the Minister of Correctional Services and Ikhwezi Consortium, now known as Bloemfontein Correctional Contracts. This has taken place following the required approval of the Ministry of Finance, State Tender Board and Cabinet. What followed the Concession Contract agreement was the signing of finance agreements between the consortium and a syndicate of banks. This culminated in the signing of the contract that led to the start of construction of the Bloemfontein prison on the 3rd of April 2000. The prison is scheduled for completion on the 1st of October 2001. On the 8th of May 2000 the Minister of Correctional Services signed a proclamation recognising the

³² <http://www-dcs.pwv.gov/Apops.htm>

Bloemfontein private prison as Mangaung Maximum Security Prison (Department of Correctional Services, 2000).³³

Although progress has been slow to reach this final stage in private prison developments the Department of Correctional Services does not regard the slow development as anything more than the natural evolution of private prison negotiations (Interview 8). Still, some would maintain that progress has been too slow due to delays and dragging of feet in the Department. Admittedly though, due to the Government's socio-economic requirements there are many stakeholders involved in the APOPS project, this itself may have complicated negotiations.

- The Companies Involved

Of all the companies who put in their bids only five companies made the initial short-list, and to qualify to this list these companies had to pass various criteria. This included the companies' abilities, such as its qualifications, experience, technical approach and understanding of the legal requirements. Financial stability and the ability to provide resources in set periods of time was obviously a necessary criteria since the companies would be required to fund the rapid construction of new facilities. In line with the affirmative action initiatives adopted throughout the country it was also a requirement that the companies' promote economic empowerment. In fact it was a necessity that the companies involved be in line with the government's plan to involve Previously Disadvantaged Enterprises (PDEs).³⁴ In order to fulfil this requirement 40% of the shares of the companies had to include PDEs or Priority Population Groups. They were also required to sub-contract 25% of their services / work to PDEs so that a Labour Goal of 3.75% training of employees could take place (Giffard, 1997; Department of Public

³³ http://www-dcs.pwv.gov.za/Media_Release.htm and <http://www-dcs.pwv.gov.za/BenSkosana.htm>

³⁴ This may explain why the ANC Youth League was willing to become involved in private corrections at one stage. It had put in a bid for the Youth Centre in Mpumalanga as no legislation had prohibited the involvement of policy-makers in the bidding (Giffard, 1997).

Works, 1999). Penalties are imposed if the private contractors do not adhere to these socio-economic requirements.³⁵

A large emphasis is thus placed on the empowerment of previously disadvantaged groups in this country so as to encourage socio-economic development by promoting South African businesses. The five companies qualified to the RFP stage due to them fulfilling all the criteria mentioned above including the need to empower PDEs. The five companies are black empowerment consortiums, the details of the two companies involved in the maximum facilities demonstrates the degree of involvement of PDEs: SA Custodial Services is a consortium of Wackenhut Corrections Corporation (a well-developed international company with prisons situated far afield) and Kensani Corrections Management (a local company), they are equity shareholders on an equal standing. The design and construction that SA Custodial Services is required to provide is sub-contracted to Concor, Group 5 and Makhosi (CGM).³⁶ Finances are provided by African Merchant Bank, while other services such as legal affairs, security and catering are provided by Edward Nathan & Friedland Construction (providing legal services), Fidelity Guards and Royal Food Services (Department of Public Works, 1999). As is well known, Wackenhut Corrections (a subsidiary of the Wackenhut Corporation) is the second largest private prison corporation in the world, second only to the Corrections Corporation of America (CCA). Its services include construction, finance and management of all types of correctional facilities worldwide as well as the provision of health services and rehabilitative programmes (Interview 5). Kensani Corrections is a consortium of black women investors (that is, professional black women and the investment of SARHWU – the South African Railway and Harbours Workers' Union). Apart from its involvement in corrections, Kensani is also involved in information technology (Infiniti Technologies), commerce and finance and has been backed by African Merchant Bank, which has invested R52 million in the Kensani group. The contract for the Louis Trichardt prison requires that Kensani provide for the rehabilitation and education of prisoners and also to maintain the building. Consequently Wackenhut

³⁵ <http://www-dcs.pwv.gov.za/BenSkosana.htm>

³⁶ Concor was also involved in a consortium for the building of other prison facilities, most notable was the construction of Baviaanspoort Prison near Pretoria (Concor press release, 22 January 1999)

will be responsible for the management of the prison while Kensani provides the much-needed inmate programmes (Interview 5).³⁷

Bloemfontein Correctional Contracts' shareholders include Group 4 Correction Services South Africa and Murray & Roberts Construction – a well-known construction company in South Africa. The local empowerment groups consist of Fikele Projects and Ten Alliance, also included is Bloemfontein Community Trust, all on an equal basis. (As mentioned already the name "Ikhwezi" was initially used for this joint venture consortium (Department of Public Works, 1999)). Group 4 Correction Services South Africa is part of the UK security company Group 4 Securitas. Activities performed by Group 4 include the provision of security guards and security systems; the transporting of valuable items; court escort services and prison management. Group 4 is the largest security company specialising in security and protection, but has become involved in corrections by becoming the first private company in the UK to manage a prison, HM Wolds in April 1992. Today it has four prison contracts in the UK and two juvenile facility contracts. It is also responsible for much of the prisoner transportation in the UK and is actively involved in the performing of court duties. Group 4 also operates in Australia (as Group 4 Corrections Services Australia) whereby it runs two prisons and is involved in prisoner transportation. It operates in a number of other countries as well.³⁸ In South Africa Group 4 is required to provide programmes of activities for inmates such as vocational training, education, behaviour courses (such as for anger management, drug and alcohol abuse), life skills courses and the like (Interview 9).

Based then on the composition of the companies one can witness the involvement of a number of South African companies along with international companies. It seems then that the international companies will be heading the management aspect of the private prisons while the local companies provide other services ranging from finance and construction to inmate rehabilitation programmes. From this one can gather that the black empowerment plan is successful and has also not hampered the involvement of

³⁷ <http://www.ambpartners.co.za/partners.html>

³⁸ <http://www.group4securitas.com/service.html>

experienced international companies and specialists who will be (and have been) vital in light of South Africa's lack of experience with public-private relations in the corrections field.

- The Cost

The Louis Trichardt maximum-security prison project is valued at approximately R1,8 billion, with the cost per prisoner per day being R65,47. The Bloemfontein maximum-security prison project is valued at over R1, 7 billion with a cost per prisoner per day of R66, 04. Compare this to the cost the Department of Correctional Services has to pay per prisoner per day – R85, and an amount which is constantly rising. The Public Works Department has pointed out the savings that are being made by employing the services of the private sector. For the Louis Trichardt project the savings will amount to 31, 47% and 31,32% for the Bloemfontein project. The Department of Correctional Services would normally only save 4, 83% and 4,86% for each prison respectively. Apart from training and paying their own staff, services that the private companies may provide include laundry, catering, cleaning, uniform provision and building maintenance. Also included is the requirement that the private companies provide rehabilitation and training programmes and provide for additional inmate outdoor time and three meals a day (as opposed to only two meals a day) (Department of Public Works, 1999; Nexus, 1999).

It is interesting to note how easily cost comparisons are being made despite the raging cost comparison debate amongst proponents and opponents of prison privatisation. The fact is that this debate has gone on as long as it has because a simple answer has not been found to show whether private prisons save money or not. Therefore one should not take this cost comparison at face value since there are many underlying and hidden costs that private sector involvement naturally generates that the government itself would not ordinarily generate. For example, the costs incurred during the legal preparation of the contract and the monitoring of the private facilities (paying the monitors and granting them benefits for example) involves costs not ordinarily incurred in the public sector. Thus cost comparison simply is not fair, as there exists a comparison between hopelessly

different entities. If there existed a prison in South Africa which matched the standard of prisons overseas and existed in the same location and at the same level of security as the private prison then *perhaps* some sort of comparison could be made.

At face value it seems that the private sector is doing more for less. But surely there is a price to pay (perhaps a hidden price) in achieving something as yet unachievable in this country – a prison of international standard and repute.

The notion that private organisations can provide more for less is undeniably attractive, but probably unrealistic. (Mullen, 1985 in Schichor, 1995:136)

The above cost comparison may appease the public but once the private prisons have been established for a number of years in this country a thorough cost comparison should be attempted as has been the case in other countries advocating private prisons.

4.4 Criticism of the Evolution of Prison Privatisation

A degree of criticism has surfaced in terms of the way in which the government went about employing the prison privatisation option. Some have criticised the speed at which the process has taken place. A couple of years after the process began two *maximum-security prisons* are underway. Other countries that advocate prison privatisation began their developments in immigration detention and youth detention before embarking on hard-core imprisonment of adult offenders. In South Africa the two maximum-security prisons were planned *alongside* a youth detention facility (in the APOPS programme) whereas, perhaps the government should have first co-operated with the private sector in terms of youth and immigration detention, as the pilot project.³⁹ If the pilot project proved a success *after some time* and analysis of the involvement of the private sector in a number of other types of privatisation services proved fruitful then the government could include the private sector into the *operational and managerial* aspects of prison administration. The private sector could then be invited to bid for the operation of an

³⁹ A number of youth facilities have been established with the help of the private sector (in the POPS programme), through finance and / or the adoption of the unit management approach. The success of these facilities has been pointed out by many so far.

adult prison. In fact the process was initiated before the legislation was analysed and approved.

Much to the chagrin of the Correctional Services Parliamentary Portfolio Committee, tenders for the first five private prisons were shortlisted months before the legislation empowering government to award such contracts as presented to Parliament (Giffard, 1999:339).

Also, Giffard (1999) points out that the earlier relevant legislation (the Correctional Services Amendment Bill, No. 99 of 1997) does not require the private company or contractor to provide rehabilitation programmes or otherwise. Apart from the government's desire to reduce the overcrowding it was also the aim to improve prison conditions and reduce the recidivism rate, some would say even more so than cutting costs (Interview 5). One of the stipulations that the private companies had to live up to before being considered for the initial shortlist was that they could provide programmes the government could not provide. The inconsistency lies in the fact that the companies that have been contracted by the government *are* required to provide programmes and have such stipulations built into their contract (Interview 5). Yet the legislation is not specific on this point, merely stating that:

...the Contractor must contribute to maintaining and protecting a just peaceful and safe society by –

(c) by promoting the social responsibility and the human development of all prisoners. (Correctional Services Act, No. 111 of 1998, section 104(1)(c)).

At first glance it seems to remain at the discretion of the parties involved as to what “promoting social responsibility and the human development of all prisoners” entails. However, it also states that the Contractor must also:

(a) [enforce] the sentences of the courts in the manner prescribed by the Act: (Correctional Services Act, No. 111 of 1998, section 104 (1)(a)).

This would imply (as stated in section 41 of the Act) that the private contractor is not exempt from providing a range of programmes and activities as the Department is meant to provide in theory. And the Department of Correctional Services is supposed to:

...give access to as full a range of programmed [sic] and activities as is practicable to meet the education and training needs of sentenced prisoners... The Department must provide social and psychological services in order to develop and support sentenced prisoners by promoting their social functioning and mental health (Correctional Services Act, No. 111 of 1998, section 41(1) and (3).

If the private contractor could at least provide these types of programmes that the Department can not, then it will be living up to expectations, as many expect the private companies to deliver far more, high quality programmes.

It is fair to say that the private companies were evaluated extensively. If the process of enabling the legislation was too rapid the contractual stage was by no means hasty. In fact the rigorous evaluation of the private companies over a period of years proves the government's cautious attitude and desire to contract with capable companies. Its focus on empowerment issues forced private companies to fall in line with the empowerment requirements and in so doing to grant opportunities to previously disadvantaged groups. There is no doubt that many jobs have been created at all stages of development. The completed project of Bloemfontein Correctional Contracts alone will create approximately 500 permanent jobs.⁴⁰

Also included in the legislation is the minimum length of the contract – 25 years. Many have criticised the length of the contracts, and perhaps rightly so as the APOPS programme has been frequently referred to by the relevant Departments involved as a *pilot project*. Being a pilot project surely the contracts and initial projects should have been on a smaller scale. Much of the criticism came from those involved such as building and engineering companies and the Public Works Committee (Giffard, 1997). A lot can happen in 25 years, the private company involved may go bankrupt or be taken over by another, possibly less reputable, company. Private operators may come and go

⁴⁰ <http://www.bday.co.za/99/0407/special/z3.htm>

which could possibly affect the stability of the company's management and even lead to contractual amendments being made based on the particular operator's means of doing business. This may happen but the Department of Correctional Services has reduced the likelihood of this happening by thoroughly evaluating the stability of the companies involved and by making provisions within the contracts allowing for certain mechanisms to prevent or deal with the possibility of a take-over or bankruptcy. (In this case another private contractor chosen by the Department would be contracted or the state itself would take control of the private prison)(Interview 9). It must also be pointed out that any evaluation of the success (or failure) of private prisons can only successfully take place after about the first ten years (Interview 2). Also considering the large amounts of money the private sector provides to finance the ambitious projects it would only be just to allow the private company to benefit from that investment over a long term, such as 20-25 years. Too short a contract may mean that it would not be to the private company's benefit to contract with the government (Interview 1).

Criticism had also been aimed at the fact that international companies were involved. This was soon righted by the black empowerment stipulation the companies had to adhere to in order that they be short-listed. The contracts contain empowerment clauses ensuring the transfer of skills to the local shareholders. Also it has to be realised that South Africa needs international assistance, especially considering the experience of the international companies involved. Wackenhut, for example, has had at least 12 years experience in the private prison field alone, with approximately 57 prisons situated far afield and incarcerating large populations. To complement this knowledge of the private prison business South African companies may provide the necessary culturally specific angle to the contracts, considering the uniqueness of South Africa's diverse and cultural prison population. Working in tandem with the international experts will benefit rather than hamper proceedings since many experts have been brought in from the UK alone to assist with unit management and the training of the controllers within the private prisons (Interview 5; Giffard, 1997).

Yet, others would argue that the government has been too slow in its progress to involve the private sector in the provision of services, otherwise known as *ancillary functions*. Schönteich (1999) lists a number of services the private sector could provide which could alleviate a substantial burden from the criminal justice system. These services would in no way hamper the managerial responsibilities of the Department's it could become involved with, yet it could draw pressure from government workers by taking over administrative duties and security, in this way allowing government workers to focus on more pressing duties. The services the private sector could provide range from guarding entry points to prisons to assisting with the monitoring of parolees. It is common knowledge that many prisons are hopelessly understaffed, by outsourcing services to the private sector warders could focus on essential duties of guarding prisoners and running programmes for them (Schönteich, 1999). But due to red tape and government bureaucracy many opportunities for involving the private sector are being delayed (Interview 3).

The means by which the government went about its decision to privatise has been criticised *and* commended. Criticism has been levelled at the government's lack of inclusion of interest groups in the decision to privatise and during the actual contractual process. Although, admittedly, not many non-governmental groups and individuals are actively involved in the corrections field and able to provide a critical analysis of the developments taking place in corrections in South Africa. Nevertheless many claim that the government should have allowed the involvement of interest groups, especially non-governmental organisations (NGOs), to (amongst other things) assist with the research of the topic of privatisation so as to develop a better understanding of it.

I firmly believe that any good policy is arrived at by good hard debate, because somebody presents the idea somebody opposes it they sit down and they work against each other until new ideas spring forth. And the Department and the Ministry has tried to avoid that as much as possible. Maybe they thought that the opposition would be absolute opposition that would try and stop the process rather than generate better ideas...privatisation can be a really positive force in prisons if there are certain safeguards which are installed and checks and balances. And the

only way you are going to work out what those checks and balances are going to be is if people are involved in the debate. (Interview 7).

Some have attributed this lack of communication between the relevant Departments (especially the Correctional Services Department) and the NGOs to the novelty of the NGOs. As one person stated the prison service is new to the idea of the NGO concept (Interview 6). The government's research consisted of a visit to the United States, instead of assessing the possible problems with privatising prisons (Interview 4). On the whole the government has, recently, been fairly open, although not avidly publicising its efforts, it has posted regular updates on the Internet for all to view and many newspapers in South Africa have been reporting on private prison developments. On the other hand many government plans have been hatched in relative secrecy and only fully revealed to interest groups and the public after its implementation (the creation of the super-maximum-security prison, C-Max, is an example). Giffard (1997) attributes this to an "act first apologise later" strategy often employed by government departments.⁴¹

The National Party (NP) in Parliament also voiced the above criticism. In general political criticism levelled against the ANC government from the opposition, the NP and Inkatha Freedom Party (IFP), have been limited, supporting the privatisation move. However, the NP did question the involvement of the ANC Youth League in one of the consortiums that had tendered for one of the APOPS programmes. The transparency of the Department was questioned as well as the potential financial benefits the Youth League (as a political party) could gain.

The short-listing process surely does not speak of any transparency whatsoever. If the reports we have are true, it would seem that the ANC wishes to boost its Youth League's coffers with state money, something one should perhaps refer...to the Public Protector (Hansard, May 1998:1786).

⁴¹ Said by the previous Minister of Correctional Services, Dr Mzimela (Electronic Mail and Guardian, <http://web.sn.apc.org/wmail/issues/971114/NEWS6.html>)

A bid for a tender from a political party / policy maker could lead to incarceration policies being amended to suit the needs of the party concerned. Influencing incarceration policies (resulting in the increased use of incarceration) could benefit parties by increasing profits earned from private prisons. The public in South Africa alone call for harsher sentencing and longer imprisonment thus providing further incentive for political groups to drive for even harsher incarceration policies (Giffard, 1999). It must be noted that the ANC Youth League did not put in a bid as such; they were merely involved in one of the consortiums that tendered. The international companies would ultimately be the core operators, not the local consortiums involved. Also it must be noted that the ANC Youth League is fully committed to addressing the needs and rights of youths in this country. Their goals include the lobbying for youth rights and empowerment and, amongst other things, the creation of funding for youth development and projects. In this regard the ANC Youth League encourages the involvement of the business sector in the funding of youth development projects and programmes.⁴² Despite the scathing criticism, the opposition has commended the government for their initiatives so far to implement prison privatisation.

Yet the potential danger of involving a political party in the incarceration industry cannot be so easily dismissed. Earlier it was explained why Western Anglo-Saxon countries are more suited to prison privatisation than African countries. A core reason was the distinction made, by Western governments, between the public and private spheres. For these two entities to merge would undermine the legitimacy of the state. Yet there is still a danger that this line is crossed when political drive becomes intertwined with the profit-making aspect of the prison industry. Political leaders may become motivated by the needs of the private prison industry and inadvertently or purposefully affect sentencing policy. It is vital that this – the revolving door syndrome – does not happen, as South Africa's carefully constructed democracy could be undermined by profit-motivated companies indirectly or directly affecting policy decisions in the upper echelons of governmental power.

⁴² <http://www.anc.org.za/youth/ancylinc.html>

Also, just as with any private business, the private companies are selling a commodity (that is, incarceration) and will attempt to convince their one and only client (the South African government) that their 'product' / services are needed on a larger and larger scale. Ordinarily a business promoting its services and products is no major issue but the fact that private companies are selling the greater use of incarceration is problematic. These problems alone are enough to refute the use of prison privatisation altogether and therefore they are factors that should always be at the forefront of the privatisation debate. No country is completely immune from these problems, it is only the degree to which undue private influence on policy decisions can be controlled and reduced.

These criticisms are related to the manner in which the government introduced the private prison enterprise into this country, the following chapter will deal more extensively with the possible problems and advantages that private prisons will create in South Africa. This will be based on international experience and then related to the South African situation. In other words the following chapter will discuss the many issues raised by international critics on the private prison business. It will be the aim of the author to relate these issues to South Africa's future experience with private prisons, years before a practical assessment can be made.

5. PRIVATE PRISONS: IMPLICATIONS AND FUTURE PROSPECTS FOR SOUTH AFRICA

As mentioned in Chapter 3 there are four types of private involvement in corrections. The most controversial type of involvement is the operation of a correctional facility by a private company or operational privatisation. Nominal privatisation, although not as controversial, also raises a few questions, since it entails the ownership of a prison facility by a private company. The provision of ancillary services by the private sector and the involvement in prison industry are the two other ways in which the private sector can become involved in corrections. In South Africa it seems likely that the private sector will eventually become involved in *all four types*. It is already known that South Africa will have a degree of operational privatisation, private companies will be responsible for the running of prisons with the state retaining its responsibility to incarcerate. Private companies have already become involved in programmes (APOPS and POPS) whereby the construction of facilities are financed, built and / or *owned* by the private sector. The government has also made provision for the contracting-out of ancillary services with the sub-contracting of certain provisions (such as catering) either contracted-out by the government or by the private company responsible for the prison (with the government's approval).

It is also very likely that private companies will make use of prison industries considering the fact that they have been contracted to provide rehabilitation programmes and training in an attempt to reduce the recidivism rate. Although the South African government may not be intending to build up prison industries per se in private prisons in the near future, the development of work experience and skills is closely linked to the rehabilitation of offenders. In fact it is imperative to the success of the Department's transformation programmes (Interviews 8 and 9). The training of prisoners in the private prisons could be extended to forms of industry training and eventual manufacture of a product. This is taking place in a few public prisons around the country whereby workshops have been created not only to provide work opportunities and to encourage self-sufficiency for the inmates (and the Department of Correctional Services) but also to provide much-needed

capital. The Department of Correctional Services for instance has benefited from an income of R8,2 million generated from the sale of agricultural and workshop equipment (Department of Correctional Services, 2000).

5.1 The International Debate on Private Prisons and its Relation to South Africa

5.1.1 Nominal Privatisation

Most of the debate revolves around the *operational* aspect of privatisation (the operation of a prison by a private company), although there is concern that the *ownership* of a correctional facility, or nominal privatisation, by the private sector could involve risks for both the government and the private company. The government is making use of both forms of privatisation, operational and nominal, in that it is not only making use of the private sector to operate a facility but it is allowing the private sector to own the facility in question. And there are two ways in which the ownership of the facility can be dealt with by the government. As was described earlier in Chapter 4, POPS entails the private sector owning a facility and renting it out to the public sector. APOPS entails the private sector owning the facility but selling it to the government on an instalment basis (lease purchase arrangement), in this way the government will eventually own the building. In fact these are the only two forms of *nominal* privatisation that a government can choose. The South African government has decided to make use of both forms of nominal privatisation. APOPS (lease-purchase agreements) specifically involves the brunt of the prison privatisation developments in that the two maximum-security adult prisons are in this type of system (with POPS / rental schemes still being left as an option for other private sector partnerships). In practice the two maximum-security facilities will combine nominal and operational privatisation in that the lease-purchase facility will be *managed* by the private sector. Aspects of operational privatisation will be discussed later.

International critics, because of the practical problems that could arise in using the private sector to finance and own a building, view nominal privatisation with a degree of

apprehension. Governments use nominal privatisation simply to gain approval for the construction of a correctional facility more quickly and without having to foot the entire bill for the facility. By using APOPS, the one type of nominal privatisation, the provided finance from a private company allows the government to pay off the debt of the building over a period of time without having to slice a substantial chunk out of its annual budget. In actual fact the lease payment owed is included in the general operating costs the government has to pay the private sector, thus it is treated as one project distinct from public projects. Although lease payments may be easier to manage for the government in the short-term, the government may be paying far more in the long-term to own the building after the contract period is over. This is the case with most lease purchase arrangements. It is probably because of this that the government has also included POPS in its overall plans, as POPS, the other type of nominal privatisation, is far more cost-effective than APOPS. One international critic of nominal privatisation pointed out that by delegating the financial responsibility to the private sector the government would weaken its "fiscal discipline" (McDonald, 1990:196). Since the debt paid to the private company is partially used to pay for dividends to private investors, the risk involved if the government cannot make a payment is quite great for both parties involved. A loss of faith in investors could lead to the plummeting of shares and the drying up of resources.

There is also another risk involved for the government. Should it want to alter the rented building it would have to enter into lengthy negotiations with the private company and eventually amend the contract. If thought went into the drawing up of the contracts in South Africa, a clause would have been included to allow for the renter to make changes to the prison buildings. Not enough emphasis can be placed on the importance of a well thought-out contract. As the reader may notice many of the problems associated with nominal (and operational) privatisation can be avoided through a good contract. Exactly what a 'good' contract means will become more apparent as the debate is further revealed. In this context a good contract is one in which leeway is given for the possibility of unforeseen problems. Included then in the contract should be clauses to allow the government flexibility in what it should, in the future, like to do with the prison building. After all the facility is primarily the government's responsibility and any

changes the government deems fit to perform should not be hampered by an inflexible contract. Nevertheless, there are risks involved but apparently these are outweighed by the government's desire for speedy prison construction without having to raise the funds / budget specifically for new construction. When employing the services of a private company the money raised for the venture, is obtained / borrowed from investors.

In POPS there are risks involved for the private companies and investors since the government may decide not to renew a contract to rent the building particularly if the prison population were to decrease to the extent that the building would not be needed. In South Africa this does not seem to be a tangible risk, otherwise there would not be any investment in POPS. It is unlikely that the prison population would decrease to such an extent that prison buildings would become obsolete. Even if the prison population was to stabilise, the overcrowded facilities would still have to be alleviated. In South Africa it is maintained that after the term of the contract, and renting is over, the private company (which would still own the building) could negotiate another contract or do with the building what it deemed fit. The real risk involved is in the termination of a contract – this provides a great incentive for the private company to perform well to prevent this from happening, at least for the first few years of the contract. A termination of a contract could be a death knell to the company, eliminating any chances for another contract. In this case the private company would literally be left with an empty prison and unsatisfied investors to say the least. The private company could attempt to sell the building (perhaps to the government, assuming they would have need for one) or to implement costly modifications to convert the building from a prison to whatever new function the building would be used for in future.

In APOPS the termination of a contract would mean the government taking over the facility and paying the outstanding debt owed for the building. But by renting the building (as in POPS) the private company will always be the owner. It is probably because of this difference that the negotiations with the private companies have culminated in the use of APOPS in terms of the delegation of the management of a prison facility to the private sector (McDonald, 1990; Leonard, 1990).

So far APOPS is being used for two joint-venture / private facilities – two maximum-security adult facilities. POPS may also be used by the government to establish a contractual agreement with the private sector to design, finance and also operate and *manage* a prison.

5.1.2 Operational Privatisation

Chapter 3 dealt with the recent history of privatisation in the USA, UK and Australia. There are parallels to South African developments in so far as the governments' decisions to privatise were related to deteriorating prison conditions in their countries. In effect, all prison privatisation decisions have been encouraged by the practical benefits that private prisons may offer. Less overt reasons for advocating prison privatisation overseas are related to the ideological need to adopt prison privatisation to bypass powerful unions and thus avoid labour problems and address the ever-growing fiscal crisis at the same time. The American government essentially adopted private prisons, along with this ideological need to do so, to save money, to alleviate overcrowding and because the private sector approached them. They had already made use of the private sector to establish peripheral correctional facilities, such as halfway houses, juvenile centres, drug treatment centres and the like. It seems then that privatising prisons was a natural progression or in more negative terms a slippery slope towards privatising secure adult correctional facilities. Australian and British governments followed suit, Australia had a close client-state relationship with the USA and had meetings with American private companies. The UK government decided to visit private prisons in the USA to make its evaluation. The South African government, too, organised a visit to private prisons in the USA to make its assessment. The point is that the countries adopting operational prison privatisation have done so mostly on the basis of practical merit and due to the influence of neighbouring countries and private companies themselves. The questions governments have predominantly asked are: 'What can private prisons offer?' or 'Are they more cost-effective?' 'Are they more efficient?' and so forth. An important question they have not effectively dealt with is: 'Is it proper / right to make use of the private sector to run a prison facility?'

Perhaps the viability of prison privatisation is best judged through a practical assessment. Nevertheless, by not discussing or fully researching philosophical questions, governments (especially the USA, Australia and South Africa) may have neglected an important aspect of prison privatisation and ignored questions relating to constitutionality and government authority. Only after the fact have international researchers discussed their philosophical concerns, something the governments should have done in conjunction with practical assessments and eyewitness accounts. In order to make a thorough analysis of private prisons one has to review all issues relating to it, not merely empirical issues. A simple question usually avoided by governments or simply dismissed by them is the question phrased by McDonald (1996:39) "Is contracting proper?"

- The Propriety of Prison Privatisation

These issues are necessarily related to empirical ones, thus an overlap may occur, but an attempt will be made to separate the theoretical issues from empirical ones, and thus a separate section will be created to review empirical concerns.

The issue of propriety raises a number of related issues about legality, constitutionality and accountability. But the premise for these concerns lies in the question of whether the state has the right to delegate its power to punish to the private sector. Opponents of private prisons would say that it is offensive to do so and that the power and authority to punish should be the sole responsibility of the state. This is further compounded by the fact that private companies make a profit from the imprisonment of offenders. But is a government handing over the responsibility to punish to a private company? No, the government retains its right and responsibility to punish and *delegates* certain duties to the private sector. But how much should be delegated? This is a key question considering the nature of imprisonment. As one researcher wrote, should private companies "be allowed to handle the two most precious possessions of every citizen – liberty and life?" (Schichor, 1995:54). Putting it in this way makes it sound unacceptable to allow the private sector to become involved, in any way, in the management of

correctional facilities. Still, one must keep in mind that a private company will never, *in theory*, determine the punishment of an inmate or, in other words, have the power to punish (in theory this should not be the case but as will be shown later the distinction between imposing punishment and administering punishment is not as clear-cut as one would hope). What a state is doing by delegating duties of management to the private sector is merely delegating administrative duties, not any power related to the imposition of punishment (Schichor, 1995). Then why is it improper to delegate the *administration of punishment* to the private sector? Some critics would say that the making and executing of laws is the *traditional* function of the state and that in some cases it is the state's reason for being consequently all legislative and judicial duties should be left to the state (McDonald, 1990; DiIulio, 1990; Buchanan, 1994). Key words that surface in this regard are '*traditionally*' the state's '*responsibility*', '*intrinsicly*' governmental in '*nature*' (McDonald, 1990). This would most definitely apply to the government's power to impose punishment but not necessarily to its power to administer punishment, to carry it out by sending an inmate to prison *as* punishment not *for* punishment. By allowing a private company to run a prison the government is delegating a power which was originally delegated to it by the public. The law allows the government to administer punishment and all are bound by the law:

Delegating administrative authority...does not free private firms to do what they want...They must conform to law and established standards. (McDonald, 1990).

Governments will retain their responsibility; however, they will allow private companies to undertake duties on their behalf.

James (1997) describes the use of punishment as being *legal* only if inflicted or imposed by a *state-constituted* institution, as opposed to a *state-run* institution. A private prison is a state-constituted institution therefore the involvement of the state ensures that the imprisonment is a legal punishment. If the state were to completely relinquish the decisions to punish the inmates to the private company, constitutionality issues would certainly emerge in local debates. As it is now, the South African government looks in no way to do this, as it will still retain responsibility over the private prisons. The

government's choice of the degree to which it plans to privatise its prisons (by not relinquishing its primary duties to incarcerate) has allowed the government to retain key policy and operational decisions thereby preventing the undue influence of the private sector on issues affecting sentencing and correctional policies. This therefore *helps* to eliminate a key concern about prison privatisation, that is, that private companies will seek to influence policy decisions concerning corrections. Private companies may lobby and "expend considerable political leverage behind the scenes" to promote their goals but as it is now, it *seems* that the government will retain ultimate decision-making authority on the fate of inmates in South Africa and on the sentencing policies to be employed by the courts (Greene, 1999:7). South Africa seems to be on the right track but it is naïve to presume that no amount of private sector influence *whatsoever* will affect the choices of those involved in government decision-making. This is because the private companies may *indirectly* be promoting the maintenance of current correctional policies that are aimed at the use of incarceration as the dominant response to criminal activity. After all that is the business these private companies are in, to incarcerate not to provide alternatives to incarceration.

Also, surely the state's delegation of the administration of punishment to a private company should entail some sort of approval or consent from the public. According to the famous philosopher, John Locke, the state's role in executing laws has been given to it or allowed it, in abstract terms, by the community. Surely if the state should further delegate this role, the community would have to 'grant' further consent? Critics have stated that the private contractors' abilities to cut red tape may in the end eliminate mechanisms put into place by the government to safeguard the will of the public (Greene, 1999). Yet this relates to the US system of procurement and financing which differs to the South African system. In the USA various jurisdictions and local governments determine financing. In South Africa government departments are centralised and largely determine national policy. The private contractors, by desiring to manage correctional facilities in South Africa, have to deal with a central policy-maker set on achieving specific goals for corrections and for society at large. The planning and deliberate negotiations of the Department of Correctional Services do not allow for private

companies to take short cuts. It seems much more likely that the South African government acted on behalf of the public and employed a strategy that to its knowledge would assist in the improvement of the imprisonment of inmates in South Africa. Just as the government, as the public's representative, will act on behalf of the public and be constrained by the Constitution and other legal parameters, so a private company, as the government's representative, will act on behalf of the government and be *constrained* by the *Constitution and legal parameters*. The government seems to be acting as a buffer between the public will (in terms of the Constitution) and the will of the private companies which some argue are based on the maximisation of profits and the maintenance of high prisoner numbers. Ultimately the public will determine who represents them (through general elections) just as, ultimately, the government would determine which private company is capable enough to live up to its standards and perform the duties allocated to it. This should happen in theory. In theory private companies will be guided by the Constitution and if not, the government would terminate the contract with the private company.

- The Constitutionality of Prison Privatisation

An important question one should ask is whether the government was acting in line with the Constitution by deciding to incorporate private prisons in its general system of incarceration. The actual process of legislation was done in the correct manner with the Correctional Services Bill being introduced to the National Assembly and the relevant amendments being suggested and made, eventually culminating in the Correctional Services Act of 1998. The government can only really be criticised for the hastiness of the initial process and the unwillingness to allow outside research to influence its decision. However, the general length of negotiations may serve to demonstrate the government's unwillingness to take short cuts.

Another question is whether the existence of private prisons will in any way violate the Constitution. *In theory* it should not, since it seems that the whole point of introducing the private sector into correctional management was to improve conditions, at least this

was one of the primary motivations for the South African government (Interview 5). The government has failed to uphold the Constitutional stipulations of the Bill of Rights with respect to offenders, only because of its lack of resources and because of inherent problems within the system itself. What the Bill of Rights states is that every detainee (awaiting-trial or sentenced) has the right:

to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment...(Bill of Rights, clause 35 (2e)).

These rights are not always upheld as the general standard of imprisonment in South Africa prevents any marked improvement in this regard.

I wouldn't say that [prisoners'] rights would be more safeguarded [in private prisons], but the private operator has to live up to the stipulations of the [Correctional Services] Act. Because he has been specifically contracted and he has a lot to lose if he doesn't live up to expectations. His whole contract can be cancelled, and can plunge his operations even into bankruptcy [sic]. (Interview 1).

By making use of private prisons it is hoped by the government that a general improvement of the public prison system will result. This will in turn hopefully improve the *general* standard of incarceration and possibly increase the applicability of the Bill of Rights to detainees and so become a real guide to incarceration instead of an ideological one. As mentioned, private prison personnel (in theory once again) are bound by legal and professional standards of performance, the violation of these leading to a possible termination of contract (Corder & Van Zyl Smit, 1998; McDonald, 1990).

[The government] must oversee the [private contractors] on a day-to-day 24-hour basis. And they must make sure, from the government's point of view, that the service delivery coming out from that private contractor is up to scratch, that all government laws are being adhered, that all specifications are being subscribed to and that it can be checked and measured...from a philosophical point of view the

government can never walk away from its responsibility of incarcerating inmates. (Interview 1).

- The Profit Motive

But what about the profit motive? Is it right to delegate administrative authority to a profit-seeking entity? Empirical evaluations aside for the moment, one can draw a parallel between the community-government relationship and the government-private company relationship. It goes without saying that a private company is motivated by its ability to create a profit, it is after all a private business. Just as the public 'rewards' a government by voting for it, so the government 'rewards' a private company by renewing its contract for the services rendered. Or, in a negative sense, the government 'rewards' a private company by *not* terminating the contract or fining the private company provided the services are up to standard. The contract will be renewed regardless of what the motivations were for performing these services well. The public does not re-elect a government because of its underlying motivations but rather because of its concrete performance. 'Has it performed its duties well and to the benefit of society?' As long as the motivations for performing a service do not affect the standard of service the motivation does not have to be a major concern. In this case the empirical results seem to outweigh any moral issue. If the moral issue predominated public correctional officials could be accused of performing their duties for the wrong reasons.

...the motivation of those who apply a punishment is not relevant either to the justice or the effectiveness of the punishment. (Logan, 1987 in James et al., 1997:154).

Also those people (private and public officials) working with inmates have:

...a wide range of motivations and neither self-interest nor moral probity is unique to either position. (Bottomley, 1997 in James et al., 1997:154).

Yet one cannot be blamed for still retaining some doubt as to whether a private profit-seeking company should manage a prison. It is difficult to pinpoint since the arguments

for the delegation of government authority seem quite rational. Perhaps as Schichor (1995) has pointed out it is the symbolism of this delegation that may be a cause for concern. It is symbolic that the state punish an individual for illegal digressions performed against another and society as a whole. Many critics of prison privatisation have maintained that the state loses a degree of legitimacy when a private company with its logo on a correctional official's uniform becomes the state's agent.

The administration of prisons...involves the legally sanctioned coercion of some citizens by others. This coercion is exercised in the name of the offended public. The badge of the arresting police officer, the robes of the judge, and the [badge] of the corrections officer are symbols of the inherently public nature of crime and punishment. (DiIulio, 1990:173).

DiIulio further states that "moral disapproval" won't be as apparent in a private facility (p 175). For example if a parent were to delegate the administration of a punishment of his / her child to another person, the seriousness of the punishment may be lost to the child, since the legitimacy of the parent's decision seems to defuse when someone else punishes the child. Since the person is an agent for the parent the child may not have the same respect as he / she would for his / her parent, this is a simple analogy but one which demonstrates the critics' concern. Something is lost when the government's authority is delegated and a distance seems to be created between inmate and state. On the other hand, proponents of private prisons have argued that inmates don't really care who is in charge of them as long as their conditions are favourable. It won't mean much to an inmate what badge / logo the correctional officer is wearing (McDonald, 1990).

What has happened in this discussion on propriety, constitutionality and the profit motive is a progression from ideological concerns about private prisons to concerns about the individual empirical experiences of the inmates in private prisons. Many constitutional and moral problems with private prisons may remain theoretical if practical problems experienced in the private prisons, such as for example a private correctional officer using excessive force to subdue an inmate, are kept in check. But is it proper to allow a private company to have authority over the lives of *theoretically* constitutionally

protected people? Without considering the practical advantages of private prisons the initial instinct would be to say that private companies should not operate fundamentally state-orientated facilities. There exists a social contract between the state and its citizens whereby the state alone has been 'granted' the right to punish those who violate criminal law. The violation is fundamentally against the state and the state alone should be responsible for inflicting punishment on behalf of society. Including a third party in this contract by allowing a private profit-seeking entity to administer punishment undermines the accepted social principle that this function is a state function exclusively, which in turn undermines the state's role in society as mediator and silent watchdog. There may also be a small chance that private companies may misuse their authority and violate the Constitutional rights of the prisoners. However remote this is, it still remains a factor in deciding whether incarceration is a commodity to be turned over to private businesses. A key aspect of the state's functioning is somehow undermined even though the state may still have the ultimate authority over the prison. But one cannot view the private prison phenomenon solely in terms of propriety and this is how the argument is turned in favour of prison privatisation once again. The philosophical considerations are so intertwined with practical considerations that one cannot judge private prisons merely on the basis of constitutionality and propriety. Even though it may not be proper to allow prison privatisation, *practical benefits* derived from private prisons may in the end refute the very constitutional problems one associated with private prisons in the first place. In other words, philosophically, it is the author's opinion that private prisons are fundamentally wrong, but the proof of their practical advantages has led to the adoption of the belief that they could in the end promote the very constitutional rights of prisoners that they are said to refute. This relates specifically to South Africa whereby prisoners' rights are not upheld despite the constitutional parameters set in place. Private prisons may be more legitimate in South Africa than in other countries because of their inherent ability to demonstrate the type of prisons the South African government should be creating. Besides, the contract, the countries' laws and Constitutions provide the boundaries in which private companies managing prisons should be restricted. And there are a number of practical ways to keep private prisons within the boundaries delegated to them. One could say that these boundaries, both written on paper and enforced, make up

the monitoring mechanisms necessary to keep private companies accountable. What follows is a review of these safeguards, checks and balances, their descriptions, and what the South African government has decided to use for its system of monitoring. Based on these mechanisms one can formulate a better decision on whether one should advocate private prisons and also whether philosophical arguments alone should ultimately decide the fate of private prisons.

Of course one cannot empirically evaluate private prisons in South Africa at such an early stage. But it is possible to speculate on what South Africa is *likely* to face based on what has happened in established international private prisons. One must therefore consider what legislation has stipulated and also what our public prisons are like and how these factors will affect South Africa's ability to ensure that the constitutionality of private prisons is maintained. After all, private prison developments internationally (see Chapter 3) have not all been unproblematic. In fact, the perceived practical advantages of prison privatisation (such as the cutting of bureaucratic red tape, the reduction of operational costs and the increase in quality) have not always been as clear-cut as proponents of prison privatisation would have hoped (Greene, 1999).

- Performance Accountability and Related Monitoring Mechanisms

Private prison contractors have to remain accountable for their actions specifically because of the nature of imprisonment. They have to be accountable to the state, as the state is accountable to the public. They are the agents of the state and have been delegated an important duty.

If we are in the kind of society that uses the buzz words 'transparency' and 'accountability' all the time, how do we ensure transparency when the administration of prisons is vested in private hands? (Interview 10).

In order to ensure that a private company is performing as it should, that is, according to the stipulations of the contract; the public sector has to create mechanisms with which to monitor the private company's day-to-day management. This would involve the

monitoring of the private company as it runs the correctional facility. The contract should clearly stipulate the operational standards to which the private company should perform.

It all depends on how the contract is worded and what we mean by default. If an operator is in default as far as escape is concerned there is a huge penalty built into that, thousands of rands can be charged. (Interview 1).

The contractual stage is important as not only is the competence of the private company assessed, but also clear provisions are created by which the company should manage the correctional facility. The government is, in a sense, forced to *translate* the desired performance and standards required of the company into a contractual arrangement. The standards and requirements specified in the contract should create a certain level of performance quality to which the private contractors should strive (Keating, 1990).

What privatisation has done is said to governments you have to tell us exactly what it is you want us to do and it has to be in such detail that the i's are dotted and all the t's are crossed, so that you can measure that [the private companies are] delivering... (Interview 5)

Monitoring mechanisms have been created by governments world-wide to ensure that contractual standards are maintained in private prisons. Also, monitoring mechanisms used in the public sector are used by most governments for private prison monitoring as well. One mechanism specifically used for private prisons is the use of a controller, otherwise known as a monitor or liaison officer. Harding (1997) points out two choices which specific states in the USA have made with respect to this monitoring mechanism. In Texas, privatisation legislation does not refer to monitoring, it is in the contract itself where monitoring is made a provision, but this is not compulsory. The Florida model is more in line with South Africa's way of doing things. The legislation in Florida requires that a monitor be appointed for each private prison (in this model the legislation may not necessarily point out the monitor's duties). The South African Correctional Services Act (No 111 of 1998) specifically requires that a controller be appointed by the

Commissioner of Correctional Services for every joint venture / private prison. The definition of a controller in this sense is a:

...senior correctional official in the employ of the Department (Correctional Services Act, No 111 of 1998, Chapter 1).

The duties of the controller are also pointed out by the Act, the main duty being the monitoring of the *daily* operation of the private prison. The controller also has access to any part of the facility and open book access to all private company records – financial and operational (Interview 5). The controller reports to the Commissioner.

Certain powers have also been granted to the controller in that she or he may order the director of the prison to conduct searches (which in a public prison would be authorised by the head of the prison), confine inmates separately and restrain separated inmates with approved mechanical restraints. The controller may also authorise the use of force (legal force proportionate to the offence), the use of non-lethal incapacitating devices or firearms or other weapons. It seems that the controller has an important authoritative position in the private prison. Compare South Africa's use of a controller to the other countries advocating private prisons. In Florida, USA, for example, there is one monitor or controller per private prison (as is the case in South Africa) with no relief given to him / her and no administrative or secretarial assistance. When one reviews the Correctional Services Act it seems that this is the case in South Africa also, with no reference to any assistants or other controllers relieving the duties of the appointed controller. Harding (1997) points out that this may be an inadequate monitoring mechanism as private prisons may hold over a thousand or more prisoners. The controller may not be able to authorise searches, separate confinement, and the use of restraints and so forth as adequately as necessary with such a large prison population as the two maximum-security prisons in South Africa. Each of which would hold approximately 3 000 inmates. For such a large-scale venture two controllers or a controller with some assistance would be more appropriate. This is the case in the UK where the normal number of controllers per private prison is two and they are granted secretarial and administrative assistance.

At the time of writing this and since August of 1999 experts from the UK Prison Service in conjunction with the Department of Correctional Services have been part of an ongoing Prisons Development Programme which started at the end of 1999. The Programme has consisted of two aspects one of which is the development of the management of contracted-out prisons in South Africa (the other being the development of the unit management approach in South Africa, with Malmesbury and Goodwood prisons being experiments of this).⁴³ The programme involved the pairing off of key personnel from both the Department of Correctional Services and Her Majesty's Prison Service. British and future South African controllers for example were specifically paired off and the South African controllers were given the opportunity to work with their UK partners in their work locations. Those involved in the programme were also discussing the possibility of having two to three assistants for each controller considering the size of the two private prisons (Prisons Development Programme, 1999). Consequently due to the ongoing nature of the programme it is likely that the problem of only having one controller per prison will be solved (either by having more controllers or more assistants for these controllers). As it is now there are only three controllers in South Africa (two for the APOPS projects and one for the POPS project, that is Emthonjeni) (Prisons Development Programme, 1999).

The duties and functions of the controller, as specified in South Africa, is indicative of the importance given to the controller. For example, in Australia (New South Wales) the controller is assigned a low value and is not a full-time monitor. At times (for example in Queensland) the resources made available to the monitor are inadequate, again indicating the low value assigned to effective monitoring. One should ask what were to happen should a controller not be given adequate resources and support. His / her monitoring of the private prison would not be as effective and as Harding (1997:43) points out "capture" or "surrender" could result.

⁴³ 'Unit management' is the term used to describe the physical design of a prison and also to describe how a prison operates. The design and functioning of a unit management prison entails the prison being divided into observable and manageable units (of one to two inmates in a cell). In this way only one prison officer is needed to monitor the inmates at any time as s/he can view all the inmates at one time. This solves many problems related to gangsterism, amongst other things, and it encourages effective service delivery. (Department of Correctional Services, 1999)

Although it is too early to judge conclusively how successful South Africa's controllers will be in their monitoring of the private prison, one can perhaps compare the possible future scenario South African private prisons may experience to the successes and failures of the private prison controllers in other countries. South Africa's system is closest to the Florida model, in this model the controller may be susceptible to capture or surrender due to lack of support and, as in the Florida model, lack of adequate resources. Capture or co-optation can be described by situations when

...regulators come to be more concerned to serve the interests of the industry with which they are in regular contact than the more remote and abstract public interest. (Grabosky and Braithwaite in Harding, 1998:638).

It is easy to understand how this could happen, an isolated individual, isolated in terms of his / her objective, required to report on the successes and more often on the failures of the people whom she / he can call colleagues. This is most likely to occur when a controller works full-time in a private prison. Capture can range from a controller starting to sympathise with the needs of the private contractor or involve the corruption or bribery of the controller by the private contractor.

The government, in this model, is responsible for allocating a controller. The controller may underreport faults with the management of the private prison so as to give the impression that the contracting with the private company was a successful venture, as it is in the interests of the government and especially the private company that it *is* successful. This would be the result of the controller's over-identification with the private contractor. This is problematic, as a pending crisis within the private prison may not be reported to the Commissioner or be reported when it is too late to prevent the crisis or deal with it swiftly. The controller's over-identification with a private company may ultimately result in the ineffective monitoring of a prison and may lead to a breach in contract and / or a violation of the Constitution. Keating's viewpoint on full-time monitoring is apt:

There is no magic in the use of a full-time monitor, who may be seduced by the contractor's overt corruption or subtle cooptation. The effectiveness of any monitor in this demanding and complex role will be determined by the

individual's background, competence, tact, shrewdness, and authority. Whistle blowing can be a lonely and onerous profession. (Keating, 1990: 146).

In South Africa then it is likely that controllers may not be as effective as they ought to be, however, it is not necessarily the case that each and every controller will be co-opted in some way or the other. But, in this eventuality other monitoring mechanisms should be created (and have been created) to complement the work of the controller.

In South Africa there are other means to monitor prisons, public and private. Some of these mechanisms are similar to those used overseas. For example, another monitoring mechanism is the use of a general ombudsman. In the case of an incident occurring in a private prison requiring investigation, the ombudsman (who is a public official) would investigate the incidents and complaints against the government department. An ombudsman is typically made use of in the UK and Australia and is primarily concerned with the maladministration of government departments. There also exists a *prison* ombudsman who is particularly concerned with prisoners' complaints. It must be noted that in international systems his / her role is primarily recommendatory in nature rather than involving any authority over subsequent changes which may or may not occur. The prison ombudsman may also report annually to parliament and his / her report may include the prisoners' complaints but, according to Harding (1997), the complaints are quite minuscule. South Africa's *general* ombudsman is now known as the National Public Protector. The Public Protector in South Africa has similar duties to the general ombudsman in overseas countries. She / he is a public official of a high level, is independent of the government and is appointed by parliament. Complaints against government agencies and / or officials are directed to the Public Protector who will then investigate the situation, recommend changes and issue reports. *Anyone* can complain to the Public Protector at no charge. And the Protector can investigate all levels of government, corporations and companies involving the state, statutory councils and "any person performing a public function".⁴⁴ The Public Protector may investigate power abuses, human rights violations, *maladministration*, and the like. It seems access to the

⁴⁴ <http://www.gov.za/structure/protector.htm>

Public Protector is available to inmates as, when all other means of lodging a complaint prove fruitless, the inmate may write to or phone the Public Protector.

Yet the applicability of this monitoring mechanism to private prisons is momentarily shadowed when one discovers that the Public Protector cannot investigate private companies per se. In this case the best the Public Protector can do is to refer the complaint to a court. However, the definitions of who the Public Protector may investigate may include a *private contractor* who is performing a *public function*. Incarceration is a public / state function and the private prison does have a degree of state involvement. Even though the investigation of private companies per se is prohibited the Public Protector could investigate a private official's handling of a public function, that is, the management and administration of a correctional facility. It seems then that the Public Protector does have jurisdiction over private companies managing South African prisons and thus can be viewed as a valid means of monitoring the private companies involved.⁴⁵

Perhaps a more accessible way for inmates to complain thereby holding the private company accountable for its actions is through an official prison visit. These visits usually involve contact with inmates and an inspection of the prison as well as an evaluation of the administration of the prison. The prison should be visited at least once a year for a thorough inspection, however, the prison visit could take place at any time. The findings of the official visitors (as well as of the ombudsman / Public Protector) are only of a recommendatory capacity (Keating, 1990; Harding, 1997). This means that the effectiveness of the official visit relies on the person(s) responsible for enforcing the changes recommended by the official visitors. And, in general, *any recommendatory* monitoring mechanism will depend on the willingness and efficiency of those who actually implement the recommendations (such as the Head of the prison), thus the accountability of the private players may depend on the will of those designated to implement changes. However, if need be these recommendations, if urgent enough, could be enforced through other channels, for example, by taking the matter to court or by referring it to an official body which does have the power to instigate change. For

⁴⁵ Fax transmission from the office of the National Public Protector, 26 April 2000.

example, the official prison visitors in South Africa may (according to the Correctional Services Act) refer a prisoner complaint to the Inspecting Judge who has power to act on the complaint. Consequently if important recommendations are ignored the matter can be referred to other monitors and monitoring bodies with the power to effect change. Thus accountability is maintained through the implementation of a variety of monitoring mechanisms not necessarily of a recommendatory nature. One of these is the Judicial Inspectorate.

In South Africa a Judicial Inspectorate was specifically created to monitor public prisons and there is no reason why it should not be used for private prisons. An Inspecting Judge controls the Inspectorate and initiates prison inspections in order to report on the conditions within the prisons, ranging from prisoner's treatment to corrupt practices occurring in the prison.

The inspecting judge for prisons or any judge can walk into that prison anytime, day or night and visit each and every area of that prison and report back.

(Interview 1).

The authority of the judge is clearly important as it is the President who appoints him / her (and whose appointment is seconded by the Supreme Court of Appeal or the High Court). The judge is allowed to appoint assistants who would have the same jurisdiction as the judge. The Inspecting Judge, according to legislation, may deal with complaints that have been submitted by the National Council, the Minister, the Commissioner, and a Visitor's Committee and, in special circumstances, an Independent Prison Visitor.⁴⁶ The Minister of Correctional Services receives a report from the Inspecting Judge upon each prison visit and an annual report is created for the President and the Minister (and tabled in parliament by the Minister). Hearings may be held and enquiries made by the Inspecting Judge (Correctional Services Act, No 111 of 1998).⁴⁷

⁴⁶ The National Council for Correctional Services (appointed at the end of 1999) encompasses two High Court judges and serves as an advisory body to the Minister in terms of all Correctional Services matters. (Correctional Services Act, No 111 of 1998).

From this it seems that the Judicial Inspectorate is quite effective in terms of its powers and link to the highest echelons of government. The judge may appoint assistants and delegate powers to other inspectors, thus adequate resources seem to be available to the judge.

The Judicial Inspectorate is more akin to the monitoring mechanism used in the UK, whereby a Chief Inspector serves as an independent inspectorate with the same duties as South Africa's Judicial Inspectorate. The Chief Inspector is also completely separate from the Prison Service. South Africa's Inspecting Judge, although reporting to the Minister of Correctional Services, is appointed by the President and submits reports to the President as well as the Minister.

Complementing the Judicial Inspectorate is the Independent Prison Visitor whom the Inspecting Judge appoints (in consultation with public and community organisations). The Independent Prison Visitor may be more accessible to inmates in particular as private interviews may be held with prisoners and complaints recorded. The Prison Visitor is in fact a liaison between the complainant and the head of the prison (or a relevant official) and will attempt to resolve complaints. What is vital in the Correctional Services Act (No 111 of 1998) is section 93(2) whereby it states that the Independent Prison Visitor ...must be given access to any part of the prison and to any document or record.

Since the two monitoring mechanisms (Judicial Inspectorate and Independent Prison Visitor) are applicable to private prisons private company accountability is almost ensured as no documents or records can be withheld from the Visitor. The schedule to the contract containing operational stipulations and set services will be made available to them (Interview 8). In fact a key problem with most monitoring efforts is exclusion from Correctional Service documentation (including contracts made with private companies) and thus the lack of autonomy of many monitoring mechanisms and officials. The simple fact that monitors are allowed access to the contract may reduce the isolation of the private companies from public scrutiny. By also allowing a monitor access to the

⁴⁷ Mr Justice Fagan is South Africa's newly appointed Inspecting Judge (Department of Correctional Services, 2000).

contractual arrangement between the government and the private company, the monitor will be able to know what contractual requirements are not being upheld and a more thorough assessment can be made of the private prison. On the other hand, a demonstration of possible contractual confidentiality that may be exercised in private prisons is revealed in section 111(1) of the Correctional Services Act. In this section it clearly requires that an employee of the contractor preserve confidentiality by not revealing any information during the term of his / her employment with the private company. But again there appears a clause that may undermine this, as the Act states that information may be disclosed when the employee is:

- (a) reasonably obliged to disclose any such information in the course of duty (Correctional Services Act, No 111 of 1998, section 111(1)).

Otherwise the employee may be required by the Commissioner or a court of law to disclose information. It is unclear as to whether a monitor poses a sufficient obligation for the employee. If not, the monitor may take the matter to court to hear the testimony of an employee (as a witness) to properly fulfil his / her monitoring duties. But this is a remote possibility, as access to the inmates and contract should provide enough information to effectively ensure private company compliance with set standards.

The Independent Prison Visitor and the Judicial Inspectorate may provide a major boost not only to public but private sector accountability. In fact the head of a prison is obliged to assist the Visitor in his / her duties and any refusal on the part of the head of the prison would result in referral to the Inspecting Judge. In effect the Visitor reports to the judge (a quarterly report is submitted). A Visitors' Committee may also be established by the judge to which unresolved complaints are allocated and by which visits are scheduled. The Visitors' Committee is perhaps equivalent to the public monitoring of a prison as it involves the specific inclusion of the community as a legitimate monitor.

This system created in South Africa seems to consist of various elements of monitoring, which are incorporating the community as well as those officials outside the Correctional Services Department. The risk of capture seems remote, but Harding (1997) points out that the composition of these monitoring mechanisms may be conducive to some form of

capture. In fact Harding (1997) has shown that this has already occurred in some countries advocating private prisons. In these cases of capture the official prison visitors have not been a clear representation of the various cultures and classes in society as they mainly consist of white middle-class magistrates. If this were the case in South Africa, the composition of the board of visitors would not at all be compatible to the myriad of people of different races, backgrounds, languages and cultures in South Africa's prisons. Since the Prison Visitors would interview inmates some sort of rapport would have to exist in order for the visitor to at least be able to negotiate the inmate's complaint with the prison officials. Thus it is vital that the composition of the board of visitors be representative of society so that an identification with the inmates would not seem profound.

The thoroughness of the Inspecting Judge, Independent Prison Visitor and Visitors' Committee is not, however, complete. There are no daily visits and assessments of day-to-day prison practices; thus this mechanism must work *in conjunction* with the controller's function. The more mechanisms created and the more diverse they are, the better the ability of the government, Correctional Services Department, community and non-governmental organisations to hold *all* prison officials (public and private) accountable for their actions, especially towards inmates, whose rights have only fairly recently been Constitutionalised in South Africa.

In the light of the above it has become apparent that the prisoners themselves provide a means to hold public officials and private contractors accountable. It's the prisoners themselves who experience day-to-day management and practice and it is in their interest to ensure that standards are maintained in both public and private correctional facilities. It should be of interest to a private contractor specifically to ensure that standards do not drop so as to avoid prisoner discomfort and possible unrest and even riots. A slippery slope from freshly contracted standard-orientated private prisons to corner cutting and poorly managed private prisons, would result in a drop in standards. The initial enthusiastic monitoring of private prisons may lapse after a few years. An effective means of keeping the contractor accountable are the prisoners themselves, thus it is

imperative that they have access to *regular* grievance / complaints procedures. In fact it is a requirement that private prison personnel in South Africa expose and explain a Grievance Procedure to newly inducted prisoners (Interview 9). In the public correctional system prisoners have access (in theory) to the head of the prison or a representing correctional official. Complaints made should be recorded and subsequently dealt with, after which the prisoner should be informed of the outcome. According to the Correctional Services Act if the matter is not resolved to the prisoners satisfaction the head of the prison is required to consult the respective Area Manager. Area Managers function below the Provincial Commissioners and are in charge of correctional officials within their prescribed management area (of which there are 153 in South Africa). Failing this, the Independent Prison Visitor is consulted (Correctional Services Act, No 111 of 1998).

This is daily access allowed to an inmate and it is to be applied to private prisons in that the controller is responsible for monitoring and timing the responses to the grievances, thus avoiding inadequate and lengthy handling of inmate grievances. According to the Correctional Services Act the Director of the private prison has the same powers and duties of the head of a prison but the Act itself and the contract restrict him / her. Thus in terms of receiving complaints the Director is obliged to deal with them. Grievance procedures should thus be maintained in private prisons as well.

A prisoner can take a private company to court for rights infringement (Interview 9). Since 1991, in South Africa, when the Internal Security Act was amended to improve the legal situation of political (or 'security') prisoners, access to legal advice was allowed although only a privileged few could afford it (Africa Watch Prison Project, 1994). Inmates made use of the court system to expose the harsh conditions within South Africa's prisons during the Apartheid era. South Africa has an unusual history of prisoners bringing cases to court to expose human rights violations. Some of these efforts proved fruitful and led to public and international scrutiny of South Africa's prison system. The final Constitution (the Constitution of the Republic of South Africa, No 108 of 1996) laid down the requirement that all (including prisoners) be granted

greater access to courts. In the light of this and due to the fact that incarceration is a public function which has been delegated to private contractors, prisoners (who have the right to seek access to legal advice) incarcerated in a private prison must be able to take a private contractor to court. They can take legal action against any other person or body as well. The law, the Constitution and the contract signed with the government, binds the private company. Along with the private company the Commissioner would also be accountable for the breach of that right since it is his / her responsibility to ensure that the private contractors perform their required services (Corder & Van Zyl Smit, 1998; Interview 9).

The monitoring mechanisms recalled so far relate to the monitoring of every day normal prison functioning. If an emergency were to arise in a private prison it is important to have special forms of outside monitoring and investigative mechanisms, especially in extreme circumstances. In this case where both the private contractor and government department are held accountable for the extreme incident, the best monitoring and investigation would be from outsiders, those not within the Correctional Services Department. For example, in South Africa, when disturbances and riots are prevalent in a public prison, investigations may be held by a special commission (specifically established for that purpose) or a human rights organisation (such as the Human Rights Commission). The findings are usually publicly available and open to media and parliamentary discussion (Harding, 1997).

It is also important that provision is made in case of emergencies in private prisons since the private contractor or Director may be forced to use any means necessary to quell, for example, a disturbance or riot. The Correctional Services Act removes this possibility by stating that the Commissioner and Minister may replace the Director of the prison with a correctional official, that is a Temporary Manager, in the event that the Director has lost control of any part of the prison. The Temporary Manager will then take over the Director's duties for a specified time. However, an urgent situation may not necessarily mean that the Director has lost control. Therefore, according to the Act, the Director may, in "case of urgency" and if delay in acting on the incident is unwise, temporarily

authorise actions ordinarily the sole responsibility of the controller (Correctional Services Act, No 111 of 1998, section 108). But the Director would then have to report to the controller immediately afterwards. In this instance the Director, in a case of urgency, may use lawful force by means of non-lethal incapacitating devices, firearms and so forth.

Discrepancy creeps in at this point. Firstly, what can be defined as a “case of urgency”? Perhaps the word ‘urgency’ in the Act should be replaced with ‘emergency’. This simple change in word may make the use of various lawful means of force seem more reasonable than if the situation was just ‘urgent’. ‘Emergency’ implies a more dire need for the use of force.

Secondly, if the controller is unavailable who decides in practical terms when the controller’s function should be taken over by the Director? In this case the Director decides in both instances. When a controller (or his / her assistants) is not available who monitors the temporary actions of the Director? Only after the course of action has been taken is the situation monitored with the return of the controller. It may be unavoidable that a situation will at some time arise which is in dire need of attention, but where the controller at that time is not available. The Director would have to take action as obtaining authorisation to do so may defeat the purpose of taking that action (due to the delay, for example). Yet, it must be emphasised that the Director, as with everyone else working in prisons, is bound by the Correctional Services Act. And the Correctional Services Act specifically states that an action taken by a prison official must be what that person “reasonably” believes to be necessary to ensure the safety and security of the community, the prisoners and the prison officials themselves. The key word is “reasonably”, as this differentiates subjective personal discretion from an objective course of action. It differentiates what that person personally deems fit to do in the emergency from what the reasonable course of action would be. Thus the Act maintains that a reasonable course of action should be taken. In consequence the Director’s personal discretion should not be a factor as she / he is required to perform the most reasonable course of action (Correctional Services Act, No 111 of 1998, section 26).

Still, despite all the monitoring mechanisms and safeguards put into place there could arise one moment in which a private custodial official is given the power to impose punishment even though it may be in the interests of the particular prison as directed by the Correctional Services Act. In the previous section one will recall that the acceptance and approval of private prisons depended on this not happening, however remote the chances. In principle therefore a private company should not be allowed to impose punishment only administer it. In practice it is very difficult to prevent this due to the nature of incarceration, the use of force, the imposition of solitary confinement are parts of the day-to-day duties correctional officials have to perform. The smooth running of a private prison may be affected by the continual requirement that the Director seek authorisation from the controller to discipline unruly or dangerous inmates. This discrepancy re-ignites constitutional arguments about the government's responsibility to impose and administer punishment as now one can see the diffusion of the two when put into practice. Since private prisons have been put into practice regardless of the moral and constitutional difficulties associated with them, a practical solution to the problem must be sought through the monitoring of the private prison. By having two or three controllers per private prison the chances of such a situation arising is reduced as a controller will be available in various sections of the prison. Also, even though the Director may act according to an urgent situation without prior controller authorisation, she / he is at least accountable after the fact and is still bound in principle by the Correctional Services Act. If, for example, excessive use of force was used by the Director to quell a sudden disturbance, the Director would still be retrospectively accountable for his / her decision. It is in the interests of the Director of the private prison to act according to the laws and Constitution of the country and especially according to the contract signed. By using excessive force the Director risks follow-up action by the government through perhaps financial penalties or the termination of his / her position as Director (Interview 5). *But* this depends on the effectiveness of the monitoring mechanisms in the private prison. If the controller has been co-opted the Commissioner may never be informed of the incident. The inmates themselves may not be inclined to report on the matter for a large number of reasons. One of which could be

their lack of knowledge of their rights (which is the case in many public prisons) or their lack of knowledge of what the Director is authorised to do.

It is clear that a lot rests on the effectiveness of the monitoring mechanisms established in private prisons. In South Africa the mechanisms put into place may work well to monitor all prisons only if they are put into practice as described in theory. As Keating (1990:133) points out:

The trick is to make sure that the processes and mechanisms developed in ad hoc fashion over the past...years for holding public correctional facilities more accountable are applied in all their vigor to the private sector.

Since South Africa has only had an *accountable* prison system for a few years, international assistance has been important in assisting in the establishment of mechanisms in both public and private prisons. All the mechanisms support each other and provide a range of ways to keep both public and private custodial officials in line with the Constitution, but nevertheless it is tricky to keep them all up to standard. Other types of mechanisms have also been established internationally, usually consisting of a variation on the mechanisms used in South Africa. For example, a document review requires that the private contractor provide all the paperwork, about the contractor's operations, to the public correctional department. *Contract monitoring* involves the review of documentation but also includes personal visits, observations and a financial audit. An extension of contract monitoring is the use of *accreditation*, although it does not include a financial audit, it:

...requires an institutional or departmental applicant to undergo an extensive examination of conditions, operations, security, programs, staffing, training, services, management, and so on. (Keating, 1990:147).

Due to the thoroughness of the process it is a costly affair. Another monitoring mechanism is an *institutional master* who is created by the courts and is the "eyes and ears of the court" (Keating, 1990:148). An institutional master is usually assigned to enforce remedial decrees when an institution, especially adult correctional facilities, fails

to comply with certain standards. In this case the terms of a contract are not taken into account, only the standards stipulated in the remedial order are enforced. The master has access to the entire facility and may monitor a large number of issues pertaining to all aspects of prison life. The master is usually appointed as a last resort (for example, when previous attempts at reform have failed) or in extreme circumstances (for example, when an entire correctional system is declared unconstitutional) (Keating, 1990). Although South Africa does not have an institutional master perhaps creating this post would further enhance other monitoring mechanisms and thereby further promote accountability.

- Financial Accountability

An important aspect of prison privatisation is the management of its finances. Private companies managing private prisons are businesses employing financial strategies to keep costs low and profits high. It is important that some sort of financial monitoring be put in place specifically for private prisons in South Africa. Already in South Africa some form of financial monitoring has taken place early in the bidding phases. All the bidding companies underwent some form of screening process including a financial assessment. In addition South Africa's Auditor-General reports on audits, accounts and financial statements and management. Included in the list of those who must be audited are institutions authorised by law "to receive money for a public purpose".⁴⁸ The reports are made public.

Recently the Department of Correctional Services made use of the Auditor-General to investigate corruption and financial mismanagement. This led to a *Management Audit* being created to further investigate corruption and maladministration specifically (Department of Correctional Services, 2000). Also the Correctional Services Department has internal service evaluations which are applicable to private and public prisons. The regular evaluation consists of the reviewing of the "reliability of financial...information" (Correctional Services Act, No 111 of 1998, section 95). It also includes the

⁴⁸ <http://www.gov.za/constitution/1996/96cons9.htm>

investigation on whether departmental assets and interests are safeguarded from losses. It must be noted that the internal service evaluation is not an exclusively financial monitoring mechanism as other aspects of the Department are assessed. For example, the evaluation monitors whether certain objectives are being achieved or not, whether operations are effective or not and whether human resources are being used effectively. The internal service evaluation also provides possible solutions to theft, fraud and corruption within prisons (Correctional Services Act, No 111 of 1998).

The importance of the monitoring of private prisons (both the operational and financial aspects of private management) cannot be emphasised enough. It is an expensive and complicated affair to ensure that all are held accountable for their actions, from the private contractors to the monitors themselves. Neglect of close supervision of private prisons has been shown in the USA to result in private contractors and officials not living up to the standards set by the public sector (Greene, 1999). The ultimate test the government and the Department of Correctional Services will have to face is whether it is able to control the delegation of a sensitive government function to a largely profit motivated private business. The contract itself is the key to this control along with effective monitoring.

5.2 Inside a South African Private Prison

The following section is based on the author's well-informed speculation on what the private sector may practically offer those working in private prisons and those imprisoned in private prisons. The interviews conducted and an interpretation of the legislation has contributed to this analysis, as has a review of current international experiences with private prisons (Chapter 3). Ultimately by speculating on the inner workings and quality of private prisons one should be able to formulate an opinion on private involvement in corrections (keeping in mind ideological issues) – specifically the management of a mainstream correctional facility.

5.2.1 Staff Issues

- The Duties and Powers of Private Custodial Officials

In public prisons correctional officers are responsible for every aspect of a prisoner's life. An inmate's life inside a prison is largely determined by his / her behaviour and the subsequent response from correctional officials. Appointing private correctional officials for a private prison can take place in two ways. The government may completely relinquish this duty to the private contractor or retain the ultimate power to veto decisions made by the contractor in terms of appointed officials. In South Africa, the government has relinquished this role and allowed the private contractors to appoint their own personnel, *but* every appointed private official must be certified as a *custody official* by the Commissioner. To qualify as a custody official the individual must live up to Department regulations and qualifications. This is a reasonable requirement applicable to the public sector as well. Suspensions of officials are the responsibility of the controller (to be enforced after notifying the Commissioner of his / her decision to suspend an official). Only the Commissioner may revoke the suspension once the issue causing the suspension has been dealt with adequately.⁴⁹

It seems South Africa has chosen a middle path when one compares the South Africa model to that used in the USA on one hand and the UK on the other hand. In the USA the contractor has much more discretion, the contractor hires and fires employees and is responsible for them. In the UK a certificate from the Home Secretary (supported by the enabling statute) determine all the appointments to be made with respect to private prisons, from the Director down to the custody officials (Harding, 1997; Correctional Services Act, No 111 of 1998).

The two consortiums (SA Custodial Services and Bloemfontein Correctional Contracts) are headed by international shareholders (Wackenhut and Group 4); their experience will be useful in the operational aspect of private prison management. But some academics

⁴⁹ For example, an official may be suspended pending trial, disciplinary hearing or investigation into his / her competency and / or fitness (Correctional Services Act, No 111 of 1998).

and interested parties in South Africa have voiced their concern over the fact that an international company will be managing culturally unique South African prisons. Who will the private contractor appoint as custody officials within the private prison, will they recruit locally or internationally or both? It is most likely that the custody officials within the private prisons will be South African. Perhaps higher management personnel will be international experts but since it is a requirement that the international shareholders transfer skills to local shareholders, it is most likely that South African custody officials will be specifically trained to work in the private prison environment (which has been the case so far with the recent Prisons Development Programme mentioned earlier). Consequently it is likely that *at all levels* of private sector involvement some degree of South African involvement will take place thereby preventing the absence of South African expertise. In 1997, Harding made a laden statement about private sector involvement in South Africa's prisons:

...one would have thought that, politically, it would be hazardous for the black government of a newly freed state to hand over any part of its incarceration responsibilities to predominantly white foreign companies, or even to local subsidiaries of those companies. (Harding, 1997:153).

This statement is defused when one considers the government's thorough means of ensuring that a predominantly white foreign company does not lay claim to the private prison phenomenon. The international private companies attend regular Department of Correctional Services meetings along with public prison staff and operators as well as other government officials. The private companies are thus included in everyday Departmental functioning and so become part of the Department's functioning. The Department determines their duties and so, in a way, the private companies' services have become a branch of the Department of Correctional Services. For example, the private companies would never build 'on spec' in South Africa, as they are required to perform according to the needs of the Department. Also the private contractors themselves have rejected the notion of building 'on spec' (Interview 5).⁵⁰ By also

⁵⁰ 'On spec' prison construction or *speculative* prison construction entails "private firms sit[ing] and construct[ing] new facilities in expectation that once new prison capacity is available, contracts with

requiring that local companies and individuals be trained and included in the APOPS project the government has boosted its affirmative action plans and created much-needed jobs. As a consequence positive developments in South Africa are occurring even before the private prisons have been built.

When speculating on the environment inside a private prison it is likely that South African inmates will be guarded predominantly by fellow South Africans with prior knowledge and experience of South African prison conditions. The prison management may be of an international origin but the controller of the prison will be a South African and the private contractor may well decide that the Director of the private prison should also be South African as she / he should have substantial experience with South African prison management. It is best that private prisons exist parallel to South African prisons yet retain an aspect of the cultural life of a South African prison but with improved conditions and a view towards rehabilitation (McDonald, 1996; Fax Transmission from the Department of Correctional Services; Interview 9).

Many international opponents of prison privatisation argue that by including the private sector in the management of a prison, the government's managerial control of the prison diminishes. Proponents, however, say that the opposite is true, that private sector involvement would increase the government's control. The way that this occurs is through contracting. Competition between private companies, set standards and rules established by the government, risk of failure and the subsequent consequences for the private company and a new philosophical direction employed by private contractors not only enhance the conditions of the private prison but increase the control of the government *indirectly*. The government will have a greater incentive to observe the functioning of the private prison and will retain control through the contract signed with the private company (McDonald, 1996).

correctional authorities for housing prisoners will be negotiated...". Speculation prisons often operate with little direct oversight or governmental control (Greene, 1999: 11).

A loss of control of a different nature may occur when one speculates on the life of a custody official within a private prison:

Accountability mechanisms are meant to maintain the division between the allocation of punishment and the administration of punishment. Yet the day-to-day management of a private prison involves many on-the-spot decisions so as not to hamper the smooth running of the correctional facility. Some of these decisions may involve the discipline of inmates.

One of the problems...is abuses, that's something that will happen over time. It's an incredibly powerful position to be in as a prison warder and as you notice that people aren't watching what you are doing little things start to creep in. (Interview 7).

This may be limited by the Correctional Services Act which states that a custody official ...has the powers and duties of a correctional official laid down by [the] Act, except in regard to matters referred to in section 104(4) or restricted elsewhere in the Act, the regulations or in the contract (Correctional Services Act, No 111 of 1998, section 110).

Section 104(4) limits the powers of the contractor (and so too the powers of custody officials) by disallowing the *imposition of penalties and disciplinary action against inmates*. Other restrictions against the custody officials and contractor related to an inmate's life include not being involved in the decisions concerning: an inmate's sentence, the prison in which the inmate should be imprisoned, the placement or release of the inmate, and community corrections placements. Large private prisons will necessarily entail a large number of decisions to be made concerning the discipline of prisoners, especially in the first few months when prisoners are likely to test the security of a new prison (Interview 5). The possible life within a private prison will entail the custody officials at some point or other having to make decisions about a prisoner's life, with or perhaps without subsequent approval from the controller and / or Director. The controller (or for that matter, the Director) cannot always be available in circumstances requiring decision-making unless assistance is provided (which seems likely to be the

case in South Africa) and / or allows more discretion to the custody officials which is in fact a degree of surrender or capture.

A general increase of government control over prison conditions (by including in the contract the requisite that the private company implement programmes) may in the end sacrifice the government's control over day-to-day management of inmates' lives, with respect to discipline. The life of a custody official in a private prison may entail a tension between doing the job of a correctional official (including disciplining an inmate) and acquiring permission from or relinquishing control to the controller or Director.

According to Greene (1999:11) the situation in the USA "has produced ample evidence of many barriers and difficulties that can impede or thwart public control of private correctional policies and practices". The question is whether the South African government will be able to ensure contractual compliance at the lowest levels of authority, in practice not just in theory. This re-iterates the government's duty to research the problems that have occurred in the USA, UK and Australia or make use of foreign governmental officials who have experience of prison privatisation. According to Greene (1999:12) lawsuits against private contractors due to "operational failures" are occurring in the USA.

South Africa seems to have covered all its bases by setting the relevant parameters in place, but despite theoretical stipulations practical end results are not always effectively bound by policies and legislation. One can only hope that the enforcement of theoretical stipulations is up to the standard required so as to avoid private contractor non-compliance.

- The Quality of Private Prison Personnel

It is hoped that the quality of private prison staff will be higher than staff in public prisons. South Africa's public prison system has faced a number of problems which has contributed to specific staff problems, all-in-all lowering the quality of service the Department is able to provide. It is hoped that the private sector can do better due to its

flexibility with respect to personnel issues and resources and its ability to avoid excessive red tape (Buchanan, 1994).

The Department currently has a serious shortage of staff, the prisoner:staff ratio is 5:1, whereas First World countries have a ratio of around 1,5:1 (Oppler, 1998). This can be attributed to the high level of overcrowding in South Africa's prisons. It is particularly problematic in the older warehouse-type prisons in South Africa to have such a distorted ratio. Perhaps in the newer prisons unit management may effectively utilise the number of officials available thereby reducing the disadvantage staff have due to the large number of inmates they are responsible for. Nevertheless, the ratio of staff to prisoners in most prisons has contributed to low morale and lack of incentive amongst correctional staff, especially warders. The situation warders have to face are stressful and challenging compounded by the many problems in South Africa's prisons today. Many correctional officers are not inspired to contribute to the Department in any way, their salaries are low and some may even resort to collaborating with inmates by assisting in smuggling illegal substances and aiding escapes. Many officials are often intimidated by inmates and succumb to their bribes or threats. It is no wonder then that the Department has a high degree of absenteeism and undisciplined staff members (Nexus, 1997; Department of Correctional Services, 1999). The Department has responded to staff problems by introducing a number of reforms and programmes. One of which is the unit management system currently being phased in to 27 prisons in South Africa. To facilitate the process training workshops have been running to train prison staff along unit management ideals.⁵¹

The Department of Correctional Services' Employee Assistance Programme has on its agenda stress management and staff has also been part of training and retraining programmes since 1994. Of note is the human rights training project launched in June 1998 and organised by the Department and various non-governmental organisations. Other solutions include the establishment of the Independent Judicial Inspectorate and an Independent Prison Visitors Scheme. These units have been created to promote transparency by inspecting prison conditions for the sake of prisoners. In conjunction

⁵¹ <http://www-dcs.pwv.gov.za/budget.htm>

with this an anti-corruption unit was created to investigate incidents of corruption within the Department (Department of Correctional Services, 1999). These reforms and programmes are meant to improve staff morale and accountability within the public prison system.

A fresh approach by the private sector may be able to instill a rehabilitative and reintegrative approach that the public sector may be resistant to due to a set of cultural beliefs revolving around old retributive values reminiscent of the Apartheid days. Many new correctional officials have been appointed as part of the Department's affirmative action plan, but the cultural ethos of retribution and military-style management still prevalent in most South African prisons has prevented any real reform from taking place by those with new ideas. A lot of newly-appointed staff may be held back by those who have been in the Department for many years and who retain a certain way of managing the inmates in line with retribution rather than rehabilitation (interview 7).⁵² A lot of reforms within the public sector depend on the correctional officers' acceptance of innovative and rehabilitative ideals. Also the re-training of correctional officials may be conducive to an increase in accountability and acceptance of new security measures, programmes and the like. However, the Department of Correctional Services may not have the means to re-train all of its correctional officials and even if this was the case, many officials may not be receptive to a new way of doing things (Interview 2). These barriers may prevent the efficient and effective introduction of quality correctional management techniques. The private sector on the other hand is able to appoint new custody officials, open to change, and train them accordingly.⁵³ Due to the focus on rehabilitation even those appointed custody officials who are resistant to inmate training and rehabilitation would have to fall in line with the new system of management adopted by the private sector.

[The private companies] are busy developing their own training programmes, not in consultation with the Department...I can't see for the next 7-8 years time that

⁵² Once again it must be noted that the use of the term 'rehabilitation' in this sense applies to modern re-integrative voluntary training programmes as opposed to the rehabilitation methods employed in the 1970s involving forced psychological analysis and the like.

the Department will change their whole policy and attitude because they are stuck in the old ways...they bring in new teachers to teach the correctional officers and they don't know business, they don't know penology. And without the principles of penology how can you apply that knowledge in a prison? (Interview 2).

International proponents and opponents of private prisons have debated the question of staff quality in private prisons. Private companies have to earn a profit and do so through the minimization of the use of correctional staff, through the issuing of low salaries and low fringe benefits and by employing non-unionised personnel. These three factors either enforced singularly or in conjunction allow the private contractors to make a profit. These factors may reduce the quality of staff in private prisons in comparison to public prisons. Staff in international private prisons is assessed according to private security company's minimum standards and is provided with little training. In fact, at times, private companies are accused of cutting corners by not formally training their staff, paying minimum wages and even leaving positions open to save money on salaries, which is called "churning" (Greene, 1999:10). Any leeway in the contract creating an opening for lower pay, lower fringe benefits (such as health insurance, pension plans, paid vacations and so forth) and lower staff appointments might be misused by the private company to save on costs (Schichor, 1995). But consider the situation in South Africa. In South Africa correctional officials' salaries are already low. If private prisons lower them even further this may perpetuate lack of incentive, morale and may increase corruption in private prisons. It is unlikely that this will happen, since it is reasonable to assume that private contractors will pay their staff the same (or even more) than their public sector counterparts. The reason is that, in proportional comparison to the UK, USA and Australia, South Africa pays its public sector correctional officials very little. The UK prison system for example is much more expensive to run than South Africa's system. Considering this, international private contractors may find it financially acceptable to maintain the standard payment given to public sector officials and even pay more to its custody officials. In fact this is to be the case Bloemfontein private prison

⁵³ Private prison custody officials are trained for three months over and above any previous training they might have had in the service of the Department (Interview 9).

personnel are to be paid competitive salaries (in comparison to public prison personnel) and will receive fringe benefits. They will also be employed full-time (Interview 9). The fact that Group 4 makes provision for competitive salaries, full-time employment and fringe benefits reduces the likelihood of the Bloemfontein private prison having low quality and / or unmotivated staff in comparison to South African public prisons.

By keeping up to the level of the Department the private contractors may not face resistance from unions, especially from the active union POPCRU, the Police and Prison Officers Civil Rights Union. Even if the contracted staff in a private prison were dissatisfied with prevailing conditions they would not be able to go on strike *while on duty*. This is because the private contractors have applied to the essential services committee in order that the contracted services of the private sector be viewed as an essential service (Schönsteich, 1999). Group 4 recognises unions and would allow its personnel to unionise in the event that the general working conditions were unsatisfactory. However, were its personnel to unionise it is likely that Group 4 management would encourage the joining of a less active union than POPCRU (Interview 9). This policy is unlike many private companies in the USA, which discourage unionisation altogether.

Private contractors (in South Africa) cannot employ custody officials on a whim, each custody official must be certified as such by the Commissioner. This factor alone may prevent the hiring of unqualified prison personnel in the private prison, since the private contractor does not set the standard on who is qualified to be a custody official (Correctional Services Act, No 111 of 1998). Many custody officials hired by private contractors are ex-public sector officials, by enforcing a form of screening process perhaps those who violated Department policy will not be re-hired by the private sector (which is often the case internationally). Custody officials may also be hired from private security companies and as Schichor (1995) points out many private security employees have chosen this field after unsuccessful attempts to join the police force or other public security departments, due to a variety of reasons. It therefore depends on the Department's minimum set of requirements and standards on what the quality of the

private prison workforce will be. South Africa's safeguards in this regard seem adequate as the Commissioner ultimately approves custody officials based on set qualifications, a register kept of those who have been suspended or revoked and also other 'particulars' about which the Commissioner may inquire (Correctional Services Act, No 111 of 1998, Section 109). Consequently even though the number of security staff employed in a private prison may be fairly low (to save on costs and due to heightened alternative security methods) it is likely that security staff will be deployed effectively within the private prisons (due partly to the unit management approach). And the quality of staff should be above that found in public prisons provided the Commissioner's approval on who should be appointed in a private prison is well informed and decisive. The three-month training given to potential private prison staff should also ensure a higher standard of security and prisoner management.

- Corruption

Corruption in public prisons may occur due to a number of reasons. As mentioned earlier prison officials do not get paid competitive salaries and most of them work under stressful conditions performing extra duties due to lack of staff. In South Africa's older prisons inmates, at times, run the show with guards avoiding so-called no-go areas. Consequently guards may be intimidated by inmates involved in prison gangs or they may be bribed into performing illegal tasks for inmates (such as smuggling contraband into the prison or assisting escapes). On the other hand these stressful conditions could lead to inmate abuse by officials, another form of corrupt behaviour. Now consider the situation in private prisons overseas. Most of these conditions are minimized or even eliminated in private prisons (and most international public prisons which operate at a higher standard than South Africa's prisons). Private prison managers have a greater incentive to protect the reputation of their correctional facilities. Private prisons in South Africa will be scrutinized in the first few months, since the private prison project is a pilot project. The contractor will have every reason to ensure that the facility is run smoothly and with the least amount of questionable activity. The Director, too, is answerable to the contractor, the government and the controller, she / he is responsible

for staff and, along with the controller, should carefully monitor staff activities. The staff itself may experience a more controlled environment with the minimal amount of overcrowding, greater monitoring (which may also negate corrupt behaviour on the part of the custody officials) and possibly a less stressful environment because of these conditions.

The profit motive, which is a concern to many critics, may in actual fact perform a positive function by overriding other motives prison officials may have. The enhancement of profit becomes the all-encompassing motive for managing officials, as they will ultimately benefit from it. And to enhance profit private prisons would have to be run according to the contract so as to avoid penalties due to possible lapse management and reckless officials (resulting in, for example, prisoners escaping). Yet this could in the end cause corruption as management may go to extreme lengths to avoid being penalized by the government or reported on by the controller. Also, although private contractors may cut down on costs through the minimal use of custody officials upper management administrators may receive high salaries in relation to their public counterparts thereby increasing the possibility of corruption (Schlosser, 1998). Private prisons may avoid some forms of corruption (prevalent to an extent in most prisons) but encourage other forms of corruption (found in businesses). As a business the private prison company is subject to corruption found in other companies which are not necessarily found in public prisons such as kickbacks, conflict of interest and upper-management bribes. Also the controller may be subject to corruption as she / he is the monitor of the private prison and will report on failures occurring in the private prison. It seems then that a greater incentive to perform well may also be a motive for corruption (Logan, 1990).

5.2.2 Security in a Private Prison

The question of private personnel naturally leads one to the question of whether security in a private prison will be better than that found in public prisons. A private company can ill afford regular penalties imposed by the government or a termination of the

contract. Contractual stipulations provide incentive for the private company to maintain a high level of security. In many contracts it is stated that a private company is allowed a certain number of prisoner escapes, more than the specified number of escapes could result in a breach of contract which may entail harsh financial penalties or even the termination of the contract.⁵⁴ International private prison companies may import expertise and technology to improve security conditions in existing public prisons. The design of prisons by private companies will necessarily be more security orientated (and not based on a warehouse design) as it is in the interests of the private contractor to develop the highest degree of security without incurring excessive expenditure on extra custody officials and security devices. By designing a prison in a unit management format a minimal number of officials is necessary to guard a large number of inmates, as the design of the prison allows for a greater degree of observation on the part of the correctional / custody official. In fact, as mentioned earlier, in South Africa the innovative unit management approach has been especially implemented in two public prisons, Malmesbury and Goodwood prisons. Thus already foreign expertise has been influential in the public prison system, as key prison experts from the UK were involved in the two projects. The use of electronic surveillance equipment (such as cameras) will also allow for larger observation without deploying a large number of officials. In practice, however, new prisons will always have a degree of tension as routines need to be developed and rapport created between guards and inmates.

Private and public prisons alike have to be extra vigilant in the first year of the prisons' opening as attempted escapes and disturbances are likely. To account for possible problems special teams may be established specifically to deal with the unexpected so as not to divert correctional / custody officials from their duties and so cause a gap in security (Interview 5; Harding, 1997). It is therefore likely that minor disturbances and volatile prisoners may disrupt life in a private prison, especially in the first year. The extent of the disorder in the first year depends; according to Harding (1997), on how quickly a new prison is filled. If a prison is filled to capacity in a few weeks it is likely

⁵⁴ In fact the government charges a penalty of R300 000 for every escape from a private prison (International Correctional and Prisons Association Conference, 27-31 August, 2000).

that major disturbances will result. For example, in the UK, Doncaster experienced a major disorder due to the rapid filling of the prison (approximately 200 in one month) whereas the Wolds only took on 320 inmates in five months and experienced only minor disruptions. Two of every three private prisons in Australia experienced major disruptions during the first few months of operations. The reason for this was the lack of cultural synch on the part of the imported US managers. A key cause for disruptions in Junee (in Australia) was the fact that inmates were transported from far off places to be imprisoned in Junee resulting in prisoner dissatisfaction and subsequent disturbances (Harding, 1997). Based on this one would expect South Africa's private prisons to face similar problems in that it would be likely that the private prison will be filled to capacity fairly quickly due to the serious overcrowding problem in public prisons. The Department of Correctional Services and the private contractors have negotiated on a gradual phase-in of inmates into the two private prisons (Interview 8). The Bloemfontein private prison will be filled over a period of about 200 days – 3 000 inmates will be introduced over a period of about 6-7 months (Interview 9). The period of phase-in is lengthy (being approximately 7 months) but since the private prison is large quite a few prisoners would have to be admitted every month within those 200 days. There may be disruptions because of this.

It is hoped that the cultural protocol within the private prisons will not be affected by foreign management, considering that the controller should be a South African public correctional official. Steps have been taken to include South Africans in every aspect of the private prison project. Thus the cultural schism experienced in Australia may be avoided. However, Junee's problem *may* be faced in the private prisons in South Africa. For example, the catchment area for prisoners may be outside Bloemfontein since the maximum-security prison will hold 3 000 inmates. Considering this, prisoners may be transported from public prisons far afield to be incarcerated in Bloemfontein. This could lead to an understandable dissatisfaction amongst those prisoners being transported. Although it is merely speculation as to whether this will happen. But it is a problem in the USA that many private prisons are built around rural areas requiring prisoners to be transported from urban areas. On the other hand the prison industry is said to provide

much needed employment and other economic benefits to these rural, isolated regions. Consequently many rural inhabitants welcome the establishment of prisons in their towns and it could similarly benefit South African rural communities (Schlosser, 1998).

The point is that private prisons in South Africa, as with any new prison, will experience difficulties in the first few months of its opening, it is a question of how serious these difficulties will be based on the experiences of private officials in private prisons overseas. But one must remember that the private prisons opened internationally were the first of their kind at the time of opening. The international companies involved in South Africa have already experienced the problems of opening a new private prison and may be better equipped now to deal with these problems in South Africa with the assistance of those in tune with South Africa's prison culture.

Apart from initial security problems private contractors may face a more long-term security problem experienced in public prisons, that of prison escapes.

- Escapes

Factors contributing to prison escapes in South Africa's public prison system are poor security, inadequate staff training and shortages of staff. From 1993 to 1997 the number of escapes per year would at times be as much as 1 200. The increased openness and transparency of the Department after the 1994 elections required that these escape statistics be made known to the public. The result was an outcry at the large number of escapes. Consequently an attempt was made in 1998 to heighten security in 21 prisons across the nation (by the creation of electronic fencing). Realising that structural upgrading alone would not solve the problem the Department has attempted to upgrade its staff through training and by enforcing disciplinary measures against negligent or corrupt staff. Also the creation of C-Max (Closed Maximum Security Unit) which is located within Pretoria Maximum Prison has been used for so-called dangerous criminals and those likely to escape (much to the chagrin of human rights organisations). The Department realising that the overcrowding factor is greatly responsible for the high

number of escapes has also planned the construction of other new prisons (most of which have been in collaboration with the private sector). Some prisons have already been constructed, some are being constructed and more are planned. For example, since 1994 nine prisons have been opened and two are near completion (Department of Correctional Services, 1999). This may not only relieve the pressure on other prisons but also break with old-fashioned warehouse designs (Oppler, 1998; Department of Correctional Services, 1999). The two maximum-security private prisons are a culmination of the Department's plan to establish prisons of a higher standard. Some of the Department's efforts (whether wise or unwise) must have paid off since only 497 escapes occurred in 1998 (as opposed to 1 200 in previous years). The optimal level the Department wishes to achieve is a 'zero escape rate' (Department of Correctional Services, 1999). Private prisons have to at least be an improvement to the current situation of public prisons in South Africa. As mentioned earlier it is of great interest to the private contractor to prevent escapes, as the contract should stipulate the maximum number of escapes that are allowed. The Department of Correctional Services has realised the severity of the escapes from prisons and is serious about solving this issue, therefore it is likely that the private contractors will be restricted by the contract in terms of the standard of security expected by the government. A private prison will most likely make use of state-of-the-art surveillance equipment and security technology. In fact many prisoners in private prisons internationally have complained about the lack of human contact with custody officials due to the alternate use of surveillance equipment. According to Beyens and Snacken (1996:252) "reduced personal contact between the prison staff and inmates is known to affect security and control in prison".

I worry about people being locked into areas without any proper supervision or contact with staff members and that rather than becoming dynamic places they will become merely dumping grounds as they are now. (Interview 7).

Actual security staff may be reduced due to increased use of alternate surveillance and unit management. Yet it is likely that staff providing inmate services *will not be reduced* as it is the contractual duty to ensure that there exists a higher standard of service delivery in terms of social work, religious care, psychological care, education and the like (the

core elements of the new, modern, 'realistic' rehabilitation) (Department of Correctional Services, 1999). It is reasonable to presume then that the number of staff providing these services will actually be greater than that in public prisons.

The physical conditions of the new private prisons will, at least initially, be less vulnerable to prison escapes due to a high degree of security and the implementation of all the means necessary to prevent excessive escapes.

- Prison Gangs

Prison gangs have been a problem within South Africa's public prisons for a number of years; other inmates as well as correctional officials may even collaborate with them. Lack of supervision, overcrowding and the constant recruitment of gang members thwart hopes of disbanding prison gangs. Other prisoners continue to be the victims of gangs for theft, rape and assaults. Prison gangs may also have connections with gang members outside prisons therefore many warders are easily intimidated by threats to their families. Gang activities, especially the rape of fellow inmates has perpetuated the HIV/AIDS crisis in South Africa's prisons (Oppler, 1998, Department of Correctional Services, 1999; Luyt, 1999). It is therefore of utmost importance that the Department solves the gang problem. Unit management along with the better design of prisons should contribute towards this, the expertise of the private sector in the design and construction of new and improved facilities will stimulate further developments, along with the recruitment and training of correctional officials.

By having better surveillance perhaps the prevalence of prison gang activities in private prisons could be less than that occurring in public prisons. However, private prisons are not expected to be free from the gang-related activities that occur in public prisons. For example, drug smuggling and use is a problem found in both public and private prisons in Australia, no custody or correctional official is infallible and short of creating all prisons in line with C-Max, there is always a way to smuggle in contraband. Ironically it is the private contractor's focus on rehabilitation and training (as stipulated by the contract) that

exposes the private prisons to a greater influx of illegal goods, as many inmates will spend a large amount of time outside their cells. Also by providing inmates with work by the creation of prison industries, they will have money to spend on illegal substances and other smuggled goods (Harding, 1997). Hopefully the standard of security and the proper screening of custody officials will keep the smuggling of contraband to an absolute minimum.

Another gang-related activity is the abuse of non-gang prisoners. Many aspects of South Africa's prisons are conducive to a gang taking control over the daily lives of inmates. Harding (1997) attributes this to a number of factors such as the size of the prison, with a large population of about 1 300, racial tension due to gang rivalry and massive overcrowding. Unfortunately the private prisons in South Africa are much larger than Harding's description of a huge prison or mega-prison. There is to be room for 3 000 inmates in each of South Africa's private prisons. Even though by South African standards a 3 000-bed prison is not huge, by European and American standards it is quite large (Interview 8). However, there are exceptions with prisons in California, USA housing approximately 6 000 prisoners. (Thus being the state with the largest prisons – six times as large as the average American prison (Schlosser, 1998)). A loss of control may occur in such large prisons and apart from the use of surveillance cameras custody officials may not witness assaults, rapes and intimidation of prisoners in parts of the prison. Harding (1997:130) refers to the lack of management in a part of a prison as a "power vacuum". These occur especially in larger prisons therefore there is no reason why it should not occur in private prisons, despite electronic surveillance. But the design of the prison whether carefully planned or not will determine whether the private prisons in South Africa will have problems in managing the large prison populations (Interview 9). South Africa's public prison system is certainly not free from gang violence and escapes. Monthly Human Rights reports are issued on the incidents of violence, deaths, escapes (individual and gang-related) and various other incidents (such as hunger strikes, the status quo of Correctional Services policy and their relation to inmates). The frequency of these incidents should be lower in private prisons than in public prisons, if

there is a greater frequency then private prison management should definitely be re-assessed.

- Overcrowding

Despite constitutional reforms and the creation and recognition of prisoners' rights by the Department of Correctional Services, South Africa's prisons are still largely overcrowded. The legislative and policy initiatives have not filtered down to the average daily life of the prisoner. The conditions of overcrowding perpetuate other problems within the prison system, such as gang activities, a decrease in warder supervision and control, a lower standard of living for all prisoners, especially with the inability of the Department in providing rehabilitative programmes and work for so many prisoners. The Department has initiated psychological services, social work services, education, training and other programmes but due to lack of resources and large number of inmates only a relative few can enjoy these services and reintegration programmes. Many attribute the rise in prisoner population not only to the Department' fiscal crisis, but also to the stricter sentencing trends being used by courts.⁵⁵ Those awaiting trial are imprisoned for long periods due to the sluggish judicial system and sentences imposed are longer, with heavy minimum sentences. This harsh trend in sentencing is consistent with the public's intolerance for rising crime levels and the demand for more convictions and harsher penalties (Oppler, 1998; Interviews 3 and 4; Department of Correctional Services, 1999; Luyt, 1999).

The overcrowding problem contributes to other problems within prisons. For example, many prison buildings are in a state of disrepair due to the vast number of prisoners housed in facilities meant for less. Pollsmoor is a good example of a prison that is still being used despite its poor condition and desperate need of repair (which is a job allocated to the Public Works Department). Supervision of so many prisoners by only a

⁵⁵ The bail laws, for example, were amended in 1995 and 1997 and came into effect in April 1998, making it more difficult to be granted bail, thereby sending more and more of those awaiting trial to prison. Evidence of this is in the fact that the unsentenced segment of the prison population form the bulk of this rise in prisoner population (Interview 3).

few warders is difficult to achieve effectively. Although the unit management approach has been influential in the design of new prisons after 1994, older prison designs still need to be modified. Unit management is an ideal way for a single warder to monitor a large number of inmates at one time due to the design of the prison, and may reduce gang activities due to higher levels of surveillance (Department of Correctional Services, 1999). But applying this approach to the entire prison system may take a long time. Also the system relies on the skills and training of the correctional officer. In South Africa progress with the unit management system has been slow partly due to staffing problems within the Department (Interview 2).

Overcrowding and the resultant lack of supervision and adequate programmes, leave inmates idle and restless for long periods of time, further encouraging violence, escape attempts, gang activity, corruption, smuggling and the like. The Department of Correctional Services is attempting to manage the overcrowding through a number of tactics one of which is through APOPS. Other strategies include the use of electronic surveillance to complement community corrections, the early release of certain offenders and the identification of criminal justice system blockages and the creation of solutions thereof by multi-sectoral teams (Department of Correctional Services, 2000).⁵⁶

Public prison officials have little choice as to how many prisoners they can have in their prison. But private prisons may be exempt from the overcrowding problem experienced all over South Africa. The reason being that the contract usually stipulates the maximum number of prisoners allowed in the private prison. The government pays for each prisoner per day only up to a maximum number of prisoners; therefore it is in the interests of the private company not to exceed that maximum number. If the contract is adhered to private prisons may never be overcrowded and all the problems associated with it may be greatly diminished. Life inside a private prison may be more favourable for inmates *in comparison* to public prisons. But is this type of elite prison, parallel to the public system, acceptable?

⁵⁶ Electronic monitoring was approved by cabinet on the 31st of March 1999 and was granted through a tender process to a consultant in December 1999 (Department of Correctional Services, 2000).

...in [private prisons], the standards and the quality and the hygiene etc is remarkably different. What does this mean in terms of a society that is trying to deal with questions of equality? Does it mean that there will be different forms of punishment for the rich and poor? Whereas in fact if people contravene the law then the notion of equality requires that the law must punish them equally, and that means the conditions under which they find themselves must be the same for all prisoners by and large. (Interview 10).

All inmates residing in overcrowded public prisons will not have the same opportunities as those in programme-orientated, non-overcrowded, newly constructed private prisons. In fact it was the case for Malmesbury prison that inmates were placed on a waiting list to be admitted, largely based on their previous track record. At that time Malmesbury had recently been constructed and was fully devoted to the unit management ideal. Also rehabilitation programmes, medical assistance (including psychiatric services) and social work services were being implemented at a higher level than most public prisons. Similarly, will there be a waiting list for inmates to enter a private prison? Surely a dual system of incarceration will result? What type of method will decide on whom is incarcerated in private prisons and who not? Will the method be arbitrary or based on a prisoner's previous track record? Although some countries' governments may require that the private company receive new prisoners and *classify* them to maximum or minimum imprisonment, in South Africa the Commissioner is meant to decide on the security classification of an inmate. In practice the Department of Correctional Services has pre-determined criteria for classifying the security status of prisoners. According to this criteria certain prisoners (with a maximum-security status) will be transferred to the private prisons from existing public prisons. Thus private prisons will release and receive inmates to and from nearby (or perhaps not so nearby) public prisons. If the Department decides which inmates are to be admitted to the private prison it is possible that "creaming" will be avoided (Barnekov & Raffel, 1990:138). 'Creaming' or "creaming off" is the process whereby private contractors select the 'best' prisoners – prisoners who are easy to manage, healthy and who have good track records in terms of escapes, discipline, rate of recidivism and so forth. In this way the public sector is left to deal with

undesirable, high-maintenance prisoners (Oppler, 1998:60). In this way the government's authority is not undermined (Harding, 1997). Therefore in South Africa the contractor may not decide in which prison a prisoner should be held, a newly convicted criminal would usually be taken to the public prison which represents a district. A public prison may serve a number of districts; however, the two maximum-security private prisons will receive inmates from various neighbouring public prisons. Except that contractual obligations may result in the rejection of new arrivals due to the maximum number of inmates allowed in the private prison.

This should take place in theory, but in practice the USA, UK and Australia succumbed to the pressure of overcrowding and, realising that the elite status of the private prison would not last, amended contracts to increase the number of inmates allowed in the private prisons. This took place after all three countries experienced a dramatic rise in their prison populations. In Florida, USA it was authorised that the *entire* prison system operate at 50% above its normal capacity (thus including private prisons). In the UK the Doncaster contract allows for 50% overcrowding. In Australia the Junee contract makes provision for an 80% spare capacity to provide for 600 prisoners. And Borallen's capacity was increased three times from 1990 to late 1995 due to new construction and the double bunking of beds. Arthur Gorrie Correctional Centre underwent four increases in capacity also due to construction and double bunking. Both facilities are now overcrowded (Harding, 1997).

Like any new prison, in practice private prisons should be exempt from the overcrowding faced in other prisons *up to a point*. If it was contractually decided to alter so many private prisons in the three First World countries it is very likely that the South African government will find it irresistible to make full use of the capacity in the private prisons. Even though the new private prisons are going to be large, at some point overcrowding will take place. The contracts signed with the private contractors have not made provision for overcrowding clauses, but *it is likely* that contractual amendments will be made to further ease the overcrowding in other correctional facilities (Interview 9). Thus Harding (1997) points out that it is through *default* that the question of whether private

prisons should be exempt from overcrowding disappears. If a dual system is initially created it may not last very long, as the private prisons will eventually start experiencing the problems found in public prisons. But perhaps it is beneficial that both systems experience the same problems. Depending on how each system copes with these problems an assessment can one day be made on the true value of each. The private and public sector will have to face the same problems within their prisons – the difference will be in the managing of these problems. The private operator is required to *deal* with these problems to live up to the contractual specifications she / he has agreed to. The operator has to demonstrate the ability to cope with the problems found in all prisons (Interview 9). If private prisons prove to be the better system then a transfer of ideas between the systems may result in an improvement of the public system. Similarly if the public system is better able to manage with the problems of incarceration then cross-fertilisation could take place thereby improving the private prison system. However, if private prisons can deal with incarceration problems and still adhere to the contract by providing a higher standard of services then the goal of privatising prisons would have been reached – at least for the South African government.

5.2.3 Quality of Life

The aforementioned security issues also relate to the quality of life for inmates within private prisons. The design of a prison is vital in this regard considering that an uncontrolled atmosphere in a prison is related to an increase in suicide rates. Harding (1997) and many international penologists rate correctional institutions, and the quality of life inmates' experience, on the basis of inmate suicide rates. It also becomes a question of whether the prison manager's abilities are such that she / he can run a suicide-free correctional facility. Suicides may also incite unrest, as was the case in the Arthur Gorrie Correctional Centre, whereby a suicide caused a riot and four other suicides followed. The management protocols of the Centre were questioned and it was soon discovered that the monitoring in the Centre was ineffective, as the monitor did not act immediately on the problematic management of the Centre. The problem was, however, solved by the bringing in of American consultants who advised on suicide prevention (Harding, 1997).

Thus the incidences of suicide is another way to monitor the quality of private prisons in South Africa. One can be assured of a certain standard of living if the inmates themselves are at least satisfied with prevailing conditions.

Overcrowding is perhaps a more obvious issue (than incidences of suicide) related to the quality of life within a prison. One must assume that private prisons will be exempt from overcrowding at least for the few months after which the private prison may be filled to capacity. If contractual stipulations eventually make provision for an overcrowding option then it is likely that the level of overcrowding will not reach the level experienced in the public prison system. For example, most of the international private prisons were increased by approximately 25%. *Excessive* overcrowding was not an issue, the governments simply made use of every available space in the private prisons by doubling bed space. The sharing of beds, mattresses on the floor and the like were therefore not the case.

By at least reducing or stabilising the problems found in most public prisons affecting prisoners' lives, such as overcrowding and prison gang activities, the quality of life may be better for inmates in relation to the rights granted to prisoners by the Constitution. In other words, the quality of an inmate's life may be greater in a private prison because of the ability and goal of the private contractor to live up to the contract and consequently to live up to the Constitution. And the Constitution requires that a prisoner be given exercise, adequate accommodation, nutrition, reading material and medical treatment (The Constitution of the Republic of South Africa, No 108 of 1996). In most cases public prisons are not able to grant adequate exercise because of the shortage of officials to provide security. Adequate accommodation is not always a given because of excessive overcrowding and nutrition is not up to the standard it should be because prisoners are only given two meals per day and at times corruption results in them receiving inadequate amounts of food and / or food that is spoilt. A lot of South African prisons are incapable of providing education, inmate programmes and other forms of rehabilitation to all prisoners thus the access to reading materials is the only way in which an inmate may receive stimulus. And it is still up to the inmate to organise for him or herself access to

study materials. Medical treatment provided in public prisons is not up to the standard it should be once again due to lack of adequate resources available to the Department of Correctional Services.

Many South African prisons are not attaining the minimum requirement laid down by the Constitution. If private prisons can do better by maintaining a certain standard at the costs negotiated in the contractual stage than the public system, even though thwarted by excessive incarceration problems, may adopt private company strategies – both financial and operational. The main problem the Department faces is the means with which to effectively implement solutions to the problems mentioned. With an approximate lack of 50 000 beds for prisoners it seems the Department's ultimate solution is to build more prisons. Unfortunately this solution is also the most costly. Government funds are short and building new prisons may have been delayed were it not for the decision of the Ministry of Correctional Services to call in the assistance of the private sector. However, the government's initiatives may pay off in the end, private sector financial and operational strategies may revolutionise the public system. As one key player in the privatisation industry said:

...we're not trying to fool anyone we don't have the solution, no one in the world has the solution. But we do have an ability to at least return certain people to society better than they came in. (Interview 5).

The existence of private prisons in South Africa may affect public prisons to that extent that a cross-fertilisation between the public and private systems result. In fact many justify the existence of private prisons on the fact that they positively influence and motivate public prisons. Cross-fertilisation therefore becomes a major justification for private prisons.

...there is nothing that you can benchmark the current prison system against in South Africa. Because what can you compare it against?...two separate entities striving towards the same goals and delivering the same service...will put parliament, taxpayer, government executives in a situation where you can say that

this specific prison is not performing up to the standard of the next one.

(Interview 1).

5.3 Cross-Fertilisation

Already the unit management approach used in modern correctional facilities overseas (for public and private prisons) has been adopted as part of an alternative prison design for South Africa's new prisons. But to be more specific one needs to ask if and how private prisons in South Africa will affect the public prison system. One needs to ask if cross-fertilisation will take place in South Africa, if so, how it will take place. Harding (1998) uses the term cross-fertilisation. He believes that the influence of the private prison sector may be the main justification for privatising prisons in the first place. So far much emphasis has been placed on the operational standards and quality of future private prisons in South Africa, a discussion on costs has been omitted purely due to the fact that it is too early to estimate whether private prisons will be cheaper than public prisons. Most contracts state that costs must be the same as the public system if services rendered by the private contractor are at a higher quality than in the public system otherwise private contractors are required to provide the same services at a lower cost as that of the public sector. Either way the private sector is supposed to provide more for less. Only recently are international countries witnessing the effects of private prisons and evidence of cheaper services and operational costs (in comparison to the public prison sector). It would be an achievement for private contractors to run their private prisons more cheaply than the government since South Africa's government is already running the public prison sector much more cheaply than the USA, UK and Australia. But as mentioned earlier the government's focus seems to be on service delivery, and the general improvement of society through job creation, affirmative action initiatives and the importing of expertise to improve the entire prison system. Costs obviously are an important factor but seem to be secondary to the government's objectives (Interview 5). The cross-fertilisation of private sector practices to the public sector has taken place internationally. Private prisons have influenced and impacted upon the public prison sectors, according to Harding (1998), prisoners, staff and managers have consistently

reported on the higher quality of private prisons. Competition between the private and public prison sectors has led to the increase of standards in both sectors and the improvement of cost management. The Tennessee Select Oversight Committee on Corrections cited the reason for this:

Evidently, competitive oversight by an independent monitor was a mechanism for bringing about mutual improvement. (Harding, 1998:648).

Therefore to answer the question of whether private prisons will influence public prisons in South Africa, one can gather evidence from international experience and the answer would have to be 'yes'. Harding's (1998) description of international public prison systems can aptly be related to South Africa's system:

Public prison systems have been allowed to run down for decades... Those highly motivated personnel who still enter the public system, despite demoralizing decades of governmental neglect and public indifference, now have a tool they can use to bring about change. (Harding, 1998:648).

Privatisation... paradoxically provides a circuit breaker for the public system to assess where it is going and how it is going to get there. (Harding, 1998:648).

South Africa's public prison system is far below the standards delivered by public prison systems in the USA, UK and Australia. At first the private prisons in South Africa may be completely parallel to the public prison sector due to the much higher standard expected. Yet before construction has even begun on the new private prisons a UK team had been brought into South Africa to familiarize South Africa's future controllers, monitors and unit managers with the standard expected internationally. The private prisons in South Africa's future will have to impact on the public prison system in some form or the other. The contractual stage alone has forced the government to assess itself, once the private prisons are fully operational it is safe to assume that they will further influence public prisons to a large extent.

Private prisons will influence the public prison system but how will this take place in South Africa?

Firstly consider the direct importation of ideas into the public prison system by the visiting international teams. The unit management approach is a good example, as newly constructed South African prisons now make provision for this method of management. Thus one mechanism of cross-fertilisation lies in the government gaining knowledge about prison system methods employed overseas (in both public and private prisons) and applying it to South Africa's prison system. Cross-fertilisation directly from the private prison sector to the public prison sector could take place through independent visiting of private and public facilities. For example, the Independent Judicial Inspectorate may expect more from public prisons after witnessing the quality of management in private prisons. In fact any form of communication between the private and public prison sectors through various intermediaries could result in public correctional officials striving to compete with private officials. Harding (1997) describes this as individual inspiration that consequently creates incentive to perform better. An example of cross-fertilisation that took place in the UK is when the private prison Wolds influenced a remand centre. This took place at about the time of the Woolf Report that was written up due to disturbances that were taking place in remand centres around the UK. The remand centre adopted a few changes from Wolds. For example in Wolds inmates would spend 14 hours, seven days a week out of their cells. The remand centre had then increased time out of cells from approximately two hours to 12 and a ¼ hours, seven days per week. In fact the new remand centre even strove to do better than Wolds. For example, Wolds would provide three meals per day with at least one hot meal, the remand centre provided the same initially but later stipulated that three hot meals a day would be provided (Harding, 1997).

Small innovations adopted by the public prison system may have larger implications for South African prisons in particular. If public prisons could provide three high quality meals per day as opposed to two lower quality meals then already a Constitutional requirement would have been met since food provision in most prisons may not be

adequate due to corruption. By providing inmates with enough food the level of corruption associated with food provision could be greatly reduced. Of course South Africa's public prisons cannot improve overnight and no amount of drive and motivation on the part of the correctional officials will solve the problems of insufficient funds, dilapidated buildings and overcrowding. In fact a sudden exponential increase in the UK prison population eventually led to the remand centre withdrawing its improvements (Harding, 1997). Thus in order for an improvement in the public prison sector to occur cross-fertilisation would have to exist in all levels of prison life, from government decision-making right down to correctional official attitudes. Also as Harding (1997) points out, cross-fertilisation is a two-way process, the South African public prison system may not have a lot to offer the private sector but South Africa's correctional officials are highly in tune with South Africa's prison culture. The mingling of South African experience of South African prisoners and the expertise of international private companies could lead to an improvement in both public and private prisons systems, each drawing from the other. Even though private companies would not wish to make their operating procedures known to their competitors (for commercial reasons) their willingness to make their expertise known to the public sector has enabled a cross-fertilisation to take place between the sectors, benefiting both systems (Interview 5).

The fact is that South Africa, as a developing country, needs a radical change to improve its prison system, the Department of Correctional Services has implemented certain changes and the demilitarisation of the Department has improved circumstances to an extent. But this is not radical enough and it is slow at best, a fully-functioning internationally ranked private prison operating alongside a mediocre South African public prison is the incentive and motivation necessary to speed up reform.

Currently we have about 222 prisons in South Africa but the question is not how many prisons do you build, the question is what do you do with the people that are in prison during the period they are incarcerated there. And that's where the Department of Correctional Services fails. (Interview 6).

The cross-fertilisation issue is especially applicable to South Africa as a transitional country and once the private prisons are observed perhaps South Africa will truly break away from the past. After all one of the reasons for adopting private prisons in this country in the first place was because of a visit to the private prisons overseas for our leaders to see things for themselves.

- Market Testing

Despite difficulties in comparing the cost of private and public prisons market testing, nevertheless, has been formulated as a regulated way of comparing public sector to private sector costs. It entails the monitoring of both systems to expose the price (what Harding (1998:648) calls the “true price”) at which both systems *deliver their services* (therefore only one aspect of cost-effectiveness is analysed). In the USA market testing is used by the public sector to gauge whether the private sector is able to offer value for money. In the UK and Australia market testing is used to gauge whether the private sector bids are realistic or not in comparison to the public sector. Market testing could be viewed as a pre-contractual monitoring mechanism as well as a means to gather whether cross-fertilisation has taken place, especially when the private sector also bids for a contract against the public sector. If the public sector outbids the private sector the competition between the two may have resulted in an improvement in the public sector which is indicative of some form of cross-fertilisation taking place.

In South Africa direct competition of this sort has not taken place as the public sector did not put in bids for the Bloemfontein and Louis Trichardt prisons. The Department of Correctional Services is also uncertain about whether public sector bids will take place in the future (Interview 8). Ironically only once some sort of general improvement in the public system has taken place, perhaps through cross-fertilisation from the private sector and an incentive to think commercially, can the public system begin to compete with the private sector for bids, further inciting competition (and direct competition at that) between the two systems (Interview 5). Influence from the private sector may create a worthy opponent in the form of the public sector. Public sector bids may eventually be

chosen over private sector bids in South Africa, as has been the case overseas. Thus not only would private companies compete with each other but eventually with the public sector.

- Resistance and Obstacles to Change

Unfortunately, however, the public sector may be resistant to influences from the private sector. Cross-fertilisation may be hampered by public prison personnel sentiment. After all, the private sector manner of running prisons differs in many respects to the public sector approach. In particular compare the private sector focus on rehabilitation to the public preoccupation with discipline and conformity.

The retributive beliefs and values of some staff are incompatible with the rehabilitative, reintegrative thrust underpinning programmes. This creates tension, conflict and dysfunction. (Logan, 1993 in Harding, 1997:135).

Years of Apartheid rule in South Africa must now be replaced by a reformed, modern penological approach. The Department of Correctional Services has already started this long and gradual process by creating programmes for correctional officials, by bringing in new employees and by importing international expertise. But despite these efforts problems the public prison system has to face such as severe overcrowding, prison gang violence and influence, escapes and so forth may retard and even reverse the Department's efforts. Public correctional officers may not be able to adopt reintegrative and rehabilitative values in the face of such obstacles. In other words maintaining personal values of rehabilitation and reintegration may be thwarted when faced with impossible situations where rehabilitation and reintegration are overshadowed by the simple maintenance of discipline. Improvements in the prison system from the highest echelons of power to the lowest positions in public prisons must take place in a coordinated fashion. Only by improving the prison conditions in South Africa can individual correctional officers focus not only on discipline but also on new programmes. Also by correctional officers focussing on new programmes for inmates a general improvement in conditions can take place by perhaps the general lowering of the

recidivism rate. Or, more specifically, the reduction in corrupt behaviour within the particular prison due to inmate preoccupation with new programmes and facilities. Prison conditions need to be improved and at the same time correctional officer values need to be encouraged as the two complement each other. Neglect of either may hamper effective cross-fertilisation.

It is ironic then that the APOPS projects may hamper Departmental developments. The Department recently made it known that the financing of the APOPS projects would require that certain positions in the Department be frozen. The freezing of posts could hamper unit management developments, the effective prevention of escapes and the safety of the staff and inmates due to the further increase of the ratio of staff to prisoners. These posts will be frozen for the next couple of years (Department of Correctional Services, 2000). In the short-term the introduction of private prisons in South Africa has financially strained the Department of Correctional Services even further. One can only hope that the general long-term benefits will reverse or negate negative financial side-effects.

Considering this, correctional officers may be open to change but may be discouraged by unfavourable prison conditions, also there may be correctional personnel who are purposefully resistant to changes brought about by cross-fertilisation. They may consider outside assistance as an intrusion and an affirmation of their inability to provide services the assistance was called in to provide instead. In fact, in the UK riots resulted due to public officers' resistance to reform (Harding, 1997). The same attitudes may be found in management positions, private sector reforms may be accepted by managers only tentatively or not at all. This may result in the unnecessarily slow enforcement of changes and reforms. Consider too the head offices that may hamper or slow down privatisation developments. Companies looking for business in South Africa may "generally encounter strong cultural and political resistance so that expansion into new markets is likely to be slow and fragmented" (Harding, 1997:136). In the light of Harding's statement consider how long it has taken South Africa to create contracts with only two private companies. Since 1997 negotiations have been taking place and the

commencement of the construction of the two private prisons has been consistently delayed due to continued negotiations. The government may just be doing its job thoroughly or there may be delays due to reluctant public prison personnel in various levels of power. Due to the large cultural difference between the countries involved private companies have had to use the time of negotiations to build programmes for the specific needs of the inmate population. These programmes are meant to address the specific shortcomings South African inmates may have thus anger management, drug rehabilitation and industrial skill development programmes are being and have been created. The programmes are designed to provide inmates with skills and in so doing reduce the chances of them returning to prison after release. Inmates will even receive certificates of competency to legitimize their progress (Interview 5).

Considering this it is understandable that it would take longer for foreign experts to familiarize themselves with cultural and sub-cultural elements of South African inmates' lives. The programmes for the inmates in private prisons can only be effective if designed for their needs. Therefore it is most likely that, considering the eagerness of the government at all levels of management, the government and the private companies are being thorough in their negotiations. In fact it has been pointed out that the contractual stipulations concerning rehabilitation programmes for example are very detailed and specific (Interview 5). Also, as mentioned already, the length of negotiations may be due to empowerment requirements made by the South African government that no other country has made. It is not just a question of the international companies running the show, South Africa's empowerment requirements include South African companies who are expected to perform alongside the international companies. This entails the international companies training and recruiting people from the South African community (especially from previously disadvantaged groups), as well as determining programmes and documenting procedures (Interview 5).

Cross-fertilisation is not merely the exchange of ideas and procedures between the public and private sector it is also a relationship between South Africa and the international countries advocating prison privatisation (Interview 7). The dynamics between the

countries involved is enough to ensure a mutual transfer of ideas on an individual and societal level. Individuals benefit from all countries involved due to the learning of each country's correctional developments and ways of doing things. Society too benefits not only because of the involvement of South African businesses in the privatisation projects but because of private contractors' aim to introduce an international aspect of prisons as yet not fully understood in South African society. South African communities, to a large extent, do not fully benefit from the creation of prisons in their areas (apart from rural areas, such as the Malmesbury community). But private contractors wish to increase the involvement of the community in corrections by buying the supplies for the private prisons from local suppliers, not necessarily from specifically delegated suppliers. Not only are the private contractors able to shop around for cheaper supplies, they are also able to involve the community in ways that will also boost the economy of the area in which the private prison is located. For example the Louis Trichardt prison will use a third of the total requirement for electricity in that area. The impact on surrounding communities is thus greater than the traditional closed city-like public prisons South Africans have grown used to (Interview 5). Housing for correctional officers, for example, may no longer be situated within prison grounds thus enabling officers to buy houses in the community. Community estate agents, builders and other service providers already benefit from this small development (Interview 5).

The cross-fertilisation of international ideas may alter South Africa's perspective of prisons as costly closed-off, exclusive mini-cities and perceive them as an economic benefit to society. Perhaps this small change in perception may alter the negative view of prisons (and prisoners) so many South Africans harbour. As it is now South Africans want more prisons to properly punish those who have committed crime ironically a change in attitude towards prisons may still encourage the building of more prisons for the promotion of economically depressed communities. Whatever attitude the public may have it seems that prisons, and a large number of them, are here to stay, what we do with these prisons is the hot issue.

6. CONCLUSION

The spread of privatisation has been rapid. One cannot mention a country in which privatisation has not at least been thought about. Prison privatisation alone is being implemented with the least amount of careful research and also at a rapid pace. Every year new records are broken as more and more private prisons are being built by ever-growing private companies. Florida, USA the home of Wackenhut has become a veritable Wackenhut state as more and more facilities and institutions are being delegated to this large corporation. The extent of privatisation in the US alone is so profound that South Africa's involvement seems minuscule by comparison.

The future of prison privatisation in South Africa could be disastrous or it could be enlightening considering the years of isolation South Africa was subject to in terms of international trends and policies. The leaders of South Africa have somehow joined an international race that South Africa was excluded from for many years. South Africa has adopted criminal justice policies employed by the strongest world powers. In doing so the problems inherent with these types of policies are being felt in South Africa along with the unavoidable effects of a country which has undergone a major transition. In other words not only do South African leaders have to cope with a transitional society but also with the problems faced by world-leading countries due to South Africa's adoption of these countries' methods of criminal justice. If South Africa were first to solve its transitional problems perhaps then could such trendy means of applying justice be adopted. For example, in terms of incarceration perhaps things could be different if South Africa adopted its own policies such as drastic alternatives to incarceration instead of a whole-hearted acceptance of the global ideal that "prison works" (Oppler, 1998:61). Instead it seems that by adopting First World country ideals, South Africa is merely placing a plaster on a gaping wound, a wound specific to the history of a unique country. Yet at the same time its similarities to First World countries is enough to justify these methods of social control. That is the dilemma, should South Africa strive towards a First World ideal simply because it has features of these countries, such as a democracy and a specific type of criminal justice? Or should the leaders of this country occupy

themselves with policies that are uniquely suited to this type of developing country, and face up to the similarities South Africa has to other African countries. Perhaps features of both, since South Africa is very much a part of both worlds – First World and Third World.

South Africa is adopting a risky venture on the basis that it has been ‘tested’ in First World countries. In the meantime the debates on prison privatisation continue, research on the subject still remains inconclusive even in the country with the most experience with private prisons. And consequently there are and probably never will be conclusive answers to the questions about the propriety, constitutionality and practical benefit of private prisons. Yet it is a *belief* in the benefit of private prisons (mostly financial benefit) that has resulted in its rapid spread and adoption by governments. The privatisation trend is the beginning of a new phase in criminal justice, one that is no longer characterised by a monopolised system of social order. It may just be another quick-fix solution or it could alter the means of interpreting criminal justice in many countries, including South Africa’s newly-formed and evolving criminal justice system.

But what is the conclusion to this debate? Should South Africa have private prisons or not? The answer is two-fold.

‘No’, because it is the author’s opinion that philosophical debates lean towards the rejection of privatisation in any form. The bottom line is that private companies are making money out of punishment. A lot could go wrong with the mere fact that private companies are somehow responsible for the lives of inmates but that their primary objective is not care of the inmate but rather ensuring that they adhere to a piece of paper. Monitoring is only as good as the monitors themselves and no one is infallible. The government, no matter how enthusiastic at first, must keep up with its monitoring efforts and nothing can ensure this, especially if one considers the lack of monitoring in our public prison system. And who benefits the most? Private company shareholders or prisoners themselves? Private company shareholders will benefit but one can only presume that prisoners will be the ultimate beneficiaries.

Currently only three *major*, multi-national private companies in the world (CCA, Wackenhut and Group 4 Securitas) are undertaking the globalisation of private prisons. Smaller companies exist but what would happen if they amalgamated into the major companies, (which is not a far off idea)? The three companies actually already have a great deal of sway as to which governments will hire them. Their reputations precede them and consequently more and more prisons are being delegated to them. If a particular country signed a contract with only one of these companies a monopoly would exist in that one country. The point is that private companies are getting too big too fast, a 'duo-poly' already exists in South Africa. Yet one key to the success of the privatisation of prisons is the *constant* presence of some form of competition from other companies. Allowing the private industry to grow unrestrained would simply produce a monopoly versus a monopoly. The point of privatisation was to escape from the problems associated with a monopolistic government. Yet at this rate having just a few major private companies may in the end refute the presence of competition. Only common sense prevents a country from only contracting with one private company.

But as any debate goes there are two sides to everything and the other answer to the question 'should we have private prisons?', is also 'yes'. Because for any philosophical problem we may find with private prisons it will always remain philosophical. Society today is concerned more with practice than theory, seeing is believing and that is the bottom line. Private prisons look better mainly because they are better. A fundamental question asked is: 'what can private prisons do for us?' The answers to this question are what make private prisons so attractive. Also private prisons may be even more justifiable in this country for the mere fact that our prisons are in such a bad state. And all the theoretical problems with private prisons may remain theoretical, it is not necessarily the case that the problems associated with private prisons will actually happen. Once again it boils down to the integrity of the private company leaders and government officials. But there are people who do care about prisoners and who are concerned about fulfilling a contract to the best of their abilities. Yes, the profit factor is always an issue but it is not the main issue.

As one person said, private companies “can’t do a worse job than the government” (Interview 7). There is not a great deal to lose by contracting with for-profit companies as long as the checks and balances are in place and by the looks of things this is the case in South Africa so far. It is the mere fact that the public is not concerned with matters of incarceration that has forced the government to try and do more for less. Blaming the government for any failure in privatisation decisions would only reflect on the public’s lack of involvement in this area of criminal justice. As a developing country, it seems South Africa can only gain from some type of improvement in its system, if only as a result of some form of cross-fertilisation with the private prison industry.

University of Cape Town

Addendum:**Interviews Conducted:**

Interview 1; interview with Henk Bruyn, former Commissioner of Correctional Services and currently Chief Executive Officer of Inmate Rehabilitation Services.

Interview 2; interview with Charl Cilliers, penologist and Professor at the Criminology Department at the University of South Africa.

Interview 3; interview with Martin Schönreich, Senior Researcher at the Institute for Security Studies.

Interview 4; interview with Amanda Dissel, attorney and researcher for the Centre for the Study of Violence and Reconciliation.

Interview 5; interview with Don Keens, Director of SA Custodial Services.

Interview 6; interview with Moses Mpiliso, SAPOHR.

Interview 7; interview with Chris Giffard, independent researcher affiliated with the Institute of Criminology, University of Cape Town.

Interview 8; interview (by means of electronic mail) with Pieter Jordaan, Director of APOPS/POPS, Department of Correctional Services.

Interview 9; interview (by means of electronic mail) with Charles Erickson, Managing Director of Group 4 Correction Services SA.

Interview 10; interview with Jody Kollapen, Commissioner of the South African Human Rights Commission.

References:

- Africa Watch Prison Project (1994). *Prison Conditions in South Africa*. New York: Human Rights Watch.
- Barnekov, Timothy K. and Jeffrey A. Raffel (1990). 'Public Management of Privatization.' *Public Productivity and Management Review*. Winter 14(2): 135-152.
- Becker, Craig (1988). 'With Whose Hands: Privatization, Public Employment, and Democracy.' *Yale Law and Policy Review* 6:88-108.
- Bennett, James T. and M. Johnson (1981). *Better Government at Half the Price: Private Production of Public Services*. Ottawa, Illinois: Caroline House Publishers.
- Bennett, James T. and Thomas J. DiLorenzo (1983). 'Public Employee Unions and the Privatization of Public Services.' *Journal of Labour Research*, vol. iv, no. 1:33-45.
- ✓ Beyens, K. and Snacken, S. (1996). Prison Privatization: An International Perspective. In Matthews, R. and Francis, P. (Eds.) *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment*. London: Macmillan Press.
- Borna, Shaheen (1986). 'Free Enterprise Goes to Prison.' *The British Journal of Criminology*, vol. 26, no. 4:321-334.
- Buchanan, Bob (1994). Privatisation and the Juvenile Sector. In Biles, David and Julia Vernon (Eds.) *Private Sector and Community Involvement in the Criminal Justice System: AIC Conference Proceedings*. Canberra: Australian Institute of Criminology.
- Camp, Camille and George Camp (1985). 'Correctional Privatization in Perspective.' *The Prison Journal* 65:14-31.
- Cavadino, Michael and James Dignan (1997). *The Penal System: An Introduction* (2nd ed). London: Sage Publications.
- Chabal, Patrick and Jean-Pascal Dalaz (1999). *Africa Works: Disorder as Political Instrument*. Oxford: James Currey.
- Concor Press Release, 22 January 1999.
- Constitution of the Republic of South Africa, No. 108 of 1996.
- Corder, Hugh and Van Zyl Smit, Dirk (1998). 'Privatised Prisons and the Constitution.' *SA Journal of Criminal Justice*, 11:475-490.
- Correctional Services Act, No. 111 of 1998.

- Correctional Services Amendment Act, No. 102 of 1997.
- Correctional Services Amendment Bill (1997).
- Correctional Services Bill (1998).
- Cox, Norman R. and William E. Osterhoff (1993). *The Public-Private Partnership: A Challenge and an Opportunity for Corrections*. In Bowman, Gary W., Simon, Hakim, and Paul Sedenstat (eds) *Privatizing Correctional Institutions*. New Brunswick, New Jersey: Transaction Publishers.
- Department of Correctional Services (1997). *In Review*. Cape Town: The Government Printer.
- Department of Correctional Services (1998). *Annual Report*. Cape Town: The Government Printer.
- Department of Correctional Services (1999). *Into the New Millennium and Beyond*. Pretoria: Government Printer.
- Department of Correctional Services (2000). Budget Vote, 12 May.
- Department of Public Works (1999). Budget Vote, 10 March.
- Dickson, Brian (1994). *The Challenge of Change*. In Biles, David and Julia Vernon (eds) *Private Sector and Community Involvement in the Criminal Justice System: AIC Conference Proceedings*. Canberra: Australian Institute of Criminology.
- ✓ DiIulio, John J. Jr. (1990). *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*. In McDonald, Douglas C. (ed.) *Private Prisons and the Public Interest*. New Jersey: Rutgers University Press.
- Dissel, Amanda (1997). *The Passing-Out Parade: Demilitarisation of the Correctional Services*. *Acta Criminologica*, 10(1): 17-27.
- Dünker, Frieder (1999). *Germany*. In Van Zyl Smit, Dirk and Frieder Dünkel (Eds.) *Prison Labour: Salvation or Slavery? International Perspective*. Aldershot: Ashgate.
- Fax Transmission from the Department of Correctional Services, March 16, 2000.
- ✓ Fenton, Joseph (1985). 'A Private Alternative to Public Prisons.' *The Prison Journal* 65:42-47.
- Flavell, Ralph (1994). *Private Sector and Community Involvement in the Criminal Justice System*. In Biles, David and Julia Vernon (eds) *Private Sector and Community*

Involvement in the Criminal Justice System: AIC Conference Proceedings. Canberra: Australian Institute of Criminology.

✓ Foley-Jones, Christopher (1994). Can the Private Sector do it Better in Corrections? In Biles, David and Julia Vernon (eds) *Private Sector and Community Involvement in the Criminal Justice System: AIC Conference Proceedings.* Canberra: Australian Institute of Criminology.

Giffard, Chris (1997). *Out of Step? The Transformation Process in the South African Department of Correctional Services.* Masters Dissertation (Criminal Justice Studies).

Giffard, Chris (1997). *Privatising Prisons in South Africa.* Draft Paper.

Giffard, Chris (1997). *South African Corrections: Privatisation Fact File.* Unpublished Work.

Giffard, Chris (1999). Privatising Prisons in South Africa. In Maharaj, Gitanjali (Ed.) *Between Unity and Diversity: Essays on Nation-Building in Post-Apartheid South Africa.* Idasa: David Philip Publishers.

Greene, Judith (1999). *Privatization of Correctional Services: Critical Issues for State Policymakers.* Unpublished Paper, the Institute on Criminal Justice, University of Minnesota Law School.

Hanke, Steve H. (1985). The Theory of Privatization. In Butler, Stuart M. (ed.) *The Privatization Option: A Strategy to Shrink the Size of Government.* Washington D.C.: Heritage Foundation.

Hansard. Debates of the National Assembly of 1995. Republic of South Africa. Cape Town: The Government Printer.

Hansard. Debates of the National Assembly of 1996. Republic of South Africa. Cape Town: The Government Printer.

Hansard. Debates of the National Assembly of 1997. Republic of South Africa. Cape Town: The Government Printer.

Hansard. Debates of the National Assembly of 1998. Republic of South Africa. Cape Town: The Government Printer.

Harding, Richard (1997). *Private Prisons and Public Accountability.* Buckingham: Open University Press.

Harding, Richard W. (1998). Private Prisons. In Tonry, Michael (ed) *The Handbook of Crime and Punishment*. New York: Oxford University Press.

Human Rights Watch (1998). *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*. New York: Human Rights Watch.

Immarigeon, Russ (1985). 'Private Prisons, Private Programs, and Their Implications for Reducing Reliance on Imprisonment in the United States.' *The Prison Journal* 65:60-74.

International Correctional and Prisons Association Conference, 27-31 August 2000, President Hotel, Cape Town.

Jacobs, James B. (1999). Prison Labour: A Tale of Two Penologies. In Van Zyl Smit, Dirk and Frieder Dünkler (Eds.) *Prison Labour: Salvation or Slavery? International Perspectives*. Aldershot: Ashgate.

James, Adrian L., Bottomley, A. Keith, Liebling, Alison and Emma Clare (1997). *Privatizing Prisons: Rhetoric and Reality*. London: Sage Publications.

Jensen, Steffen (1998). *Private Security vs. Public Security: The Reach of the State and the Privatization of Space*. Unpublished working paper.

Joel, Dana C. (1993). The Privatization of Secure Adult Prisons: Issues and Evidence. In Bowman, Gary W., Simon, Hakim, and Paul Sedenstat (eds) *Privatizing Correctional Institutions*. New Brunswick, New Jersey: Transaction Publishers.

Kalinich, Dave and Willie Clack (1998). Transformation: From Apartheid to a Democracy – South African Corrections. *Acta Criminologica*, Vol. 11(2):64-71.

Keating, Michael, Jr. (1990). Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails. In McDonald (Ed.) *Private Prisons and the Public Interest*. New Jersey: Rutgers University Press.

Kollapen, Jody (1995). Prisoners' Rights under the Interim Constitution. *Acta Criminologica*, Vol. 8(2):74-78.

Leonard, Herman B. (1990). Private Time: The Political Economy of Private Prison Finance. In McDonald, Douglas C. (ed.) *Private Prisons and the Public Interest*. New Jersey: Rutgers University Press.

Lilly, J. Robert and Paul Knepper (1992). 'An International Perspective on the Privatization of Corrections.' *The Howard Journal*, 31(3):174-91.

- Logan, Charles H. (1990). *Private Prisons: Cons and Pros*. New York: Oxford University Press.
- Luyt, Willem (1999). 'A Perspective on the Future of Prisons in the New South Africa.' *South African Journal of Criminal Justice*, Vol. 12, No. 2:223-228.
- Mail & Guardian, February 10, 1997.
- Mail & Guardian, March 24, 1998.
- Matthews, Roger (1989). Privatization in Perspective. In Matthews, R. (ed.) *Privatizing Criminal Justice*. London: Sage Publications.
- McCrie, Robert D. (1993) Private Correction: The Delicate Balance. In Bowman, Gary W., Simon, Hakim, and Paul Sedenstat (eds) *Privatizing Correctional Institutions*. New Brunswick, New Jersey: Transaction Publishers.
- McDonald, Douglas C. (1990). When Government Fails: Going Private as a Last Resort. In McDonald, Douglas C. (ed.) *Private Prisons and the Public Interest*. New Jersey: Rutgers University Press.
- McDonald, Douglas C. (1996). Public Imprisonment by Private Means: The Re-emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia. In King, Roy D. and Mike Maguire (Eds.) *Prisons in Context*. Oxford: Clarendon Press.
- McDonald, Douglas, Fournier, Elizabeth, Russell-Einhorn, Malcolm and Stephen Crawford (1998). *Private Prisons in the United States: An Assessment of Current Practice*. Massachusetts: ABT Associates Inc.
- Ministry of Correctional Services (1997). Parliamentary Media Briefing, 13 February.
- Ministry of Correctional Services (1997). Parliamentary Media Briefing, 11 September.
- Mohajane, Joseph (1999). DCS and DPW with Ikhwezi. *Nexus*, August 1999:12-13.
- Nina, Daniel (1996). Dr. Sipo Mzimela: A Minister with a Vision? *Imbizo*, No. 2:20-25.
- ✓ Nina, Daniel and Stuart Russell (1997). 'Policing "By Any Means Necessary": Reflections on Privatisation, Human Rights and Police Issues – Considerations for Australia and South Africa.' *Australian Journal of Human Rights*, vol. 3, no. 2:157-182.
- Oppler, Sarah (1998). Correcting Corrections: Prospects for South Africa's Prisons. *ISS Monograph Series*, 29, Institute for Security Studies, Halfway House, October 1998.

- Ramafoko, Humphrey (1998). DCS and Private Sector in a Joint Venture. *Nexus*, March 1998:7.
- Rutherford, Andrew (1990). British Penal Policy and the Idea of Prison Privatization. In McDonald, Douglas C. (ed) *Private Prisons and the Public Interest*. New Brunswick, New Jersey: Rutgers University Press.
- Ryan, Mick (1994). Some Liberal and Radical Responses to Privatizing the Penal System in Britain. In Biles, David and Julia Vernon (eds) *Private Sector and Community Involvement in the Criminal Justice System: AIC Conference Proceedings*. Canberra: Australian Institute of Criminology.
- Ryan, Mick and Tony Ward (1989). *Privatization and the Penal System: The American Experience and the Debate in Britain*. Milton Keynes: Open University Press.
- Savas, E.S. (1984). The Efficiency of the Private Sector. In Butler, Stuart M. (ed.) *The Privatization Option: A Strategy to Shrink the Size of Government*. Washington D.C.: Heritage Foundation.
- Schichor, D. (1995). *Punishment for Profit: Private Prisons, Public Concerns*. California: Sage Publications.
- Schlosser, Eric (1998). 'The Prison-Industrial Complex.' *The Atlantic Monthly*, vol. 282, no. 6:51-77.
- Schönteich, Martin (1999). *Unshackling the Crime Fighters: Increasing Private Sector Involvement in South Africa's Criminal Justice System*. Johannesburg: South African Institute of Race Relations.
- Shaw, S (1992). 'The Short History of Prison Privatisation.' *Prison Service Journal* 87:30-2.
- The South African Department of Correctional Services (SADCS) / Her Majesty's Prison Service (HMPS) Prisons Development Programme*, UK Visit 23 August – 3 September 1999; South African Component of Development Programme, March 2000.
- Van Zyl Smit, Dirk (1999). South Africa. In Van Zyl Smit, Dirk and Frieder Dünkel (Eds.) *Prison Labour: Salvation or Slavery? International Perspectives*. Aldershot: Ashgate.