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**THE RIGHTS OF PRISONERS UNDER THE SOUTH
AFRICAN CONSTITUTION: COMPATIBILITY WITH
INTERNATIONAL NORMS AND STANDARDS**

JOHN C. MUBANGIZI

2001

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**THE RIGHTS OF PRISONERS UNDER THE SOUTH AFRICAN
CONSTITUTION: COMPATIBILITY WITH INTERNATIONAL
NORMS AND STANDARDS**

by

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**PROMOTERS : PROFESSOR S NADASEN
PROFESSOR GE DEVENISH**

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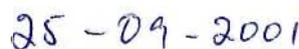
DEDICATION

This thesis is dedicated to my wife Betty, and our children Anita, Gilbert and Veronica.

DECLARATION

I, John Cantius Mubangizi, registration number 9904884, hereby declare that the thesis entitled '**The Rights of Prisoners under the South African Constitution: Compatibility with International Norms and Standards**' is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other University.


SIGNATURE


DATE

ACKNOWLEDGMENTS

The idea of doing research on prisoners' rights was hatched in the Eastern Cape where I lived for more than ten years. One windy and cold wintry evening when my family and I were sitting around a heater and I was feeling homesick, remembering my mother six thousand kilometers away, I suddenly recalled something she had told me more than three decades ago. "My son" she had said, "in life there are three places and situations a real man may not avoid getting into, namely; a hospital, a courthouse and a prison." I remembered having been to hospital a few times. I also remembered having been to court on a number of occasions, fortunately as an officer of the court and not as an accused. I couldn't recollect having been to prison either on the right or the wrong side of the law. I thought it was about time I took a journey into this enigma of a place over whose fence nobody dare peep and inside whose walls many fear to tread. It is therefore only natural that I should begin by thanking my parents, not only for sowing the seed from which I was hatched, but also for sowing the seed from which this thesis was conceived. In the same breath I wish to express my gratitude to my mother-in-law, Mrs Juliana Munderi, for her unfailing encouragement and support all along the journey.

Talking about journeys, one of my promoters once said to me; 'A doctorate is a long, slow, and lonely journey. Be prepared to face it with strength, determination and resolve.' Long and slow it may be, but lonely mine certainly hasn't been. Throughout this difficult journey I have had the privilege and honour of being guided, accompanied and supported by wonderful people without whose selflessness this project would never have seen the light of day. I therefore wish to thank my promoters: Professors Sagie Nadasen and George Devenish for their unfailing support and guidance. Indeed I have been privileged to have had some of the best legal academic brains in the country as my supervisors.

My sincere thanks and gratitude go to my colleagues and friends namely, Mr Andreas O'Shea, Dr Edith Mneney, Professor Managay Reddi, Mr David Hulme, Miss Annette Singh and Mrs K Shave. Their constant encouragement and support was always a source of inspiration and motivation. In particular, I cannot forget to mention how Professor James Mowatt's daily dose of 'How's the doctorate going?' spurred me on and on. Then there are those who assisted me in other ways: Mrs V Riley of the Department of Correctional Services, Pretoria, Mrs Schlebusch of Johannesburg prison, Mr T M Baker of Westville Prison, Mr Eddie Johnson of Pollsmoor and Mr A K Botha of St Alban's. I thank them for opening the prison doors to me and assisting me in obtaining vital information on which the findings of the research are based. I also wish to thank Judge J. Fagan of the Judicial Inspectorate, Mr Golden Miles Bhudu of the South African Prisons' Organisation for Human Rights and Mrs Jessica McKay of the Human Rights Committee (Durban) for sharing not only information but also their thoughts with me. The assistance of Mr Edgar Tabaro in getting information from Uganda is acknowledged.

It would be ungrateful of me if I didn't acknowledge the University of Durban~Westville for affording me the opportunity and the challenge, and for making available the necessary funds and facilities to undertake this study. In that regard, Mr Manny Dorsamy of the Department of Research Administration deserves special mention. Another person who deserves special mention is Mrs Kabitha Maharaj, our secretary. Her dedication and selflessness in typing the manuscript deserves a very special word of thanks. I also thank Mrs Carol Hargreaves of the Department of Statistics for her assistance with statistical data analysis.

Last but not least my heartfelt gratitude to my wonderful wife, an academic in her own right, for having faith in me and keeping the home fires burning while I was burning the midnight oil. This, as they say in the Oscars, is for her and our children.

SUMMARY

Prisoners' rights are human rights first. Any investigation of such rights has to have regard to that fact. In order to clearly understand the context within which prisoners' rights are provided for and protected or abused, a holistic approach is necessary. Accordingly, chapter one deals with introductory and historical perspectives. The magnitude of the problem under investigation is highlighted, the objectives of the study are outlined and the hypothesis is stated in these terms:

The rights of prisoners under the South African Constitution are protected, observed and compare well with international norms and standards.

A brief indication of the methodology of research is given and a literature survey undertaken. The chapter also deals with definitions and classifications wherein prisons and prisoners are defined and classified. An overview of the various justifications (purposes) of imprisonment is given and the chapter concludes with a survey of the origins and history of prisons and prisoners' rights.

As with all other human rights, the protection of prisoners' rights takes place at two levels: the domestic and the international level. A study of prisoners' constitutional rights necessitates a basic understanding of certain aspects of international human rights law. Chapter two begins with an overview of international protection of human rights and proceeds to explain how international human rights norms can be enforced in domestic law. The larger part of the chapter is dedicated to the law governing international human rights protection for prisoners. The instruments providing for such protection are outlined and discussed. The application and interpretation of such instruments are also examined. It is then concluded that, in spite of the problems inherent in the enforcement of human rights standards through international mechanisms, international law plays an important role in the protection of

prisoners' rights.

Chapter three provides a detailed discussion of the rights of prisoners as provided for under section 35 of the Constitution of the Republic of South Africa (Act 108 of 1996). The discussion is enhanced and reinforced with case law illustrating the approach taken by the courts in interpreting and applying the said rights. Other constitutional rights relevant to prisoners are also discussed together with the pertinent case law. It is then concluded that the introduction of a Bill of Rights in the Constitution has brought a new dimension and challenge to the protection and realisation of prisoners' rights in South Africa. It is also concluded that the courts, especially the Constitutional Court, have risen to the challenge in attempting to give some effect and meaning to the rights of prisoners brought about by the new constitutional order.

In an effort to place South Africa in a regional context, chapter four adopts a comparative approach. The rights of prisoners in various African countries are discussed. The countries include Zimbabwe, Zambia, Namibia and Uganda. Prisoners' rights under the constitutions of each country are first outlined. This is followed by a discussion of the approaches taken by the courts in interpreting those rights and then the views of observers regarding the protection of prisoners' rights in those countries are outlined. The conclusion is that at least on paper and in terms of judicial practice, the rights of prisoners in South Africa enjoy more constitutional protection than in other African countries.

The focus of chapter five is on the investigation regarding the extent to which prisoners' rights in South Africa are implemented and protected in actual practice. The chapter contains an analysis of the statistical data obtained through field study based on prisoners' perceptions of the realization of their constitutional rights. In analysing the data, statistical illustrations are used. Statistical methods are also used in testing the hypothesis.

The main conclusion of the study is that the constitutional rights of prisoners in South Africa are not sufficiently protected and implemented. This and other conclusions and recommendations are set out in chapter six. The thrust of the conclusions and recommendations is that something has to be done regarding police brutality, prison conditions and overcrowding, juvenile offenders, mentally ill prisoners, ratification and incorporation of relevant international human rights instruments and access to courts. Suggestions on how to address these issues are made. Other recommendations include abolishing the privilege system in prisons, increasing the role of NGO's, provision of education and public awareness, privatization of prisons and legislative intervention.

Short Title: The constitutional rights of prisoners in South Africa.

Key Terms:

Fundamental human rights

Prisoners' constitutional rights

Penology

International human rights law

Detention / Imprisonment

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CHAPTER ONE

INTRODUCTORY AND HISTORICAL PERSPECTIVES

1.1 INTRODUCTION

Over the years there has been profound disregard for human rights in South African prisons. Before 1994 this was understandable because of the general lack of a human rights culture due to the apartheid system. Before 1993 the South African Constitutional framework did not contain a Bill of Rights. Fundamental human rights were first introduced in the country's constitutional history by the Interim Constitution.¹ In that Constitution provision was not only made for the protection of the rights of all South Africans, but protection was guaranteed for specific rights of prisoners.² This development was carried over to the 1996 Constitution of the Republic.

Apart from the lack of a general human rights culture, it could be argued that in the days of apartheid imprisonment was used as a vindictive means of dealing with the opponents of the system. Indeed, incarceration played an important part in what some have referred to as 'regime maintenance' in South Africa.³ Coupled with the fact that South Africa is a party to a host of international instruments providing for the protection of prisoners' rights, the demise of apartheid and the introduction of a human rights culture in the constitution would have been expected to change the human rights situation in prisoners' favour. Some observers, however, say this is not the case.

¹ 200 of 1993.

² Section 25 of the Interim Constitution.

³ See Van Zyl Smit and Dunkel in *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions*, (1990) at 538.

A 1998 newspaper report⁴ estimated that one third of the then 145,000 people in South African prisons were unsentenced prisoners who would be awaiting trial for an average of five months before a verdict was given. The report said:

'Prisoners are held for as long as two years before coming to trial - in contravention of the South African Constitution which stresses accused must be brought to trial without unreasonable delay. In one case a woman accused has been in custody awaiting trial for five years.'⁵

The report further pointed out that there were 22 879 children and juveniles (then) in South African prisons and at least 1 230 were aged between 7 and 16 years old. Other issues raised by the report included overcrowding in prisons, shortage of correctional services personnel and the inhuman conditions in the prisons. A year later a different newspaper⁶ reported that overcrowding in South African prisons had reached nightmarish proportions. 'So acute has it become that to incarcerate an individual under such conditions comes close to infringing his basic rights and the prospect of rehabilitation close to zero',⁷ said the paper. A few months later, the same newspaper reported that the shocking levels of overcrowding in Durban prisons had been roundly condemned by an influential church organisation.⁸ Prisoners were said to be living in a state of 'depression and despair'.⁹ Referring to Durban's Westville Prison, Mr Colin Bomas of the Mathew 25 Prison Ministry was quoted as saying:

'There is terrible overcrowding in the prison. The overcrowding ... is not so much because of an increase in crime, but because of a slow-down in the judicial system. There seems to be a bottleneck in the

⁴ *City Press*, 19 April 1998. The report was entitled 'One third of our prison inmates are awaiting trial'.

⁵ *Ibid.*

⁶ *Daily News*, 8 March 1999. The report was entitled 'Nightmare in our Prisons'.

⁷ *Ibid.*

⁸ *Daily News*, 30 June 1999. The report was entitled 'Outcry over shocking jail conditions'.

⁹ *Ibid.*

courts and some prisoners have been awaiting trial for two to three years.¹⁰

A year later, a delegation of parliamentarians and prison stake-holders visiting Westville Prison concluded that chronic overcrowding in South African prisons was forcing the country's nearly 65 000 awaiting-trial prisoners to live in inhuman conditions, sometimes for as long as four years.¹¹ The stake-holders, including Parliament's Portfolio Committee for Correctional Services and the South African Prisoners' Organisation for Human Rights (SAPOHR), who were visiting the prison after allegations of ill-treatment and torture of inmates, unanimously agreed that the situation was appalling. The prison was found to have more than 12 000 inmates, a 211% occupancy rate. In one instance the visitors found 65 awaiting-trial prisoners crammed in one cell.¹²

In the Budget Vote Speech of 9 March 1999, the Minister of Correctional Services told the National Assembly that overcrowding and lack of space are among the most pressing challenges the Department of Correctional Services has to face.¹³ The Minister also pointed out that at the time South African prisons had a total of 146 000 prisoners in custody as well as 56,000 offenders on probation. There were 236 prisons countrywide for which the approved accommodation available was for 99 295 prisoners. Since 1994 only nine new prisons had been opened with a total accommodation capacity of 7 000 inmates. Another two prisons (at Kokstad and Empangeni) were nearing completion.¹⁴ Building had also just started on a new high level maximum security prison in Bloemfontein.¹⁵

10

Ibid.

11

Daily News, 01 June 2000, The report was entitled 'Chronic overcrowding is "main problem" in prisons'.

12

Ibid.

13

Budget Vote Speech to the National Assembly by Minister of Correction Services, Mr B.M. Skosana MP, 9 March 1999.

14

Ibid.

15

According to SABC TV News of 26 May 2000.

The following tables will illustrate how the prison population in South Africa grew from 1995 to 1999:

Table 1: Daily average of male prisoners

	SENTENCED	UNSENTENCED	TOTAL
1995	83 466	25 120	108 586
1996	89 475	29 865	119 340
1997	98 396	38 496	136 892
1998	90 137	50 013	140 150
1999	102 802	53 667	156 469

Source: National Department of Correctional Services, Pretoria

Table 2: Daily average of female prisoners

	SENTENCED	UNSENTENCED	TOTAL
1995	1 904	650	2 554
1996	2 135	844	2 979
1997	2 467	1 105	3 572
1998	2 233	1 192	3 425
1999	2 654	1 211	3 865

Source: National Department of Correctional Services, Pretoria

Table 3: Daily average of male children/juveniles in custody

	SENTENCED	UNSENTENCED	TOTAL
1995	9 229	5 301	14 530
1996	10 846	8 232	19 078
1997	12 570	8 930	21 503
1998	10 941	12 916	23 857
1999	12 441	13 882	26 323

Source: National Department of Correctional Services, Pretoria

Table 4: Daily average of female children/juveniles in custody

	SENTENCED	UNSENTENCED	TOTAL
1995	153	71	224
1996	207	162	369
1997	197	202	399
1998	197	204	401
1999	224	248	472

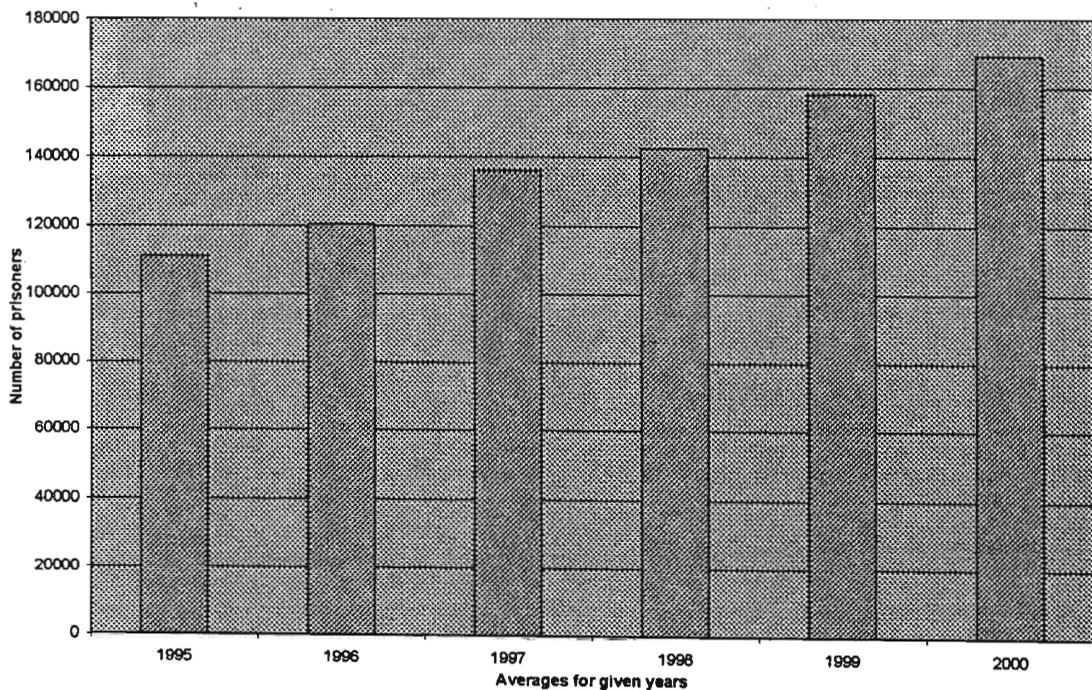
Source: National Department of Correctional Services, Pretoria

N.B. All the above figures represent the daily average of prisoners in custody for December of each year.

The above statistics clearly indicate that there has been a steady increase in the prison population of South Africa. This applies to both sentenced

and unsentenced prisoners. For purposes of comparison, in 1988 there were 110 481 prisoners in South African prisons, of whom 90 485 were sentenced prisoners.¹⁶ According to these figures, in June 1988 306 persons per 100 000 of the officially estimated population of South Africa were in custody as sentenced prisoners. Including unsentenced prisoners the total ratio at the time was 373 per 100 000.¹⁷ Today the official prison population is estimated at 172,000 sentenced and unsentenced prisoners, having increased dramatically over the last few years. This would then indicate that presently the ratio is about 397 prisoners per 100 000 persons.¹⁸ These figures can clearly be supported by the following graph which shows prisoners in South African prisons (all races, all genders, all ages, all categories of crimes and all sentence groups) over a five to six year periods.

Fig 1: PRISONERS IN CUSTODY (1995 – 2000)



¹⁶ See Van Zyl Smit and Dunkel 537.

¹⁷ These figures assume that the official population estimate of 29 617 000 for June 1988 was correct and they exclude the former TBVC territories. See also Van Zyl Smit and Dunkel at 537.

¹⁸ This calculation is based on the 2000 national population estimate of 43 291 441 obtained from Statistics, South Africa and prison population estimates of 172 000 of both sentenced and unsentenced prisoners, obtained from the Department of Correctional Services.

Table 5: Prisoners in custody (provincial estimates)

Average for periods	Eastern Cape	Free State	Gauteng	Kwa Zulu Natal	Mpumalanga	North West	Northern Cape	Northern Province	Western Cape	All RSA
Average for 1995	12452	11 170	28 393	16 554	7 977	7 541	3 443	2 672	20 889	111 090
Average for 1996	14 207	11 528	31 308	17 879	8 460	8 592	3 730	3 334	21 356	120 394
Average for 1997	16 349	12 601	35 895	20 591	9 408	9 902	4 607	3 896	22 817	136 066
Average for 1998	16 803	12 533	39 100	21 849	9 242	10 397	5 020	4 234	23 247	142 425
Average for 1999	18 415	13 252	42 118	25 035	9 744	11 054	5 841	4 696	25 875	156 031
Average for 2000	19 915	13 963	45 484	28 144	10 315	11 907	6 803	4 661	27 932	169 124

Source: National Department of Correctional Services

The table above shows the regional/provincial breakdown of the prison population (averages) for the years 1995-2000. The figures represent all ages, all genders, all races, all sentence groups (sentenced and unsentenced).

From the above figures the following is the regional breakdown of the prison population per 100 000 persons.¹⁹

Eastern Cape Province	277
Free State Province	489
Gauteng Province	539
KwaZulu Natal Province	281
Mpumulanga Province	325
North West Province	311
Northern Cape Province	671
Northern Province	88
Western Cape Province	621

It can be seen from the above prison population density figures that the more industrialized and cosmopolitan provinces have higher prison population densities.

It is not as if overcrowding and unreasonable delays in bringing accused persons to trial are the only problems. On 22 March 2000 a newspaper reported that prisoners being held in Khayelitsha's police cells in Cape Town had to share a cell with a dead man for three days before the body was removed.²⁰ 'Prisoners locked in the cell lived and ate their meals alongside the body of Mr Lungisa Mauki which lay there from Thursday to

¹⁹ The calculation is based on the provincial population estimates obtained from statistics South Africa, and prison population estimates obtained from the Department of Correctional Services.

²⁰ *Daily News*, 22 March 2000. The article was entitled 'Prisoners share cell with corpse'.

Saturday before it was removed',²¹ said the report. The body had apparently been placed in the cell by the police in the full knowledge that there were other occupants.

In a hard-hitting editorial the following day the editor²² of the newspaper said, among other things:

'This intolerable breakdown in moral rectitude shows not only a complete disrespect for the dead, but is exacerbated by an equal disregard for the sensitivities of the prisoners. And no matter what the policemen involved believe, even prisoners have a right to be treated like human beings.'²³

The matters noted above and others that will unfold as the research progresses are contemporary human rights issues that affect the livelihood of prisoners. Imprisonment is a key element in the system of social control, not only in South Africa, but in many other countries. South Africa is presently going through a period of transformation. So too are the country's institutional structures. There is need to keep pace with such developments. Hence the necessity, the interest and the desire for this study.

Another important reason for this study is the realization of the extent of society's ignorance of what happens in prisons. Society tends to think that by committing crimes prisoners have forfeited their fundamental rights and what happens to them in prisons is what they deserve and no one should care. The general public has no interest in what happens in prisons. According to the Minister of Correctional Services, imprisonment has long been viewed by the state as both a symbolic and functional

21

Ibid.

22

Then Mr Kaizer Nyatsumba.

23

Editorial, *Daily News*, 23 March 2000 entitled 'Respecting the dead'.

answer to the crisis of control which exists outside the prison wall.²⁴ The Minister added:

'Similarly, the public's general attitude and occasional interest in prisons is one of least concern, usually created by a sensational treatment of the subject in the press; otherwise, it is shockingly ignorant of the whole matter.'²⁵

This study attempts to look over the prison wall. It does so with objectivity and comparison. The findings may not necessarily change the status quo, but will at least shed more light on an institution that society would love to ignore.

1.2 OBJECTIVES, HYPOTHESIS AND STATEMENT OF THE PROBLEM

Following from the above public concerns, the objectives of the study can therefore be stated as follows:

- (1) to investigate the extent to which provision is made under South African law for the protection of the rights of prisoners;**
- (2) to investigate the extent of the reality to which the rights of prisoners in South Africa are realised and enjoyed (the discrepancies between the law and the practice);**
- (3) to determine how South Africa compares with international norms in relation to the promotion and protection of the rights of prisoners;**
- (4) to determine how South Africa compares with some African (mainly neighbouring) countries in the promotion, protection, realisation and enjoyment of prisoners' rights;**

²⁴

See Minister's Budget Vote Speech to Parliament, 9 May 2000.

²⁵

Ibid.

- (5) to determine whether there is need for policy and/or legislative intervention to address any shortcomings in the protection of prisoners rights in this country.

The Research problem can be stated as follows:

Are the constitutional rights of prisoners in South Africa observed and realised as required by and compared to international norms and standards?

Stated as a hypothesis this would translate into:

The rights of prisoners under the South African Constitution are protected, observed and compare well with international norms and standards.

1.3 METHODOLOGY

For obvious reasons the study was mainly based on library research. However, no single method of approach can be adequate in academic research. The researcher therefore also undertook some empirical research, which included interviews and questionnaires presented to prisoners and prison authorities. In the main, this was intended to determine the discrepancies, if any, between law and practice or theory and reality. It was also intended to prove or disprove the hypothesis as stated above. In so doing the quantitative method was mainly adopted. Details of this approach will be elaborated further below.²⁶

²⁶ See Chapter Five (5.1) below.

1.4 LITERATURE SURVEY

Prisons and prisoners' rights are areas of overwhelming social and legal interest. Accordingly, substantial research has obviously been conducted mainly in the general field of prisons. This study however will identify a lacuna in the said research and focus thereon. The South African Constitution is only a few years old. The said lacuna will be identified in that context.

To begin with Dirk van Zyl Smit and Frieder Dunkel compiled a collection of contributions from some participants of the Buchenbach Seminar, held in September 1989 at Buchenbach near Freiburg in the Federal Republic of Germany.²⁷ The text deals not only with prisoners' rights but also the broad question of the significance of incarceration in the general system of social control and gives an overview of the prison systems of a number of countries. In addition, the book deals with the philosophical approach and legal framework defining the various prison systems. It also addresses specific problems of the prison systems including;

- (i) complaints procedures and the judicial control of the prison administration
- (ii) the political control of the prison system
- (iii) the medical treatment of prisoners
- (iv) problems relating to prison labour
- (v) disciplinary and security measures
- (vi) visits and other contacts with the outside world, etc.

Also addressed in the book are the conditions of detention of specific classes of prisoners including women, juveniles, ethnic minorities and political detainees.

²⁷ Van Zyl Smit and Dunkel, (note 3 above).

The chapter on South Africa, written by Dirk van Zyl Smit follows the general trend outlined above. It has to be remembered that the book was written before the new constitutional dispensation. South Africa did not have a Bill of Rights at the time and that explains why specific violations of prisoners' rights are not dealt with. A lot of water has passed under the bridge since, bringing with it a Bill of Rights that has had a significant impact on imprisonment in South Africa. So too has the new Correctional Services Act.²⁸

In another benchmark literary piece of work, Dirk van Zyl Smit expounds the law and the practice relating to prisons as it was by 1992.²⁹ Smit begins with the historical and sociological aspects of imprisonment and describes the background and context from which the law relating to prisons came. Emphasis is laid not only on the unique features of the South African prison system but also its similarities to prison systems in other countries. The book defines prison law and analyses systematically how prison law relates to the more traditional subdivisions of legal thought. From this analysis emerges a picture of the rights and duties of both prisoners and prison authorities. The purposes of imprisonment are also dealt with, so too is the structure of the South African prison system. Van Zyl Smit concludes his book with two chapters dealing with specialised aspects of prison law, namely prison offences and the release of sentenced prisoners.

Although Van Zyl Smit's book deals with the rights of prisoners, it does so against a background of a general absence of a human rights culture in South Africa at the time. With the new constitutional dispensation and a Bill of Rights not only for all South Africans but also for prisoners, Van Zyl Smit's book is now rather irrelevant and outdated, at least as far as the rights of prisoners are concerned.

²⁸ 111 of 1998.

²⁹ Van Zyl Smit, *South African Prison Law and Practice*, (1992).

The closest literary attempt towards the rights of prisoners in a constitutional context in South Africa was made by Jody Kollapen in a four page article.³⁰ This very short article attempts to highlight the issue of prisoners' rights, problems existing in South African prisons and efforts by the authorities to address them. The article further attempts to show how the Interim Constitution³¹ would promote and widen the category of rights enjoyed by prisoners. Unfortunately this article is too short and rather perfunctory to say the least. In any case it was based on the Interim Constitution which has since given way to the final (1996) Constitution.

An even narrower focus was taken by DN Swart in another short article.³² In it he draws a distinction between rights and privileges. He then proceeds to discuss section 35 of the Constitution and other relevant rights in relation to the role of the state and access to courts. Although the article is based on the new (1996) Constitution, it is unfortunately also too short and demonstrates a serious lack of depth, which is quite understandable for a seven-page piece of work.

Further afield, a lot has been written on prisons, penal reform and prisoners' rights under different legal systems and on the international level. Reference can only be made to a few authors. The most prominent of these is Nigel Rodley.³³ His book deals with the international law of human rights applicable to prisoners. Much emphasis is laid on the use of torture by some states and other forms of ill-treatment of prisoners. Rodley also discusses the death penalty and corporal punishment. Also discussed in the book are conditions of imprisonment or detention and

³⁰ See Kollapen, 'Prisoners' Rights under the Interim Constitution' *Acta Criminologica* Vol 8 No. 2 1995.

³¹ 200 of 1993.

³² Swart, 'The Constitutional Rights of Prisoners with Reference to Access to Courts', *Acta Criminologica* Vol 11 (2) 1998.

³³ Rodley, *The Treatment of Prisoners under International Law*, (1987).

arbitrary arrest and detention. All in all, the book is a scholarly statement of international law applicable to prisoners as it then was. However, much has since changed on the international scene and most of the aspects discussed in the book (for example the death penalty, corporal punishment, torture) are now constitutionally outlawed in South Africa. Perhaps that is what makes the book a good starting point. It also has the added advantage of including, as annexures, all important international instruments pertaining to the treatment of prisoners.

Another prominent international literary work on the subject is by Micheal Mushlin.³⁴ Unfortunately, Mushlin only focuses on the American legal system, but he gives a comprehensive description of the complex body of law that has developed in the United States to govern prisons and prisoners' rights. His book, which comes in two volumes, gives in the first volume a historical background and general overview of prisoners' rights. It then proceeds to discuss the laws governing life in prison. These include aspects like prevention of violence, protection against overcrowding, medical care, discrimination issues, freedom of expression and speech, religion and prison labour. It then goes on to discuss laws governing control in prisons. These include aspects such as privacy and related issues, disciplinary proceedings, classification and transfers of detainees. Volume 2 concentrates on the laws governing access to courts, visiting, personal correspondence, access to medical care and civil disabilities.

Mushlin's book is an authoritative statement of the law governing prisoners in the United States legal and prison system. It is detailed and draws heavily on the US Supreme Court jurisprudence. It can however, only be used as a point of comparison with the newly developed South African constitutional system. Even then, there is still a world of difference.

³⁴ Mushlin, *Rights of Prisoners*, (1993).

Thomas Mathiesen has also written a critical assessment of the role of imprisonment as a major type of punishment and sanction in modern society.³⁵ His book critically analyses the various purposes of imprisonment including rehabilitation, general prevention, incapacitation and other theories of social defence. Mathiesen concludes his book with a look at 'the future of prison'.³⁶ In his conclusion he makes it clear that all the theories of the rationale for imprisonment 'are unable to defend the prison'.³⁷ He therefore concludes that the prison is a fiasco in terms of its own purposes.³⁸

Again, although Mathiesen explores certain aspects of imprisonment his work has a number of short-comings. First he does not deal with prisoners' rights *per se* and secondly his critique of the prison system is based on the British model. In fact his work follows on the writings of several other authors whose focus is the British penal system. These include Mike Fitzgerald and Joe Sim³⁹; Peter Evan⁴⁰ and Louis Blom-Cooper.⁴¹ All these writers do not deal specifically with prisoners' rights, let alone in the South African constitutional context. They however provide a theoretical background from which the present study finds a point of departure. From the American perspective, this background is provided by authors like Leonard Orland⁴² and Jessica Mitford.⁴³

It is practically impossible to review all the literature that has been written on prisons and prisoners. The above review is only a point of departure. What is revealed in the review is that a specific area of prisoners' rights has not been properly researched. This area is identified as the rights of

35 See Mathiesen, *Prison on Trial* (1990).

36 Chapter 6 of the book.

37 See Mathiesen (note 35 above).

38 *Ibid.*

39 See Fitzgerald and Sim, *British Prisons* (1979).

40 See Evans, *Prison Crisis* (1980).

41 See Blom-Cooper, *Progress in Penal Reform*, (1974).

42 See Orland, *Prisons: Houses of Darkness* (1975).

43 See Mitford, *The American Prison Business* (1974).

prisoners under the South African (1996) Constitution. This study, as already indicated, will attempt to fill that gap.

1.5 DEFINITIONS AND CLASSIFICATIONS

A prisoner is defined as 'one who is kept in prison or in custody ... as the result of a legal process, either as having been condemned to imprisonment as a punishment, or as awaiting trial for some offence.'⁴⁴ Flowing from that definition, imprisonment means 'the condition of being kept in captivity or confinement,'⁴⁵ the consequence of which is 'the forcible deprivation of personal liberty'.⁴⁶ A prison, is therefore a place where such confinement takes place, '... such a place properly arranged and equipped for the reception of persons who by legal process are committed to it for safe custody while awaiting trial or for punishment.'⁴⁷

According to the *World Book Encyclopedia*, a prison 'is an institution for confining and punishing people who have been convicted of a crime.'⁴⁸ This is done by severely restricting their freedom for example by limiting where they may go, what they may do and with whom they may associate.⁴⁹ The *Encyclopedia Americana* defines a prison as 'a place in which prisoners are kept in custody pending trial, or in which they are confined as punishment after conviction.'⁵⁰ And according to the *Encyclopedia Britannica* a prison is 'an institution for the confinement of

⁴⁴ Simpson and Weiner, *Oxford English Dictionary* 2nd Ed, Vol XII, (1989) at 513.

⁴⁵ Simpson and Weiner, (note 44 above) at 511.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ See *World Book Encyclopedia*, Vol. 15, (1992) at 809.

⁴⁹ *Ibid.*

⁵⁰ See *Encyclopedia Americana*, Vol. 22, (1988) at 606.

persons convicted of major crimes or felonies.⁵¹

1.5.1 Types of prisons

Various terms are usually used to refer to prisons or such institutions that confine lawbreakers or people awaiting trial. The most common of these terms include jails, gaols, penitentiaries, correctional centres, correctional facilities and reformatories. Prisons or such institutions are generally categorised according to the length of sentence, severity of crime and type of offender.

1.5.1.1 Maximum security prisons

These are generally meant for those prisoners serving long sentences. Such prisoners are usually thought to be very dangerous. They will have committed crimes like murder, robbery, kidnapping, rape, treason and other serious crimes. These prisons are usually characterised by optimum security with many strong barriers and foolproof devices such as high fences, electronic detection devices and powerful spotlights. The length and number of visits by family and friends to such prisons are usually restricted.

1.5.1.2 Medium security prisons

These are usually meant for prisoners of medium term sentences who have committed less serious crimes such as assault and theft. Such prisoners are generally considered to be less dangerous and the security measures and restrictions in such prisons are less stringent. There are usually more recreational facilities at such prisons.

⁵¹ See *Encyclopedia Britannica*, Vol. 9, (1993) at 710.

1.5.1.3 **Minimum security prisons**

These are usually least restrictive and they hold prisoners considered to be least dangerous. Such prisoners would have generally committed non-violent crimes like forgery, evading taxes, perjury and obstruction of justice. These prisons have even more recreational facilities and are even less restrictive.

1.5.1.4 **Juvenile Correctional Institutions**

These are institutions meant for juvenile offenders - minors usually under the age of 18. They hold young people who have been accused of crimes and are usually awaiting trial or who have been sentenced to a prison term. They are meant to keep young prisoners from the bad influence of dangerous adult criminals and they are supposed to offer counselling, job training and other corrective facilities.

The foregoing categorisation is based on the American prison system.⁵² Types of prisons may vary from country to country. What the above categorisation seeks to do is to throw more light on the definitions and meanings of 'prisons' and 'prisoners'.

1.5.2 **Types of prisoners**

Prisoners are generally not categorised in the same way as prisons or according to the length of sentence and severity of crime, but along different lines altogether.

⁵² See *World Book Encyclopedia* at 809-810.

1.5.2.1 **Unconvicted prisoners**

This category refers to prisoners lawfully detained but not yet convicted and sentenced to imprisonment by a criminal court. Their classification is supported by Rule 95 of the United Nations Standard Minimum Rules for the Treatment of Prisoners which provides that

'... persons arrested or imprisoned without charge shall be protected by the general Rules applicable to all sentenced and unsentenced prisoners and by the specific Rules applicable to untried prisoners.'⁵³

It is also widely recognised that unconvicted prisoners have traditionally enjoyed definable rights at common law.⁵⁴ Prisoners awaiting trial in particular are not supposed to be subjected to conditions that amount to punishment. They are only supposed to be kept in safe custody until lawfully discharged or removed from prison. Other unconvicted prisoners include prisoners detained in police cells before being transferred to prison, judgment debtors and security detainees.

1.5.2.2 **Convicted prisoners**

This category refers to prisoners who have been lawfully convicted and sentenced to terms of imprisonment. Such prisoners may be serving short-term or long-term prison sentences. The general effect of their incarceration is that their personal liberty is taken away. This category forms the bulk of prisoners in this study.

⁵³ See Van Zyl Smit (note 29 above) at 259.
⁵⁴ *Ibid.*

1.5.2.3 **Juveniles**

Under the old Correctional Services Act⁵⁵, a juvenile was defined as any person under the age of 21 years. The new Correctional Services Act⁵⁶ does not define a 'juvenile' but instead defines a 'child' as a person under the age of 18 years. Specific rights are provided for under Section 19 of the new Act for children who are prisoners. Provision was made under the old Act for the establishment of special prisons for juveniles. No such provision is made under the new Act.

1.5.2.4 **Mentally ill prisoners**

This category of prisoners is governed by the Mental Health Act,⁵⁷ which requires prison authorities to report prisoners who appear to be mentally ill or who appear to have psychopathic disorders. A rather complex procedure has to be followed in order to detain a mentally ill prisoner in an institution or prison hospital.⁵⁸ Mentally ill prisoners do not necessarily enjoy special benefits other than being removed to special institutions where treatment is available to them.

1.5.2.5 **Prisoners of War (POW's)**

A prisoner of war is a person captured by a belligerent power during war. In most cases prisoners of war have surrendered to their enemy but sometimes they are taken by the enemy force. Traditionally the term

⁵⁵

9 of 1959.

⁵⁶

111 of 1998.

⁵⁷

18 of 1973.

⁵⁸

See Section 30 of the Mental Health Act (18 of 1973).

'prisoner of war' only applied to members of regularly organised armed forces, but the status has now been extended to other categories including guerillas, civilians who take up arms against an enemy openly, or non-combatants associated with a military force. This category of prisoners falls outside the definition of 'prisoners' envisaged by this study. It also falls outside the ambit of human rights law, being mainly governed by humanitarian law. It has only been mentioned here for purposes of distinguishing it from other categories of conventional prisoners and thereby excluding it from this study.

In this study, therefore, the term 'prisoners' will be used to refer to all the above categories apart from the category of prisoners of war, and unless otherwise specified. The need for and relevance of the above definitions and categorisations are pretty obvious. It is important to have clarity on precisely whose rights this work seeks to examine.

1.6 JUSTIFICATION AND RATIONALE FOR IMPRISONMENT

It is generally agreed that prisons have five major purposes. These purposes are; (1) rehabilitation, (2) retribution, (3) deterrence, (4) incapacitation and (5) justice. What is not agreed is whether these objectives are actually achieved by imprisonment. To determine the extent to which these objectives are achieved a brief look at each of them follows.

1.6.1 Rehabilitation

According to Huber, 'imprisonment is the ultimate tool of society's reaction against considerably deviating, socially harmful behaviour.'⁵⁹ Taken to extremes, this view is supported by those who think that lawbreakers are suffering from a mental illness that needs to be treated. Thus as early as

⁵⁹ As quoted by Krainz in Van Zyl Smit and Dunkel (Ed) (note 3 above).

1870, a speaker at that year's Congress of the American Prison Association said:

'A criminal is a man who has suffered under a disease evinced by the perpetration of a crime, and who may reasonably be held to be under the dominion of such disease until his conduct has afforded very strong presumption not only that he is free from its immediate influence, but that the chances of its recurrence have become exceedingly remote.'⁶⁰

This mental illness theory of criminality was not very widely supported but, surprisingly, it found favour with some prison administrators, judges, prosecutors and law enforcement officers. This inevitably led to the replacement of 'imprisonment-for-punishment with imprisonment-for-therapy'⁶¹ under the term 'treatment'. In prison terms, 'treatment' is 'an umbrella term meaning diagnosis, classification, various forms of therapy, punishment as deemed necessary, and prognosis, or the prediction of the malfasant's future behaviour.'⁶²

Over the years this treatment theory has lost popularity, beginning , not surprisingly, with prisoners themselves. Mitford quotes one participant in an interview: 'Most prisoners I know would rather be thought bad than mad. They say society may have the right to punish them, but not a hunting licence to remould them in its own sick image.'⁶³

In spite of its loss of popularity 'treatment' still remains one of the most important functions of imprisonment in the general system of social control. This function is usually decently referred to as 'rehabilitation.' In ordinary terms 'rehabilitation' therefore refers to activities designed to change criminals into law-abiding citizens, and may include providing

⁶⁰ Mitford, (note 43 above) at 95-96.

⁶¹ Mitford (note 43 above) at 97.

⁶² *Ibid.*

⁶³ Mitford (note 43 above) at 104.

educational courses in prison, teaching job skills, and offering counselling with a psychologist or social worker.

Many commentators think that the 'idea of imprisoning a man in order to somehow make him a better person is of relatively recent vintage.'⁶⁴ Those commentators think that 'although recent theories are based on goals of treatment and rehabilitation, more traditional notions rested on premises of retribution, general deterrence, and isolation.'⁶⁵ Others actually argue that not only is prison ineffective as an institution for rehabilitation, most likely it can in fact dehabilitate.⁶⁶ Quoting an authoritative Swedish source Thomas Mathiesen says:

'What criminological research nowadays has taught us is, however, that the idea of being able to improve the punished individual through a punishment implying deprivation of liberty, is an illusion. On the contrary, today it is generally acknowledged that these kinds of punishment lead to poor rehabilitation and a high recidivism rate. In addition, they often have a destructive effect on personality.'⁶⁷

This leads us to punishment (retribution) as a purpose or rationale for imprisonment.

1.6.2. Retribution

Retribution means punishment for crimes against society. Depriving criminals of their freedom is seen as a way of making them pay a debt to society for their crimes. Retribution was initially not seen as an important purpose of imprisonment. All through the Middle Ages and in the early modern period the dominant principle was *carcer enim ad continendos homines non ad puniendos haberi debet* (prisons exist only in order to

⁶⁴ See Orland, *Prisons House of Darkness* (1975) at 41.

⁶⁵ *Ibid.*

⁶⁶ See Mathiesen, *Prison on Trial*, (1990) at 47.

⁶⁷ *Ibid.* Mathiesen quoting Regeringens proposition, 1982/83 No.85:29

keep men, not to punish them).⁶⁸ This was largely due to the fact that at that time jails were primarily places of detention before trial, where the defendants often spent several months or years before the case came to an end. When the role of the prison changed to that of housing convicted criminals, retribution became a more popular justification for imprisonment. According to Orland: 'The infliction of terrible punishment on the wrongdoer was seen as a moral good.'⁶⁹ This is reflected in the old Latin maxim *qui malum fecit, malum ferat*.⁷⁰ This is also known as the doctrine of retributive justice. Today there is a streetwise equivalent: you do crime, you do time.

The theological basis of this doctrine is explained by Kant thus:

'Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*.'⁷¹

Kant's conclusion is that 'only the law of retribution can determine exactly the kind and degree of punishment'.⁷²

This doctrine was supported by Pope Pius XII in 1954 when he stated that punishment 'accomplishes its purpose ... inasfar as it compels the criminal, because of the act performed, to suffer, that is it deprives him of good and imposes upon him an evil.'⁷³ The doctrine has also been

⁶⁸ Muncie and Sparks (Eds), *Imprisonment: European Perspectives*, (1991) at 46.

⁶⁹ See Orland (note 42 above) at 41.

⁷⁰ Literally translated the slogan means 'who does evil will have evil done to him'. See Orland (note 42 above) at 42.

⁷¹ Kant, *The Philosophy of Law* (1887) as quoted in Orland (note 42 above) at 42.

⁷² *Ibid* at 43.

⁷³ Pope Pius XII, 'Crime and Punishment', 6 *Catholic Lawyer* 92 (1960) as quoted in Orland (note 42 above) at 42.

defended and supported by many Victorian jurists including Sir James Stephen, Herbert Packer, Jackson Toby and Emile Durkheim. According to Durkheim, 'unpunished deviance would tend to demoralize the conformist, the "upright people", while punishment would "heal the wounds made upon the collective sentiments of the people."'74 He concludes therefore that the rationale for punishment 'is not that it deters and not that punishment of the evil-doer is a good in itself; rather punishment of the criminal reinforces the collective sentiments of the majority that crime is bad, and that he who commits a criminal act should be punished.'75

Commentators and penologists are not agreed on the efficacy of retribution as a worthwhile objective or justification for imprisonment. Some penologists have argued however that punishment, as an objective of imprisonment, has virtually been dropped from the lexicon of the modern prison man, although this is the only objective that prison actually achieves.76

1.6.3 Deterrence

Deterrence is another familiar justification for imprisonment. It has to be viewed from two perspectives; first, deterrence as general prevention and second, deterrence as individual prevention. Its main aim is the prevention of future crime. It is hoped that prisons provide warnings to people thinking about committing crimes, and that the possibility of going to prison will discourage people from breaking the law. The theory of general deterrence has been popular since the eighteenth century and it has its foundation in the belief that the potential criminal would be prevented from performing a criminal act if the pain of punishment

⁷⁴ See Orland (note 42 above) at 43.

⁷⁵ *Ibid.*

⁷⁶ Mitford (note 43 above) at 275.

exceeded the pleasure expected from the act.⁷⁷ According to Bentham, 'everyone, even the madman, calculates pleasure versus pain.'⁷⁸ Again commentators and penologists are not agreed on how successful the fear of prison is as a deterrent to crime. But it is safe enough to say that obviously those who have been caught and convicted were not deterred. It is also clear that the large numbers of repeaters do not gain much in the way of deterrence from the prison experience.

It has been argued that the notion of general prevention does not only raise questions about the effectiveness of punishment but also raises a basic moral question. One commentator asks:

'What is the moral basis for punishing someone, perhaps hard, in order to prevent entirely different people from committing equivalent acts, when those punished are to a large extent poor and highly stigmatized people in need of assistance rather than punishment?'⁷⁹

The theory of deterrence as individual prevention does not have a position in modern penal theory. The arguments used against prison as a method of general prevention may also be used against the notion of prison as a means of deterring the individual offender.⁸⁰ It has also been argued that deterrence 'has become a dirty word in penological discussion because it has so often been the battle cry of those who supported capital or corporal punishment.'⁸¹ It has further been argued that deterrence 'cannot threaten those beyond the point of hope. It cannot improve the morality of those whose value system is closed. And, even if deterrence is possible, it may work only at too great a price - by

⁷⁷ See Orland (note 42 above) at 44.

⁷⁸ Bentham, *Principles of Penal Law* (1843) as quoted in Orland (note 42 above) at 44.

⁷⁹ See Mathiesen (note 66 above) at 70.

⁸⁰ See Mathiesen (note 66 above) at 98.

⁸¹ Walker, *Sentencing in a Rational Society* (1969) as quoted in Orland (note 42 above) at 45.

cruel and rigorous enforcement and by widespread suppression of individual freedom.⁸²

1.6.4 Incapacitation

Another justification for imprisonment, which is closely related to the theory of deterrence is incapacitation. It is also known as isolation, or 'keeping them off the streets'.⁸³ Incapacitation became an important criminological concept in the 1980s.⁸⁴ The theoretical basis of this justification lies in the fact that as long as a man is locked up in prison, he will not be able to commit other crimes. The basic idea is that the offender is to be incapacitated by being removed from society. Incapacitation therefore refers to the removal of criminals from society so they can no longer harm innocent people. Orland argues that the problem with this justification theory is again one of prediction.⁸⁵ He thinks that the theory assumes that it is possible to predict that the person actually isolated for a specific crime is likely to commit other crimes. He concludes that:

'Unfortunately, our knowledge is not advanced to the point where we can predict human behaviour with any degree of confidence, let alone predict that a convicted burglar will, if he is released, commit another burglary. The logic of isolation theory is that it permits criminals to be locked up for a long period of time even though there is no basis for reliably predicting that they will recidivate.'⁸⁶

Thomas Mathiesen has argued that incapacitation raises two basic questions: the question of accuracy and the question of principles.⁸⁷ On the first he asks: how accurately is it possible to predict who will commit crimes in the future? He thinks that the greater the accuracy, the better

⁸² See Orland (note 42 above) at 45.

⁸³ Orland (note 42 above) at 46.

⁸⁴ See Mathiesen (note 66 above) at 79.

⁸⁵ Orland (note 42 above) at 46.

⁸⁶ *Ibid.*

⁸⁷ See Mathiesen (note 66 above) at 80.

will incarceration in prison function as a method of incapacitation. The smaller the accuracy, the more poorly it will function.⁸⁸ On the second he asks: what is the justification for locking up many who are actually not dangerous in order to secure ourselves from a few who are? To that he says that the result is a violation of principles. Just like accuracy the violation of principles varies. The more one-sided the emphasis on future acts as a basis for sentencing, the more the principles in question are violated.⁸⁹ Mathiesen concludes that incapacitation as a reason for imprisonment poses major problems.⁹⁰

1.6.5 Justice

This is a relatively new theory in penal policy, although it actually goes back to the days of Rousseau and Voltaire who advocated that first, there should be as little regulation of human behaviour as possible, and second the little regulation which had to be there should be highly specified in advance.⁹¹ Accordingly:

'The relationship between the offence on the one hand and punishment on the other should be precise, and determined by the seriousness of the offence.'⁹²

The rationale for justice as a purpose for imprisonment lies in the common legal maxim that justice must not only be done but must be seen to be done. It is sometimes difficult to distinguish between justice and punishment as theories for justification of imprisonment. It could however be said that the punishment value of an offence is determined on the basis of the objectionability or the gravity of the offence while the justice value of an offence is related to the damage or danger which that act has

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ibid.

89

Mathiesen (note 66 above) at 83.

90

Mathiesen (note 66 above) at 98.

91

Mathiesen (note 66 above) at 103 – 104.

92

Mathiesen (note 66 above) at 104.

caused. Imprisonment is therefore in a way seen as reparation for that act.

In South Africa, prison legislation does not deal directly with the purpose of imprisonment. Such purpose can however, be implied from the provisions of the new Correctional Services Act.⁹³ Section 2 provides for the purpose of the correctional systems as;

- a) enforcing sentences of the courts in the manner prescribed by this Act;
- b) detaining all prisoners in safe custody whilst ensuring their human dignity; and
- c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections.⁹⁴

This is a significant departure from the functions of the Department of Correctional Services as provided for under the old Correctional Services Act⁹⁵, section 2(2) of which provided that;

The functions of the Department shall be

- a) to ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed therefrom; and
- b) as far as practicable, to apply such treatment to convicted prisoners ... as may lead to their reformation and rehabilitation and to train them in habits of industry and labour.⁹⁶

A comparison of the two provisions immediately reveals that emphasis under the old Act was laid more on treatment (rehabilitation) and safe custody and less on punishment, while under the new Act emphasis is laid more on punishment and safe custody than on treatment and rehabilitation. The old Act specifically mentions treatment, reformation and rehabilitation while the new Act terms it 'promoting the social responsibility and human development of prisoners'. A distinction is also

⁹³ 111 of 1998.

⁹⁴ Section 2 Correctional Services Act 111 of 1998.

⁹⁵ 8 of 1959.

⁹⁶ Section 2 of Act 8 of 1959.

implied between convicted prisoners and prisoners awaiting trial. This distinction was carried further by De Villiers CJ when he stated in *Whittaker v Roos and Bateman, Morant v Roos and Bateman*⁹⁷ that

'The object of the imprisonment before trial is to obtain the appearance of the accused at the trial, and not to punish him except for offences committed against the regulations of the gaols.'⁹⁸

If the new Correctional Services Act is anything to go by, which it should be, South Africa has, over the last few years, shifted with the rest of most of the world from the 'treatment' objective to the 'retribution' and 'safe custody' objectives.

1.7 ORIGIN AND HISTORY OF PRISONS

Prisons can be said to have existed since the beginning of organised society, that is, when 'people developed the technical skills to build securely enough to incarcerate others'.⁹⁹ From the early Roman times through the Middle Ages there was evidence of imprisonment, mainly as a form of punishment. Imprisonment for example, was used by Roman masters to punish their disobedient slaves. In the Middle Ages it was also used for the detention of prisoners awaiting trial and for debtors who had failed to pay their debts.

In England the origin of prisons may be traced to as early as the eighth century when some kind of 'prison' is presumed to have first existed.¹⁰⁰ The word 'prison' was first used in a code of laws in c.890. The laws said that if a man failed in what he had pledged himself to perform, he was 'to

⁹⁷ 1912 AD 92.

⁹⁸ At 114.

⁹⁹ Van Zyl Smit, (note 29 above) at 1.

¹⁰⁰ See Pugh, *Imprisonment in Medieval England* (1968) at 1, where it is indicated that in *St Augustine's Soliloquies* King Alfred presumed that all Kings should have a prison.

be imprisoned in a royal manor for forty days and while there ... to submit himself to punishment of the bishop's devising'.¹⁰¹ At that time imprisonment seemed to be punitive. It was only later however, that people who committed more serious offences like witchcraft or arson were also sent to 'prison'. Imprisonment continued to have a penal aim.

It must be pointed out that such 'prisons' were quite different from those of today. It should also be noted that the early 'prisons' functioned only to detain prisoners prior to trial; they were not used to punish people after conviction. 'Mutilation, death, outlawing and, above all, compensation in cash were, in a general way the proper punishment for convicted criminals'.¹⁰² According to Orland, '... the idea of sending men to prison as postconviction punishment did not arise until the early decades of the nineteenth century'.¹⁰³ Orland further points out:

'The prison as we know it today - a barred and walled institution to house felons after conviction - emerged from several closely related English institutions which housed pretrial detainees. These institutions date back to the twelfth century. As early as 1116, Henry II declared that "gaols" (jails) were to be erected in walled towns or within royal castles, but their sole function was to confine prior to punishment'.¹⁰⁴

Gradually imprisonment came to be accepted not only as a device for holding persons awaiting trial but also as a means of punishing convicted criminals.

In continental Europe and England the construction of the first 'institutions to control vagrants, beggars and petty thieves' is known to have taken

¹⁰¹ Pugh (note 101 above) at 2.

¹⁰² *Ibid.*

¹⁰³ See Orland (note 42 above) at 13.

¹⁰⁴ See Orland (note 42 above) at 15..

place in the sixteenth century.¹⁰⁵ The earliest such institution, known as Bridewell Palace, was opened in London in 1552. In Continental Europe the first such institution known as the 'Raphius' was established in Amsterdam in 1596. The 'Spinhuis' (for women) was founded in 1602.¹⁰⁶ In 1775 the Ghent House of Correction was opened in England following the passing of an Act of Parliament in 1711 fixing the maximum term of imprisonment at three years.

In spite of the early developments outlined above, it has been argued, however, that prison 'as a place of confinement for the ordinary lawbreakers is less than 200 years old, an institution of purely American origin, conceived by its inventors as a noble humanitarian reform befitting an Age of Enlightenment in the aftermath of a revolution against ancient tyrannies.'¹⁰⁷ The prison therefore 'was not born amid the tyranny of Europe's divine-right monarchs or Asia's Draconian potentates, but rather among the free citizens of the United States of America'.¹⁰⁸

For a long time imprisonment as a form of punishment did not gain much popularity both in America and England. Consequently until the end of the eighteenth century, prisons as places of punishment were as little known in America as they were in England. All this was to change within a few succeeding decades when the Americans conceived and created the prison in the form that we still know it today. Much of this development is owed to a group of high-minded Pennsylvania Quakers.¹⁰⁹

¹⁰⁵ See Van Zyl Smit (note 29 above) at 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ See Mitford (note 43 above) at 3.

¹⁰⁸ See Orland (note 42 above) at 13.

¹⁰⁹ Quakers was a popular name for a Christian group also known as The Religious Society of Friends founded by George Fox (1624-91). The name was applied initially in derision to Fox when he told a judge to 'tremble at the word of the Lord'. More often it was used because Friends themselves were said to tremble in the fervor of religious feelings at their meetings (Source: *The World Book Encyclopedia* Vol 16 at 4).

The Quakers were shocked by the brutal corporal punishment of that time, especially the shedding of blood, and their revulsion led to the substitution of imprisonment for corporal punishment in those American colonial areas which the Quakers dominated. 'As a result of their efforts the first penitentiary (their word), the Walnut Street Jail in Philadelphia, was established in 1790.'¹¹⁰ A block of cells on the principle of solitary confinement was constructed in the yard of the Walnut Street Jail between 1790 and 1792, and in this manner the modern prison system had its permanent and effective birth.¹¹¹ At the Walnut Street Jail the Pennsylvania Prison system was first worked out, and from it, later on, the variant known as the Auburn System. These two systems were copied by Europeans and they dominated the prison building and administration of the world during the nineteenth and twentieth centuries.¹¹²

In 1829 the Eastern State Penitentiary was opened on Cherry Hill in Philadelphia with far greater emphasis on solitary confinement.¹¹³ Each prisoner of this institution remained in his cell or its adjoining yard, working alone and saw no one except the officers of the institution and an occasional visitor. This method of prison management known as the 'separate system' became a model for penal institutions constructed in several other American states and other parts of the world, and it remained the dominant philosophy of prison management through much of Europe and the United States during the 19th and 20th centuries.

In South Africa, prisons have a relatively more recent history. According to Van Zyl Smit, although 'imprisonment as a means of compulsory detention of accused persons has a long history ..., incarceration as a systematic form of imprisonment of convicted criminals is of relatively

¹¹⁰ See Mitford (note 43 above) at 31.

¹¹¹ See '*Pennsylvania Quakers Establish the Modern Prison System*' at www.notfrisco.com.

¹¹² *Ibid.* Apparently the Pennsylvania system was the most popular in Europe and the Auburn system in the United States.

¹¹³ See *Encyclopedia Britannica* at 710.

recent origin in South Africa.¹¹⁴ Imprisonment was not regarded as a primary form of punishment until the first half of the nineteenth century. Before that there is hardly any evidence of imprisonment in this part of the world. This was largely due to the fact that the customary law of pre-colonial Southern Africa made no provision for imprisonment as a punishment.¹¹⁵

The first Europeans came to the Cape in 1652. The Dutch East India Company immediately took control. There is little documented evidence of imprisonment during the period of the Company. However, some form of convict labour is known to have existed at the time but it appears to have been rare and unco-ordinated. There are also unclear reports of deportation of convicts to Robben Island.¹¹⁶ The end of the first Dutch occupation (1795) marked the beginning of the first British occupation (1795 - 1803) which brought some kind of new penal system.

Clear evidence of prisons only begins to emerge in the 1820's with a few lock-ups that were built specifically for offenders against 'pass laws' and other legislation that created petty offences. A Commission of Inquiry sent by the British authorities in 1823 to investigate matters in the Cape colony published a report in 1828 which observed numerous abuses in the colonial penal system. However, not much change was effected. The numbers of incarcerated increased but the system remained disorganised. It was not until 1844 that legislation was first passed regarding prisons in the Cape Colony.¹¹⁷ In 1887 a Committee of Inquiry was set up by the Cape Legislative Assembly to look into the convict system. The findings of the Committee resulted in an Act of Parliament whose purpose was 'to

¹¹⁴ As quoted in the *Law of South Africa* Vol 21 (1984) at 107.

¹¹⁵ See Van Zyl Smit (note 29 above) at 1.

¹¹⁶ See Van Zyl Smit (note 29 above) at 8.

¹¹⁷ Ordinance 7 of 1844 (Cape) providing for the discipline and safe conduct of convicts employed upon the public roads, and three years later, Ordinance 24 of 1847 (Cape) providing for improving the gaols of the Colony. See Van Zyl Smit (note 29 above) at 107.

consolidate and amend the law relating to Convict Stations and Prisons¹¹⁸ The Act was passed by the Cape Parliament in 1888. One of its objectives was to minimise the distinction between convict stations and local lock-ups by combining them in a single prison system.¹¹⁹ The Act also provided for, *inter alia*, segregation of sexes, segregation of prisoners awaiting trial, juveniles and debtors. There were minor subsequent amendments to the Act, but they did not bring about any significant changes.

As these developments were taking place in the Cape Colony during the 19th century, provision was also made for prisons in Natal, the Republic of the Orange Free State and the South African Republic.¹²⁰ In Natal the first prisons were built by the Voortrekkers in Pietermaritzburg and Durban in 1847. Legislation regarding prisons was first passed in 1862 after British annexation of the territory.¹²¹ In 1868 a Commission of Inquiry was set up to investigate the state of prisons in the territory and the findings of the Commission led to a new legislation.¹²² In 1906 the Prison Reforms Commission attempted to overhaul the penal system in Natal, but unfortunately its recommendations were not implemented and no major reforms of the Natal penal system took place until after 1910.¹²³

Little is known about the early prison history of the Orange Free State and the Transvaal. Only during the short period of British annexation (1877 - 1881) was legislation first passed regarding prisons in the Transvaal.¹²⁴ In 1900, the British occupation of the two Republics led to a major reorganisation of the penal system of both territories. In 1903 a law was passed in the Orange Free State to reorganise the prison system after

¹¹⁸ Act 23 of 1888.

¹¹⁹ See Van Zyl Smit (note 29 above) at 17.

¹²⁰ *Ibid.*

¹²¹ Law 14 of 1862 - to enable the Lieutenant-Governor to make Rules and Regulations for the Maintenance of Order in the Public Gaols of the Colony.

¹²² Law 6 of 1870 - Law for the Better Government of Public Gaols.

¹²³ See Van Zyl Smit (note 29 above) at 18.

¹²⁴ Law 14 of 1880 - For improving the Gaols of this Province, and for securing safe custody of Prisoners and for other purposes.

that territory had been annexed.¹²⁵ In 1906 a law was also passed in Transvaal¹²⁶ following the findings of a Commission of Inquiry into conditions at the Fort in Johannesburg, the major prison in Transvaal. The Commission had found that the prison was inadequate and the whole system needed to be overhauled.¹²⁷

In 1911 immediately after the Union of South Africa came into being, a prisons department was created by an Act of Parliament.¹²⁸ After several amendments this Act was later repealed by the Prisons Act¹²⁹ which, after a number of amendments including change of name, was recently repealed by the Correctional Services Act.¹³⁰ This is the Act by which prisons in South Africa are presently governed.

1.8 ORIGINS AND HISTORY OF PRISONERS' RIGHTS

Early prisoners had no rights at all. In fact in one American decision, prisoners were characterised as slaves of the state.¹³¹ Although this view did not hold substantial support for a long time, the so-called 'hands-off doctrine' prevented judges from interfering in prison matters. According to this doctrine, federal courts were not allowed to intervene because it was 'not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.'¹³²

The 'hands-off doctrine' survived in the American judicial system for more than a century. It was only brought to an end by two important decisions

¹²⁵ Ordinance 3 of 1903.

¹²⁶ Ordinance 6 of 1906.

¹²⁷ See Van Zyl Smit (note 29 above) at 20.

¹²⁸ The Prisons and Reformatories Act (13 of 1911).

¹²⁹ 8 of 1959.

¹³⁰ 111 of 1998.

¹³¹ See *Ruffin v Commonwealth*, 62 Va (21 GraH) 790, 796 (1871) as referred to in Mushlin, (note 34 above at 7).

¹³² See *Stroud v Swope*, 342 US 829 (1951) as referred to in Mushlin (note 34 above) at 7.

of the United States Supreme Court in the early 1970s. In *Wolff v McDonnell*,¹³³ Justice White said:

'There is no Iron Curtain between the Constitution and the prisons of this country.'¹³⁴

And a year later, in *Procumer v Martinez*,¹³⁵ Justice Powell proclaimed:

'A policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'¹³⁶

These two decisions marked the end of the 'hands-off doctrine'. In addition, several factors combined to accelerate the demise of the doctrine. First of all, prisoners were becoming increasingly aware of their constitutional rights and therefore becoming more militant and assertive. At the forefront of this struggle was a group known as the Black Muslims. Their efforts to practice their religion were being continuously ignored and sometimes punished by correctional authorities. The Black Muslims' challenges to the First Amendment represented some of the initial judicial victories for prisoners and opened the floodgates to litigation on several prisoner-related issues.¹³⁷ Secondly, this was the hey-day of the civil rights movement. Not only were prisoners becoming more and more aware of their civil rights and liberties, a group of civil rights lawyers was also emerging to fight for the enforcement of those liberties. The involvement of these lawyers gradually led to successful challenges to the abuse of prisoners' rights, and set important precedents for future litigation. Finally, the judiciary and the public were becoming increasingly

¹³³ 418 US 539, 555-56 (1974) as quoted in Mushlin (note 34 above) at 9.

¹³⁴ *Ibid.*

¹³⁵ 416 US 396, 405-06 (1974) as quoted in Mushlin (note 34 above) at 9.

¹³⁶ *Ibid.*

¹³⁷ See Mushlin (note 34 above) at 10 -11.

aware of the plight of society's underprivileged and the sordid conditions which often characterised prison life.

At the national level the responsiveness of the judiciary was reflected in the Supreme Court's decisions in a number of cases including *United States v Wade*¹³⁸ (dealing with the right to an attorney at a line-up) and *Miranda v Arizona*¹³⁹ (dealing with the right to warnings before interrogations).

The decline of the 'hands-off doctrine' was accompanied by the incorporation of most of the provisions of the Bill of Rights into the Fourteenth Amendment. In the Lower Courts of many American states cases started streaming in thick and fast. In 1974, the United States Supreme Court was involved in the first landmark case concerning prisoners' rights. This was in *Wolff v Mc Donnell*,¹⁴⁰ where the Supreme Court was faced with the issue of legal representation of inmates in prison disciplinary proceedings. Although the Court's decision was more in favour of prison management than inmates, the Court used the occasion to state that in situations involving either illiterate inmates or complex issues they 'should be free to seek the aid of a fellow inmate or ... to have adequate substitute aid ... designated by the staff'.¹⁴¹ 'Since then the Supreme Court has regularly addressed the question of the rights of prisoners in a variety of contexts'.¹⁴² In *Jones v North Carolina Prisoners' Labour Union*¹⁴³ for example, the Court made it clear that prisoners do not forfeit all constitutional rights. The same was held in *Bell v Wolfish*.¹⁴⁴

In Europe the advent of prisoners' rights was a result of widespread protests that reached a climax in 1968. The protests began in Sweden in

¹³⁸ 388 US 218 (1967).

¹³⁹ 384 US 436 (1966).

¹⁴⁰ 418 US 539 (1974).

¹⁴¹ *Ibid* at 570.

¹⁴² See Mushlin (note 34 above) at 12.

¹⁴³ 433 US 119 (1977).

¹⁴⁴ 441 US 520 (1979).

1966. Norway and Denmark followed suit in 1967 and Finland in 1968. These protests resulted in the formation of various prison organisations that spearheaded demands for the observation and realization of prisoners' rights.

In Britain, a prisoners' rights organisation was formed in 1972. It called itself PROP (Preservation of the Rights of Prisoners). A call by the organisation for a nation-wide strike in British jails was heeded by about 5,500 prisoners. Their demands included a right to parole, a right to appeal to the High Court for refusal of parole and the right of unimpeded access to prisons by the public and the press. Although the British government refused to grant any recognition to PROP, the organisation continued to actively campaign for prisoners rights. For example, following a riot at Hull Prison in 1976, PROP published a detailed account of the aftermath of the roof top protest alleging that prisoners who had taken part in the disturbance were beaten and that their personal property was destroyed by some prison officers.¹⁴⁵ Although the Home Office completely exonerated prison staff, at the end of 1978, more than two years after the riot, twelve prison officers and an assistant governor were sent for trial on charges arising out of the aftermath of the prisoners' demonstration.¹⁴⁶

PROP still exists today and continues to campaign for the preservation of prisoners rights. However, it has subsequently become more sophisticated and broad based in its campaigning. There have also been misgivings about its political aims.¹⁴⁷

¹⁴⁵ See Fitzgerald and Sim, *British Prisons*, (1979) at 7.

¹⁴⁶ See Fitzgerald and Sim (note 145 above) at 8.

¹⁴⁷ See Evans, *Prison Crisis* (1980) at 68.

In South Africa prisoners rights have their origin in the Prisons and Reformatories Act.¹⁴⁸ Before that Act came into force, the courts were called upon to interpret the Transitional Ordinance 6 of 1906. 'Their

general pronouncements on the rights of prisoners made in this regard were to mark the beginning of modern jurisprudence on South African prison law.¹⁴⁹ In 1911 the Transvaal Provincial Division made a watershed decision as far as prisoners' rights were concerned. This was in *Whittaker v Governor of Johannesburg Gaol*¹⁵⁰ where the court was called upon to rule on the lawfulness of detaining prisoners awaiting trial in conditions which amounted to solitary confinement. Two prisoners had been subjected to severe ill-treatment in gaol while awaiting trial. It was unanimously held that the Prison Governor was not allowed to discriminate against an individual prisoner even if he had been ordered to do so by the Director of Prisons. The ill-treatment was discontinued in consequence of an order of court against which the governor of the gaol made an unsuccessful appeal. This judgment brought into South African jurisprudence 'the principle that a prisoner who has been illegally treated in gaol has the legal standing to approach the court for relief',¹⁵¹ thus paving the way for a new approach towards the rights of prisoners in South African jails.

General prison reforms again began to emerge as a public issue in the 1940's. This initiative was mainly spearheaded by welfare organisations such as the South African Prisoners' Aid Association and the Social Services Association. Their efforts were given impetus in 1945 by the

¹⁴⁸ 13 of 1911.

¹⁴⁹ Van Zyl Smit (note 29 above) at 21.

¹⁵⁰ 1911 WLD 139.

¹⁵¹ *Ibid.*

appointment of a judicial commission, the Lansdown Commission on Penal and Prison Reform. Although the findings of the Commission were rather cautious they were quite sympathetic to the views of the reformists.

Prisoner's rights were dealt a major blow by the introduction of the 1959 Prisons Act.¹⁵² Not only did the Act explicitly entrench the policy of apartheid in the prison service, it also failed to address some of the recommendations of the Lansdown Commission. The Act also had the effect of isolating the prison service by abolishing the prescription that prisoners had to be visited regularly by magistrates and boards of visitors and also by excluding the review of prison conditions by informed outsiders.¹⁵³

The 1960s and 1970s were characterised by two important developments. The first was an increase in the number of political prisoners, the effect of which was a new generation of prisoners who were more articulate and self-consciously dedicated to attacking the legitimacy of the state and all its organs. The second was a wave of Supreme Court decisions that were not sympathetic to the cause of prisoners' rights.¹⁵⁴ The leading case in this respect was *Goldberg v Minister of Prisons*,¹⁵⁵ which placed on the Commissioner the power to determine how sentenced prisoners should be treated, thereby defining the rights of prisoners far more narrowly than had been done even in *Whittaker v Governor of Johannesburg Gaol*,¹⁵⁶ more than sixty years earlier. In *Goldberg* the appellants, who were political prisoners, had unsuccessfully instituted proceedings in a lower court claiming a right to newspapers, radio news services, news magazines and periodicals. The substance of their case was that, in denying them any form of access to news of current events, the Commissioner of Prisons acted unlawfully in breach of rights to which they

¹⁵² 8 of 1959.

¹⁵³ See Van Zyl Smit (note 29 above) at 35.

¹⁵⁴ *Ibid.*

¹⁵⁵ 1979 1 SA 14 (A).

¹⁵⁶ 1911 WLD 139.

were entitled. The court held, *inter alia*, that in so far as the appellants' application for relief had been founded upon the alleged existence of rights enforceable in a court of law, it had rightly been rejected.

It should be noted, however, that in a dissenting judgment Corbett JA (as he then was) held that the respondents were not entitled to apply a rule or policy depriving applicants of all access to news. Quoting *American Jurisprudence*¹⁵⁷ Corbett JA said:

'A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.'¹⁵⁸

The effect of such decisions was that the courts allowed prison authorities a wide discretion in dealing with prisoners and prisoners' rights were restricted more than they had been before. Another development in the 1970's was the appointment of the Viljoen Commission in 1976. The Commission proposed extensive reform to the penal system as a whole as a result of which certain intermediate sentences were abolished and some system of releasing prisoners, similar to parole, was introduced.

The 1980s were characterised by further attacks on the legitimacy of the prison system and a series of disclosures about conditions in certain prisons. A State of Emergency in 1988 did not help matters. It resulted in the incarceration, without trial, of a large number of people which led to further attacks on the prison system and the State, both from within and outside South Africa. The Courts did very little to promote the protection of the rights of detainees during the State of Emergency. In *Omar v Minister of Law and Order*,¹⁵⁹ for example, the validity of an Emergency regulation and a rule made in terms of it denying detainees access to

¹⁵⁷ 2nd ed. Vol 60 at 846.

¹⁵⁸ Note 157 above at 40.

¹⁵⁹ 1987 3 SA 859 (A).

legal advisers, were upheld by the Appellate Division of the Supreme Court.

The late 1980's and early 1990's saw greater strides in the direction of prisoners' rights protection in South Africa. The first major development was the formation of the Police and Prison Officers Civil Rights Union (POPCRU). Although POPCRU was founded in 1989, it established a significant presence especially among black prison warders in the early 1990s. Amongst other things, POPCRU was, and still is, committed to the recognition of the civil rights of all prisoners.¹⁶⁰ On its formation POPCRU did not enjoy the support of the government of the day. In fact initially the Union had to fight for survival, but with the new political dispensation, it has since weathered the storm and is now one of the affiliates of the all-powerful Congress of South African Trade Unions (COSATU).

Another significant development was the formation of the South African Prisoners Organisation for Human Rights (SAPOHR). Formed in 1988 SAPOHR has its mission statement as '[T]o address the legacy of the apartheid criminal justice and prison systems and to contribute to a culture of human rights and social justice in a non-racial, non sexist democratic South Africa.'¹⁶¹ A SAPOHR national office was opened in 1992. SAPOHR claims that its broad aim is to reform and democratise the Department of Correctional Services by doing the following, among other things:

- (1) Acting as a 'Watchdog' exposing the human rights atrocities that take place in police and prison custody and bringing national and international, governmental and public attention through lobbying and direct action to press for reform and transformation;
- (2) Providing support, information and advocacy for inmates, ex-inmates, suspects, ex-suspects and their next-of-kin;

¹⁶⁰ See Van Zyl Smit (note 29 above) at 41.

¹⁶¹ See http://www.sas.upenn.edu/Africa_Studies/Org_/usti_lutes/SAPOHR.html

- (3) Fighting for the restoration of human rights and dignity to all who come into contact with police and the Department of Correctional Services system;
- (4) Bringing an end to economic and talent exploitation by replacing forced slave labour with a basic wage for all work done in prison by prisoners; and
- (5) Fighting for genuine education, training and rehabilitation programmes in prisons.¹⁶²

The specific objectives of SAPOHR are stated as follows:

- (i) To reform and democratise the 'Correctional Services' and 'Criminal Justice System' of South Africa;
- (ii) To address human rights abuses in South African prisons that have been brought about by a system of apartheid, and to promote human and civil rights of suspects, prisoners, ex-prisoners and their next-of-kin;
- (iii) To act as a voice of suspects, detainees, prisoners, ex-prisoners and their next-of-kin, to bring attention to their plight and to respond to needs for reform, justice, reintegrative training/education and employment;
- (iv) To identify and target specific needs groups including those most disadvantaged by apartheid; women, youth, the ill, elderly and disabled; and
- (v) To forge links and working relations with other community based and non-government organisations to co-ordinate and strengthen (our) services and reform.¹⁶³

As to what extent the above objectives have been achieved, it is difficult to say. SAPHOR however claims that it has made remarkable achievements

¹⁶²

Ibid.

¹⁶³

Information supplied by then Chief Executive Officer of SAPOHR, Golden Miles Bhudu.

including curbing abuses on prisoners by fellow prisoners and abuses on prisoners by prison authorities. SAPHOR for example claims that it receives an average of 22 letters of complaints a week from prisoners in KwaZulu Natal alone. 90% of these letters are complaints from prisoners, of assault by prison staff. SAPOHR then dispatches its paralegal officers to the prison heads in these areas who then institute internal investigations which are usually unsuccessful due to unwilling witnesses.¹⁶⁴

It should be mentioned that from its inception SAPOHR did not enjoy much government support. It has been viewed with much scepticism and suspicion, particularly by the Department of Correctional Services. For that reason its significance as an organ for the protection of prisoners rights has been somewhat muted. That notwithstanding, it remains an important development in the history of prisoners' rights in South Africa.

The most important development in the history of prisoners' rights in South Africa was the introduction of constitutional rights for prisoners in the country's jurisprudence. This was done initially through the Interim Constitution¹⁶⁵ and then later through the 'final' Constitution.¹⁶⁶ Not only is provision now made for the enjoyment and protection of a number of rights in the Bill of Rights (for example the right to life, equal protection, right to dignity, privacy, and so on),¹⁶⁷ specific provision is also made for the rights of detained persons.¹⁶⁸

The Constitution also establishes a Constitutional Court. The court is accessible to all, including prisoners. Provision is also made for the establishment of certain state institutions to support constitutional

¹⁶⁴

Ibid.

¹⁶⁵

200 of 1993.

¹⁶⁶

108 of 1996.

¹⁶⁷

These rights will be discussed more fully in Chapter 3, *infra*.

¹⁶⁸

Under section 35 of the Constitution of the Republic of South Africa (Act 108 of 1996). The provisions of this section will also be dealt with in more detail in Chapter 3.

democracy.¹⁶⁹ These institutions include the Human Rights Commission and the Office of the Public Protector. The Human Rights Commission has the power to investigate any alleged violation of human rights either on its own initiative or on receipt of a complaint. The Public Protector has

the power to investigate any maladministration in state affairs and any abuse of power by people performing public functions. It can also investigate the conduct of people performing public functions, if such conduct results in impropriety or prejudice. The Public Protector is accessible to all people and communities including prisoners.¹⁷⁰

The Constitution and the structures established by it are a very important development in the history of prisoners' rights in South Africa. They have the potential of not only promoting and protecting prisoners' rights but also widening the range of rights that prisoners have hitherto enjoyed. To what extent this potential is translated into reality is one of the main questions to be answered by this study.

Finally, the recent enactment of the Correctional Services Act¹⁷¹ is another gigantic leap in the direction of the protection of prisoners' rights. The Act, which repeals the Prisons Act,¹⁷² provides for, *inter alia*, 'the custody of all prisoners under conditions of human dignity, the rights and obligations of sentenced prisoners, the rights and obligations of unsentenced prisoners and a system of community corrections'.¹⁷³ According to the preamble, the object of the Act is to give effect to the Bill of Rights in the 1996 Constitution and in particular its provisions with regard to prisoners. According to the Minister of Correctional Services,

¹⁶⁹ Chapter 9 of the Constitution of the Republic of South Africa (Act 108 of 1996).
¹⁷⁰ See Section 182 (4) of the Constitution of the Republic of South Africa (Act 108 of 1996).
¹⁷¹ 111 of 1998.
¹⁷² 8 of 1959.
¹⁷³ As per the long title of the Act.

the Act also brings South Africa's Correctional Services legislation in line with international standards and lays a foundation for the future.¹⁷⁴

Although details of the provisions of the Act will be discussed at a later stage,¹⁷⁵ it is important at this stage to mention that the Act provides for, *inter alia*, the establishment of a National Council for Correctional Services¹⁷⁶ to advise the Minister on all aspects regarding corrections. The Act also establishes the office of the Independent Inspecting Judge.¹⁷⁷ The office of this functionary is already up and running. Also provided for is the appointment of Independent Prison Visitors whose duties will include visiting prisons, interviewing prisoners, recording and discussing their complaints, and generally ensuring that their rights are not abused. Provision is also made under the Act for a new system of Parole Boards.¹⁷⁸ All these organs and functionaries established by the new Act are important developments in the history of the rights of prisoners in this country.

1.9 CONCLUSION

The prison population in South Africa, as this chapter shows, has increased dramatically over the last few years. This increase has not been matched by a proportional increase in prison accommodation and space. The resulting overcrowding is accompanied by various other forms of human rights abuses. Due to the nature of their position in society, prisoners are sometimes unfortunately regarded as having chosen to forfeit their fundamental rights. This study is an attempt to examine the extent to which this is true under the South African Constitution.

¹⁷⁴ See the Minister's Budget Vote Speech to Parliament, March 1999.

¹⁷⁵ See Chapter 3.

¹⁷⁶ Under Chapter VIII of the Act (sections 83 and 84).

¹⁷⁷ Under section 86 of the Act.

¹⁷⁸ See Chapter VII of the Act (sections 73 - 82).

This chapter gives a background to that attempt by first defining a prisoner and a prison. It also enumerates and explains the various types of prisoners in order to specify the particular categories that the study is concerned with. A number of purposes or objectives for imprisonment are also discussed and it is submitted in this chapter that South Africa subscribes mainly to the 'retribution' and 'safe custody' objectives for imprisonment.

A clear understanding of the present state of prisoners' rights requires some historical insight. For that reason this chapter looks at the origin and history of prisons and also the history and development of prisoners' rights. What emerges is a protracted prison reform struggle spanning more than a century. In the United States this struggle was assisted by a 'judicial revolution' that led to the abandonment of the so-called 'hands-off' doctrine. In Europe the struggle was assisted by widespread protests in Sweden, Norway, Denmark, Finland and England. These culminated into the formation of prisoners' rights organisations, most notably PROP (Preservation of Prisoners' Rights) in Britain. In South Africa the history and development of prisoners' rights have been related to and largely affected by the country's unique political history. One historical landmark of this political development is the enactment of the present Constitution. It is within this constitutional context that this study is premised. The foregoing chapter provides the contextual background.

CHAPTER TWO

PRISONERS' RIGHTS UNDER INTERNATIONAL LAW

2.1 INTRODUCTION

Prisoners' rights are human rights first. Any discussion of the protection of such rights has to be viewed in that context. Protection of human rights generally takes place at two levels: the domestic level and the international level. Most of the discussion concerning human rights in South Africa today is focused on the domestic protection of such rights through a Bill of Rights. At a different level there is the international dimension of human rights protection. It is this dimension, with particular reference to prisoners' rights, that this chapter is essentially concerned with. The chapter therefore looks at how prisoners' rights are protected through the system of international law. A study of prisoners' rights from this perspective necessitates a basic understanding of certain aspects of international human rights law, a brief overview of which follows here below.

2.2 INTERNATIONAL PROTECTION OF HUMAN RIGHTS: AN OVERVIEW

2.2.1 Sources and characteristics of International Law

According to Article 38 of the Statute of the International Court of Justice¹, the Court is instructed to apply

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states

¹ Annexure to the Charter of the United Nations.

- (b) international custom as evidence of a general practice accepted as law
- (c) the general principles of law recognized by civilized nations
- (d) judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.

The sources of international human rights law therefore include treaties or conventions, customs and general principles of international law, decisions of various authoritative bodies (e.g. resolutions of UN General Assembly), and writings of experts.

International law is a different kind of legal system in comparison with domestic legal systems. First, international law operates primarily between states. Individuals have very limited standing in international law and have to rely largely on states to ensure the protection of their human rights. States therefore, and not individuals, are traditionally the subjects of international law. Secondly, international law lacks a sovereign legislative authority. This means that consensus between states is the underlying basis of international law. Thirdly, there is no precise equivalent in international law of an executive and judicial branch of government. Finally, the principle of state sovereignty is recognised as being fundamental to international law. This principle was described by Brownlie as 'the basic constitutional doctrine of the law of nations'.² Those are some of the basic characteristics of international law.

2.2.2 Instruments providing for the international protection of human rights

After the Second World War, world leaders recognised that a commitment to the protection of human rights was essential to world peace. This

² Brownlie, *Principles of Public International Law* (1990) at 287.

commitment was embodied in the **Charter of the United Nations**.³ In an attempt to give substance to 'human rights and fundamental freedoms' envisaged in the Charter, the **Universal Declaration of Human Rights**⁴ was adopted by the United Nations in 1948. Although this document is in the form of a declaration rather than a convention and therefore lacks formal binding force, it has been widely recognised as binding due to the obligations contained in the Charter of the United Nations or because parts of the Declaration have become part of customary international law. The importance of the Declaration as a human rights instrument cannot be over emphasised. As Scot Davidson puts it:

'It has not only formed the basis for the drafting of two international covenants and three regional human rights treaties, but it has also been the paradigm for the drafting of the human rights provisions of over 25 domestic constitutions.'⁵

States, international institutions, NGO's and individuals alike see the Declaration as the cornerstone of human rights and the 'mother' of an international human rights culture.

In 1966 two covenants were adopted by the UN General Assembly. Unlike the Universal Declaration of Human rights they contained binding obligations. The **International Covenant on Civil and Political Rights (ICCPR)** and the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** came into force in 1976.⁶ To date, more than 100 states have ratified these Conventions. Together with the Universal

³ The Charter was signed at San Francisco on 26 June 1945 at the conclusion of the United Nations Conference on International Organisation and came into force on 24 October 1945.

⁴ The Declaration was adopted by Resolution 217A (111) of the United Nations General Assembly on 10 December 1948. Forty-eight states voted in its favour, none against and eight abstained. South Africa was among the abstentions.

⁵ See Davidson, *Human Rights* (1993) at 67.

⁶ These Covenants were adopted by Resolutions 2200A (X1) and 2200 (XX1) of the United Nations General Assembly on 16 December 1976. They required 35 states to ratify them before entering into force.

Declaration on Human Rights, those covenants are usually regarded and described as the 'international bill of rights'.

In addition to these general international human rights instruments, a number of declarations and conventions dealing with specific human rights issues have come into being under the auspices of the United Nations. These include the **Convention on the Prevention and Punishment of the Crime of Genocide** (1948), the **International Convention on the Elimination of All Forms of Discrimination Against Women** (1979), the **International Convention on the Elimination of All Forms of Racial Discrimination** (1965) and more relevantly the **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** (1984). These are but a few of a host of instruments that have been adopted by the UN over the years.

At a regional level various human rights instruments have also been promulgated. The European system based on the Council of Europe is the most advanced. It is primarily composed of two major treaties: the **European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention)**⁷ dealing with civil and political rights and the **European Social Charter**⁸ dealing with social, economic and cultural rights. The Inter-American System for protecting human rights is based on the Organisation of American States (OAS) which is composed of states from North and South America. Under this system there is the **American Declaration of the Rights and Duties of Man**⁹ and the **American Convention on Human Rights**.¹⁰

⁷ The Convention was signed in Rome on 4 November 1950 and it entered into force in September 1953.

⁸ The Charter was signed at Turin on 18 October 1961 and entered into force in February 1965.

⁹ The Declaration was adopted by the Ninth International Conference of American States on 2 May 1948 at Bogota in Columbia.

¹⁰ The Convention was signed at San Jose, Costa Rica on 22 November 1969 and came into force in July 1978.

The African system is based on the Organisation of African Unity (OAU) which is the most recent regional organisation to adopt a human rights instrument. The **African Charter on Human and Peoples' Rights**,¹¹ sometimes known as the Banjul Charter after the capital of Gambia where it was drafted, 'differs considerably from its other regional counterparts, both in the catalogue of rights protected and in the means of implementation and protection'.¹² This is because the Charter is a product of a different world order from that which prevailed in the years when the other major human rights instruments were being drafted. It is therefore a result of the entrance into the world community by underdeveloped countries, giving rise to claims for the recognition of new kinds of human rights such as the right to development. This is reflected in the incorporation of 'people's rights' into the provisions of the Charter.

2.2.3 Implementation and Supervision

The implementation of international human rights obligations is a rather problematic and complicated process. This is mainly because the primary method of implementation is more political than judicial. This in turn is due to the absence of an authoritative enforcement mechanism resulting in states ignoring their human rights obligations sometimes with impunity. As Raylene Keightley says:

'The problem arises from the fact that international law is dependent in most respects on the consensus of states and in general it lacks authoritative enforcement agents Consequently most of the implementation mechanisms which are provided for in the various human rights instruments are political rather than legal in nature.'¹³

¹¹ The Charter was adopted by the 18th Assembly of the Heads of States and Government of the Organisation of African Unity on 17 June 1981 and came into force on 21 October 1986.

¹² See Davidson (note 5 above) at 152.

¹³ Keightley, 'International Human Rights Norms in a New South Africa' (1992) *South African Journal on Human Rights* 171, 176.

What this means is that states can sometimes breach the rules of international law and get away with it. Even the occasional threats of collective economic sanctions and the use of force against a violating state, have in some cases proved pretty ineffectual.

2.2.3.1 **Implementation and Supervision by the United Nations**

Implementation of human rights by the United Nations takes place through its specialized organs, namely, the General Assembly, the Security Council, the Secretariat, the Economic and Social Council (ECOSOC) and other agencies. These bodies, the General Assembly in particular, may raise a country's violation of human rights in debate and may adopt Resolutions dealing with the matter. A Resolution is meant to put political pressure on the violating state to rectify the human rights situation. More direct pressure may be placed on states by, for example, imposition of economic sanctions as was done in respect of South Africa's apartheid system. As the plenary organ of the UN, the General Assembly has broad competence to consider questions concerning human rights. It therefore plays an important role in implementation and supervision.

The Secretariat is also a principal organ of the UN in terms of the UN Charter and it functions under the Secretary-General. One of its main functions is to submit annual reports to the General Assembly. Its reports have occasionally included human rights matters. The Economic and Social Council also plays a big role through making recommendations for the purpose of promoting respect for and observance of human rights and by submitting draft conventions to the General Assembly.¹⁴ ECOSOC, which is also established by the Charter of the United Nations, operates mainly through Commissions. The most important of these Commissions, as far as human rights are concerned, are the Commission on Human Rights, the

¹⁴ See Davidson (note 5 above) at 68.

Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and the Commission on the Status of Women. One Committee that requires special mentioning is the Committee Against Torture. Established in 1987, the Committee monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The procedures used by these organs for implementing human rights include investigations and fact-finding through specially constituted groups. Human rights violations may also be raised in debate during the public sessions of these bodies and resolutions may be taken in respect of such violations.

The Security Council also plays an important role in the field of human rights. Established under the Charter of the United Nations, the Security Council is not mandated with any specific responsibility for human rights. However, Chapter VI of the Charter of the UN (providing for disputes and situations likely to endanger maintenance of international peace and security) and Chapter VII (providing for enforcement action) have given the Security Council the basis from which, on a number of occasions, to make pronouncements on such matters. The Council, for example, was instrumental in considering the question of apartheid in South Africa and the treatment of Palestinians in the Israel occupied territories.¹⁵ More recently, it has been involved in the conflicts in the former Yugoslavia, Rwanda and Kosovo.

2.2.3.2 Implementation and supervision at regional level

A strong regional system for protecting human rights can be very effective as has been proven and demonstrated by the European system. Under the European Convention a Commission for Human Rights and a Court of Human Rights have been established. By complementing and supplementing each other these two play an important role in the implementation of human rights norms. Individuals may submit complaints

¹⁵ See Davidson (note 5) above 74.

concerning alleged violations of human rights to the Commission provided certain requirements are met and provided the state concerned has made a special declaration in this regard.¹⁶ Interstate complaints do not need to meet these requirements. Individuals do not have standing to bring complaints before the Court.¹⁷ Enforcement of the decision of a Court or a recommendation of the Commission lies in the hands of the Council of Europe's governing body, the Committee of Ministers.

The American system has similar, although less successful, implementation mechanisms. The American Convention also establishes a Commission and a Court. The functions of the Commission are spelled out in Article 44 of the Convention, and those of the Court in Article 63 and 64. The Commission can be said to have been far more successful in promoting and implementing human rights than would be expected in a region known for political excesses.

Under the African Charter only a Commission was established. A Court has only been recently provided for through a Protocol to the African Charter.¹⁸ As explained by Mubangizi and O'Shea, 'the court will become an invaluable addition to the African Commission's somewhat limited protective role'.¹⁹ The African Commission is mandated with four main functions: promotional, protective, interpretative and consultative. It has the power to accept interstate complaints and individual communications. One feature of the African Charter's individual petition system which distinguishes it from the other regional systems is that it deals not with individual violations of human rights, but only with 'special cases which reveal the existence of a series of

¹⁶ See Article 25 of the European Convention.

¹⁷ See Article 44 of the European Convention.

¹⁸ The Additional Protocol to the African Charter establishing an African Court of Human and Peoples' Rights was adopted on 10 June 1998. It has been signed by 30 member states, but requires at least 15 ratifications to enter into force.

¹⁹ See Mubangizi and O'Shea; 'An African Court of Human and Peoples' Rights' *South African Yearbook of International Law* 24 (1999) 268.

serious or massive violations of human and peoples' rights'.²⁰ On the whole the Commission has served as a limited means of control over human rights abuses, and the African regional system has generally been perceived to be weak and ineffective in implementing human rights norms.

2.2.3.3 **Supervision by the International Court of Justice**

As the principal judicial organ of the United Nations, the International Court of Justice (ICJ) has jurisdiction to adjudicate on matters involving human rights. The Court has both contentious (adjudicatory) and advisory jurisdictions. Some human rights instruments, such as the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on all Forms of Discrimination Against Women, the International Convention on the Suppression and Punishment of the Crimes of Apartheid, and more importantly the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, specifically provide that, in the event of a dispute between contracting parties concerning the interpretation or application of the Convention in question, any of the disputing parties may refer the matter to the ICJ.²¹ Advisory opinions may be sought from the ICJ by the General Assembly and the Security Council. Over the years the ICJ has been more successful in fulfilling this jurisdictional mandate than the contentious jurisdiction which has only been exercised in a handful of cases involving human rights.

2.3 **DOMESTIC ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS NORMS**

For human rights to be successfully protected and implemented, there ought to be a meaningful interplay and overlap between international human rights standards and domestic or national standards. According to Henkins:

²⁰ See Davidson (note 5 above) at 161.

²¹ Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provision, for this is made under Article 30.

'The purpose of international law is to influence states to recognise and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life.'²²

The need for a coherent incorporation of international human rights norms into domestic law becomes even more urgent when regard is had to the difficulties and complications inherent in international human rights enforcement mechanisms. Domestic enforcement of international human rights norms, however, largely depends on the relationship between international law and domestic law.

2.3.1 The relationship between international and national law

According to section 2 of the Constitution of the Republic of South Africa:

'The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.'²³

This means that national law takes precedence over any other law, including international law. However, it really all depends on the perspective and the context in which the particular law is to be applied. One commentator has observed:

'The relationship between the international legal system and the national legal system will be perceived differently from the perspective of a judge or arbiter operating within the international

²² See Henkin in Meron (ed) *Human Rights in International Law: Legal and Policy Issues (1984)*.

²³ See section 2 of the Constitution of the Republic of South Africa (Act 108 of 1996).

framework applying international law and by the national judge operating within the national legal system and applying national law.²⁴

The implication of the above observation is that states may or may not allow and apply international law in their national legal systems. Consequently some states apply the principle that international norms automatically form part of domestic law and even have priority over domestic norms. In other states international norms have to be incorporated into the domestic legal system by way of legislation. South Africa falls in the latter category. In addition to that, the South African Constitution has attempted to clarify the relationship between international law and the South African legal system through various provisions.²⁵ The most pertinent of these is section 39(1) which directs that 'in interpreting the Bill of Rights courts and tribunals must consider international law'.²⁶

2.3.2 International Treaties and Conventions

As has been mentioned,²⁷ international treaties and conventions are one of the main sources of international law. According to Steiner and Alison:

'[Treaties] have become the primary expression of international law and ... the most effective if not the only path towards international regulation of many contemporary problems. [They] for example, have been the principal means for the development of the human rights movement. Only treaties ... can create international institutions

²⁴ See O'Shea, 'International Law and the Bill of Rights' *Bill of Rights Compendium* (1999) at 7A - 5.

²⁵ The provisions referred to are section 39 (1) dealing with interpretations, section 198 (c) dealing with principles governing national security, section 199 (5) dealing with the conduct of members of security services, section 200 (2) dealing with the defence force, section 201(2)(c) dealing with the president's authority over the defence force, section 231 dealing with international agreements, section 232 dealing with customary international law and section 233 dealing with application of international law in interpretation of legislation.

²⁶ See section 39(1)(b) of the Constitution. The role of international law in interpreting the Bill of Rights will be discussed in more detail in Chapter 3 of this study, together with other constitutional provisions in the Bill of Rights relevant to rights of prisoners.

²⁷ See 2.2.1 above, 'sources and characteristics of International law'.

in which state parties participate and to which they may owe obligations.²⁸

A state becomes bound by a treaty in terms of international law by participating in a process which includes negotiation, signing and ratification. Ratification means depositing an instrument of ratification with the relevant authoritative body. Under South African law, the procedures for concluding and becoming bound by an international treaty are provided for in section 231 of the Constitution:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces ...
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces ...
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation

Clearly section 231(4) is intended to subject international treaties to a Parliamentary legislative process before being incorporated into the domestic law. The whole of section 231 indicates that international human rights norms have no guaranteed applicability in all domestic legal systems, least of all South Africa's.

2.3.3 Customary international law

Custom is regarded as 'the oldest and original source of international law'.²⁹ Customary international law refers to general state practice regarded as legally binding by the majority of the nations of the world.³⁰ The place of

²⁸ See Steiner and Alison, *International Human Rights in Context*, (1996) at 30.

²⁹ See Steiner and Alison (note 28 above) at 27

³⁰ See Botha, "The Coming of Age of Public International Law in South Africa" *South African Yearbook of International Law* 18 (1992) at 41.

international customary law in South African municipal law was initially rather confusing. There were those who took the approach that international customary law was part of South African law,³¹ while others believed that it should be regarded as a source of law available to the courts only in appropriate cases.³² It was in the context of the first approach that cases like *Nduli v Minister of Justice*³³ and *Inter Science Research and Development Services v Republic Popular da Mocambique*³⁴ were decided. In *Nduli's* case it was held that international law was to be regarded as part of South African law. The court made it clear that rules of customary international law that were either universally recognised or had received the assent of the country were to be regarded as part of South African law.

All the initial confusion has since been cleared by section 232 of the new Constitution which provides that:

'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

This provision entrenches the original common law position and automatically incorporates customary international law into South African municipal law. This is likely to play a significant part in human rights protection if regard is to be had to the fact that South Africa is usually not in a hurry to ratify important international human rights agreements and incorporate their provisions into municipal law.

The question that arises however is; which human rights may be classified under customary international law? It is significant to note that the prohibition of torture or other cruel, inhuman or degrading treatment or punishment and prolonged arbitrary detention are among the international

³¹ See for example Dugard 'The Place of Public International Law in South African Law' *Essays in Honour of Ellison Kahn*, Visser (Ed) 1989, as equal in Botha (note 30 above) at 41.

³² See Botha (note 30) at 41.

³³ 1978 1 SA 893 (A)

³⁴ 1980 2 SA 111 (T).

customary norms listed by the Third Restatement of Foreign Relations Law of the United States.³⁵ Standards for treatment of prisoners as outlined in the United Nations Standard Minimum Rules for the Treatment of Prisoners have been added by the courts.³⁶

In view of the foregoing discussion it is clear that international law plays an important role in the protection of human rights generally and prisoners' rights in particular. Although it has been seen that implementation and enforcement of international human rights norms are beleaguered with problems and complications, consolation can be taken in the fact that certain procedures have been put into place for the enforcement of international human rights norms at domestic level. Where such norms are not directly enforceable, at least their influence plays an important role in shaping constitutional human rights provisions.

2.4 INTERNATIONAL HUMAN RIGHTS PROTECTION FOR PRISONERS

International law does not prohibit imprisonment as such except where the incarceration is effected in violation of internationally recognized human rights and fundamental freedoms. It is a basic principle of international human rights law that convicted prisoners do not thereby lose their fundamental rights, except those which are incidental to their lawful detention.³⁷ Accordingly, provision is made under Article 10(1) of the International Covenant of Civil and Political Rights (ICCPR) that:

'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'

³⁵ Vol 2, section 702 at 161 (1986).

³⁶ See *Lauren v Manson* (1980) 507 F Supp 1177 (D Com).

³⁷ See Naldi, 'Prisoners Rights as Recently Interpreted by the Supreme Court of Zimbabwe: A Comparative Study with International Human Rights' *African Journal of International and Comparative Law* 4 (1992) 716.

Article 5(2) of the American Convention on Human Rights provides, *inter alia*, that:

‘All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.’

These instruments, together with a host of others including the Universal Declaration of Human Rights, the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights, the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, all prohibit torture, and cruel, inhuman and degrading treatment.³⁸ Other specific international instruments have implicitly or explicitly included these notions in their provisions. This section deals with the development and content of certain specific international instruments before looking at how these instruments have been applied and interpreted to protect specific rights of prisoners.

2.4.1 Instruments providing for international human rights norms for prisoners (under the United Nations system)

2.4.1.1 The United Nations Standard Minimum Rules for the Treatment of Prisoners

As early as 1926 the International Penal and Penitentiary Commission was working on a draft set of standard minimum rules for prisoners. The activities of the Commission mainly between 1929 and 1933 resulted in the drafting of a set of such rules in 1934.³⁹ In 1950 the United Nations became involved in the process and in July 1951 at its last session, the International Penal and Penitentiary Commission approved a revised draft of the Standard

³⁸ See Article 5 of the Universal Declaration of Human Rights, Article 3 of the European Convention on Human Rights, Article 5 of the African Charter of Human and Peoples’ Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

³⁹ See Van Zyl Smit, *South African Prison Law and Practice*, (1992), 80.

Minimum Rules for the Treatment of Prisoners.⁴⁰ In 1954 a set of these rules was approved by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders. The United Nations Economic and Social Council endorsed the text in 1957 and in 1977 an additional article (rule) 95 was added to ensure that persons arrested or detained without charges should benefit from most of the provisions of the Standard Minimum Rules.⁴¹ These Rules are reviewed on an on-going basis by the Committee on Crime Prevention and Control of the Economic and Social Council. In so doing, the United Nations tries to keep pace with current penological thinking in an effort to achieve greater success with respect to adoption and implementation of the Rules.⁴²

The main objective of the Standard Minimum Rules is stated in the Preliminary Observations thus:

'The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.'⁴³

The Rules are contained in two parts. Part I containing 55 articles provides in specific detail for rules of general application regarding the following matters; separation of categories of prisoners, accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion, retention of prisoners property, notification of death, illness, transfer, removal of prisoners, institutional personnel and inspection. Part II

⁴⁰

Ibid.

⁴¹

See ECOSOC Res 663 C(XXIV) of 31 July 1957 and ECOSOC Res 2076 (LXII) of 13 May 1977.

⁴²

See Strydom, Pretorius and Klinck, *International Human Rights Standards*, Vol 1 (1997) 121.

⁴³

See Rule 1 of the Standard Minimum Rules for the Treatment of Prisoners.

containing articles 56 - 95, provides for rules applicable only to special categories of prisoners. These include rules applicable to prisoners under sentence, rules regarding insane and mentally abnormal prisoners, rules regarding prisoners under arrest or awaiting trial, rules regarding civil prisoners and rules regarding prisoners under arrest or detained without charge.

2.4.1.2 **The Basic Principles for the Treatment of Prisoners**

In an effort to give greater meaning to the significance of the Standard Minimum Rules for the Treatment of Prisoners, the General Assembly of the United Nations adopted the Basic Principles for the Treatment of Prisoners in 1990. These 'were specifically designed to facilitate the full implementation of the Standard Minimum Rules by articulating the basic principles underlying them'.⁴⁴ This objective is clearly reflected in the preamble to the resolution adopting the principles.⁴⁵ Among other things, the Principles confirm certain fundamental prisoners' rights and stipulate that all prisoners should be treated with due respect for their inherent dignity and value as human beings, without discrimination of any kind.⁴⁶ Prohibition of discrimination on various grounds is provided for under Principle 2. Principle 5 declares that:

'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the state concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.'

⁴⁴ See Van Zyl Smit (note 39 above) at 80.

⁴⁵ See G A Res 45/111 of 14 December 1990.

⁴⁶ See Strydom, Pretorius and Klinck (note 42 above) at 134.

Principle 6 provides for the right of prisoners to take part in cultural activities and education aimed at the full development of the human personality. Principle 7 regards solitary confinement and the restriction or abolition thereof. Principle 9 provides for access and availability of health services and finally Principle 10 stipulates that favourable conditions should be created for the re-integration of the ex-prisoner into society under the best possible conditions.⁴⁷

It has to be emphasised that the Basic Principles for the Treatment of Prisoners, just like the Standard Minimum Rules, is not *per se* legally binding. Both these instruments do not constitute international treaties. They are nevertheless, unanimously accepted by a large international community of countries to which South Africa belongs. 'Indeed', says Van Zyl Smit, 'the official South African response to the Rules was enthusiastic and there is considerable evidence that the South African Prisons Act of 1959 was drafted as a conscious response to these Rules.'⁴⁸ Both the Rules and the Principles also provide guidance in interpreting general rules applicable to prisoners, and serious or widespread non-compliance may well be seen as violation of prisoners rights.

2.4.1.3 **Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment**

This instrument was a result of a study undertaken by the United Nations Commission on Human Rights whose findings were initially published in 1962.⁴⁹ The study dealt with the right to be free from arbitrary arrest, detention and exile.⁵⁰ The conclusions of the study gave rise to a draft document which after several years was finalised by a Working Group

⁴⁷ See generally the Basic Principles for the Treatment of Prisoners.

⁴⁸ See Van Zyl Smit (note 39 above) at 80.

⁴⁹ Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (UN publication sales No 65 XIV2). See also Strydom, Pretorius and Klinck (note 42 above) at 128.

⁵⁰ *Ibid.*

appointed by a Committee of the General Assembly . In 1988 the final draft of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment was approved and adopted by the General Assembly.⁵¹ The Body of Principles is prefaced with a 'scope' which says:

'These principles apply for the protection of all persons under any form of detention or imprisonment.'⁵²

The Principles (39 in number) range from very general formulations of the human rights of persons under any form of detention or imprisonment, to more specific guarantees of a procedural nature, to provisions on particular rights to be ensured in places of detention or imprisonment.⁵³ A random classification of the contents of the instruments would see the principles fall into the following categories:

- a) general provisions on human rights of detained or imprisoned persons (Principles 1-8)
- b) procedural safeguards (Principles 9-14)
- c) treatment of detained or imprisoned persons (Principles 15-39)

A general clause providing that nothing in the Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights concludes the instrument.

2.4.1.4 **The United Nations Standard Minimum Rules for the Administration of Juvenile Justice**

This is one of two important UN instruments specifically formulated for the detention of juveniles. Clearly, the UN Standard Minimum Rules for the

⁵¹ GA Res 43/173 of 1988.

⁵² See Scope of the Body of Principles.

⁵³ See Strydom, Pretorius and Klinck (note 42 above) at 130.

Treatment of Prisoners were not designed to regulate the management of juvenile penal institutions. The United Nations therefore felt that there were compelling reasons for treating adults and juveniles differently, and it was therefore decided that a complementary set of standards be designed to provide special safeguards for young offenders. The result was the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules) adopted by the United Nations General Assembly in 1985.⁵⁴

Although the Rules discourage the use of institutionalisation for juvenile offenders,⁵⁵ they set out certain essential elements for the protection of such offenders who are placed in institutions. These elements cover matters such as minimum age of criminal responsibility, the objectives of juvenile justice, the features of effective, fair and humane juvenile justice administration and human rights principles to be applied.⁵⁶ The Rules also deal with the relationship between themselves and the Standard Minimum Rules for the Treatment of Prisoners, detention pending trial and objectives of institutional treatment.

2.4.1.5 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty

This is the other UN instrument dealing with juvenile detention. It was formulated in response to the fact that the Standard Minimum Rules for the Administration of Juvenile Justice did not fully address the conditions in which juveniles deprived of their liberty were detained.⁵⁷ The Rules were

⁵⁴ Res 40/33 (1985).

⁵⁵ Rule 17(1)(c) provides that 'deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.

⁵⁶ Strydom, Pretorius and Klinck (note 42 above) at 138.

⁵⁷ Strydom, Pretorius and Klinck (note 42 above) at 144.

adopted by the General Assembly of the United Nations on 14 December 1990.⁵⁸ The main objective of the Rules is stipulated in Rule 3 which states:

'The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.'

Rule 1 also reiterates the least possible use of institutionalisation for juveniles. Imprisonment should be used as a last resort, says the Rule.

The instrument is divided into four parts; fundamental perspectives, scope and application of the Rules, juveniles under arrest or awaiting trial and the management of juvenile facilities. Regarding the conditions of detention, provision is made by the Rules for juveniles to have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers.⁵⁹ Juveniles should also be provided, where possible, with opportunities to pursue work, with remuneration, and continue education and training.⁶⁰

Regarding management of juvenile facilities, the Rules provide in specific detail for the proper keeping of records, admissions, registration and transfer. Provision is also made for classification and placement, accommodation, education, vocational training and work. The Rules also set out juveniles rights in regard to recreation, practising of religion, medical care, contacts with the wider community, disciplinary procedures and procedures for returning to the community.

⁵⁸ Resolution 45/113 (1990).

⁵⁹ See Rule 18(a).

⁶⁰ See Rule 18(b).

2.4.1.6 **Other instruments under the United Nations System**

There are a number of other instruments under the United Nations system for the protection of prisoners' rights. These include; Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment.⁶¹ The purpose of these six Principles is to prohibit health personnel from using their knowledge and skills in assisting in the interrogation of prisoners and detainees in a manner that may adversely affect their health. Principle 2 specifically states that it is 'a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment'. Another United Nations instrument is the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶² Adopted in 1975, the Declaration seeks to prohibit torture and other forms of ill-treatment. It has its genesis in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶³ These two instruments provide the basis for standard-setting and implementation as far as torture and ill-treatment of prisoners is concerned.

Another important instrument is the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.⁶⁴ It

⁶¹ Adopted by the General Assembly of the United Nations Resolution 37/194 of 15 December 1982.

⁶² Adopted by the General Assembly of the United Nations Resolution 3452 (XXX) of 9 December 1975.

⁶³ Adopted by the General Assembly of the United Nations Resolution 39/46 of 10 December 1984.

⁶⁴ Adopted by the General Assembly of the United Nations Resolution 46/119 of 17 December 1991.

deals with treatment of mentally ill persons and requires that such treatment should be based on humanity and respect for the dignity of the human person. Of particular relevance is Principle 20 which deals specifically with persons serving sentences of imprisonment for criminal offences, or who are otherwise detained. It requires that such persons should receive the best available mental health care. Finally, the Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners⁶⁵ requires states to co-operate in facilitating the transfer or return of persons convicted of crimes abroad to their country of nationality. Provision is also made for the rights of such foreign prisoners and how they should be treated.

2.4.2 Instruments providing for international human rights norms for prisoners (under regional systems)

2.4.2.1 European Standard Minimum Rules for the Treatment of Prisoners

These Rules are basically a European version of the United Nations Standard Minimum Rules for the Treatment of Prisoners. They were adopted by the Council of Europe's Committee of Ministers by Resolution (73)5 of 9 January 1973. These rules (like the United Nations Rules) are also divided into two parts. Part I deals with rules of general application while Part II deals with rules applicable to special categories of prisoners. Under Part I the Rules provide for matters relating to registration, distribution of prisoners, accommodation, personal hygiene, clothing and bedding, exercise and sport, medical services, discipline and punishment, information to and complaints by prisoners, contact with the outside world, and such other matters. Under Part II the categories of prisoners considered includes; prisoners under sentence, insane and mentally abnormal prisoners, prisoners under arrest or awaiting trial and civil prisoners.

⁶⁵ Adopted by the UN General Assembly Resolution 40/32 of 29 December 1985.

There are a few noticeable differences between the European Standard Minimum Rules for the Treatment of Prisoners and their United Nations counterpart. First, while the latter talks of separation of categories of prisoners (under rule 8), the former speaks of 'distribution' of prisoners (under rule 7). Under the European version, Rule 22 provides that prisoners may not be submitted to medical or scientific experiments which may result in physical or moral injury to their person. This prohibition is missing in the United Nations Rules. Rule 37 of the European version provides that; 'Prisoners shall be allowed to communicate with their family and all persons or representatives of organisations and to receive visits from these persons at regular intervals'. The reference to 'all persons or representative of organisations' is absent from the equivalent provision of the United Nations Standards (Rule 37).⁶⁶ Finally, another noticeable difference is the omission by the European Rules of the provision regarding privileges. Under the United Nations Rules this is dealt with under Rule 70 which provides that:

'Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment.'

The European Rules do not have a regional equivalent.

2.4.2.2 **Revised European Standard Minimum Rules for the Treatment of Prisoners**

The purposes of these Rules are set out in the preamble as, *inter alia*, to establish a range of minimum standards for all those aspects of prison administration that are essential to human conditions and positive treatment in modern and progressive systems; and to serve as a stimulus to prison administrations to develop policies and management style and practice

⁶⁶ See Strydom, Pretorius and Klinck (note 42 above) at 152.

based on good contemporary principles and equity. Also according to the preamble, the rules place renewed emphasis on the precepts of human dignity, the commitment of prison administration to humane and positive treatment, the importance of staff roles and effective modern management approaches.

Contained in 5 parts, the Revised European Rules 'reflect a re-assessment of penal philosophy and prison administration'.⁶⁷ They also reflect a 'shift in priorities and emphases, whilst maintaining the basic principles and norms of the United Nations Standard Minimum Rules'.⁶⁸ Under Part I, the usual basic principles are laid down, Part II provides for the management of prisons, Part III for personnel, Part IV for treatment objectives and regimes and finally Part V lays down additional rules for special categories of prisoners. These include untried prisoners, civil prisoners and insane and mentally abnormal prisoners.

2.4.2.3 **The Inter-American Convention to Prevent and Punish Torture**

This instrument, adopted by the General Assembly of the Organisation of American States on 9 December 1985 is in a way a regional reflection of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The objective of the Convention is spelled out in Article 1 as the prevention and punishment of torture in accordance with the terms of the Convention.

Although the instrument is not restricted to prisoners, like its United Nations counterpart it was formulated and drafted with prisoners and detainees mainly in mind. This is reflected in Article 5 which provides *inter alia*, that:

⁶⁷ See Strydom, Pretorius and Klinck (note 42 above) at 154.
⁶⁸ See Strydom, Pretorius and Klinck (note 42 above) at 155.

'Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.'

Other regional instruments relating to human rights norms for prisoners include the Draft European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment whose aim is to supplement the remedies provided for in the European Convention on Human Rights by creating a procedure for the protection of detainees from torture and other forms of ill-treatment.⁶⁹ They also include a number of resolutions and recommendations. One of these relates to the custody and treatment of dangerous prisoners.⁷⁰ It recommends that governments should as far as possible apply ordinary prison regulations to dangerous prisoners, and that extra security measures should only be applied to the extent to which they are necessary and in such a way that respects the prisoners' dignity and rights.

A resolution dealing with prison labour⁷¹ sets down a number of measures regarding the use thereof. Another resolution deals with electoral, civil and social rights of prisoners.⁷² It contains a number of important recommendations concerning the electoral, civil and social rights of prisoners. The basis of these recommendations is that the mere fact of imprisonment does not necessarily prohibit prisoners from exercising their civil rights. Finally, a recommendation dealing with prison leave⁷³ stipulates that prison leave should be granted to the greatest possible extent on medical, educational, occupational, family and other social grounds. Certain

⁶⁹ This draft was appended to Recommendation 971 (1983) on the protection of detainees from torture and from cruel, inhuman or degrading treatment adopted by the Parliamentary Assembly of the Council of Europe in 1983.

⁷⁰ Recommendation No R(82) 17 of the Committee of Ministers of the Council of Europe.

⁷¹ Resolution 75(25) of the Committee of Ministers of the Council of Europe.

⁷² Resolution 62(2) of the Committee of Ministers of the Council of Europe.

⁷³ Recommendation No R(82) 16 of the Committee of Ministers of the Council of Europe.

factors should always be taken into consideration including the nature and seriousness of the offence, length of sentence, period of detention completed, personality and behaviour of the prisoner, risk to society, family and social situation of prisoner, purpose of leave, its duration and its terms and conditions.

No specific instrument relating to prisoners' rights or prison conditions has been formulated under the African regional system. This is mainly because in comparison to the other regional systems, the African system is the newest, the least developed, the least effective, the most distinctive and the most controversial.⁷⁴ Steiner and Alison say:

'For these reasons the African system has not yielded anywhere near the same amount of information and "output" of recommendations or decisions - state reports and reactions thereto, communications (complaints) from individuals and state responses thereto as have the other two regional regimes, let alone the United Nations system.'⁷⁵

2.4.3 Application and interpretation

In order to give context or meaning to the instruments outlined above, it is important to explain briefly how they have been applied and interpreted. This will not be done on an instrument to instrument basis, but rather on the basis of the various human rights norms that the instruments are meant to protect.

2.4.3.1 Deprivation of liberty (arrest and detention)

Almost all international instruments relating to prisoners' rights recognise that imprisonment is an extreme measure. Indeed Rule 57 of the United Nations Standard Minimum Rules states that:

⁷⁴ See Steiner and Alison (note 28 above) at 689.
⁷⁵ *Ibid.*

'Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right to self-determination by depriving him of his liberty. Therefore the prison system shall not ... aggravate the suffering inherent in such a situation.'

It is in this light that provision is made under the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment that:

- (i) all persons under any form of detention or imprisonment should be treated in a humane manner and with respect and dignity;⁷⁶
- (ii) arrest, detention or imprisonment should only be carried out strictly in accordance with the law and by competent officials;⁷⁷ and
- (iii) any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority.⁷⁸

These sentiments are expressed in one form or another in many other instruments.

While almost all international human rights instruments have something to say about deprivation of liberty, it is perhaps the European Convention on Human Rights that is most elaborate on the matter. Article 5(1) contains an exhaustive enumeration of the cases in which deprivation of liberty is allowed. They include, *inter alia*, lawful detention after conviction by a competent court,⁷⁹ lawful detention for non-compliance with the lawful order of a court,⁸⁰ and lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority.⁸¹ The emphasis is obviously on the detention being 'lawful' which, in *Caprino v United*

⁷⁶ Principle 1.

⁷⁷ Principle 2.

⁷⁸ Principle 4.

⁷⁹ Article 5(1)(a).

⁸⁰ Article 5(1)(b).

⁸¹ Article 5(1)(c).

*Kingdom*⁸² was interpreted to mean that the arrest or detention must be lawful under the applicable domestic law.

Another occasion on which the application and interpretation of article 5(1) of the European Convention came before the European Commission was in the case of *Cyprus v Turkey*.⁸³ The case involved an inter-state complaint from Cyprus against Turkey (both parties to the Convention) that up to 2,000 Greek Cypriots who had been in Turkish custody from the time of the Turkish invasion of North Cyprus in 1974 were years later still missing and unaccounted for. The Commission held that the wording of Article 5 shows that any deprivation of liberty must be subject to law and that any unaccounted disappearance of a detained person must be considered as a particularly serious violation of the Article.⁸⁴ The European Court of Human Rights has also addressed the issue of deprivation of liberty on several occasions, including *Singh v United Kingdom*,⁸⁵ and *Guzzardi v Italy*.⁸⁶ In both cases the court held that the provisions of Article 5 of the European Convention had been violated.

The African Commission on Human and Peoples' Rights has in a number of cases dealt with deprivation of liberty (protected under article 6 of the African Charter). In *Achutan (on behalf of Banda); Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*⁸⁷ the Commission held that massive arbitrary arrest of trade unionists and church leaders constituted violations of Article 6. In *Commission Nationale des Droits de L'Homme v Chad*⁸⁸ the Commission held that arrest without charge and forced disappearances of certain individuals amounted to a violation of Article 6. And in *Abubakar v Ghana*,⁸⁹ where the complainant was detained without trial for seven years,

⁸² (6871/75) DR 12,14.

⁸³ (1992) 15 E.H.H.R. 509.

⁸⁴ See Janis, Kay and Bradley, *European Human Rights Law*, (1995) 299.

⁸⁵ (1996) 1 BHRC (E Ct HR) 119.

⁸⁶ (1980) (No 39) 3 E.H.R.R. 333.

⁸⁷ Communications 64/92, 68/92, 78/92 (joined).

⁸⁸ Communication 74/92.

⁸⁹ Communication 103/93.

the Commission urged the Ghanaian government to take steps 'to repair the prejudice suffered'.

2.4.3.2 Torture and cruel, inhuman or degrading treatment or punishment

The wording of this principle prohibition has its origin in the 1688 English Bill of Rights.⁹⁰ Both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights provide, in exactly the same words:

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'⁹¹

The other human rights instruments have a similar provision with slight variations in wording. The wording of the Principle prohibition has given rise to considerable controversy due to the fact that it extends to several distinct modes of conduct. However it was held in *Ireland v United Kingdom*⁹² that the prohibition extends equally to all those modes of conduct, and in all cases the obligation is absolute, non-derogable and unqualified. All that is therefore required is finding that the state concerned has failed to comply with one of these modes of conduct.⁹³ It was thus held by the European Human Rights Commission in the famous *Greek case*⁹⁴ that:

'It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.'⁹⁵

⁹⁰ See Sieghart, *The International Law of Human Rights*, (1983) 161.

⁹¹ Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR.
⁹² 1978 (No 25) 2 E.H.R.R. 25.

⁹³ See Sieghart (note 90 above) at 161.

⁹⁴ 12 Yearbook of the European Convention on Human Rights: The Greek Case 196 (1969). This case was brought by Denmark, Norway, Sweden and the Netherlands alleging a wide range of human rights violations, including torture, against Greece in the wake of its 1967 military coup.

⁹⁵ Note 94 above at 186.

The Commission further explained that:

‘the word “torture” is often used to describe inhuman treatment which has a purpose such as obtaining information or a confession, or the infliction of a punishment and is generally an aggravated form of inhuman treatment.’⁹⁶

On inhuman treatment the Commission said:

‘The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.’⁹⁷

And regarding degrading treatment the Commission stated that:

‘Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act beyond his will or conscience.’⁹⁸

The European Commission has addressed the question of torture and other forms of ill-treatment on several other occasions including the *Northern Ireland* case⁹⁹ where the alleged violations related to detention without charge and to torture or other ill-treatment of those suspected of politically motivated violence. This case was also heard by the European Court of Human Rights which held, *inter alia*, that the convention prohibits in absolute terms, torture and inhuman or degrading treatment or punishment irrespective of the victim’s conduct.

More recently the European Court of Human Rights held in *Aksoy v Turkey*¹⁰⁰ that when determining whether any particular form of ill-treatment constituted torture, the court should take account of the distinction drawn in

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See note 92 above.

¹⁰⁰ Case 100/1995/606.

Article 3 of the Convention between the notion of 'torture' and that of 'inhuman or degrading treatment', a distinction which was embodied in the convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering. The form of treatment known as 'Palestinian hanging', was of such a serious and cruel nature that it could only be described as torture and, as such, it constituted a violation of Article 3 of the Convention.¹⁰¹

2.4.3.3 Capital Punishment

Many United Nations studies have affirmed that the death penalty has very little or no deterrent effect at all on crime as a whole. In the first of such studies the conclusion was that 'the deterrent effect of the death penalty is, to say the least, not demonstrated'.¹⁰² In spite of this more than 100 countries today still have the death penalty as a legal sanction for certain offences. In view of this, it is hardly surprising that most international human rights treaties initially saved the death penalty.¹⁰³ The Universal Declaration of Human Rights is silent on the issue, so is the African Charter on Human and Peoples' Rights. Both the ICCPR and the American Convention restricted the death penalty to the most serious crimes. They also required it to be imposed only by a final judgement of a competent court in accordance with non-retroactive laws. They further conferred a right to seek pardon or commutation of sentence and provided that amnesty, pardon or commutation may be granted in all cases.¹⁰⁴ The American Convention went further and in addition to exempting persons who were below the age of 18 when they committed the capital offence, persons over 70 were also exempted. It also prohibited the death penalty for political offences or other related crimes and sought to encourage the progressive reduction of the

¹⁰¹ At 640 para. E to H.

¹⁰² Ansel, *Capital Punishment* (United Nations, 1962).

¹⁰³ See the ICCPR (Article 6), the European Convention on Human Rights (Article 1) and the American Convention on Human Rights (Article 4).

¹⁰⁴ See Sieghart (note 90 above) at 131.

death penalty by prohibiting its extension to new crimes, or its re-establishment once it has been abolished.¹⁰⁵

In 1984, upon the recommendation of the Committee on Crime Prevention and Control, the Economic and Social Council approved the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.¹⁰⁶ The instrument acknowledges the existence of the death penalty in certain countries and attempts to prescribe conditions or safeguards to be adhered to in carrying it out.

In 1989 the United Nations General Assembly adopted by a narrow majority the Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty. This Protocol constitutes an elaboration of Article 6 of the ICCPR and is the first universal, as opposed to regional, instrument to explicitly seek the abolition of the death penalty.¹⁰⁷ In 1990 the Organisation of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.¹⁰⁸ A similar step had been taken earlier by the Council of Europe when it adopted Protocol No.6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty.¹⁰⁹ These are some of the attempts that have been made both at universal and regional level to abolish the death penalty. As a result the death penalty is, in fact, now very rare among the signatory states of the European Convention, for example.

There have been other attempts, mainly judicial, aimed at the abolition of the death penalty. Many of these attempts have been based on the ground that it constitutes cruel and inhuman punishment. In the US, it was held in

¹⁰⁵

Ibid.

¹⁰⁶

Resolution 1984/50 of 25 May 1984.

¹⁰⁷

See Naldi, 'United Nations seeks to abolish the death penalty' *ICLQ* 1991 948. See also the Second Optional Protocol to the Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations Res. 44/128 of 15 December 1989.

¹⁰⁸

OAS GA Resolution 1042 adopted on 8 June 1990.

¹⁰⁹

Adopted on 28 April 1983.

*Furman v Georgia*¹¹⁰ that the imposition of the death penalty was not necessary as a means of stopping convicted criminals from further crimes. There was no reason to believe that the death penalty as then administered was necessary either to deter the commission of capital crimes or to protect society, and the death penalty could not be shown to be serving any penal purpose which could not be served equally by some less severe punishment.

The European Court of Human Rights has had to address the issue on several occasions. In *Soering v United Kingdom*,¹¹¹ it was argued - and the court agreed - that a violation was caused by the prison conditions in connection with the 'death-row phenomenon'. This was the extended period of time involved in appeals and collateral proceedings between imposition and execution of sentence during which time the condemned person would suffer severe and ever increasing stress and anguish.¹¹² The same issue was addressed extensively by the Judicial Committee of the Privy Council in *Pratt v Attorney-General for Jamaica*.¹¹³ Citing the *Soering* case the Privy Council held that a delay of 12 years after the pronouncing of a sentence of death amounted to the infliction of 'inhuman or degrading punishment or other treatment' in contravention of section 17 of the Constitution of Jamaica. The same Privy Council held as recently as 1996 in *Henfield v Bahamas*¹¹⁴ that the lapse of an overall period of six years and eight months awaiting execution following sentence of death was sufficiently prolonged as to render execution after the period inhuman punishment contrary to section 17 of the Constitution of the Bahamas. In *Fisher v Minister of Public Safety*¹¹⁵ the Privy Council held that a delay of two years and six months was not sufficiently substantial to render the subsequent execution of the appellant inhuman, even if regard were had to the period of pre-trial delay.

¹¹⁰ 408 US 238.

¹¹¹ 11 E.H.R.R. 439. Judgment of 7 July 1989 (No. 161).

¹¹² Janis, Kay and Bradley (note 84 above) at 155.

¹¹³ [1993] 4 All E.R. 769 PC.

¹¹⁴ (1996) 1 BHRC 369, PC

¹¹⁵ (1998) 4 BHRC 191, PC.

Interestingly, the UN Human Rights Committee held in *Johnson v Jamaica*¹¹⁶ that the length of the period a condemned person spent confined to death row did not in itself amount to cruel and degrading treatment and/or punishment constituting a violation by a state party of its obligation under Article 7 and 10(1) of the Covenant (ICCPR) in the absence of some further compelling circumstances. Indeed, the Committee said, if the mere length of detention on death row were to be determinative, the effect would be to expedite executions, and that would clearly be inconsistent with the Covenant's object of reducing the death penalty.¹¹⁷ The defendant was however granted further clemency in addition to the commutation of his death sentence on grounds that Article 14(3)(c) and (5) of the Covenant (providing for the right to be tried without undue delay and the right to have one's sentence and conviction reviewed by a higher tribunal) had been violated.

It can be said that attempts both at universal and regional treaty level and also judicial attempts to abolish the death penalty have been fairly successful. That is not to say, however, that the death penalty is about to disappear as a penal sanction. A lot more needs to be done before capital punishment can be eliminated altogether.

2.4.3.4 Corporal Punishment

Most international human rights instruments (including the Universal Declaration of Human Rights, ICCPR, and the regional conventions) do not address themselves explicitly to the question of corporal punishment as a judicial sanction.¹¹⁸ As far as corporal punishment for disciplinary offences in prison is concerned, provision is made under the UN Standard Minimum Rules for the Treatment of Prisoners that:

¹¹⁶ (1996) 1 BHRC 37 UN HRC.

¹¹⁷ At 43 - 44.

¹¹⁸ See Rodley, *The Treatment of Prisoners Under International Law*, (1987) at 249.

'Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment shall be completely prohibited as punishment for disciplinary offences.'¹¹⁹

Provision is also made under the United Nations Standard Minimum Rules for the Administration of Juvenile Justice that 'juveniles shall not be subject to corporal punishment.'¹²⁰

Not many cases of corporal punishment are reported to have come before either the Human Rights Committee (of the UN), the Inter-American Court and Commission of Human Rights or the African Commission. However, the European Commission and Court have had occasion to address the issue in *Tyrer v United Kingdom*.¹²¹ Tyrer was sentenced by a juvenile court in the Isle of Man, a self-governing territory of the UK, to three strokes of the cane. He petitioned the European Commission of Human Rights arguing that his punishment was in violation of Article 3 of the European Convention on Human Rights (which prohibits torture or inhuman or degrading treatment or punishment). Both the Commission and the Court concluded that the issue at stake was whether corporal punishment amounted to degrading punishment within the meaning of Article 3. They both held that indeed it did:

'Juvenile corporal punishment constitutes a breach of Article 3 of the Convention and, consequently, its infliction on the applicant was in violation of this provision of the Convention.'¹²²

The significance of the *Tyrer* case was recognised by the Isle of Man Court of Appeal in *Teary (Sergeant of Police) v O'Callaghan*.¹²³ O'Callaghan (16 years old) had been sentenced to four strokes of the cane. Despite the willingness of O'Callaghan to be whipped, the Court of Appeal annulled the

119

Rule 31.

120

Rule 17.3.

121

(1978) 2 E.H.R.R.1.

122

para 40.

123

See Steiner and Alison (note 28 above) at 738.

sentence basing its decision on the grounds that the courts should have regard to international obligations.¹²⁴

Though there have not been many international decisions to test the question whether corporal punishment amounts to torture, logically there is no reason why it should not. Judging by the provisions of the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Standard Minimum Rules for the Administration of Juvenile Justice and if *Tyrer's case* is anything to go by, clearly international human rights law prohibits corporal punishment.

2.4.3.5 **Prison conditions and treatment of prisoners**

The Universal Declaration of Human Rights does not specifically provide for prescribed conditions of detention. However, Article 10(1) of the International Covenant on Civil and Political Rights provides:

‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’

This provision has its counterpart in the American Convention on Human Rights and the African Charter of Human and Peoples' Rights. The European Convention does not have this specific provision. As the main specialized UN instrument dealing with this matter, the Standard Minimum Rules for the Treatment of Prisoners provides an unambiguous detailed guide for the required conditions and practice.¹²⁵ The intentions of the UN Standard Minimum Rules are reflected in a host of other instruments, including the Basic Principles for the Treatment of Prisoners, the UN Standard Minimum Rules for the Administration of Juvenile Justice, the Body of Principles for the Protection of All Persons Under Any Form of Detention

¹²⁴

Ibid.

¹²⁵

See 2.4.1.1. above.

or Imprisonment and the Revised European Standard Minimum Rules for the Treatment of Prisoners.

It is possible to imagine prison treatment and conditions being so appalling as to amount to inhuman or degrading treatment or punishment. A perfect example is provided by the *Greek case*¹²⁶ where the European Commission on Human Rights held that the conditions of detention and the circumstances in which persons were detained in the cells, were contrary to Article 3 of the Convention.¹²⁷ In the *Northern Ireland case*,¹²⁸ the European Court of Human Rights held that the five interrogation techniques used by British security forces in Northern Ireland amounted to inhuman and degrading treatment, though not to torture as the commission had concluded.

The Human Rights Committee of the United Nations has addressed the question of prison conditions and treatment of prisoners on several occasions. In *Buffo v Uruguay*¹²⁹ the complainant claimed to have been held incommunicado, blindfolded, with his hands bound, his only food a cup of soup in the morning and another at night, and relatives were not allowed to bring him food or medicine. The Committee found that these conditions violated Articles 7 and 10(1) of the Covenant. Similarly in *Vasilski v Uruguay*¹³⁰ the Committee found that Articles 7 and 10(1) of the Covenant had been violated because the complainant had 'not been treated in prison with humanity and with respect for the inherent dignity of the human person'.¹³¹

¹²⁶ 12 Yearbook of the European Convention on Human Rights: The *Greek Case* 196 (1969).

¹²⁷ At 480.

¹²⁸ *Ireland v United Kingdom* 1978 (No 25) 2 E.H.H.R. 25.

¹²⁹ (33/1978) Report of the Human Rights Committee GAOR, 36th Session, Supplement No 40 (1981).

¹³⁰ (80/1980), Report of the Human Rights Committee GAOR, 38th Session, Supplement No 40 (1983).

¹³¹ Para 11.

Conditions of imprisonment were the subject of two communications submitted to the African Commission on Human and Peoples' Rights in the *Orton and Vera Chirwa case*.¹³² Two persons by the names of Orton and Vera Chirwa were sentenced to death in Hastings Banda's Malawi. Their sentences were commuted to life imprisonment. They claimed that various aspects of their imprisonment contravened Article 5 of the African Charter (protecting the right to inherent dignity in a human being and prohibiting torture, cruel, inhuman or degrading punishment and treatment). These were conditions of overcrowding, acts of beating, excessive solitary confinement, shackling within a cell, poor quality of food and denial of access to medical care. The Commission held that these conditions contravened Article 5 of the Charter. The African Commission also held in *Commission Nationale des Droits de L'Homme v Chad*¹³³ that suspending prisoners by their feet, violent beatings, deprivation of food and water, and sexual assault while in custody amounted to 'torture, cruel, inhuman or degrading punishment and treatment' and contravened Article 5 of the African Charter.

One aspect of prison treatment that needs to be looked at rather closely is solitary confinement. A prisoner may be withdrawn from the ordinary prison community into solitary confinement under the following circumstances:

- a) As a disciplinary penalty, which is imposed for a limited period after a hearing following a distinct disciplinary offence;
- b) In the interest of preserving order and discipline where the officials are confronted with a recalcitrant prisoner; and
- c) In the interest of the prisoner's own safety and protection.

It would appear that solitary confinement is not absolutely prohibited. Rule 31 of the UN Standard Minimum Rules only prohibits 'punishment by placing

¹³² Communications 64/92, 68/92, 78/92 (joined).
¹³³ Communication 74/92.

*in a dark cell*¹³⁴ and all cruel, inhuman or degrading punishments'. Rule 32 acknowledges that 'punishment by close confinement' may be inflicted if a medical officer has examined the prisoner and certified in writing that he is fit to sustain it. Rule 38(1) of the Revised European Minimum Rules provides that 'punishment by disciplinary confinement' which might have an adverse effect on the physical or mental health of the prisoner shall only be imposed if authorised by a medical officer.

The Human Rights Committee of the UN has condemned solitary confinement together with other adverse prison conditions (including a spare diet) as being in violation of Articles 7 and 10(1) of the ICCPR.¹³⁵ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has expressed concern about solitary confinement.¹³⁶ The Inter-American Court of Human Rights stated in *Rodriguez v Honduras*¹³⁷ that:

'the mere subjection of an individual to prolonged isolation and deprivation or communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) of the Convention.'¹³⁸

It can be seen, therefore, that solitary confinement is not *per se* a violation of human rights, but the presence of other factors such as prolonged period, spare diet and being kept incommunicado can cause solitary confinement to amount to cruel and inhuman treatment. In an effort to alleviate prison conditions and treatment of prisoners in this regard the Basic Principles for

¹³⁴ Emphasis mine.

¹³⁵ *Larrosa v Uruguay* (88/1981), Report of the Human Rights Committee, GAOR 38th Session Supplement No 40 (1983).

¹³⁶ See Naldi (note 37 above) at 121.

¹³⁷ 28 ILM (1989) 294.

¹³⁸ Para 187.

the Treatment of Prisoners has expressed the desirability of eliminating solitary confinement by providing that:

'Efforts addressed to the abolition of solitary confinement as a punishment or to the restriction of its use, should be undertaken and encouraged.'¹³⁹

2.4.3.6 The Right to a Fair Hearing

All international human rights instruments (universal and regional) contain in one form or another provision on the right to a fair public hearing.¹⁴⁰ In fact this right is so fundamental that all over the world, wherever 'written' constitutions exist, this right has been constitutionalized.¹⁴¹ As far as prisoners are concerned complaints based on the right to a fair hearing usually fall into two categories: (1) Access to courts and (2) Disciplinary hearings (decisions taken by prison bodies against prisoners for their conduct).

2.4.3.6.1 Access to Court

In *Golder v United Kingdom*¹⁴² the UK contended, among other things, that the right of access to court under Article 6(1) was not unlimited in the case of convicted prisoners, but was subject to reasonable restraint in the interest of prison order and discipline. Both the Commission and the Court held the view that Article 6(1) not only contains certain guarantees for the course of judicial proceedings, but also grants a right to such proceedings. The Court observed further that the right to submit a civil claim to a judge and the rule of international law forbidding the denial of justice were universally recognised fundamental principles of justice.

¹³⁹ Principle 7.

¹⁴⁰ See Article 10 of the Universal Declaration of Human Rights, Article 9 of the ICCPR, Article 6 of the European Convention, Article 8 of the American Convention and Article 7 of the African Charter.

¹⁴¹ See Janis, Kay and Bradley (note 84 above) at 375.

¹⁴² Judgment of February 21 1975, (No. 18) 1 E.H.H.R. 524.

The European Court of Human Rights has addressed this aspect on many recent occasions including *Saunders v United Kingdom*¹⁴³ (dealing with the right of an individual not to incriminate himself) and *Van Mechelen and Others v Netherlands*.¹⁴⁴ In the latter case the Court held that in accordance with Articles 6(1) and 6(3)(d) of the Convention, evidence against an accused should be produced at a public hearing in the presence of that party, who should be given an opportunity to challenge and question witnesses giving evidence against him. In *Andronicon v Cyprus*¹⁴⁵ the Court held that while Article 6(1) of the Convention guaranteed litigants an effective right of access to court, it did not stipulate the means by which the state should achieve that end, beyond requiring the state to make provision for effective access that was not at variance with Article 6(1).

2.4.3.6.2. Disciplinary hearings

In *Engel and Others v The Netherlands*¹⁴⁶ the European Court held that it is open to states to maintain a distinction between disciplinary proceedings and criminal proceedings but states could not circumvent the fundamental obligation to grant a fair trial of a criminal charge by the expediency of classifying it as criminal. In *Campbell and Falls v United Kingdom*¹⁴⁷ this issue was considered in terms of prison discipline. The applicants were involved in a protest which had led to a violent disturbance. They were charged with mutiny and incitement to mutiny. Their penalties included forfeiture of the potential remission of sentence otherwise available to them. The Court attempted to separate disciplinary action from 'criminal charges' and held that 'by causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to deprivation of liberty and the object and purpose of the Convention require that the

¹⁴³ (1997) 2 BHRC (E Ct HR) 358.

¹⁴⁴ (1997) 2 BHRC (E Ct HR) 486.

¹⁴⁵ (1998) 3 BHRC (E Ct HR) 389.

¹⁴⁶ Judgment of 8 June 1976 (No. 22) 1 E.H.H.R. 647.

¹⁴⁷ Judgment of 28 June 1984 (No. 80) 7 E.H.H.R. 165.

imposition of a measure of such gravity should be accompanied by guarantees of Article 6¹⁴⁸.

2.4.3.7 Correspondence and private communication

Provision is made under the ICCPR for the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence.¹⁴⁹ This right is also echoed in the European Convention¹⁵⁰ and the American Convention.¹⁵¹ The African Charter merely states that every individual has the right to receive information.¹⁵² As to how such a right is applicable to prisoners, only the European Convention gives some clarity by setting express limitations and restrictions on the exercise of the right (under Article 8(2)). Under the UN Standard Minimum Rules prisoners are allowed 'under necessary supervision' to communicate with their families and reputable friends at regular intervals, both by correspondence and by receiving visits.¹⁵³ The Revised European Standard Minimum Rules also allow the same right 'subject to the needs of treatment, security and good order'.¹⁵⁴

In recent years the undoubted effect of the rulings of the European Court and opinions of the Commission has been to extend prisoners' rights over their legal correspondence.¹⁵⁵ In *Schonenberger v Switzerland*¹⁵⁶ the Court found a violation of Article 8 where the prosecutor refused to deliver to a prisoner held in detention on remand, a letter in which a lawyer offered his services and advised the prisoner of his rights to refuse to answer questions. The Court reinforced its strict view of any interference with correspondence

¹⁴⁸ para. 72.

¹⁴⁹ Article 17 (1).

¹⁵⁰ Article 8 (1).

¹⁵¹ Article 11(2).

¹⁵² Article 9 (1)

¹⁵³ Rule 37.

¹⁵⁴ Rule 43 (1).

¹⁵⁵ Cram, 'Interfering with goal mail; prisoners' legal letters and the courts' *Legal Studies* (1993) 363.

¹⁵⁶ Judgment of 20 June 1988 (No 137) 11 E.H.H.R. 202.

between prisoners and their legal advisors in *Campbell v United Kingdom*.¹⁵⁷ In that case it was held that unless the prison authorities could point to a reasonable cause for believing that the letter's contents would endanger prison security, the safety of others or be otherwise of a criminal nature, there could be no pressing social need for the opening and reading of mail. One commentator has recommended that as a guiding principle all rules, standing orders and circular instructions relating to correspondence with a fundamental tenet of the rule of law, be made available to prisoners and public alike.¹⁵⁸ Where interference with mail does occur, the prisoner should be informed in writing in advance, or where security considerations dictate otherwise, as soon as is practicable, of the fact and grounds for interference.¹⁵⁹

2.4.3.8 **Forced and compulsory labour**

The UN Standard Minimum Rules prescribe that prison labour must not be of an afflictive nature and prisoners should not be required to do any especially dangerous or unhealthy work. Otherwise sufficient work of a useful nature should be provided to keep prisoners actively employed for a normal working day.¹⁶⁰ The same sentiments are expressed by the Revised European Standard Minimum Rules.¹⁶¹

Complaints of detainees against the obligation to perform work in prison are normally brought by invoking Article 4 of the Universal Declaration of Human Rights (prohibiting slavery and servitude). This prohibition is even more specific under the ICCPR where Article 8(3)(a) provides that no one shall be required to perform forced or compulsory labour. A replica of the prohibition exists in the European Convention (Article 4 (2)) . So does it in the American Convention (Article 6(2)). The African Charter merely prohibits 'all

¹⁵⁷ Judgment of 25 March 1992 (No 233) 15 E.H.H.R. 137
¹⁵⁸ See Cram (note 155 above).
¹⁵⁹ *Ibid.*
¹⁶⁰ Rule 71.
¹⁶¹ Rule 71.

forms of exploitation and degradation of man ...¹⁶² One must hasten to add however, that the ICCPR, the European Convention and the American Convention expressly limit and restrict the right by excluding work required to be done in the ordinary course of detention. Accordingly the Human Rights Committee of the UN and the European Commission have always taken the position that the terms 'slavery and servitude' are inapplicable to the prison situation; and as long as prison labour meets the requirements of the Standard Minimum Rules it will be acceptable.

2.5 CONCLUSION

International law plays an important role in the protection of prisoners' rights. This role has to be understood in the light of the problems inherent in the enforcement of human rights standards through international mechanisms. A great deal usually depends on the different states and the mechanisms they apply in incorporating international legal standards into their various domestic legal systems. For those states in which international norms automatically form part of domestic law, the United Nations treaties and conventions, regional conventions, decisions and reports of the relevant courts and commissions have provided a strong basis for the protection of prisoners' rights. Even for those states that do not automatically incorporate international norms in domestic legal systems, the effect of customary international law and the desire to belong to the community of civilized nations play their part in influencing domestic constitutional human rights provisions.

The UN Standard Minimum Rules for the Treatment of Prisoners has gained remarkable importance in recent years. The same can be said of the Body of Principles for the Treatment of Prisoners. Several other instruments are off-shoots of these two. As international human rights norms evolve, so too do human rights applicable to prisoners. The reports of the UN Human

¹⁶² Article 5

Rights Committee, the judgments of the European Court and the reports of the European Commission have, slowly but surely, given effect to changing attitudes towards detainees and evolving standards of international human rights law applicable to them. The African system under the African Charter has been pretty ineffectual, to say the least. How South Africa has taken up the challenge of fitting into the bigger picture will be discussed in the following chapter.

CHAPTER THREE

PRISONERS' RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION

3.1 INTRODUCTION

British colonisation of Southern Africa since the beginning of the nineteenth century established parliamentary sovereignty as a hallmark of constitutional development in South Africa.¹ For more than a century, therefore, parliamentary sovereignty was the basic constitutional feature of the legal framework within which fundamental rights were dealt with. All this was to change remarkably in the early 1990s. This period was characterised by a series of events which culminated in a new political order and a new constitutional dispensation. The high water-mark of these developments was the enactment of the interim Constitution², which was largely a result of a negotiated settlement between political parties and organisations intent on facilitating a peaceful transition from apartheid to a new democratic order. The interim Constitution was adopted by parliament in December 1993 and it came into force in April 1994. One of the most outstanding features of this constitution was that it contained a Bill of Rights. Another important feature was that it provided for the drafting and adoption of a new and 'final' Constitution.

According to section 68(2) (of the interim Constitution) the new and 'final' Constitution was to be drafted by the Constitutional Assembly which was composed of the National Assembly and the Senate sitting jointly for that purpose. In drafting the new Constitution the Constitutional Assembly was required by section 71(1) to comply with certain Constitutional Principles contained in Schedule 4, otherwise it would not be certified by the Constitutional Court. The new and 'final' Constitution was eventually

¹ Rautenbach, 'Introduction to the Bill of Rights' *Bill of Rights Compendium* Issue No. 2 at 1 A - 5.

² Act 200 of 1993.

certified by the Constitutional Court in November 1996 and it came into operation in February 1997. This new Constitution³ also contains a Bill of Rights substantially carried over from its predecessor. It has been pointed out that in order to give effect to the Bill of Rights, and in particular its provisions with regard to prisoners, the Correctional Services Act⁴ was subsequently enacted.⁵ Chapter III of the Act provides for the custody of all prisoners under conditions of human dignity. This is in line with the opening section of the Constitution which lists 'human dignity' as one of the pre-eminent values on which the Republic of South Africa is founded. It is also in line with section 10 of the Constitution which guarantees everyone the right to have their dignity respected and protected. In particular it is in line with section 35(2)(d) which entitles prisoners to conditions of detention that are consistent with human dignity. These conditions are given effect and elaborated on by various sections of the Correctional Services Act. In particular section 7(1) of the Act reiterates the prescribed requirements of prison accommodation to include adequate floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. Section 7(2) provides for the separation of sentenced from unsentenced prisoners, male prisoners from female prisoners, children from adult prisoners and any other specified category that may require separation. Section 8 of the Act provides for proper nutrition which includes 'adequate diet to promote good health'. It also provides that nutritional requirements of children, pregnant women and such like categories, should be put into account. Provision is further made under the section for the proper preparation of the food, serving it at regular intervals and the availability of clean drinking water.

Under section 11 of the Act, prisoners must be given an opportunity to exercise sufficiently in order to remain healthy. A prisoner is entitled to at

³ The Constitution of the Republic of South Africa (Act 108 of 1996). All further mention of 'the Constitution' in this Chapter will be in reference to this 1996 Constitution, unless otherwise specifically indicated.

⁴ 111 of 1998.

⁵ See Preamble of the Act.

least one hour of exercise daily, in the open air, weather permitting. Section 12 lays down guidelines for the provision of health care services. It entitles prisoners to adequate medical care, at state expense and allows prisoners to be visited and examined by medical practitioners of their choice.

Sections 6(3) and 17 of the Correctional Services Act elaborate on and give effect to the constitutional right of prisoners to legal representation. Under section 6(3), on admission to prison, a detainee should be informed that he or she has a right to choose and consult with a legal practitioner, or to have one assigned by the state. Section 17 takes the right further by elaborating on how and where the legal consultations may take place. In particular section 17(4) provides that prisoners must be provided with adequate opportunities and facilities to prepare their defence. This echoes one of the requirements for the right to a fair trial espoused in section 35(3)(b) of the Constitution.

In giving further effect to the Bill of Rights in the Constitution, the Correctional Services Act establishes certain institutional mechanisms that will enhance the realization of prisoners' rights. First among these is a new system of Parole Boards.⁶ Section 74 empowers the Minister of Correctional Services to appoint Correctional Supervision and Parole Boards whose functions include; placing prisoners under correctional supervision, granting parole and granting remission of sentence. Section 76 establishes a Correctional Supervision and Parole Review Board whose duty is to review the decisions of the Correctional Supervision and Parole Boards.

An office of the Judicial Inspectorate of prisons is established under section 85 of the Act. Headed by the Inspecting Judge the object of the Judicial Inspectorate is to facilitate the inspection of prisons and to 'report on the treatment of prisoners in prison and on conditions and any corrupt or

⁶ See Chapter VII of the Act.

dishonest practices in prison'.⁷ The Inspecting Judge is also empowered to receive and deal with complaints, conduct investigations and submit reports to the minister. The Judicial Inspectorate has already been set up in Cape Town and is currently headed by Justice JJ Fagan. Also among the functions of the Inspecting Judge is the duty to appoint Independent Prison Visitors, another important institutional functionary. Independent Prison Visitors are charged with the duty of dealing with the complaints of prisoners by paying regular visits, interviewing prisoners in private, recording their complaints and discussing them with the Head of Prison or any other relevant official, with a view to resolving them internally.⁸

3.2 SECTION 35 OF THE CONSTITUTION

In the preamble to the Constitution there is a commitment to the improvement of the quality of life of *all citizens*.⁹ Chapter 2 of the Constitution is headed 'The Bill of Rights'.¹⁰ Section 7(1) provides that the Bill of Rights is a cornerstone of democracy in South Africa, it enshrines the rights of *all people*¹¹ in the country and affirms the democratic values of human dignity, equality and freedom. The phrases 'all citizens' and 'all people' automatically include prisoners. Prisoners therefore are protected with the rest of the population by the Constitution and the Bill of Rights.

In addition to this general protection, prisoners enjoy specific rights laid down in section 35 of the Constitution, which provides for the rights of arrested, detained and accused persons. To be placed under arrest is defined by the *Oxford Advanced Learner's Dictionary of Current English* as being 'held as a prisoner'¹², while a detainee is defined as a 'person

⁷ Sections 85(2) and 90(1) of the Act.

⁸ See section 93(1) of the Act.

⁹ Emphasis mine.

¹⁰ Because of constant reference to certain sections of the Bill of Rights in this chapter and other parts of this work, Chapter II of the Constitution has been included at the end as Appendix.

¹¹ Emphasis mine.

¹² See Hornby, *Oxford Advanced Learner's Dictionary of Current English* (regularly updated) at 42.

detained (especially by the authorities, as one who is suspected of wrongdoing).¹³ An accused is defined as a 'person charged in a criminal case'.¹⁴ In view of the definition of 'prisoner' given earlier¹⁵, arrested, detained and accused persons automatically fall within the meaning of the term 'prisoners'. That is not to say that there is no distinction between the three categories of persons. Yes there is. That is why the rights accorded to them actually differ. For purposes of distinction it can be said that in constitutional terms a suspect becomes an 'arrested person' when he or she is questioned, apprehended or otherwise detained.¹⁶ Detention on the other hand refers to coercive physical interference with a person's liberty resulting in the person being physically restrained for a significant period of time.¹⁷ An accused person is someone who has been charged.¹⁸

Ordinarily a person is first 'arrested' then 'detained' and finally 'accused'. This means that detention comes after arrest which is then followed by a formal charge. According to Viljoen, in effect 'arrest' must by its very nature entail 'detention'.¹⁹ It has also been argued that the rights contained in section 35(1), (2) and (3) 'relating respectively to arrested, detained and accused persons are not rigidly compartmentalised, but are inter-related and must be interpreted and applied contextually'.²⁰ For that reason all the three categories of persons will be considered as prisoners.

3.2.1. The rights of arrested persons (section 35(1))

First of all section 35(1)(a) stipulates that arrested persons have the right to remain silent. This right has its basis in the principle that 'the burden is on the prosecution to establish the guilt of the accused beyond reasonable

¹³ Hornby (note 12 above) at 235.

¹⁴ Hornby (note 12 above) at 7.

¹⁵ See Chapter 1 (1.5) at 15.

¹⁶ See De Waal, Currie and Erasmus, *The Bill of Rights Handbook* (2000) at 511.

¹⁷ See De Waal, Currie and Erasmus, *The Bill of Rights Handbook* (2000) at 512.

¹⁸ *Ibid.*

¹⁹ See Viljoen, 'The Law of Criminal Procedure', *The Bill of Rights Compendium* at 5B - 31.

²⁰ See Devenish, *A Commentary on the South African Bill of Rights* (1999) at 504.

doubt'.²¹ It is also related to the principle that one is presumed innocent until proven guilty. It is the task of the prosecution to prove this guilt and the accused is under no obligation to assist the prosecution in executing this task. It was stated in *S v Agnew*²² that the right to silence begins at the moment of arrest. In that case it was held that the accused's right to silence was breached when he was made to make a statement to a magistrate before his attorney arrived.

Section 35(1)(b) requires that arrested persons be promptly informed of the right to remain silent and the consequences of not doing so. According to *S v Nombewu*²³, the 'chief consequence' of which the arrested person must be informed is that statements made may be used in evidence. The question is; how prompt is 'promptly'? It is generally accepted that promptly means promptly enough for the arrested person to make an informed decision whether or not to disclose information that may be used by the prosecution. According to du Plessis and Corder 'promptly' does not 'necessarily mean immediately' or 'there and then', but rather as 'expeditiously as possible in the circumstances'.²⁴

Under section 35(1)(c) the right of an arrested person not to be compelled to make any confession or admission which could be used in evidence against him or her, is guaranteed. This right has its origin in the Judges' Rules inherited from English Law.²⁵ The basis of the right is that an arrested person should not be compelled to bear witness against himself/herself. In the first place a person who has just been arrested is usually in an unstable emotional state. Any methods which involve bringing pressure to bear on such a person will not only amount to undue influence but may also put the person in the unfortunate position of incriminating himself. The application

²¹ De Waal et al (see note 16 above) at 514.

²² 1996 2 SACR 535 (C).

²³ 1996 (12) BCLR 1635 (E).

²⁴ Du Plessis and Corder, *Understanding South Africa's Transitional Bill of Rights* (1994) at 175.

²⁵ Cachalia et al, *Fundamental Rights in the New Constitution*, (1994) at 79.

of the right not to be compelled to make any confession or admission was illustrated in *S v Zuma*²⁶ where the Constitutional Court held that:

'... the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself.'²⁷

This common-law rule, the Court said, was inherent in the right specifically entrenched in section 25(2) of the Constitution.²⁸ It has also been pointed out that compliance with this right 'has now been made into a condition for the constitutionality of an arrest'.²⁹ This means that the use of such confession as evidence would not only be inadmissible, but the arrest itself could be challenged.

Section 35(1)(d) provides for the right of an arrested person to be brought before a court as soon as reasonably possible. This constitutional right should be read in conjunction with section 50 of the Criminal Procedure Act³⁰ which requires the arresting authority to bring the arrested person before a court of law within forty-eight hours. According to Viljoen, the forty-eight hours requirement should be seen as 'the outer limit and not the standard'.³¹ This means the right could still be violated even if the arrested person was brought before a court within the forty-eight hours. This will be so if he/she could have been brought sooner.³²

According to section 35(1)(e), at the first court appearance an arrested person should be charged, or be informed of the reason for further detention

²⁶ 1995 (2) SA 642 (CC).

²⁷ At 659.

²⁸ Section 25(2) of the Interim Constitution is the equivalent of section 35(1) of the 1996 Constitution.

²⁹ Du Plessis and Corder (note 24 above) at 175.

³⁰ 51 of 1977.

³¹ Viljoen (note 19 above) at 5B-32.

³² De Waal *et al* (note 16 above) at 517.

or be released. It has been argued that since any further detention can only be ordered by the court, it is the duty of the presiding officer to provide the reason for such further detention, failure of which would render it unlawful.³³ The reason for further detention would in turn require that the prosecution inform the arrested person of the allegations being investigated.

Under section 35(1)(f) an arrested person has the right to be released from detention if the interests of justice permit and subject to certain conditions. Technically speaking this provision translates into the right to bail. The right is in a way related to the principle of being presumed innocent until proven guilty. There are two important aspects pertaining to this right. First, bail will only be granted 'in the interests of justice'. This implies that the onus is on the prosecution to prove that it would not be in the interests of justice to grant the arrested person bail. However, according to section 60(11) of the Criminal Procedure Act,³⁴ in respect of certain serious offences 'the accused has the responsibility to satisfy the court that exceptional circumstances exist in the interests of justice that permit his or her release'.³⁵ According to section 60(4) of the Criminal Procedure Act,³⁶ bail may be denied in the interests of justice if one or more of the following grounds are established;

- (i) the likelihood that the person released on bail will endanger the safety of the public or any particular person;
- (ii) the likelihood of evading trial;
- (iii) the likelihood of attempting to influence or intimidate witnesses or to conceal or destroy evidence;
- (iv) the likelihood of undermining or jeopardising the objectives of the criminal justice system; and

³³ Cachalia *et al* (note 25 above) at 82.

³⁴ 51 of 1977 as amended by the Criminal Procedure Second Amendment Act 85 of 1997.

³⁵ Devenish (note 20 above) at 507.

³⁶ 51 of 1977 as amended by the Criminal Procedure Second Amendment Act 85 of 1997.

- (v) the likelihood that the release will disturb the public order or undermine the public peace or security. This, according to section 60(8A), will be determined by taking the following factors into account:
- (a) the nature of the offence and the circumstances under which it was committed and the likelihood of inducing shock and outrage in the community;
 - (b) whether such shock and outrage might lead to public disorder;
 - (c) the safety of the accused;
 - (d) the likelihood of jeopardising or undermining the sense of peace and security of the community;
 - (e) the likelihood of undermining or jeopardising the public confidence in the criminal justice system; and
 - (f) any other factor which in the opinion of the court should be taken into account.

The other aspect pertaining to the right to bail (under section 35 (1) (f) of the Constitution) is that bail will be granted 'subject to certain conditions'. According to section 12 of the Criminal Procedure Act³⁷, such conditions should, in the court's opinion be in the interests of justice. Section 13 of the Act however provides that the court may order that the person being released on bail deposit a sum of money with the court or furnish a guarantee with or without sureties, to that effect. Section 62 of the Act further provides that the court may add other conditions of bail with regard to:

- (i) the reporting in person by the accused at any specified time and place to any specified person or authority;
- (ii) the prohibition or control over communication with witnesses for the prosecution;
- (iii) the place at which any document may be served on him;

³⁷ *Ibid.*

- (iv) ensuring that the proper administration of justice is not placed in jeopardy; and
- (v) placing the accused under the supervision of a probation officer or a correctional official.

The Criminal Procedure Act³⁸ has undergone several amendments pertaining to bail, some of which have been challenged on constitutional grounds. These challenges have finally been resolved by the decision in *S v Dlamini*³⁹ which declared most of the controversial amendments to be constitutional. In the main, the Constitutional Court held that the overriding consideration remains the 'interests of justice' which is generally a value judgment based on an overall evaluation of all the interests involved.⁴⁰

3.2.2. The rights of detained persons (section 35(2))

3.2.2.1 The right to be informed of the reasons for detention

This right has to be read together with section 39(2) of the Criminal Procedure Act⁴¹ which provides that 'the person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest'. The main difference between this statutory provision and the constitutional right is that section 32(2) makes it mandatory for an arrested and detained person to be informed of the cause of arrest or detention whereas section 35(2)(a) confers upon the arrested and detained person a right to be informed promptly.⁴² This right is important because a detained person is entitled to know the legal basis for his detention. This should be seen in the light of section 35(2)(d) which entitles a detained person to challenge the lawfulness of the

³⁸

Ibid.

³⁹

1999 (4) SA 623 (CC).

⁴⁰

Ibid. Para 47. See also De Waal *et al* (note 16 above) at 519.

⁴¹

51 of 1977.

⁴²

See Cachalia *et al* (note 25 above) at 76.

detention. One can only be able to challenge the lawfulness of one's detention if one knows the legal basis and reasons for such detention.

It should be noted that this right is not an innovation of the Bill of Rights. It was held as far back as 1959 in *Brand v Minister of Justice*⁴³ that a detained person 'should in substance be apprised of why his liberty is being restrained'.⁴⁴ In *Kader v Minister of Law and Order and Another*⁴⁵ it was held that 'the gravamen of the conduct complained of, as also the particular offence or subsection which the arrestor has in mind, should be brought home to the arrestee in order to apprise him of the substance of the grounds for his arrest'.⁴⁶

3.2.2.2 The right to legal representation

The right to legal representation is incorporated in sections 35(2)(b) and (c). It contains three elements. First, a detained person has the right to consult with a legal practitioner of his or her choice. Secondly, if substantial injustice would otherwise arise, he or she has the right to be provided with a legal practitioner by the state at its expense. Thirdly, he or she has the right to be informed of the above rights. The detainee's right to legal representation should be read together with the rights under section 35(2)(d) and (e), namely, the right to challenge the lawfulness of the detention and the right to conditions of detention that are consistent with human dignity. This is because detainees may need legal representation to enforce these rights. It is submitted that legal representation is also necessary for the enforcement of the rights under sections 35(1) and 35(3), namely, the rights of arrested persons and the right to a fair trial. It should be noted however that legal representation is only in respect to matters related to the detention. The right to legal representation is also reflected in the Criminal

⁴³ 1959 (4) SA 712 (A).

⁴⁴ At 718C.

⁴⁵ 1989 (4) SA 11.

⁴⁶ At 18 B-C.

Procedure Amendment Act⁴⁷ which provides, among other things, that every accused person must be informed of this right. It requires that the accused be told, at the time of arrest or initial court appearance, that he may be represented at his own expense by a legal adviser of his choice, or if he cannot afford, he may apply for legal aid.⁴⁸

A number of cases relating to this right have come before the courts. In *S v Mfene*⁴⁹ it was held that the right must be explained to indigent persons who are detained in connection with a charge which might lead to imprisonment. In *S v Mlhakaza*⁵⁰ it was held that a suspect was entitled to insist on the assistance of a legal practitioner during an identification parade, unless the state satisfied the Court that there were good reasons why such assistance was unobtainable and that the accused's right to a fair trial was not prejudiced by it.

There are controversial questions raised by this right. First of all, who is to decide whether and when 'substantial injustice' is likely to arise? On what basis will such a decision be made? To what extent can the state afford to provide free legal presentation? How should eligibility be determined? The case of *Msila v Government of South Africa*⁵¹ gives some guidance on some of those issues. It was held in that case that 'the decision as to whether an accused was entitled to representation was pre-eminently a decision for the judicial officer trying the case'.⁵² This was because the trial court was best placed to decide 'whether or not substantial injustice would result in the absence of state-funded legal representation'.⁵³ As for provision of free legal representation, the Legal Aid Board should be best placed to play a meaningful role. However, of late the Board has been besought with

⁴⁷ Criminal Procedure Act (As amended by the Criminal Procedure Second Amendment Act 86 of 1996).

⁴⁸ Section 73(2A)(e) of the Act.

⁴⁹ 1998 (9) BCLR 1157 (N).

⁵⁰ 1996 (6) BCLR 814 (C).

⁵¹ 1996 3 BCLR 362 (SE).

⁵² At 363 C.

⁵³ At 636 D.

serious financial problems and budgetary constraints to the extent of not being able to function properly. Without a properly funded Legal Aid Board or an alternative independent body to carry out this responsibility, the right will remain meaningless and inapplicable.

3.2.2.3 The right to challenge the lawfulness of the detention

The right to challenge the lawfulness of one's detention is not new. It is an old common law right. What is new about it is the right to do so 'in person', as opposed to the common law position where some interested party could approach the court on behalf of the detainee. According to Cachalia, 'the inclusion of the right to do this *in person* gives greater efficacy to the right and represents a departure from the past'.⁵⁴ Another important aspect of this right is that the challenge should be before a court of law. The implication here is that the detainee can only be released through an order of court, with or without bail. It is however opined by Viljoen that 'if a detainee has not been charged with an offence, the appropriate remedy is release in terms of section 35(2)(d), and not release on bail'.⁵⁵ It was so held in *S v Mbele*⁵⁶ that:

'The remedy of a detained person who has not been charged, and against whom no allegation has been made that he has committed an offence, is not to seek his release on bail: it is to move the Court to protect his liberty by means of the common law remedy of *'interdictum de homine libero exhibendi'*, a common law remedy which has now been entrenched by section 25(1) of the interim Constitution'⁵⁷ (the corresponding provision of section 35(2)(d) of the 1996 Constitution).

⁵⁴ See Cachalia *et al* (note 25 above) at 78.

⁵⁵ See Devenish (note 20 above) at 511.

⁵⁶ 1996 (1) SACR 212 (W).

⁵⁷ At 225.

As has been mentioned,⁵⁸ the right to challenge one's detention under section 35(2)(d) is related to the right to be informed of the reasons for detention under section 35(2)(a). It is interesting to note that, under section 35(2)(d), no provision is made for a detainee to challenge the conditions of his or her detention. Instead the detainee is granted that right under a separate section (section 35(2)(e)) which is now turned to.

3.2.2.4. The right to conditions of detention that are consistent with human dignity

A strict interpretation of this right will make it the most violated right under section 35. This is because, as was seen in Chapter 1,⁵⁹ the conditions in many South African prisons are far from 'consistent with human dignity'. In particular the serious problem of overcrowding flies into the face of the right to adequate accommodation envisaged by section 35(2)(e). In addition to adequate accommodation, the subsection lists other specific requirements that should be included in the conditions consistent with human dignity. They are; exercise, adequate nutrition, reading material and medical treatment.

There are a few controversial aspects regarding this right. First, does it apply equally to sentenced and unsentenced prisoners? It could be argued that unsentenced prisoners should be more entitled to this right than sentenced prisoners because the former category is presumed innocent until proven guilty. Their detention should on no account be viewed as punishment, as they may well turn out to be innocent. Secondly, what is the yardstick to determine conditions consistent with human dignity? It is submitted that this right should be understood against the background of section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected. 'Dignity'

⁵⁸ See 3.2.2.1 above.

⁵⁹ See Chapter 1 - Introduction.

which was described by the Constitutional Court in *S v Makwanyane*⁶⁰ as the foundation of other rights, is indeed reflected in several other sections of the Constitution including sections 1(a), 7(1), 36(1) and 39(1)(a). The only limitation within the provision that gives an indication of the measure of the conditions is the use of the words 'including at least'. Otherwise detainees are entitled to live in conditions that compare favourably with those under which people live outside of prison. In fact according to *Van Biljon v Minister of Correctional Services*,⁶¹ the fact that many people live in absolute squalor does not permit the state to detain them under similar conditions. In that case, two HIV-positive inmates were granted a declaratory order entitling them to anti-retroviral treatment at state expense. This, according to the judge, fell within the ambit of the right of detainees to *the provision, at state expense, of adequate ... medical treatment* as required by section 35(2)(e).

The other issue that arises is: what should be regarded as 'adequate' in terms of section 35(2)(e)? According to *Van Biljon* 'section 35(2)(e) of the Constitution does not provide for "optimal medical treatment" or "the best available medical treatment", but only for "adequate medical treatment".⁶² The judge makes it clear that:

'In determining what is "adequate", regard must be had to, *inter alia*, what the state can afford.'⁶³

This seems to clarify the position in regard to 'adequate medical treatment'. The position is less clear however when considering adequate accommodation, nutrition and reading material. Does 'adequate nutrition' for example mean three square meals a day? Do adequate reading materials include daily newspapers and magazines? If the recent decision in *Strydom v Minister of Correctional Services*⁶⁴ is anything to go by, 'adequate' amounts

⁶⁰ 1995 (3) SA 391 (CC).

⁶¹ 1997 (2) SACR 50.

⁶² At 62 para e-f.

⁶³ At 62 para c-d.

⁶⁴ 1999 (3) BCLR 342 (W)

to much more than prison basic facilities. In that case, it was held that certain maximum security prisoners had a right to plug points in their cells so that they could enjoy the privileges for which access to electricity is indispensable, such as television sets. What is adequate therefore seems to vary from situation to situation. Devenish accordingly opines that what is adequate should 'depend on the circumstances involved in each case'.⁶⁵

3.2.2.5 The right to communicate and to be visited

This right should be read together with sections 35 2(b) and (c) which provide for the right to consult a legal practitioner. It should also be understood against the general background of section 16 of the Constitution which provides for freedom of expression. There are two dimensions to section 35(2)(f). The first is the right to communicate and the second is the right to be visited. The right to communicate entails that facilities should be made available for prisoners to make and receive telephone calls, to write, post and receive letters.

The second aspect is the right to be visited. The use of the words 'spouse or partner' in section 35(2)(f)(i) clearly indicates that the right extends beyond married couples to cohabitants. Recent developments in the area of prohibition of discrimination on the basis of sexual orientation indicate that gay and lesbian partners are also included under the scope of this right.⁶⁶ It is not clear who should be included in the 'next of kin' category under section 35(2)(f)(ii). Viljoen opines that the interpretation should be broadened to include members of the 'extended family', prevalent in indigenous family relations in South Africa.⁶⁷

⁶⁵ See Devenish (note 20 above) at 513.

⁶⁶ See *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

⁶⁷ See Viljoen (note 19 above) at 5B - 40.

The right to be visited by a religious counsellor and the right to be visited by a medical practitioner should be seen as supplements to the detainee's freedom of religion (section 15(1)) and the right of access to health care services (section 27(1)(a)) respectively. It should be noted that the four categories of persons mentioned in section 35(2)(f) are not mutually exclusive of each other. In other words a visit or visits from one of the categories does not exclude a visit or visits from the other categories. According to Devenish:

'The four categories are linked by the co-ordinating conjunctive "and" and not the disjunctive "or", thereby indicating that the exercise of the right by one category is not exclusive of the others.'⁶⁸

3.2.3 The right of an accused person to a fair trial (section 35(3))

Section 35(3) contains a list of fifteen specific guarantees that are incorporated in the right to a fair trial. It is submitted that the use of the words 'which includes' implies that these guarantees should not be viewed as a closed list. Indeed it was held in *S v Zuma*⁶⁹ that:

'The right to a fair trial conferred by that provision is broader than the list of specific rights set out in para (a) to (j) of the subsection'⁷⁰ (referring to section 25(3) of the interim Constitution).

The Court further held that section 25(3) required criminal trials to be conducted in accordance with 'notions of basic fairness and justice'. This was confirmed in several other subsequent cases including *S v Ramuongiwa*⁷¹ where the court held that an accused was not only entitled to a trial initiated and conducted in accordance with the formalities, rules and

⁶⁸ See Devenish (note 20 above) at 514.

⁶⁹ 1995 (2) SA 642.

⁷⁰ At 651 - 652.

⁷¹ 1997 (2) BCLR 268 (V).

principles of procedure which the law requires, but that '[a]bstract notions of fairness and justice are now the acid test'.⁷² Although these and other decisions were made in regard to the interim Constitution (section 25 (3)), they remain valid and applicable in interpreting section 35(3) of the 1996 Constitution.

The first item on the list under section 35(3) is the right of the accused person to be informed of the charge with sufficient detail to answer it. The issue that immediately arises here is; what amounts to 'sufficient detail'? According to *S v Lavhengwa*⁷³ it basically means two things:

- (i) The accused must know the necessary particulars of the charge he has to meet; and
- (ii) the charge itself must be clear and unambiguous.

Referring to undefended accused persons it was also held in *S v Simxandi and Others*⁷⁴ that:

'At least, the presiding officer should explain to the undefended accused the essential allegations against him or her and the nature of the evidence that will be required in order to refute those allegations.'⁷⁵

The right of the accused to be informed of the charge with sufficient detail has often been considered against the background of the right of access to information. This has been particularly so in relation to access to police dockets. In that regard, it was surprisingly held in *S v Fani*⁷⁶ that 'for reasons of good administration of justice, proper investigation, detection and prevention of crime', the right of access to information could not permit an

⁷² At 272.

⁷³ 1996 (2) SACR 453.

⁷⁴ 1997 (1) SACR 169.

⁷⁵ At 171 C.

⁷⁶ 1994 (1) SACR 635 (E).

accused access to the police docket.⁷⁷ Many subsequent cases however, have disagreed with the decision in *S v Fani*. In *Khala v Minister of Safety and Security*⁷⁸ the court held that the accused was entitled to the information in the docket for the exercise or protection of his rights. It was also held in *S v James*⁷⁹ that:

'... information in the possession of the State and which the State intends to use against an accused person must be disclosed to him to enable him to protect his rights and to raise a defence to the charges brought against him.'⁸⁰

This position was also taken in a number of other decisions including *Shabalala v Attorney-General of Transvaal*⁸¹ and *Nortje v Attorney-General of the Cape*.⁸²

The other item included under the right to a fair trial is the right of the accused person to have adequate time and facilities to prepare a defence. It is submitted that this right has to be weighed against section 35(3)(d) which provides for the right of accused persons to have their trial begin and conclude without unreasonable delay. So, while it is in the interests of the accused to be allowed sufficient time, it is also in his or her interests that there be no unreasonable delay to the trial.

One question that arises is what constitutes 'adequate time and facilities'. Devenish has opined that:

'what constitutes adequate time will depend on the circumstances of each case, such as, for instance, the complexity of the matter and the availability of witnesses'.⁸³

⁷⁷ See also Devenish (note 20 above) at 517.
⁷⁸ 1994 (2) SACR 361 (W).
⁷⁹ 1994 (3) SA 881.
⁸⁰ At 885 C.
⁸¹ 1996 (1) SA 725 (CC).
⁸² 1995 (2) SA 460 (C).
⁸³ See Devenish (note 20 above) at 519.

As for adequate facilities, guidance may be taken from *S v Nkabinde*.⁸⁴ Accentuating the word 'facilities', the court held that in circumstances where the only facilities made available to the accused to prepare his defence 'consisted of a telephone line which was compromised, and a consulting area which was likewise compromised', the constitutional right in question was violated.⁸⁵ It can be inferred here that what amounts to adequate facilities would also have to depend on the merits and circumstances of each case.

Under section 35(3)(c) an accused person is entitled to a public trial before an ordinary court. This right is not an innovation of the Bill of Rights. It was held as far back as 1931 in *R v Radbrooke*⁸⁶ that:

'It is a wholesome rule that judicial proceedings in criminal cases should be conducted in public and that principle is recognised in s 220(1) of the Criminal Procedure and Evidence Act 31 of 1917...'.⁸⁷

This principle was followed in *S v Sexwale*.⁸⁸

The right to a public trial must be understood against the background of section 152 of the Criminal Procedure Act,⁸⁹ which provides that criminal proceedings should take place in open court. Exceptions to this general rule are set out in sections 153, 154 and 335A of the Act, indicating that the right to a public trial is not an absolute right.

There are two aspects of this right that need explanation. What amounts to a 'public' trial and what is an ordinary court? 'Public' is used here as

⁸⁴ 1998 (8) BCLR 996 (N).

⁸⁵ At 1002.

⁸⁶ 1931 NPD 475.

⁸⁷ At 476.

⁸⁸ 1978 (3) SA 427 (T).

⁸⁹ 51 of 1977.

opposed to 'in camera' or 'behind closed doors'. This is meant to ensure legitimacy, openness and transparency. Indeed it was held in *Klink v Regional Court Magistrate*⁹⁰ that:

'the requirement that the trial must be public amounts to the constitutionalisation of a long-recognised principle of transparency in criminal proceedings. The purpose ... is to enable the public to be fully informed ... so that it may be properly able to evaluate the judgment ...'⁹¹

Ordinary court, according to De Waal 'refers to a court which has all the powers and facilities to ensure compliance with the fair trial rights.'⁹² This interpretation is in line with the requirements of independence and impartiality of the judiciary provided for under section 165(2) of the Constitution. An 'ordinary' court is therefore not one that is specially set up for a particular occasion, nor one that 'is representative of the society from which an accused comes'.⁹³ An ordinary court is 'one that has the character and powers to ensure that a fair trial takes place according to both the letter and the spirit of the Constitution'.⁹⁴

Section 35(3)(d) provides for the right of accused persons to have their trial begin and conclude without unreasonable delay. The question is: what constitutes unreasonable delay? While some have argued that what constitutes unreasonable delay will depend on the particular circumstances of each case,⁹⁵ the court in *Coetzee v Attorney-General, Kwazulu-Natal*⁹⁶ identified a number of factors to be considered in determining whether the delay was unreasonable. According to that case, a court had to have regard to all the factors which contributed to the delay, and in particular to: (1) the length of the delay from the commission of the crime to the commencement

⁹⁰ 1996 (3) BCLR 402 (SE).

⁹¹ At 414.

⁹² See De Waal *et al* (note 16 above) at 538.

⁹³ As per *S v Collier* (1995) 8 BCLR 975 (C).

⁹⁴ See Devenish (note 20 above) at 520.

⁹⁵ *Ibid.*

⁹⁶ 1997 (1) SACR 546 (D).

of the trial; (2) the reasons for the delay, and (3) any prejudice which the accused suffered or was likely to have suffered as the result of the delay. These factors were approved by the court in *Feedmill Development v Attorney-General, KwaZulu-Natal*.⁹⁷ According to *Sanderson v Attorney-General, KwaZulu-Natal*,⁹⁸ the avoidance of unreasonable delay seeks to protect three interests of the accused, namely the right to security of the person, the right to liberty and the right to a fair trial. In determining what constitutes unreasonable delay, the court held, regard must be had to these interests.

Provisions is made under section 35(3)(e) for the right of an accused person to be present when being tried. This right is in line with section 158 of the Criminal Procedure Act⁹⁹ which provides that all criminal proceedings shall take place in the presence of the accused. Obviously, there are situations where the presence of the accused may be impracticable or impossible. Such situations are taken care of by sections 159 and 160 of the Criminal Procedure Act.

Section 35(3)(f) and (g) provide for the right to legal representation. Under section 35(3)(f) an accused person has the right to choose, and to be represented by a legal practitioner, and to be informed of this right promptly. Under section 35(3)(g) the accused person is entitled to a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result. He or she is also entitled to be informed of this right promptly. These rights have already been discussed above in relation to detained persons.¹⁰⁰ What was said in that regard is also true for accused persons. A few observations however, particularly pertinent to accused persons, may be added.

⁹⁷ 1998 (9) BCLR 1072 (N).

⁹⁸ 1998 (2) SA 38 (CC).

⁹⁹ 51 of 1977 as amended by Act 86 of 1996.

¹⁰⁰ See 3.2.2.2. above.

Even long before the present Constitution was conceived, the right to legal representation had been well-established in South African law. In 1988 the Natal Provincial Division of the Supreme Court in *S v Khanyile and Another*¹⁰¹ laid down the following criteria for determining whether substantial injustice would result from refusal to provide legal representation to an accused person:

- 1) the inherent simplicity or complexity of the case, as far as both the law and the facts go;
- 2) the personal circumstances of the accused, such as how mature, sophisticated, intelligent and articulate he looks and sounds; and
- 3) the gravity of the case and the possible consequences of a conviction.

These criteria were approvingly referred to by the Constitutional Court in *S v Vermaas*,¹⁰² and indirectly adopted by the High Court in *Legal Aid Board v Msila*¹⁰³ where it was stated that the question whether substantial injustice will result if an accused person is not afforded legal representation at state expense '...would involve ... the nature of the proceedings in question in all their ramifications, the potential consequences to the accused person and his or her ability to represent himself or herself'.¹⁰⁴

Another aspect that deserves to be looked at is the right of an accused person to be informed promptly of his or her right to legal representation. In 1990 the Appellate Division of the Supreme Court held in *S v Mambaso*¹⁰⁵ that the trial court's failure to inform the accused of his right to counsel did not itself amount to an irregularity. It would have amounted to an irregularity only if the appellant had been shown to have been ignorant of the right, the court said. This decision was of course made before the advent of the new

¹⁰¹ 1988 (3) SA 795 (N).

¹⁰² 1995 (3) SA 391 (CC).

¹⁰³ 1997 BCLR 229 (SE).

¹⁰⁴ At 243.

¹⁰⁵ 1990 (3) SA 185 (A).

Constitution and Bill of Rights. Since then courts have held otherwise. In *S v Gouwe*¹⁰⁶ it was held that the magistrate's failure to inform the accused of his right to legal representation amounted to an irregularity resulting in an unfair trial. This approach was adopted in *S v Ramguongiwa*¹⁰⁷, *S v D*¹⁰⁸ and *S v Moos*¹⁰⁹. More recently in *S v Mbambo*¹¹⁰ the court held that the failure of the trial court to advise the accused that he faced a sentence of life imprisonment, and its failure to encourage him to exercise his right to legal representation, constituted irregularities in the proceedings. As far as the meaning of 'promptly' is concerned, any doubts have been removed by an amendment to section 73 of the Criminal Procedure Act.¹¹¹ The amendment sets out clearly when the accused should be informed of the right to legal representation. Section 73(2A)(e) in particular stipulates *inter alia* that an accused person shall be informed of such right at his or her first appearance in court.

Another important component of the right to a fair trial is the right of an accused person to be presumed innocent, to remain silent and not to testify during the proceedings, as provided for under section 35(3)(h). The first aspect to consider is the presumption of innocence. Although the presumption of innocence was a well established legal principle long before the advent of a Bill of Rights in South Africa, there are numerous instances when this right was grossly violated. One such occasion was the decision in *S v Shuping*¹¹² where the judges stated that:

'If there is no evidence on which a reasonable man might convict, and there is also no ground to expect sufficient evidence, the accused ought to be discharged. If there is reason to believe that the State evidence can be supplemented by

¹⁰⁶ 1995 (8) BCLR 968 (B).

¹⁰⁷ 1997 (2) BCLR 268 (V).

¹⁰⁸ 1997 (2) SACR 671 (C).

¹⁰⁹ 1998 (1) SACR 401 (W). See also De Waal *et al* (note 16 above) at 544.

¹¹⁰ 1999 (2) SACR 421.

¹¹¹ The amendment is contained in section 2 of the Criminal Procedure Amendment Act 86 of 1996.

¹¹² 1983 (2) SA 119 (B).

defence evidence, the court should not discharge. That is the standpoint of the Court.¹¹³

Other instances that have violated the presumption of innocence include the application of the so-called statutory presumptions, some of which have since been declared unconstitutional. The essence of such presumptions is that the existence of one fact is presumed from the proof of another. Such presumptions can be found in section 21(3) of the Sexual Offences Act,¹¹⁴ section 10(1)(a) of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act¹¹⁵ and some sections of the Road Traffic Act¹¹⁶ and Drugs and Drug Trafficking Act.¹¹⁷ In *S v Shangase and Another*,¹¹⁸ the presumption in section 217(1)(b)(ii) of the Criminal Procedure Act which provides that a written confession made to or before a magistrate will be presumed to have been made freely and voluntarily, was held to be unconstitutional. Another case involving a provision of the Criminal Procedure Act was *S v Zuma*.¹¹⁹ Section 217(1)(b)(ii) of the Act, which placed a legal burden on an accused to show that a confession before a magistrate was not freely and voluntarily made, was invalidated. In *Scagell v Attorney-General, Western Cape*,¹²⁰ the court held that section 6(3) of the Gambling Act¹²¹ was unconstitutional. The section provided that if certain gambling items were found on a premises it would be prima facie evidence that the person in charge, permitted gambling. And in *S v Hulwana; S v Gwadiso*¹²² it was held that section 21(1)(a)(i) of the Drugs and Drug Trafficking Act was unconstitutional. The section involved the presumption of dealing, arising from proof that an accused was found in possession of dagga exceeding 115 grams. It is submitted that such other presumptions

¹¹³ At 120.
¹¹⁴ 23 of 1957.
¹¹⁵ 41 of 1971.
¹¹⁶ 19 of 1989.
¹¹⁷ 140 of 1992.
¹¹⁸ 1994 (2) BCLR 42 (D).
¹¹⁹ 1995 (2) SA 642 (CC).
¹²⁰ 1997 (2) SA 368 (CC).
¹²¹ 51 of 1965.
¹²² 1995 (12) BCLR 1579 (CC).

will sooner or later be constitutionally challenged and it is opined that they will not survive the challenge.

The other aspect to consider is the right of an accused person to remain silent and to refuse to testify during the proceedings. In a way this right is a follow-on to section 35(1)(a) which provides for the right of an arrested person to remain silent. It is also a reinforcement of section 196(1) (a) of the Criminal Procedure Act which provides that an accused may not be called as a witness except upon his own application.

One issue that needs to be considered is; of what evidential value is the failure of an accused person to testify in his own defence? This question was raised in *S v Sidziya*,¹²³ *Scholtz v S*¹²⁴ and *S v Brown*.¹²⁵ In *Brown's* case it was held that an accused person's failure to testify could not have any evidential value, but that ordinary logic dictated that, in certain circumstances, failure to testify would entail adverse consequences for the accused. Accordingly, Viljoen concludes that:

'Failure to testify is not a piece of positive evidence. Silence may strengthen an uncontroverted "prima facie" case, but does not constitute indirect compulsion to testify.'¹²⁶

Under section 35(3)(i) an accused person has the right to adduce and challenge evidence. It is submitted that this right reinforces the right to legal representation because many unrepresented accused persons are not ordinarily expected to possess the necessary skills to cross-examine witnesses. Accordingly, where an accused is represented by a legal practitioner the right is more easily enforceable. Where the accused is unrepresented and the accused fails to cross-examine a witness on a

¹²³ 1995 (12) BCLR 1626 (Tk).

¹²⁴ 1996 (11) BCLR 1504 (CN).

¹²⁵ 1996 (2) SACR 49 NC.

¹²⁶ See Viljoen (note 19 above) at 5B - 77.

material issue, the presiding officer may be required to question the witness as was held in *S v Simxandi*.¹²⁷

The right to adduce and challenge evidence has come before the courts on a number of occasions. One such occasion was the controversial decision in *S v Shuma*¹²⁸ where the court denied the applicant a separation of trials in order to make the co-accused a compellable witness. The court held that the existing law on criminal procedure by and large balanced the interests of the accused and the state and for the court to find that such procedures were unconstitutional would be a major step. On the facts of the particular case, the court said, there could be no infringement of an accused's constitutional rights under section 25(3)(d) (the Interim Constitution's equivalent of section 35(3)(i) of the 1996 Constitution) sufficiently compelling the court to act against the interests of society as represented by the state.¹²⁹ Devenish opines that this decision 'is not in accordance with "the spirit, purport and objects" of chapter 2 of the 1996 Constitution'.¹³⁰

Other decisions on the issue have been less controversial and have by and large recognised and protected the right. In *S v Younas*¹³¹ a refusal by the magistrate for a postponement in order to call defence witnesses was held to be a violation of the accused's constitutional right. In *S v Mbeje*¹³² the failure of the magistrate to invite the accused to address the court on the merits of the case against him at the close of the prosecution's case was held to violate the accused's right to a fair trial.

Section 35(3)(j) provides for the right of an accused person not to be compelled to give self-incriminating evidence. This right is clearly an extension of the right of arrested persons not to be compelled to make any

¹²⁷ 1997 (1) SACR 169 (C).

¹²⁸ 1994 (4) SA 583.

¹²⁹ See 591 E - H.

¹³⁰ See Devenish (note 20 above) at 528.

¹³¹ 1996 (2) SACR 272 (C).

¹³² 1996 (2) SACR 252 (N).

confession or admission that could be used in evidence against them.¹³³ A narrow interpretation of this right would seem to indicate that it protects an accused person against self-incriminating evidence adduced during the trial. The courts however have given the right a much wider interpretation to include self-incriminating evidence obtained before the trial. In *S v Gqozo(2)*¹³⁴ the court held that the right would be violated if the state were permitted to tender as evidence at a criminal trial the record of earlier proceedings at which the accused had testified as an ordinary witness. The case of *Ferriera v Levin NO*,¹³⁵ also illustrates the Constitutional Court's approach towards the right against self-incrimination. In that case the court invalidated a part of section 417(2)(b) of the Companies Act¹³⁶ which allowed incriminating evidence obtained under compulsion in an earlier enquiry to be used against the accused in subsequent criminal proceedings. The court held that the rule against self-incrimination is not simply a rule of evidence but a constitutional right.¹³⁷

According to section 35(3)(k) an accused person has a right to be tried in a language that he or she understands or, if that is not practicable, to have the proceedings interpreted in that language. It is submitted that this right reinforces, and should be understood against the background of section 6 of the Constitution which provides for eleven official languages for the Republic of South Africa. According to *S v Matomela*¹³⁸ any of the eleven official languages may be used to try the accused. The question that arises here is; to what extent should the wishes of the accused in terms of language preference, be accommodated? Secondly, how practicable is it for the courts to observe the protection of this right? The problems of practicability and choice of language manifested themselves in *S v Ngubane*¹³⁹ where the interpreter, who could not speak Zulu, interpreted in Tswana to the accused

¹³³ See section 35(1)(c).

¹³⁴ 1994 (2) BCLR 10 (CK).

¹³⁵ 1996 (1) SA 984 (CC).

¹³⁶ 61 of 1973.

¹³⁷ See also *De Waal et al* (note 16 above) at 556.

¹³⁸ 1998 (3) BCLR 339 (CK).

¹³⁹ 1995 (1) BCLR 121 (T).

who was Zulu speaking. The conviction was set aside on the grounds that the accused's right to be tried in a language he understood or have the proceedings interpreted to him, had been violated. On the question of choice, the matter has been settled in *Mthethwa v De Bruin NO*¹⁴⁰ where the court emphasised that the right does not entail being tried in the language of the accused's choice, it merely guarantees a right to be tried in a language which the accused understands.

Section 35(3)(l) protects an accused person from being convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This right reflects and reinforces the well-known principle of legality, otherwise known as '*nullum crimen sine lege*' (without a law no charge is possible). As Hosten *et al* explain, the most important rules embodied in that principle are, *inter alia*, that an accused may only be convicted of a crime if the act committed is recognised by law as a crime, that crimes may not be created with retrospective effect and that the definition of crimes may not be extended by analogy.¹⁴¹

In South African courts the principle of not trying a person for an act that was not an offence when it was committed, goes as far back as the beginning of the 20th century. In 1911 in the case of *R v Robinson*¹⁴² and in 1915 in the case of *R v M*¹⁴³ the courts held that they did not possess the power to create offences on the ground that the conduct in question was contrary to good morals.¹⁴⁴ Subsequent cases have acknowledged and accepted this principle. The reference to offences under international law in the provision is hardly surprising. It is in line with section 39(1)(b) of the Constitution which requires a court to consider international law when interpreting the Bill of Rights. Section 233 of the Constitution also gives preference to the

¹⁴⁰ 1999 (3) BCLR 336 (N).

¹⁴¹ See Hosten, Edwards, Bosman and Church, *Introduction to South African Law and Legal Theory* (1995) at 1085.

¹⁴² 1911 CPD 319.

¹⁴³ 1915 CPD 334.

¹⁴⁴ See Hosten *et al* (note 141 above) at 1086.

interpretation of legislation that is consistent with international law over any alternative interpretation that is not.

In terms of section 35(3)(m) an accused person has a right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. This right which is also known as the double jeopardy rule corresponds with sections 106(1)(c) and (d) of the Criminal Procedure Act. The basis of this rule is that no person may be put 'in peril' twice for the same offence. It involves two well known maxims; *autrefois convict* (meaning the accused has already been convicted of the same offence) and *autrefois acquit* (meaning the accused has already been acquitted of the same offence).

According to Hosten, the underlying reason in respect of *autrefois convict* is the idea that once the accused has been sentenced and punished he has paid his debt to society.¹⁴⁵ It is argued however that the reason in respect of *autrefois acquit* is not quite as apparent because the mere fact that an accused has been acquitted is not proof of his innocence. New evidence may later come to light which conclusively proves his guilt. This argument did not seem to find much support with the High Court in *McIntyre v Pietersen*.¹⁴⁶ In that case the applicants were acquitted on a charge of assault but were later charged with murder after the victim died. As the charge of murder arose from the same incident, their plea of *autrefois convict* was successful. It is submitted that this decision carries the rule rather too far. It is argued that where the death of a victim follows an acquittal or conviction on a charge of assault the accused may be charged with murder, since he has at no stage been in peril of being convicted of murder.

¹⁴⁵ See Hosten *et al* (note 144 above) at 1220.

¹⁴⁶ 1998 (1) BCLR 18 (T).

Section 35(3)(n) gives an accused person the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing. This provision is a source of confusion as it does not clarify what is meant by 'prescribed punishment' and how and when it may be changed. In 1998 for example, the sentencing powers of the Magistrates' Courts were increased from 12 months to three years and those of the Regional Courts from 10 to 15 years.¹⁴⁷ The High Court held in *S v Mbuyane*¹⁴⁸ that this did not change the 'prescribed punishment' for any particular crime. If this decision is anything to go by, then the scope of this particular right is severely limited since most common law offences would effectively be ruled out.¹⁴⁹ It is submitted that the interpretation of the law in that case did not 'promote the spirit, purport and objects of the Bill of Rights' as required by section 39(2) of the Constitution.

Under section 35(3)(o) an accused person is granted a right of appeal to, or review by, a higher court. This legal right precedes the advent of the Bill of Rights in South African legal history. Before and after its constitutionalisation, the right gave rise to considerable confusion particularly regarding the differences in appeal procedures between the different levels of courts. This confusion was finally put to rest by the Criminal Procedure Amendment Act¹⁵⁰ which sets out a clearer and more uniform procedure for appealing. Many court decisions have consequently been overtaken by the amendment. These include *R v Rens*¹⁵¹ in which the Constitutional Court dealt with the provisions of the Criminal Procedure Act which prevent a person tried by a superior court to appeal as of right against

¹⁴⁷ See section 92(1)(a) of the Magistrates' Courts Act 32 of 1944 as amended by the Magistrates' Courts Amendment Act 120 of 1993 and the Magistrates' Courts Amendment Act 67 of 1998.

¹⁴⁸ 1999 (6) BCLR 699 (T).

¹⁴⁹ This was the argument of the dissenting judgment of *S v Mbunyanane* (*Ibid*) based on a purposive interpretation of the Constitution which seeks to protect an accused against a harsher sentence than the one that applied when the offence was committed.

¹⁵⁰ 76 of 1997.

¹⁵¹ 1996 (1) SA 1218 (CC).

the conviction or sentence. Also included is *S v Ntuli*¹⁵² in which the Constitutional Court dealt with the provisions of the Criminal Procedure Act which prevented prisoners from personally prosecuting their appeals without first obtaining a judges's certificate.

More recently the Constitutional Court dealt with the right to appeal in *Mphahlele v First National Bank of South Africa*¹⁵³ and held that where an applicant to the Supreme Court of Appeal has been given reasons for the adverse decision in the court of first instance and has been informed that there are no prospects of a different order being granted on appeal, the procedure is not in any way inconsistent with an open and democratic society and is not in breach of the Constitution. Although this decision was in respect of a civil matter, it is submitted that the same approach may well be taken in criminal matters.

3.2.4 Giving of information and exclusion of illegally obtained evidence

Section 35(4) provides that whenever it is required that information be given to a person (regarding any of the rights listed in the whole of section 35), that information must be given in a language that the person understands. This provision should be seen in the light of section 35(3)(k) which provides that every accused person has a right to be tried in an language he or she understands or, if that is not practicable to have the proceedings interpreted in that language. As was said regarding that right, the question that also arises here is whether the information should be given in the language of that person's choice or in his or her native language (if he or she is not South African). This question was resolved in *Naidenov v Minister of Home Affairs*¹⁵⁴ where the court commented that:

¹⁵² 1996 (1) SA 1207 (CC).

¹⁵³ 1999 (2) SA 667 (CC).

¹⁵⁴ 1995 (7) BCLR 891 (T).

'the relevant section in the Constitution does not require that he should be informed in the native language. It must be in a language which he understands.'¹⁵⁵

In that case a Bulgarian was challenging his detention in South Africa on the ground that the reasons for his detention had not been given in his native Bulgarian language.¹⁵⁶

Section 35(5) concludes the rights of arrested, detained and accused persons by providing that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. This provision is purely an innovation of the 1996 Constitution. Over the decades the position in South Africa regarding this matter was governed partly by the Criminal Procedure Act and partly by common law. Accordingly in 1927 in *R v Mabuya*¹⁵⁷ the Cape Provincial Division accepted evidence obtained as a result of an alleged unlawful police search of a private dwelling. In 1940 in *R v Uys and Uys*¹⁵⁸ the Transvaal Provincial Division accepted evidence in form of documents discovered as a result of an alleged illegal search. And in *Kuruma, Son of Kainu V R*¹⁵⁹ it was held that if the evidence is relevant the court should not concern itself with how it was obtained.

Although the Interim Constitution did not expressly provide for admissibility (or inadmissibility) of evidence obtained illegally, the courts started to change their approach and 'recognise that they had a general discretion to exclude unlawfully-obtained evidence.'¹⁶⁰ This change in approach is evident in a number of court decisions after 1993 including *S v Hammer*,¹⁶¹

¹⁵⁵ At 898.

¹⁵⁶ See also *De Waal et al* (note 16 above) at 565.

¹⁵⁷ 1927 CPD 181.

¹⁵⁸ 1940 TPD 405.

¹⁵⁹ 1955 AC 197.

¹⁶⁰ See *De Waal et al* (note 16 above) at 566.

¹⁶¹ 1994 (2) SACR 496 (C).

*Ferreira v Levin NO*¹⁶² and *S v Mathebula*.¹⁶³ The position was therefore only concretized by the 1996 Constitution through section 35(5). Accordingly any evidence obtained in a manner that violates a right in the Bill of Rights should be excluded if admission of such evidence would render the trial unfair or would be detrimental to the administration of justice. And so it was held in *S v Naidoo*¹⁶⁴ that section 35(5) of the final Constitution had the effect that it was no longer open to courts to approach the question of admissibility of evidence unlawfully obtained in violation of a fundamental right on the basis of the wide discretion that had been exercised in earlier cases.¹⁶⁵ The admission of evidence obtained by means of an invasion of the right to privacy, the court said, would render the trial unfair. *S v Madiba*¹⁶⁶ seems to have taken a slightly different view by holding that section 35(5) was aimed at ensuring fairness to both sides and not only at fairness or advantage to the accused. According to the judge in the case:

'A trial in which a judge is bound by the absence of any discretion to close the door on evidence on the basis that it was procured in circumstances constituting a relatively unimportant infringement of a fundamental right may plainly be as unfair as a trial in which he admits evidence procured in deliberate disregard of an important right. It seems to me that the section was plainly aimed at imposing a duty on the court, in the course of a trial, to make a decision which is fair to both sides and not aimed only at considerations of fairness or advantage to the accused.'¹⁶⁷

It is submitted that this decision misinterprets section 35(5) of the Constitution by reverting to the wide discretion exercised by the courts before its enactment. To categorise some rights as 'important' and others as

¹⁶² 1996 (1) SA 984 (CC)
¹⁶³ 1997 (1) BCLR 123 (W).
¹⁶⁴ 1998 (1) BCLR 46 (D).
¹⁶⁵ At 65 E - F.
¹⁶⁶ 1998 (1) BCLR 38 (D).
¹⁶⁷ At 44.

'relatively unimportant' is to completely misunderstand the 'spirit, purport and objects of the Bill of Rights'.¹⁶⁸

3.3 OTHER RELEVANT CONSTITUTIONAL RIGHTS

In addition to the rights of arrested, detained and accused persons listed in section 35 of the Constitution, there are a number of other provisions in the Bill of Rights that have an impact on prisoners and prisoners' rights. The following is a brief discussion of each of these provisions.

3.3.1 Equality

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Under section 9(3) and (4) unfair discrimination (direct or indirect) on the basis of certain grounds is outlawed. These grounds include; race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The effect of this is that all prisoners are entitled to equality and non-discrimination.

It has to be noted, that traditionally, prisons in South Africa, like all other social services, were divided along racial lines. Due to apartheid policies, prisons built for white prisoners were of a better standard than those for black prisoners. Although there have been efforts to integrate prisons, the marked differences in quality between certain prisons and the difference in treatment of prisoners due to their colour could under the Constitution be challenged as an infringement of prisoners' rights to equality.

Another issue regarding equality between prisoners is the equal treatment of male and female prisoners. This issue came before the Constitutional Court

¹⁶⁸ See section 39(2) of the 1996 Constitution.

in the celebrated case of *President of the Republic of South Africa v Hugo*.¹⁶⁹ In 1994 the President granted a special remission of sentence to all mothers in prison at the time who had children under the age of 12 years. The respondent, a prisoner, who was the father of a child under twelve, challenged the presidential order arguing that it unfairly discriminated against him on the grounds of sex or gender. The majority of the court held that although this was discrimination, it was not unfair. In a dissenting judgment, Mokgoro J held that the measure amounted to unfair discrimination, but justified it under the limitation clause. This case illustrates two important points. First, that a distinction has to be made between fair and unfair discrimination. Only unfair discrimination is outlawed. Secondly, prisoners' rights, indeed all rights, are not absolute. They are subject to certain limitations.¹⁷⁰

3.3.2 Human dignity

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. As far as prisoners are concerned, this provision should be read together with section 35(2)(e) which entitles all prisoners to conditions of detention that are consistent with human dignity. It should also be seen against the background of section 12(1)(d) and (e) which prohibit torture and being treated or punished in a cruel, inhuman or degrading manner.

It has been argued that human dignity 'is central to the philosophy of constitutionalism on which the new constitutional dispensation is based'.¹⁷¹ This is illustrated by the way the concept is reflected and expressed in several other sections of the Constitution. Section 1(a) provides that human dignity is one of the values on which the Republic of South Africa is founded.

¹⁶⁹ 1997 (4) SA 1 (CC).

¹⁷⁰ The extent to which rights may be limited by the state, is discussed below, see 3.3.12 below.

¹⁷¹ See Devenish (note 20 above) at 81.

Section 7(1) provides that human dignity is one of the democratic values affirmed by the Bill of Rights. Section 36 (1) requires any limitation to the rights in the Bill of Rights to be based, *inter alia*, on human dignity. And section 39 requires that in interpreting the Bill of Rights, one of the values to be promoted is human dignity.

The Constitutional Court has on a number of occasions addressed the issue of human dignity with specific reference to imprisonment and punishment. One of the grounds on which the court invalidated the death penalty in *S v Makwanyane*¹⁷² was that it contravened the right to human dignity. The Court also held that the right to dignity is one of the factors to be taken into account in determining whether a punishment is cruel, inhuman or degrading. On the question of imprisonment, the Court recognised that although imprisonment inevitably impairs a person's dignity, the state inevitably has the powers to impose this form of punishment as part of the criminal justice system. The Court hastened to add, however, that imprisonment does not deprive prisoners of their rights. These rights can only be limited in terms of the limitation clause. In *S v Williams*¹⁷³ the Constitutional Court held that juvenile whippings violated the right to human dignity and amounted to cruel, inhuman and degrading punishment. In response to this decision, parliament has since enacted the Abolition of Corporal Punishment Act¹⁷⁴ which outlaws all forms of corporal punishment.

3.3.3 The right to life

The right to life is guaranteed under section 11 of the Constitution. The first issue to be addressed as far as prisoners are concerned is the death penalty. In a landmark decision, the Constitutional Court unanimously and effectively abolished the death penalty in *S v Makwanyane*.¹⁷⁵ The Court

¹⁷² 1995 (3) SA 391 (CC).

¹⁷³ 1995 (3) SA 632 (CC).

¹⁷⁴ 33 of 1997.

¹⁷⁵ 1995 (3) SA 391 (CC).

found that in addition to violating several other sections of the Bill of Rights, capital punishment was inconsistent with the right to life. Although the issue remains a source of controversy and heated debate, with many calls for the review of the death penalty, the legal (and political) position remains that the death penalty has been effectively outlawed.

Another aspect regarding the right to life is the state's responsibility to protect the lives of all prisoners held in its prisons. It is submitted that a creative interpretation of section 11 requires the Department of Correctional Services to protect prisoners and ensure that their lives are not endangered either by themselves or other prisoners. Read together with section 7(2) of the Constitution which provides that the state must respect, promote and fulfil the rights in the Bill of Rights, section 11 places a duty on the state to protect the lives of all its citizens. This means that the state should be taken to task for the frequent deaths common in South African jails.

3.3.4 Freedom and security of the person

Apart from being closely related to section 35 of the Constitution which provides for the rights of arrested, detained and accused persons, section 12(1) is of profound relevance and significance regarding prisoners' rights. It provides for the right to freedom and security of the person which includes the right not to be arbitrarily arrested, not to be detained without trial, not to be subjected to violence, not to be tortured and not to be treated or punished in a cruel, inhuman or degrading way. The prohibition of detention without trial is a constitutional safeguard against abuse of state power reminiscent of past regimes. It represents a symbolic commitment that such abuses should not be repeated.¹⁷⁶ In *Nel v Le Roux No*¹⁷⁷ the Constitutional Court was called upon to pronounce on, *inter alia*, whether section 205 of the Criminal Procedure Act violated the right not to be detained without trial. The section

¹⁷⁶ See De Waal *et al* (note 16 above) at 233.
¹⁷⁷ 1996 (3) SA 562 (CC).

requires any person who is likely to give material or relevant information relating to an offence, to be subpoenaed for questioning. If he or she refuses to answer the question without just excuse he or she will be liable to two years imprisonment. The Court held that the provision was not unconstitutional because it met the requirements of procedural fairness and it was necessary for the maintenance of law and order.

In *De Lange v Smuts NO*¹⁷⁸ the Constitutional Court categorised the right in section 12(1) into two different aspects; the substantive aspect and the procedural aspect. According to Ackermann J:

'... section 12(1), in entrenching the right to freedom and security of the person, entrenches two different aspects of the right ... The one ... (that) may ... be described as the substantive aspect of the protection of freedom The other, which may be described as the procedural aspect of the protection of freedom is implicit in section 12(1) ...'¹⁷⁹

The Court held that the power of presiding officers other than magistrates to commit recalcitrant witnesses to prison infringed the procedural aspect of section 12(1) of the Constitution.

The right 'to be free from all forms of violence from either public or private sources' is of considerable relevance to prisoners. However, the wording of the right makes it rather contradictory by imposing two conflicting obligations on the state. De Waal argues that:

'The right to freedom from state violence protects individuals from police use of an unconstitutional degree of force. At the same time, the right to freedom from private violence imposes an obligation on the state to use violent means where necessary

¹⁷⁸ 1998 (3) SA 785.

¹⁷⁹ *Ibid* at 796 - 797.

to quell or discourage violent acts by individuals that may threaten the physical security of other.¹⁸⁰

In a prison situation, prison officials are expected to refrain from the use of force on prisoners, but at the same time they are expected to use force where necessary to protect inmates against violence from fellow inmates.

The right not to be tortured in any way is also of particular importance to prisoners' rights. The *Bill of Rights Report*¹⁸¹ documents numerous cases of allegations of torture by members of the SAPS. One of such allegations was made by the IFP (Inkatha Freedom Party) that a number of its members had been tortured by police in KwaZulu-Natal, and called for the suspension of Captain Mandlenkosi Vilikazi after the death in custody of one of its supporters, Mr Ngiyane Mhlongo.¹⁸² As for the right not to be treated or punished in a cruel, inhuman or degrading manner, regard should be had to section 10 providing for the right to human dignity and section 35(2)(e) providing for the right to conditions of detention which are consistent with human dignity. The implications and consequences in relation to those rights apply equally to this one.

3.3.5 Slavery, servitude and forced labour

Section 13 of the Constitution provides that no one may be subjected to slavery, servitude and forced labour. As far as prisoners rights are concerned, the relevant aspect of the provision is 'forced labour'. Any controversy that might have arisen in terms of the right regarding the constitutionality of the work or labour performed by prisoners has been put to rest by section 40 of the Correctional Services Act.¹⁸³ First of all, under section 40(1) of the Act, the work is only intended to keep prisoners active for a normal working day. Secondly, under section 40(3) the prisoner has a

¹⁸⁰ See De Waal *et al* (note 16 above) at 234.

¹⁸¹ See Jeffery, *Bill of Rights Report* (1996/1997) at 44 - 48.

¹⁸² Jeffery (note 181 above) at 47.

¹⁸³ 111 of 1998.

choice to elect the type of work he or she prefers to do. And finally, under section 40(5) a prisoner may never be instructed or compelled to work as a form of punishment or disciplinary measure.

3.3.6 Privacy

The right to privacy is guaranteed under section 14 of the Constitution. It ought to be remembered however that imprisonment by its very nature restricts the enjoyment of this right. That is not to say that on imprisonment a person completely forfeits his or her right to privacy. There are certain aspects of a prisoner's life that undoubtedly remain private and therefore require the protection of the law. In a prison environment the right applies to searches of prisoners, their cells, censorship of communication and restriction of contact with visitors.

As far as prisoners are concerned section 14(d) which provides for privacy of communications should be read together with section 35(2)(f) which provides for a prisoner's right to communicate and be visited. The implications and consequences of the latter were discussed earlier.¹⁸⁴ It is submitted that in view of the above two provisions section 185(5) of the Criminal Procedure Act¹⁸⁵ is a good candidate for constitutional challenge. The section states that:

'No person, other than an officer in the service of the state ... shall have access to a person detained ..., except with the consent of and subject to the conditions determined by the attorney-general or an officer ... delegated by him.'¹⁸⁶

¹⁸⁴ See 3.2.2.5 above.

¹⁸⁵ 51 of 1977.

¹⁸⁶ See also De Waal *et al* (note 16 above) at 531.

3.3.7 Freedom of association and the right to assemble, demonstrate, picket and petition

Section 17 of the Constitution provides for the right to assemble, to demonstrate, to picket and to present petitions. Section 18 guarantees the right to freedom of association. Many prisoners have exercised their rights to freedom of association by joining the South African Prisoners Organisation for Human Rights (SAPOHR). The interesting question is: to what extent can the enjoyment of this right be realised? Can prisoners freely conduct the activities and operations of SAPOHR within the prisons? If so, then prisoners can also enjoy the right to assemble, demonstrate and petition as provided for under section 18. In any case as expressed by De Waal:

'the right to assemble is available to "every person". This means that foreigners, minors, prisoners, students all enjoy the full protection of the freedom of assembly'.¹⁸⁷

It is submitted however that in the case of prisoners this right can always be limited in terms of section 36 of the Constitution, and the state would not have much difficulty in justifying the limitations as reasonable and justifiable.

3.3.8. Political rights

Section 19 of the Constitution provides for political rights. The most relevant aspect of this provision is the right to vote. This right, provided for under section 19(3)(a), has been a source of controversy and debate. Some have argued that convicted prisoners, by their illegal actions, have forfeited numerous fundamental rights, among which is the right to cast a ballot. This kind of reasoning was however rejected by the Constitutional Court which held in *August and Another v Electoral Commission and Others*¹⁸⁸ that

¹⁸⁷ See De Waal *et al* (note 186 above) at 305.
¹⁸⁸ 1999 (3) SA 1.

prisoners were entitled to vote in the 1999 national elections. In that case the Constitutional Court made it clear that:

'It is a well-established principle of our common law ... that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed.'¹⁸⁹

The Court then concluded that in the absence of any specific legislation disqualifying prisoners from voting, prisoners had a constitutional right to vote and neither the Electoral Commission nor the Court had the power to disenfranchise them. The Electoral Commission was accordingly ordered to make arrangements for prisoners to register and vote in the elections.

The interesting question raised by this decision is whether prisoners can exercise their rights to stand for public office and, if elected, to hold office (under section 19(3)(b)). This question is answered in part by sections 47(1)(e) and 106(1)(e) which disqualify anyone convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, from eligibility to membership of the National Assembly or a provincial legislature. Does that imply that convicted prisoners of lesser sentences can rightfully exercise their rights under section 19(1)(b) to stand for and hold public office? Without any specific legislation disqualifying them, there is no reason not to think so. It is however submitted that the limitation clause (section 36) can justifiably come into play here.

3.3.9 Children's rights

Section 28 of the Constitution provides for the rights of a child. The relevance of this section is that, among other things, it provides for the rights of children in detention. Section 28(1)(g) sets out specific rights over and

¹⁸⁹ Para 18.

above those provided for under sections 12 and 35 (dealing with freedom and security of the person, and the rights of arrested, detained and accused persons respectively). These include the right to be detained separately from adult detainees and the right to be treated in a manner, and kept in conditions, that take account of the child's age. In addition, section 28(1)(g) makes it clear that children should not be detained except as a measure of last resort, and even then for the shortest appropriate period of time. Furthermore, in addition to the right to legal representation for accused persons in criminal proceedings (under section 35(3)(g)), section 28(1)(h) obliges the state to provide legal representation in civil proceedings affecting a child, if substantial injustice would otherwise result.

The constitutional rights of children under detention have their genesis in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1991).¹⁹⁰ They are also reflected in section 19 of the Correctional Services Act¹⁹¹ which adds even more rights including access to educational programmes, social work services, religious care, recreational programmes and psychological services. Furthermore, where practicable, children should remain in contact with their families through additional visits and by other means.

3.3.10. Access to information

Section 32(1) grants every person the right to access to any information held by the state or by another person insofar as such information is required for the exercise or protection of any rights. Under section 32(2) national legislation was to be enacted to give effect to the obligation referred to in sub-section (1). The Promotion of Access to Information Act¹⁹² was accordingly enacted. The purpose of the Act, as stated in its long title, is 'to

¹⁹⁰ These instruments are discussed in Chapter 2 above under 2.4.1.4. and 2.4.1.5.
¹⁹¹ 111 of 1998.
¹⁹² 2 of 2000.

give effect to the constitutional rights of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights'. The relevance of the right of access to information is that prison authorities, parole boards and other penal administrative bodies may take decisions that affect the rights of prisoners. It can therefore be argued that a prisoner would be entitled to demand any information regarding any decision that may have a negative effect on his or her rights.

The right of access to information regarding police dockets has already been discussed in connection with the right to be informed of the charge with sufficient details to answer it.¹⁹³ The Constitutional Court's position was articulated in *Shabalala v Attorney-General of the Transvaal*¹⁹⁴ which held that the real enquiry was whether the applicants were entitled to succeed in their application on the basis of a right to a fair trial. The implication here is that if the denial of access to the docket is likely to result in an unfair trial, then it would be unconstitutional. This approach was also adopted in *S v Makiti*¹⁹⁵ and *Park-Ross v Director: Office of Serious Economic Offences*.¹⁹⁶

3.3.11 Just administrative action

Section 33(1) provides for the right to administrative action that is lawful, reasonable and procedurally fair. Under section 33(2), everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33(3) provides that national legislation must be enacted to give effect to these rights. The said legislation was recently enacted in the form of the Promotion of Administrative Justice Act¹⁹⁷ which provides, *inter alia*, that:

¹⁹³ See 3.2.3 above.
¹⁹⁴ 1996 (1) SA 725 (CC).
¹⁹⁵ 1997 (1) All SA 291 (B).
¹⁹⁶ 1995 (2) SA 148 (C).
¹⁹⁷ 3 of 2000.

'Administrative action which materially and adversely affects the rights of any persons or legitimate expectations must be procedurally fair.'¹⁹⁸

The Act also lays down the right to reasons in clear and detailed terms.¹⁹⁹

The right to administrative justice is quite relevant to prisoners because the nature of the prison institution is such that disciplinary hearings are likely to take place from time to time. Prison authorities are required to conduct these hearings in a manner that will not violate the prisoner's right to a just administrative action.

3.3.12 The limitation clause

The opening section of the Bill of Rights specifies that all rights contained in it are subject to the limitations in section 36, or elsewhere in the chapter.²⁰⁰

Section 36 provides in detail that:

'The rights contained in the Bill of Rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...'

The factors are then listed. One of them is the nature of the right. It is submitted that the nature of prisoners' rights particularly under section 35 is such that they are more vulnerable to the limitation clause than all other rights. If a person is arrested after committing a crime for example, his or her rights as a free person are immediately compromised to some extent. The question will always be; to what extent should the limitation clause operate? The answer, it is submitted, is that each case should be considered on its own merits.

¹⁹⁸ Section 3(1) of the Act.

¹⁹⁹ Section 5 of the Act.

²⁰⁰ Section 7 (3) of the Constitution.

3.3.13 Legal standing and enforcement of rights

In South Africa, the *locus standi* rule has traditionally required that for a person to have standing to approach the court for relief, he or she had to show that he or she had some personal interest in the matter. The Bill of Rights has changed this approach and section 38 now lays down a list of people who have the right to approach a competent court alleging an infringement of any right in the Bill of Rights. These include:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of a group or class of persons;
- (d) anyone acting in the public interest;
- (e) an association acting in the interest of its members.²⁰¹

This provision has effectively broadened the approach to standing and the Constitutional Court took the opportunity in *Ferreira v Levin NO*²⁰² to acknowledge this. The Court was of the view that adopting a broader approach to standing would not only uphold the Constitution but would also serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

Of particular relevance to prisoners' rights is section 38 (b) under which a person may act on behalf of another person who cannot act in his or her own name. Many people in detention would, for some reason or other, be unable to approach the court themselves. The provision enables another person to approach the court on their behalf so that their rights can be enforced.

²⁰¹ Section 38 of the Constitution.
²⁰² 1996 (1) SA 984 (CC).

3.3.14 Interpretation of the Bill of Rights

Interpretation of the Bill of Rights is provided for under section 39 of the Constitution. In view of the objectives of this study,²⁰³ the interpretation provision takes on added significance. Section 39(1) obliges any court interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. International law must be considered while foreign law may also be considered. In *S v Makwanyane*²⁰⁴ the Constitutional Court endorsed the use of public international law and foreign law in the interpretation of the Bill of Rights. The Court made specific reference to the jurisprudence of the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights.

In the context of prisoners' rights, section 39 is of great importance in the sense that there is a wide range of international jurisprudence to draw upon. In that respect it should be noted that by the use of the word 'must' which is imperative, the court is obliged by section 39(1) to apply international law. On the other hand the use of the discretionary 'may' only requires the court to apply foreign law as and when it sees fit. Another important aspect is that according to *S v Makwanyane*²⁰⁵ the court is not required to use only binding international law. Both binding and non-binding international law may be applied in the interpretation of the Bill of Rights. The relevance of this is that the fact that South Africa is not party to many international human rights instruments (including those on prisoners' rights) does not preclude the courts from applying them in interpretation.

203

See 2.1 above.

204

1995 (3) SA 391 (CC).

205

Ibid.

3.4 CONCLUSION

Recent constitutional developments in South Africa have brought a new dimension to the protection and realization of prisoners' rights. It is clear that many sections of the Bill of Rights have the potential to protect and widen the scope of the rights of prisoners. Section 35 in particular goes a long way in attempting to lay down specific rights for the protection of those who may sadly find themselves on the wrong side of the law, resulting in their incarceration. The courts, especially the Constitutional Court, have risen to the challenge in attempting to give some effect, interpretation and meaning to the rights of prisoners brought about by this new constitutional order. So too has the legislature. By enacting the new Correctional Services Act, a legislative mechanism has been put in place, at least on paper, for the implementation of the constitutional rights of prisoners. To what extent this constitutional and legislative protection translates into reality is an issue that will be determined at a later stage of this study.

CHAPTER FOUR

PRISONERS' RIGHTS IN SELECTED AFRICAN COUNTRIES

4.1 INTRODUCTION

A study of the constitutional rights of prisoners in South Africa would be incomplete without a comparative survey of a few other African countries. The need for this comparative approach becomes even more imperative when regard is had to the main objective of the study, which is to determine the extent to which South Africa meets international norms and standards insofar as prisoners' rights are concerned. This chapter therefore looks at the constitutional rights of prisoners in a few (mainly neighbouring) African countries with a view of creating a comparative picture and determining how South Africa stands in the regional context.

The countries chosen for this study are Zimbabwe, Zambia, Namibia and Uganda. The reasons for the choices vary from country to country but generally include proximity (for most), constitutional similarities, historical relationships and political considerations. It should be noted that South Africa, Zimbabwe, Zambia and Uganda share a common British colonial heritage, while Namibia has a historical colonial relationship with South Africa.

4.2 ZIMBABWE

4.2.1 Prisoners' Rights under the Constitution of Zimbabwe

The Republic of Zimbabwe came into existence on 18 April 1980 as the successor state of what was known as Rhodesia. The independence

Constitution of Zimbabwe was published as a schedule to the Zimbabwe Constitution Order 1979,¹ and it took effect on the day the country became independent. The Constitution has undergone several amendments although attempts to repeal it and replace it with a new one have so far failed. The latest efforts to adopt a new Constitution were rejected by the majority of the population in the country's first post-independence referendum held in February 2000.²

Chapter 3 of the Constitution of Zimbabwe is headed 'The Declaration of Rights.' The opening section of the chapter provides that; 'every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual.'³ Although the section goes on to provide for limitations to the enjoyment of the said fundamental rights, it is right to presume that 'all persons' includes prisoners.

Section 13 provides for the protection of the right to personal liberty. Under section 13(1), '[n]o person shall be deprived of his personal liberty save as may be authorised by law ...'. Section 13(2) then specifies the cases where a person may be deprived of his liberty. It is submitted that the list of such limitations is so long as to make the right meaningless. It includes for example the execution of an order of court to secure the fulfilment of an obligation imposed on a person by law.⁴ It also includes a situation where a person is reasonably suspected of having committed, or is about to commit, a criminal offence.⁵ Another such limitation is 'for the purpose of preventing the spread of an infectious or contagious disease'.⁶

¹ S1 1979/1600 of the United Kingdom.

² See Zimbabwe: 'Jubilant as Constitution is Rejected' at <http://www.igc.org/igc/pn/hl/100022224864/hl2.html>

³ Section 11.

⁴ Section 13(2)(c).

⁵ Section 13(2)(e).

⁶ Section 13(2)(g).

Section 13 also provides for the rights of arrested and detained persons. Section 13(3) in particular provides that:

‘Any person who is arrested or detained shall be informed as soon as reasonably practicable in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communications with him.’

Provision is made under section 13(3)(b) that an arrested or detained person should be brought before a court without undue delay and should be tried within a reasonable time. If not, he should be released either unconditionally or upon reasonable conditions. Such conditions may include those reasonably necessary to ensure that the person will appear at a later date for trial.

Section 13(5) provides that any person who is unlawfully arrested or detained is entitled to compensation from the person who arrests or detains him/her, or from the person or authority on whose behalf the arrest or detention was made. This would have been a very good and innovative constitutional right were it not for the limitations attached to it. Judicial officers acting in their judicial capacity, and people assisting them, acting reasonably and in good faith are excluded from liability for such compensation.⁷ It is submitted that this makes the right meaningless and ineffectual.

Section 14 is also relevant for prisoners’ rights in Zimbabwe. It provides for protection from slavery and forced labour. The limitations to this right also make it untenable. Under section 14(2), ‘forced labour’ excludes any labour required in consequence of a sentence or order of court. It also excludes

⁷ Section 13(5)(a) and (b).

labour required of any person while he is lawfully detained insofar as such labour is reasonably necessary in the interests of hygiene or for the maintenance or management of the place of detention. This effectively means that courts may sentence prisoners to forced labour and that prisoners may be forced to work while in detention.

Section 15 of the Zimbabwean Constitution which provides for protection from inhuman treatment has very important ramifications for prisoners' rights. It prohibits 'torture, inhuman or degrading punishment or other such treatment'. The enjoyment of this right however is also restricted by a string of limitations. In the first place any 'reasonably justifiable' treatment of a lawfully detained person in preventing him or her from escaping from custody does not contravene this right. Secondly, 'moderate corporal punishment' is allowed in appropriate circumstances and in execution of a judgment or order of a court. Thirdly, the execution of a person sentenced to death by a competent court does not contravene the right.⁸ Finally, the delay in the execution of a person sentenced to death does not also amount to inhuman treatment.⁹ It is submitted that these wide ranging limitations are so restrictive that the enjoyment of the right is practically impossible.

Another provision which is relevant to prisoners' rights in Zimbabwe is section 18 headed 'provisions to secure protection of law'. Under section 18(2) the right to a fair hearing is guaranteed. Section 18(3) provides as follows:

'Every person who is charged with a criminal offence -

- (a) shall be presumed to be innocent until he is proved or has pleaded guilty

⁸ Section 15(4).
⁹ Section 15(5).

- (b) shall be informed as soon as reasonably practicable, in a language he understands ... the nature of the offence ...
- (c) shall be given adequate time and facilities for the preparation of his defence
- (d) shall be permitted to defend himself in person or, ... at his own expense by a legal representative of his choice
- (e) shall be afforded facilities to examine ... witnesses called by the prosecution ... and
- (f) shall be permitted to have ... the assistance of an interpreter if he cannot understand the language used at the trial.'

Section 18(5) protects an accused person from being convicted for an act or omission which did not constitute an offence at the time it was committed. The same section protects an accused person from a penalty that is severer than the maximum that might have been imposed at the time the offence was committed. In terms of section 18(6) an accused person may not be tried for an offence in respect of which he or she has been convicted or acquitted, and under section 18(7) an accused may not be tried for an offence for which he or she has been pardoned. Section 18(8) protects an accused person from being compelled to give evidence at the trial. Finally, section 18(10) provides for the right to a public trial. But as with the other rights in the Zimbabwean Constitution a detailed list of limitations to the rights enumerated above is set out in sections 18(11) to 18(15). These limitations, it is again submitted, have the unfortunate effect of rendering the rights meaningless, particularly in the context of prisoners.

It is clear that there is a great difference between the rights of prisoners under the South African Bill of Rights and those of prisoners under the Constitution of Zimbabwe. First of all there are a number of rights in the South African Bill of Rights that are noticeably absent in the Zimbabwean

counterpart. The right to remain silent and to be so informed is one such a right. So is the right to be informed of the consequences of not remaining silent. Also absent in the Zimbabwe Constitution is the right of an arrested person not to be compelled to make any confession or admission that may be used against him or her. No provision is made for the right of a detained person to challenge the lawfulness of the detention. No provision is made for the right of a detained person to communicate and be visited. Of greater relevance is the fact that there is no provision for the right to conditions of detention that are consistent with human dignity.

As far as the right to a fair trial is concerned, the Zimbabwean Constitution does not, like its South African counterpart, provide for the right of an accused person not to be compelled to give self-incriminating evidence during the trial. Another important difference lies in the right to legal representation. Under the South African Constitution a detained or accused person has the right to be assigned a legal practitioner, at state expense, if substantial injustice would otherwise result. The person also has the right to be so informed. Under the Zimbabwean Constitution an arrested or detained person merely has a right to 'be permitted at his own expense to obtain and instruct ... a legal representative of his own choice ...'¹⁰ A person charged with a criminal offence is 'permitted to defend himself in person or, ... at his own expense by a legal representative of his choice'.¹¹

The most remarkable difference between the two constitutions in the context of prisoners' rights is the mode or the way in which the rights are limited and the extent of the limitations. It is true that not all rights are absolute. All constitutions therefore contain limitation provisions. Contemporary constitutional instruments however usually incorporate a general limitation

¹⁰ Section 13(3).

¹¹ Section 18(3)(d).

clause. This is the trend followed by South Africa in the form of section 36 of its constitution. The Zimbabwean Constitution on the other hand does not have such a general limitation clause but contains specific limitation provisions attached to most of the rights. The advantage of a general limitation clause is that it 'sets out specific criteria for the restriction of the fundamental rights ...'¹² Under the South African Bill of Rights such criteria require that the limitation should be a law of general application which is reasonable and justifiable in an open and democratic society. Specific limitation provisions attached to the rights have the effect of over-restricting such rights. This is the case with the provisions of the Zimbabwean Constitution, particularly those relating to prisoners.

Finally, another important difference relates to corporal punishment and the death penalty. While in South Africa the two are outlawed, in Zimbabwe they are not. Corporal punishment is permissible 'in appropriate circumstances'¹³ and '[t]he execution of a person who has been sentenced to death ...' does not amount to inhuman treatment,¹⁴ nor does the delay in the execution of such a sentence.¹⁵

4.2.2 Prisoners' rights as interpreted by the courts of Zimbabwe

On several occasions the Supreme Court of Zimbabwe has been called upon to deal with certain aspects of prisoners' rights. In *S v Sibanda*¹⁶ the court was faced with the issue of the right to legal representation. It was held that detained persons have a constitutional right of access to their legal advisors. Denial of such access means that such persons, if charged with an offence, are prejudiced in their defence and will not receive a fair trial. The same

¹² See De Waal, Currie and Erasmus, *The Bill of Rights Handbook* (2000) at 132.
¹³ Section 15(3)(a).
¹⁴ Section 15(4).
¹⁵ Section 15(5).
¹⁶ 1989 (2) ZLR 329 SC.

issue was addressed in *S v Woods and Others*¹⁷ where the court held that it could not condone a blatant refusal of access of prisoners to their lawyers. Such refusal would violate the fundamental right granted by section 13(3) of the Constitution and would bring the administration of justice into disrepute.

In *S v Masitere*¹⁸ the court considered whether the imposition of the punishment of solitary confinement and a spare diet as part of a sentence was in contravention of section 15 of the Constitution of Zimbabwe. The applicant had been convicted by a provincial magistrate for housebreaking with intent to steal. Because he had a string of previous convictions for similar offences, he was sentenced to a term of three years imprisonment with hard labour. In addition, the magistrate ordered that the first and last fortnights of the term of imprisonment were to be spent in solitary confinement and on spare diet. The Supreme Court described such punishment as reminiscent of the dark ages and expressed the view that these forms of punishment had not been specifically declared unconstitutional at an earlier opportunity because the courts did regard them as having fallen into desuetude.¹⁹ The court took the opportunity to declare such punishments unconstitutional by virtue of their inhuman and degrading nature and the element of torture they entailed.²⁰

In *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*,²¹ the applicant challenged the conditions of detention. The prisoner who was under sentence of death, was confined in a small single cell for a minimum of 23 hours every weekday and 24 hours on Saturdays, Sundays

¹⁷ 1993 (2) ZLR 258 (S)

¹⁸ 1991 (1) SA 821.

¹⁹ At 822.

²⁰ *Ibid*; See also Naldi, 'Prisoners' Rights as Recently Interpreted by the Supreme Court of Zimbabwe: A Comparative Study with International Human Rights', *African Journal of International and Comparative Law* 4 (1992) at 719.

²¹ 1992 (2) SA 56.

and public holidays, without access to natural light and fresh air, and with only limited ability to exercise his body. He argued that such conditions infringed his fundamental right under section 15(1) of the Constitution not to be subjected to inhuman treatment. Accepting that it had a responsibility to enforce the constitutional rights of all persons, prisoners included, the court held that indeed such conditions of detention infringed the prisoners' fundamental rights under section 15(1) of the Constitution. The court said:

'Section 15(1) is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment or institutionalised treatment of offenders be exercised within the ambit of civilised standards.'²²

To subject a human being to such conditions, the court further held, transgressed the boundaries of civilised standards and involved the infliction of unnecessary suffering. The court ordered that the applicant be allowed to exercise in the open air, every weekday, for one hour in the morning and one hour in the afternoon, and on weekends and public holidays for a minimum of one hour a day.

In *Woods and Smith v The Minister of Justice, Legal and Parliamentary Affairs and Another*,²³ the court was faced with a similar situation to that in *Conjwayo*. The question was whether the *Conjwayo* judgment was binding only on the parties to that particular case or whether it was a test case that could embrace the present applicants. The Court held that the ruling in *Conjwayo* applied equally to the present applicants. A similar order was accordingly made on their behalf.

²² At 63.

²³ Judgment No. SC 145/91.

In *Woods and Others v The Minister of Justice, Legal and Parliamentary Affairs*²⁴ the matter before the court was the right to freedom of expression in terms of section 20(1) of the Constitution. The prisoners were challenging a regulation which permitted them to write and receive only one letter every four weeks. The court held that the regulation was *ultra vires* section 20 of the Constitution and therefore invalid. The court used the occasion to reiterate that by reason of his crime, a prisoner does not shed all basic rights at the prison gate. 'Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system,' the court said.²⁵

The matter before the court in *Chimora v Angwa Furnishers (Private) Ltd and Others*²⁶ revolved around the infringement of the right to personal liberty as a result of civil imprisonment for non-payment of debts. The right not to be subjected to degrading treatment was also considered. The court held that under section 13(2)(c) of the Declaration of Rights a person could be deprived of his personal liberty in execution of an order of court to secure the fulfilment of an obligation imposed by law. The imprisonment of a recalcitrant debtor did not amount to 'degrading' treatment because the debtor had it within his power to end the period of incarceration by paying the debt. Accordingly the procedure of civil imprisonment did not contravene section 15(1) of the Declaration of Rights, the court held. It is submitted that this decision is in stark contrast with the position in South Africa where the Constitutional Court held in *Coetzee v Government of South Africa*²⁷ that civil

²⁴ 1995 (1) SA 703.

²⁵ At 705.

²⁶ (1997) 1 BHRC (Zim SC) 460.

²⁷ 1995 (10) BCLR 1382 (CC).

imprisonment for debt is incompatible with the Constitution. It is further submitted that in view of adverse economic realities facing many people in both countries, the South African position is preferable.

More recently the Supreme Court of Zimbabwe had to consider the right to a fair trial in *Smyth v Ushewokunze and Another*.²⁸ The applicant was arrested in September 1997 for charges of *crimen injuria* which occurred in 1992 and 1993 respectively. He alleged that the prosecutor had revealed a desire to conduct a personal crusade against him and lacked the objectivity to ensure a fair trial as provided for under section 18(2) of the Constitution of Zimbabwe. He also complained that the delay in charging him violated section 18(2), and that he would not be afforded a fair hearing due to the lapse of five years since the commission of the alleged offences. The court held that section 18(2) embodied a constitutional value of supreme importance which required a broad and creative interpretation embracing not only the impartiality of the court but also the absolute impartiality of the prosecutor himself, whose function, as an officer of the court, forms an indispensable part of the judicial process. The application was granted in this regard but dismissed in regard to the other claims. Regarding the right to a fair trial within a reasonable time, the court held that the time began to run when the person was charged. A person was 'charged' when he received official notification of an allegation that he had committed a criminal offence. Accordingly the delay in this case was insufficient to trigger the inquiry mechanism into whether the applicant's rights to a fair hearing had been infringed.

Some of the more recent pronouncements on prisoners' rights in Zimbabwe were made by the Supreme Court in *Blanchard and Others v Minister of*

²⁸ 1998 (4) BHRC (Zim SC) 262.

*Justice, Legal and Parliamentary Affairs and Others.*²⁹ Three United States citizens were arrested and were to be charged with illegal possession of arms of war and for violating the Aircraft (Offences) Act.³⁰ They claimed to have been subjected to various forms of inhuman treatment including torture, assault and other abuse. On the right not to be subjected to torture or inhuman or degrading treatment, the court said that section 15(1) of the Zimbabwean Constitution is meant to protect both the dignity and the physical and mental integrity of the individual, and it is the duty of the state to afford everyone protection against acts that cause not only physical pain but also mental suffering. Regarding the conditions of detention the court stressed that a prisoner retains all the rights of a free citizen except for those withdrawn by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system. In respect of awaiting trial prisoners, the court said, it must never be overlooked that they are unconvicted and are accordingly presumed to be innocent. The court ordered that the applicants were to be entitled to use and wear their own civilian clothing at all times and they were also to be entitled to receive from sources outside the prison as much food as they required everyday.

The above decisions illustrate the approach taken by the Supreme Court of Zimbabwe in interpreting the constitutional rights of prisoners in that country. It can be said that the interpretation has been hampered by the various limitations imposed by the Constitution on the various rights. Although the courts upheld and protected the fundamental rights of prisoners, even sometimes applying international law, the limitations imposed by the Constitution ensure that such rights can be guaranteed only to a certain extent. Having said that, it is however evident that the courts have 'not only met the minimum standards set by international human rights law in relation

²⁹ 1999 (10) BCLR 1169 (ZS)
³⁰ Chapter 9:01.

to prisoners but, indeed, had gone further'.³¹ It has been argued that by proscribing solitary confinement, and ordering that prisoners on death row should have, not one, but two hours access to the sun daily, the Zimbabwean Supreme Court was not only upholding basic human rights but setting standards for the legal world as a whole.³²

4.2.3 Prisoners' rights in Zimbabwe as seen by observers

Generally the area of human rights protection has always been a sore spot in the social, legal and political development of Zimbabwe. Prisoners' rights are perceived as no exception to this poor record. The 1998 Human Rights Report by the US Department of State describes the prison conditions in Zimbabwe as harsh, characterised by extreme overcrowding, shortages of clothing and poor sanitary conditions.³³ The same report hastens to add however, that the government has established a successful community service sentencing programme to try and alleviate prison overcrowding.

According to the 1999 Human Rights Report, the government's overall human rights record worsened significantly that year. There were incidents of police killings and security forces are reported to have tortured, beaten and otherwise abused persons. Prison conditions are also reported to have remained harsh, and arbitrary arrest and detention remained problems. In particular the report documents the arrest, detention and torture of two journalists of the Standard newspaper, Mark Chavunduka and Ray Choto for publishing a story alleging that 23 army officers had been arrested in connection with an attempted military coup. The report states that the two journalists sustained serious physical and psychological injuries as a result of

³¹ See Naldi (note 20 above) at 727.

³² *Ibid.*

³³ See 1998 Country Reports on Human Rights Practices; Released by the Bureau of Democracy, Human Rights, and Labour, US Department of State, February 1999 at http://www.stat.gov/global/human_rights/1999_hrp_report/zimbabwe.html.

torture while in detention. Also documented by the report is the torture and physical abuse of three American citizens referred to earlier.³⁴ The three men claimed that their jailers applied electric shocks to their genitals, beat their feet with leather straps, submerged their heads under water and were forced to sleep naked, shackled with leg-irons. The findings of the physicians who examined the missionaries confirmed their claims. In September 1999, the three were found guilty of violations of sections of the LOMA (Law and Order Maintenance Act) and the Aircraft Offences Act and were given concurrent sentences of 21 months under the LOMA and 6 months under the Aircraft Offences Act.

According to the Amnesty International Annual Report, during 1999 almost 1 000 people were detained without bail, creating dangerous overcrowding in jails and remand centres.³⁵ Some detainees, the report says, were beaten and ill treated in custody. Furthermore, two men - Nyenyai Mudenge and George Chikwamure - were executed in April 1999 for murder. During the year more than five people were sentenced to death and at least seven people had their death sentences confirmed by the Supreme Court.³⁶

4.3 **NAMIBIA**

4.3.1 **Prisoners' rights under the Constitution of Namibia**

The Constitution of Namibia (formerly known as South-West Africa) was adopted in February 1990 shortly before the country gained its independence from South Africa.³⁷ The Constitution established a multi-party democracy

³⁴ See notes 29 and 33 above.

³⁵ See <http://www.amnestyusa.org/alib/aeroporto/ar99/afr46.htm>.

³⁶ *Ibid.*

³⁷ On 21 March 1990.

seeking to overcome apartheid. One of the features of the new constitution was that the common law based on Roman Dutch law applied since 1920 was to remain in force. Another important development was the introduction of a Bill of Rights in the new Constitution.

The Bill of Rights is contained in Chapter 3 which is entitled 'Fundamental Human Rights and Freedoms'. Article 6 protects the right to life and categorically outlaws the death penalty by providing that :

'The right to life shall be protected and respected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.'³⁸

The right against deprivation of personal liberty is provided for under Article 7 and respect for human dignity under Article 8, which further provides that '[N]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'.³⁹

Rights that are particularly pertinent to prisoners are laid down in Articles 11 and 12. Article 11 specifically provides that no-one may be subjected to arbitrary arrest or detention. It has been argued that the inclusion of this clause is an instance of legislation *ex abundanti caulela*, since Article 7 already provides for the right against deprivation of personal liberty except in accordance with procedures established by law.⁴⁰ This means that not only arbitrary arrest and detention are proscribed, but any arrest or detention has to be subject to certain procedures established by law. These include the right of the arrested person to be informed promptly in a language he

³⁸ Article 6 of the Constitution of Namibia.

³⁹ Article 8(2)(b).

⁴⁰ See Van Wyk, Weichers and Hill (Eds), *Namibia: Constitutional and International Issues* (1991).

understands, the grounds for such arrest.⁴¹ Also included is the right of the arrested person to be brought before a judicial officer within a reasonable time and that any further detention must be authorised by a judicial officer.⁴² It is interesting to note that article 11(4) denies these rights to illegal immigrants although article 11(5) accords persons who are detained as illegal immigrants the right to consult with a legal practitioner of their choice.

Article 12 deals with the right to a fair trial. This includes the right of an accused person 'to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...'.⁴³ Also included is the right of an accused person to be tried within a reasonable time or be released,⁴⁴ the right to be presumed innocent until proven guilty after having been given an opportunity to call witnesses and cross-examine state witnesses,⁴⁵ the right to be afforded adequate time and facilities to prepare his or her defence and the right to be represented by a legal practitioner of his or her choice.⁴⁶ An accused person is also protected from being compelled to give evidence that may incriminate himself or his spouse.⁴⁷ Under article 12(2) no person shall be liable to be tried for an offence for which he or she has been convicted or acquitted. Finally, article 12(3) provides that no person shall be tried or convicted for an act or omission which did not constitute an offence at the time it was committed.

There are a number of differences between the constitutional rights of prisoners in Namibia and those of prisoners in South Africa. First of all, the rights of arrested, detained and accused persons are laid out in more detail under the South African Constitution. Secondly, although the Namibian

⁴¹ Article 11(2).

⁴² Article 11(3).

⁴³ Article 12(1)(a).

⁴⁴ Article 12(1)(b).

⁴⁵ Article 12(1)(d).

⁴⁶ Article 12(1)(e).

⁴⁷ Article 12(1)(f).

Constitution affords arrested and accused persons the right to be represented by legal practitioners of their choice, there is no provision for legal representation, at state expense, for those who are unable to afford it. Thirdly, there is no provision under the Namibian Constitution for the right of detainees to communicate and be visited.

A very remarkable difference lies in the failure of the Namibian Constitution to specifically provide for conditions of detention that are consistent with human dignity. There is also no specific provision for the right to challenge the lawfulness of the detention. As far as the right to a fair trial is concerned, the Namibian Constitution does not provide for the right of an accused person to be tried in a language he or she understands nor does it provide for the right of appeal or review.

As for the limitation of rights, both constitutions have a general limitation clause. The equivalent of the South African limitation clause is Article 22 of the Namibian Constitution which requires that any limitation to the rights and freedoms in the Constitution must (i) be a law of general application; (ii) not negate the essential content of the right or freedom concerned; (iii) specify the ascertainable extent of such limitation; (iv) not be aimed at a particular individual and (v) identify the provision on which authority to enact is based.

4.3.2 Prisoners rights as interpreted by the Namibian courts

No sooner had the Constitution of Namibia come into effect than the courts were called upon to interpret and enforce the rights therein enshrined. In 1990 it was held in *S v Willemse*⁴⁸ that where an unrepresented accused does not understand his or her rights, failure by the court to inform and explain in detail such rights results in the accused failing to receive a fair

⁴⁸ 1990 NR 344.

trial. The interpretation of the right to a fair trial was taken a step further in *S v Nassar*.⁴⁹ The High Court of Namibia held that the point of departure in a criminal case was that the accused is presumed innocent until proven guilty. To do justice to this fundamental right it was a prerequisite that an accused be put in the position whereby he knows what case he has to face so that he can fully prepare his defence. The court further said that the right embodied in Article 12(1)(d) to have the opportunity to call witnesses and cross examine state witnesses can only be properly exercised if the accused knows in advance what the case against him is. In terms of the Constitution, the court further held, the accused was entitled to be provided with all reasonably practicable time and facilities to ensure that the trial was fair. 'Facilities' included providing an accused with all relevant information in possession of the state, including copies of witness statements, relevant evidential documents, as well as an opportunity to view any material video recordings.

In *S v Van den Berg*⁵⁰ the court addressed the right to be presumed innocent in the context of the right to a fair trial. The following observations were made by the court: (1) The presumption of innocence had to be defined as obliging the state generally to prove all elements of the offence beyond reasonable doubt; (ii) Recognised exceptions to this general rule did, however, exist in Namibian law; (iii) All laws limiting the fundamental rights to be presumed innocent had to be of general application, not negate the essential content of the rights and not be aimed at a particular individual; (v) Such a law, when it was in the form of a statute and that statute was enacted after the coming into operation of the constitution, had to specify and identify the Article in the Constitution in which the authority for the limitation rested. The court held that the presumption in this case which placed on the accused

⁴⁹ 1995 (2) SA 82 Nm HC.
⁵⁰ 1996 (1) SACR 19 (Nm).

the onus to prove an element of the offence, being that the diamonds bought, sold or possessed were rough uncut diamonds, was unconstitutional. It was also held that the presumption negated the essential content of the right to be presumed innocent.

Another case in which a statutory presumption of guilt was struck down was *S v Pinero*.⁵¹ The court held that the statutory presumption of guilt in terms of the Sea Fisheries Act (RSA)⁵² was in direct conflict with Article 12 of the Namibian Constitution. The court further held that the requirement imposed that an accused had to prove that he could not have prevented the offence was contrary to the spirit of the Constitution as it included every person on the vessel, even those who did not take part in the crime.

*S v Titus*⁵³ also dealt with the right to be presumed innocent in the context of the right to a fair trial. In an appeal against a conviction of theft the appellant contended that the presumption in section 217(1)(b)(ii) of the Criminal Procedure Act,⁵⁴ requiring an accused to prove that a confession was not freely and voluntarily made, placed an onus on the accused to prove his innocence and was therefore in conflict with the fundamental rights contained in Articles 12(1)(d) and 12 (1)(f) of the Namibian Constitution. The High Court found that section 217(1)(b)(ii) did not impose on an accused, the burden of proving his innocence. The requirements of section 209 of the Criminal Procedure Act⁵⁵ that the confession be in a material respect or that the offence be proved by evidence independent of the confession, ensured

⁵¹ 1991 NR 424.

⁵² 12 of 1988. See section 50 of the Act. It has to be noted that, until 28 February, 1994 Walvis Bay was part of South African territory and the Sea Fisheries Act was enforceable in that area. After that date the Act was no longer enforceable by South Africa but by Namibia until it enacted its own legislation.

⁵³ 1995 (3) BCLR 263 (NmH).

⁵⁴ 51 of 1997.

⁵⁵ *Ibid.*

that the burden of proof remained on the state. The court concluded that the provisions of section 217(1)(b)(ii) were not unconstitutional.

The Namibian Supreme Court, however, took a different view on this matter in *S v Shikunga*.⁵⁶ The facts were almost similar to those in *Titus*. It was contended on behalf of the appellant that the appeal be upheld because the provisions of section 217(1)(b)(ii) were unconstitutional and that in admitting the confession a constitutional irregularity had been committed during the course of the trial. It was contended that this was a fatal irregularity which should vitiate the conviction. The court found that indeed the provisions of section 217(1)(b)(ii) were unconstitutional. The court, however, refused to set aside the conviction on the basis that the conviction did not depend on the confession, and the guilt of the appellant had been proven by means of other reliable evidence.

The question of access by the accused to information in the possession of the state relating to the charges against him or her has been considered in several cases in Namibia. The guidelines in this regard were laid down by the Namibian Supreme Court in *S v Scholtz*⁵⁷ where it was held that the general privilege attaching to the contents of a police docket as laid down in *R v Steyn*⁵⁸ was incompatible with the guarantee of a fair trial contained in Article 12(1) of the Namibian Constitution. The Supreme Court made a declaratory order intended to provide guidance in future prosecutions in which an accused sought to obtain the contents of police dockets relevant to his or her particular matter. It was declared that in prosecutions before the High Court an accused person or his or her legal representative should ordinarily be entitled to the information contained in the police docket relating to the case against him or her, including copies of the statements of

⁵⁶ 1997 (4) BCLR 1321 (NmS).

⁵⁷ 1997 (1) BCLR 103 (NmS).

⁵⁸ 1954 (1) SA 324 (A).

witnesses whom the police had interviewed, whether or not the prosecution intended to call such witnesses at the trial. Although the declaratory order referred only to prosecutions in the High Court, the Supreme Court stressed that nothing contained in the order should be interpreted so as to preclude an accused person appearing before a different court from contending that the guidelines which had been set out should also be applicable to proceedings before other courts. And so it was held in *S v Angula and Others*; *S v Lucas*⁵⁹ that the principles applied in *S v Scholtz*⁶⁰ were also applicable in the lower courts. The court acknowledged, however, that due to the nature of the majority of the cases that came before the lower courts, in many instances disclosure of the witness statements would not be necessary in order to ensure the fairness of the trial.

Other matters regarding prisoners' rights that have come before the Namibian courts include the right to be tried within a reasonable time. As early as 1991 it was held in *S v Amujekela*⁶¹ that allowing an accused to languish away in custody at the whim of the Prosecutor-General, pending his authority to proceed with the trial, was contrary to Article 12 of the Constitution. The right to be tried within a reasonable time was again addressed by the court in *Garces v Fouche and Others*.⁶² The state argued in this case that the detention of an accused during the forty-eight hour period following arrest was expressly authorised by section 50(1) of the Criminal Procedure Act,⁶³ and that no provision existed which enabled a court to determine a shorter period within which the accused had to be brought to court. The court rejected this argument and held that section 50(1) of the Criminal Procedure Act dealt with the maximum and not the minimum time that might expire prior to appearance before court. The provisions of

⁵⁹ 1997 (9) BCLR 1314 (Nm).

⁶⁰ See note 57 above.

⁶¹ 1991 NR 303.

⁶² 1998 (9) BCLR 1098 (Nm).

⁶³ 51 of 1977.

the Criminal Procedure Act had to be read in light of article 11 of the Namibian Constitution which was intended to operate solely for the benefit of arrested persons and not for the benefit of the state. Article 11(3) of the Constitution, the court held, did not confer a right on the state to detain a person for forty eight-hours at its whim if it was reasonably practicable to bring that person before a court at an earlier point in time.

It is quite clear that the courts of Namibia, especially the Supreme Court, have spared no effort in giving effect to the constitutional rights of prisoners in that country. In so doing the judges have had to be imaginative and bold in their judgments. It ought to be remembered that unlike South Africa, Namibia does not have a specialised constitutional court. Constitutional and human rights jurisprudence falls under the jurisdiction of the High Court and the Supreme Court. It also ought to be remembered that Namibia incorporated a Bill of Rights in their constitutional system more than four years before South Africa did. In many respects therefore, South Africa has gained from the human rights litigation experience of the Namibian courts. That in part explains the similarity in the approach of the courts of both countries towards the interpretation of the constitutional rights of prisoners.

4.3.3 Prisoners' rights in Namibia as seen by observers

According to the 1999-2000 *Annual Survey of Political Rights and Civil Liberties*⁶⁴ respect for human rights generally in Namibia has been among the best in Africa. This good record, however, has been tainted by isolated but serious incidents of human rights abuses, some of which involved prisoners' rights. It was reported by the Namibian National Society for Human Rights for example, that in August 1999 up to 500 people were arrested after an

⁶⁴ See *Freedom in the World* at http://freedom_house.org/survey2000/reports/country/namibia.html.

attack on an army base and they were 'subjected to acts of torture and other cruel, inhuman treatment and punishment'.⁶⁵ This incident is corroborated by the 1998 Human Rights Report by the US Department of State which also confirms that such incidents are fewer outside the Caprivi area.⁶⁶ According to the latter report, there were 25 official complaints reported in 1997 of people being beaten or otherwise abused by the police during arrest or in detention. One police officer is reported to have been prosecuted and convicted of abusing prisoners.⁶⁷

In 1995 the Namibian government created a Ministry of Correctional Services, charged with administering the country's prisons. Prison conditions however are reported to be harsh, although the government has been focusing greater attention on rehabilitation programmes and vocational training for inmates.⁶⁸ The government is also making efforts to separate youthful offenders from adult criminals, although in many rural areas juveniles continue to be held with adults. There are several pilot programmes that provide alternatives to incarceration for juvenile offenders.⁶⁹

On the question of arbitrary arrest and detention, the 1998 Human Rights Report points out that the rights abused are primarily the right to legal representation and the right to be tried within a reasonable time.⁷⁰ In the latter case it is reported that some awaiting-trial detainees have been held for up to one year.⁷¹ In the case of the former, many accused persons particularly in remote and rural areas are not represented by counsel

65 *Ibid.*

66 See http://www.state.gov/global/human_rights/1998_hrp_report/namibia.html.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

primarily due to resource constraints.⁷² The constitutional right to a fair trial is regarded to be generally well protected by the judiciary. However the protection of this right is reported to be somewhat limited in practice by long delays in hearing cases in the regular courts and the uneven application of constitutional protections in the traditional system.⁷³ The traditional system is governed by the Traditional Authorities Act,⁷⁴ which empowers traditional courts to deal with minor criminal offences, such as petty theft and infractions of local customs.

A lack of qualified magistrates, prosecutors and private attorneys has been reported to result in a serious backlog of criminal cases, which often translates into delays of up to a year between arrest and trial.⁷⁵ This contravenes the constitutional right to a speedy trial. It is also reported that many of those awaiting trial are treated as convicted prisoners.⁷⁶

A 2000 Amnesty International report⁷⁷ documents a number of human rights abuses by Namibian authorities in the Namibia/Angola border area. Some of these human rights violations involve prisoners' rights. According to the report, the spilling over of the Angolan civil war into Namibia has led to a marked escalation of human rights abuses in the volatile border areas. In the context of prisoners, the report claims that people were arrested and detained without investigating the allegations of crimes and without instituting criminal proceedings in the normal way. This, according to the report, denies them their rights, particularly the right to be represented by defence counsel and the right to challenge the legality of their detention.⁷⁸ The report makes

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ 17 of 1995.

⁷⁵ See Human Rights Report (note 66 above).

⁷⁶ *Ibid.*

⁷⁷ See *Amnesty International; 'Angola and Namibia Human Rights Abuses in the Border Area'* at http://ushr.namweb.com.na/amnesty_international_angola_htm.

⁷⁸ *Ibid.*

it clear that the failure of the Namibian authorities to bring the detainees promptly before the judicial authorities and to afford them access to lawyers, violates not only Articles 9 and 14 of the ICCPR and Articles 6 and 7 of the African Charter but also Articles 7, 11 and 12 of the Namibian Constitution. Finally, the report documents allegations of numerous beatings, torture and ill treatment of detainees suspected of involvement in the attack on Katima Muliro on 2 August 1999.⁷⁹ This in breach of Article 8(2) of the Namibian constitution which clearly prohibits torture, and also in breach of provisions of the UN Convention Against Torture.

From the foregoing observer reports, it can be seen that abuse of prisoners rights in Namibia is mainly restricted to particular areas and incidents. On the whole the situation is much better than it used to be in the past. According to one commentator, during the dark days of the struggle, prison authorities in Namibia earned a reputation as one of the worst abusers of human rights in Southern Africa.⁸⁰ The commentator quotes a statement of the Prisons Minister saying that 'Namibian prisons should never again be thought of as "dungeons and torture chambers"'.⁸¹ The statement concludes by remarking that the level of a nation's civilisation can be seen most clearly in the way it treats its prisoners.⁸² Namibia seems to be striving to live up to this ideal.

⁷⁹ This incident has already been referred to above (see note 65).
⁸⁰ See Ellis; *Namibian*, 31 January 2000 'Prisons aim to exit dark ages' at <http://www.namibia.com.na/Netstories/2000/January/News/exit.html>.
⁸¹ *Ibid.*
⁸² *Ibid.*

4.4 ZAMBIA

4.4.1 Prisoners' rights under the Constitution of Zambia

Zambia was a one-party state until 1991 when Kenneth Kaunda's United National Independence Party (UNIP) was defeated by Frederick Chiluba's Movement for Multi-party Democracy (MMD). A new Constitution was adopted⁸³ and it came into force on 30 August 1991. It was amended substantially in 1996.⁸⁴ The new amended Constitution took effect on 28 May 1996. Chapter 3 of the Constitution is entitled 'Protection of Fundamental Rights and Freedoms of the Individual'. Article 11 recognizes the fundamental rights and freedoms of every person in Zambia and emphasises *inter alia*, the right to life, liberty, security of the person and the protection of the law.⁸⁵ Article 12 provides for protection of the right to life. By providing that no person shall be deprived of his life intentionally except in execution of a sentence of a court,⁸⁶ the death penalty is maintained. There are further limitations to the right to life which include the loss of life as a result of the use of force which is reasonably justifiable in certain circumstances. Notable among these is where a person dies as a result of the use of force in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.⁸⁷ It is submitted that this and several other limitations incorporated in Article 12 effectively render the right to life meaningless particularly with regard to prisoners.

The right to personal liberty is protected under Article 13. In many respects this constitutional right is similar to that of Zimbabwe in that a host of

⁸³ Act No. 1 of 1991.

⁸⁴ The Constitution (Amendment) Act No 18 of 1996. Any further reference to the Constitution of Zambia will be in regard to the 1996 Constitution.

⁸⁵ Article 11(a).

⁸⁶ Article 12(1).

⁸⁷ Article 12(3)(b).

limitations are attached to it. These include, *inter alia*, the execution of a sentence or order of court,⁸⁸ for the education and welfare of a person,⁸⁹ for the purpose of preventing the spread of an infectious disease,⁹⁰ and for the purpose of preventing the unlawful entry of a person into Zambia.⁹¹ It is submitted, as it was in the case of Zimbabwe, that the list of limitations is so long as to make the right practically unavailable. Under Article 13(2) an arrested or detained person has the right to be informed of the reasons for his arrest or detention. Under Article 13(3) an arrested or detained person has the right to be brought before the court without undue delay, and if not tried within a reasonable time, then be released either unconditionally or upon reasonable conditions. Article 13(4) entitles any person who is unlawfully arrested or detained by any other person to compensation from that other person. It is not clear whether the 'other person' includes the state.

Article 14 of the Zambian Constitution, which provides for the protection from slavery and forced labour, is similar to the equivalent provision in the Zimbabwean Constitution. The expression "forced labour" excludes labour required in consequence of a sentence or order of court and any labour required of any person while he is lawfully detained. The difference between the position on forced labour in Zambia (and Zimbabwe) and in South Africa is that while the South African Correctional Services Act⁹² permits prison work intended to keep prisoners active for a normal working day, it outlaws any prison work as a form of punishment or disciplinary measure.⁹³ In the Constitution, apart from the general limitation clause⁹⁴ there are no other limitations imposed on the right. In Zambia and Zimbabwe, on the other

⁸⁸ Article 13(1)(a).
⁸⁹ Article 13(1)(f).
⁹⁰ Article 13(1)(g).
⁹¹ Article 13(1)(h).
⁹² 111 of 1998.
⁹³ Section 40(1) and (5).
⁹⁴ Section 36.

hand, there are several limitations attached to the right, the most relevant of which is that labour required in consequence of a sentence or order of court is permissible.

Article 15 provides that '[n]o person shall be subjected to torture, or to inhuman or degrading punishment or other like punishment.' It is interesting to note that there are no limitations attached to this right. This is in contrast to the equivalent provisions in the Zimbabwean and South African Constitutions. In the case of Zimbabwe the right incorporates several restrictions while in the case of South Africa, the general limitation clause may apply to the enjoyment of this right.

The other rights of prisoners are dealt with under Article 26 of the Constitution which lays down provisions relating to restriction and detention. Under Article 26(1)(a) an arrested or detained person should be furnished with a statement in writing in a language that he/she understands, the grounds upon which he/she is restricted or detained. This should be done 'as reasonably practicable and in any case not more than fourteen days after the commencement of his/her detention or restriction'.⁹⁵ Within fourteen days a notification of the restriction or detention should be published in the Gazette.⁹⁶ A restricted or detained person may request that his case be reviewed by an independent and impartial tribunal.⁹⁷ If he/she so does, the restricted or detained person 'shall be afforded reasonable facilities to consult a legal representative of his/her own choice...'⁹⁸ At the hearing he/she may appear in person or be represented by his/her legal counsel.⁹⁹ Legal representation at public expense is expressly ruled out by Article 26(4).

⁹⁵ Article 26(1)(a).

⁹⁶ Article 26(1)(b).

⁹⁷ Article 26(1)(c).

⁹⁸ Article 26(1)(d).

⁹⁹ Article 26(1)(e).

Many differences are apparent between the rights of prisoners under the Constitution of Zambia and those under the South Africa Bill of Rights. No provision is made under the Zambian Constitution for the right of arrested persons to remain silent and to be so informed. There is also no protection of arrested persons from being compelled to make admissions or confessions that could be used in evidence against them. The other main differences lies in the right to legal representation. Under the South African Bill of Rights an accused or detained person is not only entitled to legal representation but has a right to have a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result. The Zambian Constitution allows legal representation but expressly rules out such representation at state expense. There is also no provision under the Zambian Constitution for the right to conditions of detention that are consistent with human dignity. So too is the right to challenge the lawfulness of the detention. The right to communicate and be visited is also not provided for.

As far as the right to a fair trial is concerned there are several similarities and differences between Zambian provisions¹⁰⁰ and their South African counterparts.¹⁰¹ Provision is made for presumption of innocence, being informed in detail of the nature of the charge, being given adequate time and facilities to prepare one's defence, the right to examine prosecution witnesses and the right to the assistance of an interpreter if one cannot understand the language used at the trial. Some of these rights however are limited in respect of detainees on trial for offences under the law regulating their discipline in detention.¹⁰² Provision is also made for legal representation, but legal aid may only be granted in accordance with the law

¹⁰⁰ Provided for under Article 18.

¹⁰¹ Section 35(3).

¹⁰² Article 18(12).

enacted by parliament for such purpose.¹⁰³ An accused person may also not be tried for an act or omission which, at the time it was committed, did not constitute an offence.¹⁰⁴ He or she may not also be tried for an offence for which he or she has been acquitted or convicted except upon the order of a superior court in the course of appeal or review proceedings.¹⁰⁵ No person may be tried for an offence for which he has been pardoned,¹⁰⁶ and one cannot be convicted of an offence unless it is defined and its penalty prescribed by law.¹⁰⁷ An accused person may also not be compelled to give evidence at the trial.¹⁰⁸

Under Article 10 provision is made for all criminal proceedings to be held in public, but Article 11 lays down circumstances under which proceedings may be held in camera. The main difference between the Zambian constitutional right to a fair trial and its South African counterpart is the extensive list of limitations to such a right set out in article 18(12) of the Zambian Constitution. The South African provision does not have such limitations apart from the general limitation clause set out in section 36.

4.4.2 Prisoners' rights as interpreted by the Zambian courts

Like Zimbabwe and Namibia, Zambia has no constitutional court. The High Court has original jurisdiction over matters arising from the contravention of fundamental rights in Chapter 3 of the Zambian Constitution.¹⁰⁹ The Supreme Court exercises appellate jurisdiction over such matters.¹¹⁰ Both courts have occasionally been called upon to interpret and apply human

¹⁰³ Article 18(2)(d).
¹⁰⁴ Article 18(4).
¹⁰⁵ Article 18(5).
¹⁰⁶ Article 18(6).
¹⁰⁷ Article 18(8).
¹⁰⁸ Article 18(7).
¹⁰⁹ Article 28(1).
¹¹⁰ Article 28(2)(b).

rights provisions in the specific context of prisoners. Even long before the new Constitution came into being the High Court had ruled in *Simaata and Simaata v The Attorney-General*¹¹¹ that section 53(1) of the Corrupt Practices Act¹¹² was unconstitutional in that it took away an accused's constitutional right not to be compelled to give evidence at his/her trial. Much later in the case of *Fred M'membe and Bright Mwape v The Speaker of the National Assembly and the Commissioner of Prisons and the Attorney-General*¹¹³ the two appellants requested the court to order their release from prison where parliament had committed them for an indefinite period for alleged contempt of parliament. They had written newspaper articles opposing the protest by some members of parliament against a Supreme Court judgment. The articles were alleged to breach the privileges and immunities of the House. The questions to be considered by the High Court were whether the National Assembly could commit a person to prison and whether the proper procedure had been followed in sending the applicants to prison. The Court observed that although parliament is not a court, it has power to punish for contempt, which power is inherent in the nature of its status in order to protect its dignity and honour. According to the court, that power includes the common law power to imprison, and not only to reprimand. It was held, however, that because the remand was indefinite, it was incompatible with the spirit of the country's legal system. The court found that the disciplinary procedures were unorthodox and ordered the release of the prisoners.

In *Patel v The Attorney-General*¹¹⁴ the issue before the court was the right to bail under section 13(3) of the Constitution. The court held that the proper test whether bail should be granted or refused is whether it is probable that

¹¹¹ 1986 HP 448.
¹¹² No. 4 of 1980.
¹¹³ 1996/HJC/X.
¹¹⁴ 1993/HC/366.

the applicant will appear to take his trial.¹¹⁵ In applying this test the Court takes into account the following considerations:

- (1) The nature of the accusation against the applicant and the severity of the punishment which may be imposed;
- (ii) The nature of the evidence in support of the charge;
- (iii) The independence of the sureties if bail is granted;
- (iv) The prejudice to the applicant if he is not admitted to bail; and
- (iv) The prejudice to the state if bail is granted.

The court added that over and above the foregoing considerations, special circumstances peculiar to the applicant may also be taken into account. Bail was granted.

In *Banda v The Chief Immigration Officer and The Attorney General*¹¹⁶ the Supreme Court of Zambia considered, *inter alia*, the right to personal liberty under article 13 of the Constitution. The court held that since the appellant was not a Zambian national as he claimed, but a Malawian, his right to personal liberty had not been infringed and the deportation order against him was valid.

There are not many reported cases involving prisoners' rights in Zambia. This would wrongly seem to give the impression that prisoners' rights are well

¹¹⁵ At <http://zamallii.zamnet.zim/courts>.
¹¹⁶ 1994/SCZ/16.

protected and observed. Unfortunately the contrary is true as is explained here below.

4.4.3 Prisoners' rights in Zambia as seen by observers

Zambia is one of those countries in Africa with dismal human rights records. This poor human rights record has been exacerbated and aggravated by the political situation which is characterised by turmoil and instability. An attempted coup in 1997 led to the detention of more than 100 people. According to an Amnesty International report, those people were held in conditions amounting to cruel, inhuman and degrading treatment; at least one detainee died in custody.¹¹⁷ The report indicates that torture and ill-treatment of detainees by police officers were widespread. Although some police officers were prosecuted for torture, in scores of cases those responsible were not brought to justice. According to the report, between December 1997 and May 1998, the Permanent Human Rights Commission received information about 73 cases of torture, ill-treatment and unlawful detention, including 17 deaths apparently at the hands of the police.¹¹⁸

It is estimated that in 1998 about 20 people were sentenced to death. At the end of the year more than 150 prisoners remained on death row.¹¹⁹ By the end of 1999, this figure is reported to have risen to 240, the last execution of convicts having taken place on 20 January 1997, when eight people were hanged.¹²⁰

¹¹⁷ See Amnesty International Annual Report 1999 at <http://www.amnestyusa.org/ailib/aireport/ar99/afr63.htm>.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ See 'Condemned prisoners ask for mercy' *Newsletter of the Legal Resource Foundation of Zambia*, December 1999 - February 2000 at <http://www.lrf.org.zm/Newsletter/dejafeoo/frontp.htm>.

On the question of prison conditions a 1997 human rights report intimates that the conditions were so harsh that they posed a serious threat to prisoners' lives.¹²¹ According to official statistics at the time, prisons designed to hold 6,000 prisoners held over 12,000. This severe overcrowding, combined with poor sanitation, inadequate medical facilities, meagre food supplies, and lack of potable water resulted in serious outbreaks of dysentery and other diseases, including tuberculosis, at various prisons.¹²² In a report submitted to Parliament in 1996, the Director of prisons said that 975 prisoners had died in prison between January 1991 and December 1995, due to illness and harsh conditions.¹²³

On the issue of arbitrary arrest and detention there are reports of criminal suspects being arrested on the basis of flimsy evidence or uncorroborated accusations.¹²⁴ According to those reports, most detainees are held for more than a month from commission of an offence to first court appearance. In many cases an additional period of six months elapses before the accused is committed to the High Court for trial. After committal, preparation of the magistrate's court record for transmittal to the High Court takes months, in some cases a year. Trial proceedings last an average of six months.¹²⁵ Some prisoners are reported to have been awaiting trial for four years which is an improvement compared to past years where some had waited for as long as ten years.¹²⁶ These long delays were attributed to inadequate resources, inefficiency, lack of trained personnel and broad rules of procedure that give wide latitude to prosecutors and defence attorneys to request adjournments.

¹²¹ See Zambia Report on Human Rights Practices for 1997 at http://www.state.gov/global/human_rights/1997_hrp_report/zambia.html.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

The right to a fair public trial is reported to be still fairly well respected.¹²⁷ This is borne out by several court decisions that reflect the independence of the judiciary. The last known attempt by Parliament to overturn court rulings was in the 1996 case of *Fred M'membe and Bright Mwape v The Speaker of the National Assembly and the Commissioner of Prisons and the Attorney-General*.¹²⁸ Since then the government has generally respected the independence of the judiciary. Inefficiency and the lack of resources, however, have seriously hampered the judicial system. The resulting congestion and long delays while the accused are in custody have been reported to amount to denial of the right to fair trial.¹²⁹ So is the inability of many Zambians to afford legal representation. Many accused persons are reported to be too poor to retain a lawyer, and the poor state of the Government's legal aid department means that many citizens entitled to legal aid find that it is unavailable.¹³⁰

The reality of the situation regarding prisoners' rights in Zambia has been highlighted by one Lusaka lawyer.¹³¹ According to Mr Ostoph Dzekedzeke, in practice, prisoners in Zambia have no legal rights but privileges which can be withdrawn if the prisoner misbehaves. The usual privileges, according to the commentator, include use of the prison library, receiving suitable personal books and periodicals from outside and having a radio. Prisoners are also allowed to send and receive letters, but prison authorities have the right to read all incoming and outgoing mail. A prisoner may also be visited by a legal adviser, but according to the rules:

¹²⁷ See Zambia Country Report on Human Rights Practices for 1998 (note 121 above).

¹²⁸ See note 113 above.

¹²⁹ See Zambia Country Report on Human Rights Practices for 1998 at <http://www.uscirf.gov/dos.98Pages/zambia.htm>.

¹³⁰ *Ibid.*

¹³¹ See "Prisoners have Rights', *Newsletter of the Legal Resources Foundation in Zambia* at <http://lrf.org.zm/Newsletter/July/prights.html>.

'The officer in charge shall permit a legal adviser of a prisoner who is a party to legal proceedings to interview him in connection with such proceedings in the sight but not in hearing of a prison officer.'¹³²

One aspect of prisoners rights' in Zambia that needs to be highlighted is the violations of such rights in states of emergency. One such situation arose at the end of 1997 when President Chuluba declared a state of emergency after a failed coup attempt.¹³³ Zambian human rights activists have occasionally raised concerns about the Zambian authorities using emergency regulations to detain people and violate their rights. These concerns have been shared by international human rights organisations. One such organisation, Amnesty International, has recommended that the Constitution should be amended to conform to the provisions of the ICCPR, particularly section 4 which prohibits the suspension of specific rights at any time.¹³⁴ The Constitution should also list core rights which are non-derogable. It is also recommended that Article 26 of the Constitution should be amended so that it provides adequate safeguards for detainees, including the right to have their detention reviewed by the High Court at any time and to have unrestricted and confidential access to a lawyer, to ensure that a detainee is provided adequate protection of his rights from the moment of his detention.¹³⁵ Another recommendation is that legislation should be adopted to confirm the role of courts in safe-guarding human rights, including giving courts the mandate to supervise effectively the detention of prisoners, and the release or transfer of those detainees who in the opinion of the court appear to have been tortured.¹³⁶

¹³² Part V Section 135 of Prison Rules, See *Ibid.*

¹³³ Referred to above at page 150.

¹³⁴ See Amnesty International Report March 1998 at <http://www.amnesty.it/ailib/aipub/1998 AFR/16300498.htm>.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

Further safeguards should include legislation requiring assurances of access to doctors, lawyers and family members, information about their rights be given to them, judicial review without delay of their detention and an absolute time limit on their detentions with the requirement that the authorities explain to a judicial authority why detention should be extended. Finally, the government of Zambia has been urged to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and incorporate relevant provisions into domestic law.¹³⁷

The recommendations of Amnesty International noted above in many respects reflect the differences between the constitutional rights of prisoners in Zambia and South Africa. South Africa has not only incorporated the recommended safeguards into the Bill of Rights but, has unlike Zambia, refrained from attaching unreasonable restrictions and limitations to those rights. It may also be noted in favour of South Africa that states of emergency are a thing of the past. Violations of prisoners' rights associated with such situations are therefore not among South Africa's present human rights problems.

4.5 UGANDA

4.5.1. Prisoners rights under the Constitution of Uganda

The choice of Uganda for purposes of comparison with South Africa in regard to prisoners' constitutional rights stems mainly from the fact that the Constitution of Uganda was drafted and adopted at approximately the same time South Africa was undergoing its own constitutional change. The Ugandan Constitution like the Constitutions of the other countries discussed above contains a bill of rights with provisions on the rights of prisoners, and it

¹³⁷ *Ibid.*

is no secret that, in drafting its Constitution, Uganda drew heavily on the South African Interim Constitution.

In 1986 the National Resistance Movement (NRM) of Yoweri Museveni came to power, bringing to an end fifteen years of inordinate violations of human rights by the governments of Idi Amin and Milton Obote. Through a proclamation,¹³⁸ various parts of the 1967 Constitution were suspended. It was not until 1995 that a new Constitution was adopted.¹³⁹ Chapter Four of the Constitution is entitled 'Protection and Promotion of Fundamental and Other Human Rights and Freedoms'. Several Articles under Chapter Four have direct or indirect relevance to prisoners. To begin with, Article 22(1) purports to protect the right to life by providing that no person shall be deprived of life intentionally except in execution of a court sentence. This limitation effectively maintains and upholds the death penalty in Uganda.

The specific rights of prisoners are dealt with by Article 23, which provides for the protection of personal liberty. The limitations attached to this right are similar to those attached to the corresponding rights in the Zimbabwean and Zambian constitutions.¹⁴⁰ Provision is made for a person who is arrested, restricted or detained to be informed immediately, in a language he or she understands, of the reasons for the arrest, restriction or detention.¹⁴¹ He or she should be informed of his or her right to legal representation.¹⁴² An arrested or detained person also has a right to 'be brought to court as soon as possible but in any case not later than forty-eight hours from the time of arrest'.¹⁴³ An interesting innovation of the Ugandan Constitution is the right of a detainee to have his or her next-of-kin 'informed as soon as practicable

¹³⁸ Legal Notice No. 1 of 1986.

¹³⁹ The Constitution of the Republic of Uganda enacted on 28 October 1995.

¹⁴⁰ See 4.2.1 and 4.4.1 above.

¹⁴¹ Article 23(3).

¹⁴² *Ibid.*

¹⁴³ Article 23(4).

of the restriction or detention'.¹⁴⁴ Article 23(5) further provides for reasonable access to the detainee by the next-of-kin, lawyer and personal doctor.¹⁴⁵ It also provides for the right of access to medical care.¹⁴⁶

Provision is made for the right to bail 'on such conditions as the court considers reasonable'.¹⁴⁷ Under Article 23(7) a person who is unlawfully arrested, restricted or detained is entitled to compensation from that other person or authority whether it is the state or an agency of the state. This right has a counterpart in the Zimbabwe Constitution but, unlike its Zimbabwean counterpart the Ugandan provision has no limitation attached to it apart from the general limitation clause.¹⁴⁸ In Uganda the right also extends beyond private persons, to the state and its agencies. The South African Constitution does not provide for such a right. Another right in the Ugandan Constitution that is absent in its South African counterpart is to be found in article 23(8), under which any period a person spends in custody in respect of an offence is to be taken into account in imposing sentence on conviction. Provision is also made for the right to an order of *habeas corpus* which is inviolable and cannot be suspended.¹⁴⁹

Torture, cruel, inhuman or degrading treatment or punishment are outlawed by Article 24. So too is slavery or servitude and forced labour.¹⁵⁰ In the case of forced labour, however, the right is limited by excluding 'any labour required in consequence of the sentence or order of court'.¹⁵¹ This implies, therefore, that prisoners are not protected against forced labour.

144 Article 23(5)(a).

145 Article 23(5)(b).

146 *Ibid.*

147 Article 23(6).

148 Article 43.

149 Article 23 (9).

150 Article 25.

151 Article 25(3)(a).

The right to a 'fair, speedy and public hearing' is provided for under Article 28. To a large extent the rights under this particular provision are similar to those of its South African counterpart.¹⁵² They include the presumption of innocence, the right to be informed of the nature of the offence, adequate time and facilities for the preparation of the defence, and the right to legal representation. One aspect of difference regarding the right to legal representation is that under the Ugandan Constitution an accused is entitled to legal representation at the expense of the state only if the offence for which he or she is charged carries a death sentence or life imprisonment.¹⁵³ Also included under the right to a fair trial are the assistance of an interpreter, facilities to examine prosecution witnesses and the presence of the accused at his or her trial. A person may also not be convicted for an act or omission which did not constitute an offence at the time it took place.¹⁵⁴ The *autrefois acquit* and *autrefois convict* concepts are incorporated in Article 28(9) and the right against self-incrimination is guaranteed under Article 28(ii). Furthermore, this right extends beyond the accused person to include evidence of the spouse.

Apart from some differences already mentioned, by and large, the rights of prisoners under the Ugandan Constitution are similar to those under the South African Constitution. The Ugandan Constitution, however, does not include the right to challenge the lawfulness of one's detention, nor does it include the right to conditions of detention that are consistent with human dignity. Also omitted is the right of an arrested person to remain silent and to be so informed. So too is the right of a detained person to communicate and be visited. The right of appeal or review is also absent. The main difference however lies in the extent of the limitations to the relevant rights. In addition to a general limitation clause, several rights in the Ugandan Bill of Rights

¹⁵² Section 35(3) of the South African Constitution.

¹⁵³ Article 28(3)(e).

¹⁵⁴ Article 28(7).

have specific limitations attached to them. This is not the case with the South African Bill of Rights, to which only the general limitation clause applies.

4.5.2. Prisoners' rights as interpreted by the Ugandan courts

Over the years several cases involving prisoners' rights have come before the Ugandan courts. One such a case was *Professor Isaac Newton Ojok v Uganda*.¹⁵⁵ The appellant had been convicted of treason and sentenced to death. He appealed to the Supreme Court of Uganda claiming, *inter alia*, that the trial judge had been biased in the conduct of the trial and in the formulation of her judgment. He also claimed that he had already received a presidential pardon and that the trial judge had erred in law by rejecting the defence of pardon. On the latter claim, the court held that it was quite clear that the President had never granted any pardon to the appellant, nor was the appellant a beneficiary of any amnesty process. The appellant was however successful on the former ground which was based on the fact that the trial judge assigned to the case was a blood sister of the Deputy Prime Minister and National Political Commissar of the ruling National Resistance Movement. The court agreed that there was a likelihood of bias resulting in an unfair trial. The conviction was accordingly quashed, sentence set aside and a re-trial by another judge ordered.

The right to a fair trial was more recently addressed by the Uganda High Court in the case of *James Sebugarambe v Uganda*.¹⁵⁶ The appellant had been convicted by a magistrate for criminal trespass and disobedience of a lawful order, and was sentenced to three years imprisonment. Among his grounds of appeal the appellant argued that he had not been given an

¹⁵⁵ Criminal Appeal No. 33/91.

¹⁵⁶ Criminal Appeal No. MKA 8 of 1998.

opportunity to examine the prosecution witnesses and that part of the prosecution evidence was taken in his absence. Referring to Article 28(3)(d) of the Constitution, the court held that it was a fundamental right that an accused person should be afforded a chance to attend all the proceedings involving his trial. The court found that the trial magistrate had acted irregularly when he did not avail the accused an opportunity to attend the proceedings at the *locus in quo*. Referring to article 28(3)(g) of the Constitution, the court further held that, by denying the accused the right to cross-examine the prosecution witnesses, the proceedings had become tainted with grave irregularities. It was found that the accused's right to a fair trial had been further violated when the magistrate failed to make an interpreter available. The appeal succeeded.

In *Byaruhanga Rugyema Jese and Nalubega Harriet v Uganda*¹⁵⁷ the issue before the Uganda High Court was the right to bail. In his judgment Tabaro J referred to Article 23(b)(c) of the Constitution which gives the right to bail on conditions as the court considers reasonable. In his opinion, bail cannot be taken away; only restrictions can be imposed depending on the gravity of the offence. The discretion lies with the court. The judge emphasized the fact that remand should not be punitive but rather a measure to ensure that the accused will be available to face trial. He concluded:

'Let it not be forgotten that presumption of innocence is a sacred cardinal principle of our penal system. If the accused will honour his bail, is not a danger to the public or will not interfere with the state evidence and witnesses, I would be administering a wrathful law indeed not to allow these two people to attend court from their homes.'¹⁵⁸

¹⁵⁷ Criminal Misc. Application No. 87/98.
¹⁵⁸ paragraph 11.

The Ugandan Constitution creates an interesting scenario by establishing a Constitutional Court which in effect is the Court of Appeal that sits as a Constitutional Court to determine constitutional matters.¹⁵⁹ The Supreme Court however remains the final court of appeal. Hence decisions of the Constitutional Court are appellable to the Supreme Court. This judicial paradoxical hierarchy was put to test in the case of *Salvatori Abuki and Richard Obuga v Attorney-General*¹⁶⁰ which was one of the very first cases heard by the Constitutional Court. Initially there were two petitioners. One died in prison and his petition abated. The other petitioner was convicted for offences under the Witchcraft Act¹⁶¹ and, in addition to a 22 months prison sentence, he was banned from access to his home in terms of an exclusion order under section 7(1) of the Act. The petitioner sought to challenge the constitutionality of the legislation in question on the grounds that, first, the offence of witchcraft was not defined sufficiently as required by Article 28(12) of the Constitution and therefore infringed the right to a fair trial. Secondly that making an exclusion order was not constitutional because it amounted to inhuman, cruel or degrading treatment or punishment. The Constitutional Court agreed with the petitioner that not only was the offence insufficiently defined, the legislation in question was also archaic and outdated, having been enacted in 1957, some five years or so before independence (1962). The legislation was found to be vague and ambiguous and therefore unconstitutional.

On the constitutionality of the exclusion orders, the court found that the order was antisocial and may only serve to brutalise the offender and deny him or her the opportunity to be rehabilitated. The exclusion order was pronounced by the court null and void for being cruel, inhuman or degrading. In so doing, the court referred to the judgement of Mohammed J, Madala J and Langa J in

¹⁵⁹

Article 137.

¹⁶⁰

Constitutional Case No. 2 of 1997.

¹⁶¹

Cap 108 Laws of Uganda.

the South African case of *S v Makwanyane*,¹⁶² in particular the approach of the South African Constitutional Court towards the concept of *ubuntu* on which African values are based.

On appeal,¹⁶³ the Supreme Court disagreed with the decision of the Constitutional Court by reasoning that the term “witchcraft” was properly defined by section 2 of the Act and the offences in relation to witchcraft were also sufficiently defined in sections 2 and 3 of the Act, and, accordingly, Article 28(12) of the Constitution was not contravened. On that count the appeal was allowed. On the question of the exclusion order, however, the Supreme Court agreed with the finding of the Constitutional Court that the order amounted to cruel, inhuman and degrading treatment or punishment and accordingly was in contravention of Articles 24 and 44(a) of the Constitution. To that extent the appeal was dismissed.

The above judicial arrangement raises several interesting questions. A situation in which the decisions of a Constitutional Court can be overturned can only be a source of judicial controversy. It certainly does not augur well for the enforcement of the Constitution, the promotion of human rights in general and the protection of prisoners’ rights in particular. Luckily South Africa is not subject to that kind of controversy. Its Constitutional Court’s decisions are final.¹⁶⁴

4.5.3 Prisoners’ rights in Uganda as seen by observers

Although there has been some improvement recently, the Ugandan government’s human rights record is reported to be poor with numerous,

¹⁶² 1995 (3) SA 391 (CC).

¹⁶³ *Attorney General v Salvatori Abuki*, Constitutional Appeal No. 1 of 1998.

¹⁶⁴ Section 167(3)(a) of the South African Constitution.

serious human rights problems.¹⁶⁵ In the context of prisoners' rights there are many reports of security forces commonly beating and sometimes torturing criminal suspects, often to force confessions. On 17 May 1999, a former security guard who was charged with terrorist activity is reported to have told a Kampala court that he was tortured by the police at Kampala's central police station.¹⁶⁶ In February 1999, family members found the badly mutilated body of Patrick Ocan who was last seen in the custody of the Uganda Peoples Defence Forces (UPDF).¹⁶⁷ On 9 October 1999, police beat a man while in custody in Buwenge, Jinja District; the man died after being released the following day.¹⁶⁸

Some human rights abuses in Uganda are perpetrated by the Uganda People's Defence Force (UPDF) members and members of the Local Defence Units (LDU's), who are usually insufficiently trained and ill-disciplined. On 9 February 1999, two teenage girls were reportedly raped by two LDU personnel at Kabujogera police post in Fort Portal.¹⁶⁹ Other human rights abuses were perpetrated by the police. During 1999, the police Human Rights Desk, established in 1998, received 620 complaints, including allegations of excessive force, torture, assault, rape and murder.¹⁷⁰ Of these, 205 cases were resolved, and a total of 50 cases were referred to the criminal courts.¹⁷¹

¹⁶⁵ See the 1999 Country Report on Human Rights and Practices released by the Bureau of Democracy, Human Rights and Labour, U.S. Department of State, February 25, 2000 at <http://www.nationbynation.com/Uganda/Human.html>.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

The Ugandan Human Rights Commission (UHRC) has played an important role in investigating and monitoring human rights abuses in and out of jail.¹⁷² In its 1998 Annual Report the Commission documented several violations of the rights to liberty by members of the Uganda police and the Uganda People's Defence Forces (UPDF).¹⁷³ The Commission also reported on its investigation of a number of complaints related to detention in the so-called 'safe houses'. The arrests, detentions and treatment of suspects in the 'safe houses' were said not to conform to the established legal procedures.¹⁷⁴ On the issue of torture, cruel, inhuman and degrading treatment, the report stressed 'the apparent "culture" of the police in Uganda in general which subjects criminal suspects to harassment, humiliation, cruelty, abuse and overall mistreatment during arrests and interrogation'.¹⁷⁵ In February 1999 the Commission completed investigations into the 1997 torture of Corporal Twasha Kabushera and the 1997 deaths by torture of Paul Kollo and Stephan Baryakajuka. The cases were handed over to the courts for prosecution.¹⁷⁶ On 10 March 1999 the Commission awarded \$400 (600 000 shillings) to Mary Iripoit 'for torture, degradation and deprivation of her personal liberty at the hands of a former ISO (Internal Security Organisation) officer in Soroti in August 1998'.¹⁷⁷

The above mentioned reports are corroborated by an Amnesty International report according to which torture, cruel, inhuman and degrading treatment are endemic in police stations and jails.¹⁷⁸ At least five prisoners are

¹⁷² The Uganda Human Rights Commission is established under article 51 of the Constitution. One of the commission's functions is to visit jails, prisons and places of detention or related facilities with a view to assessing and inspecting conditions of inmates and make recommendations (article 52(1)(b)).

¹⁷³ See the Uganda Human Rights Commission Annual Report 1998 at 12.

¹⁷⁴ Note 173 above at 14.

¹⁷⁵ Note 173 above at 16.

¹⁷⁶ See the 1999 Country Reports (note 165 above).

¹⁷⁷ *Ibid.*

¹⁷⁸ See Amnesty International Annual Report in Uganda at <http://www.amnestyusa.org/ailib/aieroport/ar99/afr59.htm>.

reported to have died after being tortured. The report also documents several cases of detainees who were tortured by being beaten and burned with molten plastic.¹⁷⁹ Other detainees were reportedly beaten and tortured with electric shocks.¹⁸⁰

Regarding prison conditions, a very gloomy picture is painted by several reports. Prison conditions are said to be very harsh and life threatening.¹⁸¹ There are reports of high mortality rates in prison due to overcrowding, malnutrition, diseases spread by unsanitary conditions, and HIV/AIDS. According to the Ugandan Human Rights Commission (UHRC), the situation is compounded by severely inadequate medical services, seriously unhygienic conditions and a situation of 'semi-starvation' among prisoners.¹⁸² In its 1998 Annual Report the Commission identified congestion as a serious problem primarily brought about by the delay in the administration of justice. The problem of keeping juvenile offenders in prisons with adults was also highlighted and the use of excessive and exploitative hard labour was condemned.¹⁸³

Prison conditions are said to come closest to meeting minimum international standards only in Kampala, where prisons provide medical care, running water, and sanitation.¹⁸⁴ However, these prisons are also among the most overcrowded. It is estimated that the country's prisons (all of which predate independence in 1962) hold about three times their maximum planned capacity.¹⁸⁵ Severe overcrowding is also a problem at juvenile facilities and women's wings. Education facilities and health clinics in most prisons are

179

Ibid.

180

Ibid.

181

See the 1999 Country Reports (note 165 above).

182

Ibid.

183

See Uganda Human Rights Commission Annual Report 1998 at 33 - 35.

184

See the 1999 Country reports (note 165 above).

185

Ibid.

defunct. Prisoners as young as 12 years of age perform manual labour from dawn to dusk.¹⁸⁶

Arbitrary arrest and deprivation of liberty is a serious problem in Uganda. Members of the security forces commonly arrest and detain citizens arbitrarily without any regard to the procedural protections guaranteed by the Constitution.¹⁸⁷ One notorious operation is the system of arbitrary mass arrest known as '*panda gari*' (which literally means 'board the truck'). It is usually conducted after bomb scares and political protests. Most persons arrested in this manner are usually released after a short while, but not before being tortured, beaten and generally harassed.

Pre-trial detainees (unsentenced prisoners) comprise nearly 75% of the prison population. The average time in pre-trial detention is reported to be between 2 and 3 years.¹⁸⁸ As pointed out earlier, prison overcrowding has in part been blamed on the excessive length of detention without trial. Congestion and delay in the legal system has resulted in an increased number of detainees each year. In November 1999 more than 400 prisoners held without trial since at least 1997 staged a protest at Luzira prison in Kampala.¹⁸⁹ The prisoners refused to return to their cells until they received assurance from the director of public prosecutions that their cases would be brought to court. Not much was achieved by the protest. Amnesty International is reported to have expressed grave concern at the common practice of detention without trial.¹⁹⁰ Not much was achieved by their efforts either.

186

Ibid.

187

Article 23 of the Constitution.

188

See the 1999 Country Reports (note 165 above).

189

Ibid.

190

See Amnesty International Annual Reports on Uganda (note 178 above).

The right to a fair trial is largely impaired by an understaffed and weak judiciary. The highest court is the Supreme Court. It is followed by the Court of Appeal which also serves as a constitutional court for cases of first instances involving constitutional issues.¹⁹¹ This is followed by the High Court, and several levels of magistrates courts. The judicial system contains procedural safeguards, including the granting of bail and the right of appeal. However, an inadequate system of judicial administration and a lack of resources, resulting in a serious backlog of cases, have circumscribed the rights to a fair trial for many years.¹⁹² Many accused persons cannot afford legal representation. The Constitution requires that the government provides state funded legal representation to indigent persons accused of capital offences.¹⁹³ This however is rarely done because of lack of funds. In the final analysis many accused persons go to trial unrepresented. Finally, the right to a fair trial is also tampered with by the existence of a military court system. Although the accused has the right to retain legal counsel, military defence attorneys are often untrained and may be assigned by the military command, which also appoints the prosecutor and the adjudicating officer.¹⁹⁴ The sentence passed by a military court which can include the death penalty, may be appealed against to the High Command but not to the High Court, Court of Appeal or Supreme Court.¹⁹⁵ Clearly the military court system, which is not a constitutionally established organ, but which apparently enjoys extensive jurisdiction, does not assure the right to a fair trial.

¹⁹¹ Article 137 of the Constitution. See also note 159 above.

¹⁹² See the 1999 Country Reports (note 165 above).

¹⁹³ Article 28(3)(e).

¹⁹⁴ See the 1999 Country Reports (note 165 above).

¹⁹⁵ *Ibid.*

4.6 CONCLUSION

All the constitutions of the countries discussed above include provisions relating to prisoners' rights. The main difference lies in the extent of the detail to which such rights are provided. By comparison South Africa is clearly ahead in terms of clarity and detail regarding the rights of prisoners. Another factor that distinguishes South Africa from the rest of the countries surveyed, is the fact that apart from the general limitation clause, the relevant rights in the South African Bill of Rights are not unduly restricted. It has been seen that the constitutional rights of prisoners in the other constitutions have several limitations attached to them, sometimes in addition to a general limitation clause. These limitations are in many respects reflected in the approaches taken by the various courts in applying and interpreting the said rights.

Regarding the role of the courts in applying the constitutional rights of prisoners, South Africa again measures much more favourably in comparison with its counterparts. This in part is due to the existence of an independent, innovative and active constitutional court, an institution that is lacking in many of the countries discussed. The result is that constitutional matters generally and prisoners' rights in particular have tended to take a rather peripheral position in the general jurisprudence of those countries. It can safely be concluded that the rights of prisoners in South Africa enjoy more constitutional and judicial protection than in many other African countries. Whether that protection actually translates into reality is what the next part of this study will attempt to determine.

CHAPTER FIVE

THE LAW VERSUS THE PRACTICE - A CRITICAL ANALYSIS

5.1 INTRODUCTION

It is one thing to provide for prisoners' rights in the Constitution, it is a different matter altogether to implement them in actual practice. The protection of prisoners' rights under international law has already been comprehensively discussed above.¹ So too has the extent to which prisoners' rights are provided for under the South African Constitution.² The purpose of this chapter is to investigate the extent to which prisoners' constitutional rights are practically implemented and to assess whether prisoners in South Africa actually enjoy and realise the human rights protection accorded to them by the Constitution. To that end a survey was conducted to determine the perceptions of prisoners regarding the protection of their constitutional rights. A separate survey aimed at obtaining information on the official position as portrayed by prison authorities was also conducted. This chapter therefore attempts to determine the discrepancy, if any, between the law and the practice based on the analysis of the findings of the survey. In so doing an attempt will be made to prove or disprove the hypothesis of this study and to highlight the problem under investigation.

It has already been pointed out that the quantitative method of research was adopted,³ although some elements of the qualitative approach were applied. Indeed, in order to research a topic thoroughly and provide meaningful results, it is necessary to cut across the qualitative and quantitative boundaries. A survey was accordingly conducted involving prisoners from four prisons: Westville prison in Durban, Johannesburg prison in Johannesburg, Pollsmoor prison in Cape Town and St Alban's prison in Port Elizabeth. The prisons were mainly chosen because of their sizes and their positions in the four main regional centres of the country. There were two main questionnaires. The first questionnaire was directed at awaiting trial

¹ See Chapter Two above.

² See Chapter Three above.

³ See Chapter One (1.3) above

prisoners. Accordingly, the questions therein were based on the rights of arrested and detained persons under section 35(1) and (2) of the Constitution. The second questionnaire was directed at sentenced prisoners. Accordingly, the questions therein were based on section 35(3) of the Constitution.

In all, 4000 questionnaires were distributed. Half of these (2000) were administered to awaiting-trial prisoners and the other 2000 to sentenced prisoners. The questionnaires were distributed equally among all the four prisons mentioned above. The choice of respondents was random. It was not based on any criteria, like sex, age, nature of crime or any such like categorisation. The only differentiation was between sentenced and unsentenced prisoners. A high-ranking official was appointed at each of the prisons, by the National Department of Correctional Services to assist in the survey.⁴ The function of the official was to facilitate the efficient administering of the questionnaires, to assist prisoners in completing them, to translate and explain the questions where necessary and to respond to a separate questionnaire on behalf of the prison.

In keeping with the constitutional requirement of using 'a language that the accused person understands', the questionnaires were translated in two main African languages. Those destined for Durban and Johannesburg were in English and Zulu. Those destined for Cape Town and Port Elizabeth were in English and Xhosa. For purposes of simplicity and clarity most of the questions were of a 'Yes' and 'No' nature.

A total of 2326 prisoners (a response rate of more than 50%) from all the four prisons responded properly to the questionnaires. 1085 of the respondents were awaiting-trial (unsentenced) prisoners and 1241 were sentenced prisoners. These figures excluded all responses that showed signs of impropriety or incompleteness. Such responses were discarded.

The advantages of using questionnaires in a study of this nature are quite obvious. First of all, with questionnaires the researcher is able to reach

⁴ The officials, appointed by the Commissioner of Correctional Services were those in charge of support services and communications at each of the prisons.

respondents in distant places, but more importantly, questionnaires are an excellent way of dispassionately tackling questions dealing with perceptions, attitudes and representativeness. Moreover questionnaires 'are the only realistic way of taking the pulses of hundreds or thousands of people'.⁵ Obviously, there are certain disadvantages associated with the use of questionnaires including misinterpretations and misrepresentations. Many respondents may not take the questionnaires seriously, answering as they think they should in order to portray or conform to a particular image. This is certainly more so with prisoners, most of whom have a grudge against society and the state that they perceive as being responsible for their plight. The researcher usually has no control over such responses other than to take cognisance of such shortcomings in interpreting the data.

For purposes of analysis, the discussion of the results of the survey is based on the three categories of prisoners' rights as provided for under the Constitution. These are; the rights of arrested persons (under section 35(1)), the rights of detained persons (under section 35(2)) and the rights of accused persons to a fair trial (under section 35(3)). The views of the prison officials are also briefly considered and then the hypothesis of the study is tested.

5.2. PRISONERS PERCEPTIONS OF THE REALISATION OR THEIR CONSTITUTIONAL RIGHTS

5.2.1 Arrested persons

In spite of the common law maxim that ignorance of the law is no defence, 52,2% of the 1085 awaiting-trial prisoners who responded to the questionnaire claimed they were not aware of their right to remain silent on arrest. 69,1% of the respondents claimed the arresting officer had not informed them that they had this right and 76,2% stated that they had not been informed of the consequences of not remaining silent. This general trend was observed among all the four prisons surveyed, but it was more alarming at Westville prison where 77% of the 378 respondents claimed not

⁵ See Bickman and Rog (Eds) *Handbook of Applied Social Research Methods* (1998) at 485.

to have been informed of their right to remain silent while 85,7% were not informed of the consequences of not remaining silent. This data reflects a gross abuse of the right to remain silent and to be so informed. The trend changes somewhat, however, in regard to the right not to be compelled to make any confession or admission that might be used in evidence against the arrested person. Responding to the question whether at the time of arrest they were asked to confess or admit what they had done, 52,8% replied in the negative.

Regarding the right to be brought before a court as soon as reasonably possible, only 40% of the respondents indicated they had been brought before the court within 48 hours of their arrest. The other 60% were brought after 48 hours. This trend is somewhat reversed in regard to the right to be charged at the first court appearance. Responding to the question whether they had been charged on their first court appearance, 51,4% of the respondents answered in the affirmative while 48,6% answered in the negative. As for the right to be informed of the reasons for further detention, 53,5% of the respondents claimed to have been denied this right. Only 46,5% said they had been informed of the reasons for their continued detention.

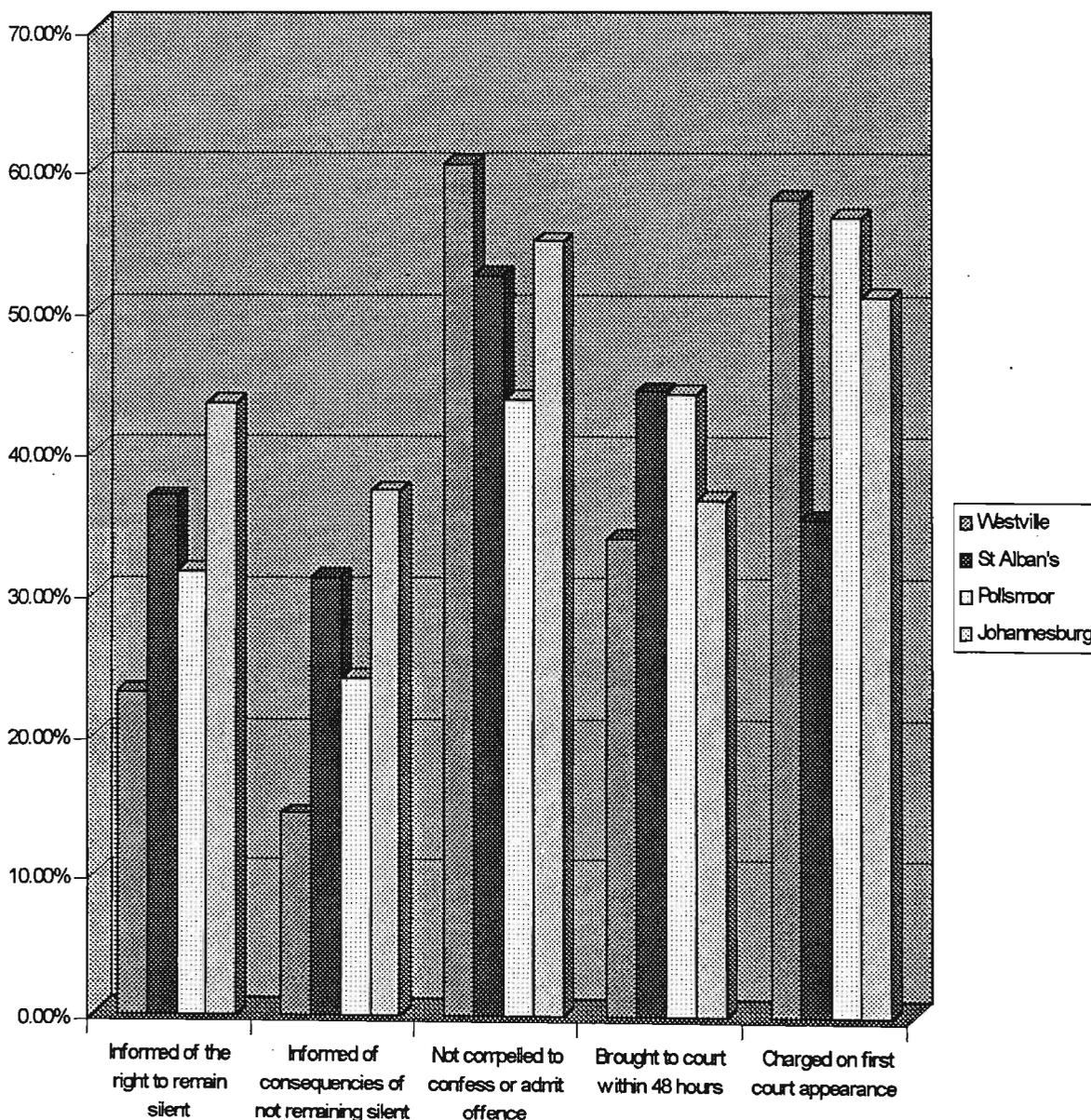
A summary of the responses to the questions pertaining to the rights of arrested persons is depicted in the following illustration:

Table 6: Summary of responses regarding rights of arrested persons

RIGHTS	YES	NO	TOTAL
Informed of the right to remain silent	30,9%	69,1%	100%
Informed of the consequences of not remaining silent	23,8%	76,2%	100%
Not compelled to confess or admit offence	52,8%	47,2%	100%
Brought to court within 48 hours	40%	60%	100%
Charged on first court appearance	51,4%	48,6%	100%

The above data clearly illustrates that the perceptions of the prisoners are such that the rights of arrested persons are not very much respected and implemented. This trend cuts across all the four prisons surveyed although in terms of regions, KwaZulu-Natal seems to be the worst affected area, judging from the responses from Westville prison in comparison to the other prisons, and as illustrated by the following graph:

Fig. 2: Comparison of responses regarding rights of arrested persons.



5.2.2 Detained persons

One of the basic constitutional rights of detainees is the right to legal representation. In South Africa, as in many other developing countries, the realisation of this right may be hindered by several factors including lack of financial resources. Indeed, 78,4% of the awaiting-trial respondents claimed they were unable to pay for a legal practitioner. Only 21,6% could afford the services of legal counsel. Under the Constitution detainees are not only entitled to the right to choose and consult with a legal practitioner of their choice, but where substantial injustice would otherwise result, detainees also have the right to have a legal practitioner assigned to them by the state at state expense. According to the survey,⁶ all detainees who were able to retain the services of a legal practitioner had been allowed to do so. 74,2% of those who claimed to be unable to pay for legal services had had a lawyer appointed for them by the state. This data indicates that the right to legal representation is fairly well protected.

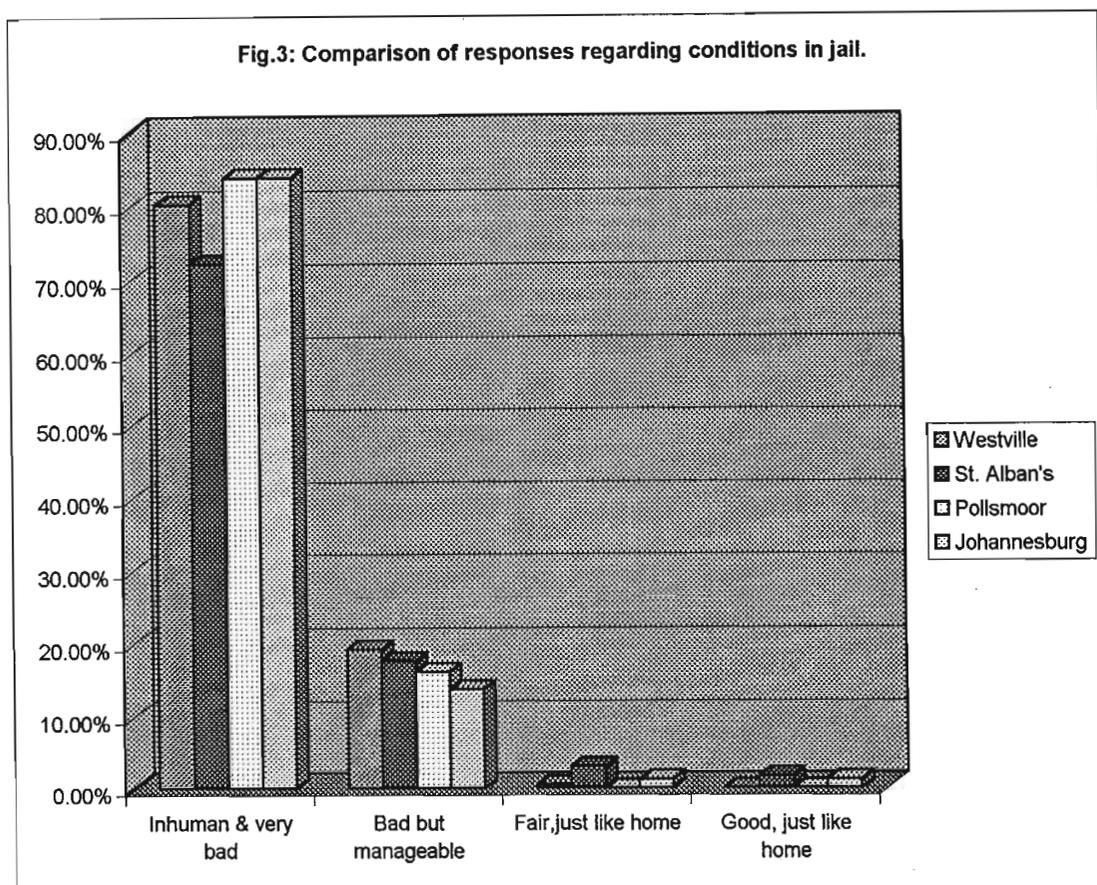
The right to conditions of detention that are consistent with human dignity recorded the most negative response in the whole survey. Asked to describe the conditions in jail, 80,8% of the awaiting-trial prisoners who responded said the conditions were inhuman and very bad. 17,4% thought the conditions were bad but manageable. Less than 2% thought conditions were fair or good. The following table illustrates these statistics:

Table 7: How would you describe the conditions in jail? (Awaiting-trial prisoners)

Inhuman and very bad	Bad but manageable	Fair, just like home	Good, better than home
80,8%	17,4%	1,2%	0,6%

⁶ See note 4 above.

The trend depicted by the statistics above was uniform among all the respondents of all the four prisoners surveyed, as illustrated by the following graph:

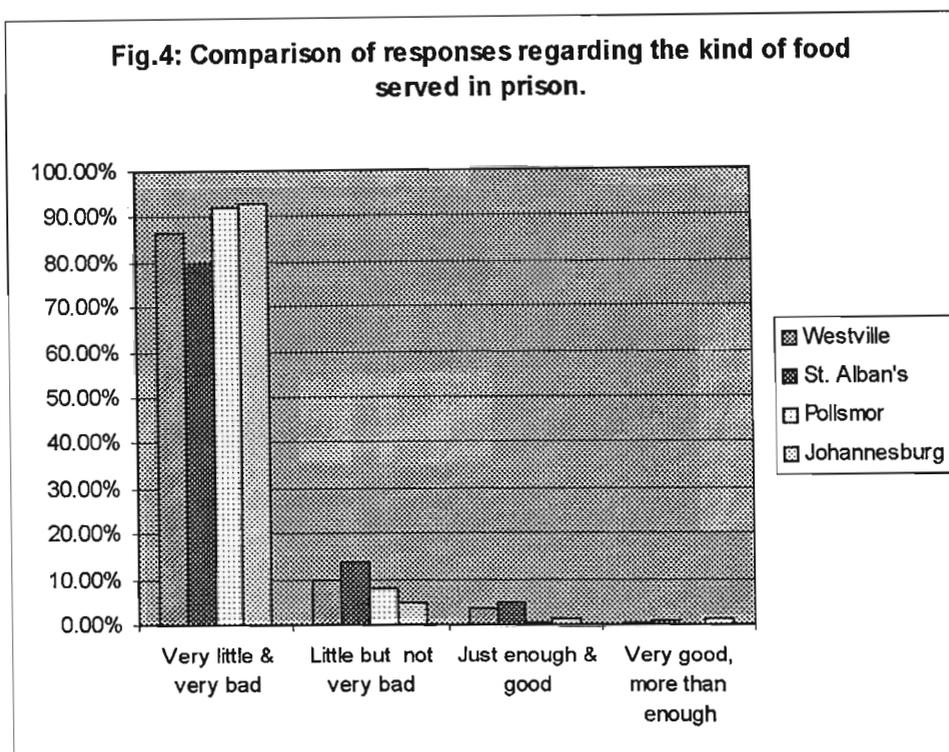


Not surprisingly the responses depicted by the above statistics were very similar to the responses regarding the kind of food served in prison. Asked to describe the food, 86,7% of all respondents said it was very little and very bad. 10,1% thought it was very little but not very bad while 2,8% said it was just enough and good. 0,4% thought the food was very good and more than enough. While it is agreed that people will always complain about institutional food, the data reflected by these statistics indicates an overwhelming perception of poor feeding and inadequate nutrition.

Table 8: How would you describe the kind of food you are given in prison?

Very little and very bad	Little but not very bad	Just enough and good	Very good and more than enough
86,7%	10,1%	2,8%	0.4%

Again the above-described trend cuts through all the prisons surveyed as shown below:



Besides adequate accommodation and proper nutrition there are other constitutional requirements for conditions of detention consistent with human dignity. These include exercise, provision of reading material and medical treatment. In response to the question as to whether they were allowed to exercise and play some games only 53,2% of the respondents answered in the affirmative. Asked whether they were provided with newspapers and

books to read only 18,4% said that they were. A surprising 81,6% answered in the negative. This data is rather baffling considering that every prison visited has a library, which is accessible to all prisoners. However, this paradox could be explained by the fact that usually a small percentage of the inmates have any sort of interest in newspapers and books. Others are simply illiterate.

On the question of provision of medical treatment 78,7% of the respondents claimed to have fallen sick at some time or other since they were detained and 54,9% of them had been allowed to see a doctor. This figure might be misleading and would seem to indicate some abuse of the particular right. It should however be pointed out that many inmates who fall sick are treated locally in prison sickbays without being referred to doctors. It may well be said that this right is not generally abused.

Regarding the right to communicate and be visited, the results of the survey showed a positive response. 61,4% of the respondents said they were allowed to write and receive letters, while 54,8% were allowed to make and receive phone calls. The latter figure should have been much higher but some respondents indicated that they were only allowed to make and not to receive calls, thus responding in the negative. There is also a limit on how many calls may be made. The reasons for these restrictions have more to do with administration and logistical issues than with human rights. Because of this, there was a large discrepancy between the responses from the various prisons surveyed. Only 36,4 % of the respondents at Westville prison said they were allowed to make and receive phone calls. At the other prisons the percentage was higher; St Alban's 56,7%, Johannesburg 55,4% and Pollsmoor 74,7%. Much seems to depend on the rules of the various prisons.

The highest percentage response in the whole survey was in reply to the question whether detainees were allowed visitors. A staggering 94,8% of the respondents stated that they were allowed visitors. Only 5,2% of the respondents claimed that they were not allowed visitors. Interestingly, 41,4% claimed that they had had their visitors turned away at one time or another. This can be explained by the fact that for administrative reasons, prison rules

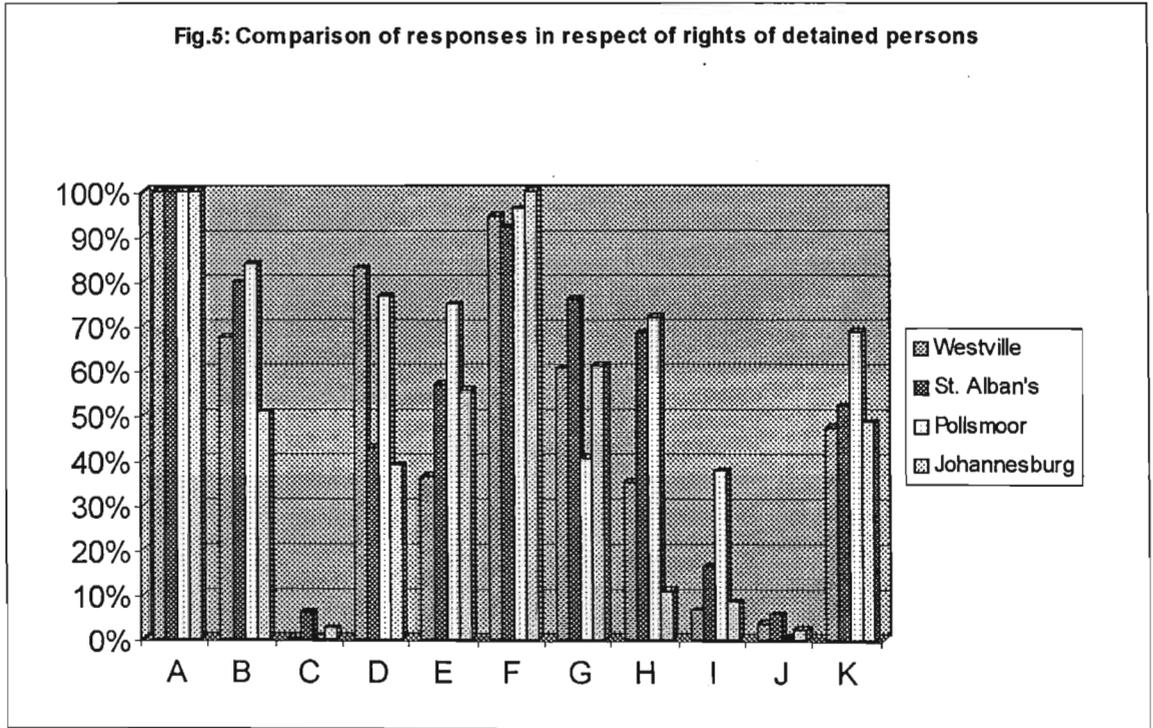
prescribe scheduled visiting hours. People visiting outside those hours would naturally be turned away. This does not necessarily amount to an abuse of the prisoners' rights to be visited. Indeed, the overwhelming affirmative response to the question whether prisoners were allowed visitors shows that the right is observed and properly implemented.

A summary of the responses to the questions pertaining to the rights of detained persons is depicted in the following table:

Table 9: Summary of responses regarding rights of detained persons

RIGHT	YES	NO	TOTAL
Allowed to consult a lawyer if able to pay	100%	0%	100%
Had a lawyer appointed by the state because unable to pay	74,5%	25,5%	100%
Good or fair prison conditions	1,5%	98,5%	100%
Allowed to write and receive letters	67,4%	32,6%	100%
Allowed to make and receive phone calls	54,8%	45,2%	100%
Allowed visitors	94,8%	5,2%	100%
Not had visitors turned away	58,6%	41,4%	100%
Allowed to exercise and play some games	53,2%	46,8%	100%
Provided with books and newspapers	18,4%	81,6%	100%
Good and enough food	3,2%	96,8%	100%
Allowed to see a doctor when sick	54,9%	45,1%	100%

According to the data reflected in table 9 and the foregoing discussion, the rights of detained persons are generally well protected. The main source of serious concern is the perception of detainees in regard to prison conditions. This is indicated by the extremely low percentage of those who think that the prison conditions are fair or good and that the food is good and enough. The general trend depicted above is relatively uniform among all the prisons surveyed. The following graph illustrates that observation:



KEY

- A Allowed to consult lawyer if able to pay
- B Had lawyer appointed by state because unable to pay
- C Good or fair prison conditions
- D Allowed to write and receive letters
- E Allowed to make and receive phonecalls
- F Allowed visitors
- G Not had visitors turned away
- H Allowed to exercise and play some games
- I Provided with reading materials
- J Good & enough food
- K Allowed to see doctor when sick

5.2.3 The rights of accused persons to a fair trial

The constitutional right to a fair trial encompasses fifteen specific rights.⁷ The survey, based on those specific rights, was conducted among 1241 sentenced prisoners in the four prisons already mentioned above.⁸ The first aspect of the right to a fair trial is the right of the accused person to be informed of the charge with sufficient detail to answer it. In response to the question whether this right had been observed, 60,6% of the respondents replied in the affirmative and 39,4% in the negative. This positive trend was however reversed in answer to the question whether the respondents had been given enough time to prepare their defence. 51,7% of the respondents said they had not, while 48,3% stated that they had.

In view of the general complaint of delays in criminal trials, this data is difficult to reconcile. It may be noted that when awaiting-trial prisoners were asked how long they had been in detention, 42,8% replied that they had spent more than a year, 22,9% had spent more than six months, and only 34,3% had been in detention for less than six months. These statistics echo the responses of sentenced prisoners in regard to how long their trials took. Of the 1221 sentenced prisoners who responded to the question as to how long the trial had taken, 61,8% said more than six months, 13,4% answered between two and six months, while only 24,8 % stated that their trials had taken less than two months. This data is reflected in the following illustrations:

⁷ See Section 35(3) of the Constitution of the Republic of South Africa (Act 108 of 1996).

⁸ See 5.1 above; see also note 5 above.

Fig. 6 Responses regarding time spent in detention awaiting trial

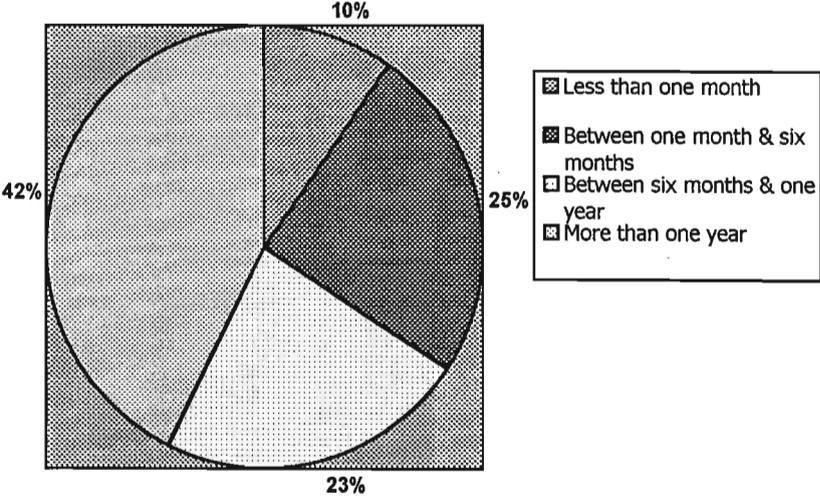
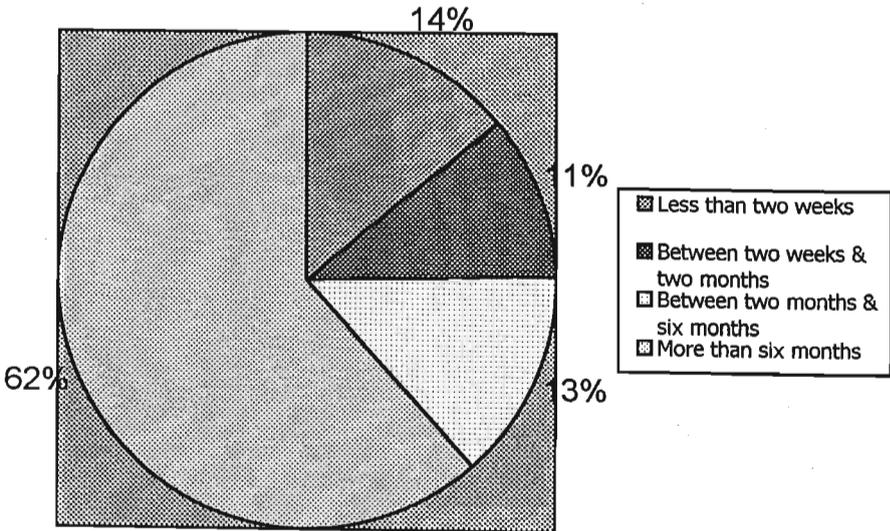


Fig. 7 Responses regarding time taken to conclude trial



The data depicted in the above pie charts indicates that many suspects spend a long time in detention while awaiting trial. The same applies to the time spent in conducting the trial. These two factors are the major causes of the serious problem of prison congestion and over-population as has already been alluded to above and as will be indicated below.⁹

One aspect of the right to a fair trial that appears to be well observed is the right of an accused person to be present when being tried. 88,5% of the respondents indicated they had been present at the trial, while only 11,5% said they had not. In view of a number of possible legitimate reasons that could prevent an accused from attending his or her trial, the general perception is that this right is generally not abused.

The data regarding the right to legal representation in respect of detained persons has already been analysed above.¹⁰ The trend seems to be much the same in respect of accused persons. Not surprisingly 80.4% of the accused respondents claimed to have been unable to afford the services of a legal practitioner. For 83,9% of those however, lawyers had been appointed by the state. All the 19,6% who were able to afford the services of a lawyer had been allowed to do so. As with the perception of detained persons therefore, the right of accused persons to legal representation is, according to the data, reasonably well protected. So is the right to be so informed. This is borne out by the fact that 82,3% confirmed that the magistrate had informed them of their right to be represented by a lawyer. Only 17,7% claimed not to have been informed.

Another aspect of the right to a fair trial is the right to adduce and challenge evidence. In response to the question whether the accused had been allowed to call all their witnesses, a large majority (76%) said they had not:

⁹ See 1.1 above and 6.3 below.
¹⁰ See 5.2.2 above.

Table 10: Did you call all your witnesses?

YES	NO	TOTAL
24%	64%	100%

The indication here is that the right to adduce evidence was not well observed.

Under section 35(3)(k) of the Constitution, an accused person has the right to be tried in a language he or she understands or, if that is not practicable to have the proceedings interpreted in that language. According to the data collected, this right is generally well observed, for 66,6% of the respondents said the trial was conducted in a language they understood. All those who required the services of an interpreter had the services provided. This positive trend is maintained in respect of the right not to be tried for an offence for which that person has previously been acquitted or convicted. The majority of the respondents (76,9%) confirmed they had not been previously acquitted or convicted of the crime for which they were presently in jail. Regarding the right of appeal or review, many of the respondents were either not aware of or chose not to exercise this right. Only 47,2% had applied for leave to appeal and 37,9% had had the appeal granted.

A summary of some of the responses pertaining to the right of accused persons to a fair trial is depicted in the following table:

Table 11: Summary of some responses regarding the right to a fair trial

RIGHT	YES	NO	TOTAL
Informed of the charge with sufficient detail	60,6%	39,4%	100%
Given enough time to prepare defence	48,3%	51,7%	100%
Case heard in public trial before an ordinary court	44,4%	55,6%	100%
Accused present at the trial	88,5%	11,5%	100%
Allowed legal representation if able to pay	100%	0%	100%
Had a lawyer appointed by the state because unable to pay	83,9%	16,1%	100%
Informed of the right to legal representation	71,6%	28,4%	100%
Allowed to call all defence witnesses	24%	76%	100%
Trial conducted in language accused understands	66,6%	33,4%	100%
Provided with an interpreter	100%	0%	100%
Previously acquitted or convicted for crime in jail for	23,1%	76,9%	100%
Applied for leave to appeal	47,2%	52,8%	100%
Granted leave to appeal	37,9%	62,1%	100%

The data reflected in the above illustration shows that the right to a fair trial is generally well observed. The main problem (not reflected in the table above) seems to be the length of the trials or the right of an accused person to have their trial begin and conclude without unreasonable delay. The abuse of this

right is aggravated by the unreasonably long time unsentenced prisoners spend while awaiting trial as illustrated earlier.¹¹

5.2.4 Other relevant constitutional rights

In analysing the responses to the survey in respect of other relevant constitutional rights, the starting point is the right to dignity, which in the specific context of prisoners is provided for under section 35(2)(e) of the Constitution. In terms of that section, everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity. The data regarding the responses of detained persons in respect to this right has already been analysed above.¹² The perceptions of sentenced prisoners on this aspect are much the same as those of awaiting-trial prisoners. An overwhelming majority of sentenced prisoners (72,3%) described the conditions in jail as inhuman and very bad, 24,8% said the conditions were bad but manageable. Less than 3% considered the conditions in prison to be fair or good.

Table 12: How would you describe the conditions in jail? (Sentenced prisoners)

Inhuman and very bad	Bad but manageable	Fair, just like home	Good, better than home
72,3%	24,8%	1,1%	1,8%

Through the eyes of sentenced prisoners therefore the conditions in prison are perceived to be generally very bad. This trend is consistent among all the respondents in all the prisons surveyed. Closely related to this, is section 12 of the constitution which, among other things, prohibits torture and

¹¹ See Figures 6 and 7 above.

¹² See 5.2.2 above.

cruel, inhuman or degrading treatment or punishment. Under this provision, corporal punishment has been held to be unconstitutional.¹³ It has also been outlawed by legislation, in particular, the Abolition of Corporal Punishment Act.¹⁴ That notwithstanding, 50,7% of the respondents claimed to have been tortured in some way during their imprisonment. The figure was much less in respect to corporal punishment. Only 39,1% claimed to have been subjected to corporal punishment (specifically caning or sjamboking). It is submitted that these figures suggest a certain amount of abuse of the rights in question, although it may be argued that some form of force is necessary in order to maintain a reasonable amount of discipline and to protect some inmates against violence from others.

Another relevant right is the right to equality¹⁵, which *inter alia* outlaws unfair discrimination. The effect of this is that all prisoners have a right to be treated equally and not to be unfairly discriminated against in any way. However, the perceptions of the prisoners are that this is not so. Asked whether there was discrimination in prison, 73,5% of the respondents answered in the affirmative. The 26,5% representing those who said there was no discrimination tends to be a credible figure since people wouldn't usually concede that there was discrimination if such discrimination was in their favour.

Section 13 of the Constitution provides that no one may be subjected to slavery, servitude or forced labour. The relevant aspect of this provision is 'forced labour'. Although the majority (66,2%) of the respondents said that they had not been made to do any forced labour in prison, the 33,7% who claimed to have been, need to be put into proper context. It ought to be remembered that the Correctional Services Act¹⁶ permits work 'to keep prisoners active for a normal working day...'¹⁷ It may well be argued that some prisoners consider this type of work to be some form of forced labour. In that case, therefore, it is fair to conclude that the right is generally not abused.

¹³ See *S v Williams* 1995 (3) SA 632 (CC)

¹⁴ 33 of 1997.

¹⁵ Section 9 of the Constitution.

¹⁶ 111 of 1998.

¹⁷ Section 40(1) of the Act.

5.2.5 What prison authorities say

In order to obtain a balanced perception of the dichotomy between the law and the practice, a separate survey, involving prison authorities was conducted. The survey was based on a questionnaire to which a designated official from each of the four prisons in the study responded.¹⁸ The officials were nominated by the authorities at the headquarters of the National Department of Correctional Services, Pretoria to assist in this study. In each case the nominated official was the head of support services and communications at each of the prisons.

First of all, the four respondents all agreed that prisoners under their custody were separated on the basis of sex and age, but not on the basis of criminal record. Closely related to that was the question of the kind of accommodation in the prisons. All but one of the respondents described the accommodation as extremely over-congested. Only the respondent from St Alban's prison in Port Elizabeth described their accommodation as congested but manageable. None of the respondents indicated that there was no congestion or that there was enough space for everyone. On this count prisoners and their jailers are in agreement. What they are not in agreement on, is the kind of food served in the prisons. While more than 96,1% of the prisoners claimed that the food was bad and not enough, the authorities were unanimous in saying that the food was good and enough. This discrepancy may be due in part to the fact that people always complain about institutional food and also that prison authorities will not readily admit that they are starving their inmates.

The respondent officials were also unanimous on the provision of suitable exercise (at least one hour in the open air daily) to the inmates. This was slightly more consistent with the perceptions of the prisoners 53,2% of whom said they were allowed to exercise and play some games. This is not the case however in respect of provision of reading materials to prisoners. While all the respondent officials claimed that they provide reading materials (books, newspapers and magazines) to their inmates, only 18,4% of the

¹⁸ See Appendix 4.

respondent prisoners agreed that this was so. One is inclined to accept the view of the authorities other than that of the prisoners. In the first place each of the prisons surveyed has a library which is accessible to all prisoners. Secondly, as already mentioned, many prisoners have little or no interest in reading, while many more are outright illiterate.

In terms of section 27(1)(a) of the Constitution everyone has the right to have access to health care services. In regard to prisoners this right is given further emphasis through section 35(2)(e). All the respondent prison officials claimed that sufficient medical care was provided to prisoners who needed it. 54,9% of all the prisoners who claimed to have fallen sick during their incarceration stated that they had been allowed to see a doctor. It was noted that some prisoners who fall sick are provided with in-house treatment at prison sickbays without necessarily being referred to see a doctor, indicating that the perceptions of the authorities are not in disparity with those of the prisoners. Accordingly the right to health care is generally well observed. The same applies to the right to communicate. Three of the four respondents confirmed that prisoners were allowed to write and receive letters without any restrictions. The respondent official from Westville prison conceded that there were some restrictions on the number of letters written and received. More restrictions were acknowledged in regard to the right to make and receive phone calls. 50% of the respondent officials said that there were some restrictions while the other 50% claimed there were none. It has already been noted that 54,8% of the respondent prisoners claimed that they were restricted from making and receiving telephone calls. It has also been noted that such restrictions have more to do with administration and security than with denial of the right. The explanation of the prison officials was that phone calls were based on a privilege system. In some cases phone calls were regarded as visits. It is submitted that these restrictions amount to an abuse of the right to communicate, although the administrative and security concerns of the prison authorities cannot altogether be disregarded.

The situation is certainly much better in regard to the prisoners' rights to be visited. All the respondent officials claimed that there were no restrictions on prisoners being visited by their spouses, relatives and religious counsellors during normal visiting hours. This claim is consistent with the response of

the prisoners 94,8% of whom conceded that they were allowed visitors. The higher figure of 41,4% who claimed that they had had their visitors turned away did not put into consideration those visitors who chose to visit outside normal visiting hours.

All the respondent prison officials denied the use of corporal punishment. 60,9% of the respondent prisoners agreed with them. It was earlier pointed out that the 39,1% who claimed to have been subjected to corporeal punishment may owe their claim to the necessary force that may sometimes be applied in order to maintain discipline and protect some inmates against violence from others. Indeed, when asked whether excessive force was sometimes used in order to subdue unruly prisoners, 50% of the prison authorities replied in the affirmative. Their explanation was that certain circumstances may require the use of excessive force in order to restrain an unruly prisoner and maintain order.

Although the right not to be held in solitary confinement is not specifically provided for under section 35 of the Constitution, it is nevertheless deemed to amount to cruel, inhuman or degrading treatment and punishment. Surprisingly, all the officials admitted to using solitary confinement in their prisons. One official referred to it as 'isolation' and hastened to emphasise that those in isolation were allowed all their other privileges like normal food rations, visits, exercise, reading materials and so on. He also added that such isolation was necessary for the maintenance of order and security. It is submitted that this practice amounts to an abuse of prisoners' rights and is inconsistent with not only the Constitution but also international law.

Finally, all the respondent officials were unanimous on the non-use of hard labour as a form of punishment in prison. This claim is consistent with the responses of the prisoners, 66,3% of whom said they had not been subjected to forced or hard labour. It has already been noted that some of the 33,7% who answered to the contrary may have considered ordinary prison work as forced labour. In general terms therefore, this right is well observed as reflected through the data.

A perception might be created that the findings of the survey analysed above are primarily based on the opinions of the prisoners, thereby giving little credence to the views of state authorities. It is submitted however that if one were investigating family violence for example, more credence would be given to the responses of the victims (women and children) than those of the perpetrators (men). The same is certainly true for this investigation. Secondly, since it is impossible to get as many prison officials as prisoners, a technique known as representative sampling has to be applied. A sample is said to be representative if the analyses made on its sampling units produce results similar to those that would have been obtained had the entire population been analyzed or had it been larger.¹⁹ It is therefore submitted that the responses of the prison authorities analysed above are representative enough and the data from the responses of the prisoners can be relied on.

5.2.6 Testing the hypothesis

In statistical terms a hypothesis may be defined as 'a statement about the value of a population parameter'²⁰. Such statement is usually an assumption about the population involved in a study. The assumption, which may or may not be true, is a general statement about the probability distribution of the population. A hypothesis is usually formulated for the sole purpose of proving or disproving it. In so doing the researcher determines whether the imperical evidence does or does not support the statement (or hypothesis). The process involves hypothesis testing which may be defined as 'a procedure based on sample evidence and probability theory used to determine whether the hypothesis is a reasonable statement and should not be rejected, or is unreasonable and should be rejected'.²¹

The hypothesis of this study was initially stated in the following terms: 'The rights of prisoners under the South African Constitution are protected,

¹⁹ See Frankfort-Nachmias and Nachmias; *Research Methods in the Social Sciences* (1992)

²⁰ Mason and Lind; *Statistical Techniques in Business and Economics*, at 334.

²¹ Mason and Lind (note 20 above) at 335.

observed and compare well with international norms and standards'. Prisoners' rights under international law were discussed at length in Chapter Two above. The rights of prisoners under the South African Constitution were also discussed at length in Chapter Three above. It may safely be stated that most, if not all, the rights of prisoners under international law have been incorporated in the South African Constitution. Whatever lacuna may have been left, has been taken care of by the Correctional Services Act²² and other pieces of legislation like the Mental Health Act.²³ In theory, therefore, South Africa has met the required international standards by putting on paper the human rights norms relevant to prisoners. Having thus observed, what remained to be statistically proved was whether the said rights are observed, protected and implemented in actual practice. This was done by first stating the null hypothesis (H₀) and the alternate hypothesis (H_a) as follows:

H₀ : There is a high proportion of prisoners who feel their rights as provided for under the South African Constitution are well protected and implemented in actual practice (i.e. $p < 0,5$).

H_a : There is a high proportion of prisoners who feel their rights as provided for under the South African Constitution are not well protected and implemented in actual practice (i.e. $p > 0,5$).

The next step was to choose the level of significance. Traditionally, researchers usually select the level of significance of 0.05 or 5%. It was felt that this was ideal for this particular study. The sample proportions were determined by obtaining the sum total of all the responses indicating protection of prisoners' rights (N₁) on one hand and the sum total of all the responses indicating abuse of prisoners' rights (N₂) on the other. In this case N₁ = 20844 and N₂ = 19934, therefore N = 40778. Because of the large sample sizes it was felt that the z proportions test would be used. Also known as the binomial distribution test, this particular test is not only suitable for large sample sizes, but it is also most appropriate when dealing with dichotomous populations and proportions.

²² 111 of 1998.

²³ 18 of 1973.

With the level of significance (α) at 0,05 or 5% the null hypothesis would be rejected if $z > 1,645$.

$$\begin{aligned}\text{Hence } z &= \frac{x - Np_0}{\sqrt{Np_0(1-p_0)}} \\ &= \frac{20844 - 40778(0,5)}{\sqrt{40778(0,5)(0,5)}} \\ &= \frac{20844 - 20389}{\sqrt{10194,5}} \\ &= \frac{455}{100,9678167} \\ &= 4,5\end{aligned}$$

Since $z = 4,5$ the null hypothesis (H_0) is therefore rejected and the alternative hypothesis (H_a) is accepted. In other words the null hypothesis - that there is a high proportion of prisoners who feel their rights under the Constitution are well protected and implemented in practice - is totally rejected. The alternative hypothesis - that there is a high proportion of prisoners who feel their rights under the Constitution are not well protected and implemented in actual practice - is therefore accepted. This means that the general perception that exists in the minds of most prisoners is that their constitutional rights are not well protected and implemented.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

The main conclusion that flows from the analysis of the data in the foregoing chapter is that the constitutional rights of prisoners in South Africa are not sufficiently protected and implemented. This, however, is a generalisation. Some aspects of prisoners' rights, it has been seen, are quite well implemented. These include the right to legal representation for those who can afford, the right to communicate and be visited, the right to medical treatment, the right to be present when being tried and the right to have an interpreter if the proceedings are in a language the accused does not understand. Other aspects however are a source of serious concern. In this concluding chapter, apart from making general conclusions, specific recommendations are put forward regarding those particular areas in which abuse of prisoners' rights has been highlighted.

6.2 POLICE BRUTALITY

The police, as a major institution of state power is the main arresting agency of the state. It is no secret that the old apartheid era was characterised by inordinate violations of human rights of which police brutality was a significant feature. The police force's *modus operandi* was largely characterised by a culture of torture and abuse. The results of this study show that the police have not yet abandoned that culture. Hence, it has been seen, the rights of arrested persons are seriously abused and violated.¹ These findings were recently corroborated by a graphic national television

¹ See 5.2.1 above.

footage of police using suspects as human bait in dog-training exercises.² The incident which received widespread media coverage and public condemnation was said to be only the tip of the iceberg.³ In a separate report it is claimed that 'some SAPS (South African Police Services) members continue to dispense the "short-cut" justice for which South Africa has become notorious'.⁴ The report claims that certain torture methods including inflicting cigarette burns, electric shocks and suffocation are practices still embraced by policemen.⁵ Excessive use of police dogs on suspects is another notorious aspect of police brutality.

It has been argued that in an atmosphere of apparent lawlessness, where criminals are often armed, members of the police may have scant regard for the rights of the suspects, eventually becoming case-hardened and cynical.⁶ It is submitted that a rising crime rate is not sufficient justification for the flagrant disregard of suspects' rights. It has not been shown that tough bully-boy police tactics have the capability of bringing down the crime rate.

It is recommended that meaningful measures should be undertaken by government to instil a human rights culture in the police force. The starting point is to identify and root out those elements of the police force whose allegiance still ideologically and conservatively lies in the past. The next step is to educate and sensitize all the remaining members of the police force, in sufficient detail, in the letter and spirit of the Bill of Rights, and to inculcate an ethos and culture of policing that is consistent with the Bill of Rights. This is not to say that nothing has been done so far in this respect. The SAPS claims that in 1998 and 1999, seminars, workshops and training

² *Special Assignment* SABC 3 Tuesday, 7 November 2000.

³ See 'Torture and abuse by cops', *Mail & Guardian*, November 10 to 16, 2000.

⁴ See 'SA's post-democracy police force embraces apartheid-era methods', *Mail & Guardian*, November 10 to 17, 2000.

⁵ *Ibid.*

⁶ *Ibid.*

programmes were held throughout the country to sensitize and acclimatize members of the police force with human rights issues and the minimum standards for law enforcement.⁷ It is believed however that the human rights sensitivity programme was frustrated by certain elements in the police, including the top brass who are passionately resisting any programme that smacks of transformation.⁸ The police force will not reflect the ideals of the new democracy unless such elements of the old guard are done away with.

One way of eliminating police brutality and enforcing adherence to human rights norms is by ensuring accountability of the police. This can be done in three different ways. The first method is by ensuring accountability through the courts. Like all citizens, the police are subject to the ordinary law of the land administered by the ordinary courts. The availability of the courts to provide remedies to citizens who complain of police misconduct is, indeed, the ultimate safeguard to ensure control and accountability of the police in a society governed by the rule of law. The conduct of the police can be examined by the courts in several different contexts, namely:

- (i) in civil actions against a police officer;
- (ii) in criminal charges brought against a police officer alleged to have committed a crime; and
- (iii) in considering whether evidence ought to be excluded in prosecutions because of police misconduct.

Another medium of ensuring police accountability is through internal disciplinary procedures. Such procedures would be a more effective instrument of accountability if the proceedings, or at least the results thereof, were made public. This would not only enhance public confidence but would

⁷ 'Old habits die hard as transformation is resisted', *Mail & Guardian*, November 10 to 16, 2000.

⁸ *Ibid.*

also act as a deterrent to further police brutality. Another requirement for the effectiveness of internal discipline procedures is the existence of a comprehensive code of conduct. The code of conduct is supposed to provide an ethical framework for the conduct of the police.

In 1997 an attempt was made at introducing a new code of conduct for the South African Police Services (SAPS) personnel. However, this new code of conduct has been heavily criticised. According to one commentator:

'... it is not meaningful to the day-to-day work of the police force. For instance, it says nothing about the use of force.'⁹

Another criticism is that while every member of the police service is meant to sign the code of conduct, only new recruits have been obliged to do so. It is submitted that unless all members of the police force sign the code of conduct, it will not have a collective binding effect and its provisions will continue to be breached.

Both the court process and the internal disciplinary process can only be effective if there is a proper citizen complaint procedure. This is the third medium through which police accountability can be ensured. The complaint procedure must be perceived by the public as a meaningful process which fairly and publicly addresses the concerns and grievances of the victims, otherwise it will not serve much purpose. In an attempt to realise this ideal the South African government set up the Independent Complaints Directorate (ICD) in 1997. It was mandated to investigate police brutality, deaths resulting from police action and other allegations of police criminality or misconduct. Since its inception the ICD has been inundated with complaints against policemen. Unfortunately, the ICD is operating amid severe

⁹ David Bruce, senior researcher at the Centre for the Study of Violence and Reconciliation as quoted in the *Mail & Guardian*, November 10 to 16, 2000, *Ibid*.

constraints. It is severely understaffed - there are about 45 investigators countrywide to monitor a 128,000 strong police force - and it has experienced severe budget cuts recently.¹⁰ It is recommended that this important functionary be strengthened and reinforced. Funds should be made available and more investigators should be recruited to strengthen the Directorate. It is also recommended that the findings of the ICD be made public on a regular basis. So too should the outcome of litigations involving the police.

It is further recommended that the SAPS introduce and implement wide-ranging human rights policies within its ranks. In July 1999 one such policy was introduced - the anti-torture policy, which defined torture as 'any cruel, inhuman or degrading treatment or punishment, or any act by which severe pain, suffering or humiliation, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him or her or a third person information or a confession'.¹¹ It is suggested that more such policies be not only introduced, but strictly implemented and their breaches severely punished. It is also felt that such policies cannot have any effect unless certain police methods are eradicated. For example, the anti-torture policy will remain meaningless unless the use of police patrol dogs is severely restricted and their handlers psychologically re-evaluated. Presently there are 68 dog units in South Africa and there is growing evidence that the police use dogs to punish suspects during either an interrogation or an arrest.¹² Police dogs are also extensively used in crowd control and there are claims that 'on numerous occasions dogs have been used as instruments of torture by some unscrupulous, racist police officers'.¹³

¹⁰ See *Mail & Guardian* (note 4 above).

¹¹ *Ibid.*

¹² This claim was made by Munirah Osman of the Law Clinic of the University of Natal, Durban, as quoted in 'Tshwete to restrict use of police dogs', *Sunday Tribune*, 12 November 2000.

¹³ *Ibid.* See also note 2 above.

It is difficult to imagine how a person under arrest can exercise his or her right to remain silent or indeed demand to be informed of this right when vicious dogs are tearing at him or her. It is equally difficult to imagine how a person in such a situation can avoid making confessions or admissions that may be used in evidence against him or her.

6.3 PRISON CONDITIONS AND OVERCROWDING

If regard is to be had to the findings of the survey discussed in the previous chapter,¹⁴ it can safely be concluded that most human rights abuses in prison are directly or indirectly linked to the adverse conditions and severe overcrowding in South African prisons. The enormity of the problem was highlighted in Chapter One above¹⁵ and confirmed by the data analysed in Chapter Five.¹⁶ It was noted that both the respondent prisoners and officials were unanimously in agreement about the inhuman prison conditions and the alarming congestion. Some commentators have expressed their opinions on this quite candidly:

'Overcrowding jails are a symptom of the sickness of our society - too many wrongdoers, too little space for what is euphemistically called "correctional supervision" - the formal name of the prison department'¹⁷.

Such sentiments are not out of tune if one considers the reality of the situation. According to Judge J. Fagan, the inspecting judge in charge of the Independent Judicial Inspectorate, the 236 prisons in South Africa were built

¹⁴ See 5.2.2. above.

¹⁵ See 1.1 above.

¹⁶ See 5.2.2. above.

¹⁷ See 'Who goes where?' Editorial, *Eastern Province Herald*, Thursday, 28 September 2000.

to accommodate 100 668 prisoners.¹⁸ On 30 April 2000 those prisons were accommodating over 172 271 prisoners, which meant that more than 72 000 prisoners were being kept in prison without the necessary infrastructure such as toilets, beds, showers and such like facilities being available to them. This is worsened by the uneven distribution of prisoners which results from the inconsistent placing of prisoners in different jails on one hand, and the need to separate different genders and categories on the other. Hence while some prisons are more than 400% overcrowded, others are less than 100% occupied.¹⁹ Clearly, such conditions do not support the promotion and protection of human rights.

There are several factors responsible for the current overcrowding in South African prisons. However, in order to make any meaningful recommendations as to how the situation may be resolved one first has to put one's finger on the main cause of the problem. It is generally believed that the cause is an unprecedented growth in the number of awaiting-trial prisoners. According to Judge J Fagan, while the population of sentenced prisoners has slowly increased (from 92 581 in January 1995 to 108 307 on 30 April 2000, i.e 17% growth), the number of awaiting trial-prisoners almost trebled (from 24 265 in January 1995 to 63 964 on 30 April 2000, i.e 164% growth).²⁰ Consequently the average period that awaiting-trial prisoners remain in prison has increased even more dramatically. Over the past four years the number of awaiting-trial prisoners held for longer than three months increased from 3 957 to 27 357, an increase of 591%.²¹ So almost half of all awaiting-trial prisoners have been held in prison for longer than three

¹⁸ Fagan, *Release of Prisoners, parole and post-release supervision*, a briefing document presented at the 14th International Conference of the International Society for the Reform of Criminal Law: Human Rights and the Administration of Criminal Justice (5 December 2000).

¹⁹ *Ibid.* See also Oliver and McQuoid-Mason, *Human Rights for Correctional Services* (1998) at 10.

²⁰ See Fagan (note 18 above).

²¹ *Ibid.*

months. These figures are in total agreement and quite consistent with the data analysed in the previous chapter where it was seen that more than 65% of the awaiting-trial prisoners claimed to have been in detention for more than six months.²²

So what are the recommendations that one can make which would resolve the problem of overcrowding and enhance the realisation of prisoners' rights? Simplistically speaking, one option is to build more prisons, create more space and provide adequate prison accommodation. This, however, does not present itself as a viable option, considering the enormous cost involved in building new prisons.²³ In any case, there is much more involved in establishing a new prison than merely putting up physical structures. In November 2000 a new prison was opened in Empangeni, KwaZulu-Natal. At the time of its opening it was operating at little more than a third of its capacity because of a staff shortage.²⁴ The staff shortage, it was reported, was largely due to a lack of suitable accommodation in the town for the prison's full complement of officers and warders.²⁵ It was further reported that at the time the 1392 inmate capacity prison had just over 500 prisoners.²⁶ A spokesman for the Department of Correctional Services indicated that the number of prisoners in the new prison would have to remain low as long as there was a shortage of staff. It can therefore be seen that apart from being costly, building new prisons does not immediately solve the problem of overcrowding unless several other logistics are in place.

²² See 5.2.3 above.

²³ According to Judge Fagan it is estimated that the cost of building new prisons sufficient to accommodate all prisoners would amount to R200 000 per prisoner.

²⁴ See 'New Empangeni prison short of warders - and inmates', *Daily News*, 16 November 2000.

²⁵ *Ibid.*

²⁶ *Ibid.*

It is therefore recommended that such logistics be addressed first, for example the issue of staff training and welfare. As far as staff training is concerned, it is recommended that specialised prison staff training colleges and schools be established. At the moment only Technikon South Africa and the University of South Africa (UNISA) offer certain courses relevant to correctional services. It is submitted that correctional services management should be considered as a professional calling like nursing or teaching. For that reason there should be a system of streamlined correctional services qualifications that can be continuously upgraded. There should also be continuous in-service training for correctional services personnel in order to keep them up-dated with legal and penological developments. In that way, junior and middle management personnel can understand how their duties, obligations, rights and responsibilities, are affected by the Constitution and especially the Bill of Rights. This would go a long way in addressing the problem of human rights abuses in prisons.

The other option through which the problem of overcrowding can be resolved is by reducing the number of prisoners, especially those awaiting trial. There are two ways of doing this. Firstly, by reducing the inflow of prisoners from the courts and secondly by getting those in prison out. The first method is probably less tricky than the latter. Judge J Fagan has suggested that in order to reduce the inflow of awaiting-trial prisoners the following should be encouraged:²⁷

- (i) pre-trial diversion especially for juveniles;
- (ii) greater use by police of their powers to release arrested persons on bail;

²⁷ See note 18 above.

- (iii) wider use by public prosecutors and clerks of the court of the procedure of admission of guilt and payment of a fine without appearance in court;
- (iv) more information to be provided by investigating officers to prosecutors to assist them in deciding what to ask magistrates to do with accused before trial; and
- (v) magistrates to make use of other options available to them other than incarceration for those awaiting trial.

As far as getting awaiting-trial prisoners out is concerned the following suggestions are made²⁸:

- (i) withdrawal by prosecutors of trivial cases, weak cases and cases where the accused have been waiting for trial for unreasonably long periods;
- (ii) consideration by magistrates of alternatives to further imprisonment when matters come to court on remand dates;
- (iii) preference to be given by prosecutors to cases of accused persons held in prison over those awaiting trial outside prison; and
- (iv) consideration to be given to all possible methods of expediting trials.

In terms of section 81 of the Correctional Services Act,²⁹ certain measures may be taken to reduce prison population if it is felt that 'the prison

²⁸

Ibid.

²⁹

111 of 1998.

population is reaching such proportions that the safety, human dignity and physical care of the prisoners is being affected materially'.³⁰ Such measures include the advancement of the parole date of certain categories of sentenced prisoners. This was done in January 2000 but the problem was not solved. The ultimate method of getting prisoners out in order to reduce the numbers seems to be by simply releasing some of them. This rather drastic and controversial step was taken by the South African government in September 2000 by setting in motion a process of releasing about 18 000 awaiting-trial prisoners. Only those who had not been convicted or sentenced were released. The other criteria included the fact that only those who had been granted bail of R1000 or less and failed to pay could benefit from this process. The reasoning was that by granting them bail such prisoners had been allowed back into society but were in prison simply because of poverty. It was stressed that the release did not amount to an amnesty and that each of the prisoners would still have to stand trial.

The method of reducing prison overcrowding by releasing some of the prisoners requires to be handled with extreme caution. Indeed, the release of prisoners in September 2000 was met with widespread criticism and public condemnation. Some felt that there was not enough justification to release prisoners who had not yet had to answer their cases in a court of law. According to one commentator:

'Far more important to this country than overcrowded jails is that ordinary members of the public need to see justice done. They need to see criminals tracked down, brought to the courts and if found guilty given proper punishment'.³¹

³⁰

See section 81.

³¹

See 'Who goes there?' Editorial *Eastern Province Herald*, 28 September 2000.

It was also argued that 'such arbitrary releases' were unfair to the victims of crime and to the investigating police and detectives who had tracked down the suspects. These fears expressed by the public were confirmed by immediate reports of prisoners who had been released only to be involved in crime a few hours later. In one case only hours after two accused men were freed from Westville prison, they allegedly held up an off-duty policeman, beat him up and stole his watch.³² In another incident, less than 24 hours after being released a suspect on a car theft charge pointed a pistol at a woman's head and hijacked her car.³³ Such reports go to show that although releasing prisoners is a practical and pragmatic way of reducing prison overcrowding, it could lead to a vicious circle of crime and aggravate crime levels.

In order to avoid taking drastic and unpopular measures, it is recommended that more use be made of the procedure of alternative sentencing in trying to alleviate the problem of overcrowding. This would require adopting the approach known as restorative justice. What this approach entails is a kind of justice that focuses on reconciliation and repairing the harm caused by crime while at the same time it encourages the rehabilitation of the offender. Restorative justice has a very broad application. While it is mainly aimed at better meeting the needs of victims, it also focuses on crime prevention and engages communities on the criminal justice process. Most importantly however it serves as an alternative to incarceration. In short it is one simple way of reducing the use of imprisonment by making more use of non-custodial sentences. The following are some of the ways through which this can be done:

³² See 'Freed prisoners return to crime', *Sunday Tribune*, 17 September 2000.
³³ See 'Freed to hijack' *Sunday Times*, 17 September 2000.

- (i) postponing sentences with or without the various conditions set out in section 297(1)(a)(i) of the Criminal Procedure Act;³⁴
- (ii) handing down suspended sentences with or without conditions;
- (iii) discharging with a reprimand;
- (iv) affordable fines;
- (v) compensation to the victim;
- (vi) community service;
- (vii) correctional supervision; and
- (viii) for juveniles, placement in the custody of a suitable person and/or under the supervision of a probation officer or correctional official.

It is submitted that these alternative sentencing procedures, if applied correctly and consistently would go a long way in reducing the overcrowding in prisons, thereby enhancing the protection and implementation of the rights of those for whom there is no alternative but incarceration.

It ought to be pointed out that all the above recommendations aimed at reducing overcrowding in prisons in order to enhance better implementation of prisoners' rights cannot be effective and meaningful unless all the problems in the criminal justice system are seriously and urgently addressed. Indeed, as one commentator has rightly pointed out, 'the police, prosecutors, courts and correctional services are links in the chain of criminal justice that, if weakened, could end in collapse'.³⁵ It is no secret that the criminal justice system is in a chaotic state. The morale of the judicial officers and especially the prosecutors is extremely low. They are constantly complaining of being under-paid and over-worked. The situation came to a head in 2000 when a country-wide strike by prosecutors almost crippled the system. The

³⁴ 51 of 1977.

³⁵ This is according to Professor Shadrack Ghutto of the Centre for Applied Legal Studies, University of Witwatersrand, as quoted in 'Who goes there?' Editorial *Eastern Province Herald*, Thursday, 28 September 2000.

consequence of this state of affairs is a large backlog of cases in the courts which causes awaiting-trial prisoners to wait inordinate periods for their trials to be disposed of.

It is recommended that such cases which have been on the cause list for unreasonable periods of time be withdrawn. It is further recommended that the problems besetting the criminal justice system be addressed as a matter of urgency. This involves, but is not limited to, employing more magistrates and prosecutors, improving the working conditions of these judicial officers, providing better court facilities, improving legal training and encouraging, with incentives, fresh law graduates to join the public judicial service, other than private legal practice. It is submitted that an efficient, motivated and thorough criminal justice system is the starting point in reducing the number of awaiting-trial prisoners, and thereby resolving the problem of overcrowding. This would ensure more adequate protection and implementation of the rights of prisoners.

6.4 JUVENILES

Although this study is not restricted to juveniles, but investigates the constitutional rights of all categories of prisoners, it is necessary to make specific conclusions and recommendations regarding juveniles as they are the most vulnerable category of people, not only in prison but in society as a whole. Mention has already been made of the international instruments relevant to juvenile justice, specifically the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)³⁶ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.³⁷ Mention has also been made of section 28 of the South African

³⁶ See 2.4.1.4 above.

³⁷ See 2.4.1.5 above.

Constitution providing for the rights of a child, in particular section 28(1)(g) which sets out specific rights of children who get in trouble with the law.³⁸

It is submitted that human rights abuses in prisons identified and discussed in this study naturally impact more on juveniles than on adults. This is more so in respect of abuses arising from overcrowding and harsh prison conditions. KwaZulu-Natal has been reported to be the main culprit of the human rights abuses of child prisoners.³⁹ In June 2000 there was an average of 550 awaiting trial juveniles at the Westville Youth Center (prison).⁴⁰ This led to a situation where 60 to 90 children shared a cell designed for 19 persons. The problems arising from such a state of affairs are pretty obvious. These range from over-utilisation of facilities and under-resourcing to social problems among the prisoners. These problems are compounded by the unreasonable long periods that some of the children have to spend awaiting trial. The findings of this study which indicate that more than 42% of the unsentenced prisoners surveyed have been awaiting trial for more than a year are supported by media reports which claim that some children at Westville prison have been languishing there for up to three years without being released or given bail.⁴¹

It is strongly recommended that juvenile offenders should be completely removed from the prison system. Several attempts by the South African government in this regard have been unsuccessful. Efforts by the Department of Correctional Services to remove juvenile offenders from prison have primarily failed because of the lack of safe and secure outside facilities where to place them. It goes without saying that the best way to avoid having

³⁸ See 3.3.9 above.

³⁹ See 'KZN criticised for having the most child prisoners', *Daily News*, 27 November 2000.

⁴⁰ According to a report of the Human Rights Committee, Durban: *'Awaiting Trial Children in Prison - A Situational Analysis'*

⁴¹ See 'Children treated like animals', *Daily News*, 23 November 2000.

juvenile offenders in prison is by not getting them in at all in the first place. It is therefore suggested that the starting point in resolving the problem is by making use of alternative sentencing. This means that correctional supervision should always be considered ahead of imprisonment. It also means placement of the juvenile offenders in the custody of suitable persons. Above all, it means more use of reform schools and other places of rehabilitation specifically designed for minors. More use should also be made of pre-trial diversion. Diversion is the referral of cases away from the formal criminal justice system to an appropriate programme or plan.

It is also recommended that whenever government decides to release prisoners as was done in September 2000, juveniles should always be considered first. They should always be the first beneficiaries of such 'amnesties' because they are not supposed to be there in the first place. This would not only serve to promote the rights of the child but would also alleviate the problem of overcrowding discussed earlier. Where minors have to be kept in a correctional facility, certain measures and safeguards should be put into place. These include but are not limited to:

- (i) orientating the children properly to the fact that they are in an alien environment with certain rules and procedures;
- (ii) determining whether the placement is in fact the correct one and, if they have been misplaced by the courts, follow appropriate action to remedy this;
- (iii) assessing each child in terms of their individual needs;
- (iv) holding regular interviews with all children either on an individual basis or in a group setting;
- (v) liaising with family (to pay bail, provide support, visit or bring clothes);
and

- (vi) holding programmes which involve educational, therapeutic and recreational activities.

In order to implement the above measures there needs to be adequate staffing and human resource personnel in terms of social workers and child-care workers. It is therefore recommended that if children have to be kept in any correctional facility sufficient specialised staff should be appointed to take care of their needs and requirements.

There have been recent commendable attempts aimed at addressing the plight of juvenile offenders. The South African Law Commission has recently proposed, by way of recommendation, a cohesive child justice system which strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions by means of various diversion options and programmes.⁴² These options and programmes embody restorative justice principles which, as has already been mentioned, focus on reconciliation and restitution rather than on retribution and punishment, and lay emphasis on compensation to the victim by the offender with the object of successfully integrating both victim and offender as productive members of safe communities.⁴³ The proposed system does provide for the criminal prosecution of children who are accused of serious or violent offences as well as those who repeatedly commit crimes. The proposed system also allows for the secure containment of children who are assessed to be a danger to others. The imprisonment of children awaiting trial should only be permissible in certain defined circumstances but the proposals must accord with the constitutional provisions that imprisonment of children should be a measure of last resort and for the shortest appropriate period of time.

⁴² See South African Law Commission Report on Juvenile Justice at <http://www.law.wits.ac.za/sale/report/project106.html>

⁴³ *Ibid.*

The above recommendations of the South African Law Commission which are based on international human rights standards and constitutional principles, are embodied in the proposed Child Justice Bill whose aim is to move away from the current situation where the legal framework applicable to children does not differ materially from that applicable to adults. The proposed Child Justice Bill also aims to establish a specialised child justice court and to extend the range of sentencing options available to such a court and other courts in which child offenders are tried.⁴⁴ At the moment the draft Bill has still to be submitted to the Cabinet for approval after which it will proceed on its journey through the usual legislative process. It is recommended that this Bill be given full support and be swiftly passed into law. The implementation of the provisions of that law will go a long way in addressing the abuse of juvenile offenders and alleviating the general human rights situation in prisons.

6.5 MENTALLY ILL PRISONERS

It has already been mentioned that this category of prisoners is governed by the Mental Health Act,⁴⁵ which defines 'mental illness' as 'any disorder or disability of the mind, [including] any mental disease, any arrested or incomplete development of the mind and any psychopathic disorder'.⁴⁶ This definition is rather controversial because it is too wide. The Act further lays down the procedure to be followed in order to detain a mentally ill prisoner. There is no provision for any specific rights for such people. It is interesting to note that no mention is made either in the Constitution or in the

⁴⁴ See Chapter 7 of the draft Child Justice Bill.

⁴⁵ 18 of 1973; See 1.5.2.4 above.

⁴⁶ Section 1 of the Act.

Correctional Services Act⁴⁷ about mentally ill prisoners. It is therefore clear that this category of prisoners is overlooked and neglected. It is submitted that mentally ill inmates form a very vulnerable category of prisoners and specific rights should be accorded to them. In the case of juveniles, it has been seen, there are specific rights over and above those provided for under section 35 of the Constitution.⁴⁸ The same should apply to mentally ill prisoners. It is therefore recommended that legislative mechanisms be introduced to provide for specific rights for mentally ill prisoners. It must be remembered that some of them are in prison due to their mental illness. Apart from making medical treatment available to them, therefore, specific rights over and above those provided for under section 35 of the Constitution, should be accorded to them.

6.6 RATIFICATION AND INCORPORATION OF RELEVANT INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Historically the South African legal system has always had difficulty in embracing international law. This was mainly because of political reasons. A new political era however brought with it a shift both in foreign policy and legal jurisprudence. Chapter 14 of the Constitution⁴⁹ formalises this new status of international law in South African domestic law by first of all confirming the common law position that customary international law is recognised in South Africa,⁵⁰ and secondly by confirming that all international agreements which were binding on the Republic prior to the enactment of the Constitution would continue to be in force.⁵¹ It also provides that '[W]hen interpreting any legislation, every court must prefer any reasonable interpretation ...that is consistent with international law over any alternative

⁴⁷ 111 of 1998.

⁴⁸ See 3.3.9 above. See also section 28(1)(g) of the constitution.

⁴⁹ See sections 231 - 233.

⁵⁰ See section 232.

⁵¹ See section 231(5).

interpretation that is inconsistent with international law'.⁵² This section is complimented by section 39(1)(b) which states that '[W]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law ...'⁵³ It is recommended that South African courts should give maximum effect to these provisions especially in regard to prisoners' rights.

One problem that has to be addressed is the fact that South Africa is not well known for its haste in ratifying international treaties. For example, the 1966 International Covenant on Civil and Political Rights was ratified by South Africa as recently as 10 December 1998. The same applies to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The 1966 International Covenant on Economic, Social and Cultural Rights was signed on 3 October 1994, but has not yet been ratified. It has also to be remembered that for any international treaty to be incorporated into South African law it has to be enacted into law by national legislation.⁵⁴ It is therefore recommended that South Africa should move with haste and purpose not only in ratifying important international treaties, but also in incorporating them into domestic law.

It ought to be mentioned however that some of the most important international instruments relating to prisoners (like the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice) clearly do not constitute international treaties. Nevertheless, 'they were unanimously accepted by a large international assembly at which several countries, including South Africa, were represented'.⁵⁵ It is generally accepted however that these

⁵²

See section 233.

⁵³

See section 39(1)(b).

⁵⁴

See section 231(4) of the Constitution. Also see 2.3.2 above.

⁵⁵

See Van Zyl Smit, *South African Prison Law and Practice* (1992) at 82.

instruments now form part of the South African common law on prisons.⁵⁶ The Standard Minimum Rules were first referred to by a South African court in the 1990 case of *S v Staggie*.⁵⁷ They were again referred to a year later in *S v Daniels*.⁵⁸ Since then not much reference has been made to the Rules. It is recommended that more consideration be given to the Standard Minimum Rules and other United Nations instruments in the application of statutory South African prison law. In so doing the rights of prisoners will definitely get more judicial protection.

6.7 ACCESS TO COURTS

It has already been mentioned that many human rights abuses in prison are a result of the overcrowding and prison congestion.⁵⁹ It has also been mentioned that the main cause of overcrowding is the unreasonably high number of awaiting-trial prisoners in jail.⁶⁰ It is submitted that this situation would easily be avoided if the right of access to attorneys and to courts was well implemented and respected. The right of access to court goes hand in hand with the right of access to an attorney. The constitutional guarantee of due process means that an individual has access to courts to seek redress and such right has little meaning if the individual does not have access to legal assistance.⁶¹ It is therefore suggested that the starting point in protecting the right of access to courts is to make legal services and assistance readily available to all prisoners especially those awaiting trial.

⁵⁶ Note 55 above at 83. See also note 48 above.

⁵⁷ 1990 (1) SACR 669 (C).

⁵⁸ 1991 (2) SACR 403 (C).

⁵⁹ See 6.3 above.

⁶⁰ *Ibid.*

⁶¹ See Swart, 'The Constitutional Rights of Prisoners with Reference to Access to Courts', *Acta Criminologica* 12(2) 1998 at 52.

The right of access to courts is perhaps the most basic of all prisoners rights and it forms the foundation of all other rights an inmate has.⁶² Indeed according to Mushlin:

‘an inmate’s right to unfettered access to the courts is as fundamental a right as any other he may hold ... All other rights are illusory without it’.⁶³

Mushlin further points out that ‘... prisoners’ rights exist only as long as, and only to the extent that inmates are given access to courts’.⁶⁴ Without such access, prisoners would have no way of defending their rights through judicial action.⁶⁵ This being the case, it is submitted that in order to realise the other rights of prisoners, courts must be made more accessible especially to awaiting-trial prisoners. The state has a big role to play in this matter. The most certain way of ensuring right of access to the courts is by assigning legal counsel to all unsentenced inmates. This would obviously require overhauling the Legal Aid Board. It is recommended that government urgently addresses the current problems being faced by the Legal Aid Board with a view to resolving them by providing more funding, better management and more facilities and incentives.

One pragmatic way of ensuring the right of access to courts is by establishing courts at the main prison centres where unsentenced prisoners are held. This practical approach would solve many problems including reducing prison overcrowding and avoiding prisoners escaping en route to courts situated far away from prisons.

⁶² *Ibid.*
⁶³ See Mushlin, *Rights of Prisoners* (1993) at 3.
⁶⁴ Mushlin (note 63 above) at 4.
⁶⁵ See D N Swart (note 59 above) at 53.

6.8 THE PRIVILEGE SYSTEM

The privilege system hails from the past when prisoners had no rights and anything they were allowed to do or have was called a 'privilege' or an 'indulgence'. This was laid down by the old Correctional Services Act⁶⁶ which provided that

'The Commissioner [of Correctional Services] may

- (a) grant such privileges and indulgences as he may determine to any prisoner
- (b) withdraw or amend any privilege or indulgence granted in terms of paragraph (a) to any prisoner if it is in the interests of the administration of prisoners'.⁶⁷

Although the new Correctional Services Act⁶⁸ makes no mention of privileges or indulgences, clearly the privilege system is part and parcel of present day prison administration. According to the Department of Correctional Services, the main objective of the privilege system is to encourage prisoners towards good behaviour, to engender a sense of responsibility in them and to ensure their interest and co-operation in their treatment.⁶⁹ The system consists of primary privileges and secondary privileges. Primary privileges are aimed at the retention, maintenance or furthering of family ties while secondary privileges are aimed at leisure-time activities, such as participation in sports and watching television. It was mentioned earlier that during the survey, the reason given by prison officials for the restrictions on making and receiving phone calls, was that phone calls were based on the privilege system.⁷⁰

⁶⁶ 8 of 1959.

⁶⁷ Section 22(2).

⁶⁸ 111 of 1998.

⁶⁹ See South Africa Yearbook, Justice and Correctional Services, at <http://www.gov.za/yearbook/justice.htm>

⁷⁰ See 5.2.5 above.

It is submitted that the privilege system should be completely eradicated from the prison institutions. Such an arrangement could only apply during those times when human rights was an alien concept in the South African legal system. Today, with a Bill of Rights that clearly sets out the rights of everyone including prisoners, who needs privileges? In any case the existence of such a system creates the danger of blurring the line between privileges and rights. Moreover, those so-called privileges are set out, not in the new Correctional Services Act⁷¹ or in the regulations published with the legislation but in Departmental Orders whose legal status is unclear. As such, the likelihood of the Commissioner of Prisons and his subordinates abusing their discretion is more than real. It is therefore recommended that the privilege system has no place in the present day correctional services system. The enjoyment of prisoners' rights will be better realised and enhanced without it.

6.9 THE ROLE OF NGO's

Non-governmental organisations (NGO's) always play a critical role in democracy, especially where liberty is removed. In the United Kingdom, for example, non-governmental agencies play an important role in campaigning for prisoners' rights and providing assistance in resettling released prisoners. One such NGO is the National Association for the Care and Resettlement of Offenders (NACRO). Established in 1966, NACRO employs about 1200 staff members working on projects in prisons and in communities.⁷² By commenting critically on prison conditions and working inside prisons, NACRO plays a crucial role in the protection of prisoners' rights in the United Kingdom.

⁷¹ 111 of 1998.

⁷² See Thompson, '*The Role of Non-governmental Agencies and the Resettlement of Prisoners*', A paper presented at the 14th International Conference of the International Society for the Reform of Criminal Law: Human Rights and the Administration of Justice, 5 December 2000.

In South Africa the two main NGO's involved in prison work are the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) and Business Against Crime. Unfortunately, the impact of these organisations on the protection of prisoners' rights has been rather minimal. Their approach is long-term and their role comes nowhere near the success achieved by NACRO in the United Kingdom. There are thousands of NGO's in South Africa but very few of them are involved in prisons in any sort of way. It is recommended that NGO's get more involved in campaigning for and overseeing the protection of prisoners' rights. Such involvement will position NGO's as watchdogs and enhance the government's role in ensuring proper protection of the rights of prisoners.

6.10 EDUCATION AND PUBLIC AWARENESS

Everybody is presumed to know the law, hence the maxim *ignorantia iuris neminem excusat* (ignorance of the law is no excuse). All people are expected to have knowledge of the law so as to safeguard themselves and to protect and enforce their rights. The reality of the situation in South Africa (and many other developing countries) however, is that many people know little or nothing about the law. Many people cannot enforce their rights because they don't even know that they have them. This fact was illustrated by the findings of the survey which showed that more than 52% of the awaiting-trial prisoners who responded to the questionnaire were not aware of their right to remain silent on arrest.⁷³

The starting point in protecting people's rights is by sensitizing them and making them aware of the existence of such rights. This is more easily said than done, considering that the South African population has more than 60% illiteracy levels. But it is not impossible. No one is born a criminal, but there

⁷³ See 5.2.1 above.

is a likelihood that anyone can get in trouble with the law. Education and public awareness of people's rights should be aimed at all people in the early stages of their lives. It is therefore suggested that human rights be introduced in primary and secondary schools as a subject of study. A public awareness campaign targeting the youth would also go a long way in sensitizing communities and individuals about their rights.

It is also recommended that human rights education be offered to prisoners since they, more than anybody else, need this knowledge. It is interesting to note that the Department of Correctional Services claims that education is provided to prisoners, including 'tuition for illiterate prisoners; primary, secondary and tertiary education and preparedness'.⁷⁴ The Department claims that it offers and encourages literacy education for prisoners in the following programmes:

- (i) vocational training in a variety of trades;
- (ii) occupational skills training;
- (iii) constructive unskilled labour; and
- (iv) literacy and adult education.

It is recommended that a programme on human rights education be included in the prison education programmes. It is also recommended that prisoners be introduced to some elementary aspects of the law in the hope that knowledge of the law and the consequences of breaking it would lead to less crimes and reduce the likelihood of recidivism.

⁷⁴ See note 29 above.

6.11 PRIVATIZATION OF PRISONS

Provision is made under the Correctional Services Act⁷⁵ for the Minister (of Correctional Services) to enter into a contract with any private entity 'to design, construct, finance and operate any prison or part of any prison ...'⁷⁶ The private entity (contractor) would be required to ensure that all prisoners are treated with dignity. The Act states that within 21 days after the contract has been awarded the contractor must apply to have their service declared an essential service. In order to monitor the activities of the contractor, a controller would be appointed to review the daily management and operation of the contracted-out prison and would report to the Commissioner of Correctional Services.⁷⁷

In tandem with the above, a R1.3 billion contract was entered into in July 1999 between the government and a private consortium, Ikhweai, to build, staff and operate a 3000-bed private maximum security prison in Bloemfontein.⁷⁸ A second contract was entered into between the government and the South African Custodial Services according to which a private maximum security prison would be built for 3024 inmates in Louis Trichardt in the Northern Province.⁷⁹ Construction of these prisons has already begun.

The primary object of privatization of prisons is to make them more cost effective and to provide for tighter management and raise the standard of correctional services. Indeed it is common knowledge that private enterprises are usually more efficient and effective than public enterprises. However, another objective that would be inadvertently achieved would be the protection of human rights in prison. The contractors would simply be

⁷⁵ 111 of 1998.
⁷⁶ Section 103(1).
⁷⁷ Sections 105 and 106(1).
⁷⁸ See note 69 above.
⁷⁹ *Ibid.*

required to comply with all constitutional provisions and all international conventions governing detention or imprisonment to which South Africa is a party. Adherence to this requirement would be monitored by the controller⁸⁰ and other organs established by the Correctional Services Act.⁸¹ It is recommended that more and more prisons be privatised as this would clearly go a long way in addressing the problems currently facing prisons and would therefore enhance better protection of prisoners' rights.

6.12 LEGISLATIVE INTERVENTION

Although the enactment of the new Correctional Services Act⁸² was an important step in the right direction, there is certainly room for improvement. A more comprehensive statute that incorporates provisions on the rights of all categories of prisoners is recommended. It is particularly recommended that the rights of mentally ill prisoners be included in such a statute. Although it has been recommended that the proposed Child Justice Bill should be fast-tracked and hastened through the legislative process, it would certainly make more sense if the rights of juveniles were also included in the suggested comprehensive statute. Prisoners' rights would be better promoted through a single legislative framework other than through an amalgamation of loosely related legislative enactments. In short legislative intervention is urgently required.

In conclusion, two final questions; firstly, according to the findings of this study does South Africa meet the required international norms and standards in protectiing prisoners' rights? The answer: on paper yes, in practice no. Secondly, if, as claimed by one commentator,⁸³ the level of a nation's

⁸⁰ Appointed under section 105 of the Act.

⁸¹ For example the independent judicial inspectorate and the independent prison visitors.

⁸² Act 111 of 1998.

⁸³ See Chapter 4, note 82 above.

civilisation is to be seen most clearly in the way it treats its prisoners, can South Africa on that count, stand high and stake a rightful claim to a position among the civilised nations of the world? The answer as shown by the findings of this study is unfortunately no, and so will it remain until the foregoing recommendations are given serious consideration.

APPENDIX 1

CHAPTER 2

BILL OF RIGHTS

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2); a court -
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right,

provided that the limitation is in accordance with section 36(1).

- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislation and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12. (1) Everyone has the right to freedom and security of the person, which includes the right-
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
- (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.

Slavery, servitude and forced labour

13. No one may be subjected to slavery, servitude or forced labour.

Privacy

14. Everyone has the right to privacy, which includes the right not to have-
- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized; or
 - (d) the privacy of their communications infringed.

Freedom of religion, belief and opinion

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
- (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising-
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Freedom of expression

16. (1) everyone has the right to freedom of expression, which includes-
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic, freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to-
- (a) propaganda for war;
 - (b) incitement of imminent violence; or

- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Assembly, demonstration, picket and petition

- 17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of association

- 18. Everyone has the right to freedom of association.

Political rights

- 19. (1) Every citizen is free to make political choices, which includes the right-
 - (a) to form a political party;
 - (b) to participate in the activities of , or recruit members for a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right-
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

Citizenship

- 20. No citizen may be deprived of citizenship.

Freedom of movement and residence

21. (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.
- (4) Every citizen has the right to a passport.

Freedom of trade, occupation and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right-
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right-
 - (a) to determine its own administration;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation

may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Environment

24. Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been

agreed to by those affected or decided or approved by a court.

- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure is land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact legislation referred to in subsection (6).

Housing

- 26. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Health care, food, water and social security

- 27. (1) Everyone has the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progression realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

Children

28. (1) Every child has the right-
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;

and

- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Education

29. (1) Everyone has the right -
- (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where the education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institution, taking into account-
- (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practises.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and

- (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent education institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
- (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Access to information

32. (1) Everyone has the right of access to -
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in sub-sections (1) and (2); and
 - (c) promote an efficient administration.

Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right-
- (a) to remain silent;
 - (b) to be informed promptly-
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or

- admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than-
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court, and, if the detention is unlawful, to be released;
 - (e) 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; and

- (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused person has the right to a fair trial, which includes the right-
 - (a) to be informed of the charge with sufficient detail to answer it;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;
 - (j) not to be compelled to give self-incriminating evidence;
 - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (l) not to be convicted for an act or omission that was not an

- offence under either national or international law at the time it was committed or omitted;
 - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the admission of justice.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of

the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when-
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - (b) the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.
- (3) Any competent court may decide on the validity of -
- (a) a declaration of a state of emergency;
 - (b) any extension of a declaration of a state of emergency;
- or

- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) the derogation is strictly required by the emergency; and
 - (b) the legislation-
 - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
 - (ii) conforms to subsection (5); and
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequences of a declaration, may permit or authorise-
- (a) indemnifying the state, or any person, in respect of any unlawful act;
 - (b) any derogation from this section; or
 - (c) any derogation from a section mentioned in column 1 of the Table on Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.
- (6) Whenever anyone is detained without a trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
- (a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
 - (b) A notice must be published in the national Government

Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

- (c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
- (d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
- (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
- (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
- (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
- (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

- (7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows the Court a good cause for re-detaining that person.
- (8) Subsection (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequences of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
- (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

APPENDIX 2

QUESTIONNAIRE FOR AWAITING-TRIAL PRISONERS

Tick (✓) Yes or No or choose the right alternative (A, B, C or D)

1. When you were arrested did you know that you had the right to remain silent?

Yes	No
-----	----

2. Were you informed by the arresting officer that you had this right?

Yes	No
-----	----

3. Did the arresting officer inform you of the consequences of not remaining silent?

Yes	No
-----	----

4. At the time of your arrest were you asked to confess or admit what you had done?

Yes	No
-----	----

5. How long after arrest did it take to bring you before the court?

A	within 48 hours
B	after 48 hours

6. Were you charged on your first court appearance?

Yes	No
-----	----

7. Were you informed of the reason for your continued detention?

Yes	No
-----	----

8. How long have you been in detention?

A	less than one month
B	between one month and six months
C	between six months and one year
D	more than one year

9. Are you able to pay for a legal practitioner?

Yes	No
-----	----

10. If yes, have you been allowed to consult a lawyer?

Yes	No
-----	----

11. If not, has the state appointed one for you?

Yes	No
-----	----

12. Have you tried to challenge the lawfulness of your detention?

Yes	No
-----	----

13. How would you describe the conditions in jail?

A	Inhuman and very bad
B	Bad but manageable
C	Fair, just like home
D	Good, better than at home

14. Are you allowed to write and receive letters?

Yes	No
-----	----

15. Are you allowed to make and receive phone calls?

Yes	No
-----	----

16. Are you allowed visitors?

Yes	No
-----	----

17. Have any of your visitors been turned away?

Yes	No
-----	----

18. Are you allowed to exercise and play some games?

Yes	No
-----	----

19. Are you provided with newspapers and books to read?

Yes	No
-----	----

20. How would you describe the kind of food you are given in prison?

A	Very little and very bad
B	Little but not very bad
C	Just enough and good
D	Very good and more than enough

21. Have you fallen sick since you were detained?

Yes	No
-----	----

22. If yes, were you allowed to see a doctor?

Yes	No
-----	----

APPENDIX 3

QUESTIONNAIRE FOR SENTENCED PRISONERS

Tick (✓) Yes or No or choose the right alternative (A, B, C or D)

1. At the trial, were you informed of the charge with sufficient details?

Yes	No
-----	----

2. Were you given enough time to prepare your defence?

Yes	No
-----	----

3. Was your case heard in a public trial before an ordinary court?

Yes	No
-----	----

4. How long did the trial take?

A	less than 2 weeks
B	between two weeks and two months
C	between two months and six months
D	more than six months

5. Were you present at the trial?

Yes	No
-----	----

6. Did you have the money to afford a lawyer?

Yes	No
-----	----

7. If yes, were you allowed to be represented by a lawyer?

Yes	No
-----	----

8. If not, did the state appoint one for you?

Yes	No
-----	----

9. Did the magistrate inform you that you had a right to be represented by a lawyer?

Yes	No
-----	----

10. Did you testify during the trial?

Yes	No
-----	----

11. Did you call all your witnesses?

Yes	No
-----	----

12. Was the trial conducted in a language you understand?

Yes	No
-----	----

13. Did you require an interpreter?

Yes	No
-----	----

14. Were you provided with an interpreter?

Yes	No
-----	----

15. Had you been previously acquitted or convicted for the crime you are now in jail for?

Yes	No
-----	----

16. Did you apply for leave to appeal?

Yes	No
-----	----

17. If so was the appeal granted?

Yes	No
-----	----

18. Were you satisfied with the way the trial was conducted?

Yes	No
-----	----

19. Were you satisfied with the decision and sentence?

Yes	No
-----	----

20. How would you describe the conditions in jail?

A	Inhuman and very bad
B	Bad but manageable
C	Fair, just like home
D	Good, better than at home

21. Is there any discrimination at this prison?

Yes	No
-----	----

22. Have you been tortured in any way during your imprisonment?

Yes	No
-----	----

23. Have you been caned / sjamboked in jail?

Yes	No
-----	----

24. Are you sometimes made to do forced / hard labour?

Yes	No
-----	----

APPENDIX 4

QUESTIONNAIRE FOR PRISON OFFICIALS (COMMANDER OR AUTHORISED OFFICIAL)

1. Do you separate prisoners on the basis of their sex, age or criminal record?

Yes	No
-----	----

2. How would you describe the accommodation at this prison?

A	over-congested
B	congested but manageable
C	not congested at all, there is enough space for everyone
D	too much space, too few prisoners

3. How would you describe the kind of food given to prisoners?

A	very little and very bad
B	little but not very bad
C	just enough and good
D	very good and more than enough

4. Are prisoners allowed to have suitable exercise (at least one hour in the open air daily)?

Yes	No
-----	----

5. Do you provide reading materials (eg. books, newspapers, magazines, etc) to prisoners?

Yes	No
-----	----

6. Do you provide medical care to prisoners who need it?

Yes	No
-----	----

7. Do you allow prisoners to write and receive letters without any restrictions?

Yes	No
-----	----

8. Do you allow prisoners to make and receive phone calls without any restrictions?

Yes	No
-----	----

9. Do you allow prisoners to be visited by their spouses, relatives, religious counsellors, during the normal visiting hours?

Yes	No
-----	----

10. Do you sometimes punish prisoners by caning / sjamboking them?

Yes	No
-----	----

11. Do you sometimes use excessive force (eg. torture) on some unruly prisoners in order to subdue them?

Yes	No
-----	----

12. Do you sometimes use solitary confinement as a form of punishment for unruly prisoners?

Yes	No
-----	----

13. Do you sometimes make prisoners do hard work as a form of punishment for bad behaviour?

Yes	No
-----	----

INTERNATIONAL CONVENTIONS, TREATIES AND OTHER RELEVANT INSTRUMENTS

- African Charter on Human and Peoples' Rights (1981)
- American Convention on Human Rights (1969)
- American Declaration of the Rights and Duties of Man (1948)
- Basic Principles for the Treatment of Offenders (1990)
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (1975)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- European Social Charter (1961)
- European Standard Minimum Rules for the Treatment of Prisoners (1973)
- Inter-American Convention to Prevent and Punish Torture (1985)
- International Covenant on Civil and Political Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights (1966)
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)

Principles of Medical Ethics Relevant to the Role of Health Personnel,
Particularly Physicians, in the Protection of Prisoners and Detainees
Against Torture and Other Cruel, Inhuman Degrading Treatment or
Punishment (1982).

Revised European Standard Minimum Rules for the Treatment of Prisoners
(1987)

Statute of the International Court of Justice (Annexure to the United Nations
Charter)

United Nations Charter (1945)

United Nations Rules for the Protection of Juveniles Deprived of their Liberty
(1990)

United Nations Standard Minimum Rules for the Administration of Juvenile
Justice (1985)

United Nations Standard Minimum Rules for the Treatment of Prisoners
(1955)

Universal Declaration of Human Rights (1948)

LIST OF ACRONYMS

COSATU	-	Congress of South African Trade Unions
ECOSOC	-	Economic and Social Council
ICCPR	-	International Covenant on Civil and Political Rights
ICD	-	Independence Complaints Directorate
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
IFP	-	Inkatha Freedom Party
ISO	-	Internal Security Organisation (Uganda)
LDU	-	Local Defence Unit (Uganda)
LOMA	-	Law and Order Maintenance Act (Zimbabwe)
MMD	-	Movement for Multi-party Democracy (Zambia)
NACRO	-	National Association for the Care and Resettlement of Offenders (United Kingdom)
NGO's	-	Non-governmental Organisations
NICRO	-	National Institute for Crime Prevention and the Rehabilitation of Offenders
NRM	-	National Resistance Movement (Uganda)
OAS	-	Organisation of American States
POPCRU	-	Police and Prison Officers Civil Rights Union
POW's	-	Prisoners of War
PROP	-	Preservation of the Rights of Prisoners
SAPOHR	-	South African Prisoners' Organisation for Human Rights
SAPS	-	South African Police Services
UHRC	-	Uganda Human Rights Commission
UN	-	United Nations
UNIP	-	United National Independence Party (Zambia)
UNISA	-	University of South Africa
UPDF	-	Uganda Peoples Defence Forces

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