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The use of mechanical restraints by Correctional Services in South Africa and Namibia: *Namunjepo v Commanding Officer, Windhoek Prison* [2000] 6 BCLR 671 (NmS)

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1 Introduction

South Africa is currently suffering a major crime wave. The extent of the problem has reached such proportions that it affects not only the daily lives of the people of South Africa, but also the economy and South Africa's international image. The government is constantly under pressure from the public to take positive measures towards solving the problem. Criminals are not viewed sympathetically.[1]

With these facts in mind, it is understandable that public opinion on the human rights of prisoners is unfavourable. An example is the public outcry in 1999 when the South African Constitutional Court overturned an order of the Pretoria High Court and granted prisoners the right to vote.[2] Public opinion generally regards criminals negatively, requiring their removal from the community as punishment for their crimes.

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1 An example of the South African government's attitude towards crime is the tightening of bail requirements which became applicable with the coming into effect of the Criminal Procedure Second Amendment Act 85 of 1997 on 1 August 1998. Another example is the Parole and Correctional Supervision Amendment Act 87 of 1997 which was assented to by parliament, but which has not yet come into effect. In terms of this latter Act, a court sentencing an offender to a term of imprisonment of two years or longer will be entitled to fix a 'non-parole period' during which parole may not be granted to such an offender.

2 *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

Prisoners are widely seen as having renounced their fundamental rights when they chose to break the law and endanger the community.

The conditions in South African prisons are, at the least, precarious.[3] In practice, these conditions differ greatly from the conditions envisaged by the international community; ideals encouraging not the punishment of societal outcasts, but the rehabilitation of prisoners who had made some wrong decisions. The main cause of the bad conditions in the prisons seems to be overcrowding. This in turn leads to a myriad of related problems including the obvious lack of cell space, food, clothing and blankets, as well as prison staff shortages and the consequent lack of sufficient supervision. This encourages prison violence, the establishment of prison gangs and an increase in jailbreaks, the much criticised placement of juvenile prisoners with adult prisoners,[4] presidential pardons to petty criminals and the release of prisoners on early parole in an effort to alleviate the overcrowding, to name but a few.[5] The Department of Correctional Services does not have the financial resources to address these and other growing problems sufficiently, even though efforts in this regard have been made in the past.[6]

In spite of the chaos that exists in our prisons, warders are expected to be in control of every situation and to maintain discipline among the inmates. This is often a difficult, if not impossible task, taking into account that the prisons are often understaffed, their staff overworked and underpaid. The public demands drastic measures to maintain order in the prisons and specifically to prevent those who have been apprehended for their crimes from escaping from detention. One solution to the latter problem is by means of mechanical restraints, which may even include chains.

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3 See, in general, Africa Watch Prison Project *Prison Conditions in South Africa* (1994).

4 Such placement of juveniles is also unconstitutional — see sec 28(1)(g)(i) Constitution of South Africa Act 108 of 1996.

5 See S Pete 'The politics of imprisonment in the aftermath of South Africa's first democratic election' (1998) 11 *South African Journal of Criminal Justice* 51–83 and S Pete 'The good, the bad and the warehoused': The politics of imprisonment during the run-up to South Africa's second democratic election' (2000) 13 *South African Journal of Criminal Justice* 1–56 for a general discussion on the problems faced by South Africa in this regard, as well as the reactions of the different groups involved in these problems.

6 These efforts include the building of more prisons and the establishment of the new maximum and super maximum prisons, stricter bail regulations, the introduction of correctional supervision and community service as an alternative punishment for petty criminals and a system of electronic tagging for those prisoners qualifying for parole.

2 The position with regard to mechanical restraints in South Africa

In South Africa the use of mechanical restraints is regulated by the Correctional Services Act of 1998 (1998 Act),[7] which repealed the Correctional Services Act of 1959 (1959 Act) as a whole.[8] Both Acts make provision for the use of mechanical restraints in certain circumstances.[9] Neither Act, however, gives a definition of mechanical restraints. Both these Acts make provision for the promulgation of regulations by the Minister of Correctional Services with regard to the permissible mechanical restraints and the manner in which they may be used.[10] The regulations currently in effect are those that have been issued under the 1959 Act, namely the Correctional Services Regulations published by Government Notice No R2080 of 31 December 1965 as amended. These regulations do not list the instruments of restraint that may or may not be used, and are quite vague. Regulation 102 states as follows:

> (1) Restraint shall be applied only in the circumstances and for the purpose prescribed in section 80 of the Act and shall in no circumstances whatsoever be used as punishment.
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> (2) All forms of mechanical means of restraint and the manner in which they are applied, shall be as prescribed: Provided that chains exceeding five kilogram in mass shall not be used.

The only specific limitation has regard to the maximum weight of the chains.

Both Acts also limit the use of mechanical restraints to certain circumstances. The 1959 Act provides that mechanical restraints may only be used when a prisoner is detained in a single cell and if the use is reasonably necessary in the interests of the safety of that prisoner, other prisoners or correctional officials, or to prevent damage to any property or to prevent the prisoner's escape. The 1998 Act restricts the use of mechanical restraints to circumstances in which it proves necessary for the safety of a prisoner or any other person, the prevention of damage to property, when a reasonable suspicion exists that a prisoner may escape or if a court requests that a prisoner be restrained. The 1998 Act further prohibits the use of mechanical restraints, other than handcuffs

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7 Act 111 of 1998, as amended by the Correctional Services Amendment Act 32 of 2001.

8 Act 8 of 1959. Although the 1998 Act has already been assented to and some of its provisions came into effect on 19 February 1999, the date of commencement of the rest of the provisions, including those with regard to mechanical restraints, still has to be proclaimed. The amending Act (32 of 2001) affected numerous of these provisions, including secs 31, 32 and 33. The Amendment Act commenced on 14 December 2001.

9 Sec 80 of the 1959 Act and sec 31 of the 1998 Act respectively.

10 Sec 94(1)(q) of the 1959 Act and sec 134(1)(x) of the 1998 Act respectively.

or leg irons, when a prisoner is brought before a court, unless the court authorises such restraints. Both Acts forbid the use of mechanical restraints as a form of punishment or as a disciplinary measure. The 1998 Act, as a mended, also provides that mechanical restraints in addition to handcuffs or leg-irons may only be used when prisoners are outside their cells.[11]

A further restriction is with regard to the maximum period of time that mechanical restraints may be used. The 1959 Act sets the time limit to 30 days, extendable to 90 days without the permission of the Minister of Correctional Services. The 1998 Act calls for the use of mechanical restraints for the minimum period necessary and to a maximum of seven days. This period may be extended to 30 days, but only after consideration of a report by a medical officer or a psychologist.

Recently the Supreme Court of Namibia delivered judgment in a case involving the use of mechanical restraints in prisons. This case is relevant to the South African situation, because the Acts concerned, the (Namibian) Prisons Act 8 of 1959 (1959 Namibian Act) and its South African counterpart, the Correctional Services Act 8 of 1959, not only share the same number and year in its titles, but actually differ very little in their content. In fact, before 1991 the South African version was also known as the Prisons Act.[12] Section 80 of the 1959 South African Act and the 1959 Namibian Act, dealing with mechanical restraints, are identical. Therefore, while section 80 of the 1959 South African Act is still in force in South Africa, a ruling of Namibian courts on similar legislation is a handy guideline to our judiciary.

3 The facts of the *Namunjepo* case

The five appellants were awaiting trial and were detained at Windhoek prison. Four of the appellants had previously escaped from detention, but had been recaptured. After their recapture, they were put in 'chains'. The fifth appellant, who had not actually escaped, although he had allegedly attempted to, was also put in 'chains'. Their 'chains' consisted of two metal rings with a fastener that was welded closed. The two rings, connected with a metal chain of 30 cm, were then placed on the prisoner's legs, just above the ankle. The chains inhibited walking, exercising and sleeping. The appellants claimed that showering was also a problem, because the chains posed difficulties when removing their trousers. It was further alleged that the rings themselves caused pain, discomfort and abrasions through their constant bumping against the

11 Sec 17 of Act 32 of 2001, amending sec 31 of the 1998 Act.

12 The title of the 1959 South African Act was amended by sec 33(1) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

prisoners' ankles. Each of the appellants had been chained continuously for longer than five months.

4 The constitutionality of section 80 of the 1959 Namibian Act

The application was brought in terms of section 80 of the 1959 Namibian Act, which made provision for the placing of prisoners in irons or other mechanical restraints under certain conditions, subject to a time limit of one month (and in certain circumstances three months) and the restraints weighing no more than five kilograms.

The main question on which the Court had to decide was whether the Namibian Constitution tolerates the use of irons and chains with regard to prisoners under *any* circumstances.[13] The Court tested this practice against article 8 of the Namibian Constitution. This article deals with the right to human dignity. The Court came to the conclusion that, when faced with a question regarding the infringement of article 8(2)(b), the answer should involve a value judgment based on the current values of the Namibian people.[14] The current value test entails a 'value judgment based on the contemporary norms, aspirations, expectations and sensitivities of the Namibian people'.[15] No evidence was apparently led in this regard, and the court agreed with the court *a quo* that parliament, as the chosen representatives of the peoples of Namibia, is one of the most important institutions to express these 'current values'.[16]

The Court then proceeded to formulate such a value judgment by interpreting the Constitution. It was held that although imprisonment infringes on some of the human rights of a person, it does not follow that a prisoner may be deprived of every basic right. A prisoner cannot be regarded as a person without dignity.[17]

The court consequently concluded unanimously that the practice of placing prisoners in leg irons or chains was unconstitutional on the grounds, firstly, that it was a humiliating experience which reduced the person in question to 'the level of a hobbled animal whose mobility is limited so that it cannot stray'[18] and, secondly, that it was a reminder of the practice of slavery. The court held that[19]

13 *Namunjepo v Commanding Officer, Windhoek Prison* [2000] 6 BCLR 671 (NmS) 683C.
14 As above, 678F.
15 As above, 679B.
16 As above, 682B.
17 As above, 680D.
18 As above, 683D.
19 As above, 683E.

> [t]o be continuously in chains or leg irons and not to be able to properly clean oneself and the clothes one is wearing, sets one apart from other fellow beings and is in itself a humiliating and undignified experience.

Placing a prisoner in leg irons or chains therefore constitutes degrading treatment.[20] The court also pointed out that not even a general public outcry against the escalating incidence of crime could justify the chaining of a prisoner.[21]

5 Comments on the decision

The main point of criticism against this judgment is that the Supreme Court declared unconstitutional the use of leg irons or chains as such, without considering the possibility of a limited use of these restraints that would possibly not be in conflict with the Constitution. The court came to a hurried conclusion that was influenced by emotion based on the personal circumstances of the appellants in the case under discussion. The infringement does not lie in the restraint of a prisoner *per se*, but in the *manner* and *excessive length* of the restraint to which the appellants had been subjected in the particular case. Not being able to remove one's clothes for a period exceeding five months because of inhibiting and painful chains on one's ankles and subsequently being prevented from exercising, showering and sleeping are clearly infringements of that person's right to dignity. One can understand that the court was influenced by the fact that situations such as these still exist in modern democracies that espouse civilised methods of punishment. One can also understand the court's reasoning in declaring unconstitutional the treatment of the appellants in the particular case.

But what is more difficult to understand, is how the court could overlook the useful purpose served by the moderate use of leg irons and chains. In a society where crime is an everyday occurrence and jail breaks are not considered unusual any more, any strategy that does not infringe the dignity of a prisoner and is not unconstitutional but which can help to establish order in an overcrowded prison is, at the least, to be considered before being disposed. In my opinion the unconstitutionality *in casu* does not lie in the use of the leg irons and chains *per se*, but in the way in which the legislation dealing with the subject was transgressed. The use of leg irons or chains for a minimum period of time to contain a prisoner who is suspected of planning (another) escape should not be considered unconstitutional as long as the restraints are removable and, indeed, removed at certain times to enable the prisoner to sleep, exercise or shower. In other words, as long as the use of leg irons

20 As above, 683I.

21 As above, 683F.

and chains does not interfere with the dignity of the prisoner, such use should not be declared unconstitutional.

A fact which supports my conviction is that the application for an order declaring unconstitutional the relevant sections was dismissed by the High Court.[22] This ruling supports the idea that the matter is not straightforward and that a difference in opinion exists on the question whether or not the Supreme Court was correct in finding unconstitutional the use of placing prisoners in leg irons or chains.

The Namibian courts do not follow the two-stage enquiry that South African courts have adopted to constitutional interpretation, as the Namibian Constitution does not provide for a general limitation clause.[23] The court never asked the question whether it might be reasonable under certain circumstances to infringe a person's right to dignity by means of mechanical restraints.

Although the fundamental rights and freedoms contained in the Namibian Constitution and entrenched in the Bill of Rights may be limited subject to certain provisions,[24] article 24(3) of the Namibian Constitution expressly prohibits any derogation of a number of these rights and freedoms, including the right to dignity as entrenched in article 8.[25] In *Ex parte Attorney-General Namibia: In re Corporal Punishment by Organs of State*[26] the Namibian Supreme Court held that the protection afforded by article 8 is absolute and unqualified[27] and that no limitation of the right to human dignity is permitted. Mahomed AJA held that

> [a]ll that is therefore required to establish a violation of article 8 is a finding that the particular statute or practice authorised or regulated by a state organ falls within one or other of the seven permutations of art 8(2)(b),

and that 'no questions of justification can ever arise'.[28]

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22 As above, 673E–G.

23 For an example of the application of the two-stage enquiry in the South African courts, see *S v Williams* 1995 (3) SA 632 (CC) which dealt with corporal punishment. The approach was constitutionally required: see sec 33 of the 1993 South African Constitution and sec 36 of the 1996 South African Constitution. The Namibian Constitution does not contain a general limitation provision, although sec 21(2) provides for 'reasonable restrictions' to the 'fundamental freedoms' listed in sec 21(1).

24 Art 22 Namibian Constitution. See G Carpenter 'The Namibian Constitution — *ex Africa aliquid novi* after all?' in D Van Wyk *et al* (eds) *Namibia constitutional and international law issues* (1991) 39–40; J Diescho *The Namibian Constitution in perspective* (1994) 60–61 & GJ Naldi *Constitutional rights in Namibia: A comparative analysis with international human rights* (1995) 30–36 for interpretations of this clause.

25 According to Carpenter (n 22 above 41) the protection conferred in terms of art 24(3) can only be placed at risk if there is a total collapse of the Constitution.

26 1991 (3) SA 76 (NmS).

27 As above, 86D & 96G.

28 As above, 86D–E. Compare *S v Tcoeib* 1993 (1) SACR 274 (Nm) in which the Namibian court held that although the right to dignity is inviolable, art 8 has to be read as a whole and that the language of the article did not prohibit the violation of human dignity by a lawful sentence of court. See Naldi (n 22 above) 51.

It is to be debated whether, if this case had been heard by a South African court, the infringement of the right to dignity would not have been found to be justifiably limited in terms of our limitations clause. Could it not perhaps be reasonable to physically restrain a prisoner, who has already escaped from detention once, by means of leg irons, in order to prevent possible future escapes and maintain order in general in the prison?[29] A question which further comes to mind is: Should the limited use of mechanical restraints be an exception to the inviolability of the right to human dignity, which mechanical restraints classify as lawful? In the *Namunjepo* case the court did not answer this question directly, although it did refer in passing to handcuffs as excluded from the declaration of unconstitutionality.[30] The court made a ruling on leg irons and chains only. This means that the use of mechanical restraints *per se* was not included as constituting degrading treatment.

No comprehensive list of the admissible and prohibited forms of mechanical restraints exists.[31] The only definite prohibition as recognised internationally is stipulated in article 33 of the Standard Minimum Rules for the Treatment of Prisoners with regard to the use of chains or irons as means of restraint.[32] Article 33 further clearly states that even accepted instruments of restraint may never be applied as punishment and then only in certain circumstances (that is (a) as a precaution against escape during a transfer; (b) on medical grounds; and (c) to prevent a prisoner from injuring himself or herself or others or from damaging property) and for limited periods of time.[33] Permissible instruments of restraint include handcuffs, strait-jackets[34] and fetters. This once again supports

29 See *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another* 1999 (4) SA 1108 (ZSC) 1113E for the opinion of the Zimbabwe Supreme Court in this matter.

30 673G.

31 Although international documents and treaties, such as The Universal Declaration of Human Rights of 1948, The European Convention on Human Rights of 1949 and The International Covenant on Civil and Political Rights of 1966, do not specifically deal with the use of mechanical restraints, they do prohibit torture and cruel, inhuman and degrading punishment or treatment. Other international documents in this regard are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, The Inter-American Convention to Prevent and Punish Torture of 1985 and art 5 of the Code of Conduct for Law Enforcement Officials of 1979.

32 Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council on 31 July 1957.

33 Art 34.

34 Art 33 of the Standard Minimum Rules for the Treatment of Prisoners mentions not only handcuffs and strait-jackets, but also chains and irons. However, the same article specifically forbids the use of chains or irons as restraints. Thus it seems that not only may chains and irons not be applied as forms of punishment, but that it may not be used in any form at all.

the notion that the use of instruments of restraint is not prohibited *per se*, but if they are used in accordance with certain basic limitations and requirements, they do not constitute an infringement on a person's dignity.

6 The position in South Africa

The 1998 Act was rewritten from scratch to make it compatible with the new Constitution and the Bill of Rights.[35] The new Act contains many provisions to ensure that prisoners are not stripped of their human dignity and acknowledges the basic human rights of prisoners. With this in mind, it therefore might surprise someone who has read the *Namunjepo* decision to find that the South African legislator not only included the permissible use of mechanical restraints, but also went further and authorised the use of force[36] as well as non-lethal incapacitating devices.[37] One might ask oneself if these stipulations do not go against the grain of the Constitution and the idea that prisoners have human rights and dignity. The fact is that the 1998 Act takes into account the principle of human rights and especially human dignity. The provisions in the 1998 Act impose much stricter requirements than the 1959 Act.[38] The legislator did not leave out these stipulations, because these mechanisms are necessary to control the chaos that would otherwise exist in South African prisons.

7 Conclusion

Abhorrent prison practices are as old as humanity itself. It is not a phenomenon found only in medieval times or underground dungeons. In spite of the official recognition of human rights in most countries, the infringement of these rights still takes place every day. Prisons are by nature isolated from the rest of the community. Society is not interested in what goes on in prisons, as long as the criminals are kept inside and removed from the community. With the public turning a blind eye, prisoners are often at the mercy of their warders and are often subjected to cruel, inhuman and degrading treatment or punishment.

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35 See the Preamble of the 1998 Act.

36 Sec 32. Also see sec 18 of Act 32 of 2001, which allows the use of force only 'when it is necessary' for self-defence, the defence of another person, preventing an escape and protecting property.

37 Sec 33. Also see sec 19 Act 32 of 2001.

38 Examples are the allowed time period for the use of mechanical restraints, and the requirement that this period may only be extended after consideration of a medical or psychological report.

It is, however, important that we remember that prisoners have (human) rights and that we protect these (human) rights as diligently as we protect those of the rest of society. Perhaps the most important remark of the court in the *Namunjepo* case was not the conclusion that the uninterrupted chaining of a prisoner for five months is unconstitutional, but that imprisonment does not deprive a prisoner of all basic rights. This in turn implies that a prisoner's rights may be limited, as long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.