

## Emerging trends in the protection of prisoners' rights in Southern Africa

*Sufian Hemed Bukurura\**

Senior lecturer, Faculty of Law, University of Namibia

Traditionally, courts in many jurisdictions have adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy awareness of realism that prison administrators are responsible for securing their institutions against escapes or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems.<sup>1</sup>

[P]risoners 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. Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and their liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.<sup>2</sup>

---

\* LLB (Hons) (Dar es Salaam), LLM (Warwick), Ph D (Cambridge); shbukurura@unam.na; Many friends and colleagues deserve thanks for their invaluable assistance and encouragement, among them William McClain, Chuks Okpaluba and Pempelane Mufune. Special acknowledgement to JW Nyoka (Deputy Commissioner of Prisons, Namibia) for his insightful discussion of the issues and sharing of his enormous experience in prison administration.

<sup>1</sup> Per Gubbay CJ in the case of *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) 60.

<sup>2</sup> Per Sachs J in *August and another v Electoral Commission and others* [1999] 4 BCLR 363 (CC) 372–373).

## 1 Introduction

The controversy surrounding the treatment of people admitted into prison, whether upon court sentence or awaiting trial, is a familiar subject to correctional services staff around the world, including those in Central and Southern Africa. One of the central issues is whether such prison inmates have any rights whatsoever.<sup>3</sup> Some of the inmates know that they have some rights, and insist that those rights be respected. Instances are known where prison authorities have found themselves being summoned to court to explain how prisoners under their care were being treated. However, until fairly recently most governments did not have a high regard for prisoners' rights, and courts, when called upon to decide such issues, were generally inclined to decide in favour of prison authorities.

In the past 20 or so years, the situation appears to have changed dramatically.<sup>4</sup> In most countries, constitutions with detailed provisions for the protection of the fundamental rights and freedoms of all people, including prison inmates, have been enacted. In addition, governments have, of their own volition, also established other mechanisms to monitor, investigate and report on conditions in prisons in general, and the treatment of inmates in particular. Legislation has also been passed which makes specific provisions regarding the rights of inmates. Besides government initiatives, different non-governmental organisations (NGOs) have also become interested in prison life.<sup>5</sup> Partly as a result of all these mechanisms and other factors, courts have become more sympathetic, and have expressed their unreserved willingness, to depart from the past 'hands-off' approach in the protection of prisoners' rights. These developments show that, of late, prisoners have scored major victories in the battle for the protection of their human rights against intrusive prison authorities.

<sup>3</sup> It is important to emphasise that any meaningful discussion of inmates' rights must be located in the context of multiple factors including, the protection of individual rights in general, the end of the cold war era, and most importantly, the changing theories of crime and punishment. J Braithwaite 'Crime in a convict republic' (2001) 64 *Modern Law Review* 11, for example, discusses the practical aspects of the changing theories of punishment in the context of Australia.

<sup>4</sup> For a discussion of how grim the situation was in apartheid South Africa, see for example G Rudolph 'Man's inhumanity to man makes countless thousands mourn: Do prisoners have rights?' (1979) 96 *South African Law Journal* 640 and D van Zyl Smit ' "Normal" prisons in an "abnormal" society? A comparative perspective on South African prison law and practice' (1987) 3 *South African Journal on Human Rights* 147.

<sup>5</sup> See eg the tireless and phenomenal achievements by the Howard League (named after John Howard) established in 1866. Although the Penal Reform International, on the other hand, was only established in 1989, its campaigns are well known, so are its enormous worldwide successes.

This paper outlines different mechanisms that have recently been put in place in recognition and protection of prisoners' rights. These range from international instruments, national mechanisms such as constitutional provisions, the establishment of offices of the ombudsmen, to favourable legislation. How courts have dealt with prisoners' rights in different countries in the region will also be examined. The way in which prison authorities and staff handle inmates under their care has come under strict scrutiny in recognition of inmates' rights. What this means in practical terms is that prison officers not only have to be increasingly aware of and sensitive to prisoners' rights; they also have to change their working practices to conform with these important individual rights and freedoms. These are the challenges facing prison authorities and personnel in the new millennium.

## 2 Kinds of safeguards

In order to have a clear grasp of what prisoners' rights are and how they are protected, three levels of safeguards need to be borne in mind, namely international standards, regional mechanisms, as well as measures provided by each individual nation. For want of time and space, international and regional mechanisms will only be mentioned in passing, while national safeguards, including court decisions, will be examined in a little more detail.

### 2.1 International and regional standards

The world in which we live is nowadays referred to as a global village. It is in that respect, too, that the welfare of inmates is no longer only a matter of concern to members of inmates' families and individual nations. The international community is interested in, and has taken steps, to ensure that standards of the civilised community are adhered to, and inmates, as members of the civilised world, are treated in accordance with these same standards.

Several international instruments have been agreed upon and ratified by governments under the auspices of the United Nations (UN).<sup>6</sup>

---

<sup>6</sup> The following selected international treaties are relevant to prison administration:

- (i) Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXI) of 13 May 1977;
- (ii) Basic Principles for the Treatment of Prisoners: adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990;
- (iii) Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment: adopted by General Assembly resolution 43/173 of 9 December 1988;

Ratification of these instruments makes them binding on, and creates obligations to, member countries. Whereas those standards could be breached with impunity in the past, governments have come to understand that it is in their best interest to comply.<sup>7</sup>

All the countries in the Southern African region are members of the African Union (AU).<sup>8</sup> Its predecessor, the Organisation of African Unity (OAU) passed the African Charter in 1986 and pledged to adhere to and protect human rights.<sup>9</sup> It is in accordance with article 30 of the Charter that the African Commission on Human and Peoples' Rights came into existence. Recently, a decision to create an African Court of Human Rights was taken.<sup>10</sup> These initiatives suggest that heads of African governments are continually committing themselves, and expressing

- 
- (iv) Code of Conduct for Law Enforcement Officials: adopted by General Assembly resolution 34/169 of 17 December 1979;
  - (v) Basic Principles on the use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990;
  - (vi) United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990;
  - (vii) United Nations Rules for the Protection of Juveniles Deprived of their Liberty: adopted by the United Nations General Assembly resolution 45/113 of 14 December 1990;
  - (viii) The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 (entry into force 23 March 1976);
  - (x) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (entry into force on 26 June 1987, in accordance with art 27(1)).

Most of this information has been obtained from United Nations *Human rights and law enforcement: A manual on human rights training for the police* (1997). See also NS Rodley *The treatment of prisoners under international law* (1987), and JW Palmer *Constitutional rights of prisoners* (1997). Also D van Zyl Smit 'South African prisons and international law' (1988) 4 *South African Journal on Human Rights* 21.

<sup>7</sup> n 5 above.

<sup>8</sup> For the Constitutive Act and a discussion, see E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

<sup>9</sup> Organisation of African Unity *African Charter on Human and Peoples' Rights* (also referred to as the African or Banjul Charter) (adopted 26 June 1981, and entered into force on 21 October 1986). See also F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 47–116. On the influence the European Convention had on England, for example, see G Zellick 'The rights of prisoners and the European Convention' (1975) 38 *Modern Law Review* 683; also 'Human rights and the treatment of offenders' in JA Andrews (ed) *Human rights in criminal procedure: A comparative study* (1982) 375–416. See also JM Schone 'The short life and painful death of prisoners' rights' (2001) 40 *Howard Law Journal* 70–73.

<sup>10</sup> Organisation of African Unity *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted on 9 June 1998). See also M Mutua 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

their willingness, to protect and safeguard the human rights of their people, including inmates, in accordance with international and regional standards.

## 2.2 National mechanisms

Whereas the enumerated international and regional instruments are drafted elsewhere by bodies to which national governments participate, they are assumed to be universal and of general application, and apply to and bind those countries that are signatories. At the national level, however, different ways and means of protecting individual rights in general, and rights of inmates in particular, are initiated and made by national organs themselves. In most instances national efforts are taken to harmonise national laws, and bring them in line with international standards, mentioned earlier. In that respect some of the national measures of protection have become so common and widespread to the extent that they are getting more and more standardised. The following are only a few examples.

### 2.2.1 *Constitutional safeguards*

With the advent of the third wave of democratisation, constitutions of different countries recognise and make provision for basic fundamental rights and freedoms of individuals. As will be shown below, prison inmates are first and foremost human beings, who are also entitled to enjoy those constitutional protections.

Chapter 3 of Zimbabwe's Independence Constitution of 1980, for example, made detailed provisions for fundamental rights and freedoms (styled as a declaration of rights),<sup>11</sup> and ten years later, in 1990, fundamental rights and freedoms were incorporated in the Namibian Constitution.<sup>12</sup> South Africa followed in 1993. The people of South Africa, like their Namibian counterparts, suffered immensely during the apartheid era. With democratisation, these people were not only eager to get rid of their tortuous past; they also recognised the urgent need to make a fresh beginning. The Preamble to the 1993 Interim Constitution of South Africa, for example, expressed the desire of building a bridge from the past into the future in the following words:

---

<sup>11</sup> For a detailed discussion of the bill of rights in post-colonial commonwealth Africa, see JS Reads 'Bills of rights in the third world: Some commonwealth experiences' (1973) 6 *Verfassung und Recht in Ubersee* (VRU) 21. Fundamental rights and freedoms provisions in the Zimbabwe Independence Constitution were not to be amended for a period of 10 years after independence.

<sup>12</sup> It must be emphasised that although most of the rights protected by different constitutions may bear some resemblance, there are important differences in the wording of the respective provisions.

This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The Constitution of Namibia captures this background succinctly in the preamble as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid. . . .

In the case of Zimbabwe, chapter 3 was not to be amended for a period of ten years after independence. The Namibian Constitution, on the other hand, made an express undertaking in article 25(1) that the rights enshrined in chapter 3 would never be reduced. Tanzania (which became politically independent as Tanganyika in 1961), on the other hand, did not have a bill of rights until 1984, and even then, the rights in question remained suspended for another four years until 1988.<sup>13</sup>

As part of the provisions protecting individual human rights, the Constitutions of Namibia (article 8) and Mozambique (article 70(2)) (both passed in 1990), outlawed the death penalty as a form of punishment. Law makers in the two countries took the bold step of abolishing capital punishment in the Constitution, instead of leaving the matter to be decided by the higher courts.<sup>14</sup> In recognition of these countries' past, the respective governments have taken deliberate steps to protect and safeguard the rights of their own people, including those of inmates.

<sup>13</sup> See Tanzania Constitution (Fifth) (Amendment) Act 15 of 1984, which incorporated a bill of rights into the 1977 Constitution. These provisions, however, were suspended (not to become effective) for four years (sec 5(2)). See CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 12.

<sup>14</sup> It is known that parties to the constitutional negotiation process in South Africa could not agree on a solution to the death penalty problem. See F Viljoen 'The impact of fundamental rights on criminal justice under the Interim Constitution (pre-trial to prison)' (1994) 27 *De Jure* 231 247 and D Davis 'Democracy and integrity: Making sense of the Constitution' (1998) 14 *South African Journal on Human Rights* 127 131. For a detailed discussion on the campaign against the death penalty around the world, see the judgments of the Constitutional Court in *S v Makwanyane and another* [1995] 6 BCLR 665 (CC).

### 2.2.2 Governmental institutions

In addition to constitutional provisions, some governments have gone even further and established human rights watchdog institutions. Where such have been established, they are funded by governments from taxpayers' money, in itself further evidence of their commitment to human rights. In some instances, legislation establishing such institutions guarantees their autonomy and operational independence.<sup>15</sup> Chapter 9 of the Constitution of the Republic of South Africa 1996, for example, establishes what are known as state institutions supporting constitutional democracy.<sup>16</sup> Institutions relevant to this discussion include the Human Rights Commission and the Public Protector. Tanzania, like South Africa, established the Permanent Commission of Inquiry in 1967, and most recently passed a law setting up the Human Rights Commission. Namibia, like other countries in the region, has an independent Ombudsman.<sup>17</sup>

The Namibian Ombudsman, for instance, has a mandate to investigate human rights abuses and reports annually to parliament. Inmates have exercised their legal rights, granted by section 67(2)(a) of the Prison Act 1998, to report their grievances, without censorship, to the Ombudsman. Since the formation of the Ministry of Prisons and Correctional Services in 1995, complaints emanating from prisons have made out a

<sup>15</sup> Human Rights Watch report 'Government human rights commission in Africa: Protectors or pretenders' <<http://www.hrw.org/reports/2001/africa>> (accessed 31 January 2002) provides a critical assessment of the performance of these institutions.

<sup>16</sup> For a detailed discussion of South African constitutional institutions established under ch 9, see J Sarkin 'An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission for Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa' (2000) 15 *SA Public Law* 385; and 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587.

<sup>17</sup> The institution of ombudsman also exists in Botswana, Malawi, Lesotho, Zambia and Zimbabwe. For constitutional provisions and enabling legislation, see E Kasuto & A Wehmhormer (eds) *The Ombudsman in Southern Africa: Report of a sub-regional conference* (1996). For a detailed discussion of a history of ombudsman in Africa and its variants, see VO Ayeni 'The ombudsman concept in Southern Africa: Evolution, problems and prospects' in E Kasuto & A Wehmhormer (eds) *The Ombudsman in Southern Africa: Report of a sub-regional conference* (1996) 27–52 and 'From Tanzania to Gambia: The ombudsman institution in Africa at the turn of the millennium' (Conference papers of the 6th Africa Regional ombudsman conference, held in Windhoek, Namibia 18–22 October 1999). Also GN Barrie 'The ombudsman: Governor of the government' (1970) 87 *South African Law Journal* 224. See also J Hatchard 'The institution of the ombudsman in Africa with special reference to Zimbabwe' (1986) 35 *International and Comparative Law Quarterly* 255 and 'The ombudsman in Africa revisited' (1991) 40 *International and Comparative Law Quarterly* 937.

large percentage of the overall complaints made to the Ombudsman every year.<sup>18</sup>

### 2.2.3 'Friendly' correctional services legislation

Some countries in the region have amended or repealed their outdated legislation governing prison administration bringing them in line with international standards, and in some cases with their own constitutional provisions. In this respect, South Africa is the best example. The Preamble to the Correctional Services Act 111 of 1998 states as follows:<sup>19</sup>

Preamble

With the object of changing the laws governing the correctional system and giving effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners;

Recognising —  
international principles on correctional matters;

Regulating —  
the release of prisoners and the system of community corrections;  
in general, the activities of the Department of Correctional Services; and

Providing —  
for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services. . . .

Where outdated prison administration legislation has not been repealed or amended, as was the case in Namibia between 1990 and 1998, courts have been asked, and have stepped in, to examine whether actions taken and decisions made by prison authorities were in conformity with

<sup>18</sup> Ch 10 arts 89–94 of the Namibian Constitution and the Ombudsman Act 7 of 1990. In the Ombudsman's Annual Report for the year 1999, it was suggested that '[t]he increase in complaints against the Prison Service might be an early indication of deteriorating prison conditions which should be considered by prison authorities'. The statistics below show the number of complaints received by the office of the Ombudsman in Namibia between 1995 and 2000. The numbers, which have been extracted from various Ombudsman annual reports must, however, be read cautiously because they do not show how many of the complaints are, upon investigation, found to be genuine or otherwise.

**Year — Number of complaints received**

1995 — 40  
1996 — 88  
1997 — 85  
1998 — 103  
1999 — 194  
2000 — 226

From 1996 the Ombudsman has been visiting a number of prisons every year. See Ombudsman annual reports (1996 at 7, 1998 at 7, 1999, at 18 and 2000 at 20).

<sup>19</sup> The passage of the South African Correctional Services Act 1998 was preceded by a White Paper (WPG-94) as well as the New Legislative Framework for Corrections. See Government Notice 1155 of 1995, *Government Gazette* 16804. The Act was approved on 11 September 1998 and assented on 19 November 1998. It is very unfortunate that only a few selected number of sections of that Act have so far been brought into effect (19 February 1999). See South African *Government Gazette* GG 19778.

constitutional provisions. Offensive provisions and unacceptable practices have in some cases been found to be unconstitutional and invalid, as will be shown below.

#### 2.2.4 *Monitoring NGOs*

Besides governmental measures and initiatives outlined above, there are also mechanisms initiated by non-governmental organisations. These organisations, which operate at both the national and international level, monitor and report on human rights in general and, particularly, about the rights of inmates. The strength of these bodies has been enhanced by their recognition by international human rights monitoring organisations. Amnesty International and Human Rights Watch are well known for their vigilant work on human rights generally, and prisoners' rights in particular. Several more exist.

NGOs in various countries report annually on the human rights (including the rights of inmates) situations in their respective countries. Two examples come to mind: the South African Prisoners' Organisation for Human Rights (SAPOHR) and the National Society for Human Rights of Namibia (NSHR). NSHR, for instance, has an observer status with the African Commission on Human and Peoples' Rights and the Economic and Social Council of the United Nations.<sup>20</sup> The Legal Assistance Centre (a public interest law centre in Namibia) concentrates on public interest related cases, including those in which the rights of prison inmates are concerned.<sup>21</sup>

In each country local NGOs have recognised the need to form umbrella organisations to co-ordinate their efforts, avoid duplication and share resources. In the Kingdom of Swaziland, for example, the Human Rights Association of Swaziland (HUMARAS) co-ordinates several local NGOs, as are the Namibian Non-Governmental Forum (NANGOF) and the Tanzania Non-Governmental Organisations (TANGO), among many others. At the regional level these NGOs have created a co-ordinating body, known as the Southern African Human Rights Non-Governmental

---

<sup>20</sup> See National Society for Human Rights of Namibia (NSHR) *The state of prisons and detention conditions* (1995). Like other human rights NGOs in many countries, the NSHR does not appear to be popular with the Namibian government. On how governments respond to human rights reports, see S Cohen 'Government responses to human rights reports: Claims, denials, and counterclaims' (1996) 18 *Human Rights Quarterly* 517. The role NGOs can play in the promotion and protection of human rights in general is discussed in detail by CE Welch *Protecting human rights in Africa: Strategies and roles of NGOs* (1996), especially ch 2 42-83.

<sup>21</sup> Public interest law firms, like the Namibian Legal Assistance Centre, exist and operate in other countries, for example, Lesotho (Community Legal Resource Centre); South Africa (the Legal Resource Centre, Community Law Centre, etc); Tanzania (Legal and Human Rights Centre and the Zanzibar Legal Services Centre); Zimbabwe (Zimrights), among others.

Organisations Network (SAHRNGON) to promote human rights, including those of prison inmates. SAHRNGON representatives hold their meeting in tandem with Southern African Development Community (SADC) heads of states so that their presence can be felt and their voices heard by governments.

### 3 Examples of what courts have decided on inmates' rights

Courts are usually regarded as the custodians of justice and guardians of fundamental rights and freedoms. This is also true in regard to the role they play in the protection of inmates' rights. As indicated by Sachs J, in the introductory quotation to this article, an inmate who has been treated unfairly, or whose rights have been unlawfully infringed, is entitled not only to approach the courts, but also to an appropriate remedy where the alleged infringement is proven. This is based on a long established legal rule expressed in Latin as *ubi ius ibi remedium* (meaning that where there is a right there is a remedy). The following are only a few examples.

#### 3.1 South Africa

The South African process of constitutional negotiations led to the formulation of a constitution with unique features. South African courts, on their part, have been willing to lead the way to establish how inmates should be treated under the new dispensation. Prison administration legislation and practices found not to be in conformity with constitutional requirements have been set aside. A few illustrations are offered below.

In the case of *S v Makwanyane and another*<sup>22</sup> the Constitutional Court had to decide an issue that South African constitutional negotiators (unlike their counterparts in Mozambique and Namibia) shunned; that is whether the death penalty was constitutional. All members of the Court unanimously decided that it was not.<sup>23</sup> They observed that the death penalty was a violation of the right to life and cruel, inhuman and degrading in nature. The death penalty was also an invasion of human dignity, and the nature of its imposition was arbitrary.

<sup>22</sup> 1995 (3) SA 391(CC), [1995] 6 BCLR 665 (CC), 1995 (2) SACR 1 (CC). See n 17 above.

<sup>23</sup> See also the case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General Zimbabwe and others* 1993 (4) SA 239 (ZS) in which death row prisoners contested the constitutionality of their indefinite detention, as death row prisoners, without any clear indication as to when their death penalty was to be implemented. Taken together with the prison conditions in which those death row prisoners were held, the court found sufficient reasons to set aside the death penalty and substitute it with life imprisonment.

A few days later, the same Constitutional Court was faced with another question regarding the rights of inmates: whether corporal punishment by organs of state was constitutional. In the case of *S v Williams and Others*,<sup>24</sup> in a unanimous decision, the court said it was not.<sup>25</sup>

South African prisoners<sup>26</sup> also fought for their right to vote in general and local government elections, and subsequently won it in the Constitutional Court. See the case of *August and another v Electoral Commission and Others*.<sup>27</sup>

In the case of *Van Biljon and others v Minister of Correctional Services and Others*<sup>28</sup> four prison inmates who were HIV positive asked the high court to intervene in their demand for the right of access to medical care, including special medication like AZT, ddl, 3TC or ddC treatment, the cost to be borne by the state. The Department of Correctional Services argued that prisoners should have access to health care equal to that available to any other patient attending a provincial hospital. In such hospitals, it was argued, AZT was only available to patients whose conditions had developed to full-blown AIDS. In the case in question the prisoners' conditions were only at an asymptomatic stage of the disease. In effect the Department relied on the defence of budgetary constraints.

The court considered whether prisoners were constitutionally entitled to special medication and whether the state was obliged to pay for such treatment. Put differently, the question was whether the rights of prisoners were stronger than the rights of people outside prison. Justice Brand looked at article 35(2)(e) of the Constitution, 1996, which provides that '[e]veryone who is detained, including a sentenced prisoner, has a right . . . the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. The judge decided in favour of the inmates. In the course of the judgment he commented that prison conditions were more likely to give

<sup>24</sup> 1995 (3) SA 632 (CC), [1995] 7 BCLR 861 (CC), 1995 (2) SACR 251 (CC).

<sup>25</sup> After Namibia's independence, the Attorney General asked the Supreme Court to decide whether the use of corporal punishment by organs of state was constitutional. See *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC), 1991 (3) SA 76 (Nm).

<sup>26</sup> Sentenced and awaiting trial.

<sup>27</sup> [1999] 4 BCLR 363 (CC). Sachs J, who wrote the judgment, in which all court members concurred, observed as follows: 'Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of universal franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood . . . The vote of each and every citizen is a badge of dignity and of personhood' (372).

<sup>28</sup> 1997 (2) SACR 50 (C), also reported as *B and others v Minister of Correctional Services and others* [1997] 6 BCLR 789 (C).

rise to infections, therefore placing a heavier responsibility on prison authorities.

Commentators have noted that Justice Brand had made a brave decision. None of them, however, found the decision to be faulty.<sup>29</sup> In the light of dwindling resources, the nature of the problem of the HIV/AIDS pandemic and current levels of prison overcrowding, this decision will have grave implications to prison authorities.<sup>30</sup>

*Strydom v Minister of Correctional Services and Others*<sup>31</sup> arose out of prison practices in a maximum-security prison. Prison authorities had allowed certain categories of prisoners the privilege of obtaining, keeping and making use of electrical appliances in their prison cells. When the maximum-security section of the prison was built, no plug points were provided in single cells, but prisoners, through their own ingenuity (including illegal connections), procured power for their appliances. The practice was widespread and even acquiesced to by prison authorities. At some stage, the authorities decided to bring the practice to a halt. The prison authorities planned to install electric plugs in the cells and money was budgeted. The Department of Works (who was responsible for installing the connections) recommended that it could not proceed with that work until all illegal electricity connections were removed. Around the same time, prison authorities had launched a campaign to improve discipline and security in the prison, including the removal of unauthorised wiring and seizure of all electrical appliances not specified in prison regulations.

<sup>29</sup> See comments in 1997 *Annual Survey of South African Law* 809. Also F ka Mdumbe 'Socio-economic rights: *Van Biljon v Soobramoney*' (1998) 13 *SA Public Law* 460, 461, and H Corder & D van Zyl Smit 'Privatised prisons and the Constitution' (1998) 11 *South African Journal of Criminal Justice* 475 480. Whether a sick person convicted of a crime should be given a lenient sentence was one of the issues considered by courts in Zimbabwe and South Africa. In both cases, however, no definitive answer was given. Instead, the courts only made passing remarks. See *S v Mahachi* 1993 (2) SACR 36 (Z), an HIV-positive person, and *S v Mazibuko and others* 1997 (1) SACR 255 (W), a person rendered quadriplegic by wounds suffered as a result of shootout between police and suspects, of which the accused was a party. For a comment on the Mahachi case, see Z Achmat & E Cameron 'Judges and policy on AIDS: Prisons and medical ethics' (1995) 112 *South African Law Journal* 1 2.

<sup>30</sup> By 31 December 1999, Namibian prisons with a capacity of 3 514, had a total of 4 620 prisoners. Tanzanian prisons, on the other hand, have a capacity of 21 188 prisoners. As of 1 March 1999, there were 43 866 inmates. See LS Mmbaga 'Overcrowding in prisons in Tanzania: A statistical analysis' paper presented at the seminar on prisons and alternative sentencing as a human rights issue, Arusha, Tanzania, 6–10 April 1999. Note that Namibia has a population of about 1,8 million while that of Tanzania is about 30 million. From time to time, prison authorities in different parts of the world experience the problem of overcrowding. There is a general understanding that the problem is invariably associated with other prison difficulties like inadequate living space, poor ventilation and possible eruption of epidemics.

<sup>31</sup> [1999] 3 BCLR 342 (W).

One of the inmates approached the High Court to prevent prison authorities from removing electrical appliances in the possession of prisoners in his section of the prison. The applicant relied on section 10 of the Constitution, which protects human dignity, and section 12(1)(c) that guarantees freedom and security from all forms of violence. On their part, prison authorities argued that they had definite plans for the installation of electric plugs in the cells. They insisted, however, that they could neither be compelled to do so immediately at the insistence of the prisoners, nor were they under any obligation to commit themselves to a time frame for the execution of the work.

Justice Schwartzman referred to the constitutional provisions cited by the applicants, and reaffirmed that the applicants' constitutional rights were being infringed.<sup>32</sup> Although the court allowed prison authorities to remove all electrical equipment and appliances (with the exception of battery operated ones) from inmates, the authorities were instructed to set out the timetable within which the electrical work would be commenced and completed. Once the work was completed, the authorities were obliged to return the removed items to the prisoners from whom they were taken.<sup>33</sup>

### 3.2 Namibia

The words of the Preamble to the Namibian Constitution were referred to earlier as an illustration of the extent to which the Namibian people, through their representatives in the constituent assembly, felt about their colonial and racist past. When inmates challenged the constitution-

<sup>32</sup> The court also found in favour of the applicants on the basis of the principle of legitimate expectation. That is to say in this case, that by the act of authorities, allowing prisoners to connect electricity from whatever source, in order to use their appliances, they had created an expectation, on the part of the prisoners, that was capable of being enforced. See also S Foster 'Legitimate expectations and prisoners' rights: The right to get what you are given' (1997) 60 *Modern Law Review* 727.

<sup>33</sup> Other South African cases include: *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), on the legality of solitary confinement; *S v Mazibuko and others* 1997 (1) SACR 255 (W), whether a quadriplegic person should be given a lighter sentence; *C v Minister of Correctional Services* 1996 (4) SA 292 (T), an illegal testing of a prisoner for HIV. The case of *Coetzee v The Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison, and others* 1995 (4) SA 631 (CC) arose out of apartheid era provisions in secs 65A–M of the Magistrates' Courts Act 32 of 1944 which authorised the imprisonment of civil debtors. In Namibia, the High Court was also asked to decide on the constitutionality of the same secs 65A–M of the MCA 1944 regarding the imprisonment of civil debtors in the case of *Julius v Commanding Officer, Windhoek Prison; Nel v Commanding Officer, Windhoek Prison* 1996 NR 390 (HC). The court arrived at the same conclusion as the South African constitutional court. The provisions were declared unconstitutional and of no effect.

ality of the use of leg-irons, for example, the Supreme Court had no hesitation in declaring the practice an invasion of individual dignity and, consequently, unconstitutional.<sup>34</sup> The courts were also willing to order government to compensate inmates placed under these irons after 1990.<sup>35</sup> The court awarded the applicant inmate N\$ 15 000 as general damages and damages for pain suffering and impairment of dignity.

The case of *Titus Amakali v Minister of Prisons and Correctional Services*,<sup>36</sup> on the other hand, emanated from the illegal detention of an inmate by prison officers, beyond the date of his lawful imprisonment. The applicant was supposed to have been released on 8 March 1999, but he was detained for 18 more days until he was released at the order of the court on 26 March 1999. The delay was caused by an improper and erroneous decision of a prison officer. The court awarded the applicant damages amounting to N\$ 25 000.

### 3.3 Zimbabwe

Post-apartheid South African courts have been able to lead the way on the strength of the historical bridge mentioned in the Post-amble to the interim Constitution, an innovative bill of rights, and 'user friendly' correctional services legislation. The Zimbabwean courts have also made a significant contribution in their own way, based on the declaration of rights in the country's constitution. The Supreme Court of Zimbabwe, for example, was the first in the region to declare corporal punishment of juveniles and adults unconstitutional.<sup>37</sup>

In the case of *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*<sup>38</sup> the Supreme Court was called upon to decide the question of prison conditions.<sup>39</sup> A prison inmate, convicted of murder and sentenced to death, was held in a single and tiny cell in a maximum-security prison of 4,6 metres long by 1,42 metres wide. His main complaint was that, as a result of prolonged detention, he had very

<sup>34</sup> [2000] 6 BCLR 671 (NMS). For a discussion of other developments in the Namibian prison service since independence, see SH Bukurura and JW Nyoka 'The Namibian prison service and the Constitution: Lessons and experiences, 1990–2000' (2001) 34 *De Jure* 96.

<sup>35</sup> See *Norman John Gerald Engelbrecht v Minister of Prisons and Correctional Services* High Court Case No I 1110/99, unreported judgment delivered 17 November 2000.

<sup>36</sup> See *In re Thomas Namunjepo and Commanding Officer, Windhoek Prison* High Court Case No A 66/99, unreported judgment delivered 27 October 2000.

<sup>37</sup> In regard to corporal punishment for juveniles, see *S v A Juvenile* 1990 (4) SA 151 (ZS). As for adults, see *S v Ncube* 1988 (2) SA 702 (ZS). See also J Hatchard 'The fall and rise of the cane in Zimbabwe' (1991) 35 *Journal of African Law* 198.

<sup>38</sup> 1992 (2) SA 56 (ZS).

<sup>39</sup> Other Zimbabwean cases in which prison conditions were challenged include *S v Masitere* 1991 (1) SA 821 (ZS) and *Blanchard and others v Minister of Justice Legal and Parliamentary Affairs and Others* [1999] 10 BCLR 1169 (ZS).

limited access to open air, sunshine and physical exercise (especially on weekends and public holidays). He requested the intervention of the Supreme Court, arguing that the conditions in which he was held were so excessive as to amount to inhuman treatment, and an infringement of his constitutional right to dignity, humanity and decency.

Prison authorities attempted to justify their actions (of strict curtailment of exercises) by referring to shortage of staff during weekends and public holidays, and the high security risk posed by the prisoner. After making reference to provisions of section 102(3) and (4) of the Prison Act and section 179 of the Prison Regulations (both of which lay down the duration of one hour exercises each day for prisoners under solitary confinement), the court decided in favour of the applicant. Most importantly, the court made the following observation:

[T]o deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of 23h30 hours per day, by holding him in a confined space, is virtually to treat him as non-human. I think it is repugnant to the attitude of contemporary society. The emphasis must always be on man's basic dignity, on civilised precepts and on flexibility and improvement in standards of decency as society progresses and matures.

Prison authorities in different countries in the region have in the past determined not only the number of letters prisoners can send and receive, but also prescribed a restricted time frame within which that could be done. That has not always been considered acceptable to prisoners eager to write and receive letters. The Supreme Court of Zimbabwe was asked to decide the constitutionality of such restrictive measures in the case of *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others*.<sup>40</sup> The prisoner argued that section 141(1)(a) of the Prison Regulations that restricted the sending and receiving of one letter in four weeks, was an infringement of his right to freedom of expression. The court examined the purposes of the regulation, and the circumstances in which it was implemented. The conclusion arrived at was that there were no good reasons of public safety or public order to justify such restrictions in a democratic society. The matter was decided in favour of the inmates.

### 3.4 The Kingdom of Swaziland

Unlike Namibia, South Africa and Zimbabwe which have constitutional safeguards, the Swaziland Independence Constitution, enacted in 1968 with similar provisions, was abrogated in 1973. Since then the people of Swaziland have been without such protection. The lack of constitu-

<sup>40</sup> 1995 (1) SA 703 (ZS).

tional protection did not prevent the High Court from finding a remedy for an aggrieved prison inmate in the case of *Meshack Shabangu v Attorney General*.<sup>41</sup> Upon completion of his prison sentence, Shabangu approached the High Court seeking damages suffered as a result of being subjected to unauthorised, unlawful and degrading labour at the hands of the prison commander. His argument was that during part of his imprisonment he was made to work as a house servant at the commander's house, which included washing clothes of family members, taking care of the baby of the prison commander, feeding it and changing its nappies. He also bathed the father of the prison commander, and treated his skin disease and leg wound. The court relied on general legal principles and granted the applicant damages to the tune of E 40 000.<sup>42</sup>

#### 4 Conclusion

In this discussion, a combination of mechanisms for the protection of inmates' rights, ranging from international standards to local measures, have been outlined. From the examples and illustrations given, a conclusion can safely be drawn that these rights are now not only recognised but also entrenched. Rights and standards for the protection of inmates in civilised societies have not only been adequately demarcated, but monitoring and enforcement measures and institutions are already in

<sup>41</sup> Civil case No 838/95 (unreported, judgment delivered on 15 September 98). Although the court's decision in the *Meshack Shabangu* case is unreported, it has turned out to be widely read among prison officers. The case was featured in the *Times of Swaziland* Sunday 17 September 1998. At the time the decision was given, some senior prison officers in Swaziland were attending an in-service training at the Prison College. There was, therefore, an opportunity to use the decision as a case study. I learnt from one of the participants, who turned out to have studied at the University of Swaziland, that most course participants had a lot of sympathy with the officer in charge of the prison at which Shabangu was imprisoned. The reason for the sympathy was that, after all, most prison officers in the Kingdom of Swaziland were in the habit of using prison labour for their own private work without a complaint from anyone. Some officers were of the view that Shabangu should have considered himself privileged to work as a servant at the commander's house instead of complaining. Their view was, therefore, that it was only unfortunate that the ex-prisoner, Shabangu, went to court, where most prisoners could not even have cared. In Tanzania, the case was featured in the *Daily News* 13 July 1999. The writer, a person with over 30 years of working experience in the prison service, started the story as follows: 'Think of a prisoner, after serving a two-year sentence at Ukonga Central Prison, in Dar es Salaam, goes to court for redress, and is awarded repayment for the wrong that has been done. It has never happened, at least to my knowledge.' It is known that this newspaper report became a talking point among prison officers, not only for the message it carried but, most importantly, the motive of its author. In Namibia, the decision was circulated to all heads of prisons not only for their information but also as a caution.

<sup>42</sup> Swazi *lilangeni* (singular), *emalangeni* (plural) equivalent to South African Rand.

place and playing their part. In the cases mentioned above, for example, it has been shown that courts are presently more willing to intervene in the enforcement of these rights than ever before, and have granted appropriate remedies, including awards for damages, where necessary. In that respect, it is of utmost benefit to prison authorities, at all levels (lower, middle and high), not only to embrace these rights, but also to adapt working practices in conformity with them. Training and re-training of all prison officers is not only necessary, but will have to be accompanied by a change of attitudes accepting these rights as a fact and not fiction. It is going to be hard, but not impossible.

It may be very tempting to assume that training or re-training will be accompanied by the requisite change of attitude. There is some indication that this is not always the case. In most countries, prison establishments are composed of the old generation of prison officers, who were trained in old methods of dealing with prison inmates, on the basis of old and outdated theories of punishment, and who have acquired many years of experience in old-style prison management. It cannot be assumed that these officials will easily recognise and embrace prisoners' rights. Prison authorities, therefore, need to have a plan of action for the checking and consistent monitoring of an attitude change among staff. It needs to be emphasised that in real life situations, any form of change has its doubting Thomas. The greatest challenge to those prison authorities who accept change and the need to embrace it, will be to know how to bring on board their doubtful colleagues. As shown by the decisions discussed here, the consequences for any kind of delay is likely to be enormous. Those who are dragging their feet in catching up with the emerging trends might have to be left behind, with huge bills incurred from damages awarded to successful inmates.

The doubting Thomas of this region has to be aware of the fact that so far there is sufficient international and regional pressure being exerted in favour of adherence to international standards of decency. Monitoring mechanisms at the national level are gaining in strength, thanks to alliances and collaborations with their regional and international counterparts. As observed by Chief Justice Gubbay, in the second quotation above, courts in the southern African region have started to assert their role and play a meaningful part in ensuring that international standards are adhered to.

We do not know what may happen in the future, just as much as less was known about the current developments in the past. As things stand now, however, prisoners' rights are of concern to the international community, as well as at regional and national levels. If this assessment is correct, actions taken and decisions made by prison authorities need to be guided by, determined and constrained through international and regional standards, as well as national laws and practices. This is not only good for prisoners, but for humanity as a whole.<sup>43</sup>

---

<sup>43</sup> In order to appreciate the importance of respect for human dignity of inmates, one needs to look at the people who, at one point or other, have spent many precious years in prison whether as sentenced or awaiting trial prisoners or detainees. The imprisonment of many African heroes, the kinds of Nelson Mandela (South Africa), Jomo Kenyatta (Kenya), Robert Mugabe (Zimbabwe), and the easily forgotten and least mentioned heroines like Edna Jimmy and Rona Nambinga (Namibia) and Albertina Sisulu (South Africa), Titi Mohamed (Tanzania), Mbuya Nehanda (Zimbabwe) Alice Lenshina (Zambia), to mention only a few, speaks volumes. Recently, Anwar Ibrahim (Malaysia) and Nawaz Sharriff (Pakistan) also found themselves in prison. These examples show how false it is to believe that only bad people are sent to prison. No one knows, therefore, who the next prison visitor, and ultimate tenant, might be.