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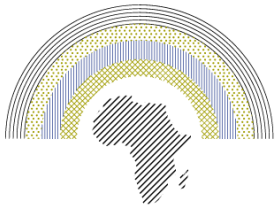

Conférence Panafricaine
sur la réforme pénale et pénitentiaire
en Afrique

Protecting Prisoners' Rights in Southern Africa:

An Emerging Pattern

Dr. Sufian Hemed Bukurura

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Content

Protecting Prisoners' Rights in Sub-Saharan Africa: An Emerging Pattern

"Traditionally, courts in many jurisdictions have adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy sense 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."
Judge Gubbay, the Chief Justice of Zimbabwe, in the case of *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at p 60.

"*The view (above) no longer holds firm in this jurisdiction, and in many others, that by reason of his crime a prisoner 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 Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the correctional system."*
Chief Justice Gubbay, in the case of *Woods v Minister of Justice Legal and Parliamentary Affairs and Others* 1995 1 SA 703 (ZS) at p 705.

"[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 substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress"
Judge Sach in the case of *August and another v Electoral Commission and others* 1999 4 BCLR 363 (CC) at p 372-373).

Introduction

The controversy surrounding treatment of people admitted into prison, whether upon court sentence, or awaiting trial or otherwise, is a familiar subject to correctional services staff around the world including those in the central and southern African. One of the central issues being whether such prison inmates have any rights whatsoever. 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. Until fairly recently most governments did not have high regard for prisoners' rights, and courts, when called upon to decide such issues, were generally inclined to decide in favour of prison authorities.[1]

In the past twenty or so years, the situation appears to have dramatically changed.[2] 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, on their own volition, also established other mechanisms to monitor, investigate and report on conditions in prisons in general, and treatment of inmates in particular. Legislation has also been passed which also make specific provisions regarding rights of inmates. Besides government initiatives, different non-governmental organisations (NGOs) have also become interested in prison life[3]. Partly as a result of all these mechanisms and other contributing factors, courts have also become more sympathetic, and have expressed their unreserved willingness, to depart from the past 'hands-off' approach in the protection of prisoners' rights. A combination of these developments show that prison inmates have lately scored major victories

1. *For a discussion of how grim the situation was in apartheid South Africa, see for example, J Mihalik 'Restrictions on Prison Reporting: Protection of the Truth or a Licence for Distortion?' (1989) 5 South African Journal of Human Rights 406-30, HG Rudolph '"Man's Inhumanity to Man Makes Countless Thousands Mourn": Do Prisoners have Rights?' (1979) 96 South African Law Journal 640-50, 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 of Human Rights 147-66.*

2. *It is important to emphasise that any discussion of rights of inmates 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 11-50, for example, discusses the practical aspects of the changing theories of punishment in the context of Australia.*

3. *A good and old example of NGO efforts in the area of criminal justice reform, in general, include the tireless of, and phenomenal achievements by, the Howard League (named after John Howard) since its establishment 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 successes. See also Human Rights Watch, Prison Conditions in South Africa (New York: Human Rights Watch, February 1994), and http://hrw.org/prisons/africa.htm (accessed 25 February 2002).*

in the battle for the protection of their human rights against intrusive prison authorities.

This work attempts to outline different mechanisms that have recently been put in place in recognition and protection of prisoners' rights in some African countries. These initiatives range from international instruments and regional measures, national mechanisms such as constitutional provisions, the establishment of offices of the ombudsmen, to favourable correctional services' legislation. How courts have been called upon to intervene in the protection of prisoners' rights in different countries in the region will also be examined.

What emerges from both legal instruments and court decisions is that 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.

Varieties 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: the international standards, regional mechanisms, as well as safeguards provided by each and individual nations. For want of time and space international and regional mechanisms will only be outlined, while national safeguards, including judicial decisions, will be examined in a little more detail.

International and Regional Standards

The world in which we live is nowadays referred to as a global village. It is 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 interest as much, 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. Although these measures and initiatives complement each other, it is appropriate to outline and discuss them separately in order to emphasise the differences in their origins and extent of their application.

International Measures and Standards

Several international instruments have been agreed upon and ratified by independent African governments[4]. Ratification entails that these instruments acquire a binding effect on, and create 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 (see note 2).

In addition to international instruments there are several international bodies mandated in various ways to monitor human rights generally, including rights of prison inmates. These include, for example, United Nations Commission on Human Rights and the Office of the UN High Commissioner for Human Rights. The agreement leading to the Paris Principles by the United Nations Commission on Human Rights in 1992, for example, was followed by an endorsement of the United Nations General Assembly in 1993.

Among international initiatives for human rights monitoring one need to include the State Department of the United States of America which has vigilantly continued not only to monitor but also report on human rights situations, including prisoners' rights, around the world on an annual basis. Its reports are not only widely circulated, they are also known to be very informative to prospective investors and tourists.

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4. *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 resolution 663 (XXIV) of 31 July 1957 and 2076 (LXII) 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. (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). (ix) 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 article 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 (New York and Geneva: United Nations, 1997). See also NS Rodley The Treatment of Prisoners under International Law (Oxford: Clarendon Press, 1987), and JW Palmer Constitutional Rights of Prisoners (Cincinnati, Oh: Anderson Publishing, 5 ed., 1997). Also D van zyl Smit 'South African Prisons and International Law' (1988) 4 South African Journal of Human Rights 21-36, and R Murray 'Application of International Standards to Prisons in Africa: Implementation and Enforcement' in Penal Reform International Newsletter 12, March 2000,*
see http://www.penalreform.org/english/article_stafrica.htm (accessed 15 November 2000).

Regional Initiatives

All African countries are members of the African Union (AU). Its predecessor, the Organisation of African Unity (OAU) passed the African Charter in 1986 and pledged to adhere to and protect human rights of their citizens.[5] Article 26, for example, states as follows:

> *"State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."*

It is in accordance with article 30 of the Charter that the African Commission for Human and Peoples' Rights (the African Commission) came into existence. The role that was played by the African Commission in the case of Amnesty International on behalf of Orton Chirwa/Malawi (communications 68/92 and 78/92), for example, needs to be acknowledged. The two prisoners, who were allegedly abducted from Zambia (where they were living in exile), were tried for treason and sentenced to death by the Southern Regional Traditional Court and their sentences upheld by the national traditional Appeals Court. It was successfully argued before the African Commission that their trial was conducted without the accused being defended by counsel. The Commission found the government of Malawi to have contravened Article 7(1)(c) of the African Charter.

Before transforming itself into an African Union, the OAU took a decision to create an African Court of Human and Peoples' Rights.[6] The establishment of both the African Commission, and the recent initiative to create and African Court, suggest that heads of African governments are continually committing themselves, and expressing their willingness, to protect and safeguard human rights of their people, including those of inmates, in accordance with international and regional standards.

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5. *Organisation of African Unity, African Charter on Human and Peoples' Rights (also referred to as the African or Banjul Charter), adopted 17 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 (The Hague: Kluwer Law International, 1977), pp 47-116. On the influence the European Convention had on England, for example, see G Zellick 'The Rights of Prisoners in the European Convention' (1975) 38 Modern Law Review 683-89. Also G Zellick 'Human Rights and the Treatment of Offenders' in JA Andrews (ed) Human Rights in Criminal Procedure: A Comparative Study (The Hague: Martinus Nijhoff, 1982) pp 375-416. See also JM Schone 'The Short Life and Painful Death of Prisoners' Rights' (2001) 40 Howard Journal 70-82, at 73.*

6. *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 J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 South African Yearbook of International Law 256-69, M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 Human Rights Quarterly, 342-61, and NJ Udombana 'Towards the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3 Yale Human Rights and Development Law Journal 45-111.

Further regional measures were taken in 1996 following the Kampala Declaration on Prison Conditions in Africa. The office of Special Rapporteur on Prisons and Conditions of Detention in Africa was created and Professor EVO Dankwa was appointment as its first holder. Later Dr Vera M Chirwa was appointed as the second Special Rapporteur. Between them, they have visited and reported on prisons and conditions of detention in several African countries, including Zimbabwe, Mali, Mozambique (1997); Madagascar and Mali (1998); The Gambia, Benin, (1999) Central African Republic (2000); and Mozambique and Malawi (2001). Dr Chirwa also visited Namibia in September 2001.

Heads of Correctional Services in the region, who had been holding regular consultative meetings, decided to regularise those meetings into a standing forum. They established the Conference of the Central, Eastern and Southern African Heads of Correctional Service (CESCA) in 1993. At its fifth meeting held in Windhoek in September 2001, for example, they passed, among other things, a resolution on a Charter of prisoners' rights. The conference made a recommendation for the Charter to be adopted by all Africa countries.

National Mechanisms

Whereas the enumerated international and regional instruments are made by international and regional bodies to which national governments are parties and participate, they are assumed to be universal and of general application, and apply to and bind those countries that are signatories. At national the level, however, different ways and means of protecting individual rights in general, and rights on 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 protection measures have become so common and widespread to the extent that they are getting more and more standardised. The following are only a few examples.

Constitutional Provisions

With the advent of the third wave of democratisation, constitutions of different countries recognise and make provisions for basic fundamental rights and freedoms of individuals. As will be shown below, prison inmates are first and foremost individuals who are also entitled to enjoy those constitutional protections. Whereas 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),[7] ten years later, in 1990, fundamental rights and freedoms were incorporated in the Namibian Constitution.[8] South Africa followed suit in its two Constitutions of 1993 and 1996. 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 urgency to make a fresh beginning. The post-amble 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:

> *"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 that 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;..."*

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7. *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) 21-47. Fundamental rights and freedoms provisions in the Zimbabwe independence constitution were not to be amended for a period of 10 years after independence.*

8. *A discussion of developments in the Namibian prison service since independence is found in SH Bukurura and JW Nyoka 'The Namibian Prison Service and the Constitution: Lessons and Experiences, 1990-2000' (2001) 34 De Jure 96-112.*

In the case of Zimbabwe, chapter 3 was not to be amended for a period of ten years after independence. The South African and Namibian constitutions, on the other hand, made an express undertaking that rights enshrined in respective chapters should never be reduced. Tanzania (which became politically independent, as Tanganyika, in 1961), on its part, did not have a Bill of Rights until 1984, and even then, the rights in question remained suspended for another 4 years until 1988.[9]

As part of the provisions protecting individual human rights, the constitutions of Namibia (article 8), and Mozambique (article 70(2), (both constitutions passed in 1990), outlawed the use of death penalty as a form of punishment. Law-makers in the two countries, took a bold step and were courageous enough to join a few other progressive countries in the world, to abolish capital punishment by making express provisions in the constitutions, instead of leaving the matter to be decided by superior courts.[10]

What one gathers from these constitutional provisions is that some African governments are taking deliberate steps to protect and safeguard rights of their people, including those of inmates.

Governmental Institutions

In addition to constitutional provisions, some governments have even gone further to establish human rights watchdog institutions. Where such have been established they are also funded by governments themselves from taxpayers' money, in itself being further evidence of their commitment to the respect of human rights. In some instances, legislation establishing such institutions guarantees their autonomy and operational independence.[11] Chapter 9 of the Constitution of the Republic of South Africa 1996, for example, establishes what are known as state institutions supporting constitutional democracy.

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9. *See, The United Republic of 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 4 years, vide s 5(2). See CM Peter, Human Rights in Tanzania: Selected Cases and Materials (Koln: Koppe, 1997), p 12.*

10. *It has been suggested that parties to the constitutional negotiation process in South Africa could not agree on a solution to the death penalty issue, see F Viljoen 'The Impact of Fundamental Rights on Criminal Justice under the Interim Constitution (pre-trial to prison)' (1994) 27 De Jure 231-251, at p 247 and D Davis 'Democracy and Integrity: Making Sense of the Constitution' (1998) 14 South African Journal of Human Rights, 127 at p 131. For a detailed discussion of the campaign against death penalty around the world, see Amnesty International, When the State Kills: The Death Penalty versus Human Rights (London: Amnesty International, 1989), and the judgments of the Constitutional Court in S v Makwanyane and others 1995 (6) BCLR 665 (CC).*

11. *Human Rights Watch report, 'Government Human Rights Commission in Africa: Protectors or Pretenders' http://www.hrw.org/reports/2001/africa (accessed 14 June 2001) provides an overview and critical assessment of the performance of national human rights institutions in Africa.*

Institutions relevant to this discussion include the Public Protector and the Human Rights Commission.[12]

Tanzania, on the other hand, was the first Africa country to establish the Permanent Commission of Enquiry in 1967, and most recently passed a law setting up the Commission for Human Rights and Good Governance.[13] Ghana has the Commission for Human Rights and Administrative Justice (CHRAJ).[14] On its part, Uganda has the Office of the Inspector of Government as well as the Ugandan Human Rights Commission.[15]

Several countries in the region,[16] have independently established Ombudsman that have mandates to investigate human rights abuses and reports annually to Parliament. Inmates in Namibia, for example, have exercised their legal rights, granted by section 67(2)(a) of the Prison Act 1998, to report their grievance without censorship, to the Ombudsman. Since the formation of the Ministry of Prisons and Correctional Services in 1995, complaints emanating from prisons have either been high on top, or there about, of the overall complaints made to

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12. *For a detailed discussion of South African constitutional institutions established under Chapter 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 South African Journal of Public Law 385-425, and J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter 9) Structures' (1999) 15 South African Journal of Human Rights 587-613. See also Report of the National Prisons Project (South Africa Human Rights Commission, SAHRC 1998).*

13. *See Constitution of the United Republic of Tanzania (13th Amendment) Act 3 of 2000, Article 129-131, and the Commission for Human Rights and Good Governance Act 7 of 2001.*

14. *The Constitution of Ghana 1992, (Chapter 18, articles 216-230) and the Commission on Human Rights and Administrative Justice Act 456 of 1993. See also Report of the Inspection of the Country's Prisons, Prison Camps and Police Cells (Ghana Commission on Human Rights and Administrative Justice, CHRAJ March 1995).*

15. *The Human Rights Commission is provided for in the Constitution of Uganda 1995, articles 51-58, and the Uganda Human Rights Commission Act 1997. See also Annual Report of the Uganda Human Rights Commission, UHRC (1999). For provisions establishing the Inspectorate of Government, see The Constitution of Uganda Chapter 13, (articles 223-232), and the Inspector-General of Government Act 2 of 1987.*

16. *For constitutional provisions and enabling legislation of the institution of Ombudsman in Botswana, Malawi, Lesotho, Namibia, Zambia and Zimbabwe, see E Kasuto & A Wehmhormer (eds) The Ombudsman in Southern Africa: Report of a sub-regional conference (Windhoek: Friedrich-Ebert-Stiftung, 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 (Windhoek: Friedrich-Ebert-Stiftung, 1996), pp 27-52 and VO Ayeni '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 224-38. See also J Hatchard 'The Institution of Ombudsman in Africa with reference to Zimbabwe' (1986) 35 International and Comparative Law Quarterly 255-71, and J Hatchard 'Developing Governmental Accountability: The Role of the Ombudsman' (1992) Third World Legal Studies 215-29.*

the Ombudsman every year.[17]

Although questions have frequently been raised regarding the efficiency and effectiveness of African national institutions of monitoring human rights,[18] their presence is a very valuable addition to the ally of tools and mechanisms needed for protecting and safeguarding these rights in Africa and other countries.

'Friendly' Correctional Services Legislation

Some countries in the region have amended or repealed their outdated legislation governing prison administration to bring 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:

> *"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,..."* [19]

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17. *In Namibia, the Ombudsman's Annual Report for the year 1999, a suggestion is made to the effect that 'the increase in complaints against the Prison Service ... might be an early indication of deteriorating prison conditions which should be considered by prison authorities' at p 34. The statistics below show the number of complaints received by the office of the ombudsman in Namibia between 1995-2000. 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 and 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 (Namibia) Annual Reports (1996 at p 7, 1998 at p 7, 1999, at p 18 and 2000 at p 20).*

18. *See Human Rights Watch Report 2000, note 11 above.*

19. *The enactment 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 sections of that Act have so far been brought into effect (19 February 1999), see South African Government Gazette GG 19778.*

Developments in Tanzania, Uganda and Zimbabwe are worth mentioning here. Whereas Tanzania enacted the Parole Boards Act 25 of 1994, Uganda passed the Community Services Orders Act 10 of 1998. Zimbabwe, on its part, amended its Criminal Procedure Act in 1992 to make provisions for what has become a shining example of community service in Africa.

Where outdated prison administration legislation has not been repealed or amended, as was the case in Namibia between 1990 until 1998, courts have been asked, and have stepped in, to examine whether actions taken and decisions made by prison authorities were in conformity with constitutional provisions. Offensive provisions of prison legislation and unacceptable prison practices have, in some cases, been found to be unconstitutional and invalid, as will be shown later.

Monitoring Non-Governmental Organisations (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 rights of inmates.

NGOS in various countries report annually on the human rights, including rights of inmates, situations in their respective countries. Some of these include: the South African Prisoners' Organisation for Human Rights (SAPOHR); Ugandan Foundation for Human Rights Initiative (FHRI), Kenya Human Rights Commission (KHRC), Swaziland Federation of ex-Prisoners (SWANFEL), and the Namibia Society for Human Rights (NSHR). NSHR, for example, has been granted an observer status with the African Commission for Human and Peoples' Rights. NSHR is also an observer at the Economic and Social Council of the United Nations.[20] The Legal Assistance Centre (a public interest law centre in Namibia), on its part, does among other things concentrate on public interest related cases, including those in which rights of prison inmates are concerned.[21]

20. *See, for example, National Society for Human Rights (NSHR) The State of Prisons and Detention Conditions (Windhoek: NSHR, 1995). Like other human rights NGOs in many countries, the NSHR does not appear to be very 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 517-43. The Kenya Human Rights Commission, an NGO registered in 1992, on its part, has produced several reports two of which have directly relevance to prisons, namely, Death Sentence: Prison Conditions in Kenya (1996) and Prisoners' Rights in Kenya (1997). See http://www.hri.ca/partners/khrc (accessed 16 January 2002). The role NGOs play in the promotion and protection of human rights in general is discussed in detail by CE Welch, Jr. Protecting Human Rights in Africa: Strategies and Roles of NGOs (Philadelphia: University of Philadelphia Press, 1996), especially Chapter 2, pp 42-83.*

21. *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.*

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, Human Rights Association of Swaziland (HUMARAS) co-ordinates several local NGOS, so is the Namibian Non-Governmental Forum (NANGOF), the Tanzania Non-governmental Organisations (TANGO), and the South African National Non-Governmental Organisation Coalition (SANGOCO) among many others.

At the region level human rights monitoring NGOs have created a co-ordinating body, known as the Southern African Human Rights Non-Governmental Organisations Network (SAHRINGON). SAHRINGON representatives hold their meeting in tandem with Southern African Development Community (SADC) heads of states so that NGO presence could be felt and their voices and opinions heard by participating heads of states and senior government officials.

In addition to the good work done and tireless efforts made in their respective countries, and co-operation at a regional level, the strength of these NGOs has been bolstered by recognition granted to them by international human rights monitoring organisations. Amnesty International, the Howard League for Penal Reform, Human Rights Watch, the International Prisons Watch and Penal Reform International, are well known internationally for their vigilant work on human rights generally, and prisoners' rights in particular. Several more exist.

Judicial interventions: some examples and highlights

Courts are usually referred to as the custodians of justice. This is also true in regard to the role they play in protection of inmates' rights in particular. As indicated by Justice Sach, in the third quotation above, an inmate who has been treated unfairly, and/or whose rights have been unlawfully infringed, is entitled not only to approach the courts, but also for an appropriate remedy where the alleged infringement is proved. This is based on a long established legal rule expressed in Latin as *ubi ius ibi remedium* (where there is a right there is a remedy). The following are only a few examples.

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 also been willing to give a lead on the way in which inmates should be treated under the new dispensation. Prison administration legislation and practices found not to be in conformity with the constitutional requirements have been set aside. A few illustrations are offered below.

In the case of *S v Makwanyane and others* 1995 (6) BCLR 665 (CC) the Constitutional Court had to decide an issue that constitutional negotiators (unlike their counterparts in Mozambique and Namibia) shunned; that is whether the use of death penalty was constitutional? All members of the court unanimously decided that it was not. Their lordships observed that death penalty was a cruel and inhumane punishment, and an invasion into human dignity.

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 or not. That was the case of *S v Williams and others* 1995 3 SA 632 (CC), where, in a unanimous decision, the court said it was not.[22]

South African prisoners (sentenced and awaiting trial) 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* 1999 4 BCLR 363 (CC). Justice Sach, whose judgment all members of the court concurred, observed at page 372, that 'universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order…The vote of each and every citizen is a badge of dignity and of personhood.'

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22. *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: in re Corporal Punishment by Organs of State 1991 NR 178 (SC).*

In the case of *Van Biljon v Minister of Correctional Services* 1997 SACR 50(C) four prison inmates diagnosed as HIV/AIDS positive, asked the High Court to intervene in their demands for the right to access to medical care, including special medication like AZT, ddI, 3tC or ddC treatment, and that the cost for that 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 a symptomatic stage of the disease. In effect the department relied on the defence of budgetary constraint.

The court considered whether prisoners were constitutionally entitled to special medication, in this case AZT, etc 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? Mr Justice Brand looked at article 35(2)(e) of the Constitution, 1996, which provides that 'Everyone 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 judgement he commented that prison conditions were more likely to give rise to infections, therefore, placing a heavier responsibility on the prison authorities.

Mr Justice Brand's decision has been characterised by commentators as brave. None of them, however, found the decision to be faulty.[23] In the light of dwindling resources, the nature of the problem of HIV/AIDS pandemic and current levels of prison overcrowding, this decision will have grave implications to prison authorities.[24]

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23. *See comments in 1997 Annual Survey of South African Law, at p 809. Also F ka Mdumbe 'Socio-economic rights: Van Biljon v Soobramoney' (1998) 13 South African Journal of Public Law 460-70, 461, and H Corder & D van zyl Smit 'Privatised Prisons and the Constitution' (1998) 11 South African Journal of Criminal Justice 475-490 at p 480. Whether a sick person convicted of a crime should be given a lenient sentence is among 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 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 1-9, at p 2.*

24. *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 an official 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. By 1 April 2001, Tanzanian prison population had increased to 45,286 inmates, see LS Mmbaga 'Scientific Approach in Criminal Justice Administration as a Remedy to Correctional Problems' Paper submitted by the Tanzania Prison Service to the 5th Conference of Eastern, Southern and Central African Heads of*

Strydom v Minister of Correctional Services and others 1999(3) BCLR 342 (W) arose out of prison practices in a maximum security prison. Prison authorities had allowed certain categories of prisoners a 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 electric 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 had plans to install electric plugs in the cells and money was budgeted. The Department of Works (which was responsible for making 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, in which they included the removal of the unauthorised wiring and seized all electrical appliances not specified in prison regulations.

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 the provisions of the Constitution, (section 10 which protects human dignity, and 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.[25] Although the court allowed prison authorities to remove all electrical equipment and/or appliance (with the exception of battery operated ones) from the inmates, the authorities were instructed to set out the timetable within which

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Correctional Services (CESCA), held at Windhoek Namibia, 4-6 September 2001. Note that Namibia has a population of about 1,8 million while that of Tanzania is about 30 million. On overcrowding in South African prisons, see Human Rights Watch website http://hrw.org/prisons/africa.html (accessed 25 February 2002). 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 including inadequate living space, poor ventilation and possible eruption of epidemics.

25. *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 expectation and prisoners' rights: The right to get what you are given' (1997) 60 Modern Law Review 727-33.*

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.[26]

Under the apartheid system, applicable in both South Africa and Namibia, there was a legal requirement that a person convicted and sent to prison sentence could not appeal against conviction and sentence unless such a person was either represented by a lawyer or obtained a certificate to that effect from a judge. The relevant provisions were enacted in s 305 of the Criminal Procedure Act. One needs to imagine the magnitude of sentenced prisoners who remained in custody as a result of that legal restriction. The constitutional changes brought about in independent in Namibia in 1990 and South Africa in 1994 meant that the about provision came under constitutional scrutiny. In the case of *S v Ntuli* 1996 1 SA 1209 (CC), the Constitutional Court was asked to determine the constitutionality of that provision in the light of the right to equal protection before the law and the right to a fair trial. The court unanimously found that it was not.

Namibia

The preamble to the Constitution of Namibia 1990 was referred to earlier as an illustration of the extent to which the Namibian people, through their representatives in the Constituent Assembly, felt about and responded to their colonial and racist past. When inmates challenged the constitutionality of the use of leg-irons, for example, the Supreme Court had no hesitation in declaring the practice an invasion into individual dignity and, consequently, unconstitutional, see in re Thomas Namunjepo and Commanding Officer, Windhoek Prison 2000 (6) BCLR 671 (NmS). The courts were also willing to order government to

26. *Other South African cases include Minister of Justice v Hofmeyr 1993 3 SA 131 (A), on the legality of solitary confinement, S v Mazibuko 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 v Commanding Officer, Port Elizabeth Prison 1995 4 SA 631 (CC), arose out of apartheid era provisions in sections 65A-M of the Magistrates Courts Act of 1944 which authorised the imprisonment of civil debtors. For a discussion of various aspects of prisons and prisoners' rights in South Africa, see R Louw 'The Legacy of Barend van Niekerk: A Challenge to the on-going Abuse of Prisoners' Rights (2000) 13 South African Journal of Criminal Justice 83-98; S Oppler 'Assessing the State of South African Prisons' (1998) 7 African Security Review at http://www.iss.co.za/Pubs/ASR/7No4/SAPrisons.html (accessed 15 November 2001), and 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. In Namibia, the High Court was also asked to decide on the constitutionality of sections 65A-M of the Magistrates Court Act 1944, regarding the imprisonment of civil debtors, in 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. Different conclusions, however, were arrived at in Botswana and Zimbabwe. In Noor & others v Botswana Co-operative Bank Ltd [2000] 3 LRC 472 (Botswana Court of Appeal) the constitutionality of legislation providing for civil imprisonment as enforcement for debt was found to be constitutional by the Supreme Court. The same conclusion was reached in Chinamora v Angwa Furnishers (Private) Ltd & Others (1997) 1 BHRC 460 (Zimbabwe Supreme Court).*

compensate inmates placed under these iron after 1990, see *Norman John Gerald Engelbrecht v Minister of Prisons and Correctional Services*, Case No I 1110/99 (unreported judgment delivered on 17 November 2000). The court awarded the applicant inmate N$ 15,000 as general damages and damages for pain suffering and impairment of dignity.

In the case of *Titus Amakali v Minister of Prisons and Correctional Services*, Case No A 66/99 (unreported judgment delivered on 27 October 2000), on the other hand, an inmate, illegally detained by prison officers beyond the date of his lawful imprisonment, was awarded damages amounting to N$ 25, 000. The Legal Assistance Centre reports that in March 2000 three other inmates were awarded monetary compensation by the Magistrates' Court in cases resulting from unlawful conduct committed by some prison officers in the Windhoek Central Prison.[27]

Senior officials in the Ministry of Prisons and Correctional Services have taken note of these successful compensation claims, brought against the ministry (as a result of staff indiscretions), by prison inmates. Minister Marco Hausiku expressed this concern in his closing speech at the September 2001, CESCA meeting in Windhoek. He posed the question: for how long will the government continue to pay damages for excesses committed by Correctional Services staff? In effect the minister seems to be suggesting that it may not be too long before responsible errant prison officers are required to compensate successful prisoners from their pockets.

In *State v Simon Ganeb*, Case Number CA 85/98 (decided on 13 December 2001, unreported) a convicted prisoner inmate asked the High Court to decide whether or not sections 309(4)(a) and 305 of the Criminal Procedure Act 51 of 1977 were constitutional. The two legal provisions read together required that a person convicted in a lower court could not appeal against conviction or sentence without either being represented by a lawyer or obtaining a judge's certificate indicating that there were reasonable grounds for review. The challenge was based on article 10 (equality and freedom from discrimination) and 12 (fair trial). The court (Mtambanengwe, AJP; Mainga J and Unengu JA) found that prison inmates were unequally treated and discriminated against by the provisions of section 305 as regards their right to appeal. Section 305 was, therefore, unconstitutional.

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27. *See Legal Assistance Centre News, October 2001, Issue 6 at p 13.*

Zimbabwe

Post-apartheid South African courts have led the way partly on the strength of the historical bridge mentioned in the post-amble to the interim Constitution, an innovative bill of rights, and a user 'friendly' correctional services legislation. The courts of Zimbabwe have also made 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 earliest in the region to declare the law that made provisions for corporal punishment on juveniles and adults unconstitutional.[28]

In the case of *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS), from which the first quotation above was obtained, the Supreme Court was called upon to decide the question of prison conditions.[29] A prison inmate, convicted of murder and sentenced to death, was held in single and tiny cell of 4,6 metres long by 1,42 metres wide, of a maximum security prison. His main complaint was that, as a result of prolonged detention, he had very limited access to open air, sunshine and physical exercises (especially on weekends and public holidays). He requested for 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 sections 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*

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28. *In regard to corporal punishment for juveniles, see S Juvenile 1990 4 SA 151 (ZS). As for adults, see S v Ncube1988 2 SA 702 (ZS). See also J Hatchard 'The Rise and Fall of the Cane in Zimbabwe' (1991) 35 Journal of African Law 198-204. In State v Petrus [1985] LRC (Const) 699 (Botswana Court of Appeal), the Court did not decide the wider issue of the constitutionality of corporal punishment, but found that the repeated and delayed infliction of strokes offended section 7(1) of the Constitution of Botswana.*

29. *Other Zimbabwean cases in which prison conditions were challenged in court 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).*

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 v Minister of Justice Legal and Parliamentary Affairs and Others* 1995 1 SA 703 (ZS). The prisoner argued that section 141(1)(a) of the Prison Regulation that restricted the sending and receiving 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, therefore, decided in favour of the inmates.

The Kingdom of Swaziland

Unlike Namibia, South Africa and Zimbabwe which have constitutional safeguards, the Swaziland independence constitution, enacted in1968 with similar provisions, was abrogated in 1973. Since then the people of Swaziland have been without such protections. The lack of constitutional protections have not hindered courts from finding remedy for aggrieved prison inmates in *Meshack Shabangu v Attorney General*, Civil Case No 838/95 (judgment delivered on 15 September 98, unreported), and *Professor Dlamini v The King*, Appeal Case No 41/2000 (decided on 14 June 2001, unreported), for example.

Meshack Shabangu was lawfully sentenced to serve a prison term of two years. Upon his release he narrated his experiences in prison, while serving a lawful prison sentence, to the High Court. He sought for 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, including washing clothes of family members, taking care of the baby of the prison commander, feeding it and changing nappies. He also bathed the father of the prison commander, and treated his skin disease and leg wound.[30] The court relied

30. *Although the court decision in the Meshack Shabangu case is unreported, it has turned out be widely read among prison officers. The case was featured in the Times of Swaziland Sunday on 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*

on general legal principles and granted the applicant damages to the tune of E 40,000 (Swazi lilangeni (singular), emalangeni (plural) equivalent to South African Rand).

Professor (being the appellant's name, not title) Dlamini was an awaiting trial prison inmate, who could not be admitted to bail pending trial because of the provisions of the Non-Bailable Offences Order 14 of 1993, proclaimed by His Majesty the King. Section 3 of the Order provided as follows:

(i) Notwithstanding any provision in any law, a Court shall refuse to grant bail in any case involving any of the offences in the Schedule hereto.

(ii) The Minister (of justice) may amend the Schedule from time to time.

Professor Dlamini appealed to the Court of Appeal against the decision of the High Court refusing to grant him bail. Leon JP, on behalf of the court, remarked that the law in question was not only draconian it was also inconsistent with the presumption of innocence and an invasion of the liberty of the subject. The Non-Bailable Offences Order was declared unconstitutional, and the appeal allowed. The case was remitted to the High Court to decide whether or not to admit the appellant on bail.[31]

Both decisions show that although the Kingdom of Swaziland does not have constitutional safeguards, courts are capable of and have found mechanisms for

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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 (Tanzania) 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 story became a talking point among prison officers, not only for the message it carried but, most importantly, the motives of its author. The decision was circulated to all heads of prisons in Namibia, not only for their information, but also as a matter of caution.

31. Prior to the Court of Appeal decision in Professor Dlamini, the Court of Appeal, constituting of different judges, rejected similar arguments in Mkhize Bhembe v R civil appeal 27 of 1996 (decided on 7 July 1997). For a background discussion on the development of the law relating to bail in Swaziland, see B Khumalo 'Contemporary and Prospective Legal Protection of Procedural Rights in Swaziland' in C Okpaluba, N Hlatshwayo & B Khumalo (eds) Human Rights in Swaziland: The Legal Response (Kwaluseni, University of Swaziland: Inter Agencies, 1998) pp 174-209. Recently the South African Constitutional Court was called upon to decide the constitutionality of bail provisions of the Criminal Procedure Act (as amended in 1997) in S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 4 SA 623 (CC). For comments on the decision, see HS Axam 'If the Interest of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail' (2001) 15 South African Journal of Human Rights 320-40, and J Sarkin, et al 'The Constitutional Court's Bail Decision: Individual Liberty in Crisis? S v Dlamini' (2000) 16 South African Journal of Human Rights 292-312.

granting appropriate remedies in deserving cases of violation of rights of prison inmates and other citizens.

Botswana

The constitutionality of death penalty in Botswana came before the courts in *Patrick Ntesang v The State* 1995 4 BCLR 426 (Botswana Court of Appeal). The five Justice of Appeal who constituted the Court considered sections 4 and 7 of the Constitution, which provides as follows:

Section 4(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

Section 7(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.

The court concluded that death penalty was legally provided for in Constitution, and there was nothing that could be done about it. The following observation made by Aguda JA, who wrote the judgment of the court, to which all members agreed, is informative:

> *"...despite that the death penalty may be considered, as apparently has been elsewhere, to be torture, inhuman or degrading punishment or treatment, that form of punishment is preserved by sub-section (2) of section 7 of the Constitution. I have no doubt in my mind that the Court has no power to re-write the Constitution, in order to give effect to what the appellant has described as progressive movements all over the world, and to give effect to the resolution of the United Nations as to the abolition of the death penalty. I however express the hope that before long the matter will engage the attention of that arm of the Government which has responsibility of affecting changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world."*[32]

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32. *1995 4 BCLR 426 (Botswana) at p 435.*

As the Privy Council was being criticised, for not providing adequate protection for death row prisoners,[33] the Court of Appeal in Botswana was grappling with the plight of death row prisoners in that country in the case of *Catholic Commission for Justice and Peace v Attorney General 1993 4 SA 239 (ZS)*. As it turned out the case became famous both in Botswana and beyond. Prisoners, who had been on death row for a long time, 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.

The Kingdom of Lesotho

According to article 12(1) of The Constitution of Lesotho 1993, any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time. An employee of the Ministry of Trade and Industry was suspended without pay from her post on suspicion of being involved in irregular transactions. Subsequently, three criminal charges were laid against her. For more than three years her trial had not commenced. She challenged this prolonged delay before the High Court on the ground that her constitutional right to a fair hearing had been infringed, and applied for a permanent stay of proceedings. She won the case in the High Court. The Director of Public Prosecutions appealed to the Court of Appeal in which she also won in *DPP v Lebona* [1998] 4 LRC 524 (Lesotho Court of Appeal). Both courts not only found that the delay was unreasonable, they also noted that no reasons were given by the prosecuting authorities to justify such delay. The applicant was also found to have used every available opportunity to assert her rights and had suffered various kinds of prejudices as a result of the delay.

It was noted by the Court of Appeal, as well as South African courts,[34] for example, that permanent stay of proceedings was a drastic and extreme remedy that could generally only be justified where the applicant can prove that prejudice has been caused by the delay. That observation notwithstanding, such a remedy

33. *See RMB Antoine 'The Judicial Committee of the Privy Council: An inadequate remedy for death row prisoners' (1992) 41 International and Comparative Law Quarterly 179-90. The article examines among other things appeals by death row prisoners in Jamaica to the Privy Council. Also J Hatchard 'A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts' (1994) 20 Commonwealth Law Bulletin 309-17.*

34. *Sanderson v Attorney-General, Eastern Cape 1998 2 SA 38 (CC), Wild v Hoffert NO 1998 3 SA 695 (CC). See RA Edwards 'The Right to a Speedy Trial' (1999) 15 South African Journal of Human Rights 233-40, and D Singh 'The Constitutional Right to a Fair Trial: Understanding section 35(3)(d) through the cases' (200) 63 Journal of Contemporary Roman-Dutch Law (THRHR) 121-33.*

would be ordered in appropriate circumstances. It is a remedy that serves as a reminder to the investigators and prosecution, and indeed all those involved with the administration of criminal justice, of the urgent need to be vigilant in the efficient and effective delivery of justice, because, justice delayed is justice denied.

Although the case was not brought by, and did not in any way involve, a prison inmate, permanent stay of proceedings is a remedy that may turn out to be very useful to awaiting trial prison inmates, who in some countries, for example Tanzania and South Africa, are known to languish in prison for many years waiting to be tried.[35]

Tanzania

Very little was written about prison conditions in Tanzania until 1994 when the Law Reform Commission published its report on the problem of overcrowding in prisons in the country.[36] Since then, however, prison officials have organised seminars and other discussion forums to sensitise officials in other criminal justice institutions of the difficulties brought about by congestion in prisons. Prison officials have also written extensively about different facets of prisons, prison life and rights of prisoners.[37] What emerges from these seminars, workshops and literature is that prison officers are frustrated by the goings on in the Tanzanian prisons. These officials appear to be pleading to government and other criminal justice institutions to be sensitive to and actively involved in the reduction of congestion in prison by utilising other non-custodial measures, and improving the human rights situation of inmates in the country. So far the sensitisation and appeals do not seem to have received sufficient attention from the intended audiences.

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35. *In Tanzania awaiting trial prisoners appear to spend a long time in remand. The Tanzania Prison Service reports, for example, that out of 18,111 people in remand on 1 March 2001, 2720 had been in custody for between 1-2 years, 1744 for 2-5 years and 716 for over 5 years, See CESCA presentation referred to in note 24 above. On a comparable situation in South Africa, see Human Rights Watch website http://www.hrw.org/prisons/africa.html (accessed 25 February 2002).*

36. *Law Reform Commission of Tanzania, Report of the Commission on the Problem of Congestion in Prisons (Dar es Salaam: Government Printer, 1994).*

37. *Following the publication of the Law Reform Commission report on Congestion, prison officers in Tanzania started to make public presentation on the prison situation. See, for example, the paper by the Principal Commissioner of Prisons (OE Malisa) and the Prisons Legal Adviser (JC Minja) at a Workshop held in Dar es Salaam 3-7 April 1995. That paper has since been published, see OE Malisa & JC Minja 'Prison Inmates and Their Basic Rights in Tanzania' in CM Peter & IH Juma (eds) Fundamental Rights and Freedoms in Tanzania (Dar es Salaam: Mkuki na Nyota Publishers, 1998), pp 169-82. Seminars and workshops organised in 1999 alone include: Workshop on Good Prison Practice (held at Arusha, 23 February 1999); The Seminar on Prisons and Alternative Sentencing as a Human Rights Issue (held at Arusha, 6-10 April 1999) and Workshop on Identifying Measures to Reduce Prison Overcrowding (held at Morogoro, 22-23 August 1999).*

These developments, notwithstanding, several decisions have emerged from the High Court and Court Appeal that are relevant, albeit indirectly, to the plight of prison inmates in the country. Three court decisions are illustrative, namely, *Chumchua Marwa v Officer in Charge Musoma Prison & Another* (Mwanza High Court Miscellaneous Criminal Cause 2 of 1988, unreported); *Daudi Pete v R* (Mwanza High Court Miscellaneous Criminal Cause 80 of 1989, unreported and [1991] LRC (Const) 553 Tanzania Court of Appeal), and *R v Mbushuu & Another* ([1994] 2 LRC 335 Tanzania High Court and [1995] 1 LRC 216 Tanzania Court of Appeal).

The Chumchua Marwa case, for example, involved persons who were in prison waiting to be deported following deportation orders issued by the President. The President ordered the deportation of more than 155 people from one region of the country to another because their continued residence in that one region was considered dangerous to peace and good order. The deportation orders were made in September 1987 under the Deportation Ordinance 1921 (Chapter 38 of the Laws of Tanzania), which also authorised the detention of deportees until a fit opportunity for deportation occurs. While in prison awaiting their deportation, which had not been effected for lack of suitable transport, the son of one of the deportees challenged the constitutionality of the provisions of the Deportation Ordinance. It is worth mentioning that at the time the challenge was launched, the Bill of Rights in the Constitution of Tanzania had just come into operation.[38]

Justice Mwalusanya of the High Court of Tanzania examined the Deportation Ordinance in the light of comparative human rights literature and the new Bill of Rights in the Tanzanian Constitution. He concluded that the Ordinance did not pass the test of the Bill of Rights provisions. The court found that the law under which the deportation was authorised was unconstitutional, the deportation order authorising the detention was, consequently, of no legal effect. The judge ordered the immediate release of the applicant. Not only did this court decision lead to the release of the prison inmate, it also gave rise to the amendment of the offending Deportation Ordinance.

In Daudi Pete, the High Court and Court of Appeal had to grapple with the question whether an awaiting trial prisoner, charged with robbery with violence, had a right to bail pending trial, in view of the fact that section 148(5)(e) of the Criminal Procedure Act 9 of 1985 made that offence non-bailable. When the trial court refused to grant bail, the accused person made a further application to the High Court. Mwalusanya J noted that section 148(5)(e) was inconsistent

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38. *See note 9 above.*

with the Constitution as it did not pass the proportionality test. Although the Court of Appeal, on its part, had some difficulty with Justice Mwalusanya's overall reasoning, it concluded as well that section 148(5)(e) was unconstitutional. The legislature followed the advice of the two superior courts and amended section 148(5)(e) accordingly.

The two court decisions were not only of benefit to individual and specific prison inmates, they contributed significantly to the enhancement of inmates' rights, at a broader level. The Mbushuu case, on the other hand, was not. The case involved the question of the constitutionality of death penalty in Tanzania. The High Court found death penalty an violation of the right not be subjected to torture nor to cruel, inhumane or degrading treatment or punishment, and was, therefore, unconstitutional. The matter was taken to the Court of Appeal (*DPP v Mbushuu* 1995 1 LRC 216 Tanzania Court of Appeal) where the decision was reversed. Although the Court of Appeal found death penalty to be cruel, it concluded, on the other hand, that it was not arbitrary.

The decisions of Courts of Appeal of Tanzania and Botswana in Mbushuu and Ntesang respectively, have not gone down well with human rights activists in Africa and around the world. Critics suggest that the respective courts not only missed valuable opportunities to contribute to good penal practices in their respective countries, and the whole of the African continent, but also failed to appreciate penal trends in liberal countries of world at large. Put differently, judges of the two superior courts are accused of, first, abdicating their duty to protect individual liberty by adopting narrow interpretations of the respective constitutional provisions, and secondly, failure to rely on international instruments and make use of international trends that are in accord with the furtherance of liberal penal policies. Death row prison inmates in Tanzania and Botswana, therefore, have missed out on constitutional protection that has already been afforded in Namibia, Mozambique, and South Africa, for example.

Zambia

Zambian law, like that of other countries in the region, makes provision for corporal punishment for certain crimes. The question as to whether corporal punishment was constitutional or not came before the High Court in two recent cases, namely, John Banda v The People HPA/06/1998 (unreported), and *The People v Ian Kainda*, HLR/01/2000 (unreported). In both case the High Court had no hesitation in concluding that corporal punishment was a violation of

article 15 of the Constitution of Zambia which provides that 'a person shall not be subjected to torture, or inhumane or degrading punishment or other like treatment.

It has been suggested also that there are cases challenging the conditions of detention and prison overcrowding which were pending before the High Court of Zambia by February 2002.

Conclusion: Implications of the protections

What emerges from the above discussion is that rights and standards for the protection of inmates in civilised societies have not only been adequately demarcated, monitoring and enforcement measures and institutions are already in place and playing their important part. In the cases mentioned above, for example, it has been shown that courts are now 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/or re-training of all prison officers is not only necessary, it 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 it is not impossible.

It may be very tempting to assume that training and/or re-training will be accompanied by the requisite change of attitude. There is evidence to suggest that 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 checking and consistent monitoring of 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 prison officers who have already accepted that change has come about, and of the need to be embraced it, will be how to bring along their doubtful colleagues. There is very little time, in fact no more time at all, to convince the doubting Thomas to come on board. As shown by the court 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 court damages awarded to successful inmates.

Some of those who are in grave doubts about these developments appear to be thinking, and even suggesting, that the emerging pattern of protecting prisoners' rights in the region and elsewhere, is not likely to last for very long. To them, these are only short-term issues, which do not deserve so much attention. There

might be some shades of truth in that. A recent study on prisoners' rights in England, for instance, appears to support such a conclusion[39]. The doubting Thomas of Africa have 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, and national legislation has only recently come into force. Monitoring mechanisms at the national level are getting stronger, thanks to alliances and collaborations with their regional and international counterparts. As observed by Chief Justice Gubbay, in the second quotation above, courts in some countries of Africa 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 near future, just as much as less was known about the current developments in the past. As things stand now, however, prisoners' rights are issues on the agenda, and matters of concern to the international community, as well as regional and national levels. If that 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. It is not only good for prisoners but for humanity as a whole. In order to appreciate the importance of the respect for human dignity of inmates, one needs to look at the long list of people who, at one point or other, have spent many precious years in prison.[40]

In the above discussion a combination of mechanisms for the protection of inmates' rights, ranging from international standards to local measures, have been outlined. It took a long time and a lot of energy as well, for these mechanisms to come into place and become accepted. From the examples and illustrations given a conclusion can be safely drawn that these rights are now not only recognised but also entrenched.

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39. *JM Schone, (n 5 above). While forces that have led English courts to take retrogressive steps, regarding the protection of prisoners' rights, must be taken note of, for the moments at least, the same have neither been considered nor found favour with courts in the countries examined in this report.*

40. *The imprisonment (either as sentenced or awaiting trial prisoner or detainee) 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 Titi Mohamed (Tanzania), Winnie Mandela and Albertina Sisulu (South Africa), Mbuya Nehanda (Zimbabwe) Alice Lenshina (Zambia), Rona Nambinga and Edna Jimmy (Namibia), to mention only a few, speaks volumes. Recently, Anwar Ibrahim (Malaysia) and Nawaz Sharriff (Pakistan) also found themselves in prison. These examples show how unfounded 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.*

Dr. Sufian Hemed Bukurura

Dr Sufian Hemed Bukurura taught law in the Faculty of Law at the University of Namibia between May 1999-April 2002. Before that he worked at the University of Swaziland and the Institute of Development Management (IDM) in Tanzania. He studied at the University of Dar es Salaam (Tanzania) where he obtained the degree of Bachelor of Laws (LL.B). He also holds the degrees of Master of Laws (LL.M) and Doctor of Philosophy (Ph.D), from the Universities of Warwick and Cambridge (England), respectively.

Dr Bukurura has been appointed Associate Professor in the School of Law, at the University of Durban-Westville, South Africa and started in June 2002.

His latest book, Essays on Constitutionalism and the Administration of Justice in Namibia 1990-2002 will be published by Out of Africa Publishers (Windhoek) in July 2002.

Dr Bukurura, together with two of his colleagues, are currently working on a Human Rights Casebook for Namibia where High Court and Supreme Court decisions, interpreting Chapter Three of the Namibian Constitution 1990 since independence, will be brought together. The book is likely to be published sometimes in mid 2003.

PENAL REFORM INTERNATIONAL IN SOUTHERN AFRICA

PRI has been working in Malawi since 1995 when the organization was invited by the Ministry of Justice to conduct a Needs Assessment of the Malawi Prison Service (MPS). This was done in collaboration with the MPS, Malawi CARER and a prison officer attached from the Zimbabwe Prison Service. The recommendations from the Assessment, together with the agenda for penal reform in Africa - set in 1996 by the Kampala Declaration on Prison Conditions in Africa -, formed the basis for PRI's work in the country.

PRI has sought **to build up the penal reform network** among civil society groups as well as lawyers, judiciary, social services, police and prisons by co-founding and supporting the Prison Reform Committee and assisting in the creation of a newsletter called New Hope. PRI has lobbied donor agencies to support penal reform and worked closely with the Malawi Prison Service to assist in the implementation of these projects.

The three most notable achievements to-date have been:

- the development of the Community Service scheme;
- the Malawi Prison Farms project; and
- the Paralegal Advisory Service.

PRI has supported the **development of Community Service** from its introduction in November 1996 to programme implementation in 2000. The support included organization of national and regional seminars and exchange meetings with other National Committees, support to the Law Reform and training of Community service and magistrates. PRI has also stressed the importance of an inclusive approach to recruiting officers on the National Committee on Community Service as this maximizes the participation of both officials and representatives from civil society.

Following on from one the recommendations of the 1995 needs-assessment report, that the **prison farms** should be revived, PRI carried out a feasibility study in 1997 in partnership with the Prison Farm Manager. A pilot project focusing on three farms started the same year. Its success led to a three year Prison Farms Rehabilitation Programme, funded by DfID, incorporating the

entire prison service. By the end of the third year, the production which before had been negligible had reached 25% of the ration requirement for maize (with the starting year prison population figure as a reference). In 2001, PRI was invited to assist in the development of a Second Phase Programme. This started with a small livestock project to introduce rabbit meat into the prisoners' diet. Following an evaluation commissioned by PRI of the vegetable production programme in each prison, a plan for semi-intensive fruit and vegetable production was included in the programme. The rabbit cycle of breeding and expansion into other prisons will thus follow the vegetable cycle and enable the farm management to reduce the cost of feeding. PRI obtained funding from DfID for a three year Prison Farm Development programme which includes crop, vegetable and livestock production under the management of the Malawi Prison Farms Manager. This started in April 2002.

Since 2000, PRI started a very innovative programme of paralegal aid for the Criminal Justice System. The Paralegal Advisory Service (PAS), funded by DFID, UK, works in the four principal prisons in Malawi (covering two thirds of the prison population, presently 8,500). Through Paralegal Aid Clinics, follow-up of cases and cases referrals, the PAS provides services to all remand prisoners and assistance to convicted prisoners. It facilitates where needed the release of prisoners whether through bail, discharge or release on compassionate grounds, and achieves substantial reductions in the numbers of remand prisoners held unlawfully (from hundreds to tens).

The PAS is based on three cornerstones:

- linking the criminal justice system: improving communication, co-operation and co-ordination between the prisons, courts and police
- legal literacy: to help prisoners understand the law and how it affects them,
- legal advice and assistance: to enable prisoners to apply the law and help themselves

The scheme represents a unique partnership between the prisons service and NGOs. The paralegals operate under a Code of Conduct and work under a national co-ordinator. An advisory Council comprising the Chief Commissioner of Prisons, two senior judges, all the chief resident magistrates, Director of Public Prosecutions, Chief Legal Aid advocate and Head of Police Prosecutions steers and guides the PAS so that misunderstandings are avoided and mistakes mitigated.

An independent evaluation assessed the PAS to be

> *'a remarkably innovative and successful attempt to use relatively few resources to achieve maximum benefit for users (and used) of the criminal justice system in Malawi. Through well focused assistance, it marshals good will and resources already present in the system to best effect by promoting a holistic view and furthering communication between actors.'*

Finally, PRI has been working with the EU Rule of Law programme **to provide assistance to the Prison Service**. It undertook a review of the Management system of the MPS, an assessment of the prison staff training needs and is currently working on the review and redraft of the Prison Act.

PRI is convinced that unless the **participation of stakeholders at all levels is maximized**, the projects will not be sustainable. Thus the Paralegal Advisory Service includes senior government officials (through its Advisory Council), prison officers (micro-projects and paralegal aid clinics) and other criminal justice agencies (Court Users Committees, case follow-ups). The prison farms project is wholly managed by the Prison Farms manager and his team with financial and technical support from PRI.

All projects have been raising considerable interest from neighbouring Southern African countries, and beyond on the continent. Study tours, exchange visits and provision of information and expertise have been organised with countries including with Mozambique, Ghana, Rwanda, Uganda, Kenya and Benin.

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