

Prisoners' Rights Under the Constitution Act No 200 of 1993

Kollapen, J. (1994). ***Prisoners' Rights Under the Constitution Act No 200 of 1993***. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 5, 29 June.

Seminar No. 5, 1994

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Date: 29 June 1994

Venue: Centre for the Study of Violence and Reconciliation

Introduction

In 1912 in the case of *Whittaker & Morant vs Roos & Bateman*, his Lordship Mr Justice Innes said that:

True, the plaintiffs' freedom had been impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty has been legally curtailed could be no excuse for a further illegal encroachment upon it.

In 1993 his Lordship Mr Justice Hoexter in *Minister of Justice vs Hofmeyer* approved the Innes dictum and in so doing followed the dissenting view of Corbett J. A (as he then was) in the case of *Goldberg vs Minister of Prisons* where the following observations were made:

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law ...

If the sentiments expressed in the above two cases, which span some 80 years of South African law, is an accurate reflection of the general approach our courts as well as society to the issue of prisoners' rights, one may well have come to the conclusion

that all was well within our prisons. Sadly this is not the position and the state of prisoners' rights in South Africa is a cause for concern. Some of the major problems that warrant mention at this stage are:

(a) overcrowding; at present we have ñ 110,000 prisoners being housed in accommodation that was designed to hold 84,000.

(b) differentiated treatment on the basis of race still exists within the prison service despite the "integration" of the prisons which commenced just after 1990. Examples of differentiated treatment are general prison living conditions, vocational training, the allocation of jobs within the prison structure (kitchen jobs which were regarded as the most desirable were often allocated to white prisoners), and bias on the part of warders motivated by race.

(c) gang violence which has virtually become synonymous with most institutions and the power that gangs wield within prison is indeed worrying. Allegations that prison warders orchestrate and are involved in such violence are made with frequent regularity.

(d) the lack of adequate vocational training that would enable prisoners to be better prepared for their release is also an area that needs urgent addressing.

(e) almost everything that an inmate is allowed to do or to have in his/her possession is called a "privilege" or "indulgence". The relevance of this is that in terms of Section 22(s) the Commissioner of Prisons may withdraw any privilege or indulgence granted to any prisoner without furnishing reasons and without hearing such a prisoner, provided it was in the interest of the administration of prisoners. The effect of this Section virtually means that almost every aspect of prison life falls within the untrammelled discretion of the prison authorities. In the past such discretion was exercised to deny prisoners the right to study, access to news and news items, and indeed effective access to legal representation.

On the other hand, it needs to be mentioned that since 1990 there have been some attempts on the part of the authorities to address the fundamental problems which exist within our prisons and some of the more important changes that we have seen in recent years have been the abolition of at least de jure segregation; lifting of the censorship provisions within the Correctional Services Act, and finally the changes made to the parole system, as well as mechanisms to deal with disciplinary infractions. These are welcome changes but certainly much more requires to be done within the coming months and years.

The Constitution Act of 1993 and its Implications

The introduction of our Interim Constitution incorporating within it a chapter on fundamental rights, has created legitimate expectation for the transformation of our society and all the many institutions within it – prisons included. In the Preamble to the Constitution there is a commitment to the creation of a constitutional state where there is equality and where all citizens are able to enjoy and exercise their fundamental rights and freedoms. Chapter 3 of the Constitution attempts to give

content to some of these fundamental rights and some of them have direct relevance for prisons and prisoners.

It has correctly been said that the scope and extent of rights granted in terms of the Constitution will ultimately depend on the manner in which Chapter 3 is interpreted by our soon to be appointed Constitutional Court.

I will now proceed to deal with some of the relevant Sections of Chapter 3 insofar as they may have an impact on prisons and prisoners' rights.

Class Actions – extended locus standi

Section 7(4)(b) introduces into our law for the first time the possibility of class actions. This is particularly relevant for prisoners who very often do not have the means to access the legal system. Thus prisoner organisations, NGOs and in fact individuals could become parties to litigation that has as its object the advancement of prisoners' rights and/or practices that violate the provisions of the Charter on Fundamental Rights.

Equal Protection – non discrimination

Section 8 provides that all persons shall have the right to equality before the law and to equal protection of the law. This section further outlaws unfair discrimination. The effect of this must be that all prisoners held within the prison system would be entitled to demand substantial equality in treatment. The marked differences in conditions between white and black prisons might well already be a violation of Section 8 and it is hoped that the authorities will address this matter with a sense of urgency. A speedy integration of our prisons coupled with an equitable distribution of resources might be the starting point.

In this regard, one has to take cognisance of the fact that traditionally, prisons built for white prisoners were of a better standard than those for black prisoners, had better recreational and medical facilities, etc. Although the process of integration of prisons is still underway, most South African prisons can still be characterised as essentially white or black prisons.

The Right to Life

Section 9 provides that "every person shall have the right to life". There are approximately 300 persons facing sentence of death at the present time and it is conceivable that not before long a case will be brought before the Constitutional Court arguing that the death penalty violates Section 9. To the extent that the Constitution is not definitive on the death penalty, the matter would probably have to be dealt with on the basis as to whether the imposition of the death penalty is a reasonable and justifiable limitation on the right to life entrenched in Section 9. In addition, it will have to be shown that the operation of the death penalty does not negate the essential content of the right in question.

Protection of Dignity – No Cruel, inhuman treatment

Sections 10 and 11 provide for the respect for and protection of dignity as well as a prohibition against cruel, inhuman or degrading treatment or punishment. These sections generally speak for themselves and it is important to note that a recent amendment to the Correctional Services Act, which came into effect in March this year, abolished corporal punishment, dietary punishment and solitary confinement as forms of punishment within the prison system.

What might well constitute cruel, inhuman or degrading treatment is not defined and it is conceivable that negative prison conditions might well form the basis of an action testing the scope of Sections 10 and 11. For example, a communal cell where 20 prisoners share one toilet that is in close proximity to the sleeping quarters might well be considered to be degrading treatment.

No Servitude or Forced Labour

Section 12 provides that no person shall be subject to servitude or forced labour. Section 77 of the Correctional Services Act states that "every prisoner ... shall at all times perform such labour, tasks and other duties as may be assigned to him ...". Does Section 77 violate the rights entrenched in Section 12? In this instance it might well be argued that the limitation that Section 77 introduces is in fact reasonable and just, and does not in fact negate the essential content of the right.

The Right to Privacy

Section 13 guarantees the right to personal privacy. It may be argued in such an instance that imprisonment, by its very nature, deprives one of the right to personal privacy to a substantial extent. On the other hand, if one had to give effect to what has become known as the "residuum principle" there are no doubt certain areas of a prisoner's life which remain private and thus warrant the protection of the law.

Freedom of Association, Assembly, et cetera

Sections 16 and 17 raise interesting problems. Section 17 guarantees the freedom of association while Section 16 guarantees the freedom to assemble, demonstrate and to present petitions. In recent times we have seen high levels of unrest in our prisons and while not condoning some of the actions taken, some of the underlying causes of such unrest appear to be legitimate. It might very well be argued that prisoners who all have a common interest should have the freedom to associate and any law which makes inroads on such freedoms would be unconstitutional. If one was able to successfully argue the freedom of association, the notion of prisoner organisations operating within prisons could become a reality, and if this is so, on what basis could one possibly argue against the right of such prisoners who belong to such associations, to assemble, demonstrate and present petitions. These questions pose interesting challenges not only to the administration of prisons but to the notion that we in society have regarding prisons and prisoners' rights. If prisoners were allowed to associate, to assemble and to present petitions, could it still be argued that such conduct was objectionable, or would someone seeking to outlaw such conduct have difficulty in presenting an argument to the effect that a limitation of such rights complied with the criteria set out in Section 33 of the Constitution. It would certainly appear that the Constitution, far from providing definite answers, brings up interesting questions.

The Right to Vote

Section 21(2) provides that every citizen shall have the right to vote. The present Electoral Act precludes certain categories of prisoners from the franchise and it is probably arguable that the provisions of the Electoral Act go contrary to Section 21(2) and do not satisfy the limitation criteria laid down in Section 33.

Approximately two weeks prior to the general elections our organisation brought an action in Transvaal Provincial Division seeking to challenge the provisions of the Electoral Act. We, unfortunately, were not able to progress very much in the matter, in that the court had found it did not have the necessary jurisdiction to hear the matter. I might mention that the arguments relevant to the merits of the matter were quite interesting from both sides and it remains to be seen how a future Constitutional Court deals with the issue.

Access to Information

Section 23 grants every person the right of access to information held by the state or its organs insofar as such information is required for the exercise or protection of any of his/her rights.

Within the prison system decisions are taken on a regular basis by the Head of Prison, institutional committees, parole boards, advisory boards, etc, which decisions affect the rights of prisoners. It is once again arguable that any action that could have a positive or negative effect on any of the rights a prisoner has, should fall within the ambit of this particular Section, thereby giving the prisoner the right to the information in question.

Administrative Justice

Section 24 deals with administrative justice and administrative fairness. The entire manner in which disciplinary infractions are dealt with within prisons could possibly be challenged in terms of Section 24.

In the recent amendments which came into effect in March of this year, the old accusatorial system of trials was done away with and replaced by a hearing before an Institutional Committee. The proceedings are essentially inquisitorial and legal representation is specifically excluded. The ordinary rules of evidence do not apply and interrogation of the accused or any witness is provided for.

It is certainly arguable that the mechanisms to deal with disciplinary infractions violate the due process clauses of the Constitution and in particular Section 25(3).

The Rights of Detained Persons

Section 25(1) provides that detained persons (including every sentenced prisoner) shall have the right:

(i) to be detained under conditions consonant with human dignity, which shall include **at least** the provision of adequate nutrition, reading material and medical treatment at State expense.

(ii) to consult lawyers, and in cases where substantial injustice would otherwise result, to be provided with a lawyer at State expense.

(iii) to visits by spouses, partners, next of kin, religious counsellor and a medical practitioner of his/her choice.

These provisions speak for themselves and again it will probably be a question of interpretation as to what would constitute adequate nutrition, reading material and medical treatment.

From the above it is clear that there are various areas of the Constitution that, at least on paper, provide the potential to promote and widen the category of rights that prisoners presently enjoy. An important question that arises, however, is whether the promise of such widening protection that the Constitution provides becomes reality. There are at present certain developments which are underway and which might impact on this reality. They are:

(i) We understand that the Department of Correctional Services is presently reviewing the Correctional Services Act in the light of the new Constitution. It is certainly hoped that the authorities will make the necessary changes to the Act and Regulations to bring it in line with the spirit of the Constitution. This will obviate the need to seek rulings from the court with regard to most of the contentious provisions.

(ii) Although the rules of the Constitutional court have not as yet been drafted, one certainly hopes that the Court will be easily accessible to all, including prisoners. I understand that the present draft Bill on the Constitutional Court procedures provides for an investigative and/or research division and it is hoped that this would be utilised in instances where complaints are lodged by persons who do not have the means or expertise to undertake extensive research or investigation. By way of example, the Indian Supreme Court has a mechanism in terms of which the court can appoint investigators to investigate allegations made by a petitioner and the results of such an investigation could be utilised in evidence before the court. This has the advantage in that it relieves the indigent petitioner of the burden of proof that normally rests with the applicant. Such a system introduced to our law would certainly operate to the advantage of prisoners and will in a sense ensure that the rights that the Constitution guarantees are subject to effective court supervision.

(iii) Apart from the Constitutional Court, the Human Rights Commission and the Office of the Public Protector also represent important protection mechanisms for prisoners' rights. The Human Rights Commission has the competence to investigate on its own initiative or on receipt of complaint, any alleged violation of fundamental rights. It may also arrange or provide financial assistance to enable proceedings to be taken to a competent court. Prisoners who have specific complaints will certainly be forwarding many of them to the Human Rights Commission for investigation and it is hoped that the Commission will have the means and resources to conduct the necessary investigations and provide effective support.

The Public Protector is empowered to investigate maladministration in connection with the affairs of government, as well as the abuse or unjustifiable exercise of power by a person performing a public function. It can, in addition, investigate an act or omission by a person performing a public function which results in unlawful or improper prejudice to any other person.

These structures certainly have the potential to impact on the power relations that presently exist between the prison staff and prisoners, and if the Office of the Public Protector was accessible and effectively resourced, it could have an important effect in terms of serving as a watch-dog with regard to the conduct of prison staff.

Conclusion

As we set about the task of transforming into a just and democratic one, we can hardly ignore the fate of prisoners and the conditions of our prisons. The Constitution and the mechanisms that it establishes provides an important foundation to advance this course and we need to utilise it effectively, as well as responsibility, in the months and years ahead. I believe we need to recognise that we cannot ignore what goes on with prisons simply because they are physically removed from us. On the contrary, prisoners remain an important component of our society and the manner in which we treat them must ultimately reflect on how successful we have been in transforming our society.