Prisoner's rights litigation in South Africa since 1994: A critical evaluation

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1. Introduction

It is a sad fact that there is often a huge gap in South Africa between the Constitutional promise of a life lived with dignity and respect on the one hand, and the actual lived reality of people who are supposed to be protected by that Constitution on the other. The ongoing hearings at the Jali Commission of enquiry into the system of correction in South Africa has revealed that many prisoners[1] are incarcerated in circumstances that fall far short of those guaranteed to them in the South African Constitution.[2] The Bill of Rights in the South African Constitution contains several guarantees aimed at safeguarding the rights of those individuals detained by the state, whether they are sentenced prisoners or awaiting trial. Yet, it is common cause that South African prisons are desperately overcrowded and that the most basic Constitutional rights of prisoners are often not protected adequately. Prisoners often complain that they are locked up in conditions that are far from consistent with human dignity. This gap between the guarantees set out in the Constitution and the actual conditions in prisons is a serious matter, not only because a sizable number of prisoners are thereby deprived of their Constitutional rights, but also because this situation poses a threat to the maintenance of the Rule of Law in South Africa. If the State is failing to provide prisoners with even the most basic rights guaranteed by the Constitution and if the mechanisms that are in place to deal with this problem appear to be woefully inadequate, it points to a breakdown in respect for the highest law – the Constitution itself.

One potential strategy to deal with this problem, would be to turn to the courts in an effort to promote the rights of prisoners. In this report I ask whether such a strategy is needed and how effective it would be, given the present legal and social realities of South Africa and given the state of the

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[1] In this report I use the term prisoners as an all encompassing term that includes all individuals detained in a facility directly or indirectly controlled by the Department of Correctional Services. In this definition, "prisoners" include individuals awaiting trial, individuals convicted but not yet sentenced and individuals who have been convicted and sentenced and are serving a prison sentence.

[2] The Constitution of the Republic of South Africa Act 108 of 1996. See "Jali warns prison official on 'games'" SABC Radio, accessed on 19 June 2003 at http://www.bdfm.co.za/cgi-bin/pp-print.pl; "Jail work 'private businesses'" News 24 accessed on 19 June 2003 at http://www.wheels24.co.za/South_Africa/News/0,1113,2-7-1442_1286511,00.html.

administration within the Department of Correctional Services and the state of the leadership within individual prisons.[3] I conclude that prisoners' rights litigation should be an essential part of any strategy to advance the rights of prisoners in South Africa, but that such a strategy should be employed *as part of* a larger strategy to improve the conditions in prison and to change the behaviour and attitude of prison officials and bureaucrats.

2. Methodology

This report aims to identify the problems and challenges associated with current prisoners' rights litigation strategies and to make practical suggestions and, in broad terms, propose specific new strategies around prisoners' rights litigation in South Africa. This study is therefore not primarily focused on academic writing in the field of prisoners' rights or criminology. The most important component of this study is therefore a number of interviews conducted with human rights practitioners directly involved in prisoners' rights litigation in South Africa. I have interviewed several practitioners to gain insight into the problems relating to prisoner's rights litigation and to find out more about the failures and successes of such litigation and about the way in which the Department of Correctional Services deals with such litigation.[4] To gather background information about the problems relating to the administration inside the Department of Correctional Services, I also interviewed other experts who have worked with the Department in the past.[5] I also did a search of all reported cases in South Africa since 1994 dealing with prisoners' rights, and read all relevant cases I could find to ascertain trends and to gain insight into the nature of prisoner's rights litigation in the post-apartheid era in South Africa. Through my research assistants, I also gathered academic writing on the topic of prisoner's rights, which include published books and articles as well as occasional papers and monographs published on the Internet. Furthermore, I gathered news reports via the Internet and the Sabinet database regarding court cases and news about the work of the Department of Correctional Services. Although this is not an academic study, I also garnered valuable insights about the way in which human rights litigation can be used as

[3] I believe it is helpful to distinguish at some points between those administrators working for the provincial and national Department of Correctional Services, and those members of the Department who actually work inside prisons. Any effective strategy to tackle the conditions under which prisoners live will have to target both groups and will have to ensure that not only the officials in the Department, but also those actually doing the job in individual prisons, change their behaviour and attitude.

[4] I have interviewed the following practitioners: William Kerfoot (Legal Resources Centre, Cape Town); Peter Jordi (Legal Aid Clinic, Wits); Achmed Mayet (Legal Resources Centre, Johannesburg); Michelle Norton (Cape Bar); Louis van der Merwe (Lawyers for Human Rights, Pretoria); and Geoff Budlender (Legal Resources Centre, Cape Town).

[5] I have interviewed the following experts: Karl Paxton (Legal Advisor of the Department of Correctional Services); Chris Gifford (Centre for Conflict Resolution); Ashraf Grimwood (Medical Research Council); Mr Justice Hannes Fagan (Office of the Inspecting Judge); Ms FT Sehoole (Head, Johannesburg Prison); Representatives of State Attorney's Office, Cape Town, Pretoria.

part of a broader strategic struggle for social and political change, from academic work done on the successful campaigns of one of the most dynamic NGO's in South Africa – the Treatment Action Campaign. The report at hand was put together by identifying trends from the raw material and teasing out the consequences of those trends. In the final section of the report, which contains my recommendations, I also make use of my general insight into Constitutional litigation to propose ways in which prisoners' rights litigation could be used as part of an affective strategy for advancing the rights of prisoners in South Africa.

3. Prisoner's rights in context: prisons and prisoners' rights litigation in apartheid South Africa

To understand the present human rights related problems in the Correctional Services system and to identify the best strategies to deal with these problems it is important to take note of the political role accorded to the system of incarceration by the apartheid government, and the concomitant way in which prisons were run during this period. This history of incarceration in apartheid South Africa reflects all the predictable attributes of racial prejudice and capitalist exploitation, but one also finds more distinct and even surprising trends in the way prisons were run before the advent of our Constitutional democracy.

When the (old) National Party came to power in 1948 the prison system was a major supplier of reliable unskilled black labour for the mines. [6] But by 1959 an act of parliament officially abolished prison labour, replacing the practice with policies that prescribed "useful and healthy outdoor work" for short term prisoners. This practice continued until as late as 1989.[7] During this period, the treatment of prisoners reflected the separatist ideology of the apartheid regime. Black and white prisoners were thus separated from one another and received different treatment.[8] This is not surprising, seeing that before the advent of democracy the penal system in South Africa played a pivotal role in the government's attempts to maintain social control through racial segregation over the population. On the one hand, the system was used to deal with "ordinary" criminal activity (such as murder, rape, theft, and assault) and other social phenomena thought to be a threat to the morals and well-being of the Afrikaner-Nationalist state (such as sex work, drug use and abuse and the free expression of sexuality). On the other hand, the system was also pressed into service to ensure the enforcement of the apartheid legislation (such as the Group Areas Act and Pass Laws) and to control and suppress political dissent and resistance to the apartheid regime (through the application of "security" legislation and common law prohibition

[6] Dirk van Zyl Smit 1991 15; See also Dirk van Zyl Smit "Prisoners' Rights" in Ronald Louw (ed.) *South African Human Rights Yearbook 1994* vol. 5 (1995) 268.
[7] Judith Van Heerden *Prison Health Care in South Africa* (1996) UCT 6.
[8] Amanda Dissel "Tracking Transformation in South African Prisons"; Kollapen 1.

against treason). Many South Africans who would not have found themselves on the wrong side of the law in a more normal society were therefore sent to prison. The vast majority of these were black, which meant that the prison system reflected the political reality of apartheid.[9] Because the Correctional Services institutions were also used extensively to incarcerate individuals who had not been found guilty of any crime but had been detained in terms of security legislation, or prisoners convicted of "political crimes" the running of prisons in South Africa was highly politicised and was viewed as having a strategic importance – it was of vital importance to the state that the system work effectively as it assisted in incarcerating the perceived enemies of the regime. Often the conditions under which these prisoners were held were not determined by the prison authorities but by the security police.[10] The Correctional Services Department was also militarised in the 1950s, implanting a strict hierarchical management structure on the prison services to ensure strict discipline and to counter corruption. The military command structure mirrored that of the South African Defence Force and the Correctional Services culture was one in which a strict chain of command was adhered to at all times.[11]

The Departments' general attitude towards prisoners was that they had been deprived of their freedom and that they therefore had no rights, only privileges. This attitude was often endorsed by the South African Courts when prisoners – often prisoners incarcerated for political reasons – challenged their treatment at the hands of the Department. As early as 1912 the Appellate Division confirmed the common law position that all prisoners:

> "are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration."[12]

But in subsequent cases where political prisoners challenged the Department's application of legislation the Courts' took a less sympathetic view. In *Rossouw v Sachs,*[13] for example, the Appellate Division questioned whether regulations made in terms of detention legislation conferred any legal rights upon prisoners[14] and found that detainees had a right to the necessities of life but that they had no right to

[9] "A Brief History of Prisons in South Africa" Monograph 29 – Correcting Corrections October 1998, published by the Institute of Security Studies, accessed at http://www.iss.co.za/Pubs/Monographs/ No29/History.html.
[10] See *Minister of Justice v Hofmeyer* 1993 (3) SA 131 148E-F.
[11] Dissel 2.
[12] *Whittaker v Roos & Bateman; Morant v Roos a& Bateman* 1912 AD 92 123.
[13] 1964 (2) SA 551 (A).
[14] Ibid. at 562A.

any "comforts".[15] And later in *Goldberg and Others v Minister of Prisons and Others*[16] the Appellate Division confirmed that long term prisoners had no right to reading materials because these did not constitute "necessities".[17] By 1993, however, the political atmosphere in South Africa had changed and in a remarkable turnaround the full bench of Appeal Court in the case of *Minister of Justice v Hofmeyer*[18] stated that:

> "In seeking to identify or circumscribe basic rights, I would approve the critical approach adopted by Corbett JA [the minority judgment] in the *Goldberg* case in regard the efficacy or otherwise of a test based upon the distinction between 'comforts' on the one hand and 'necessities' on the other hand. In this field of enquiry, so I consider, the line of demarcation between the two concepts is so blurred and so acutely dependent upon the particular circumstances of the case that the distinction provides a criterion of little value. An ordinary amenity of life, the enjoyment of which may in one situation afford no more than comfort or diversion, may in a different situation represent the direst necessity. Indeed in the latter case, to put the matter starkly, enjoyment of the amenity of life may be a lifeline making the difference between physical fitness and debility and likewise the difference between mental stability and derangement."[19]

While the law as enforced by the South African courts now recognised the basic rights of prisoners this was not reflected in the way the Department of Correctional Services dealt with prisoners from day to day. As we shall see, this discrepancy between the legal position of prisoners on the one hand, and the factual reality in which prisoners find themselves on the other, persisted and to some extent became even more pronounced after the advent of a new Constitution brought to power many of the leaders who had experienced prison at first hand.

4. The Constitutional Rights of Prisoners

Given the recent political history of South Africa, it is not surprising that the South African Constitution contains explicit provisions protecting anyone who finds him or herself in jail. Not only awaiting trial prisoners, but also sentenced prisoners are explicitly protected by section 35 of the Constitution, one of

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[15] Ibid at 564-565.
[16] 1979 (1) SA 14 (A).
[17] But in *Mandela v Minister of Prisons* 1983(1) SA 938 (A) at 957E-F the Court again confirmed that "[o]n principle a basic rights must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration."
[18] 1993 (3) SA 131 (A).
[19] 141H-142A.

the most extensive provisions in the Bill of Rights. Section 35(1) protects the rights of arrested individuals, but for the purposes of this study, the most important section of the Constitution is section 35(2). Section 35(2)(e) states that everyone who is detained has a right "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment". Section 35(2)(f) furthermore states that everyone who is detained has the right to communicate with and be visited by that person's spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner. The Bill of Rights, furthermore protects everyone's right to human dignity,[20] and everyone's right to freedom and security of the person[21] In *S v Makwanyane and Another*[22] Chaskalson P said that:

> "Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity. But a prisoner does not lose all his or her rights on entering prison."[23]

He then proceeded to say the following:

> "A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality [...] are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three subject only to limitations imposed by the prison regime that are justifiable under section 33. Of these, none are more important than the section 11(2) right not to be subjected to 'torture of any kind...nor to cruel, inhuman or degrading treatment or punishment.' There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether.[24]

Although the Constitutional Court has not directly pronounced on the conditions under which prisoners are kept in South Africa, its decisions make clear that it will be quite sympathetic to Constitutional claims based on s 35 of the Constitution because the non-compliance with these provisions will have a serious effect on the human dignity of prisoners. The Court has also

[20] Section 10.
[21] Section 12(1).
[22] 1995 (3) SA 391 (CC).
[23] Par 142
[24] Par 143, footnotes omitted.

shown an extremely keen interest in safeguarding the Rule of Law[25] and has come down strongly against the failure of state organs to adhere to existing legal rules. Claims against the Department of Correctional Services for failing to adhere to legislation or claims of corruption and maladministration are therefore ripe for litigation in the highest courts of the country. Moreover, the new Correctional Services Act[26] now contains a whole chapter aimed at bringing the practices of the Department of Correctional Services in line with the Constitutional requirement of keeping prisoners incarcerated under conditions of human dignity.[27] The bulk of its provisions are not yet operative, but once the Act comes into force and the required regulations have been promulgated, it will create a powerful tool to hold the Department of Correctional Services to account.[28] Some prisoner's rights litigators have expressed the opinion that the Act and its regulations have not yet been promulgated exactly because the Department knows that it is unable at present to meet all the requirements stipulated in the Act. All these factors seem to suggest that from a purely legal perspective, prisoners' rights litigation will often have a good chance of success in the South African courts. It also suggests that it may be possible, under the right conditions, to use the mere threat of litigation to force changes in the way the Department and its leadership in individual prisons operate.

5. Structure of prisoners' rights litigation in South Africa

On the available evidence, there often seems to be a gap between the official version of how prisoners' rights litigation is conducted and how it is conducted in reality. This gap seems to be largely caused by a breakdown in respect for rules, regulations and procedures of the Department of Correctional Services. According to Karl Paxton, head of legal services in the Department of Correctional Services,[29] the legal department of the Department of Correctional Services deals with all complaints that reach its office. He confirmed that his department received "many complaints", but stated that the number of complaints received – especially regarding the maltreatment of prisoners by warders – has dropped dramatically over the past few years because of the work of the office of the Inspecting Judge. When his department receives a complaint, either from individual prisoners or from their legal representatives, his office deals

[25] See De Waal Currie and Erasmus *The Bill of Rights Handbook* (2001) 9-15.
[26] Act 11 of 1998.
[27] See Chapter III.
[28] For example, s 10 of the Act places a duty on the Department to provide every prisoner with clothing and bedding "sufficient to meet the requirements of hygiene and climatic conditions" while s 11 states that every prisoner must be given the "opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily".
[29] Telephonic interview with Karl Paxton on 5 May 2003.

with the matter in the appropriate manner – depending on the nature of the complaint. He states that the department receives two types of complaints:

- complaints which challenge the *application* of policy by prison authorities or challenge the *conduct* of individual warders; and
- complaints challenging the *official policies* of the department.

Mr Paxton stated that both types of complaints would primarily be dealt with on a regional level by legal personnel in the provincial Departments "in co-ordination with functional personnel". An investigation would be launched in each case to ascertain whether the complaint had any legal basis. This investigation would determine whether the Department had acted contrary to its own policies and rules or whether its policies conformed to the Constitution and to the legislation governing Correctional Services in South Africa. In cases where the conduct of specific prison warders or Heads of Prison are being attacked, the matter will remain largely a provincial matter. But in cases where the stated policies of the Department are being attacked, the national office would get involved. Mr Paxton states that when his office investigates a complaint regarding a policy matter and it establishes that a certain policy is Constitutionally problematic, the department will change that policy accordingly. But he conceded that these matters may take a considerable amount of time to rectify. In cases where the actions of prison officials are challenged, Provincial Commissioners will have a big say in how to deal with the matter and how to respond to a particular accusation and/or challenge. Once a legal advisor – nationally or in each province – decides that the complaint is unfounded or that there is no reason to settle a case, he or she will hand the matter over to the State Attorney's office of that particular province with instructions to oppose the matter in court. Mr Paxton said that his department did not have a specific budget allocated to it to deal with the cost of court cases brought against the Department, and argued instead that the state attorneys of each province carry the cost for each case brought to court.[30] Mr Paxton conceded that the Department often settled cases when they thought it to be in the interest of the Department.[31] Where a court decision that is binding on the country as a whole is handed down, the legal department would issue directives to ensure that Departmental policies are adopted across South Africa. Where a court decision is only binding on a specific region or province, the legal advisors of that province would do the same for that province.

[30] I contacted representatives of the state attorney's office in the Western Cape and Gauteng for details of the number of cases of the Department of Correctional Services they deal with and the costs involved, but they claimed not to have statistics available for specific state departments and referred me back to the Department of Correctional Services. Louis van der Merwe of Lawyers for Human Rights claimed that the almost R35 million was spent in 2002 on legal fees and settlement money by the Department. There is no independent confirmation of this figure.

[31] See 6.2 below.

The version provided by Mr Paxton is clearly the official version that the Department and the representatives of its legal department strive to implement to the best of its ability. But according to prisoners' rights litigators, there is often a large gap between how prisoners' rights litigation ought to proceed and how it proceeds in reality. Problems arise especially where existing policies are ignored or deliberately or not deliberately misinterpreted by legal advisors of the Department at national or provincial level or by the prison leadership in individual prisons, and preliminary investigations by members of the Department confirm this. In such cases there often seems to be some reluctance on the part of the leadership at local prison level or at the provincial level to adhere to stated policy, either because they are scared to take responsibility for such decisions[32] or because they have a lack of respect for the law and the Rule of Law and view themselves as not being bound by particular regulations because these regulations are seen as "impractical" or "difficult to implement". Louis van der Merwe of Lawyers for Human Rights relates his experiences in a particular case in Gauteng to illustrate the point:

> "I had a case where a prisoner made an application to see his fiancé who was coming all the way from England to visit him. This was a special application for which the Departmental rules explicitly made provision. However, the Head of the Prison refused the application, stating that he did not want to create a precedent that other less deserving prisoners would abuse. This is outrageous because the Department's own regulations provide for exactly this situation. We threatened the Department with a Court order and then we are phoned by the guys at the provincial Commissioner's office and they say that we should first speak to them before we go to court. Then I do this and they promise me that everything will be sorted out and that my client will get his visiting rights within 24 hours. But then the Head of the prison just point blank refuses to budge. Then I threaten them with a court case and then the legal advisor at the provincial commissioner phones me and says: just hang on for a day, we'll sort it out. But weeks go by and nothing happens and nobody calls me back – even after promising to do so and after begging me not to go to court."

Mr van der Merwe also notes that there is sometimes a lack of good co-operation between the State Attorneys office and the officials at the Department of Correctional Services. The provincial or national legal advisors often hand cases over to the State Attorney's office to defend "just to get rid of a problem" and the State Attorneys office then is obliged to proceed to defend the cases but it often does

[32] Mr Louis van der Merwe from Lawyers for Human Rights referred to a "head in the sand" approach, which is caused by fear on the part of prison authorities to do anything out of the ordinary. Such an approach means that prison officials often choose not to do anything, rather than doing something which turns out to be wrong or to be unpopular with superiors.

not receive the information from the various officials in the Department it needs to launch an effective defence in court. This means that the State Attorney will often proceed with a case but will then withdraw at the last moment because it has not been able to gather sufficient information that would allow it to mount an effective defence in a court of law due to a lack of co-operation from the various Departmental officials. Many cases are therefore taken close to or all the way to court merely because officials see this as the path of least resistance that would make the least amount of trouble for them and their institution.

Achmed Mayet form the Legal Resources Centre in Johannesburg confirmed Mr Paxton's assertion that the legal section of the Department of Correctional Services makes an initial assessment of a case and unless it is very clearly in the wrong, it will pass the case on to the State Attorney for further action. The State Attorney's office in a province almost always gets involved in a case that is potentially going to go to court. But even the State Attorneys complain that they do not get any co-operation form the Department and that they find it difficult to deal with these cases because of a lack of information or co-operation from the relevant members of the Department. This means that the State Attorneys' office will often settle a case merely because it has no way of defending it and thus has no other choice. This conclusion does not mean that all officials should be viewed with suspicion. Mr Van der Merwe cautioned against seeing all officials of the Department in a negative light and emphasised that many officials at local prison level and at the Departmental level were honest, hardworking and ready to deal with problems head on. But, these officials often faced obstacles and resistance from within the Department.

Any litigation strategy that engages with the Department of Correctional Services will therefore have to take cognisance of the various forces within the Department and will have to find ways to counteract the inertia and lack of respect for the law that seems to be widespread amongst officials while bolstering those officials willing to address problems. Such a strategy will have to ensure that litigation does not become yet another way for officials to pass the buck or to scapegoat colleagues, but that it will assist in creating a culture of responsibility and respect for the law in the Department. To do this, it will be necessary to conduct litigation in such a way that it will have potential consequences for those officials from the Department who had made the decision to go to court or who had decided to ignore or bend existing rules and regulations.

6. Trends in prisoners' rights litigation in post-apartheid South Africa: the good the bad and the ugly

6.1 Few reported judgments – but many cases unreported

In the nine years since the introduction of the democratic Constitution there has been only one reported judgment of the Constitutional Court dealing directly with the rights of prisoners,[33] while two judgements of the Supreme Court of Appeal during this period dealt with these issues.[34] Five judgments of the High Court dealing with prisoners' rights were reported during this same period.[35] This is a surprisingly small number of reported cases, given the fact that prisoners have an especially keen interest in bringing cases against the Department and also have sufficient time on their hands to take forward litigation on their own behalf. It is even more surprising when one considers that in 2001/2002 the Office of the Inspecting Judge received no less than 123 456 complaints from prisoners regarding prison conditions, the treatment of prisoners and the alleged infringement of prisoners' Constitutional rights.[36]

A closer look at prisoners' rights litigation reveals that the mere fact that so few cases have been reported does not mean that lawyers do not take up cases of prisoners. One prisoners' rights litigator told me that he had taken up the complaints of literally hundreds of prisoners over the past few years and that although many cases had been settled out of court, many others found their way to court where judgements were often handed down against the Department of Correctional Services.[37] But these cases were not considered reportable because they did not establish any important precedent or deal with a matter considered politically interesting or controversial.

The fact that so few cases are actually reported in the law reports therefore suggests that at present prisoner's rights litigation plays a significant role in challenging the conditions of individual prisoners and might assist individual prisoners to gain access to the rights guaranteed in the Constitution, but because of the nature of the cases litigated and the lack of publicity, this litigation has not been used to great effect to change the atmosphere and culture in the Department of Correctional

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[33] *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC). There has also been the case of *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), but this case dealt with the pardoning of prisoners in terms of the powers entrusted to the President by the Constitution and not with the conditions or treatment of prisoners or the actions or inactions of the Department of Correctional Services and for the purposes of this study I do not consider it here.

[34] *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455; and *Nortje en 'n ander v Minister van Korrektiewe Dienste en Andere Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455.

[35] *Winckler v Minister of Correctional Services*. 2001 (2) SA 747 (CPD); *Roman v Williams NO*1998 (1) SA 270 (CPD); *Van Biljon and Others v Minister of Correctional Services and Others*1997 (4) SA 441 (CPD); *C v Minister of Correctional Services* 1996 (4) SA 292 (T); and *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W).

[36] Office of the Inspecting Judge "Annual Report 2001/2002: Prison and Prisoners" at 17.

[37] Interview with Louis van der Merwe, Lawyers for Human Rights.

Services and to help establish respect for the Rule of Law and for the Constitution within the Department. In the absence of a slew of reported cases one is tempted to conclude that the prisoner's rights litigation is failing to deal effectively with issues that will set legal precedents and thus is failing to put pressure on the Department to change and to become more respectful of existing legislation and rules.

6.2 Little news coverage of prisoner's rights litigation

An even more surprising fact, perhaps, is that an Internet search revealed that very few cases brought against the Department are actually reported on in the print media. The few news reports I came across mostly dealt with reports of those cases later reported in the law reports. Although news reports do appear in newspapers from time to time to expose the conditions under which prisoners – especially juvenile prisoners – are required to live, I could find hardly any news reports revealing the kinds of shocking treatment of prisoners and the shocking lack of respect for the rules and regulations by warders and the prison leadership that one would have thought would be revealed in many of the cases taken up by public interest lawyers and pursued through the courts. This means that even where the Department is challenged and even where cases go to court, these cases hardly ever receive sufficient publicity and thus do not serve to "shame" the Department into changing its ways. Because cases are brought by individual complainants as they arise and because there is no strategy on the part of litigators to use these individual cases to attack the system as a whole, their effect is less spectacular than one would have hoped for.

6.3 Inability of the Department of Correctional Services to deal adequately with court challenges

Given the problems with the way in which the Department of Correctional Services deals with prisoners' rights litigation – highlighted in section 5 above – it is not surprising to discover that in several of the reported cases the presiding judge criticised the lacklustre way in which the Department had presented its case to court. In the case of *Minister of Correctional Services v Kwakwa and Another,*[38] for example, the Supreme Court of Appeal, judge Navsa launched an uncharacteristically scathing attack on the quality of the case presented on behalf of the Department of Correctional Services and remarked that:

[38] 2002 (4) SA 455. The category of "unsentenced prisoners" is made up of prisoners awaiting the commencement or finalisation of their trials and includes prisoners who have been granted bail but have been unable to raise the funds to secure their release, as well as those prisoners convicted of a crime but not yet sentenced. Ibid par 1.

> "the case of the applicants before Maritz AJ [in the High Court], as set out in the supporting affidavits, was short on detail and fact. It was inadequately presented and poorly answered by the appellants. The applicants whilst stating that the withdrawal or restriction of privileges cannot be justified for lack of facilities, or on the basis of security risks or for other reasons, did not supply sufficient detail of the practical implementation of the old system and the problems encountered in giving effect to it. No reliable statistical information was supplied. The number of unsentenced prisoners at the Pretoria Prison was not provided. The Court was not informed about the average time for finalisation of trials. The extent of the Pretoria Prison's resources was not set out by any of the parties…. Answers to the case presented [by applicants…] are scanty and generally unhelpful."[39]

While the Department of Correctional Services is not the only government Department that has been lambasted for its poor presentation of a Constitutional case, and while some of the blame for such tardiness may be put at the door of the legal council employed by the Department, it is more than likely also at least partly due to the lack of co-operation provided by the officials of the Department. According to one of the prisoners' rights litigators I have spoken to, the members of the Department seem to be struggling to adopt to the Constitutional culture of justification and find it difficult to comprehend why they have to justify their policies – no matter how problematic – to anyone, even to judges in court.[40] This inability is the more surprising in a case like *Kwaka*, quoted above, because in this case the Department's new policy regarding the rights and privileges of awaiting trial prisoners was challenged head on and defeat would have serious long-term consequences for the Department. A defeat in this case would throw the whole system in disarray and would require the Department to redraft its policies completely, yet it could not manage to muster even the most basic evidence and justification for its policies.

On the one hand, such a lacklustre approach might indicate that it would be well worth the effort and money to bring well planned, strategically wise, and properly prepared challenges against the Department, purely because it will likely defend itself in an inadequate way and will make it easier for its opponents to score victories in court and in the court of public opinion. On the other hand though, it points to a deeper problem with the Department, namely that there seems to be a disturbing absence of respect for the law and the Rule of Law within its ranks. It is to this problem that I will now turn.

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[39] Ibid par 8 and 9. See also par 19. See also e.g. *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W) par 18.

[40] Interview with Louis van der Merwe, Lawyers for Human Rights.

6.4 Erosion of the Rule of Law

In conversations with various prisoners' rights litigators, it emerged that one of the most pressing problems faced by anyone trying to take on the Department of Correctional Services – in or out of court – is the often breathtaking absence of respect for the law and legal processes and, indeed, for the Rule of Law itself by especially the leadership in individual prisons. There is also evidence of this problem when one studies the reported cases brought against the Department. The absence of the Rule of Law in the Department manifests itself on various levels.

6.4.1 Lack of respect for the Constitution, for court orders and judgments

There seems to be a fundamental lack of respect for the law, and for court orders and judgments by some officials employed by the Department of Correctional Services. In the case of *Kwaka*, for example, the respondents had challenged new rules designed to deal with the rights and privileges of awaiting trial prisoners. The Supreme Court of Appeal found that the new system was both discriminatory and unreasonable[41] and argued that the challenge was based on the principle of legality. Navsa J continued:

> "In the present case it is clear that the second appellant fundamentally misconceived his powers in terms of the Act and that he acted beyond his powers. He disregarded the provisions of the Constitution and fashioned a privilege system inconsistent with its core values and not countenanced by the statutory regime from which he assumes his powers. […] [S]ince the second appellant so fundamentally misconceived his powers the system designed by him cannot be allowed to stand. … Prison authorities if they intend to fashion a new privilege system for unsentenced prisoners must take into account the *residuum* principle, act within the confines of their statutory powers and, most importantly, must respect the Constitution…. *Prison authorities in exercising their statutory powers must take care to ensure that they act in accordance with the principle of legality*.[42]

The remarks by judge Navsa appears to be thinly disguised criticism of the Department for fashioning a new system of rules without any regard for the Constitution or the existing legal framework. The Supreme Court of Appeal appears rather perplexed that a government Department could so fundamentally misconstrue its own powers.

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[41] Par 32.
[42] Par 36 (my italics).

A charitable reading of the facts would suggest that the Department was merely ignorant of its obligations under the Constitution and under ordinary legislation, but other judgments suggest that there is a more fundamental problem with the attitude of representatives of the Department towards law and towards the Constitution. For example, in the Witwatersrand Division of the Transvaal High Court in the case of *Strydom v Minister of Correctional Services and Others*,[43] the High Court had to consider whether the conditions under which prisoners were held in the Maximum Security Section of the Johannesburg prison contravened the provisions of the South African Constitution. The crisp issue in this case was whether prisoners in the maximum security section of the prison have a right to an electricity plug point in their cells. Judge Schwartzman found that there was indeed a constitutional obligation to provide prisoners with access to electricity and requested council for the Department to furnish him with a date by which the timetable setting out when the upgrading would take place, would be furnished. But when the Department came back to Court they had not done so. Judge Schwartzman remarked:

> "The surprising and unhelpful answer I received on the afternoon of 28 December 1998 was that the respondents were not obliged to and were in any event unable to comply with my request, leaving me with the task of fixing a date by which the respondents should report to this court…"[44]

The Department had thus refused to comply with a direct order from the Court, claiming that it was not obliged to do so, thus again misconstruing its legal obligations as set out by the common law, the relevant legislation and the Constitution.[45]

Any litigation strategy aimed at expanding the enjoyment of human rights by prisoners, will have to take cognisance of this reluctance on the part of some representatives of the Department to obey court orders and to adhere to the letter of the law.

6.4.2 Attempts to undermine the legal process and to intimidate prisoners

Several of the prisoners' rights litigators I have spoken to noted that it was often extremely difficult to pursue the cases of individual prisoners against the Department of Correctional Services because of subtle and not so subtle attempts to place stumbling blocks in the path of a legal representative. While

[43] 1999 (3) BCLR 342 (W).
[44] Par 18.
[45] The court ordered that that electricity points had to be installed in the prison and in all fairness to the Department, it must be noted that this order was indeed obeyed. I contacted the Head of the Johannesburg Prison, Ms FT Sehoole, who confirmed that the prison's electricity grid was upgraded and that all prisoners had access to electricity in their cells. (Telephonic interview with FT Sehoole on 9 June 2003.

some of these difficulties can be ascribed to the nature of the claims and problems experienced with clients who, after all, are prisoners who are spending time in jail after being convicted of serious criminal offences,[46] prisoners' rights litigators also face a myriad of obstacles often illegally put up by members of the Department. Apart from the ordinary difficulties associated with consulting with clients who are locked up in prison (for example, one cannot receive one's client in one's office),[47] there are also steps that prison authorities can take to undermine cases brought by complainants. William Kerfoot from the Legal Resources Centre in Cape Town says the Department of Correctional Services seems to deal differently with different cases. For example, in cases where alleged illegal foreigners have been detained, the Department seems to be quite efficient and helpful, providing relatively easy access to lawyers dealing with such cases to determine whether they were illegally detained or not. Kerfoot suggests that the members of the Department do not see such prisoners as criminals and also do not feel under personal attack and therefore act in a relative efficient and magnanimous way. The same can be said for those personnel working at prison medical facilities and who seem to be rather helpful. In fact, said Kerfoot, "some of the hospital people have complained to us about the conditions in the prison and the conditions under which they have to provide medical services in prisons".

This helpful attitude can be contrasted with situations in which the Department of Correctional Services and its staff are being scrutinized or challenged. In these cases the members of the Department are often less enthusiastic about co-operating with lawyers, and often fail to provide quick and easy access to prisoners who complain about prison conditions. In such cases there are several strategies used by the Department to try and prevent a complaint from being lodged or of interfering in a case once it has been taken to a lawyer:

- There is a perception among prisoners in some prisons that the interview between a lawyer and his or her client is not confidential and this leads to difficulties when lawyers consult with their clients.[48]
- The Department has been known to use a "divide and rule" strategy by splitting up a case where a group of prisoners bring the same complaint, forcing attorneys to deal with the complaints one at a time. This makes the work of the attorney very difficult because he or she

[46] Prof Peter Jordi, litigator at the Wits Legal Aid Clinic, put it to me that many prison clients and their witnesses are untrustworthy or are at least perceived to be untrustworthy by the legal system and it therefore becomes difficult to prove a case against the Department because the officials usually will be seen as more trustworthy than prisoners.
[47] Interview with Peter Jordi.
[48] Prof Peter Jordi.

now has to deal with several cases with exactly the same facts as if they were completely different cases dealing with different issues.[49]

- It is also alleged that a prisoner who complains of the conditions under which he or she is being kept in a specific prison or of the behaviour of a specific warder is often transferred to another prison to "make the problem go away". According to Achmed Mayet, the Department is often shrewd when it does this, "so they move the prisoner to a prison with better conditions, thus removing the basis for the complaint". In other cases the move would merely be one more attempt to "lose" the prisoner and thus to make it impossible for the lawyer to meet with his or her client to prepare a case. In such a case a prisoner would be moved to a remote area where the lawyer would find it difficult or not impossible to get easy access to his or her client. Prisoners are also moved to punish them for ratting on the warders, often to prisons far away from their loved ones.[50]
- It is also alleged that members of the Department victimise prisoners who lay complaints or bring forward legal challenges against the members of the Department. Those who complain will often not be sited for good behaviour or allegations will be trumped up against them to prevent them from achieving a higher grade ranking (which leads to more privileges) or from being considered for parole.[51]
- Lawyers who represent clients also have to take special care not to antagonise warders. According to Mayet, "if one is on the wrong side of the warders they can really frustrate a lawyer because they can subtly refuse to co-operate with a lawyer who is bringing a case against the Department. One will go to prison to meet a client and they will claim the client is not there. But later the client will say that he was there all the time but was never told that his lawyer was visiting." In this way the members of the Department can claim to follow the letter of the law, while refusing to co-operate in a way required by the law.[52]

All these allegations point to a severe lack of respect on the part of the warders and the Department of Correctional Services for the legal process. While there are standard procedures for dealing with the complaints of prisoners and while the Department of Correctional Services officially acknowledge that prisoners have the same rights to legal representation than non-prisoners, in practice this right of

[49] Achmed Mayet.
[50] Achmed Mayet. Louis van der Merwe confirmed these allegations.
[51] Louis van der Merwe.
[52] Achmed Mayet. Allegations confirmed by Peter Jordi. According to Justice Hannes Fagan, the computerised system of all prisoners run by the Office of the Inspecting Judge has made it more difficult for the prison authorities to victimise prisoners, especially by transferring them. Because the information of every prisoner is now available on the computer network, it has become impossible to "lose" a prisoner. This is of course true if one has access to the computer system of the Office of the Inspecting Judge but for an individual lawyer trying to assist a client, this may not be the case.

prisoners is undermined both subtly and sometimes not so subtly. Once again, this points to a lack of respect for the Rule of Law in the Department of Correctional Services.

6.4.3 Failure to adhere to agreements brokered with lawyers

The Department often settles cases out of court – especially where its members are aware that they are not adhering to the Departments' own rules and regulations regarding the conditions under which prisoners are kept. It is alleged that the Department will often agree – after some pressure from lawyers and often after threats of court action – to ensure that its warders and the leadership of a specific prison follow certain procedures or rules or to ensure that the conditions under which prisoners are kept are improved, and that this agreement will be adhered to and that the conditions in the specific prison would improve only to quickly lapse back into old ways once the lawyer's attention is taken up by other cases.[53] Achmed Mayet refers to a case he dealt with at Johannesburg Central prison where the LRC challenged the diet provided to prisoners. Making use of International Conventions about the treatment of prisoners which stipulate that prisoners should not be left unfed for more than 12 hours at a time and also challenging the ways in which the food was prepared (to ensure that spinach is washed and sand removed!), the LRC settled the case out of court. After the State Attorney went to the prison to check on the allegations, the State Attorney intervened and secured an undertaking from the prison authorities of a specific prison that they would ensure that prisoners are not fed at 16h00 and then only at 06h00 and that the food preparation would at least measure up to minimum standards that the Department profess to adhere to. The prison authorities implemented this agreement but after two months they seemed to have reverted back to their old ways which was easier for them to administer and was less work for warders. Mayet then went back to the State Attorney who intervened and got another undertaking from the prison authorities that the food preparation and the interval between meals would improve. Because he had other cases to deal with, this was not followed up again, but given the history of the Department, the chances are that the agreement is not being adhered to.

This failure to adhere to agreements reached in good faith by lawyers once again points to a fundamental lack of respect for the Rule of Law. It is difficult to say whether the blame should be placed at the door of the prison authorities of individual prisons or at the door of the National and Provincial Departments who fail to ensure that the Departmental policies are followed correctly in individual prisons. Either way, it points to a breakdown in the respect for the Rule of Law. This lack of trustworthiness on

[53] Louis van der Merwe.

the part of the Department seems to severely curtail the effectiveness of legal representatives fighting for prisoner's rights. It means that once agreements are reached, there will be a constant need to check up on the Department to ensure that the agreement is implemented.

6.4.4 Failure to investigate alleged misconduct by warders

Proceedings at the Jali Commission of Enquiry have revealed widespread corruption and cronyism in the various prisons around the country. Evidence led at the Commission seems to suggest that there is a reluctance on the part of some prison leaders and of some of the ordinary prison officials to uncover corruption and misconduct. Prisoners rights' litigators confirm this and argue that the Department of Correctional Services often deal with complaints against warders in a way that at best could be described as tardy and at worst as deceitful and corrupt.

Louis van der Merwe of Lawyers for Human Rights relates one experience he had to confirm this tendency:

> "I represented a juvenile prisoner who had been sold for sex by a warder to an adult prisoner for R50. After being raped by the adult prisoner, the juvenile complained to the prison authorities on several occasions but his complaints were ignored until five months later when he managed to smuggle a letter out of prison which reached LHR. I investigated the case and found that no police docket had been opened in the case and I pursued the matter with the provincial commissioner of police. They gave me excuse after excuse and eventually claimed that they had conducted an internal enquiry and that there had been no rape, but only consensual sex between two prisoners. I disputed this vigorously and pointed out that in terms of the law a juvenile cannot consent to sex. They promised to look into the matter again but nothing came of it. In the end the adult prisoner was convicted for indecent assault but to this day the Department of Correctional Services claim that nothing untoward ever happened."

In the face of such stonewalling, it becomes very difficult for individual litigators with limited time and resources to successfully pursue the matter of the maltreatment of prisoners with prison authorities. Even where members of the Department are finally cajoled into action, all the energy and hard work seldom brings about a fundamental change in the behaviour of the prison authorities.

In conclusion it must therefore be said that this lack of respect for the law can have the effect of paralysing the efforts of individual lawyers and create an atmosphere in which the work becomes exhausting without seeming to change anything within the system. Any prisoners' rights litigation strategy will have to take cognisance of this and will have to find ways to deal with the lack of respect for the law within some sectors of the Department of Correctional Services. It does suggest, however, that behind the scenes lobbying of the Department and "quiet diplomacy" alone will not fundamentally change the system where the system itself thrives on duplicity and lack of transparency and openness.

6.5 Out of court settlement of cases

There is a perception amongst some prisoners' rights litigators that the Department of Correctional Services is eager to settle cases before they go to court so as to avoid establishing a precedent that would be binding on the Department in future. Achmed Mayet,[54] a lawyer at the Legal Resources Centre in Johannesburg who often takes on prisoners' rights litigation says in his experience the Department of Correctional Services does have a tendency to settle cases, especially once it becomes aware that a prisoner has retained the services of an attorney. He points out that almost all the prisoners' rights cases taken on by the Legal Resources Centre are cases referred to the LRC by a judge where a prisoner has made an application to court and where the court has decided that it was in the interest of justice that the prisoner had to be represented by council. He argues that the Department is less enthusiastic in taking cases to court where prisoners do not represent themselves but are represented by council and once the LRC gets involved the Department seems to want to settle. He says he believes the Department likes to settle cases where they fear that a precedent would be set for the whole prison or province or for the country as a whole and in cases where a specific prison is not following existing rules properly and where the authorities can therefore easily make promises to provide the minimum standard of care in a specific prison or to a specific prisoner without publicity or long term consequences.

Mr Karl Paxton, legal advisor of the Department of Correctional Services, conceded that the Department often settles cases out of court and proffered two reasons for this tendency to settle cases. (It is important to note that he did *not* indicate that the Department had a deliberate policy to settle cases, but he did say that the Department makes very conscious decisions whether to settle a case or not. Unlike the Department of Home Affairs, it is not too eager to fight every single last case to its conclusion

[54] Interviewed via telephone on 9 June 2003.

in a court of law.) First, Mr Paxton states that many financial claims for damages against the Department are settled purely for economic reasons. It is often thought easier and less costly to settle a claim of a few thousand rand than to fight such a claim in court where the legal fees alone would amount to far higher costs than that incurred in making a one-off payment to a claimant. Second, Mr Paxton concedes that in some cases the Department decides to settle a case because it does not want the court to set a precedent that would potentially have far-reaching consequences for the Department's policies and the way those policies are applied.[55]

Other lawyers do not necessarily disagree with this assessment, but point out that the Department often vigorously oppose matters brought against them. William Kerfoot, a lawyer at the Legal Resources Centre in Cape Town, argues that the Department sometimes does settle cases but that it does not settle a case "at any cost". He agrees that the Department does sometimes settle cases, which is not always a bad thing when it has a hopeless case and it knows that it would lose if the case ever came to court. "But in my experience, the Department can fight a case tooth and nail when it thinks an important principle is at stake and it believes it has any chance of winning the case. The Department definitely does not settle cases at all cost." Even when it does settle a case it is not completely averse to making such a settlement an order of court, which would be binding throughout the country. For example in the case of *W and Others v The Minister of Correctional Services and Others*[56] a group of prisoners challenged the way in which the HIV/AIDS policies of the Department was implemented at Pollsmoor Prison. Although the Department had adopted new policies they were apparently not fully implemented at this prison and the Department consented to an order of court in which it recommitted itself to the policies.[57]

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[55] The Department of Correctional Services has settled several cases out of court. Most recently an out of court settlement was reached between an HIV positive prisoner who claimed to have been infected during a 13 month stint in prison and sued the department for over one million Rand in damages. Although the settlement was made an order of court, one of the terms of the Cape High Court order was that the terms of the settlement would remain confidential. See Marianne Merten "State settles with HIV-infected prisoner" *Mail & Guardian* February 14-20 2003 p 13.

[56] Unreported case in the (then) Supreme Court of South Africa (Cape of Good Hope Provincial Division) before Mr Justice van Deventer on 20 June 1996 case no 2424/96, order reported at http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/Spring1997/27HEYWOOE.html, accessed on 3 May 2003.

[57] The Court order stated that:

At Pollsmoor Prison the First, Second and Third Respondents and their servants shall, in accordance with the Department of Correctional Services' policy:

- observe confidentiality about the status of all persons who are HIV positive or suffering from AIDS (hereinafter collective referred to as HIV positive prisoners or having HIV status);
- protect, as far as possible, prisoners from stigmatisation on account of their HIV status or sexual orientation;
- provide, or cause to be provided, condoms to all prisoners;
- provide or make available the necessary and appropriate medical attention and treatment to HIV positive prisoners;
- carry out and permit testing for HIV or AIDS only with the informed consent of the prisoners involved;
- not deprive any prisoner of access to work solely on the basis of his or her HIV status;

This view is supported by Louis van der Merwe, litigator at the Penal Reform Project of Lawyers for Human Rights, who argues that the Department of Correctional Services does sometimes settle cases, but he also points out that the Department would often be more likely to try and dissuade a lawyer from taking a case to court. He says he has had many cases where the Head of a specific prison would refuse to give prisoners access to the rights and procedures guaranteed in the Constitution and in the regulations of the Department of Correctional Services because he or she would say that s/he "does not want to set a precedent for other prisoners to follow". As a litigator he would then threaten court action. Representatives of the Department would then call him to plead with him not to go to court and would promise that they would speak to the Head of the prison and would ensure that the existing regulations are adhered to. The same would happen when the case is taken over by the State Attorneys office. But mostly these promises are not kept and litigators are strung out for days and weeks while prisoners do not get what they are legally entitled to get. He says this means that in many cases he will end up going to court after a long delay because of the lack of an adequate response from the various responsible representatives of the Department. He calculates that about 70% of cases go to court unnecessary because they merely challenge the non-application or the incorrect application of existing rules. The court judgments then merely confirm that the leadership of a specific prison had failed to fulfil its duty to implement the regulations already in place. This means that such cases has little long term effect or consequences and would seldom fundamentally change the attitude or behaviour of the prison leadership of a specific prison.

To summarise, while the Department sometimes settles cases and often uses delaying tactics to prevent cases from coming to court, it often also pursues cases completely unnecessarily because individual prison officials refuse to implement the actual rules and regulations of the Department. There is therefore not an excessive settling of cases that will present an insurmountable obstacle to effective prisoners' rights litigation.

6.6 Nature of court challenges against the Department of Correctional Services

Given the magnitude of the problems associated with the treatment of prisoners in South Africa, there are surprisingly few NGO's who shows any interest in pursuing prisoner's rights through litigation and other strategies. The Penal Reform Project of Lawyers for Human Rights is a notable exception, but due

- not discriminate against HIV positive prisoners vis-à-vis other prisoners as far as the provision of accommodation and ablution facilities is concerned;
- provide appropriate education and information about the HIV and AIDS condition to staff and prisoners.

to a lack of resources and because the office runs, to a large degree, as an advice office providing direct support to prisoners with legal complaints, it does not seem as if this institution has the capacity or mandate to develop and implement a coherent long term strategy to make a decisive intervention that would begin to change the prevalent culture in the Department of Correctional Services and make it more human rights responsive. And according to William Kerfoot, the Legal Resources Centre – a prime candidate to drive or get involved in such a strategy – gets involved in the litigation of prisoners' rights issues only when a case deals with issued raised by one of the organisation's other projects such as health care or Constitutional litigation. At the same time, as I have noted above, the Department often settles cases that it has no chance of winning and which it believes will set a precedent in the prison system. It is therefore not surprising that almost all prisoners' rights cases deal with individual complaints initially launched by individual prisoners and that these complaints often deal with challenges to the actions of individual officials in the Department and not to the rules or policies adopted by the Department.

Of the reported cases only two cases challenged an existing policy. In *August and Another v Electoral Commission and Others*[58] a group of prisoners challenged the Electoral Commission who had excluded all prisoners from the right to vote in the 1999 national elections and won in the Constitutional Court. In *Minister of Correctional Services v Kwakwa and Another*[59] two awaiting trial prisoners challenged the introduction of a new privilege system for unsentenced prisoners imposed by the Department in 1998, which restricted or withdrew some privileges previously enjoyed by such prisoners. The prisoners lost their case in the High Court but were victorious in the Supreme Court of Appeal.

In the other reported cases, individual complainants had success in the courts but this success did not necessarily translate into a change in the attitude of the leaders or ordinary warders in the prison service, nor did it fundamentally attack the present conditions under which prisoners are being kept. For example, in *Nortje en 'n ander v Minister van Korrektiewe Dienste en Andere*[60] two prisoners challenged their transfer to C-Max maximum security prison. The appellants did not challenge the power of the Commissioner to create C-Max prison or the conditions under which they were kept there,[61] but challenged the decision to send them to C-max on the ground that they did not receive a fair hearing,

[58] 1999 (4) BCLR 363 (CC).
[59] 2002 (4) SA 455. The category of "unsentenced prisoners" is made up of prisoners awaiting the commencement or finalisation of their trials and includes prisoners who have been granted bail but have been unable to raise the funds to secure their release, as well as those prisoners convicted of a crime but not yet sentenced. Ibid par 1.
[60] 2001 (3) SA 472 (SCA).
[61] Par 13.

particularly that the *audi alteram partem* rule was not adhered to.[62] The respondents conceded that the *audi* rule had to be adhered to in the case at hand, although not in all cases in which prison transfers are made. They nevertheless argued that the rule was adhered to after the appellants were transferred to C-Max.[63] The Court rejected this argument because according to the stated facts the *audi* rule was never adhered to. Appellants were given no opportunity to present their side of the story.[64] This case represents a victory for the applicants, but it did not fundamentally change the conditions under which prisoners were kept at the C-Max prison nor did it address the way in which transfers generally occur within the prison system.[65]

An even more instructive case in this regard is the case of In *Van Biljon and Others v Minister of Correctional Services and Others*[66] where prisoners challenged the decision by prison services not to provide prisoners with antiretroviral drugs at state expense when their CD count deteriorated to below 500 per millilitre.[67] Due to the unique facts of the case and perhaps because the court victory in the High Court was not followed up by lobbying and applying pressure on the prison services,[68] the case had little if no effect on the access of prisoners to HIV treatment. Van Biljon's case is unique because he was provided with the anti-retroviral drug AZT by prison doctors on two occasions after he had launched an application in Court regarding this matter.[69] Van Biljon was discharged on the first occasion and escaped on a second occasion after which he was recaptured and held at Pollsmoor Prison where he was prescribed anti-retroviral drugs which was not provided by the prison authorities. [70] At the time the third application was launched, the Department of Correctional Services had no firm guidelines relating to the provision of anti-retroviral drugs to HIV positive prisoners. The policy was to provide prisoners with the same treatment provided at provincial hospitals[71] and this meant – given severe budget constraints – that only some patients qualified for anti-retroviral treatment.[72] At the heart of the case was

[62] Par 14. The *audi alteram partem* rule (also referred to as the *audi* rule) requires that where a person's rights are affected by an administrative decision he or she has a right to present his or her side of the story before the decision is made.
[63] Par 15.
[64] Par 20.
[65] See also *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (CPD) (unsuccessful challenge, thus no precedent set); *Roman v Williams* NO1998 (1) SA 270 (CPD) (question whether a decision by the Commissioner of Prisons to reimprison a probationer as provided for by the Act is a reviewable administrative action, thus no precedent set); *C v Minister of Correctional Services* 1996 (4) SA 292 (T) (existing policy banning voluntary counselling and testing was not adhered to, but a damages claim only);.
[66] 1997 (4) SA 441 (CPD).
[67] Par 8.
[68] In an interview William Kerfoot expressed regret at not having had time to pursue this matter any further to ensure that the court order was implemented and to try and broaden its effect to other prisoners who did find themselves in the unique factual situation of the applicants in this case.
[69] Par 14, par 16-17.
[70] Par 18-19.
[71] Par 24.
[72] Par 26.

the contention by the state that it was not possible to provide the treatment sought by applicants because of a lack of funds, but the court rejected this argument stating that "once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment."[73] Although budget constraints can be used to provide a lower standard of health care, the court found that in this case the prison services had not shown that it could not afford to provide the service. It was after all, not the provincial hospital but the department of correctional services who had responsibility to provide adequate health care. Moreover, the state's case was based on the faulty premise that it owed no higher duty to prisoners than to citizens in general in provide adequate health care services. Many people outside prison are not provided with adequate health care or housing, but that does not mean the state has no duty to provide prisoners with such adequate facilities and care.[74] Unlike other people who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment. Although prisoners could not demand the same treatment as what they could afford outside prison, the standard of medical treatment for prisoners in general cannot be determined by the lowest common denominator of the poorest prisoner on the basis that he or she could afford no better treatment outside.[75] Lastly, HIV positive prisoners are more prone to opportunistic infections in prison. This means the state must provide treatment that would better protect them than that which the state provides to HIV patients outside.[76] The Court therefore ordered the authorities to provide anti-retroviral therapy to applicants as had already been prescribed for them on medical grounds and only as long as this treatment is so prescribed.

At first glance this case appears to represent a major victory for HIV positive prisoners in South African, but closer investigation reveals that it represents a pyrrhic victory. While some of the prisoners who took part in the case did receive some anti-retroviral drugs, they did not receive all drugs that they were prescribed. Moreover, the Department of Correctional Services has now developed an HIV treatment policy and at present no HIV positive prisoners receive any anti-retroviral drugs and "several prisoners die each day of causes related to HIV".[77]

[73] Par 49.
[74] Par 51-52.
[75] Par 53.
[76] Par 54
[77] Interview with Dr Ashraf Grimwood on 4 June 2003.

In short, an analysis of reported cases seems to suggest that over the past nine years prisoner's rights litigation has brought victory to individual complainants, but these victories have seldom translated into fundamental changes within the Department. This does not mean that prisoner's rights litigation cannot make a difference and that it cannot address some of the issues relating to the conditions under which prisoners are kept. In *Strydom v Minister of Correctional Services and Others*[78] the Witwatersrand local division ordered the Department of Correctional Services to install plug points in prison cells at the Johannesburg maximum security prison and this was duly done.[79] But such cases will remain few and far between unless prisoners' rights litigation is dealt with in a more coherent and strategic way.

7. Other factors to be taken into account when evaluating prisoner's rights litigation

7.1 Prison authority and governance

Dealing with the Department of Correctional Services can be taxing and frustrating and it is important to take cognisance of particular difficulties regarding the way the Department operates to ensure that any litigation strategy does not falter because of a lack of insight regarding the dynamics of the Department. One factor mentioned by prisoner's rights litigators, is the erratic discipline and weak lines of authority created by the demilitarisation of the prison services. Although this is clearly not the only reason for a breakdown in discipline, some research reports and in conversations with prisoners' rights litigants, the demilitarisation of the Department of Correctional Services in 1996 is often referred to as a seminal occurrence. According to Louis van der Merwe, the demilitarisation of the Department was a traumatic occurrence for the long serving members. "It was as if their children had been taken away from them," he said. The military-like command structure created a rigid hierarchy and a relatively strict disciplinary environment where orders were never questioned and almost always followed. Given the urgent need to transform the Department into a more racial and gender representative organisation, and given the rise of Popcru, the military command structure had to be dismantled, but, according to Van der Merwe, this has contributed to a situation of paralysis and uncertainty.

Other officials say that the demilitarisation of the Department is only one of many reasons why the Department is faced with such difficult management problems. Whatever, the reasons may be, it is clear that the Department suffers from a lack of strong and authoritative leadership. According to Louis

[78] 1999 (3) BCLR 342 (W).
[79] See section … above.

can der Merwe many in leadership positions in the various prisons seem scared to take decisions because they are not sure who is in charge and who to please to advance their careers. "I often get the impression they will rather send a case to court than exercise their discretion because that is the way of least resistance." Achmed Mayet agrees, stating that:

> "It is difficult to find anyone in the Department of Correctional Services prepared to take responsibility for making any decision or for anything that is going wrong. They will pass the buck and one will go around in circles. It sometimes feels as if no one is in charge or dare be in charge and it is not easy to get the Department to co-operate with a legal representative. They are unorganized and even chaotic and one does not always get co-operation form them."

William Kerfoot agrees, and adds that the big problem is that there is a huge gap between what happens in the individual prisons and what the influential people in leadership positions in the Department think happens. "In my dealings with the Department is has become clear that those at the top do not always know what is really going on in the prisons. There seems to be chaos."[80]

To my mind this points to a very important insight. I believe any prisoners' rights litigation strategy will have to aim to expose the corruption, maladministration and disrespect for the Rule of Law in the prison system in a way that would make the world uncomfortable for both the leadership within individual prisons and for the leadership in the Department of Correctional Services – including the political leadership. Prisoners' rights litigation up to date has only had limited success exactly because there has been little political fallout for the prison leadership and for the political leadership. Things will only change when it becomes more difficult for prison authorities not to do something than to address the problems. One way in which this can occur is to combine litigation on selective cases with a public relations/political campaign to shame individuals and the collective leadership of the prison services.

7.2 Prison conditions

Any litigation strategy aimed at addressing prisoners' rights will have to take cognisance of the actual conditions in prisons and such a strategy will have to include long term goals to address the reality on

[80] Evidence of this chaotic situation is also to be gleaned from reported judgments. In the case of *Nortje en 'n ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) prisoners challenged their transfer to C-Max prison, a closed maximum security prison created after the abolition of the death penalty to cater for prisoners sentenced for extraordinarily long terms of imprisonment who presented a high flight risk. When appellants were incarcerated at Pretoria Maximum prison they were classified as category A prisoners but the Department claimed that they did not belong to this category and that the upgrading to category A prisoners was a mistake. Commented the judge of the Supreme Court of Appeal: "Die verantwoordelike amptenare gee dan ook 'n ietwat onverstaanbare verduideliking oor hoe die fout ontstaan het." (Par 7).

the ground. The Inspecting Judge, justice Hannes Fagan[81] argues – correctly, I believe – that many (but not all) of the problems relating to conditions in prisons can be traced back to the severe overcrowding in prisons, which to a large degree can be blamed on the problems inherent in the criminal justice system and the way the Department of Justice (and not Correctional Services) deal with the issue. As Justice Fagan points out, it is therefore difficult to address the problems of prisoners' rights in a vacuum and that a strategy than does no more than engage with the Department of Correctional Services will probably not succeed.

8 Litigation strategies to advance prisoner's rights

8.1 Treatment Action Campaign perspective

The insights about the various difficulties faced by prisoners' rights litigators, presented above, suggests that any strategy developed to advance respect for the human rights of prisoners in South Africa, will have to be carefully co-ordinated and will have to address weaknesses in current practices. This is a complex matter and questions on whether litigation should form part of such a strategy and if so, how this should be done, cannot be answered easily. I nevertheless, believe that in the right circumstances public interest litigation may and should be used as an important tool for social change in prisons. At the same time I believe that fundamental change can only be achieved where the use of law is limited and strategic, and where lawyers play an important albeit limited role within a broader social movement that is advocating fundamental change. What is required is a comprehensive understanding of the political, economic and institutional context within which one is operating, because this will inform the manner in which the law is used to further the aims of the change strategy.[82]

Although the circumstances under which the Treatment Action Campaign (TAC) operates may be different from those under which a prisoners' rights NGO operate, and although the political landscape may present different threats and opportunities for those advancing prisoners' rights, I believe much can be learnt from the way in which the TAC has used public interest litigation as part of a more comprehensive strategy to win rights for their constituents. It is therefore interesting to note how the TAC views the use of law and litigation as part of its overall strategy and to see to what extent

[81] Interview at his office in Cape Town on 6 May 2003.
[82] See Jonathan Berger "Litigation strategies to gain access to treatment for HIV/AIDS: The case of South Africa's Treatment Action Campaign" vol. 20 no 3 (2002) *Wisconsin International Law Journal* 595 at 597.

lessons can be learnt from this approach. Jonathan Berger explains that the TAC's approach to the use of law is multifaceted.

> "While TAC aims to secure a legal victory whenever litigation is undertaken, the organisation is also highly aware of the role of the litigation process beyond the orders made in court judgments. In addition, by framing political and moral demands in the language of legal rights and constitutional obligations, TAC seeks to use the law without necessarily having to litigate. Recognising that the 'formal content of a bill of rights is often less useful than the fact that it brings under scrutiny the justification of laws and decisions',[83] Etienne Mureinik provides the basis for such an understanding:
>
> > '[A]ny decisionmaker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen … then the programme would have to be struck down…. The knowledge that any government programme could be summoned into court for searching scrutiny would force its authors closely to articulate their reasons for dismissing the objections and the alternatives to the programme, and precisely to articulate the reasons that link evidence to decision, premises to conclusion. The need to articulate those reasons during decision making would expose weaknesses in the programme that might force reconsideration long before the need arose for judicial challenge.'[84]
>
> "Litigation is also used to place issues on the agenda, both before the judge and in the court of public opinion. In the much-publicised case of *The Pharmaceutical Manufacturers' Association of South Africa and Others v. The President of the Republic of South Africa and Others*,[85] one of TAC's primary objectives was to 'turn a dry legal contest into a matter about human lives', not only for the purpose of placing the

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[83] Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 *SAJHR.* 464, 471 (1992).

[84] *Id*. at 471-473.

[85] *See The Pharmaceutical Manufacturers' Association v. The President of the Republic of South Africa*, case no: 4183/98, High Court of South Africa (Transvaal Provincial Division) (March 2001), ureported case *available at* http://www.tac.org.za/Documents/MedicineActCourtCase/affiavd.doc.

> impugned legislation in its proper context but also to influence public opinion[86] Thus TAC's founding affidavit was deposed to by the campaigns co-ordinator of the Congress of South African Trade Unions (COSATU),[87] South Africa's largest trade union federation and a partner in the ruling African National Congress-led tripartite alliance government,[88] with supporting affidavits from people living with HIV/AIDS and doctors offering "personal testimony about living with HIV or AIDS in the shadow of medicines that are available but not affordable."[89]

There are, of course, significant differences between the struggles faced by the TAC and those faced by prisoners rights groups, most notably that public sympathy in the latter field is much harder to come by, but I would nevertheless contend that prisoners' rights litigation could benefit from the insights presented here. What is important is that litigation should not be used as a piecemeal weapon to win fleeting victories in individual cases with little or no long term effect on the way in which the Department of Correctional Services and the leadership in individual prisons operate and with little impact on the actual day to day conditions under which prisoners are kept. In a sector where there seems to be a significant breakdown in the Rule of Law, I suggest such a strategy will be particularly effective.

8.2 The Canadian Experience

In Canada today litigation remains an exceptional strategy in the advancement of prisoners' rights. Although litigation has a part to play and although some judgments have provided significant landmarks, "the intermittent, exceptional, and delayed nature of judicial intervention necessarily limits its capacity to achieve compliance with the law and the constitution on a day-by-day, prison-by-prison basis".[90] It is therefore not surprising that administrative remedies, particularly those provided by internal grievance mechanism assume particular significance for prisoners. Because these avenues do not require access to a lawyer and no special legal knowledge or knowledge of ones rights is required. But some people believe that litigation should play a more important role in addressing the conditions under which prisoners in Canada live. Once such a person is Madam Justice Louise Arbour, who conducted an enquiry into events at the prison for women in 1994 and noted that the prison authorities had developed a culture of little respect for the Rule of Law and for the rights of prisoners and recommended that courts

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[86] Mark Heywood, *Debunking 'Conglomo-talk': A Case Study of the Amicus Curiae as an Instrument for Advocacy, Investigation and Mobilisation* 12 (presented at *Health, Law and Human Rights: Exploring the Connections—An International Cross-Disciplinary Conference Honoring Jonathan M. Mann*, Philadelphia, PA, Sept. 29 – Oct. 1, 2001).

[87] Ms. Theo Steele, also an executive member of TAC.

[88] The third member of this alliance is the South African Communist Party.

[89] Berger *supra* note 84 , at 598-99. See also Heywood, *supra* note 86.

[90] Michael Jackson *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002) 575.

should play a larger role in safeguarding the rights of prisoners and to ensure the effective enforcement of their rights.[91] Justice Arbour recommended that prisoners who had experienced illegalities, gross mismanagement, or unfairness in the administration of their sentences be able to apply for a judicial remedy to reduce the period of their imprisonment. She stated that:

> "Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without the assistance and control from Parliament and the courts…. One must resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner. Indeed, it is always more important that the vigorous enforcement of rights be effected in the cases where the right is the most meaningful… Respect for the individual rights of prisoners will remain illusory unless a mechanism is developed to bring home to the Correctional Services the serious consequences of interfering with the integrity of a sentence by mismanaging it. The administration of a sentence is part of the administration of justice. If the Rule of Law is to be brought within the correctional system with full force, the administration of justice must reclaim control of the legality of a sentence, beyond a limited traditional scope of *habeas corpus* remedies.[92]

She thus concluded that if illegalities, gross mismanagement or unfairness in the administration of a sentence render the sentence harsher than that imposed by the court, a reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended.[93] This view sees a slightly different role for courts, but it is one that may be taken up by South African NGO's fighting for the rights of prisoners.

9. Recommendations and conclusion

Perhaps not surprisingly, all the prisoners' rights litigators I spoke to agreed that there is a great need for continued strategic prisoner's rights litigation in South Africa. Because of positive developments in the common law, the strong protections for prisoners in the Constitution and the protection of prisoners in new Correctional Services Legislation, litigation could become a powerful tool for change in the Department. There is therefore a strong belief amongst litigators that a more co-ordinated long term

[91] Jackson supra at 583.
[92] Arbour Report at 182-83 as quoted by Jackson 583-84. *Habeas Corpus* remedies refer to remedies which require the state to present prisoners to court.
[93] Arbour report 183 as quoted in Jackson 584

strategy that would include, but would not be limited to litigation, would have a good chance of making a real impact in the field of prisoners' rights. The crux of the matter is therefore not *if* litigation should be used to advance prisoners rights, but *how* it should be used.

When devising such a strategy it would be important to address the problems presently encountered by prisoners' rights litigators. It would also be important not to see litigation as a magic formula that on its own will change the way the prison services operate. Such a strategy must therefore take cognisance of the following:

- There is a lack of respect for the Rule of Law within prison services, which means existing rules are disobeyed, court orders ignored and corruption and misconduct condoned or covered up;
- Representatives of prison services often fear taking responsibility and therefore often fail to act, passing on cases to court to pass the buck;
- The leadership in the Department often does not know what is going on in individual prisons;
- The public and the newspapers have little sympathy for prisoners and there is little publicity for the plight of prisoners and consequently representatives in the prison service feel that they can get away with actions that would otherwise not be tolerated; and
- Conditions of overcrowding in the prisons are often caused by problems in the criminal justice system and must be addressed if one wants to improve the conditions under which prisoners are kept.

In the light of these difficulties, what is required is a comprehensive strategy that will force the Departmental leadership and the leadership in individual prisons to take responsibility and to face consequences for their failure to respect the Rule of Law. Although the South African public (and the print and electronic media) might not have much sympathy with prisoners and the conditions under which they are being kept, the public (and the print and electronic media) do not condone corruption, maladministration and disrespect for the Rule of Law. The revelations of maladministration and corruption at the Jali Commission of Enquiry are also bringing about a change in public perceptions about conditions in prisons and a campaign to shame and call to account corrupt and lawless officials in the Department will have some chance of success. Litigation strategies may be used as part of such a campaign and might provide powerful publicity that will assist in calling officials to account. What is required is to put political pressure on the political leadership of the Department of Correctional Services to such a degree that prison officials will begin to feel the heat as well. It may therefore be wise to select one or two issues relating to the maladministration of prisons that might garner public sympathy and to take a test case to court which would challenge the Department. I would imagine that the failure of officials to adhere to the Rule of Law would be an ideal candidate for such a campaign. Such a court

challenge will have to be supplemented with non-legal action to ensure that the court case is used to place maximum pressure on all responsible officials.

At the same time, victories in court cases come and go. It would therefore also be important to follow up court victories with consistent pressure on prison officials to ensure that court decisions are carried out and to expose officials where such orders are disregarded. What is required is a coherent, co-ordinated strategy that would include the threat of court action and, in extreme cases, court action, in cases carefully selected to place the maximum pressure on prison officials that would begin to change the culture of disrespect for the law. This will only happen where officials believe it would be more difficult and more disadvantageous to them if they failed to address the problems than if they actually addressed them. At the moment officials follow the rout of least resistance. The aim should be to change that route of least resistance so as to make it impossible for officials not act.

What cases should be selected? It is very difficult to say which cases would be effective but I will nevertheless make some suggestions about the outline of a strategy of case selection for litigation. I believe it is important not to be too ambitious at the outset and to start with an easier case that will elicit almost automatic public sympathy and then work towards achieving more difficult goals. To that end I will make the following basic suggestions, which might sound slightly cynical, but is aimed at providing some realistic guidelines based on the strategies employed by other organisations. One should, in my opinion, draw a clear distinction between cases launched in the first phase of such a strategy and cases launched in a second phase. A first phase case will be one that will not alienate a sceptical public and media and will address the relative lack of respect for the Rule of Law in the Department. The second kind of case will address more directly the conditions under which prisoners are being held.

- To gather public sympathy and to place the issue of prisoner's rights on the media agenda it will be ideal to kick off the litigation with a case that combines a sense of injustice done to a relatively sympathetic complainant or group of complainants with some evidence of tardiness, or lack of respect for the law on the part of the Department. An ideal example would be a case, say, where female prisoners are denied contact visits with their children despite the fact that regulations provide for such visits and merely because the Head of that prison has decided that allowing for contact visits would be to difficult to administer.[94] Such a case will elicit sympathy because our society is quite sentimental about the bond between mother and child and the

[94] I use this as a textbook example – I am not aware that such a situation ahs ever arisen or will arise in future.

media is particularly keen to expose or at least to report on cases where state officials are perceived as being corrupt or as seeing themselves as being above the law.

- Cases dealing with the conditions under which juvenile prisoners are being kept might also be ripe for litigation where these conditions to not conform to those already agreed to or already guaranteed in various rules and regulations. Because children are especially vulnerable and because the threat of sexual abuse of children kept in adverse conditions in prison will make such cases newsworthy and will elicit sympathy and attention, such cases might have an important impact on prison authorities.
- Cases dealing with breach of existing rules and regulations or cases where the facts show that previous agreements reached between lawyers and the Department are not being adhered to, will also be affective. These latter cases will potentially have an especially important impact if it can create an environment in which prison leaders and their superiors in the Department begin to feel that it is more risky and would make life more difficult for them if the do not adhere to rules or do not stick to agreements than if they did.

In a second stage of prisoner's rights litigation, it will be necessary to take up cases directly attacking the conditions under which prisoner's are kept. The Constitution contains clearly defined rights protecting those incarcerated by the State and at present it is clear that many prisoners are kept in conditions not compatible with these Constitutional guarantees. At the same time these rights are not popular with the public and it would be important to select cases clearly demonstrating the inhuman circumstances under which prisoners are kept.

I have sketched here only the outlines of a possible strategy for change. It would be up to the contracting organisation to develop a coherent strategy based on the insights and principles set out here. What is clear, is that litigation can be a powerful tool for social change. If used wrongly, it can also be a monumental waste of time and money. What is required is the strategic use of litigation or threats of litigation in ways that would begin to address the more fundamental problems in the Department.

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