

# Prisoners' 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 hearings at the Jali Commission of Inquiry into the system of corrections in South Africa have revealed that many prisoners<sup>1</sup> are incarcerated in circumstances that fall far short of those guaranteed them in the South African Constitution.<sup>2</sup>

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. This gap between the guarantees set out in the Constitution and the actual conditions in prisons is a serious matter, not only because a sizeable 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, and if the mechanisms in place to deal with this problem appear to be woefully inadequate, it points to a breakdown of 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 article, 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 administration within the Department of Correctional Services as well

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1 In this article, 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 who 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"' News24, accessed on 19 June 2003 at [http://www.wheels24.co.za/South\\_Africa/News/0,1113,2-7-1442\\_1286511.00.html](http://www.wheels24.co.za/South_Africa/News/0,1113,2-7-1442_1286511.00.html).

as the state of the leadership within individual prisons.<sup>3</sup> 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.

This article is based, in part, on a number of interviews conducted with human-rights practitioners directly involved in prisoners' rights litigation in South Africa.<sup>4</sup> 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.<sup>5</sup> The article furthermore relies on academic writing and press reports.

## 2 PRISONERS' 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 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.<sup>6</sup> 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.<sup>7</sup>

3 I believe it is helpful to distinguish between those administrators working at the provincial and national levels of the 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); Ahmed 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 (then Legal Advisor of the Department of Correctional Services); Chris Giffard (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 and Pretoria.

6 See Van Zyl Smit D 'Prisoners' rights' in Ronald Louw (ed.) *South African human rights yearbook 1994* vol. 5 (1995) 268.

7 See Prisons Act 8 of 1959. Van Heerden J *Prison health care in South Africa* (1996) UCT 6.

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.<sup>8</sup> 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 over the population through racial segregation. 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 penal 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 the common-law prohibition 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.<sup>9</sup> Because the Correctional Services institutions were also used extensively to incarcerate individuals who had not been found guilty of any crime but who had been detained in terms of security legislation, or who were 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 vital to the State that the system work effectively to incarcerate 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.<sup>10</sup> The Correctional Services Department was also militarised in the 1950s, implanting a strict hierarchical management structure on the prison services to ensure authoritarian 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 rigid chain of command was adhered to at all times.<sup>11</sup>

The Department's 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 – especially prisoners incarcerated for political reasons – challenged their treatment at the hands of the Department.<sup>12</sup> In

8 Dissel A 'Tracking transformation in South African prisons'; Kollapen J 'Prisoners' rights under the Constitution Act No. 200 of 1993' Seminar No. 5, 1994, Centre for the Study of Violence and Reconciliation 1.

9 'A brief history of prisons in South Africa' *Monograph 29 - Correcting Corrections* October 1998, published by the Institute of Security Studies, available at <http://www.iss.co.za/Pubs/Monographs/No29/History.html>.

10 See *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) 148E–F.

11 Dissel A (note 8 above) 2.

12 This was not always the case. As early as 1912 the Appellate Division, in *Whittaker v Roos & Bateman; Morant v Roos & Bateman* 1912 AD 92 at 123, confirmed the common-law position that all prisoners:

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*Rossouw v Sachs*,<sup>13</sup> for example, the Appellate Division questioned whether regulations made in terms of detention legislation conferred any legal rights upon prisoners<sup>14</sup> and found that detainees had a right to the necessities of life but that they had no right to any 'comforts'.<sup>15</sup> Later, in *Goldberg and Others v Minister of Prisons and Others*,<sup>16</sup> the Appellate Division confirmed that long-term prisoners had no right to reading materials because these did not constitute 'necessities'.<sup>17</sup> 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*<sup>18</sup> rejected this distinction as of little value because it was a blurred line dependent on the particular circumstances of the case.

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.<sup>19</sup>

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.

### 3 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 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

'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'.

13 1964 (2) SA 551 (A).

14 *Ibid* at 562A.

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 right 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.

section 35(2) which 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 her or his spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner. The Bill of Rights furthermore protects everyone's rights to human dignity,<sup>20</sup> to freedom and to security of the person.<sup>21</sup>

In *S v Makwanyane and Another*,<sup>22</sup> Chaskalson P confirmed that a person's dignity is inevitably impaired by imprisonment, but that a prisoner does not lose all his or her rights on entering prison.<sup>23</sup> Prisoners retain all the rights to which every person is entitled in terms of the Constitution, including the right not to be mistreated, the right to associate with other prisoners, to exercise, to write and receive letters and the rights of personality. These rights are subject only to the limitations clause.<sup>24</sup>

Although the Constitutional Court has not directly pronounced on the conditions under which prisoners are kept in South Africa, its decisions make it clear that it will be quite sympathetic to constitutional claims based on section 35 of the Constitution because non-compliance with these provisions will have a serious effect on the human dignity of prisoners.<sup>25</sup> The Court has also shown an extremely keen interest in safeguarding the rule of law<sup>26</sup> 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 to react to corruption and maladministration are, therefore, ripe for litigation in the highest courts of the country. Moreover, the new Correctional Services Act<sup>27</sup> contains a whole chapter aimed at bringing the practices of the Department of Correctional Services in line with the constitutional requirement of keeping incarcerated prisoners under conditions of human dignity.<sup>28</sup> With the Act now in force and the required regulations promulgated, a powerful tool to hold the Department of Correctional Services to account has been created.<sup>29</sup> All these factors seem to suggest that, from a purely legal perspective, prisoners' rights litigation will stand a good chance of success in South African courts. It also suggests that it may be

20 S 10.

21 S 12 (1).

22 1995 (3) SA 391 (CC).

23 Par 142.

24 Par 143.

25 See, for example, *Minister of Home Affairs v Nicro and Others* 2004 (5) BCLR 445 (CC).

26 See De Waal J, Currie I and Erasmus G *The Bill of Rights handbook* (2001) 9-15.

27 Act 111 of 1998.

28 See Chapter III.

29 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'.

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.

#### 4 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, or by capacity and resource constraints. According to Karl Paxton, head of legal services in the Department of Correctional Services at the time the original research on which this article is based was conducted,<sup>30</sup> 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 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 at 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 conform 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 stated that, when his office investigates a complaint regarding a policy matter and 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

<sup>30</sup> Telephonic interview with Mr Karl Paxton on 5 May 2003.

how to respond to a particular accusation and/or challenge. Once a legal advisor – nationally or in each province – decides that a 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.<sup>31</sup> Mr Paxton conceded that the Department often settled cases when they thought it in the interest of the Department.<sup>32</sup> 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 binding on a specific region or province only, the legal advisors of that province would do the same for that province.

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 their 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 misinterpreted (deliberately or otherwise) 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 many 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 the leadership is scared to take responsibility for such decisions<sup>33</sup> or lacks respect for the law and the rule of law and views itself as not being bound by particular regulations because these regulations are seen as 'impractical' or 'difficult to implement'. According to Louis van der Merwe of Lawyers for Human Rights, there is sometimes a lack of co-operation between the state attorney's 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 attorney's office is then obliged to proceed to defend the cases even though it often does not receive from

31 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 almost R35 million was spent in 2002 on legal fees and settlement money by the Department. There is no independent confirmation of this figure.

32 See 6.2 below.

33 Louis van der Merwe of 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 do something which turns out to be wrong or to be unpopular with superiors.

the various officials in the Department the information it needs to launch an effective defence in court. This means that the state attorney will often proceed with a case but will withdraw at the last moment because, on account of lack of co-operation on the part of Departmental officials, he or she has not been able to gather sufficient information that would allow him or her to mount an effective defence in a court of law. Many cases are, therefore, taken close to or all the way to court because officials see this as the path of least resistance and/or are unable to deal with the matter effectively because of capacity constraints.

Achmed Mayet from 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 the Department is very clearly in the wrong, passes 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 court. But even state attorneys complain 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 state attorneys' offices will often settle a case merely because they have no way of defending it and, thus, have 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 departmental level were honest, hardworking and ready to deal with problems head on. But these officials often face obstacles and resistance from within the Department.

Any litigation strategy that engages with the Department of Correctional Services will, therefore, have to take cognizance 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 at the same time 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 instead assists 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 made the decision to go to court or who had decided to ignore or bend existing rules and regulations.

## **5 TRENDS IN PRISONERS' RIGHTS LITIGATION IN POST-APARTHEID SOUTH AFRICA: THE GOOD, THE BAD AND THE UGLY**

### **5.1 Few reported judgments – but many cases unreported**

In the ten years since the introduction of the democratic Constitution, there have been only two reported judgments of the Constitutional Court

dealing directly with the rights of prisoners.<sup>34</sup> In the same period, two judgments of the Supreme Court of Appeal dealt with these issues<sup>35</sup> and five judgments of the High Court dealing with prisoners' rights were reported.<sup>36</sup> 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 fewer than 123 456 complaints from prisoners regarding prison conditions, the treatment of prisoners and the alleged infringement of prisoners' constitutional rights.<sup>37</sup>

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 the cases of prisoners. One prisoners' rights litigator told me that he had taken up the complaints of 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 judgments were often handed down against the Department of Correctional Services.<sup>38</sup> 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.

It is, therefore, clear that prisoners' rights litigation plays a significant role in challenging the conditions of individual prisoners and might assist individual prisoners in gaining access to the rights guaranteed in the constitution. However, I would argue that, 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 Services. More pertinently, the litigation has not contributed significantly to establishing respect for the rule of law and for the Constitution, within the Department. Any litigation strategy will have to take cognizance of this.

## 5.2 Little news coverage of prisoners' 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

34 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC); *Minister of Home Affairs v National Institute for Crime Prevention (Nicro) and Others* 2004 (5) BCLR (CC), both dealing with the right to vote. 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.

35 *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455 (SCA); and *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA).

36 *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C); *Roman v Williams NO* 1998 (1) SA 270 (C); *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C); *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).

37 Office of the Inspecting Judge 'Annual Report 2001/2002: Prison and prisoners' at 17.

38 Interview with Louis van der Merwe, Lawyers for Human Rights.

in the print media. The few news reports deal mostly 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, there were, at the time of this research was conducted, hardly any news reports revealing the shocking treatment of prisoners and 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.

### 5.3 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 4 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*,<sup>39</sup> for example, Navsa JA launched an uncharacteristically scathing attack on the quality of the case presented on behalf of the Department of Correctional Services and remarked that the Department’s case was ‘short on detail and fact’. It was, Navsa JA said, ‘inadequately presented and poorly answered’. The judge also complained about the complete lack of information which would have assisted the court in making an informed decision.<sup>40</sup>

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 counsel employed by the Department, it is more than likely that at least some of the blame attaches 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 adapt 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.<sup>41</sup> This inability is the more surprising in a case like *Kwakwa*,<sup>42</sup> 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.

39 2002 (4) SA 455 (SCA).

40 *Kwakwa* par 8 and 9. See also par 19. See also, eg. *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W) par 18.

41 Interview with Louis van der Merwe, Lawyers for Human Rights.

42 2002 (4) SA 455 (SCA).

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, as it is likely to defend itself in an inadequate way, thus making 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.

#### 5.4 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, especially amongst 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.

First, 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 *Kwakwa*,<sup>43</sup> 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<sup>44</sup> and concluded that the challenge was based on the principle of legality. Navsa JA found that the second applicant had 'fundamentally misconceived his powers in terms of the Act' and that he had acted beyond his powers by disregarding the provisions of the Constitution and fashioning a privilege system inconsistent with its core values and not countenanced by the statutory regime from which he assumed his powers. Navsa JA warned: 'Prison authorities in exercising their statutory powers must take care to ensure that they act in accordance with the principle of legality'.<sup>45</sup> 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 the Constitution.<sup>46</sup>

43 2002 (4) SA 455 (SCA).

44 Par 32.

45 Par 36.

46 See, for example, *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W), where the Department refused to comply with a direct order of the High Court, claiming that it was not obliged to do so, again misconstruing its legal obligations as set out by the common law, the relevant legislation and the Constitution. The court ordered that electricity points 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

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Second, several of the prisoners' rights litigators consulted 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 some of these difficulties can be ascribed to the nature of the claims and problems experienced with clients who, after all, are prisoners spending time in jail after being convicted of serious criminal offences,<sup>47</sup> prisoners' rights litigators also face myriad obstacles often 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, not being able to receive one's client in one's office),<sup>48</sup> there are additional 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 members of the Department do not see such prisoners as criminals and also do not feel under personal attack and, therefore, act in a relatively efficient and magnanimous way. The same can be said for those personnel working at prison medical facilities and who seem to be rather helpful.

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, often using different strategies to try and prevent complaints' being lodged or 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. This leads to difficulties when lawyers consult with their clients.<sup>49</sup>
- 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 now has to deal with several cases with exactly the same facts as if they were completely different cases dealing with different issues.<sup>50</sup>

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upgraded and that all prisoners had access to electricity in their cells (telephonic interview with ET Schoole on 9 June 2003).

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

48 Interview with Prof Peter Jordi.

49 Prof Peter Jordi.

50 Achmed Mayer.

- 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, if not impossible, to get easy access to his or her client.<sup>51</sup>
- It is also alleged that members of the Department victimise prisoners who lay complaints or bring forward legal challenges against members of the Department. Those who complain will often not be cited for good behaviour, or allegations will be trumped up against them to prevent them from achieving a higher grade classification (which leads to more privileges) or from being considered for parole.<sup>52</sup>
- 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, 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.<sup>53</sup>

The foregoing points to a severe lack of respect for the legal process on the part of the warders and the Department of Correctional Services. While there are standard procedures for dealing with the complaints of prisoners and while the Department of Correctional Services officially acknowledges that prisoners have the same right to legal representation as non-prisoners, in practice this right is undermined both subtly and sometimes not so subtly.

Thirdly, the Department often settles cases out of court – especially where its members are aware that they are not adhering to the Department's own rules and regulations regarding the conditions under which prisoners are kept. It is alleged that the Department will often agree –

51 Achmed Mayet. Louis van der Merwe confirmed these allegations.

52 Louis van der Merwe.

53 Achmed Mayet. Allegations confirmed by Prof Peter Jordi. According to Justice Hannes Fagan, the computerised system of recording the complaints 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.

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 lapse quickly back into the old ways once the lawyer's attention is taken up by other cases.<sup>54</sup>

Achmed Mayet refers to a case he dealt with at Johannesburg Central Prison where the Legal Resources Centre 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 challenging the way in which the food was prepared, the Legal Resources Centre settled the case out of court. 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 the minimum standards the Department professes to adhere to. The prison authorities implemented this agreement but after two months they seemed to have reverted to their old ways which were easier for them to administer and involved 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. It is, therefore, unknown whether the agreement is 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 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 the part of the Department seems to curtail severely the effectiveness of legal representatives fighting for prisoners' rights.

Fourthly, proceedings at the Jali Commission of Inquiry 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 ordinary prison officials to uncover corruption and misconduct. Prisoners rights' litigators confirm this and argue that the Department of Correctional Services often deals with complaints against warders in a way that, at best, could be described as tardy and, at worst, as deceitful and corrupt. According to Louis van der Merwe of Lawyers for Human Rights, misconduct by warders is seldom investigated internally. In the face of stonewalling by prison officials, it becomes very difficult for individual litigators with limited time

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<sup>54</sup> Louis van der Merwe.

and resources to pursue successfully with prison authorities the matter of the maltreatment of prisoners. Even where members of the Department are finally cajoled into action, all the energy and hard work seldom bring about a fundamental change in the behaviour of the prison authorities.

In conclusion, it must 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 cognizance of this and will have to find ways of dealing with the lack of respect for the law within some sectors of the Department of Correctional Services. The examples cited above do, however, suggest 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 a lack of transparency and openness.

### 5.5 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 NGOs which show any interest in pursuing prisoners' rights through litigation and other strategies. The Penal Reform Project of Lawyers for Human Rights is a notable exception, but, due 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 thereby make it more human-rights responsive. 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 issues raised by one of the organisation's other projects, such as access to health care or constitutional litigation. At the same time, the Department often settles cases 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 three challenged an existing policy. In *August and Another v Electoral Commission and Others*,<sup>55</sup> a group of prisoners challenged the Electoral Commission, which 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*

55 1999 (4) BCLR 363 (CC).

Another,<sup>56</sup> two awaiting-trial prisoners challenged the introduction of a new privilege system for unsentenced prisoners which was imposed by the Department in 1998 and 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. And in *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) and Others*,<sup>57</sup> prisoners successfully challenged further amendments to the Electoral Act which prohibited all prisoners who had been sentenced to imprisonment without the option of a fine from voting in national elections.

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 kept. For example, in *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*,<sup>58</sup> 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 would be kept there,<sup>59</sup> but challenged the decision to send them to C-Max on the ground that they did not receive a fair hearing in that the *audi alteram partem* rule had not been adhered to.<sup>60</sup> 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.<sup>61</sup> The court rejected this argument because, according to the stated facts, the *audi* rule was never adhered to.<sup>62</sup> This case represents a victory for the applicants but did not fundamentally change the conditions under which prisoners are kept at C-Max prison nor did it address the way in which transfers generally occur within the prison system.<sup>63</sup>

An even more instructive case in this regard is *Van Biljon and Others v Minister of Correctional Services and Others*<sup>64</sup> where prisoners challenged the decision of prison services not to provide prisoners with anti-retroviral drugs at state expense when their CD count deteriorated to below 500 per

56 2002 (4) SA 455 (SCA).

57 2004 (5) BCLR 445 (CC).

58 2001 (3) SA 472 (SCA).

59 Par 13.

60 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 the right to present his or her side of the case before the decision is made.

61 Par 15.

62 Par 20.

63 See, also, *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C) (unsuccessful challenge, thus no precedent set); *Roman v Williams NO* 1998 (1) SA 270 (C) (question whether a decision of the Commissioner of Prisons to re-imprison 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).

64 1997 (4) SA 441 (C).

millilitre.<sup>65</sup> Because of the unique facts of the case and perhaps because the court victory in the High Court was not followed up by lobbying and by the applying of pressure on the prison services,<sup>66</sup> 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.<sup>67</sup> He 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 were not provided by the prison authorities.<sup>68</sup> When 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 as that provided at provincial hospitals<sup>69</sup> and this meant – given severe budget constraints – that only some patients qualified for anti-retroviral treatment.<sup>70</sup> The Court found that the State's case was based on the faulty premise that it owed no higher duty to prisoners than to citizens in general in providing adequate health care services. Many people outside prison are not provided with adequate health care or housing, but this does not mean the State has no duty to provide prisoners with such adequate facilities and care. Because the State had incarcerated the applicants, it had a higher duty of care towards them.<sup>71</sup> This means the State must provide treatment that would better protect them than the protection afforded HIV-patients outside.<sup>72</sup> The Court, therefore, ordered the authorities to provide anti-retroviral therapy to applicants as had already been prescribed for them on medical grounds and for as long as this treatment was so prescribed.

At first glance this case appears to represent a major victory for HIV-positive prisoners in South Africa, 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 the 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'.<sup>73</sup>

65 Par 8.

66 In an interview, William Kerfoot expressed regret at not having had time to pursue this matter any further in order to ensure that the court order was implemented and also to try and broaden its effect to other prisoners who did find themselves in the unique factual situation of the applicants in this case.

67 Par 14, 16-17.

68 Par 18-19.

69 Par 24.

70 Par 26.

71 Par 51-52.

72 Par 54.

73 Interview with Dr Ashraf Grimwood on 4 June 2003.

In short, an analysis of reported cases seems to suggest that, over the past ten years, prisoners' 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 prisoners' 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*,<sup>74</sup> the Witwatersrand Local Division of the High Court ordered the Department of Correctional Services to install plug points in prison cells at the Johannesburg maximum security prison, which this was duly done.<sup>75</sup> But such cases will remain few and far between unless prisoners' rights litigation is dealt with in a more coherent and strategic way.

## 6 OTHER FACTORS TO BE TAKEN INTO ACCOUNT WHEN EVALUATING PRISONERS' RIGHTS LITIGATION

### 6.1 Prison authority and governance

Dealing with the Department of Correctional Services can be taxing and frustrating and it is important to take cognizance of particular difficulties regarding the way the Department operates to ensure that any litigation strategy does not falter because of a lack of insight into the dynamics of the Department. One factor mentioned by prisoners' 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, in 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 long-serving members. The military-style 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,<sup>76</sup> the military command structure had to be dismantled. However, 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 van der Merwe, many in leadership positions in the various prisons seem scared to take decisions because

74 1999 (3) BCLR 342 (W).

75 See section 5.4 above.

76 Popcru emerged as a trade union for black and coloured warders in the late 1980s to fight the prejudice and racism experienced by its members within the Department of Correctional Services. It has since grown into a powerful union within the Correctional Services system.

they are not sure who is in charge and who to please in order 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'.<sup>77</sup> William Kerfoot agrees and adds that the big problem is that there is a huge gap between what happens in individual prisons and what the influential people in leadership positions in the Department think happens. 'In my dealings with the Department it 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'.<sup>78</sup>

To my mind this points to a very important insight. 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 things 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 to date has had only limited success exactly because there has been little political fallout for the prison leadership and for the political leadership. Things will change only when inaction becomes more difficult for prison authorities than action. One way in which this can occur is to combine litigation in selective cases with a public relations/political campaign to shame individuals and the collective leadership of the prison services.

## 6.2 Prison conditions

Any litigation strategy aimed at addressing prisoners' rights will have to take cognizance of the actual conditions in prisons and such a strategy will have to include long-term goals to address the reality on the ground. The Inspecting Judge, Judge Hannes Fagan,<sup>79</sup> 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

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77 Actmed 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 from them'.

78 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 and 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 responsible officials also gave a somewhat undecipherable explanation as to how the mistake came about.]

79 Interview at his office in Cape Town on 6 May 2003.

large degree, can be blamed on problems inherent in the criminal justice system and the way the Department of Justice (and not Correctional Services) deal, with the issue. As Judge Fagan points out, it is difficult to address the problems of prisoners' rights in a vacuum, and a strategy that does no more than engage with the Department of Correctional Services will probably not succeed.

## 7 LITIGATION STRATEGIES TO ADVANCE PRISONER'S RIGHTS

### 7.1 Treatment Action Campaign perspective

The insights presented above about the various difficulties faced by prisoners' rights litigators suggest 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 about whether litigation should form part of such a strategy, and, if so, how this should be done, cannot be answered easily. In the right circumstances, though, public-interest litigation may and should be used as an important tool for social change in prisons. At the same time, 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 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.<sup>80</sup>

Although the circumstances under which the Treatment Action Campaign (TAC) operates may be different from those under which a prisoners' rights NGO operates, and although the political landscape may present different threats and opportunities for those advancing prisoners' rights, I submit that much can be learned from the way in which the TAC has used public-interest litigation as part of a more comprehensive strategy to win rights for its 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 lessons can be learned from this approach.

Jonathan Berger explains that the TAC's approach to the use of law is multifaceted. He indicates that the TAC is 'highly aware of the role of the litigation process beyond the orders made in court judgments'. The TAC strategy seeks to use the law without necessarily litigating, 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'.<sup>81</sup> The TAC also uses litigation to place issues on the agenda, both before the judge and in the court of public opinion.

80 See Berger J 'Litigation strategies to gain access to treatment for HIV/AIDS: The case of South Africa's treatment action campaign' (2002) *Wisconsin International Law Journal* vol. 20 no. 3595 at 597.

81 Mureinik E 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *SAJHR* 464, 471.

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. 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. What is required is a co-ordinated and strategically well-thought-through approach with a keen eye on public opinion, similar to that utilised by the TAC. 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 RECOMMENDATIONS AND CONCLUSION

Perhaps not surprisingly, all the prisoners' rights litigators I spoke to agreed that there is a great need for continued strategic prisoners' 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 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 *whether* 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 take cognizance 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 media have little sympathy for prisoners and there is little publicity for the plight of prisoners; consequently, representatives in the prison service feel that they can get away with actions that would otherwise not be tolerated; and
- overcrowding in prisons is 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 media) might not have much sympathy with prisoners and the conditions under which they are being kept, the public (and the media) do not condone corruption, maladministration and disrespect for the legal process. The revelations of maladministration and corruption at the Jali Commission of Inquiry 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 may provide powerful publicity that will assist in calling officials to account. What is required is to put political pressure on the 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 as a challenge to the Department. 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.

It would, however, 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 when 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 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 fail to address the problems than if they actually address them. At the moment, officials follow the route of least resistance. The aim should be to change that route of least resistance so as to make it impossible for officials not to act.

What cases should be selected? It is very difficult to say which cases would be effective, but 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. 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 merely because the Head of that prison has decided that allowing contact visits would be too difficult to administer.<sup>82</sup> Such a case will elicit sympathy because our society is quite sentimental about the bond between mother and child and the media are particularly keen to expose or, at least, to report 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 kept might also be ripe for litigation where these conditions do 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 a significant impact on prison authorities.

Cases dealing with breaches 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 effective. These latter cases will potentially have an especially profound impact if they can create an environment in which prison leaders and their superiors in the Department begin to feel that it is riskier and would make life more difficult for them if they do not adhere to rules or do not stick to agreements than if they did.

In a second stage of prisoners' rights litigation, it will be necessary to take up cases directly attacking the conditions under which prisoners 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 potential litigators to develop a coherent strategy based on the insights and principles set out here. What has been demonstrated 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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<sup>82</sup> I use this as a theoretical example -- I am not aware that such a situation has ever arisen or will arise in future.

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