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The implications of torture for South Africa

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The implications of torture and other ill treatment for South Africa

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1. Introduction

> *It took the death of Steve Biko under torture to provoke the [UN] General Assembly into drafting and accepting the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which requires state parties to take jurisdiction to punish torture committed within their territory either by or against their nationals.*[1]

As the above quote demonstrates, South Africa has a special relationship with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and ratified it on 10 December 1998. This signified to the international community that South Africa subscribes to the international ban on torture and that it would implement national measures to give effect to the objectives of the Convention. After South Africa ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) progress towards compliance with its obligations has been minimal, but this has not been without consequence. This paper reflects on the implications of torture for South Africa from a socio-legal perspective.

There is little doubt that torture is still taking place in South Africa, especially where people are deprived of their liberty. This has been established by several researchers and oversight structures.[2] The 2010/11 Department of Correctional Services Annual Report reflects that 51 prisoners died in that year due to unnatural causes.[3] The Judicial Inspectorate for Correctional Services recorded a total of 2276 complaints from prisoners in 20010/11 alleging that they had been assaulted by prison warders.[4] The 2004/5 Independent Complaints Directorate (ICD) Annual Report similarly reflects on a number of cases where torture and assault of

[1] Robertson G (2006) *Crimes against Humanity – the struggle for global justice*, Penguin, London, p. 265
[2] See Bruce D, Newham and Masuku T (2007) *In Service of the People's Democracy – an assessment of the South African Police Service*, CSVR, Johannesburg.
[3] Department of Correctional Services (2011) *Annual Report 20010/11*, Pretoria, p. 48.
[4] Office of the Inspecting Judge (20011) *Annual Report of the Judicial Inspectorate 2010/11*, Cape Town, p. 32.

police suspects are alleged.[5] The 2005/6 Annual Report of the ICD provides more detail: of 1787 cases against police officers investigated by the ICD, 62% related to assault, attempted murder, intimidation and torture.[6] The assault and torture of people in police custody and in prisons therefore appears to be common, often leading to fatalities.

Government support for the prevention and combating of torture remain less than enthusiastic thirty years after Steve Biko was tortured to death in detention by apartheid era police. The lack of progress and political support for preventing and combating torture is even more perplexing when reading ten President Mbeki's Steve Biko Memorial Lecture (2007) in which he poignantly cites the attributed words of Biko to his torturers: *"I ask for water to wash myself with and also soap, a washing cloth and a comb. I want to be allowed to buy food. I live on bread only here. Is it compulsory for me to be naked? I am naked since I came here."*[7] More than 13 years after South Africa ratified UNCAT, torture has not been criminalised in domestic law. State officials remain largely unaware of the international ban on the use of torture.[8] Legislation regulating places of detention is devoid of the language of UNCAT.

The paper commences with a description of the status of the crime of torture under international human rights law and also the definition of torture. This is followed by a brief assessment of whether torture is effective in yielding information that could, for example, be used to prevent loss of life or other tragedies. The paper then turns to the South African situation reflecting on the Constitutional and legal standards. By turning to a number of historical themes it is argued that post-1994 governments created a particular climate that would allow permissiveness in respect of rights violations of criminal suspects and prisoners. It is this climate of harsher punishments and law and order rhetoric that would enable torture and other ill treatment to continue. The discussion on South Africa concludes with a two case studies dealing with a mass assault of prisoners in 2008 and the admissibility of evidence

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[5] See for example the following cases from the *ICD Annual Report 2004/5* listed according to the relevant police station: Moroka (p. 59), Zonkisizwe (p. 59), Linden (p. 60), Smithfield (p. 61), Odendaalsrus (p. 61), Klerksdorp (p. 63), and Benoni (p. 66). The *ICD Annual Report 2005/6* present similar cases involving assault and torture listed according to the relevant police station: Wolmaransstad (p. 52), Ipelegeng (p. 52), Queenstown (p. 52), Mthatha (p. 52).

[6] Independent Complaints Directorate (2007) *Annual Report 2006/7*, Pretoria, pp. 63-64. The following specific offence categories are being referred to: assault common, assault gbh, attempted murder, beaten with handcuffs, beaten with fists, dog attack, emotion/verbal/psychological abuse, indecent assault, intimidation, kicked, kidnapping, physical abuse, pointing of firearm, rape and torture.

[7] Steve Biko Memorial Lecture delivered by the President of South Africa, Thabo Mbeki, on the occasion of the 30th Anniversary of the death of Stephen Bantu Biko, Cape Town, 12 September 2007, http://www.info.gov.za/speeches/2007/07091314151001.htm Accessed on 25 September 2005.

[8] SAPS is the only government department that has a policy on the prevention of torture.

obtained under torture in legal proceedings. The paper concludes with an assessment of the implications of torture for South Africa.

2. A definition of torture and cruel, inhuman or degrading treatment

The international ban on the use of torture has the enhanced status of a peremptory norm of general international law,[9] meaning that it

> "*enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.*"[10]

The prohibition of torture imposes obligations on states owed to the other members of the international community, each of which then has a correlative right.[11] It signals to all states and people in their respective jurisdictions that "the prohibition of torture is an absolute value from which nobody must deviate."[12] At national level, it de-legitimates any law, or administrative or judicial act authorising torture.[13] Also, no state may excuse itself from the application of the peremptory norm. The revulsion with which the torturer is regarded is demonstrated by the very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind",[14] and torture itself as an act of barbarity which "no civilized society condones,"[15] "one of the most evil practices known to man"[16] and "an unqualified evil".[17]

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[9] See the recent House of Lords decision in *A (FC) and others (FC) v. Secretary of State for the Home Department* (2004); *A and others (FC) and others v. Secretary of State for the Home Department* [2005] UKHL 71 para 33. See also *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199; Prosecutor v. Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at paras 147-157.

[10] *Prosecutor v. Furundzija* ICTY (Trial Chamber) Judgment of 10 December 1998 at para 153 (Case no. IT/95-17/1/T)

[11] *Prosecutor v. Furundzija* Para 151. The violation of such an obligation constitutes a "breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued".

[12] *Prosecutor v. Furundzija* Para 154.

[13] *Prosecutor v. Furundzija* Para 155.

[14] *Filartiga v. Pena-Irala [*1980] 630 F (2nd Series) 876 US Court of Appeals 2nd Circuit 890.

[15] *A (FC) and others v. Secretary of State for the Home Department* para 67.

[16] Para 101.

Defining torture proved to be a challenging task, given the wide range of contexts, but more importantly, the vast array of means and situations that can be exploited to inflict torture and cruel, inhuman or degrading treatment (CIDT). The Universal Declaration of Human Rights (1948) states in Article 5 the right to be free from torture and cruel, inhuman or degrading treatment or punishment. The International Covenant on Civil and Political Rights (1966) (ICCPR) similarly, in Article 7, confirms the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. Other instruments predating the adoption of UNCAT also make reference to torture, again without defining it (e.g. Geneva Conventions with reference to common Article 3 and the Additional Protocols I and II). The first instrument defining torture is the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1975).[18] It would, however, take another nine years for the UN General Assembly to agree on a definition of torture when it adopted UNCAT in 1984.

UNCAT defines torture in Article 1 as follows:

> *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

Based on this definition, four conditions are required for an act to qualify as torture:

- It must result in severe mental and/or physical suffering: It must be emphasised that torture is not restricted to physical suffering resulting from, for example, beatings

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[17] Ibid at Para 160.

[18] Article 1: 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. (Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975)

or electrical shocks. Mental or emotional pressure applied to a person may also constitute torture; for example, threatening to harm a person's family. The requirement that it must result in "severe" suffering is not an absolute and objective standard and will depend on the facts of the case and the context in which the acts occurred.

- It must be inflicted intentionally: Article 1 requires that such acts must be inflicted intentionally for such purposes as obtaining information, a confession, or punishment, intimidation, or motivated by reasons of discrimination. It is important to note that the definition reads "for such purposes as" and what follows should be understood to serve as examples and not an exhaustive list of purposes set down by the Convention. An act may therefore still meet the requirement of purpose if the purpose was something other than those listed in Article 1.
- It must be committed by or with the consent or acquiescence of a public official: An act of torture may be committed directly by a public official, for example, by assaulting a criminal suspect. It may also be committed by a person who is not a state official, but with the consent of a state official. An act of torture may also occur if a state official omits or fails to do something that could have prevented the infliction of severe mental and/or physical suffering being inflicted upon another person by non-state actors.
- It excludes pain and suffering as a result of lawful actions: The fact that something is "lawful" does not mean that it is necessarily consistent with the objectives of UNCAT. For example, punishments such as the death penalty and corporal punishment will inflict severe physical and mental suffering. The Constitution of Botswana allows for corporal punishment to be inflicted as a form of punishment even though Botswana ratified UNCAT in 2000.[19] The legal situation in South Africa in respect of punishment is fortunately clearer since the abolition of both the death penalty and corporal punishment. There are, however, other areas of state operations where force is used, that could fall in the grey area of what is lawful and what is not,

[19] Upon ratification, Botswana entered the following reservation:"The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana." http://www2.ohchr.org/english/bodies/ratification/9.htm#reservations Accessed 3 July 2008.
The Special Rapporteur on Torture has specifically asked for corporal punishment as a form of punishment to be abolished in all jurisdictions. [UN Special Rapporteur on Torture (undated) *General Recommendations of the Special Rapporteur on Torture*, http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm Accessed 4 July 2008.]

for example, whether the use of force in quelling a prison riot exceeded the minimum threshold.

Whereas UNCAT defines torture in Article 1, no definition is provided for CIDT; this has been the subject of much scholarly writing as well as court decisions.[20] The key question is whether something is inherently torture or, if it becomes torture when a certain threshold is transgressed and CIDT meets the requirements of the definition of torture? The UN Declaration against Torture, in Article 1.2, refers to aggravation: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." The UNCAT definition does, however, not make the link that torture is an aggravated form of CIDT, but the Committee against Torture (CAT) invokes the concept of "degree of severity" to distinguish torture from CIDT.[21] Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment are left to courts to decide.[22] A growing body of international case law on this issue provides increasing guidance and South African courts should take note of these.[23]

Scholars have also spent many hours questioning the relationship between torture, on the one hand, and CIDT, on the other hand. Can acts that do not in themselves constitute torture, amount to torture when applied over a prolonged period? When does cruel, inhuman or degrading treatment become torture? These are vexing questions that will keep courts and scholars occupied for decades to come. Despite these challenges, it should be noted that both torture and CIDT are prohibited under UNCAT (see Articles 1 and 16), and that protection against CIDT is also guaranteed in Section 12 (e) of the South African Constitution. There is an obligation on State Parties to prevent both torture and CIDT. Experience has also

[20] For a discussion on changes in the interpretation of the definitions of torture see Rodley N (2002) 'The Definitions of Torture in International Law' *Current Legal Problems*, Vol. 55, pp. 467-493.
[21] UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 10.
[22] See *Ireland* v *UK* 1976 2 EHRR 25; Rodley N.S. (2002) 'The Definition of Torture under International Law' *Current Legal Problems*, Oxford University Press, Vol. 55, pp. 467-493.
[23] See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002; Cantoral Benavides Case (2000) I-A Ct. HR, Ser. C, No. 69 (Peru);

demonstrated that the conditions that give rise to CIDT frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent CIDT.[24]

In an academic article that pre-dates General Comment 2 of CAT, the former UN Special Rapporteur on Torture takes a view different from that of the Committee on the distinction between torture and CIDT. He argues that while a proportionality test[25] can be applied when a person is free and the state (e.g. the police) uses force to achieve a legitimate aim such as arrest, the same proportionality test cannot be applied when a person is deprived of his or her liberty:

> [this] has led me to the conclusion that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim. . . As soon as the person concerned is, however, under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted. If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession or information, it must even be considered as torture. It is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test.[26]

3. Does torture work?

States and individuals have attempted to justify the use of torture by citing the severity of the situation such as the seriousness of the crime allegedly committed or the potential threat posed by terrorists. The question remains, however, whether the use of torture can be justified if it yielded results, for example, by preventing the further loss of life? Research into the

[24] UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 3.
[25] The Special Rapporteur refers to the proportion of force used to achieve a legal objective and whether the force used was proportional to the situation. The Committee against Torture refers to 'degrees of severity'.
[26] Nowak, M and McArthur E (2006) 'The distinction between torture and cruel, inhuman or degrading treatment' *Torture* Vol. 16 No. 3, pp. 150-151

effectiveness of torture in yielding reliable information has, however, found that there is no evidence supporting such a view.[27]

The first problem is that when suspects are subjected to interrogations relying on torture, they will do or say anything to make the pain and/or mental anguish stop. False confessions and manufactured "evidence" are therefore real risks when using torture. Using this evidence to guide further investigations and actions will therefore result in a waste of time and resources, yielding few, if any, results.

The second problem arising from the use of torture is the question of who to torture? For the torturer the identification of a victim is not a clear cut issue and often based on tenuous evidence and unfounded suspicions, or a particular profile. The war on terror has seen many suspects ending up in Guantanamo Bay for merely being at the wrong place at the wrong time. When torture is used with the purpose of punishment, such as was the case in the *McCullum* decision, it was indiscriminate, made no contribution to making the particular prison safer, and in fact served only to heighten tension and the potential for violence between prisoners and warders.

Thirdly, using torture to extract information may yield large volumes of information (of an unreliable nature) but because the torturers are not omnipresent, it is difficult for them to tell the difference between truth and deception. A research experiment has indeed found that untrained university students were more accurate in sifting truth from deception than trained interrogators.[28]

4. The South African situation

4.1 Background

The use of torture in South Africa dates back to the earliest colonial times.[29] Its use must also be assumed during the several military conflicts that shaped South African history. For example, concentration camps used by the British during the Second Anglo-Boer War

[27] Costanzo, M. and Gerrity, E. (2009) The effects and effectiveness of using torture as an interrogation device – using research to inform the policy debate, *Social Issues and Policy Review*, Vol. 3, No. 1 pp. 179-210.
[28] Costanza, M. and Gerrity, E. (2009) The effects and effectiveness of using torture as an interrogation device – using research to inform the policy debate, *Social Issues and Policy Review*, Vol. 3, No. 1 p. 185.
[29] Van Zyl Smit (1992) *South African Prison Law and Practice*, Butterworths, Durban, p. 7.

inflicted enormous suffering on Boer women and children and was viewed at the time by the international community as genocide.[30] More recent is the widespread and systematic use of torture by the apartheid regime; the study by Foster *et al*, released in 1985, provides a grim yet empirical account of the wide array of torture techniques used by the apartheid security authorities.[31] The wide range of torture techniques used by the apartheid security forces in combination with each other, the repeated periods of detention, disappearances, and ultimately deaths in detention victimised not only individuals and their kin, but also a society. South Africa has a long, deep and regrettable history in the use of torture.

The Truth and Reconciliation Commission (TRC) report on gross human rights violations[32] is extensive; nearly 4 800 incidents of torture were recorded. It is also noteworthy that the use of torture against political opponents increased from the early 1960s after state security officials received training in interrogation and counter-insurgency from France, Italy, Chile and Argentina.[33] Regarding torture, the TRC found "that the use of torture in the form of the infliction of severe physical and/or mental pain and suffering for the purposes of punishment, intimidation and the extracting of information and/or confessions was practiced systematically particularly, but not exclusively, by the security branch of the SAP throughout the commission's mandate period."[34] It is unfortunate that limited information on the use of torture emerged from the former government's submission during the TRC process and that even fewer perpetrators were prosecuted. As a result the Amnesty Committee of the TRC dealt with only a limited number of cases relating to torture.[35]

South Africa's recent political history made the drafters of the Constitution alive to the issue of torture and the importance of including the right to be free from torture into the Constitution. The right to be free from torture therefore found its way into the Interim

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[30] Packenham T (1999) *The Boer War*, Jonathan Ball Publishers, London, pp. 250

[31] Foster D, Davis D and Sandler D (1987) *Detention and Torture in South Africa*, James Currey, London. A preliminary report of this research was already available in 1985. For a further account of torture under apartheid see Suttner R (2001) *Inside Apartheid's Prison*, Ocean Press, New York.

[32] Gross human rights violations were defined as killing, torture, abduction or severe ill-treatment, or any attempt, conspiracy, incitement, instigation, command or procurement to commit any of these acts. [s1(ix) Promotion of National Unity Act, 34 of 1995]

[33] Truth and Reconciliation Commission (2003) Vol. 2 Chapter 3 Para 121 - 126

[34] Truth and Reconciliation Commission (2003) Vol. 2 Chapter 3 Para 220.

[35] 'The Amnesty Committee received applications specifying only ninety cases of torture or assault. In addition, seventeen applications or investigations involved the use of torture and assault against an unspecified number of victims. A small number of applications involved torture in formal custody. These figures stand in sharp contrast to the 4792 torture violations recorded in HRV statements.' [Truth and Reconciliation Commission (2003) Vol 6 Section 3 Chapter 1 para 43] For a more detailed description of the work of the TRC Amnesty Committee see Sarkin J (2004) *Carrots and Sticks – the TRC and the South African Amnesty Process*, Intersentia, Antwerp.

Constitution[36] and the final Constitution[37] under the heading "Freedom and security of the person".

The recent political history, especially during the 1980s, and the widespread use of torture by the apartheid regime against political opponents, had the unintended consequence that it left many South Africans with the impression that torture is used only against political opponents, and that since South Africa is now a constitutional democracy, torture does not happen anymore. A further perception is that criminal offenders and suspects do not hold the same moral position as political detainees, and when subjected to torture or ill- treatment, they do not invoke the same moral condemnation. The high levels of crime of the last 15 years and the extensive victimisation of South Africans have created an environment that is less sympathetic towards criminal detainees and suspects. This has even prompted politicians to make statements fuelling a departure from constitutional principles and the rule of law in order to inflict justice.[38]

It is therefore important to understand "torture", not only in the historical South African sense, but also in the much broader contemporary sense that it is envisaged by the Constitution and accepted in international law. Not only political prisoners are at risk of torture, but also common law prisoners, children in secure care facilities, and those in a host of other situations where people are deprived of their liberty at the mercy of officials of the state.[39]

In the post-1994 era it has indeed been difficult for human rights activists to secure widespread acknowledgment that torture is still taking place, and furthermore, to move government to take active steps to eradicate torture. Sporadic media reports of allegations of torture have not fallen on a receptive audience; even the extensive work of agencies tasked to

[36] Section 11(2) Act 200 of 1993
[37] Section 12(1)(e) Act 8 of 1996
[38] The now much-publicised statements to a gathering of police officials by the Deputy Minister of Safety and Security, Susan Shabangu, were extremely unfortunate. She reportedly said, referring to criminal suspects: 'You must kill the bastards if they threaten you or the community. You must not worry about the regulations. That is my responsibility. Your responsibility is to serve and protect.'('We can't just shoot: cops' IOL, Reported by Ayanda Mhlongo, 15 April 2008 http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20080415103721868C917016)
[39] Muntingh L (2008) *Preventing and combating torture in South Africa – a framework for action under CAT and OPCAT*, CSPRI and CSVR, Bellville and Johannesburg, p. 4.

investigate allegations of torture and ill-treatment, such as the Independent Complaints Directorate (ICD), has been marginalised.

It is widely accepted that many of the practices of the past in the state's security and law enforcement agencies have survived, and that these sub-cultural traits are difficult to eradicate. Prison systems and police forces are close-knit communities; the wall of silence and reluctance to change is often notorious. Acknowledging and giving full recognition to the rights of prisoners and suspects is often actively resisted in various forms, giving rise to attitudes and conditions in which torture and ill-treatment prevail with impunity.

Efforts to hold officials accused of gross rights violations accountable have seldom succeeded. Investigations are undermined, witnesses may be intimidated, fellow officials maintain a wall of silence, cases are withdrawn and trials, if they do proceed to this level, drag on forever. The cumulative effect is a culture of impunity, leaving officials with the impression that "nothing will happen".

Even though South Africa ratified UNCAT in 1998, few measures have been taken to give effect to the obligations under this convention, despite the fact that government has admitted that torture continues to take place[40] and that the then Chairperson of the SAHRC warned against complacency in respect of torture: "12 years into democracy it can be easy to be seductively relaxed and forget to look at issues of torture, inhuman, degrading and cruel treatment or punishment".[41]

4.2 Constitutional requirements

Because people deprived of their liberty are at risk of torture and ill-treatment, the Constitution, in section 35, spells out in unusual detail the rights of arrested and detained persons. It must be assumed that this level of detail was informed by the violations that many anti-apartheid activists suffered after being taken into custody. The UN Special Rapporteur on Torture attached great significance to the deprivation of liberty in understanding torture:

[40] SAHRC (2006) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)*, SAHRC, Johannesburg, p.136.
[41] SAHRC and APT (2006) *Report: Roundtable Discussion on the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), April 2006*, http://www.sahrc.org.za/sahrc_cms/downloads/OPCAT%20Roundtable%20Discussions%20Report.pdf, Accessed 26 June 2008

"It is the powerless of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure".[42] People deprived of their liberty do not have freedom of choice; they are entirely dependent on the officials detaining them. Any pressure exerted on a person deprived of his or her liberty must therefore be seen as an interference with the dignity of that person.[43] Dignity, as a constitutional value, has been discussed at length in a number of Constitutional Court cases;[44] it has been concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner. [45] Further, that the right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.[46] The right to dignity exists, however, not only to protect individuals against conditions adversely affecting them; it also places a positive obligation on the State. The State is obliged to act proactively to prevent people's dignity from being negatively affected.

Even though dignity is a founding value of the Constitution, it is "a difficult concept to capture in precise terms".[47] It should also be acknowledged that, since South Africa is a young constitutional democracy, the value of dignity is often poorly understood and has difficulty in taking root when many people continue to suffer the indignities of socio-economic deprivation. Whether one is referring to people deprived of their liberty or people living in informal settlements without the most basic of services, both present situations where people's rights are at risk or have already been violated. The right to dignity is an absolute one and people are not more or less deserving of it; it has universal application and cannot be derogated from. Bringing the right to dignity forth in tangible terms is of course more challenging than debating it in legal and scholarly texts. In this regard the Constitutional Court has shown great understanding in the challenges facing the

[42] Nowak M and McArthur E (2006) 'The Distinction between torture and cruel, inhuman or degrading treatment' *Torture*, Volume 16, Number 3, p. 151.
[43] Ibid
[44] *S v Williams* 1995 (3) SA 632 (CC); *Minister of Home Affairs v Nicro* 2004 (5) BCLR (CC), *S v Mkwanyane* 1995 (3) SA 391 (CC)
[45] Chaskalson, A. (2002) Human dignity as a Constitutional Value. In Kretzmer, D. and Klien, E. (eds), *The Concept of Human Dignity in the Human Right Discourse*, The Minerva Centre for Human Rights the Hebrew University of Jerusalem Tel Aviv University, p. 134.
[46] Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 276
[47] Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 273

government,[48] but has also been firm in ensuring that the rights of people deprived of their liberty are not eroded.[49]

4.3 Current legislative framework

Even though the Constitution guarantees the right to freedom from torture and cruel, inhuman or degrading treatment or punishment,[50] there is no specific law criminalising torture. The fact that South Africa does not have legislation criminalising torture does not mean that there are no legislated standards for the treatment of people deprived of their liberty. In the past 15 years, much has been done to enact new legislation setting standards for the treatment of people deprived of their liberty, and to establish procedural safeguards as well as oversight mechanisms in some instances, i.e. police custody and prisons.

People are deprived of their liberty involuntarily in numerous institutions. These are: police detention cells; prisons; the foreign national repatriation centre; psychiatric hospitals; substance abuse treatment centres; child and youth care centres;[51] military detention barracks; and places where private security personnel are deployed.

4.4 A brief history

It is argued below that government, due to the high violent crime rate, became increasingly intolerant of prisoners' and suspects' rights and attempted (and was partly successful) to reframe or dilute these rights, or distance itself from prisoners' and suspects' rights enshrined in the Constitution. In effect, the rights afforded to suspects and sentenced prisoners became a contested terrain. See against this background, the underlying reasons for the lack of government action in preventing and eradicating torture become more evident.

4.4.1 Policy and rhetoric

[48] *Government of RSA and Others v Grootboom and Others* 2001(1) SA 46 (CC)
[49] *Minister of Home Affairs v Nicro and Others* 2005 (3) SA 280 (CC).
[50] Section 12(e) Act 108 of 1996
[51] The Children's Amendment Act (41 of 2007) has brought the various institutions where children can be detained under one umbrella term, namely child and youth care centres and reformatories, schools of industry; places of safety; secure facilities for children are now referred to as such.

By 1994 violent crime had spoiled the fruits of the new democratic order and continued to do so[52] – the public was fearful and demanded action from government. It was in fact President Mandela that framed the problem in a particular manner, portraying a war-like situation of criminals versus law-abiding citizens.[53] The ensuing government response was focused on improved law enforcement embodied in the National Crime Prevention Strategy (NCPS) of 1996, although the NCPS still balanced this with social crime prevention. However, the focus on law enforcement became overt after a review of the NCPS in 1998.[54] Political rhetoric, espousing a tough-on-crime approach, found popular support and in his 1999 State of the Nation Address President Mbeki was convinced that more effective law enforcement would reap dividends.[55] At an earlier opportunity Mbeki (then Deputy President) likened criminals to "barbarians in our midst".[56] The then new Ministers of Justice and Safety and Security in the first Mbeki Cabinet were explicit in how they saw the required response:

> As our country embarks on the second democratic term, we have to reflect on the shortcomings of the previous term and resolve to improve significantly on performance. While over the last five years the Department [of Justice] was able to lay a solid legislative and indeed infra-structural foundation for a strong and responsive justice system, many problems continue to plague our justice system and at times evoking public sentiments that the new democratic order is more sympathetic to human rights concerns of criminals and less sensitive to the plight of victims of crime and the general sense of insecurity that continues to besiege our country. (Minister of Justice, Penuel Maduna, June 1999)[57]

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[52]Sarkin, J. (2000) Fighting crime while promoting human rights in the police, the courts and the prisons in South Africa, *Law Democracy and Development*, Vol. 4 No. 2, pp.151-153.

[53] The situation cannot be tolerated in which our country continues to be engulfed by the crime wave which includes murder, crimes against women and children, drug trafficking, armed robbery, fraud and theft. We must take the war to the criminals and no longer allow the situation in which we are mere sitting ducks of those in our society who, for whatever reason, are bent to engage in criminal and anti-social activities. Instructions have therefore already gone out to the Minister of Safety and Security, the National Commissioner of the Police Service and the security organs as a whole to take all necessary measures to bring down the levels of crime. (Opening of Parliament address by President N. R. Mandela, 17 Feb 1995, Cape Town) Also Cavadino, M. and Dignan, J. (eds) (2006) *Penal Systems – a comparative approach*, London: Sage Publications, p. 95.

[54] Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*. Johannesburg: CSVR, p. 10. http://www.csvr.org.za/docs/urbansafety/1996nationalcrime.pdf Accessed 11 October 2011.

[55]Address of the President of the Republic of South Africa, Thabo Mbeki, At the Opening of Parliament: National Assembly, Cape Town, 25 June 1999.

[56] Speech by ANC President, Thabo Mbeki, at the Fourth National Congress of the South African Democratic Teachers Union, Durban, 6 September 1998.

[57]Cited in Rauch, J. (2001) p. 10.

> The criminals have obviously declared war against the South African public. … We are ready, more than ever before, not just to send a message to the criminals out there about our intentions, but more importantly to make them feel that "die tyd vir speletjies is nou verby".[58] We are now poised to rise with power and vigour proportional to the enormity and vastness of the aim to be achieved. (Minister of Safety and Security, Steve Tshwete June 1999)[59]

Minister Maduna was evidently frustrated with the rights to which offenders and suspects were entitled. In 1999 Steve Tshwete, then Minister of Safety and Security, reportedly suggested that police officers deal with criminals "in the same way a bulldog deals with a bull".[60] Calls for the return of the death penalty were also frequent despite it having been declared unconstitutional in 1994. Throughout the 1990s and later, political rhetoric framed crime and human rights in a particular manner, attempting to drive a wedge between the Constitution (applicable to the just and innocent) and offenders (who should have limited protection under the Constitution).

4.4.2 Harsher punishment and tighter bail laws

Shortly after the April 1994 elections the Constitutional Court dealt with the constitutionality of the death penalty and of corporal punishment.[61] Both types of punishment were declared unconstitutional and this may have given some cause for optimism around a more liberal sentencing framework. This was not to be the case. The political rhetoric and "tough on crime" approach espoused by government which found public support, were soon expressed in harsher sentences and tighter bail laws. Indeed a sense of "moral panic" had set in as a result of the high crime rate and perceptions that offenders were walking away scot free.[62] Even the courts expressed disgust at the high levels of crime and supported longer sentences.[63]

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[58] The time for fun and games is over. (own translation)
[59] Cited in Rauch, J. (2001) p. 10.
[60] ANC Daily News Briefing 8 January 2006 citing article by W. Roelf. http://www.e-tools.co.za/newsbrief/2006/news0108.txt Accessed 11 October 2011.
[61] *S v Makwanyane* 1995 (3) SA 391 (CC) and *S v Williams* 1995 (3) SA 632.
[62] Cavadino, M. and Dignan, J. (eds) (2006) p. 94.
[63] Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by

Initially, and as a temporary and annually renewable measure, Parliament passed the minimum sentences legislation in 1997.[64] This legislation set down certain mandatory minimum terms of imprisonment to be imposed for certain, primarily violent, crimes.[65] However, courts could deviate from the prescribed minimum sentence if there were "substantial and compelling reasons" to do so. To add further sting to the minimum sentences legislation, it had two provisions to ensure that the time served in prison is as long as possible, although both these stipulations have subsequently been amended. Firstly, offenders sentenced under the minimum sentences legislation had to serve four fifths of the sentence before they could be considered for release on parole compared to the one third or one half rule of thumb depending on the applicable parole regime.[66] Secondly, the sentence starts on the day of sentencing, thus deliberately excluding discount for any time spent awaiting trial in prison.[67] Shortly after passing the minimum sentences legislation, the sentence jurisdiction of the Magistrates' Courts was increased.[68] In the case of district courts the jurisdiction was raised from one year to three years imprisonment and in the case of regional courts, from ten to 15 years. A further development, by means of the Correctional Services Act (111 of 1998), was that prisoners sentenced to life imprisonment had to serve 25 years and not 20 years, as the case was previously, before they could be considered for parole.[69]

Amendments to the bail legislation in 1995 and 1997 saw a tightening of the bail laws which undoubtedly also contributed to prison overcrowding.[70] Awaiting trial prisoners would spend, and continue to do so, long periods in detention due to unaffordable bail, unnecessary arrests

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acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct. *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O).

[64] Act 105 of 1997.

[65] For example, the imposition of life imprisonment was mandatory for the crime of rape when: the victim is raped more than once by the accused or others; by more than one person as part of common purpose or conspiracy; the accused has been convicted of more than one rape offence and not yet sentenced; the accused knows he is HIV positive; or when the victim is under 16 years of age; a vulnerable disabled woman; is a mentally ill woman; or involved the infliction of grievous bodily harm.

[66] This requirement has subsequently been removed by section 12 of the Correctional Matters Amendment Act 5 of 2011, but was at the time of writing (December 2011) not yet in operation.

[67] This requirement has subsequently been removed by section 1 of the Criminal Law (Sentencing) Amendment Act, 38 of 2007.

[68] Magistrates Amendment Act No. 66 of 1998.

[69] s 73(6)(iv) of the Correctional Services Act. As at the end of February 2011 there were 10349 prisoners serving life imprisonment, compared to the 443 in 1995 (Giffard, C. and Muntingh, L. (2006) *The impact of sentencing on the size of the prison population*, Cape Town: Open Society Foundation (SA). DCS website http://www.dcs.gov.za/WebStatistics/ Accessed 3 November 2011).

[70] Steyn, E. (2000) Pre-trial detention – its impact on crime and human rights, *Law Democracy and Development*, Vol. 4 No. 2, p. 213.Van Zyl Smit, D. (2004) Swimming against the tide. In Dixon, B. and Van der Spuy, E. *Justice gained – crime and crime control in South Africa's transition*, Devon: Willan Publishing, p. 242-243.

and inefficiencies in the criminal justice process. In the absence of a mandatory review mechanism and enforceable time limits on pre-trial detention the situation will persist.[71]

The 1998 parole guidelines were furthermore reflective of the punitive attitude demonstrated by government.[72] Even though they were later declared unconstitutional,[73] they were nonetheless an attempt to regulate the release of (violent) offenders through a policy instrument instead of regulating it through legislation. This consequently created much confusion, resulting in a flood of High Court applications from prisoners believing they were being treated unfairly.[74]

Punishment and deterrence remained the central themes in government's response and between 1995 and 1998 a number of legislative and policy measures were adopted reflecting this. This was borne out of a perception that offenders were getting away with light sentences and that government should be seen to be "tough on crime". There was and is, however, no scientific evidence that such an approach would indeed be effective in bringing crime under control. These changes were purposefully directed at imposing harsher punishments by limiting access to bail, increasing sentence jurisdiction, lengthening prison terms, limiting courts' discretion at sentencing and increasing non-parole periods. The impact of these measures, individually or combined, on the already overcrowded prisons was of little concern to the legislature and the executive.[75] The combined effect of these measures contributed to worsening the overcrowding in the prisons, having a material impact on conditions of detention and thus the right to dignity but it simply did not matter: prisoners were not a group worthy of sympathy and public concern.

4.4.3 The right to vote

A further indication of how the executive's attitude towards prisoners became more vengeful was the intended exclusion of prisoners from the 1999 general elections as the Electoral

[71] Ballard, C. (2011) *Research report on remand detention in South Africa – an overview of the current law and proposals for reform.* CSPRI Research Report, Bellville: Community Law Centre. Steyn, E. (2000) p. 215.
[72] Muntingh, L. (2007 d) *Punishment in South Africa*, Paper delivered at seminar hosted by the Wits Institute for Social and Economic Research (WISER), 29-30 August 2007, Johannesburg.
[73] Mujuzi, J.D. (2011) Unpacking the law and practice relating to parole in South Africa, *Potchefstroom Electronic Law Journal*, Vol. 14, No. 5, p. 220.
[74] Jali Commission, pp. 505-507.
[75] Van Zyl Smit, D. (2004) p. 239.

Commission had not put in place steps to register prisoners for the upcoming elections.[76] The matter was ultimately settled in the Constitutional Court in favour of prisoners and they were permitted to participate in the 1999 general elections.[77] Late in 2003 Parliament passed the Electoral Law Amendment Act (34 of 2003) and this time the intention was clear: certain prisoners (those serving a prison sentence without the option of a fine) should be excluded by law from voting. Again the matter went to the Constitutional Court and again the Court ruled in favour of prisoners and declared unconstitutional the impugned provisions of the legislation.[78] Importantly, part of the state's defence was that the government would be seen to be "soft on crime" if prisoners were allowed to vote but the Constitutional Court rejected this argument. Government's intention was nonetheless clear: the symbolic and thus political value of harsher punishments outweighed constitutional concerns.

4.4.4 Prison law delayed

In 1996 the Department of Correctional Services (DCS) commenced with drafting new legislation to replace the already extensively amended Correctional Services Act of 1959. Parliament adopted the new Correctional Services Act in 1998, but it would take six years before the chapters detailing the minimum conditions of detention and other relevant rights applicable to prisoners would come into operation.[79] While some parts of the Act were brought into force earlier (e.g. the chapters dealing with the Judicial Inspectorate), the effect was that there was legal uncertainty with both the 1996 Constitution and the 1959 prison laws being applicable. Reasons for the delay are less than firm and not entirely convincing, as noted by Sloth-Nielsen. Firstly, that regulations for the 1998 Act had to be drafted; secondly that a "work study" was required to redefine staff levels and shifts so as to be able to serve three meals at reasonable intervals each day; and thirdly that the legislation had to accommodate changes in the composition of Correctional Supervision and Parole Boards (CSPB) since some government departments had decided that they could no longer be

[76] Muntingh, L. and Sloth-Nielsen, J. (2009) The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa, In Ewald, A.C. and Rottinghaus, B. (eds) *Criminal disenfranchisement in an international perspective*, Cambridge: Cambridge University Press, p. 232.
[77] *August and Another v Electoral Commission and Others*, [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363.
[78] *Minister of Home Affairs v NICRO and Others*, [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).
[79] Reference is made here to specifically Chapter 3 (Custody of all prisoners under conditions of human dignity); Chapter 4 (Sentenced prisoners); Chapter 5 (Unsentenced prisoners) which came into effect on 31 July 2004.

represented on these structures due to cost and time implications.[80] The delay in bringing the Correctional Services Act into force did, however, not make a material difference as substantial areas of non-compliance with it remain to date.[81] The apparent reluctance to bring the full Correctional Services Act (111 of 1998) into operation is nonetheless regarded as indicative of government's unwillingness to bring legal certainty to prisoners' rights under the new democratic and constitutional order.

4.4.5 Summary of issues

Seeking a balance between being tough on crime and strong on human rights[82] proved to be a difficult task for the post-1994 governments. However, emphasising the former at the cost of the latter was not only easier, it was done at the cost of an already marginalised group who had little political influence and low moral standing in the eyes of the public. In response to the high violent crime rate and under pressure from public opinion and the media, government's attitude towards criminal suspects and prisoners became increasingly conservative and punitive, if not vindictive. By emphasising punishment, "tough on crime" rhetoric, and delaying the coming into operation of the Correctional Services Act, the national government appealed to populist notions of crime and justice, but twice this position landed it in the Constitutional Court. The effect was that it had not only failed to establish a firm policy and legal framework for prisoners' rights, but actively sought to dilute and limit them. As a result it was easier for the DCS senior management and other stakeholders (such as Parliament) to tolerate rights violations in the prison system, even when these were well known and frequently reported in the media. The acceptance of prison overcrowding by government is a good example in this regard and it is doubtful if government would have of

[80] Sloth-Nielsen, J. (2003) *Overview of Policy Developments in South African Correctional Services.* CSPRI Research report No. 1, Bellville: Community Law Centre, p. 32. Prior to an amendment in 2001(s 28 Correctional Services Amendment Act 32 of 2001) the Correctional Services Act required that a CSPB would consist of a chairperson and vice chairperson, two DCS officials, an official from the South African Police (SAPS) nominated by the Commissioner of Police, an official and an alternate from the Department of Justice and Constitutional Development (DoJCD) nominated by the Director General of the DoJCD (both with a legal background) and two members from the community. In total a CSPB would have had nine members. The 2001 amendment reduced the number to five by requiring only one DCS official and doing away with required representation from the DoJCD and SAPS, although allowing for cooptation of one official from each department.

[81] Report of the Auditor-General to Parliament on the financial statements of vote no. 18: Department of Correctional Services for the year ended 31 March 2010, In Department of Correctional Services (2010) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 132.

[82] Calland, R. and Masuku, T. (2000) Tough on crime and strong on human rights – the challenge for us all, *Law Democracy and Development*, Vol. 4 No. 2, pp. 121-135.

its own accord have taken any measures if it were not for pressure from the Office of the Inspecting Judge and civil society groupings after 2003.

4.5 Two case studies

4.5.1 Mthembu v S

Article 15 of CAT requires that any statement obtained though torture may not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made. The Constitution in section 35(5) affirms this prohibition: "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

The use of a statement obtained under torture to secure the conviction of a criminal suspect was the central issue in *Mthembu v S* heard by the Supreme Court of Appeal (SCA) in 2008.[83] The torture was, however, not directed against the appellant but against the state's chief witness, one Ramseroop, who implicated the appellant in several crimes through narrative and real evidence. At the trial, four years later, Ramseroop disclosed that he had been assaulted and tortured before leading the police to the key evidence incriminating the appellant. The central question was whether the evidence disclosed and pointed out by Ramseroop could be used against the appellant to secure his conviction.

The appellant, a former a police officer, was convicted in the Verulam Regional Court on two counts of vehicle theft and two counts of robbery involving more than R68 000. He received a prison sentence of eight years for the vehicle thefts and a further 15 years for robbery - in total 23 years imprisonment. He appealed to the Durban High Court against his convictions and sentence. Although the convictions were confirmed the sentences were reduced to a total of 17 years imprisonment. The Durban High Court also granted leave to appeal to the SCA, consequently this decision.

In late January 1998 the appellant brought Ramseroop a Toyota Hilux vehicle to repair. He was accompanied by another person, one Mhlongo. A few days later he returned to collect

[83] *Mthembu v The State* (64/2007) [2008] ZASCA 51 (10 April 2008)

the vehicle, again accompanied by Mhlongo, and paid Ramseroop for the work done. In early February 1998 the appellant brought Ramseroop another vehicle, a Toyota Corolla, with an instruction to do repairs and spray painting on the vehicle. A few days later the appellant returned and paid Ramseroop for the work done. He, however, left the vehicle with Ramseroop. Upon departing he left a large metal box with Ramseroop with the instruction to dispose of it. Ramseroop, however, decided to keep the metal box and hid it in the ceiling of his house. On 19 February 1998 the police arrived at Ramseroop's house informing him that they were investigating the whereabouts of a stolen vehicle. Ramseroop immediately started telling the police about the Toyota Corolla and at the request of the police, pointed out to them where it was parked on his property. After establishing that the vehicle was stolen, the police took Ramseroop into custody.

It was after Ramseroop was taken into custody that matters became problematic:

> It is common cause that after Ramseroop was taken into custody on 19 February, the police at Tongaat assaulted him severely. The assaults included torture through the use of electric shock treatment. Ramseroop's uncontested evidence was that he received a "terrible hiding" on the evening after he had been taken into custody. Thereafter assaults continued until the morning of the 21st when he took the police to his home to show them where he had hidden the metal box.[84]

It was also a result of the torture that Ramseroop took the police to the residence of Mhlongo where the Toyota Hilux vehicle was discovered. There was evidence that persons arrested at Mhlongo's residence were also subjected to torture although this did not have a material bearing on the case. The discovery of the Toyota Hilux and the metal box, the latter being material evidence to the robberies, were therefore a result of the torture inflicted on Ramseroop.

In the judgment, Cachalia J refers to the pre-constitutional era where "courts generally admitted all evidence, irrespective of how it was obtained" and that it was left to the discretion of the judge to determine what evidence would be inadmissible, and that a stricter approach was followed in respect of statements compared to real (physical) evidence. In short, "the fruit of the poisonous tree was not excluded".[85] In the constitutional era this position had changed; reference is made in the judgment to emerging jurisprudence holding

[84] Para 17
[85] Para 22

that "proof of an involuntary pointing out by an accused person is inadmissible even if something relevant to the charge is discovered as a result thereof".[86]

Evidence improperly obtained from a person other than the accused is a new dimension to the debate and this case was, according to Cachalia J, the first to deal with this issue. Relying on what is called a "plain reading" of section 35(5) of the Constitution, it is found that it would not only apply to evidence obtained from the accused, but from any person. To strengthen its point, the Court then turns to the right to be free from torture in section 12 of the Constitution and supports this with the definition of torture in Article 1 of UNCAT, noting that South Africa ratified CAT in 1998. Relying further on case law from Ireland and the House of Lords it is concluded that to accept the discovery of the Hilux and the metal box would "involve the State in moral defilement":[87]

> Ramseroop made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux [vehicle] and metal box was extracted through torture. It would have been apparent to him when he testified that, having been warned in terms of s 204 of the Act, any departure from his statement would have had serious consequences for him. It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.[88]
>
> To admit Ramseroop's testimony regarding the Hilux [vehicle] and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in "moral defilement". This "would compromise the integrity of the judicial process (and) dishonour the administration of justice". In the long term, the admission of torture induced evidence can only have a corrosive effect on the criminal justice system. The

[86] Para 23 referring to *S v January* and *Prokureur-Generaal, Natal v Khumalo*.
[87] Para 32
[88] Para 34

> public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial."[89]

The net result was that the convictions and sentences relating to the theft of the Hilux and the post office robbery (metal box) were overturned. Only the conviction related to the theft of the Corolla remained, and the sentence was adjusted from five years to four years. The Court was not pleased with the turn of events:

> What has happened in this case is most regrettable. The appellant, who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have not only failed to investigate the case properly by not following elementary procedures relating to the conduct of the identification parade, but have also, by torturing Ramseroop and probably also Zamani Mhlongo and Sithembiso Ngcobo, themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held to account for their actions.[90]

In a demonstration of judicial activism, the court ordered that copies of the judgment be sent to the Minister of Safety and Security, National Commissioner of SAPS, Director of the ICD, Chairperson of the SAHRC, and the NDPP.

4.5.2 The McCullum decision

How government dealt with the prevention and eradication of torture after 1998 was starkly illustrated in the recent *McCullum* decision by the UN Human Rights Committee (HRC).[91] In 2006, when CAT was assessing South Africa's initial report, it was informed of a particular incident at St Albans prison (Port Elizabeth, Eastern Cape) where in July 2005 a mass assault on prisoners by officials took place. The assault reportedly happened in retaliation for the fatal stabbing of a warder.[92] In deliberations with CAT the South African government evaded

[89] Para 36
[90] Para 39
[91] CCPR/C/100/D/1818/2008.
[92] Muntingh, L. and Fernandez, L (2006) *Civil Society Prison Reform Initiative (CSPRI) submission to the UN Committee Against Torture in response to "Republic Of South Africa – First Country Report on the implementation of the Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment"*, Bellville: Community Law Centre, para 57.

the allegations and stated that the matter was subject to a civil claim and thus sub judice.[93] The mass assault in question was particularly brutal.[94] In the aftermath, the prisoners were denied access to medical treatment as well as legal representation. The latter was only remedied after a successful High Court application.[95] One prisoner, a Mr. McCullum, assisted by legal counsel, made numerous attempts to have the mass assault investigated and to seek relief. These efforts amounted to nothing and he subsequently directed an individual complaint to the UN Human Rights Committee (HRC). On 2 November 2010 the HRC released its decision, finding that his right to be free from torture, protected by Article 7 of the International Covenant on Civil and Political Rights (ICCPR), had been violated.[96] Even though the decision attracted some media attention, the DCS did not respond at the time. However, nearly a year later, when the matter was brought to the attention of the Portfolio Committee on Correctional Services by the South African Human Rights Commission (SAHRC) the DCS did respond.[97] It placed an advertorial in the major newspapers claiming that the Department had not been given the opportunity to respond, and if they were given such an opportunity the outcome may have been different. This was, of course, untrue as the HRC invited the South African government on five occasions to respond.[98] Nonetheless,

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[93] CAT/C/SR.739 para 57.

[94] The following is an extract from the decision by the United Nations Human Rights Committee (HRC) in the McCullum matter describing the events at St Albans prison*: On 17 July 2005, the author [McCallum], together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author's shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them. Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them into their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus. As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain. At some point, Warder P. approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, faeces and blood and some inmates fell over each other.* (CCPR/C/100/D/1818/2008)

[95] 'Court victory for St Alban's prisoners' *The Herald*, 24 April 2006.

[96] ICCPR Art 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[97] Telephonic interview with Ms J. Cohen, SA Human Rights Commission, Parliamentary Programme, 3 December 2011.

[98] CCPR/C/100/D/1818/2008 para 4.

government gave the undertaking that the investigation will be reopened.[99] Subsequently, the Portfolio Committee on Correctional Services took up the broader issue of torture and held public hearings on the prevalence of torture in November 2011 indicating some greater awareness of the absolute prohibition of torture.[100]

The *McCullum* decision is significant for a number of reasons since it developed into a small crisis and pointed to numerous failures of the safeguards to protect prisoners. It firstly demonstrated the shambolic nature of the government's internal systems for communicating and coordinating with treaty monitoring bodies. If the failure to cooperate with the HRC was a deliberate one, it reeks of malfeasance.[101] Secondly, the Department's actions since South Africa ratified UNCAT in 1998 reflect an attitude characterised by indifference towards the broader issue of torture. Notwithstanding the *White Paper on Corrections in South Africa's* repeated references to prisoners' constitutional rights (one of which is the right to be free from torture) there is little evidence that the DCS has taken any tangible steps to prevent and reduce assaults by officials on prisoners. Thirdly, at policy level there is still no policy on the prevention and eradication of torture in the DCS and the concept of torture has not yet entered the Department's terminology. Fourthly, instead of holding perpetrators of torture accountable and ensuring their criminal prosecution (even if only on assault and attempted murder charges), the DCS leadership has rather opted to shield them from prosecution and create obstacles for victims seeking redress. With specific reference to the McCullum case, the DCS senior management was already aware of the incident by 2006 and disclosed as much to CAT but failed to address the issues at hand. Fifthly, when the McCullum case was reported to various institutions (e.g. SAPS and Judicial Inspectorate for Correctional Services) there was a general failure to respond and investigate. Whether this was due to a lack of willingness or capacity to investigate the allegation is unknown. Nonetheless, the

[99] Response by South African Government to the findings of the United Nations Human Rights Committee in the matter of McCullum, 29 September 2011, Statement by Department of Correctional Services, issued by Government Communication Service http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=21945&tid=44442 Accessed 21 October 2011.

[100] PMG report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011,http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centresAccessed 28 December 2011.

[101] At the time of writing, the DCS was embroiled in a class action of 231 prisoners and former prisoners who were the victims of the St Albans mass assault. The DCS was evidently frustrating all efforts at redress and the claimants ultimately had to obtain a court order to compel the Department to release the necessary evidence pertaining to the assault as is required by the discovery procedure (*The Herald,* 23 November 2011).

McCullum case demonstrated the institutional and systemic failures to deal with allegations of torture in a manner that is compliant with Articles 12 and 13 of UNCAT.

The absence of legislation criminalising torture combined with the Department of Correctional Services' poor response to allegations of torture and ill treatment have left prisoners vulnerable to violations in this regard. Notwithstanding the absolute prohibition of torture, the high number of alleged assaults reported annually to the Department and the Judicial Inspectorate, there is little evidence to indicate that the Department has taken any meaningful and tangible steps to abide by its obligation to promote and protect the constitutional right of prisoners to be free from torture and other ill treatment.

5. Conclusion

The historian, Alfred McCoy, concluded that "Once torture begins, it seems to spread uncontrollably, particularly during times of crisis, in a downward spiral".[102] Recent South African history contains dimensions of a crisis: high violent crime, a fledgling criminal justice systems, a police force that often appear to be a law unto themselves, a prison service evasive of oversight, political instability demonstrated by public protests, a widening gap between the haves and the have-nots and a state which exercises varied levels of control over its subjects. Against this background and the preceding, a number of conclusions can be drawn with regard to torture and South African society.

Firstly, the absence of legislation criminalising torture has presented a significant hurdle to ensure accountability. It remains the case that few perpetrators of torture and other ill treatment are prosecuted, convicted and punished in a manner reflecting the gravity of the crime of torture. In the absence of accountability impunity prevails.

Secondly, a satisfactory level of transparency over places of detention has not been attained. With reference to interpreting the Bill of Rights, the Constitution emphasises "the values that underlie an open and democratic society".[103] This is given further specificity with reference to the principles of co-operative government, requiring "effective, transparent, accountable

[102] Cited in Costanzo, M. and Gerrity, E. (2009) The effects and effectiveness of using torture as an interrogation device – using research to inform the policy debate, *Social Issues and Policy Review*, Vol. 3, No. 1 pp. 201.
[103] s 39(1)(a) Act 108 of 1996.

and coherent government".[104] It is from this requirement that it is demanded from a constitutional democracy that places of detention must function in a transparent manner. In very blunt terms this means that officials in the prison system have a duty to act visibly, predictably and understandably.[105] More specifically, the actions of officials must be predictable as they should be guided by policy, legislation, regulations, standing orders and good practice. When called to account, officials must be able to motivate their decisions and actions in a manner that is rational and justifiable. In sum, it needs to be known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer.[106] However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.[107]

Thirdly, the criminal justice system and law enforcement agencies should enjoy legitimacy and the use of torture in investigating criminal cases and the punishment of prisoners deepens the legitimacy deficit of these institutions. In respect of legitimacy three questions are asked.[108] Legal scholars will firstly ask if the power has been legally obtained and if it is being exercised within the bounds of the law. The philosopher will ask if the power relations at play are morally justifiable. The sociologist will enquire into the actual beliefs of subjects about power and legitimacy.

Using this analysis, it is evident that legitimacy is fluid and may indeed be a "roller coaster ride of waxing and waning legitimacy" for institutions of state.[109] Legitimacy once attained needs to be sustained through the effective implementation of reforms addressing the legitimacy deficit and "[U]nless implementation becomes the leaders' business and strategy [and] the concern of everybody within either an organisation or a nation, the gap between plan and implementation is likely to grow only larger."[110] Even in the day-to-day minutiae of prison life the actions of prison management and its officials should at least be perceived to be just, fair and legitimate by prisoners. It is in this sense that Sparks and Bottoms conclude in respect of threats to legitimacy:

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[104] s 41(1)(c) Act 108 of 1996.
[105] Transparency International "*What is transparency*?" http://www.transparency.org/news_room/faq/corruption_faq
[106] Muntingh, L. (2007 b) p. 25.
[107] De Maria, W. (2001) Commercial-in-Confidence: An obituary to transparency? *Australian Journal of Public Administration*, Vol. 60 No 4, p. 92. Hammarberg, T. (2001) Searching the truth – the need to monitor human rights with relevant and reliable means. *Statistical Journal of the United Nations*, ECE 18 , pp. 131-140.
[108] Sparks, J.R. and Bottoms, A.E. (1995) p. 48.
[109] Sparks, J.R. and Bottoms, A.E. (1995) p. 48.
[110] Ghani, A. and Lockhart, C. (2009) p. 197.

> These include every instance of brutality in prisons, every casual racist joke, and demeaning remark, every ignored petition, every unwarranted bureaucratic delay, every inedible meal, every arbitrary decision to segregate or transfer without giving clear and well founded reasons, every petty miscarriage of justice, every futile and inactive period of time – is delegitimating. The combination of an inherent legitimacy deficit with an unusually great disparity of power places a peculiar onus on prison authorities to attend to the legitimacy of their actions.[111]

Fourthly, the use of torture in the criminal justice system (or a permissive attitude towards it) places in grave jeopardy the rule of law for it means that the system is using means expressly prohibited under international human rights law and the Constitution.

Fifthly, the use of torture in the interrogation of suspects or punishment of prisoners changes the way society perceives these groups. Being permissive about torture and other ill treatment changes the perceptions and views about the reach and applicability of the Constitution and the absolute prohibition of torture. It implies that the right to dignity is more important for some ("the just and honest") than for others (the criminal suspect and convicted offender). The consequence is that the Constitution does not apply to all equally.

Six, and following from the preceding, it places at risk of torture and ill treatment people regarded as belonging to out-groups for they are blamed for the problems experienced by the in-group. For example, Muslims are blamed for terrorism, foreigners are blamed for crime and prisoners should suffer because they are guilty. This logic opens a door of endless identification and labelling: the poor, the unemployed, refuges, immigrants, street children, sex workers and so forth.

Seven, poor conditions of detention (in police cells and prisons) normalises ill treatment and it becomes to be regarded as part of the punishment. While prison overcrowding and its associated ills have been part of the prison system for as long as statistics in this regard has been available, government has been reluctant to recognise this as ill treatment, in accordance with Article 16 of UNCAT, or amounting to a violation of the Constitution. It is rather the case that prisoners have done wrong, even when awaiting trial and thus not convicted, and should therefore pay the price.

[111]Sparks, J.R. and Bottoms, A.E. (1995) p. 60.

Lastly, irresponsible political rhetoric about crime, law enforcement and punishment based on populist notions of “what works” in crime reduction is dangerous because it is not based on knowledge and science. Moreover, political heads espousing such rhetoric communicates a message to their officials that the rules can be ignored, bent or even broken to achieve a safe society. This creates a climate where rights violations in the criminal justice system are trivialised and not regarded as real.