Is imprisonment in South Africa legally defensible?

By Caryl Verrier

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The writer's propositions are twofold: (1) that the continued imposition of sentences of imprisonment in South Africa has become unlawful/legally indefensible both because imprisonment no longer satisfies the elements of sentence and because conditions of detention in South Africa amount to 'cruel, inhuman or degrading punishment' and are thus unconstitutional and unlawful; and (2) that South African prisoners across the board are entitled to their release because conditions of detention in South Africa are unconstitutional and unlawful.

To begin with, the elements of sentence. Our courts have traditionally justified the imposition of sentences of imprisonment with reference to the four elements of sentence, namely, deterrence, retribution, punishment and rehabilitation (see *R v Swanepoel* 1945 AD 444 at 455; *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F; *S v Rabie* 1975 (4) SA 855 (A) at 862 and *S v Khumalo and Others* 1984 (3) SA 327 (A)). What they fail to acknowledge is that, what might have been true 100 years ago or 50 years ago, or even 20 years ago, is not necessarily true today. While those elements might well have justified the imposition of imprisonment when they were first expounded, it is my view that, in 2009, they no longer do so.

The first of the elements of sentence is punishment. Punishment is never an end in itself. Punishment is not vengeance by another name. The purpose of punishment is to correct offending behaviour. If it no longer serves that purpose, it must go and we must find some other way of correcting the problem. As a general proposition, imprisonment does not correct offending behaviour. In South Africa, the rate of recidivism, or the rate at which prisoners are likely to re-offend upon release, is estimated as being as high as 94% (see L Muntingh 'After Prison, The Case for Offender Reintegration' *ISS Monograph* No 52 March 2001 at 54; and Parliament: Research Unit of the Republic of South Africa, 7 March 2008 'A Correctional Services Perspective on the 2008 State of the Nation Address'). Blatantly, imprisonment fails to satisfy the first element of sentence. Punishment therefore no longer justifies the imposition of sentences of imprisonment.

The second element of sentence is retribution. CR Snyman *Criminal Law* 4 ed at 14 explains retribution as follows:

'According to the retributive theory, punishment is justified because it is X's just desert. Retribution restores the legal balance which has been disturbed by the commission of the crime. Punishment is the payment of the account which, because of the commission of the crime, X owes to society. … X now has a debt which he owes to society. By being given a punishment and serving such punishment, he pays the debt he owes to society. In this way, "the score is made even".'

How quaint, then, if imprisonment is meant to be the repayment of a debt to society, that the repayment does not enrich or recompense society or benefit society in any way; that, in fact, imprisonment is a burden on society (at the very least, financially). Imprisonment fails to 'restore the legal balance' and thus fails to satisfy the second element of sentence. Consequently, retribution no longer justifies the imposition of sentences of imprisonment.

The third element of sentence is rehabilitation. The general rule is that imprisonment is a resounding failure in terms of rehabilitation. In para 1.6.8 of the 2006/7 Annual Report of the Acting Inspecting Judge of Prisons, Judge NC Erasmus (the Erasmus Report), it is reported that '[o]ur assessment during the inspections [of 235 of the 237 prisons in South Africa] indicates that only about 11% of sentenced prisoners were actively involved in rehabilitation and vocational programmes.' And one might logically assume that the success rate is something less than the level of involvement. Successful rehabilitation is the remote exception to the rule and rehabilitation therefore no longer justifies the imposition of sentences of imprisonment.

The final element of sentence is deterrence. Imprisonment does not deter people from committing crime. It's laughable to suggest that anyone planning to commit a crime might be deterred from doing so because of the possibility of imprisonment. Why, every last would-be criminal thinks he'll get away with it *or he wouldn't do it*!! In any event, the deterrence argument can only ever apply to planned crimes. It cannot apply to unplanned crimes – even those involving *directus directus* – or to crimes involving negligence. Added to which, only a small percentage of crimes committed in South Africa are successfully prosecuted (see the Development Indicators 2008 of the Presidency of the Republic of South Africa), which would significantly reduce any conceivable deterrent effect of sentence. Deterrence, therefore, is a myth and no longer justifies the imposition of sentences of imprisonment.

Sentences of imprisonment thus no longer satisfy any of the elements of sentence. It follows, in my view, that imprisonment has ceased to be a legally defensible sentencing option and that the continued imposition of sentences of imprisonment has become unlawful/legally indefensible.

Even in the case of the statutorily prescribed sentences of imprisonment, my view remains the same. In terms of the legislation, the court retains a dis-

cretion to depart from the prescribed sentences (see *S v Malgas* 2001 (1) SACR 469 (SCA) at 482) and I would suggest that, in the exercise of that discretion, on the basis that the continued imposition of sentences of imprisonment has become unlawful/legally indefensible, the court *should, in every case*, impose some non-custodial sentence in lieu of imprisonment (see, for example, *S v Tabethe* TPD Case No CC468/06, 23 January 2009, Bertelsmann J, unreported, where that was done on a charge of raping a girl under the age of 16).

Now to the conditions of detention that are unconstitutional and unlawful.

The State's constitutional obligations towards prisoners are set out in sections 27(2) and 35(2)(e) of the Constitution (read together with various international instruments). Section 27(2) provides that:

'The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

... imprisonment has ceased to be a legally defensible sentencing option and that the continued imposition of sentences of imprisonment has become unlawful/legally indefensible.

And section 35(2)(e) provides that:

'Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least ... the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.'

The nominated elements relating to conditions of detention must be examined :

1 Accommodation

In terms of section 7(1) of the Correctional Services Act 111 of 1998:

'Prisoners must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installation and general health conditions. These requirements must be adequate for detention under conditions of human dignity.'

However, as reported in para 1.6.3 of the Erasmus Report:

'The norms applied in South African prisons for floor space per prisoner is 3.5m2 for communal cells and, 5.5m2 for single cells, 5m2 for communal hospital cells and 9m2 for single hospital cells. This means that at those prisons which are overcrowded, ie 72% of all prisons, prisoners have a living space of less than 3.5m2. At those prisons that have critical levels of overcrowding, prisoners often have less than 1.2m2, the size of an average office table, in which they must sleep, eat and spend 23 hours per day ... .

... Some serious failures of existing infrastructure were observed during our inspections. These failures include the breakdown of water reticulation systems, toilets, showers, kitchen equipment and a lack of fresh water and hygiene in kitchens and hospitals. ... The JIOP observed many prisons which were equipped with open toilet facilities in communal cells shared by 20 to 30 adults, resulting in no privacy. [Several] prisons had, at the time of our inspection, no fresh running water ... .'

According to the evidence, therefore, in the vast majority of instances, the State is in breach of section 7(1) of the Correctional Services Act and section 35(2)(e) of the Constitution for failure to provide 'adequate accommodation'.

2 Nutrition

In terms of section 8 the Correctional Services Act, prisoners must be provided with an adequate diet to promote good health and such diet must make provision for the nutritional requirements of vulnerable groups such as children, pregnant women and the disabled. In terms of section 8(5):

'Food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours, except that there may be an interval of not more than 14 hours between the evening meal and breakfast.'

However, as reported in para 1.6.5 of the Erasmus Report:

'... many problems are experienced on a daily basis in providing the required diet to prisoners. Food remains a chief source of complaint among prisoners and the cause of much frustration and acts of violence. Most prison gangs use food as their preferred currency when trading inside prison. These are all factors which contribute to the complexity of complying with the provisions of the Act, in particular, the intervals between meals and the availability of clean drinking water. ...'

While the 2007/8 annual report of the Acting Inspecting Judge of Prisons, Judge NJ Yekiso (the 'Yekiso Report') at 18 identified 52 of the 93 prisons inspected as 'not complying with the required time intervals per meal as stipulated in s 8(5) of the Act ... .'

In the result, the evidence establishes that the State is in breach of section 8(5) of the Correctional Services Act and section 35(2)(e) of the Constitution for failure to provide 'adequate nutrition'.

3 Medical treatment

The right of all prisoners, including awaiting trial prisoners, to adequate health care is set out in section 35 of the Constitution, arts 22—26 of the Standard Minimum Rules for the Treatment of Prisoners and section12 of the Correctional Services Act. Section 12 of the Act provides:

'(1) The department must provide, within its available resources, adequate health care services, based on the principle of primary health care, in order to allow every prisoner to lead a healthy life.

(2)(a) Every prisoner has the right to adequate medical treatment ... at State expense.'

However, as reported in para 1.6.5 of the Erasmus Report:

'Health care in most of our prisons is in crisis. A lack of medical staff, prison overcrowding, poorly resourced prison hospitals and operational inefficiencies are some of the contributing factors.'

(See also the Yekiso report at 12, 19 and 39.)

Blatantly, the State is in breach of section 12 of the Correctional Services Act and section 35(2)(e) of the Constitution for failure to provide 'adequate medical treatment'.

In conclusion, the State is in breach of its obligations in terms of section 35(2)(e) of the Constitution for failure to provide 'conditions of detention that are consistent with human dignity, including ... [each of] adequate accommodation, nutrition ... and medical treatment '.

Furthermore I would suggest, the State is in breach of its obligations in terms of section 27(2) of the Constitution inasmuch as, whatever measures it might be taking, they have not achieved, *and cannot possibly achieve*, 'the progressive realisation of each of these rights'. Indeed, indication is that overcrowding is the root cause of the State's failure to fulfill its constitutional obligations (see the

Erasmus Report at 7 and in paras 1.3, 1.6.0 and 1.6.3 and the Yekiso Report at 6) and that, far from decreasing, overcrowding is likely to increase over time (see the Erasmus Report in paras 2.2.5 and 2.3; the Yekiso Report at 6 and 23; and the CSPRI Submission to the Portfolio Committee on Correctional Services on the 2005/6 Budget Vote, prepared by Lukas Muntingh, March 2005), with the result that conditions of detention can be expected to deteriorate even further. The only possible conclusion is that the State is not, *cannot and therefore will not*, achieve 'the progressive realisation of each of these rights'.

In my view, the 'inhumane conditions of detention' in South Africa (see the Yekiso Report at 6; *Moolman and Another* TPD Case No A1342/03, Bertelsmann J, 11 February 2005, unreported in paras [61]-[65] and *S v Standaard* 1997 (2) SACR 668 (C) at 670A referred to therein) – conditions which fail to satisfy the minimum constitutional threshold – amount to 'cruel, inhuman or degrading punishment', in breach of section 12(1)(e) of the Constitution. This view is borne out by the following dicta of the Constitutional Court in *S v Williams and Others* 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861) and endorsed in *S v Niemand* 2002 (1) SA 21 (CC) in para [20]:

'[20] It is clear that, when the words of s 11(2) of the Constitution are read disjunctively, as they should be, the provision refers to seven distinct modes of conduct, namely torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment.

[35] … the common thread running through the assessment of each phrase is the identification and acknowledgment of society's concept of decency and human dignity.

[37] … In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution.

[38] The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.'

(See also *S v Dodo* 2001 (3) SA 382 (CC) in paras [35]-[37]; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) in paras [90]-[95] and *Kalashnikov v Russia* SISAC 2002 VI at 284-304).

In addition, I would suggest, the 'inhumane conditions of detention' in South Africa are in breach of the right to dignity, as provided for in section 10 of the Constitution (see *S v Williams (supra)* in paras [35] and [77]), and, on the residuum principle (see *S v Makwanyane (supra)* in para [142] and *Thukwana v Minister of Correctional Services and Others* 2003 (1) SA 51 (T)), also in breach of the right to equality and the right not to be discriminated against, as provided for in section 9 of the Constitution.

The final enquiry, in terms of section 36(1) of the Constitution, is whether the breaches by the State of sections 9, 10 and 12(1)*(e)* of the Constitution (or the limitation by the State of the rights contained in sections 9, 10 and 12(1)*(e)*) are 'in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors …'. The State bears the onus of justifying the limitation (see *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) in paras [20]-[21]) and the enquiry 'involves the weighing up of competing values, and ultimately an assessment based on proportionality' (see *S v Makwanyane and Another* 1995 (3) SA 391 (CC) in para [104] and *S v Williams (supra)* in paras [58]-[60]).

In justification of its limitation of the rights contained in sections 9, 10 and 12(1)*(e)*, the State would doubtless argue, amongst other things, that imprisonment is a deterrent, that there are no practical alternatives and, relying on section 27(2) of the Constitution, that it lacks the necessary resources to comply with its constitutional obligations. In my view, the first of those arguments would be misplaced inasmuch as imprisonment has no deterrent value, alternatively, such deterrent value as it might have is not sufficiently significant to justify the State's overriding rights entrenched in the Constitution (see *S v Williams (supra)* in para [84]). The second argument, in my view, would be similarly misplaced inasmuch as a lack of practical alternatives – or the State's 'state of unreadiness' – cannot justify punishment which is 'cruel, inhuman or degrading' because it entails a negation of 'the values that fuel our progress towards being a more humane and caring society.' (See *S v Williams (supra)* in para [63]). And, finally, in my view, the lack of resources argument could only possibly avail the State if it could show that its application of available resources was, as a fact, contributing to the progressive realisation of prisoners' rights. The evidence belies such a contention.

In addition, I would suggest, the 'inhumane conditions of detention' in South Africa are in breach of the right to dignity, as provided for in section 10 of the Constitution...

In resolving the section 36(1) enquiry, the court weighs up any deterrent, preventative and retributive values of imprisonment, on the one hand, against 'the alternative punishments available to the State, and the factors which, taken together, make [conditions of detention] cruel, inhuman and degrading' (see *S v Makwanyane (supra)* in para [35]). In my view, given that imprisonment has no deterrent, preventative and retributive values that a lack of practical alternatives cannot justify punishment that amounts to 'cruel, inhuman and degrading punishment' (see *S v Williams (supra)* in para [63]) and that conditions of detention in South Africa are 'cruel, inhuman and degrading' for lack of adequate accommodation, nutrition and medical treatment, the inevitable conclusion is that there is no justification for the current 'inhumane conditions of detention' and, therefore, that the State's breaches of sections 9, 10 and 12(1) *(e)* of the Constitution are not 'reasonable and justifiable' as contemplated in section 36(1) of the Constitution and are unconstitutional and unlawful. In the result, conditions of detention, across the board in South Africa, are unconstitutional and unlawful.

I would suggest that there are two consequences of such a finding: first, that our courts cannot justifiably continue imposing sentences of imprisonment. And second, that South African prisoners, across the board, become entitled to their release. Or perhaps they can sit tight and claim constitutional damages? Or perhaps, as in several jurisdictions in the United States (see, for example, 'Court orders California to cut prison population' *The New York Times* 9 February 2009), the High Court can, on application, issue a declaratory order, coupled with an order directing the State to comply with its constitutional obligations, including the release of however many prisoners need to be released in order to eliminate overcrowding and thus restore humane conditions of detention, all subject to the court's supervision?

advocate December 2009 43