cspri newsletter
CIVIL SOCIETY PRISON REFORM INITIATIVE
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Issue 3

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SA prisons at a glance

30/12/2003

Variable	Figure
▲ Prisons	242
▲ Functioning Prisons	235
▼ Closed Prisons	7
▲ Total Prisoners	185623
▼ Sentenced Prisoners	130400
▲ Unsentenced Prisoners	55232
▲ Male Prisoners	181682
▼ Female Prisoners	4030
▼ Children in Prison	3931
▼ Sentenced Children	1734
▲ Un-sentenced Children	2197
▼ Total Capacity of Prisons	112412
▲ Overcrowding	165.14%
Most Overcrowded Durban Med C	361.19%
Least Overcrowded Vryheid	24.73%
▼ Waiting Trial Longer than 3 months	22481
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Constitutional Court rules on the right of prisoners to vote

"A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claims to representative democracy, and erodes the basis of its right to convict and punish law-breakers." (1)

Introduction

On 3 March 2004 the Constitutional Court ruled on the application brought by NICRO and two others regarding the Electoral Laws Amendment Act (34 of 2003) that excluded prisoners serving a sentence without the option of a fine from registering for the elections and from participating in them. Due to a convergence of circumstances, the Constitutional Court allowed the Department of Home Affairs' application for direct access to the highest court of the land, without a prior the Cape High Court decision having being finalised. Each election since 1994 has seen constitutional litigation regarding the right of prisoners to vote.

Before looking at the results and consequences of this ruling by the Constitutional Court, NICRO's motivation for bring this application and its importance within the broader context of prison reform needs to be explored.

Motivation for the application

NICRO and the Community Law Centre at UWC established the Civil Society Prison Reform Initiative (CSPRI) to address the human rights concerns of prisoners and to support prison reform in South Africa through research and evidence-based lobbying and advocacy. In the current climate in South Africa, where crime control and law enforcement are seen as paramount, and with the increasingly intolerant attitude of the public towards prisoners, CSPRI is deeply concerned about the general erosion of the rights of prisoners. This trend is not unique to South Africa and can be observed in other parts of the world. This concern about the erosion of prisoners rights is based on a number of factors that informed the decision to litigate:

There is limited involvement from civil society in the debate on corrections and prison reform and the quality and depth of the debate is often based on very select and dated information.

Currently, there weak civilian oversight over corrections and what oversight there is is occurring within the context of widespread corruption, as evidence before the Inquiry of the Jali Commission continues to show. This creates a dangerously fragile environment for human rights in prisons.

It has now been six years since the Correctional Services Act (111 of 1998) has been passed by Parliament. The Act has, however, yet to be promulgated, save for very limited sections such as those relating to the Office of the Inspecting Judge. In the absence of a clear legislative framework that regulates prisons, we need to be extra vigilant.

The severe overcrowding of South African prisons has a direct impact on the rights of prisoners on a daily basis, and this has in itself an eroding effect.

Prisoners have limited ability to address their concerns as a result of their physical containment. Whilst most prisons have Independent Prison Visitors, and although there are departmental complaints mechanisms in place, we are aware that much of what happens in prisons does not reach the outside world.

Lastly, should prisoners lose the right to vote, it would signal a fundamental departure from our understanding of a constitutional democracy in the post 1994 period. This could then open the door for the curtailment of other rights of prisoners, and possibly other sectors in the population.

Prisoners and citizenship

Central to the issue of the rights of prisoners to vote is our understanding of citizenship. In modern times, the imprisoned offender does not suffer “social death” leading to forfeiture of all civil rights.(2) The history of democracy is indeed one of growing inclusion. Sachs J described this notion of citizenship as follows in August and Another v Electoral Commission and Others:
" the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.
For the prisoner, the right to vote becomes a fundamental - even if symbolic link - to the outside world. More importantly, it affirms that he or she enjoys protection under the Constitution because he or she is a full citizen and can participate in political decision-making. We also have to ask the question in reverse. If a prisoner cannot vote, what is his or her status in a democracy? Is it akin to that of a foreigner with permanent residence?

The right to vote is absolutely fundamental in a democracy and both the Canadian Supreme Court and the South African Constitutional Court have accepted this premise. Justice Chaskalson described this in the South African context as follows:(3)
In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right, which must be vigilantly respected and protected.

What were the issues in this case?

The Electoral Laws Amendment Act, promulgated in December 2003, provided that only awaiting trial prisoners and prisoners serving a prison sentence with the option of a fine would be allowed to register for and participate in elections. The result was that prisoners who are serving a prison sentence without the option of a fine would not be able to vote.

The Department of Home Affairs motivated this exclusion with essentially two arguments.

Firstly, the Department argued that it would be logistically difficult and too costly to register all prisoners. Secondly, they suggested that it would be unfair to make special arrangements for serious offenders whilst the same arrangements were not being made for law abiding citizens who could not vote at ordinary voting stations. The result would be that the message being sent out to the public is that the government favoured criminals and was therefore soft on crime.

The Constitutional Court based its decision to declare the relevant sections of the Electoral Laws Amendment Act unconstitutional on essentially three points:

The Electoral Laws Amendment Act resulted, in effect, in the disenfranchisement of all prisoners serving a term of imprisonment without the option of a fine and this limitation of the right to vote does not conform to the requirements set out in S 36(1) of the Constitution

The state failed to provide the court with sufficient information as to why it sought to disenfranchise the group of prisoners targeted, and what purpose the disenfranchisement was intended to serve.

The Electoral Laws Amendment Act provided for blanket exclusion that had long since failed scrutiny in the first Sauvé v Canada case.

What are the consequences of the decision?

The most immediate result is that all prisoners will be allowed to register and vote in the April 2004 elections. Given the limited time between the judgment date and the date of the forthcoming elections, one can expect that logistical difficulties and prisoners' access to bar-coded identity documents will in reality exclude a significant proportion of those affected by the Constitutional Court judgment.

The second result is that there has been intense public debate and media attention on this matter, and if this is to be used as any gauge, the conclusion has to be that the Constitutional Court did not make a very popular decision. Nonetheless, it also provided the platform for other matters regarding prison reform to be raised, especially at the time when a new Correctional Services White Paper has become available.

Third, there is a growing body of local and international case law relating to the right of prisoners to vote, and it is encouraging to see that the South African Constitutional Court and the Canadian Supreme Court are thinking along similar lines at this stage. It should also be said that in both courts, the decision was not unanimous. In Canada the bench was split 5-4, whilst two judges in South Africa dissented.

This particular piece of legislation was found to be unconstitutional; essentially because its blanket exclusion of large numbers of prisoners was not sufficiently motivated by the state. This decision may well not be the end of the road should the state decide to limit the right of prisoners to vote and present a more convincing argument that meets the requirements in terms of S 36(1) of the Constitution.

Footnotes:
(1) Sauv v Canada, para 34.
(2) Sauv v Canada, para 43.
(3) Minister of Home Affairs and Others v NICRO and Others, CCT 03/04, para 47

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