Report
on

The Process of the Substitution of the Death Penalty

October 2002

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Introduction

The South African Human Rights Commission (SAHRC) was approached by the Registrar of the Constitutional Court to consider and comment on why certain prisoners, originally sentenced to death, (the applicants) had not had their sentences converted.[1] The Registrar was of the view that: "The problem with these cases are that there seems to be undue delay in bringing them to a speedy and satisfactory conclusion."[2] The death penalty was declared unconstitutional in South Africa in 1995, yet seven years later a large number of prisoners continue to reflect this penalty. Applicants, however, do still not have certainty regarding their new sentence, which impacts upon their ability to obtain parole and privileges.

The Investigation

The SAHRC set out to understand the process involved in converting applicants' sentences and the difficulties experienced in this regard. Our aim was to ascertain where the blockages were and to assist the role players to carry out their duties in terms of the legislation. Our original objective was to finalise this process by formulating a definitive list of those applicants who had not been assisted. As the project evolved, so did our objective, as set out below.

Methodology

The SAHRC reviewed the Constitutional Court decision affecting the death penalty, as well as the resultant legislation, in order to understand the process involved in amending these death sentences. Thereafter, the SAHRC identified and contacted the various role players.

The SAHRC has been working in consultation with the Department of Correctional Services, the Department of Justice and Constitutional Development, the various Registrars of the High Courts, the Legal Aid Board (LAB), the Directorate of Public Prosecutions and, where necessary, the Office of the Judicial Inspectorate. Once the SAHRC had an understanding of the process involved, we attempted to compile a list and an audit of those affected. Finally, we assessed the problems experienced in the system.[3]

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[1] The SAHRC would like to thank the European Foundation for Human Rights, without whose kind support, this report would not be possible

[2] 21/2000/0552 Mbelu: Prisoners Death Row

[3] As our research progressed so we shifted our focus slightly to concentrate more on the problems experienced by applicants, rather than an audit of those affected (see below)

Background

The last execution in South Africa occurred on the 14 November 1989[4] , and thereafter the State issued a moratorium on executions[5] . In 1995 the Constitutional Court handed down its first judgment, the *Makwanyane*[6] decision, which abolished the death penalty as a form of punishment in South Africa. In that matter the court held that the punishment of anyone by death was cruel and inhumane and therefore unconstitutional as it *inter alia* violated s 10 and s 11 of the South African Bill of Rights, namely the right to human dignity and the right to life. The court further ordered that the provisions of s 277(1) of the Criminal Procedure Act[7] , and all corresponding legislation and provisions were declared to be unconstitutional and therefore invalid. It was further ordered that the state and all its organs were forbidden from executing any person already sentenced to death.

Official records indicate[8] that there were 430 people who had been under sentence of death at the time of the *Makwanyane* judgment.[9] As a result of that judgment, legislation was passed to provide for the procedure to be followed in setting aside the death sentences and the substitution of such sentences with an appropriate sentence.

[4] As stated in an address to Parliament by former President FW de Klerk.
[5] Criminal Law Amendment Act No. 107 of 1990
[6] *S v* Makwanyane and another 1995 BCLR 665 (CC)
[7] Criminal Procedure Act No. 51 of 1977
[8] Legal Aid Board Report on the Death Sentence Appeals in terms of sec 1 (1) Act 105 of 1997 (the LAB report). According to the LAB report, the figures that were supplied to them by the Ministry of Justice indicate that there were 497 cases and out of those 387 of those cases have been substituted with other forms of punishment
[9] This assertion that 430 were affected was made in the Makwanyane case and was not disputed by the state

The Legislation

The enabling legislation is the Criminal Law Amendment Act 105 of 1997 (the Act). The commencement date of the Act was 13 November 1998. The Act was intended to provide the process by which the death penalty cases were to be reviewed and substituted by other punishment.

1. The Act classifies prisoners into three categories:
    a. Section 1(1) deals with cases where the prisoner has exhausted all avenues of appeals or reviews.
    b. Section 1(7) and s 1(10) addresses situations where there are appeals against the sentence and not against the conviction. In this instance the case shall be heard by the full court of that division as would be required by the Criminal Procedure Act, 1977.
    c. Section 1(10) deals with all other cases where the sentence of death was imposed and which were not disposed of by that court.
2. In the cases which are covered by s 1(7) and s 1(10), the affected persons still have recourse to the courts and their death sentences will be substituted during this ongoing process. Our focus was on s 1(1) cases where the matters had already been finalised and the sentence was that of death. In these matters, the prisoners had exhausted all legal avenues available to them. It is these prisoners who have yet to receive a substituted sentence, and are the subject of this investigation.
3. The process involved in converting the death penalty cases in terms of the Criminal Law Amendment Act No. 105 of 1997 is very complex:
    - In terms of s1 of the Act the Minister of Justice has to notify the Registrar of the High Court of the cases which have to be heard.
    - Often the records pertaining to these matters have been in the archives for a while so it is necessary to locate the original court files and ensure that the documentation was complete and in order.
    - The Director of Public Prosecutions has to ensure that the Heads of Arguments are filed on behalf of the state and the LAB has the duty to appoint counsel who will file Heads of Argument on behalf of the applicant.
    - When both sides have filed the Heads of Arguments, and the matter has been set down, the matter is then allocated to a court for hearing. The court shall, where possible, consist of the judge who sentenced the prisoner to death, failing which the Judge President will designate another judge to handle the case. As already stated, the court shall then consider the written arguments as well as the evidence that was led at the hearing when the applicant was originally sentenced to death.
    - Oral argument may be requested by the presiding judge if that is deemed necessary. In conclusion, the judge is required to make a recommendation regarding a new sentence.

- These recommendations are submitted to the Office of the President for consideration. If the President approves the recommendations then he is required to attach his signature as confirmation. The President may, after careful consideration, impose a different sentence from the one recommended by the court.
- According to the Act no appeals will apply in respect of either the proceedings, or the recommendation of the court in terms of the court process.
- The process of submitting recommendations to the Office of the President is facilitated through the Department of Justice. Initially there was some confusion in terms of the process. It was established that in some instances some Registrars were sending the information directly to the President's office and that caused misunderstanding and some delay to a certain extent.
- As soon as the President has reviewed and signed the request, the Department of Justice notifies the court Registrars as well as the Department of Correctional Services about the finalisation of the matter. The Department of Correctional Services would then inform the prisoners of their new status and sentence. The LAB, through the officer representing the individual, also has an obligation to inform the applicant about the progress of the process and the final outcome.

The Various Role Players

The important role players in this process are the Registrars of the High Courts, the Directorate of Public Prosecutions (DPP), the LAB, the Office of the Judicial Inspectorate, the Department of Justice and Constitutional Development and the Department of Correctional Services. The Registrars have an obligation to interact with the Judge President, the Office of the Public Prosecutor and the representatives of the applicant to ensure all the necessary papers are filed timeously and that the matter is set down for hearing.

The Office of the Public Prosecutor has an obligation to prepare all the records for the hearings and submit Heads of Argument on behalf of the state.

The LAB, according to a directive issued in terms of the Act,[10] is the lead player in this process. Through its legal officers the LAB has the duty to ascertain from the Department of Correctional Services the identities of the applicants; the place of sentencing (Division of the High Court); the case number; and the current place of detention.

[10] Directive in terms of s 1 (6) of the Criminal Law Amendment Act 105 of 1997

The LAB is required to liaise with the Judge Presidents to inquire about which judges are dealing with which matters. The Department of Justice is also an important role player, because it interacts with the Registrars and the President's office. It also keeps the line of communication open between the Correctional Services Department and the LAB. It records all the matters that are outstanding and those that have been finalised. To date, their records have not been entirely accurate and up to date.

The Department of Correctional Services must ensure their records correctly reflect the sentences, as amended, and that no prisoners fall through the cracks. The Department keeps a record of all cancelled death warrants and substituted sentences, but is only able to keep such record accurately, if it receives accurate information from the Department of Justice.[11]

Example of Heads of Arguments[12]

Applicants Heads:
The reasons for conviction are set out, followed by the sentence of death. In this case, the applicant was convicted of the murder of 2 persons, both of which carried the death penalty. The circumstances surrounding the conviction are set out. The personal circumstances of the applicant at the time of his conviction, as well as his current circumstances are placed before the court. The papers before the court look to the law surrounding the reasoning behind the conviction and in this case, allege that the court had erred in its findings.

Respondent's heads:
The State's advocate argued that the only appropriate sentence is life imprisonment. This was argued on the facts of the case and the circumstances surrounding the murders.

Outcome:
The applicant was handed a life sentence

[11] This was confirmed in a telephonic discussion with Mr Erns Kriek of the DCS, who is the Director in charge of these matters. (012 3072166)
[12] Bongani Buthelezi v The State Case number CC 163/94 (Natal Provincial Division) date of hearing 13/02/01

An analysis of the Process

During our investigation we interacted with all the role players with a view to understanding precisely how many people were affected, and the steps that had been taken in terms of the Act. We received responses from all participants, in varying degrees of detail and style.

The LAB, as the lead player in this process, has been tackling these matters through their Justice Office in Pretoria. The lead person is Advocate Janie Kriel who acts as legal representative for the applicants. We have also established through our interaction with Mr Kriel that he has been handling most of the cases nationally, and in those instances where he is not the direct representative he is involved in assisting to move the process forward.

The SAHRC established that the LAB's list of those prisoners affected, was the most accurate of all the lists kept.[13] Once we had established that the LAB was in possession of such a list, which list was furnished to us in August 2002, we began to concentrate our resources away from compiling the list and more towards critically reviewing the procedures currently underway.[14] We did, however, compile a list of affected persons, which although not as comprehensive as the LAB's list, assisted us to highlight some concerns within the current system. On 19 August 2002 the SAHRC received the LAB's report and list, which we have used to inform our investigation.

[13] Please note that the HRC has a concern that the LAB list may not be entirely accurate, as will be indicated below. The LAB also has reservations about the accuracy of its list, but has proposed solution to this concern, which is also discussed below

[14] The HRC attempted to work with the LAB on compiling the list but the LAB was not amenable to this. The reasons given was that they were in the process of compiling a comprehensive report on the death penalty matters, which was to be presented to the Justice Portfolio Committee by a representative of the LAB. The LAB advised us that all our questions would be answered in that report. The initial understanding was that the report would be ready and made available to us mid May 2002. However this did not materialize. We continued to interact with the LAB and requested that they provide us with at least a draft report so that we could incorporate information received from LAB. In response to our request we were informed that the report was almost ready, that it would be made available to us the following week (mid June) but to no avail

Legal Aid Board's Report

According to the LAB's report, on formulating their own list they were able to establish that 291 sentences had already been converted as opposed to the figure of 387 given to them by the Ministry of Justice.[15] However, the LAB also concedes that its list cannot be said to be completely accurate, as the accounting of names and sentences is an ongoing process and the circumstances are fluid.

The LAB proposes that all the information from the different Registrars of the different divisions of the high courts be pooled together in a more centralised way and be maintained by the Registrar of the court in the Transvaal Provincial Division. They refer to an existing precedent in the system, namely the Chief Sheriff, who was also the Registrar of the court in Transvaal

Provincial Division.[16]

The SAHRC would respectfully agree that there is a need to centralise the collation of information, but disagrees with the proposal that it be the Chief Sheriff. The Chief Sheriff was integral to the carrying out of death sentences and to revive this position may revive the negative connotations attendant on it. We are of the view that the correct party to collate all information is the Department of Justice, which is required to both initiate the procedure, as well as to finalise it by obtaining the advice from the President.

[15] Legal Aid Board -Report on Death Sentence Appeals in Terms of Section 1 (1) Act 105 of 1997 p19
[16] Note 15 above p 17

Information compiled by the SAHRC

In summarised form, the SAHRC's list indicated the following:

Name of the High Court	No of outstanding cases
1. Cape Provincial Division	11
2. Orange Free State Division	16
3. Bophuthatswana Provincial Division (Mmabatho)	3
4. Venda Provincial Division (Thohoyandou)	6
5. Durban Coastal Local Division	22
6. Natal Provincial Division (Pietermaritzburg)	11
7. Transkei Provincial Division (Umtata)	15
8. Eastern Cape Provincial Division (Grahamstown)	2
9. Witwatersrand Local Division	47
Total number of cases outstanding	**133**

It is important to bear in mind that the figures shown above are only those records received from the different Registrars and the DPP. The SAHRC attempted to reconcile this list with the lists we received from the Department of Correctional Services and from the Department of Justice, but the lists did not reconcile. When attempting to reconcile these lists, we experienced a number of problems, such as:[17]

- The list from Justice contained only some names that appear on the list from Correctional Services and vice versa. Even with respect to the Registrars' list there are inconsistencies regarding whether the applicants cases on these lists are pending.
- Furthermore the format used to compile the lists of cases that are pending and that of cases that have been finalized,[18] are not the same. Each office or department uses its own format.

[17] It is important to note that the Legal Aid Board in its report has raised the same problems raised here.

[18] We have list of finalised cases received for Justice, this gives an indication of those cases that have been finalised, and when those were finalised and what the new sentences were. However this list too is not conclusive, as it does not provide all the necessary information

- Some lists are compiled in such a way that they focus on the case numbers and not on the number of accused in each case. Other lists, however, will indicate the number of people still in prison, meaning that they are focusing on the names and numbers of individuals, and not each case. This has a direct bearing on how the numbers of outstanding cases are counted and recorded. For example, one may be led to believe that there are five outstanding cases in a particular high court, only to learn at a later stage that there is actually one case, which has five applicants.
- Due to a lack of coherent communication between the role players regarding these matters, finalised matters may on occasion, appear as pending in certain department's records. This has led to confusion and inaccuracies regarding the status of certain matters.
- In certain instances a name appears on more than one list with the name spelt differently on each list. We might assume that the record is that of the same person but we are unable to confirm this because the case numbers might be different or there is no case number next to the name on the other list.

The aforementioned inconsistencies have led to confusion and have militated against us determining an accurate list of both names and numbers of affected applicants.

Reasons for the delay

1. According to our research and observations the process is moving forward albeit slowly at times. This is due to the intricacy of the procedure and the fact that it involves quite a number of role players who each have to perform in order for the process to move forward.
2. We are of the view that the LAB experienced a delay prior to it initiating its role in terms of the Act, due to internal organisational problems. This is confirmed in their report where it is stated that the LAB could not reach agreement with private practitioners on their remuneration concerning the death penalty matters. The problem was finally resolved when the LAB appointed their own in-house representative to deal with the matters.[19]
3. In certain instances, a matter has been heard by the relevant court and the parties are awaiting recommendations from the presiding judge. We have been able to establish that it sometimes takes a while before the judges concerned make sentence recommendations.
4. Even when the matters have been finalised the Ministry of Justice, at times, fails to inform the relevant court, the LAB and Correctional Services of the new sentences as confirmed by the President. This serious lack of communication between role players has resulted in enormous prejudice to applicants.
   In some instances there are reports that prisoners are not able to obtain privileges because they are still considered to be death row prisoners. The Department of Correctional Services will continue to have warrants that indicate these prisoners are serving the sentence of death until such time as it is advised of the new sentence to replace the old one. In one example we were informed that an individual death row prisoner had the opportunity to be transferred to a new and privately managed prison but could not be transferred because, according to the Department records, his status had not changed; he was still a death sentence inmate.
5. The different lists that are available, but which contradict each other, also create problems and unnecessary delays. This confusion can often result in cases falling through the cracks resulting in matters being sidelined for long periods of time.

> An illustration of this is proffered by the Mbelu case (the original complaint forwarded to the Constitutional Court, which instigated this investigation). On receipt of the complaint, we established that the complainant, Mbelu, is actually known as Simon Mbelu Nkisimane. We were able to establish that he was serving his sentence in Waterval Prison in KwaZulu Natal and according to the prison records, his sentence had not been changed from that of death.

[19] Note 15 above pp 22- 23

> The record indicates that he was sentenced under case no 26/86 in the Umtata High Court on 12 March 1986. His name appeared only on the list from Correctional Services. His name did not appear either on the list received from Registrars,[20] or on the list from the Department of Justice. In order for us to ascertain that his case emanated from the Umtata High Court, we had to use the information we had from the Correctional Services list, using his prison number, to establish where he was serving his sentence. Thereafter we had to approach the Head of Prison in Waterval for him to give us the prisoner's record, specifically which court he was sentenced in, and what the case number was. As soon as we were able to establish that information we were able to approach the Registrar in Umtata. He indicated that according to his records there was no outstanding matter under that name, and also that they had no record of the Nkisimane matter.
>
> We have been able to interact with the LAB concerning this matter and they have assured us that they will attend to it urgently.[21] This example serves to illustrate the danger that certain applicants may be difficult to identify and accordingly may not be assisted. [22]

Constitutional Issues

A number of constitutional concerns are raised by the inordinate delays between the *Makwanyane* decision and its practical application.

Right to Dignity

According to the Constitution s 10 reads "everyone has inherent dignity and the right to have their dignity respected and protected." The mental turmoil suffered by prisoners on death row is well known. The fact that the death penalty has been abolished is not a reality to them until they know that their sentences have, in fact, been changed to reflect a new sentence. These prisoners must certainly think that for as long as their sentences have not been changed there is a chance that they could still be executed. The fact that these concerns are unfounded is not the issue; to them it is reality. These prisoners have the right to have their dignity protected in terms of the Bill of Rights. This confusion and stress may also be evidenced within the prisoners' families.

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[20] We were hoping that the report from LAB would be able to assist us with the information from the High court in Umtata, but Nkisimane's name did not appear on the list from the LAB

[21] See below note 26. Mr Nkisimane's name appears on the most recent LAB list, attached to Circular 5 of 2002

[22] It is important to note that the Umtata court had indicated in their records that they had finalised all the outstanding matters except for one case. They did not have Nkisimane as part of their record

In *Makwanyane* O' Regan J stated that:

> The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated with respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3…[H]uman dignity is important to all democracies.[23]

The Constitutional Court decided seven years ago that the death penalty was an inhumane and degrading punishment and therefore unconstitutional, but these prisoners continue to serve as death row prisoners with no indication of when their sentences would be changed to reflect otherwise.

Just Administrative Action
Sec 33 of the Constitution, on the right to just administrative action provides that:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair…

Prisoners who are still on death row are denied their right to just administrative action, which is not unduly delayed, in that the death sentence was abolished in 1995. Legislation was only enacted in 1998. The Act, although dilatory, does not justify that by 2002 there are still prisoners whose warrants indicate their sentences as that of death.

Section 33 of the Constitution has been brought into effect through the Promotion of Administrative Justice Act 3 of 2000. This Act articulates applicants' rights in its objectives, which are to "promote an efficient administration and good governance" and "to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of public function."[24] This serves to emphasise the human rights violations experienced by applicants as a result of the inordinate delays in the system.

[23] Note 5 above paras 328- 330
[24] The Preamble to the Promotion of Administrative Justice Act 3 of 2000

Recommendations

1. There should be a focal point in the form of a designated person, in each of the offices of the role players who will liaise with each other.[25] The Department of Justice has a pivotal role to play and the SAHRC is of the view that it should be the lead actor in these matters. In particular, the Department of Justice should collate all the statistics and ensure that it, and its partners, communicate effectively to ensure that these matters are finalised.

2. It is important to obtain consensus from all the role players to agree to use the same format when compiling their lists. If possible agreement should be reached on the format of a national database, which is accessible to all the role players concerned.

3. The LAB as the main promoter of this issue, should be acknowledged as such and should be supported in its attempts to finalise these matters. It should be able to collect correct information from all the role players and be able to ascertain the exact numbers of outstanding cases. The SAHRC will work closely with the LAB to assist the facilitation of this procedure, insofar as possible.[26]

4. The SAHRC will forward a copy of this report to the LAB and the Parliamentary Portfolio Committee on Justice as it emphasises the importance of finalising these matters. The SAHRC can substantiate and support many of the concerns raised by the LAB, and the SAHRC should advise the Portfolio Committee accordingly.

5. The Departments of Justice and that of Correctional Services should strengthen their liaison and communication regarding these cases to ensure that they update their records and inform the prisoners and prisons about new sentences in those matters that have been finalised

6. The Judicial Inspectorate should establish a relationship with the LAB so they are able to advise the LAB whether there are any applicants in any of the prisons that have been visited. This will assist in ensuring that no case is left unattended. The concerns raised by the Nkisimane case, as discussed above, may fall into the purview of the Office of the Judicial Inspectorate as their Independent Prison Visitors will be alerted to those prisoners who remain un-sentenced.

[25] DCS: Erns Kriek; LAB: Janie Kriel; Department of Justice: Tessie Bezuidenhout tbezuidenhout@justice.gov.za

[26] Whilst finalising this report, the SAHRC received a copy of a Directive, which emanated from the LAB dated 10 October 2002, namely "Circular No. 5 of 2002". This Directive instructs all of the Justice Centres to ensure that prisoner's who are still serving the death sentence, must be visited by a legal advisor by 25 October 2002. The Justice Centre must then advise the CEO of the LAB, by 31 October 2002 that each prisoner on the LAB's list has been attended to. The LAB has determined that all death penalties must be converted by no later than 30 June 2003

7. The Judicial Inspectorate, through its Independent Prisons Visitors, should initiate a campaign, consisting of placing notices and posters in all prisons throughout South Africa, alerting both inmates and prison personnel to the legal situation regarding applicants. In this way, those persons who have yet to have their sentences revisited, will be able to contact the LAB to initiate the finalisation of their matters.

8. The central role-players, namely the Department of Correctional Services, the Department of Justice and the LAB should meet quarterly to review their progress in these matters. It is noted that the LAB intends finalising all matters by 30 June 2003,[27] and it is suggested that the first meeting be held in the first quarter of 2003.

Conclusion

A copy of this report should be submitted to all role-players, in order to assist in educating as many stakeholders as possible, about their role and duties. The LAB should continue to play an active role in ensuring cases are finalised as soon as possible. The SAHRC would like to be kept up to date on the progress of these matters, on a quarterly basis, in order to ascertain whether the SAHRC can offer further assistance in order to ensure that these matters are finalised. It is suggested that the LAB furnish the SAHRC with updates, due to the LAB's pivotal role in this process.

Legal Services Department
South African Human Rights Commission
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[27] See above Note 26