

ARTICLES

Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex

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ABSTRACT

While the exact extent of sexual victimisation in prisons amongst men is uncertain, it is accepted that this is a universal phenomenon. This article, in two parts, examines sexual violence in South African prisons and emphasises the duty of the state to provide safe custody. It is argued that rape and sexual violence in prisons fall within the ambit of the definition of torture and other ill-treatment, as defined by the United Nations Convention against Torture (UNCAT) and interpreted by the United Nations Special Rapporteur on Torture. The duty of prison officials to prevent sexual victimisation is discussed, reflecting in particular decisions from the United States (US). Particular attention is furthermore paid to the nature of sex in prisons and the relationship between coercion and consent. It is concluded that the duty to provide safe custody and protect the dignity of people deprived of their liberty rests with the state. Further, that this is an active and progressive duty placing the emphasis on managing risks and preventing torture and ill-treatment, as required by Articles 2 and 11 of UNCAT. The state is furthermore not only responsible for its own officials but also for the actions of non-state actors (i.e. other prisoners) when torture and other forms of ill-treatment have been perpetrated.

1. Introduction

In this two-part article, sexual violence in prisons in South Africa is discussed against the background of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The deprivation

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of liberty by the state, according to the United Nations Working Group on Arbitrary Detention, places people at risk of human rights violations because of ‘the inability of those who are in detention to defend and protect themselves, as their daily life is largely dependent on the decisions taken by the staff at the detention facilities.’¹ The significance of the deprivation of liberty in understanding torture and other ill-treatment is remarked upon as follows by the Special Rapporteur on Torture (SRT), emphasising the powerlessness of the detained person:

‘Persons held in captivity, be it in police custody, remand facility or prison, or deprived of their liberty in any other context, find themselves in a situation of complete dependency and are therefore particularly vulnerable to any abuse. It is against this background that the intentional infliction of severe pain or suffering for a specific purpose requires a particularly strong moral stigma and legal prohibition.’²

This vulnerability has a permeating effect on how the problem of sexual violence in prisons is understood and responses formulated.

Sexual violence in custodial settings is a universal problem and South Africa is no exception. In South African prisons, sexual violence is strongly associated with the number of gangs, as the gangs use rape as an instrument of control and dominance within prison systems.³ These gangs are an entrenched but unfortunate feature of the prison landscape. There are also indications of more opportunistic sexual predation that are, at least at face value, not gang-related.

¹ Report of the United Nations Working Group on Arbitrary Detention, A/HRC/10/21 ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development (16 February 2009) para [46], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement>, accessed on 2 February 2011.

² Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/13/39/Add.5 ‘Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention’ (5 February 2010) para [37], available at http://www2.obchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf, accessed on 1 February 2011.

³ See generally S Gear and K Ngubeni ‘Daai Ding: Sex, sexual violence and coercion in men’s prisons’ *Centre for the Study of Violence and Reconciliation* (CSVR) research paper (2002) and J Steinberg ‘Nongoloza’s Children: Western Cape Prison Gangs During and After Apartheid’ *CSVR Monograph* (2004); P Mashabela ‘Victims of Rape and Other Forms of Sexual Violence in Prisons’ paper submitted for *XIth International Symposium on Victimology South Africa* (2003); *Jali Commission of Inquiry of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services* (known as the Jali Commission of Inquiry Report) (2006) Chapter 8, available at <http://www.info.gov.za/otherdocs/2006/jali/chapt-8.pdf>, accessed on 2 February 2011.

The extent and prevalence of sexual violence in prisons is uncertain, although there have been some attempts to quantify it.⁴ Furthermore, sex in prisons is notoriously under-reported and often deliberately hidden and it is therefore difficult to ascertain the exact prevalence, nature and dominant modes. Research from the United States (US) (where the phenomenon has been extensively researched) indicate that between 7% and 12% of male inmates are raped an average of nine times during their term of imprisonment.⁵ There is evidence that sexual victimisation in prisons is profile-driven and inmates displaying certain characteristics are more vulnerable to aggression, making them more likely to be ‘turned’ into the feminine character.⁶ Targets are usually those who are least able to defend themselves, lack credibility with prison staff or are disliked by inmates and staff, as well as those who are easily ostracised.⁷ The female role is also forced upon the newcomer, or the weaker prisoner by more tactful, experienced, and stronger prisoners.⁸ Lack of knowledge of the prison and gang system, youth, economic circumstances, weaker physical attributes, reluctance to engage in violence, conviction for a crime lacking the element of violence and aesthetically pleasing looks, are all factors which contribute to a prisoner’s risk profile and possible assignment to the female gender.⁹

The Jali Commission,¹⁰ regarded the issue of sexual violence as so important that it dedicated an entire chapter of its final report to the issue, calling it a ‘horrific scourge ... that plagues our prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners.’¹¹ Despite the reported prevalence of sexual violence in prisons, the official position of the Department of Correctional Services (DCS) has been one of general denial and at best, uneasy acceptance. It was only in 2008 that the DCS publicly acknowledged that sexual violence, including male rape, was a

⁴ S Gear ‘Fear, violence & sexual violence in a Gauteng juvenile correctional centre for males’ CSVR *Criminal Justice Programme Briefing Report No. 2* (2007), available at <http://www.csvr.org.za/docs/gender/fearviolence.pdf>, accessed on 15 March 2011.

⁵ JE Robertson ‘Rape among incarcerated men: Sex, coercion and STDs’ (2003) 17(8) *Aids Patient Care & STDs* 423.

⁶ CD Man and JP Cronan ‘Forecasting sexual abuse in prison: The prison subculture of masculinity as a backdrop for “deliberate indifference”’ (2001-2002) 92 *Journal of Criminal Law and Criminology* 157. See also Gear and Ngubeni op cit (n3) 14-32.

⁷ RW Dumond ‘The impact of prisoner sexual violence: Challenges of implementing public law 108-79 — The Prison Rape Elimination Act of 2003’ (2006) 32 *Journal of Legislation* 142 at 150.

⁸ Ibid.

⁹ For an in depth discussion of the profiles of inmate sex victims and perpetrators, see Man and Cronan op cit (n6) 157-74, and Gear and Ngubeni op cit (n3) 14.

¹⁰ The Jali Commission op cit (n3).

¹¹ The Jali Commission op cit (n3) Chapter 8, 393.

problem in prisons.¹² More recently it was reported that the DCS is in the process of developing a policy framework on the prevention of sexual violence in prisons and that certain procedures have been put in place.¹³

The duty to ensure safe custody and the protection of prisoners, as required by the Constitution of the Republic of South Africa,¹⁴ and the Correctional Services Act (CSA) 111 of 1998,¹⁵ falls squarely on the DCS. The Department has an inescapable duty to take all necessary steps to prevent the sexual victimisation of prisoners by other prisoners and staff.¹⁶ In *B and Others v The Minister of Correctional Services*,¹⁷ the court reiterated that prisoners retain their basic rights – they are not removed by, or inconsistent with, their status as prisoners and that prisoners also retain ‘a substantial *residuum*,¹⁸ of basic rights which cannot be denied’.¹⁹ Based on this, it is argued that where the DCS fails to protect the inherent rights of prisoners that reside within them, it should be held liable for the consequences which result from the relevant infringement.

This article, in two parts, assesses sexual violence and the duty of the state to provide safe custody within the context of imprisonment, and focuses on the implications that the Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereafter the SOA) could hold for male prisoners, both offenders and victims of sexual violence, as well as the DCS. Part 1 focuses on the rights of prisoners in relation to their custodians, focusing on the right to be free from sexual abuse, torture and other ill-treatment. Attention is also given in Part 1 to the nature of sex in prisons, how the concept of ‘gender’ is constructed within the prison context, and identifies the factors contributing to sexual violence within prisons. Part 2 focuses on the SOA and describes the sexual offences enumerated in the legislation

¹² DCS Offender Rape Seminar took place June 30, 2008. In opening remarks, DCS National Commissioner Vernie Peterson said that the Department is developing a policy on sexual violence, available at <http://www.dcs.gov.za/UploadedFiles?COMCSIR.pdf>, accessed on 3 February 2011. Pollsmoor Prison invited US-based NGO Stop Prisoner Rape to conduct a week long seminar with staff, 7-11 July 2008. Author L Muntingh attended the workshop.

¹³ Minutes of the Portfolio Committee on Correctional Services, meeting of 14 April 2010, PMG Minutes, available at <http://www.pmg.org.za/report/20100414-feedback-department-matters-related-their-accountability-management-n>, accessed on 8 February 2011.

¹⁴ Sections 12 and 35(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵ Section 2(b) of the Correctional Services Act 111 of 1998.

¹⁶ See sections 2(b) and 4(2)(a) of Correctional Services Act 111 of 1998.

¹⁷ *B v The Minister of Correctional Services* 1997 All SA 574 (C).

¹⁸ Not author’s italics.

¹⁹ See *B v The Minister of Correctional Services* supra (n17) at para [42]. See also *Whittaker and Morant v Roos and Bateman* 1912 AD 92.

as well as other matters related to the SOA, and assesses the impact that the newly defined offences may have on prisoners as well as the DCS. Lastly, Part 2 makes recommendations for leveraging the SOA as a tool for raising awareness and reducing the rate of sexual violence in prisons, and will shed light on other measures which may be taken in order for the DCS to fulfil its duty to protect individuals in its custody from sexual victimization.

2. The right to be free from sexual violence, torture and other ill-treatment

The marginalisation of prisoners' rights and the political marginalisation of male rape, places prisoners in a particularly vulnerable situation. This double marginalisation stands in sharp contrast to the non-derogable protections afforded by the Constitution,²⁰ namely to be free from all forms of violence,²¹ and the right to be free from torture and ill-treatment.²² Fundamentally, the nature of sex in prisons is shaped by three issues: (1) the loss of power by prisoners due to their confinement, (2) the duty of the state to provide safe custody as required by international law, the Constitution and CSA, and (3) the conceptual tension between consent and coercion. These issues are explored below with particular reference to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) as a theoretical framework.

2.1 The state's duty to provide safe custody

Under international law, states are under the obligation to ensure that persons deprived of their liberty shall be treated with humanity and with due respect for the inherent dignity of the human person. This obligation is laid down in Article 10 of the International Covenant on Civil and Political Rights (ICCPR), as well as in the regional human

²⁰ Section 37 of the Constitution of the Republic of South Africa, 1996 deals with states of emergency and includes a table of non-derogable rights. The protection afforded by the Constitution in respect of certain fundamental rights may thus not be derogated from even during a state of emergency. In particular, and relevant to this discussion, are the rights to be free from torture (s 12(1)(d) of the Constitution of the Republic of South Africa, 1996) and to be free from cruel, inhuman and degrading treatment or punishment (s 12(1)(e) of the Constitution of the Republic of South Africa, 1996).

²¹ Section 12(1)(c) of the Constitution of the Republic of South Africa, 1996.

²² Section 12(1)(d) and 12(1)(e) of the Constitution of the Republic of South Africa, 1996.

rights treaties,²³ and the specific principles and rules on deprivation of liberty.²⁴ The Human Rights Committee, in General Comment No. 21, stressed the link between Articles 10 and 7 of the ICCPR (prohibition of torture), which is also clear from the fact that the American Convention on Human Rights and the African Charter on Human and People's Rights both combine the requirement for the respect for human dignity and the prohibition of torture into the same articles. South African courts have also ruled unambiguously that prisoners are entitled to all personal rights and personal dignity not temporarily taken away by law through imprisonment. Deprivation of *liberty* is the punishment, and other rights must remain intact, only to be balanced for reasonable safety and security measures which are required. Accordingly, all prisoners retain the right to dignity, a founding constitutional value, which implies the respect of autonomy of each prisoner, the right of each prisoner not to be treated less than a human being, and the right not to be treated in a humiliating manner.²⁵ Moreover, the right

²³ Article 10 of the International Covenant on Civil and Political Rights (ICCPR): '1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status', available at <http://www2.obchr.org/english/law/ccpr.htm>, accessed on 3 February 2011. See also Article 5(2) American Convention on Human Rights (ACHR), available at , accessed on 3 February 2011. Article 5 of the African Charter on Human and Peoples' Rights (ACHPR), available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf, accessed on 3 February 2011. See also Articles 12 and 13 of the Third Geneva Convention, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68>, accessed on 3 February 2011. Also see Common Article 3 to the Geneva Conventions, available at <http://www.icrc.org/ihl.nsf/WebART/375-590006>, accessed on 3 February 2011.

²⁴ See Principle 1 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>, accessed on 16 March 2011: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.' and Rule 60(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), available at http://www2.obchr.org/english/law/treatment_prisoners.htm, accessed on 3 February 2011: 'The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.'

²⁵ See *Whittaker and Morant v Roos and Bateman* 1912 AD 92 at para [123], *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at para [20], *Goldberg v Minister of Prisons* 1979 (1) SA 14 at para [39]C-E, *S v Williams* 1995 (3) SA 632 (CC) at para [76]-[77], *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para [142], *Stanfield v the Minister of Correctional Services* 2004 (4) SA 43 (C) at para [89].

to dignity gives rise to the right to freedom and security of a prisoner and the right not to be tortured in any way, or to be treated in a cruel, inhuman or degrading manner.²⁶

The DCS has a clearly legislated duty to provide safe custody to prisoners in its care, as well as to conform to the requirements of international law and constitutional demands.²⁷ It must therefore act proactively to prevent the transgression of human dignity through torture or ill-treatment.²⁸ Any failure to provide custody consistent with conditions that ensure human dignity,²⁹ whether through action or inaction,³⁰ is a breach of that duty and constitutes a violation of prisoners' rights.

Being imprisoned does, however, make a fundamental difference to the choices people are able to exercise, but more importantly, to the obligations imposed on the state. In *B and Others v Minister of Correctional Services* the Court found that the state owed a higher degree of care to prisoners: '[u]nlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment'.³¹ Although the case concerned access to medical treatment, the point is well made that the state has a 'special responsibility' towards prisoners. It is the extent of this special responsibility that is the cause of much debate. The duty to ensure safe custody and prevent torture and ill-treatment brings the issue of sexual violence in prisons within the scope of UNCAT.

2.2 Torture and ill-treatment

2.2.1 Definition of torture and other ill-treatment

Article 1 of UNCAT sets out the definition of torture which requires the satisfaction of three elements before conduct may constitute torture. It also provides for one exclusion. First, the act in question must result in severe mental and/or physical suffering, second, it must be inflicted with intention, and lastly, it must be committed by a public official or with the consent or acquiescence of a public official. However, pain and suffering resulting from, or incidental to, a lawful action does not constitute torture.

²⁶ See previous footnote.

²⁷ Preamble to the Correctional Services Act 111 of 1998.

²⁸ Committee Against Torture, CAT/C/GC/2/CRP.1/Rev. 4 'Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment: General Comment 2' (November 2007) paras [2]-[3], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>, accessed on 3 February 2011.

²⁹ Section 2 of the Correctional Services Act 111 of 1998.

³⁰ The State has a positive duty to protect citizens from preventable harm and is liable for wrongful omissions that result in harm. *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). The police have a positive duty to protect individuals in custody from assault. *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C).

³¹ *B v The Minister of Correctional Services* supra (n17) at 590 para [53].

UNCAT also, in Article 16, prohibits acts that do not meet the requirements of torture in Article 1 but still amount to other ill-treatment. Although there has been some debate on the distinction between torture and cruel and inhuman treatment, there appears to be a growing consensus that the severity test (the intensity of the pain inflicted) is not the defining characteristic, but rather the purpose of the conduct, the intention and the powerlessness of the victim.³² According to Nowak and McArthur, cruel and inhuman treatment or punishment can therefore be defined as the infliction of severe mental or physical pain or suffering,

'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such conduct can both be intentional or negligent, with or without a particular purpose. It does not require the specific situation of detention or direct control of the victim by the perpetrator, which is characteristic only for torture'.³³

The duties to provide safe custody and more particularly to prevent torture and other ill-treatment are articulated in Articles 2,³⁴ and 16,³⁵ of UNCAT. Seen through the lens of UNCAT, a different perspective emerges in respect of sexual violence in prisons and the obligation of the state to prevent it. This has been confirmed by the United Nations Committee against Torture (CAT) in General Comment No. 2, in which the Committee expressly acknowledges men's vulnerability to gender-based violence:

'Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports'.³⁶

Given the gender-neutral definition of rape and sexual violation in the SOA,³⁷ the views of the SRT and CAT are then of particular relevance

³² Report of the Special Rapporteur on Torture op cit (n2) at paras [186]–[187].

³³ M Nowak and E Mc Arthur *The United Nations Convention against Torture – a commentary* (2008) 558.

³⁴ Article 2(1) of UNCAT: Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

³⁵ Article 16(1) of UNCAT: Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

³⁶ Committee Against Torture, General Comment 2 op cit (n28) at para [22].

³⁷ Section 1, 'Definitions', of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

when assessing sexual violence in prisons. The SRT further notes the importance of classifying acts as torture because ‘this carries considerable stigma for the State and reinforces legal implications, which include the strong obligation to criminalise acts of torture’.³⁸ Bringing rape and sexual violence in prisons within the ambit of the definition of torture and other ill-treatment, gives it a particular legal status of great importance. The implications of the above are considerable. As rape and sexual violation are thus recognised as forms of torture, conduct by officials that facilitate or enable, through commission or omission, in any manner of sexual abuse by or of prisoners within prisons, would then also fall within the ambit of torture and cruel, inhuman and degrading treatment as suggested by the SRT.

2.2.2 The role of prison officials in sexual violence

Acts of rape and sexual abuse perpetrated by officials against prisoners would fall squarely within the scope of the absolute prohibition of torture.³⁹ This is because it remains easy, due to the deprivation of liberty, for the offender to exploit the victim’s vulnerability and weakness, and the act leaves deep psychological scars on the victim.⁴⁰ Moreover, the state’s obligations extend beyond that of its own officials and the state has a duty towards non-state actors; in this case to all prisoners. In the prison environment this duty of the state is of particular importance in the relationship between officials and prisoners, especially with those prisoners who victimise other prisoners. The CAT has been clear in this regard:

‘The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene

³⁸ Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/7/3, ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development’ (15 January 2008) para [26], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>, accessed on 4 February 2011.

³⁹ The Jali Commission op cit (n3) Chapter 8, 397.

⁴⁰ Report of the Special Rapporteur on Torture op cit (n38) at para [34]. See also *Aydin v Turkey* (57/1996/676/866) European Court of Human Rights, 25 September 1997, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Aydin%20%7C%7C%20v%20%7C%20Turkeys&sessionId=66043368&skin=hudoc-en>, accessed on 4 February 2011.

to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.⁴¹

The SRT is even more specific in this regard, noting that the Convention, 'goes beyond the traditional concept of State responsibility and includes acts which are not directly inflicted by the State officials, but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture.'⁴²

Furthermore, the rape (or other sexual violation) of a prisoner by an official should be seen as a crime separate and in addition to the crime of torture. The elements of the crime of torture are different from the elements of the crime of rape.⁴³ The elements of the crimes related to rape and sexual violations in the SOA make no mention of causing severe mental or physical suffering; that it is committed intentionally, or that the crime is committed by a public official or with the consent or acquiescence of a public official. Moreover, since rape and sexual violations are inherently unlawful, they cannot arise from, or be incidental to, any lawful action or sanction.

2.2.3 *Deliberate indifference and the role of officials*

What officials do, or do not do, is central to the issue of safe custody and is also within the context of sexual violence in prisons, the notion of 'deliberate indifference' has brought greater clarity to understanding the duties of the state in general and more specifically the duties of individual officials. In the United States Supreme Court case of *Farmer v Brennan*,⁴⁴ the court built on the notion of 'deliberate indifference' as a legal standard for claims of cruel and unusual

⁴¹ Committee Against Torture, General Comment 2 op cit (n28) at para [18].

⁴² Report of the Special Rapporteur on Torture op cit (n2) at para [39].

⁴³ In *Prosecutor v Furundzija* the International Criminal Tribunal for the Former Yugoslavia (ICTY) also drew the distinction between rape and torture and delineates the elements of the crimes respectively (Case no. IT-95-17/1-T), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>, accessed on 16 March 2011 at paras [162] and [185].

⁴⁴ *Farmer v Brennan* (92 – 7247), 511 U.S. 825 (1994), available at <http://supreme.justia.com/us/511/825/case.html>, accessed on 7 February 2011, Dee Farmer was a 21-year-old transsexual with breast implants and a young feminine appearance, yet was placed with a general male population in a high-security male prison.

punishment,⁴⁵ against prison officials in prisoner rape litigation.⁴⁶ In order to establish a violation of the prisoner's right under the Eighth Amendment, the rape victim must satisfy the court that, (1) he is incarcerated under conditions that pose a substantial risk of serious harm, and (2) that prison officials acted with deliberate indifference toward his safety and health by allowing the conditions to be maintained.⁴⁷ Deliberate indifference entails that the prison official knows of a substantial risk to inmate health and safety, and disregards that risk. The prison official must also be aware of the facts from which it can be deduced that a substantial risk toward the prisoner exists, and the prison official must have made that deduction.⁴⁸

The Supreme Court of the United States furthermore highlighted that no duty exists on a prisoner to prove that a prison official acted or failed to act, believing that harm would be caused to the prisoner. It suffices that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. Furthermore, it also suffices that the official simply knows that 'a threat exists' to the prisoner's health or safety, and thus he need not be aware of the precise threat. If the prison official is aware of a threat, it makes no difference whether the prison official knew beforehand precisely who would attack whom.⁴⁹

In the particular case before the Supreme Court it was also not necessary that the petitioner (Farmer) should have given the officials advance warning of the risk. In applying the victim's profile, since Farmer clearly presented as a young female, the court mentioned that adequate evidence existed of harm posed to Farmer when he was placed in a male prison. The court held that one could infer from these facts that prison officials must have known that Farmer was at risk but failed to act accordingly.⁵⁰ Importantly, the court held that because a violation occurs when the prisoner is placed in unsafe conditions,

⁴⁵ 8th Amendment of United States Constitution, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

⁴⁶ Man and Cronan op cit (n6) 131.

⁴⁷ Man and Cronan op cit (n6)133.

⁴⁸ Man and Cronan op cit (n6)134-36.

⁴⁹ Man and Cronan op cit (n6)135. The court mentioned at page 842 that '[W]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.'

⁵⁰ Similarly in *Wilson v Wright* 998 F. Supp. 650 (E.D. Va. 1998) the court found that placing a physically large (1.86 m tall and weighing 132kg) black man serving a sentence for abduction and rape of a 12-year old girl, with a 19-year old white juvenile, weighing a third of his weight, was an action that was deliberately indifferent, see Man and Cronan op cit (n6) 139-140.

the prisoner is entitled to seek judicial relief even before any physical injury is inflicted.⁵¹ On this issue the court thus concluded that the threshold of deliberate indifference is also satisfied by something less than an act or an omission: ‘While *Estelle v Gamble*,⁵² establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.’⁵³

3. The nature of sex in prisons

3.1 Confinement, care and coercion

In the South African prison system confinement is structured in a particular way with reference to time and space. The overwhelming majority of prisoners live in communal cells, which are often severely overcrowded.⁵⁴ Added to this is the fact that prisoners spend very little time outside of their cells.⁵⁵ Once prisoners have been locked up for the night, the prison operates on a skeleton staff complement to provide supervision. Responding to an emergency and unlocking a cell is a time-consuming process regulated by security concerns.⁵⁶ The overwhelming impression is that for the greater part of a day, prisoners are effectively locked up but unsupervised, or minimally supervised. Confinement is furthermore not only regulated by the official regime of the prison, but also by the unofficial regime imposed by the prison gangs, especially in prisons where gangs are entrenched. A prisoner not belonging to one of the powerful ‘number’ gangs, and enjoying the accompanying status and protection, may find himself marginalised in a number of ways and vulnerable to various forms of exploitation.⁵⁷

⁵¹ Man and Cronan op cit (n6) 136.

⁵² *Estelle v Gamble* 429 U.S. 97 (1976), available at <http://supreme.justia.com/us/429/97/case.html>, accessed on 7 February 2011.

⁵³ *Estelle v Gamble* supra (n52) at 92 – 7247.

⁵⁴ By March 2010, 55% of the South African prisoners were accommodated in prisons that were 150% or more full. (statistics supplied to authors by Judicial Inspectorate of Correctional Services).

⁵⁵ Prisoners are normally unlocked at 07h30 in the morning and locked up again by 15h00, or earlier. This does, however, not mean that they are necessarily outside of their cells during that period; it is more likely that the minimum of one hour outside exercise per day, as required by law, is what the norm is in fact. For all intents and purposes it can be assumed that prisoners are locked in their cells from at least 15h00 to 07h30 the next morning; a period of at least 16 hours.

⁵⁶ See procedure set out in the Department of Correctional Services: B-Order 2 (2004) Chapter 12.

⁵⁷ Gear and Ngubeni op cit (n3) 5 & 16.

Against this background a key conceptual tension merges: sex in prisons appears to exist on a continuum of consent and coercion, and with consent often manufactured under the threat of coercion. First-time prisoners are often tricked and manipulated into providing sex in exchange for cigarettes, protection or other commodities.⁵⁸ Lacking the ‘street-smarts’, they accept a gift or protection only to discover that this must be ‘paid for’ later. Fearing violence, an individual may give consent, but this is not out of free will but rather out of a will to survive. It furthermore appears that sexual violence and coercion range from opportunistic events of victimisation, to long-term ‘prison marriages’ between men.⁵⁹ Untangling consent and coercion, not only in relation to a particular incident, but in the broader context of sex in prisons, raises complex questions in respect of law enforcement, protecting victims and prosecuting perpetrators.

Three modes of sexual practices have been identified. The first, and seemingly most prevalent mode, relates to sex inside power-defined ‘prison marriages’.⁶⁰ This is because prison marriages reportedly provide the ‘most common site of sexual interaction between prisoners’, and is ‘sanctioned and institutionalized by inmate power structures’.⁶¹ Sex inside ‘prison marriages’ will be discussed in greater detail below. Sex in the form commonly referred to as ‘*unchincha ipondo*’ (to exchange a pound) is a second mode, where each participant in the sex act exchanges sexual favours with the other. This mode contrasts sharply with the first mode in the sense that here, the sexual activity is mutual and consensual,⁶² and is often between lower ranking gangsters, ‘wives’, and non-gangsters who exchange sexual favours with each other for gratification. In this mode therefore, it is not only one man who penetrates the other, as in the ‘prison marriage’ setting,⁶³ but both participants usually take turns to penetrate each other. The third mode is similar to the second and thus also consensual, but relates more to matters where participants share feelings of love, care or affection toward each other. It differs from ‘*unchincha ipondo*’, in the sense that the former does not necessarily involve passionate feelings and is aimed more at sexual gratification.⁶⁴ From this basic categorisation, it appears then that male rape occurs most commonly in ‘prison

⁵⁸ Gear and Ngubeni op cit (n3) 19–21.

⁵⁹ Gear and Ngubeni op cit (n3) 40.

⁶⁰ Gear and Ngubeni op cit (n3) 10.

⁶¹ Ibid.

⁶² Gear and Ngubeni op cit (n3) 48.

⁶³ Ibid.

⁶⁴ Gear and Ngubeni op cit (n3) 52–53.

marriage' settings. It should however be noted that this may or may not be preceded by more opportunistic attacks in order to establish such a 'marriage'.

3.2 Male rape and sexual violence in prisons

Rape is the most egregious form of sexual violence in prisons and can happen quickly through intimidation and violence. Victims often also submit to the act in the absence of violence but with the imminent threat thereof.⁶⁵ In a prison setting, rape is generally open, condoned, often encouraged and usually involves repeated assaults after the initial rape.⁶⁶ The victim is forced into a system of 'perpetual abuse' and must therefore unwillingly devote his existence to servicing his rapists for years after the first violation.⁶⁷ Prison rape may take many forms, and the most brutal form is gang rape.⁶⁸ Anal penetration, oral penetration and thigh sex are dominantly practiced. Insertion of objects into the anus often occurs during the rape.⁶⁹

Prison rape, as is the case with rape in other settings, is less of a sexual act than an act of violence, domination and exhibition of power.⁷⁰ It is perpetrated in order to achieve ultimate humiliation over the victim, to establish dominance, and furthermore, to validate the manhood of the perpetrator through the 'sexual conquest'.⁷¹ A 'man' in prison is identified by his ability to (sexually) subdue another male prisoner, and the degree of satisfaction obtained by the perpetrator is often in direct proportion to the degree of force and humiliation that the victim has been subjected to.⁷²

The act of rape also plays an important role in structuring prison society, and for creating the hierarchy of 'manliness' in which prisoners function.⁷³ Senior gang members gain financially, sexually, psychologically, as well as politically, through the sexual violation of other prisoners.⁷⁴ Prison officials are also known to use the threat of male rape to 'divert prison aggression, destroy potential leaders,

⁶⁵ Gear and Ngubeni op cit (n3) 21.

⁶⁶ P Mashabela 'Victims of Rape and Others Forms of Sexual Violence in Prisons' paper submitted for the *XIth International Symposium on Victimology* (13-18 July 2003) 4.

⁶⁷ GJ Knowles 'Male prison rape: A search for causation and prevention' (1999) 38(3) *Howard Journal of Criminal Justice* 267.

⁶⁸ E Harvey *Rape in Prison: An intervention by Rape Crisis at Pollsmoor Prison* (2002) 4.

⁶⁹ Ibid.

⁷⁰ Harvey op cit (n68) 1.

⁷¹ Knowles op cit (n67) 274.

⁷² Ibid.

⁷³ Harvey op cit (n68) 4.

⁷⁴ Knowles op cit (n67) 275.

and intimidate prisoners into becoming informers.⁷⁵ While individual perpetrators and corrupt officials are also implicated, gangs are, to a large extent, the architects and functionaries of institutionalised sexual violence that permeates prison life. By intertwining rape and coerced sex with initiation rituals and hierarchical structures,⁷⁶ gangs effectively create and control sex as a ‘commodity within the prison economy.’⁷⁷ While gangs are the main architects of sexual violence in prisons, it must be accepted that there are some individuals who will commit sexual violence outside of the gang structure and without permission from gang leadership.

3.3 Construction of gender

A reportedly common form of sexual relations in prisons is power-defined ‘prison marriages’, as noted in section 3.1 above. Depending on the prisoner’s role in the sexual act, the participants are identified – through prison culture ‘gender reconstruction’ – as either the ‘husband’ or the ‘wife’.⁷⁸ The first sexual encounter of the ‘wife’ is in most instances through rape or gang rape, which ultimately subdues him.⁷⁹ Other methods include the use of fear and intimidation, manipulation, threat to use violence, tact, and denial of basic necessities, in order to subjugate the weaker prisoner.⁸⁰ Where the feminised gender role is imposed on a prisoner, control is exercised over him by his masculinised counterpart.⁸¹ He is perceived as the wife (the female identity) and is at all times the subservient personality. Only the ‘wife’ is sexually penetrated and is primarily deemed the sexual property of his husband and must sexually satisfy his husband when called upon.⁸² Other duties are generally allocated to him as well, such as seeing to the domestic needs of his husband by washing his clothes, keeping the cell clean, and in certain instances he must use sex to seduce other inmates or officials, in order to achieve an objective for the gang.⁸³ Gear and Ngubeni note however, that prison subculture is fiercely homophobic and that prison marriages are not the same as

⁷⁵ Ibid.

⁷⁶ Steinberg op cit (n3) 21 & 31.

⁷⁷ Gear and Ngubeni op cit (n3) 19.

⁷⁸ Gear and Ngubeni op cit (n3) 9.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Gear and Ngubeni op cit (n3) 37.

⁸² S Gear ‘Rules of engagement: Structuring sex and damage in men’s prisons and beyond’ (2005) 7(3) *Culture, Health and Sexuality* 199.

⁸³ Gear and Ngubeni op cit (n3) 38.

same-sex relationships. The female identity is deliberately constructed to serve the male party to the marriage.⁸⁴

3.4 Factors contributing to prison sexual violence

Multiple factors facilitate the prevalence of sexual violence in prisons. Critical amongst them is the general lack of active supervision of prisoners by staff due to overcrowding, high prisoner to warder ratios and long lock-up periods. Further, the DCS does not have a comprehensive policy on the prevention of sexual violence in place either, and officials at operational levels are thus uncertain about how to prevent sexual violence and how to respond to reports of sexual violence; assuming that they are willing to do so.⁸⁵ The reporting of incidents is furthermore undermined by a 'culture of silence' subscribed to by both prisoners and staff. Prisoners are reluctant to report rapes due to fears of reprisal. Corruption, official indifference, poor response time, lack of knowledge by staff on how to respond, inadequate reporting mechanisms, and collusion between officials and gang leaders further aggravate the problem. Access to medical staff may also be restricted due to the shortage of nurses in the department.⁸⁶ The DCS internal complaints mechanism for prisoners (the G365 register) has also been shown as an ineffective mechanism for dealing with serious and sensitive complaints, and prisoners generally lack confidence in it.⁸⁷

4. Conclusion

Rape and other forms of sexual assaults, as has been shown above, can constitute acts of torture and other ill-treatment as defined by UNCAT. As noted by the SRT, rape constitutes an act of torture when it has been carried out with the instigation of, or with the consent of, or through the acquiescence, of a public official. The prohibition of torture furthermore has the enhanced status of *ius cogens* under international law. Because of the absolute prohibition of torture, no state

⁸⁴ Gear and Ngubeni op cit (n3) 12.

⁸⁵ Law Society of South Africa *Prison Report 2003* (2004) 6. The most recent information indicates that the DCS has developed a draft framework on sexual violence and that certain procedures have been put in place but that this does not, as yet, constitute a comprehensive policy. (Portfolio Committee on Correctional Services, 14 April 2010, available at <http://pmg.org.za/report/20100414-feedback-department-matters-related-their-accountability-management-n>, accessed on 30 June 2010)

⁸⁶ The Department of Correctional Services Annual Report of 2008, available at <http://www.dcs.gov.za/Publications/Annual%20Reports/DCS%20Annual%20Report%202008.pdf>, accessed on 8 February 2011, 152 lists a vacancy rate for nurses at 34.6%. Thus only 65% of nursing positions are filled.

⁸⁷ Law Society of South Africa op cit (n85) 44.

is permitted to excuse itself from the application of the peremptory norm. The absoluteness of the ban means that it applies regardless of the status of the victim and the circumstances, be it a state of war, siege, emergency, or whatever.⁸⁸ It therefore does not matter that a rape in prison occurred after lock-up time, or that there were too few officials on duty for the number of prisoners to be supervised.

The duty to provide safe custody and protect the dignity of people deprived of their liberty rests with the state. Importantly, this is an active and progressive duty placing the emphasis on managing risks and preventing torture and ill-treatment, as required by Articles 2 and 11 of UNCAT. The state is furthermore not only responsible for its own officials but also for the actions of non-state actors (i.e. other prisoners) when torture and other forms of ill-treatment have been perpetrated. Officials who deliberately create a risk situation or are aware of a risk situation, but fail to act to prevent the attack, must be held liable. The central issue is that officials may not be indifferent to the known, an-

⁸⁸ Article 4(1) of the ICCPR; Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 'General Comment No. 29, States of Emergency (Article 4)' (31 August 2001), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361), accessed on 8 February 2011; Article 27 of the ACHR; Article 15 of the European Convention for the Protection of Human Rights (ECHR). Report of the Human Rights Committee, A/61/40, Vol. I, chapter IV (2006) at para [76](15): 'The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant.' See also, *inter alia*, European Court of Human Rights, *Chahal v United Kingdom*, Judgment, 15 November 1996, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item+bbkm&action=html&highlight=chahal%20%7C%20v%20%7C%20united%20%7C%20kingdom&sessionid=66210125&skin=budoc-en>, accessed on 8 February 2011 at paras [76]-[80]; United Nations Human Rights Committee, CCPR/C/CAN/CO/5, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Canada' (20 April 2006) para [15], available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.CAN.CO.5.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.CAN.CO.5.En?OpenDocument), accessed on 8 February 2011; UN Committee against Torture, *Paez v Sweden* (1997), Communication No. 39/1996 at para [14.5]; Supreme Court of Israel, *Judgment concerning the legality of the General Security Service's interrogation methods*, (6 September 1999), para [23], available at <http://www.jstor.org/stable/pdfplus/20693943.pdf>, accessed on 11 February 2011; Article 3 of the *United Nations Declaration on Torture* (1975), available at <http://www.cirp.org/library/ethics/UN-torture/>, accessed on 11 February 2011; Article 2(2) of the *Convention against Torture* (1984); European Court of Human Rights, *Aksoy v Turkey* (1996) at para [62], available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item+1&portal+bbkm&action+html&highlight+aksoy%20%7C%20v%20%7C%20turkey&sessionid=66268561&skin=budoc-en>, accessed on 9 February 2011; World Conference on Human Rights, A/CONF.157/23, 'Vienna Declaration and Programme of Action' (12 July 1993) para [60], available at [http://www.unhcr.ch/buridocda/buridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/buridocda/buridoca.nsf/(symbol)/a.conf.157.23.en), accessed on 8 February 2011. See further NS Rodley *The Treatment of Prisoners Under International Law* (2ed) (1999) 54-55, 64-65, 73-74, 78-84.

ticipated or reasonably expected risks that a prisoner may face in the particular custody situation. Their duty is quite the opposite, namely to actively intervene and prevent what could happen.

Despite the uncertainties about the prevalence and exact nature of sexual violence in prisons in South Africa, it must be accepted that it is regrettably common and that it poses a real and present danger to the safety and dignity of many prisoners every day. However, prison rape is frequently ignored or worse, it is regarded as one of the accepted pains of imprisonment and the victim deserving of his lot. The SOA does provide some measures that, if successfully implemented, should at least give proper recognition to the victims of male rape in prisons.