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OBEDIAH MAKONI

v

**(1) COMMISSIONER OF PRISONS
(2) MINISTER OF JUSTICE LEGAL & PARLIAMENTARY
AFFAIRS**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GWAUNZA JCC, GARWE JCC,
HLATSHWAYO JCC, PATEL JCC, MAVANGIRA JCC,
BHUNU JCC, UCHENA JCC, CHITAKUNYE AJCC
HARARE, JANUARY 27 & JULY 13, 2016**

T. Biti, for the applicant

M. Chimombe, for the respondents

PATEL JCC: The applicant in this matter was convicted of the murder of his girlfriend. Because of extenuating circumstances, he was sentenced to life imprisonment. He was aged 19 at the time of his conviction and has been in gaol since 1995 for almost 21 years. The gravamen of his application is that life imprisonment without the possibility of judicial review or parole is unconstitutional.

The applicant avers that his dignity and expectations have been crushed. Despite his excellent behaviour whilst in prison, which behaviour is acknowledged and conceded by the respondents, he has absolutely no hope of any amnesty or release from prison. He further avers that the conditions in Zimbabwean prisons are horrendous due to prevailing

economic constraints. This compounds the psychological stress of knowing that he will never be released. He notes that Part XX of the Prisons Act [*Chapter 7:11*] allows for the release on parole of prisoners on extended imprisonment. However, there is no similar administrative process in place for prisoners serving life sentences. In any event, the grant of parole should not be left to executive discretion but should be subjected to mandatory judicial review after the lapse of 10 years imprisonment.

The applicant accordingly seeks a *declaratur* that a life sentence imposed without the possibility of parole amounts to inhuman and degrading treatment and constitutes a violation of human dignity in breach of ss 51 and 53 of the Constitution. He also seeks a *declaratur* that ss 112, 113, 114 and 115 of the Prisons Act contravene s 56 of the Constitution and that his further incarceration in prison is in breach of his rights under ss 49, 51 and 53 of the Constitution. In the event, he applies for an order requiring the respondents to release him from prison forthwith.

The first respondent, the Commissioner of Prisons, points to the possibility of reprieve for life prisoners through presidential pardon or commutation of sentence available under s 121 of the Prisons Act. He avers that the nature of a life sentence requires executive rather than judicial review. Although this process is different from release on parole, there is no discrimination between life prisoners and others because of the availability of executive reprieve. The Commissioner accepts that prison conditions in Zimbabwe are not ideal due to current economic hardships. However, they meet the

requisite needs of prisoner correction and rehabilitation. At any rate, poor prison conditions cannot be relied upon to escape criminal liability.

The second respondent is the Vice-President who is also responsible for the administration of justice, legal and parliamentary affairs. He refers to s 112 of the Constitution which empowers the President to grant pardons or vary life sentences. He avers that this provision affords the applicant the hope of release from prison and that, therefore, there is no violation of his constitutional rights. The alternative of parole for life prisoners would serve to trivialise the heinous crimes which they have committed and which society abhors. He further contends that the judiciary cannot arrogate to itself the power to review life sentences without legislative authority to do so.

In response, the applicant invokes s 227(1) of the Constitution which calls for the rehabilitation of offenders and their reintegration into society. This overrides the concurrent objectives of retribution and deterrence which have now become secondary in penological theory. As regards the available options of executive reprieve, he accepts that the process of parole under the Prisons Act is reviewable. However, the refusal of executive pardon under the Constitution is not justiciable. This remedy is subject to executive whim and is therefore inadequate. Moreover, it is not effectively utilised in practice. Lastly, the applicant avers that this Court is the legitimate constitutional watchdog and does not require executive or legislative authority in order to adjudicate in the interests of justice.

Having regard to the respective arguments of the parties and the relief sought by the applicant, I perceive the issues for determination *in casu* to be the following:

- Whether a life sentence imposed without the possibility of parole constitutes a violation of human dignity or amounts to inhuman or degrading treatment in breach of sections 51 and 53 of the Constitution.
- Whether sections 112, 113, 114 and 115 of the Prisons Act are unconstitutional to the extent that they exclude whole life prisoners from the parole process and thereby contravene the right to equal protection and benefit of the law under section 56 of the Constitution.
- Whether the further incarceration of the applicant amounts to a breach of his rights to liberty, human dignity and protection against inhuman or degrading treatment under sections 49, 51 and 53 of the Constitution.
- In the event of an affirmative answer to any or all of the foregoing, the nature and extent of the relief that should be granted to the applicant, *i.e.* his immediate release from prison or some other appropriate remedy.

Human Dignity and Inhuman or Degrading Treatment

Section 51 of the Constitution enshrines the right to human dignity in the following terms:

“Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.”

The inevitable corollary of human dignity, *viz.* freedom from torture and similar ill-treatment, is guaranteed by s 53 of the Constitution:

“No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.”

Mr. *Biti*, for the applicant, contends that conditions in our prisons are so deplorable as to be intolerable and that fact in itself renders a life sentence in contravention of the fundamental rights of whole life prisoners. Mr. *Chimombe*, for the respondents, accepts that prison conditions are not perfect but counters that this alone cannot be a ground for holding a life sentence to be inhuman and degrading.

In *Kachingwe & Others v Minister of Home Affairs & Another* 2005 (2) ZLR 12 (S), the Supreme Court had occasion to inspect the conditions in police holding cells at High lands Police Station. It was held that detention under those conditions amounted to inhuman and degrading punishment in violation of s 15(1) of the former Constitution. Mr. *Biti* argues that the conditions in Chikurubi Prison, as described by the applicant, are not dissimilar to those obtaining in *Kachingwe's* case and should therefore be similarly denounced by this Court.

As a preliminary interpretive point of departure, it is necessary to recognise the special status enjoyed by the rights and freedoms guaranteed by ss 51 and 53 of the Constitution. By virtue of paras (b) and (c) of s 86(3), no law may limit and no person may violate, *inter alia*, the right to human dignity and the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment. What this means is that these two rights are inviolable. They cannot be circumscribed by reference to the

rights and freedoms of others as envisaged by s 86(1). Furthermore, they are not derogable by dint of any law of general application contemplated under s 86(2).

A further guide to the interpretation of the Declaration of Rights as a whole is afforded by paras (c) and (e) of s 46(1) in the specific context of international law and foreign law. In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution, courts and tribunals must take into account international law and all treaties and conventions to which Zimbabwe is a party and may, where appropriate, consider relevant foreign law. Furthermore, insofar as concerns statutory interpretation generally, the courts are enjoined by s 326(2) of the Constitution to interpret legislation in a manner that is consistent with international customary law. In similar vein, s 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe.

Turning to case authorities from other jurisdictions, the decision of the Namibian Supreme Court in *State v Tcoeib* (1996) 7 BCLR 996 (NmS) is particularly germane to the applicant's position. At 1004-1005, MAHOMED CJ observed as follows:

“..... there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or

become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at state expense constitutes a cruelty which can no longer be defended in the public interest. To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy

..... It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity."

In the South African case of *State v Bull & Another* 2002 (1) SA 535 (SCA) at 552 (para. 23), the court adopted a similar approach and noted that the possibility of parole saves a whole life sentence from being cruel, inhuman and degrading punishment. In a case emanating from Mauritius, *de Boucherville v The State of Mauritius* [2008] UKPC 37, the Judicial Committee of the Privy Council dealt with an irreducible life sentence from a different perspective. Having noted that the legislative provisions for parole and remission did not apply to a prisoner in penal servitude, leaving him without hope of release for the rest of his life, the Committee held that the sentence imposed was so manifestly disproportionate and arbitrary as to contravene the right to a fair trial and procedural safeguards for prisoners. The Committee considered that a whole life sentence must allow for the prisoner to appreciate from the outset the possibility and timing of his sentence being reviewed.

The European Court of Human Rights has dealt with several cases involving the compatibility of whole life sentences with specific provisions of the European Convention on Human Rights. Of particular concern is Article 3 of the Convention which prohibits torture and inhuman and degrading treatment. In *Dickson v The United Kingdom* (2007) ECHR (44362/04), the Grand Chamber underscored the role of rehabilitation as follows:

“In recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe’s legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the ‘progression principle’: in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.”

Again, in *Vinter & Others v The United Kingdom* (2013) ECHR (66069/09, 130/10, 3896/10), at paras. 111-114, the Grand Chamber further expounded the integral relationship between rehabilitation and the prospect of release:

‘It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in *Bieber* and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and

unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in *Wellington* – a poor guarantee of just and proportionate punishment.

Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”

A comparative survey of international law further fortifies the point that penological theory has evolved from sentencing as a tool of retribution to one of rehabilitation and the re-socialisation of prisoners. Thus, Article 10 of the International Covenant on Civil and Political Rights (1976), in its relevant portions, declares that:

- “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

This position is echoed by the United Nations Human Rights Committee in CCPR General Comment No. 21 (1992) relative to Article 10:

“No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.”

The International Covenant on Civil and Political Rights (1976) as well as its counterpart International Covenant on Economic, Social and Cultural Rights (1976) were both acceded to by Zimbabwe in May 1991. This was after the introduction, through s 17 of Act No. 23 of 1987, of s 111B(1)(a) of the former Constitution which rendered any treaty or international convention concluded by the Executive subject to parliamentary approval. However, this requirement of parliamentary approval was specifically

excluded, by s 12(2) of Act No. 4 of 1993, in respect of any treaty or convention concluded before November 1993. Both Covenants are therefore binding upon Zimbabwe and fall into the category of treaties that must, in conformity with s 46(1)(c) of the current Constitution, be taken into account in interpreting the Declaration of Rights.

The principal international instrument on the regulation of prisons is contained in the Standard Minimum Rules for the Treatment of Prisoners, which were adopted by a United Nations Congress in 1955 and subsequently approved by its Economic and Social Council in July 1957 and May 1977. The preamble to the Rules makes it clear that they are not intended to detail a model system of penal institutions. Rather:

“They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.”

In relation to prisoners under sentence, the guiding principles are set out in Rules 56 to 64. In summary, they emphasise the following tenets: the prison system should not aggravate the suffering inherent in the deprivation of liberty; the prisoner should be able to lead a law-abiding and self-supporting life upon his return to society; the institution should seek to address the individual treatment needs of the prisoners; the institution should respect the dignity of prisoners as human beings; steps should be taken to ensure for the prisoner a gradual return to life in society; the treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it; the institution should detect and treat any mental or physical illnesses or defects that hamper

a prisoner's rehabilitation; institutions should endeavour to achieve the individualisation of prisoner treatment.

On 17 December 2015, the General Assembly adopted Resolution 70/175, titled the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The 2015 Rules are designed to revise the original 1957 Rules so as to reflect recent advances in correctional science and best practices as well as major developments in human rights and criminal justice since 1957. The 2015 Rules pertaining to prisoners under sentence, *i.e.* Rules 86 to 90, are essentially similar to those contained in the precursor 1957 Rules. However, in the section dealing with rules of general application, the 2015 Rules incorporate certain basic principles that are novel in their emphasis on human dignity and the need to safeguard that dignity through appropriate corrective measures. In particular, Rules 1 and 4 state as follows:

“1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”

“4. The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. These purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.”

The status of General Assembly resolutions was considered by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 226, at para. 70:

“The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinion juris*. [A] series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of new rule.”

With reference to “soft law” generally, John Dugard: *International Law* (4th ed.) at pp 33-34, observes that such law constitutes:

“imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of ‘law’. The passage of time and state practice in support of such a standard may convert it into a customary rule, but until this occurs it serves as a useful guide to state conduct.”

In normative terms, the Standard Minimum Rules of 1957 are generally considered to be “soft law” and cannot be equated to obligations under a treaty or convention. The same applies to the successor Rules of 2015. As such, they are not legally binding on member States of the United Nations. Nevertheless, the general consensus amongst States is that they are highly persuasive in influencing and regulating the treatment of prisoners and the administration of penal institutions generally. They are regarded as being the primary source of standards relating to treatment in detention and as the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners.

Some of the principles embodied in the 1957 and 2015 Rules are now recognised and replicated in s 50 of the Constitution which elaborates the rights of arrested and detained persons. Thus, in terms of s 50(1)(c), any person who is arrested “must be treated humanely and with respect for their inherent dignity”. More specifically, s

50(5)(d) provides that any person who is detained, including a sentenced prisoner, has the right “to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment”. Very significantly, s 50(8) stipulates that “an arrest or detention which contravenes this section, or in which the conditions set out in this section are not met, is illegal”.

The traditional approach to punishment for serious offences is derived from the Roman *lex talionis* and its equivalents in other ancient societies, whereby justice is to be attained through the exaction of an eye for an eye, a tooth for a tooth and a life for a life. The new Constitution ushers in a fundamental departure from this archaic retributive approach to one of social reintegration. This is emphasised in s 227(1) which articulates the rehabilitative functions of the Prisons and Correctional Service:

- ‘There is a Prisons and Correctional Service which is responsible for—
- (a) the protection of society from criminals through the incarceration and rehabilitation of convicted persons and others who are lawfully required to be detained, and their reintegration into society; and
 - (b) the administration of prisons and correctional facilities.”

The regional and European case authorities that I have cited earlier all point to the conclusion that whole life imprisonment, without rehabilitative treatment coupled with the possibility of release, is tantamount to inhuman and degrading treatment in contravention of the relevant constitutional and conventional rights. Similarly, all the international instruments alluded to above, *viz.* the 1976 Covenant and the Standard Minimum Rules of 1957 and 2015, capture the essentially twofold purpose of penal

servitude as it has developed over the years within the broad framework of societal protection: firstly, the infliction of a punishment that is condign to the nature and gravity of the crime committed; secondly, the rehabilitative reorientation of the offender to render him fit and suitable for societal reintegration as a law-abiding and self-supporting citizen. These two objectives are intrinsically interconnected, so that the unavoidable cruelty of incarceration without the correlative beneficence of rehabilitation would unnecessarily aggravate and dehumanise the delivery of corrective justice. In short, every prisoner should be able to perceive and believe in the possibility of his eventual liberation after a period of incarceration befitting his crime and his capacity for reformation.

Having regard to our own constitutional provisions, *viz.* ss 50 and 227(1) which establish revised liberal guidelines on the treatment of prisoners and the rehabilitative responsibilities of correctional institutions, I see no reason to depart from the foreign and international jurisprudence that has developed on the subject over the past sixty years. I accordingly conclude that an irreducible life sentence without the possibility of release in appropriate circumstances, constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of ss 51 and 53 of the Constitution.

For the sake of completeness, it is necessary to mention in passing section 344A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which stipulates that:

“Subject to any other law, the effect of a sentence of imprisonment for life imposed on or after the date of commencement of the Criminal Procedure and

Evidence Amendment Act, 1997, shall be that the person so sentenced shall remain imprisoned for the rest of his life.”

The first point to be made is that the constitutionality of this provision has not been challenged *in casu*. This is because the applicant himself was convicted and sentenced to life imprisonment in 1995, before the promulgation and commencement of s 344A. As is quite correctly accepted by both counsel, this provision cannot be applied with retrospective effect to the applicant and, therefore, it has no direct bearing on his fundamental rights. The second point is that the provision is expressly made “subject to any other law”. That being so, its constitutionality may well be saved and remain intact by virtue of such other law which applies or which is interpreted to apply so as to override or negate its explicit import and effect, *viz.* that life means for life. Apart from these *obiter* observations, the conclusion that I have arrived at in relation to the applicant’s case does not specifically apply to the constitutionality of s 344A. Nevertheless, I would simply add that, if and when the question should arise for determination, the same conclusion would probably be inescapable.

Equal Protection and Benefit of the Law

Section 56(1) of the Constitution guarantees the right to equality and equal protection in the following terms:

“All persons are equal before the law and have the right to equal protection and benefit of the law.”

The remaining provisions of s 56 pertain to gender equality and the right not to be treated in an unfairly discriminatory manner on specified grounds that are irrelevant to

the questions at hand. What is in issue in the present matter is the legality of differentiation in treatment as between different categories of persons who are imprisoned.

The applicant contends that certain provisions contained in Part XX of the Prisons Act, in particular, ss 112, 113, 114 and 115, are unconstitutional to the extent that they exclude whole life prisoners from the parole process and thereby contravene the right to equal protection and benefit of the law under s 56(1) of the Constitution. The respondents argue that the Prisons Act properly differentiates between serious and trivial offenders. Thus, a different system is in place for life and death row prisoners who are dealt with under section 121 of the Act in conjunction with s 112 of the Constitution. These sections provide for executive clemency and constitute an adequate remedy in the instant case. However, as regards the prerogative of clemency, Mr. *Chimombe* was unable to provide any statistics as to how many life prisoners have actually been released under that system. Moreover, he accepts that this process lies entirely within the realm of executive discretion and is therefore not justiciable.

Section 112 of the Prisons Act establishes the Prisoners Release Advisory Board. It also provides for the composition, functions and proceedings of the Board, the tenure of office of its members and their terms and conditions of office. The principal functions of the Board are to consider cases involving the release of prisoners and to make recommendations for that purpose. In my view, there is nothing intrinsically

objectionable in these provisions of s 112 *per se* that might invite constitutional censure, whether under s 56(1) of the Constitution or otherwise.

Section 113 of the Prisons Act establishes the Parole Board and prescribes its composition, the tenure and terms of office of its members and its proceedings. In terms of s 113(5), the primary function of the Parole Board is to consider the cases of prisoners who are serving sentences of extended imprisonment and to make reports to the Minister (the second respondent) as to the treatment and release on licence of such prisoners. The phrase “extended imprisonment” is defined in s 2 of the Act to mean extended imprisonment imposed in terms of s 346 of the Criminal Procedure and Evidence Act, *i.e.* a sentence of imprisonment, ranging from a minimum of seven years to a maximum of twenty years, imposed upon habitual offenders convicted of very serious offences specified in the Seventh Schedule to that Act.

Section 114(1) of the Prisons Act enjoins the Parole Board to consider and report on the case of each prisoner who is serving a sentence of extended imprisonment, at regularly prescribed intervals or at any other times that the Board thinks appropriate. In terms of s 114(2), when making a report to the Minister as to the release of any prisoner, the Board must have regard to all the relevant circumstances of the case and of the prisoner. In particular, it must consider the number and nature of the offences committed by the prisoner, the period during which the prisoner has been detained, the behaviour of the prisoner while in prison, the likelihood of the prisoner leading a useful and law-abiding life outside prison, and the need to protect the public. Thereafter, s 114(3)

requires the Board to inform the prisoner whether or not it has recommended his release and, if it has not recommended his release, to inform him briefly of the reasons why no such recommendation was made.

Subsections (1) and (3) of s 115 of the Prisons Act empower the Minister, after consultation with the Parole Board or the Advisory Board, as the case may be, to release a prisoner on licence, for such period and subject to such conditions as may be specified in the licence. This power applies to “any convicted prisoner, including a prisoner who has been sentenced to periodical or extended imprisonment, other than a prisoner who has been sentenced to death or to imprisonment for life” (my emphasis). Subsections (2) and (4) of s 115 enable the Minister, at any time but subject to consultation with the relevant Board, to amend, cancel or add to any of the conditions of a licence or to cancel a licence and direct that the person concerned be returned to a prison.

Section 121, which appears in Part XXI of the Prisons Act, governs the reporting procedure on long term prisoners with reference to the power of mercy exercisable under s 112 of the Constitution. Section 121(1a) of the Act deals specifically with prisoners undergoing imprisonment for life. It enjoins the Commissioner (the first respondent) to prepare a report at the end of every five years after the first ten years served by each life prisoner. The Commissioner must forward every such report to the Minister “who may, if he thinks fit, submit it to the President”. Section 121(2) requires the Commissioner to supply more frequent reports if so requested by the Minister. It also requires the

Commissioner to arrange for compliance with any instructions as to pardon, respite, reprieve, commutation or remission of sentence given by the President.

Section 112(1) of the Constitution empowers the President, after consultation with the Cabinet, to exercise the power of mercy, *i.e.* to grant a pardon or respite from the execution of any sentence, or to substitute or suspend or remit the whole or part of a sentence. In so doing, the President may impose conditions on any such pardon, respite, substitution or suspension.

Several critical points arise for consideration from the foregoing provisions of the Prisons Act and the Constitution. First and foremost, the reporting requirements and the possibility of release on parole or licence under ss 113, 114 and 115 of the Act are largely restricted to the situation of prisoners serving sentences of extended imprisonment. They explicitly exclude from their ambit those prisoners who are sentenced to imprisonment for life. Such prisoners cannot be released on parole or licence.

Secondly, to the extent that life prisoners may be considered for clemency under s 121 of the Act, the reporting obligation imposed upon the Commissioner is mandatory, but the consequential power conferred upon the Minister to take the matter further is clearly discretionary. Thirdly, even if the Minister should deign to submit a recommendation for the release of any prisoner to the President, there is no assurance that such release will be forthcoming. The power of mercy reposed in the President under s 112 of the Constitution, although exercisable after consultation with the Cabinet, is

entirely discretionary. Equally significantly, unlike the powers of release conferred upon the Minister under s 115 of the Act, it constitutes a prerogative power that is not ordinarily justiciable: *Nkomo & Another v Attorney-General & Others* 1994 (3) SA 34 (ZS) at 37; *Woods v Commissioner of Prisons & Another* 2003 (2) ZLR 421 (S) at 435C-E. In short, it does not afford adequate redress for the purpose of enforcing the Declaration of Rights.

The critical aspect of the reducibility or otherwise of a life sentence was considered by the Grand Chamber of the European Court of Human Rights in *Kafkaris v Cyprus* (2008) ECHR (21906/04), at paras. 98-99, as follows:

“In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court’s case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. The Court has held, for instance, in a number of cases that where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, that it could not be said that the life prisoners in question had been deprived of any hope of release. The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited. It follows that a life sentence does not become ‘irreducible’ by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible.

Consequently, although the Convention does not confer, in general, a right to release on licence or a right to have a sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination, it is clear from the relevant case-law that the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3. In this context, however, it should be observed that a State’s choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries

out at European level, provided that the system chosen does not contravene the principles set forth in the Convention.”

In *Vinter's* case (*supra*), the European Court reiterated that the imposition of a whole life sentence for especially serious crimes was not in itself incompatible with Article 3, so long as the sentence is *de jure* and *de facto* reducible. Thus, in order to be compatible with Article 3, a life sentence must include the possibility of review and the prospect of release.

The same concerns were expressed by Mahomed CJ in *Tcoeib's* case (*supra*) at 1006:

“The nagging question which still remains is whether the statutory mechanisms to which I have referred, constitute a sufficiently ‘concrete and fundamentally realisable expectation’ of release adequate to protect the prisoner’s right to dignity, which must include belief in, and hope for, an acceptable future for himself.”

Consequently, having found, at 1007, that the statutory arrangements were not arbitrary or unpredictable, because the parole and release boards were required to act impartially, in accordance with the law and subject to the supervision of the courts, it was concluded, at 1009:

“For the reasons which I have articulated I am unable to hold that life imprisonment as a sentence is *per se* unconstitutional in Namibia, regard being had to the fact that the relevant legislation permits release on parole in appropriate circumstances.”

Insofar as concerns the provisions of Part XX of the Prisons Act, there is no doubt that they differentiate between prisoners generally and those sentenced to life imprisonment. By excluding life prisoners from the statutory process of possible release

on parole available to other prisoners they operate to deny them the constitutional guarantee of the right to equal protection and benefit of the law. Apart from the argument that persons sentenced to life imprisonment would have been so sentenced for having committed some heinous or atrocious crime, the respondents have proffered no reasonable or justifiable basis for the limitation of their rights within the contemplation of s 86 of the Constitution. It is not clear what legitimate public interest is served by depriving life prisoners of the possibility of their release following an appropriate period of reformatory and rehabilitative incarceration. In the absence of any such justification, it follows that the impugned provisions are unconstitutional to the extent that they exclude whole life prisoners from the parole process and thereby contravene the right to equal protection and benefit of the law under s 56(1) of the Constitution.

This conclusion *per se* does not end the present enquiry. It is still necessary to consider the objectives of the impugned provisions in the context of their potential scope of coverage, *i.e.* their possible extension to all prisoners undergoing imprisonment, whatever the length of their period of imprisonment, including whole life prisoners. In this regard, I am unable to perceive any rational or practical objection to applying the reporting procedures and powers of release vested in the authorities under Part XX of the Prisons Act to those prisoners who have been sentenced to life imprisonment. In principle, this approach is perfectly concordant with para 10 of the Sixth Schedule to the Constitution, which provides for the continuation of existing laws, as follows:

“Subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution.”

The established approach espoused in constitutional interpretation is to adopt a purposive and generous rather than a pedantic or restrictive interpretation. As was enunciated in the celebrated decision of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985) 1 SCR 295, at 344:

“The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.”

In similar vein, it was recognised in *State v Zuma* 1995 (2) SA 642 (CC), at para. 14, that a Constitution requires:

“a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”

Extrapolating from these authorities, the preferable approach to the construction of an enactment is to interpret and apply it in a manner that accords with the overall tenor of the Constitution and is liberal, generous and purposive in its impact on fundamental rights, insofar as this is possible without doing violence to its scope and objects. The adoption of the approach that I commend in the construction of Part XX of the Prisons Act would, to use the words of MAHOMED CJ in *Tcoeib*'s case (*supra*), “constitute a sufficiently concrete and fundamentally realisable expectation of release adequate to protect the prisoner's right to dignity”. It would thus attain the constitutional objective of

advancing rather than diminishing fundamental rights and construing existing laws in conformity with that objective in a manner that is expressly sanctioned by para 10 of the Sixth Schedule to the Constitution.

To conclude on this aspect, it is clear that the impugned provisions of the Prisons Act operate to deprive whole life prisoners of the equal protection and benefit of the law. Furthermore, by excluding them from the possibility of release, they also violate their rights to human dignity and freedom from inhuman and degrading treatment or punishment. In principle, this would entail the invalidation of all the offending provisions. However, in order to avoid the complete and total nullification of these provisions, I take the view that Part XX of the Prisons Act should be construed and applied in conformity with the Constitution, by extending the scope of their coverage to all prisoners, including prisoners sentenced to life imprisonment.

In adopting this approach, I am alive to the critical consideration that it appears to involve judicial encroachment into the legislative domain of Parliament, in disregard of the time-honoured doctrine of the separation of powers. Nevertheless, it seems to me perfectly possible to obviate this apparent conflict by applying the broad remedial powers conferred upon the courts in constitutional matters. I refer in particular to s 175(6) of the Constitution which provides that:

- “(6) When deciding a constitutional matter within its jurisdiction a court may—
- (a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
 - (b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order

suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.”

I take the view that it would be just and equitable, in the circumstances of this case, to invoke and apply the wide discretion allowed by this provision in order to address and appropriately modify the declaratory and consequential relief sought by the applicant.

Breach of Applicant’s Rights

Without delving into the details of the specific conditions to which the applicant has been subjected at Chikurubi Prison, I have no doubt that they are, euphemistically speaking, far from ideal. Moreover, it is not in dispute that they have been exacerbated by the prevailing economic constraints that bedevil the Prisons and Correctional Service in its operations throughout the country. Be that as it may, it seems to me that the more critical feature to be considered *in casu* is not so much the physical fact of imprisonment *per se*, a condition that is common to every prisoner, as much as the effects of irreducible incarceration on the emotions and psyche of a life prisoner.

In the instant case, the applicant’s assertions as to the acute angst that he continues to endure are uncontroverted and the sheer hopelessness of his mind-set cannot be denied. It must be accepted as being truly reflective of the highly deleterious impact of indeterminate imprisonment on his emotional and psychological well-being. Having regard to the conclusions arrived at earlier vis-à-vis whole life prisoners, I am satisfied that the further incarceration of the applicant, without consideration for parole and the

possibility of release, amounts to a breach of his rights to human dignity and protection against inhuman or degrading treatment or punishment under ss 51 and 53 of the Constitution. It also constitutes a contravention of his right to equal protection and benefit of the law under s 56(1) of the Constitution. However, all of this is subject to what I have stated in relation to the extended application of the provisions of Part XX of the Prisons Act.

Finally, it is necessary to address the alleged breach of the applicant's right to liberty contrary to section 49 of the Constitution. That section provides as follows:

- “(1) Every person has the right to personal liberty, which includes the right—
 (a) not to be detained without trial; and
 (b) not to be deprived of their liberty arbitrarily or without just cause.
(2) No person may be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

My reading of these provisions is that they have no bearing whatsoever on the applicant's present situation. He has not been detained without trial or deprived of his liberty arbitrarily or without just cause. And he certainly has not been imprisoned merely on the ground of his inability to fulfil a contractual obligation. It is abundantly clear, therefore, that the applicant has absolutely no basis for the complaint that his right to liberty under s 49 of the Constitution has been violated in any way.

Appropriate Relief or Remedy

Apart from the constitutional declarators that the applicant seeks, he also seeks an order for his immediate release from prison. As I have already intimated, such an order would not be appropriate *in casu*, particularly as the facts before this Court do not

adequately establish the propriety of immediately releasing the applicant from prison at this juncture. What is first necessary is a full inquiry and report by the Parole Board, having regard to all the relevant factors delineated in s 114 of the Prisons Act, to determine the applicant's aptitude and suitability for release on parole. It would then be a matter for the Parole Board to make such recommendations as it may deem fit and proper and, thereafter, for the Minister, in terms of s 115 of the Act, to decide whether or not to release the applicant on licence, for such period and subject to such conditions as he may specify.

I should add, for the sake of completeness, that the authorities who administer the provisions of Part XX of the Prisons Act, namely, the Advisory Board, the Parole Board, the Commissioner and the Minister, are administrative authorities *stricto sensu*. Accordingly, the exercise of their functions and powers under these provisions, unlike the presidential prerogative of mercy, is ordinarily reviewable on the established grounds of irrationality, illegality or procedural irregularity, either under the common law or in terms of section 3 of the Administrative Justice Act [*Chapter 10:28*].

In the result, the application is granted in the following terms and with the following conditions:

It is declared that:

1. A life sentence imposed on a convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and

amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution.

2. The provisions of Part XX of the Prisons Act [*Chapter 7:11*], to the extent that they exclude prisoners sentenced to imprisonment for life from the parole or release on licence process, contravene the right to equal protection and benefit of the law under section 56(1) of the Constitution.
3. Subject to paragraph 4 below, the further incarceration of the applicant amounts to a breach of his right to human dignity, right to protection against cruel, inhuman or degrading treatment or punishment and right to equal protection and benefit of the law under sections 51, 53 and 56(1) of the Constitution.

It is accordingly ordered that:

4. Pending the enactment of legislation amending the provisions of Part XX of the Prisons Act [*Chapter 7:11*] so as to conform with the right to equal protection and benefit of the law under section 56(1) of the Constitution, the respondents shall apply those provisions, *mutatis mutandis*, to every prisoner sentenced to imprisonment for life, including the applicant.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

HLATSHWAYO JCC: I agree.

MAVANGIRA JCC: I agree.

BHUNU JCC: I agree.

UCHENA JCC: I agree.

CHITAKUNYE AJCC: I agree.

Tendai Biti Law, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners