

**PRISON INMATES' SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA:
COMPATIBILITY OF DOMESTIC LAW WITH INTERNATIONAL NORMS AND
STANDARDS**

by

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I declare that 'Prison inmates' socio-economic rights in South Africa: Compatibility of domestic law with international norms and standards' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

.....

SIGNATURE
(Mr)

.....

DATE

DEDICATION

This thesis is dedicated to my late mother Vumile Mlotshwa and late grandparents Paulos Mlotshwa and Gladys Mlotshwa.

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I would like to thank God for protecting me and making this work a success. I also thank my parents for opening doors for me and for their enormous support since I came to this world.

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Last but certainly not least, I would like to thank my family for supporting me.

LIST OF ACRONYMS

ACHPR---African Charter on Human and Peoples' Rights.

ACHR---American Convention on Human Rights.

ACRWC---African Charter on the Rights and Welfare of the Child.

AHRLJ---African Human Rights Law Journal.

ALP---AIDS Law Project.

ART---Anti-Retroviral Treatment.

ARVs---Antiretrovirals.

CEDAW---Convention on the Elimination of All Forms of Discrimination Against Women.

CD4 count---Laboratory test that measures the number of white blood cells in a blood sample.

CPT---Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

CRC---Convention on the Rights of the Child.

CRPD---Convention on the Rights of Persons with Disability.

CSPRI---Civil Society Prison Reform Initiative.

DCS---Department of Correctional Services.

ECHR---European Convention on Human Rights.

ECOSOC---Economic and Social Council.

ESR---Economic and Social Rights in South Africa.

GED---General Education Development.

HAART---Highly Active Retroviral Treatment.

HRC---Human Rights Committee.

HIV---Human Immunodeficiency Virus.

ICERD---International Convention on the Elimination of All Forms of Racial Discrimination.

ICCPR---International Covenant on Civil and Political Rights.

ICESCR---International Covenant on Economic, Social and Cultural Rights.

KEH---King Edward VIII Hospital.

LRF---Legal Resource Foundation.

OHCHR---Office of High Commissioner for Human Rights.

Operational Plan---The National Department of Health's Operational Plan for Comprehensive HIV and AIDS care, Management and Treatment for South Africa.

Para---Paragraph.

RLUIPA---Religious Land Use and Institutionalized Persons Act.

SACJ---South African Journal of Criminal Justice.

SAHRC---South African Human Rights Commission.

SAJHR---South African Journal on Human Rights.

SAPL ---South African Public Law Journal.

SMRTP---Standard Minimum Rules for the Treatment of Prisoners.

TB---Tuberculosis.

TSAR---Tydskrif vir die Suid-Afrikaanse Reg.

UCLA L. Rev---University of Columbia Law Review.

UDHR---Universal Declaration of Human Rights.

UN JDL---UN Rules for the Protection of Juveniles Deprived of their Liberty protect education in prison.

UK---United Kingdom.

UN---United Nations.

UNAIDS---United Nations Programme on HIV and AIDS.

UNHRC---United Nations Human Rights Committee.

UNODC---United Nations Office on Drugs and Crime.

USA---United States of America.

WCC--- Westville Correctional Centre.

WHO---World Health Organisation.

ZACRO---Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender.

ZPS---Zimbabwe Prison Services.

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SUMMARY

This study critically analyses the protection and enforcement of inmates' socio-economic rights in South Africa. For the purpose of this study inmates' socio-economic rights include the right to adequate medical treatment, accommodation, nutrition and education. This analysis is informed by the fact that South African courts are struggling to interpret and enforce inmates' socio-economic rights as required by the Constitution and international norms and standards. The objective of this study, therefore, is whether South Africa protects and enforces these rights as required by the Constitution and international norms and standards.

In an attempt to resolve the problem, the methodology of this study relies on a legal methodology which focuses on a review of law books, journal articles, the constitutions, statutes, regulations and case law. The study concludes that South Africa protects and enforces these rights as required by the Constitution and complies with international norms and standards. However, the enforcement of these rights has to pay attention to the constitutional imperatives of interpreting the Bill of Rights.

When interpreting inmates' right to adequate medical treatment, it is imperative for the courts to unpack its content. The courts need to also promote the value of human dignity when determining whether overcrowding violates their right to adequate accommodation. The determination of whether their right to adequate nutrition has been violated should focus on whether inmates' claim to cultural food is based on a sincere belief which could be objectively supported. Further, the Regulations should

extend the right to cultural or religious food to all inmates. Lastly, it is the duty of the courts and the institutions of higher learning to ensure that inmates have access to the internet for study purpose.

Key Terms: South Africa, inmates, human rights, socio-economic rights, Constitution, international norms and standards

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 BACKGROUND

In the past, inmates' rights, including their socio-economic rights, were not taken seriously around the world. This was partly due to the social perception that inmates had to be punished for the wrongs they did. Accordingly, their punishment was deemed as a deterrent to the crimes they committed and did not embrace the human rights culture in the correctional centres. This situation was worsened by the fact that the courts were not willing to play any role aimed at redressing the plight of the violation of inmates' rights. In the United State of America (USA) the courts' reluctance to interfere with the inhumane manner in which inmates were treated was based on the doctrine which was referred to as the Hands-Off Doctrine. Essentially, this doctrine empowered the officials of the correctional centres to attend to the inmates' complaints.¹ Some of the cases which paved the way for this doctrine include the cases of *Perver v Massachusetts*² and *Gore v United States*.³ In *Perver v*

¹ Zalman M, "Prisoners' rights to medical care", *The Journal of Criminal law, Criminology and Police Science*, 1972, Vol. 63, No. 2, 185.

² *Perver v Massachusetts* 72 U.S 475, 1866, available at, <https://supreme.justia.com/cases/federal/us/72/475/case.html>, accessed on 23 November 2014.

³ *Gore v United States*, 357 U.S. 386,1958, available at, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=357&invol=386> accessed on 23 November 2014.

Massachusetts, the Supreme Court held that the fine of 50 dollars and imprisonment at hard labour for three months did not amount to cruel and unusual punishment.⁴ In *Gore v United States*, the Supreme Court refused to review the sentence imposed on inmates as follows:

...Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility... these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences...This Court has no such power.⁵

According to Whitney, this doctrine was based on the principle of separation of powers which empowered the executive to manage the correctional centres.⁶ It came to an end in 1964 when the court in *Cooper v Pate*⁷ rejected it and allowed inmates to challenge the correctional centre's inhumane treatment which violated their rights.

This case paved the way for subsequent cases to interfere with the internal discipline of the correctional centres by protecting the infringement of inmates' constitutional

⁴ *Perver v Massachusetts*, (note 2), above.

⁵ *Gore v United States*, (note 3), above.

⁶ Whitney EA, "Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest", *Transnational Law and Contemporary Problems*, 2009, Vol. 18, 783, citing Mushlin MB, 'Rights of Prisoners', 3rd ed, 2002, 6.

⁷ *Cooper v Pate* 378 U.S. 546, 1964.

rights.⁸ Inmates' rights were recently protected by the Supreme Court of Appeal in *Brown, Governor of California, et al. v. Plata et al* as follows:

Courts nevertheless must not shrink from their obligation to enforce the constitutional rights of all 'persons,' including prisoners....Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.⁹

The USA Constitution protects inmates' socio-economic rights through the Eight Amendment rights and the First Amendment right.¹⁰ The Eight Amendment rights protect these rights through the right not to be subjected to cruel, inhuman and degrading punishment. The First Amendment right protects these rights, in particular the right to adequate nutrition, through the right to freedom of religion which entitles everyone, including inmates, to demand food that takes into account their religious beliefs.

Apart from the USA Constitution, these rights are protected by the Prison Litigation Reform Act (PLRA)¹¹ and the Religious Land Use and Institutionalized Persons Act

⁸ Lines R, "The right to health of prisoners in international human rights law", *International Journal of Prisoner Health*, March 2008, 4(1),37, available at, <http://www.humanrightsanddrugs.org/wp-content/uploads/2009/09/Right-to-Health-IJPH-2008.pdf>, accessed on 8 December 2011.

⁹ *Brown, Governor of California, et al. v Plata et al*, Appeal from the United States District Courts for the Eastern and Northern Districts of California No. 09–1233, Decided May 23, 2011, 13, available at, <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>, accessed on 10 May 2014.

¹⁰ USA Constitution 1791.

¹¹ Prison Litigation Reform Act of 1995.

(RLUIPA).¹² Section 3626(a) (3) (B) of the PLRA¹³ empowers a three-judges court to grant a “prisoner release order” which instructs the state to reduce overcrowding in the correctional centres.. Section 2000CC—1 of the RLUIPA¹⁴ provides that “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...”

Just like the USA Hands-Off Doctrine, the South African courts were also reluctant to interfere with the manner inmates were treated in the correctional centres. The Supreme Court of Appeal (then the Appellate Division) enforced the USA version of the Hands-Off doctrine in *Goldberg v Minister of Justice*.¹⁵ In this case, the Supreme Court of Appeal did not abide by its earlier decisions in *Whittaker v Governor of Johannesburg Gaol*¹⁶ and *Whittaker v Roos and Bateman; Morant v Roos and Bateman*¹⁷ in which it had found that inmates should retain rights except those taken away from them by the law. Instead it held that the power to determine how inmates should be treated rested with the Commissioner. However, in 1993, the same Supreme Court of Appeal changed this position and stressed the importance of protecting inmates’ rights through the residuum principle in *Minister of Justice v Hofmeyr* as follows:

¹² Religious Land Use and Institutionalized Persons Act of 2000.

¹³ Prison Litigation Reform Act, (note 11) above.

¹⁴ Religious Land Use and Institutionalized Persons Act, (note 12), above, emphasis added.

¹⁵ *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A).

¹⁶ *Whittaker v Governor of Johannesburg gaol* 1911 WLD 139.

¹⁷ *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, 123.

The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to a gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. The Innes dictum is a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the Innes dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights...For these reasons I would respectfully express my agreement with the general approach reflected in the residuum principle enunciated by Corbett JA in the Goldberg case.¹⁸

The residuum principle became entrenched in the Bill of Rights in the Interim Constitution¹⁹ and later in the Final Constitution.²⁰ It, essentially, ensures that the state, as a custodian of inmates, takes care of the inmates' physical welfare.²¹ One of the cases which have applied this principle is *Thukwane v Minister of Correctional Services*.²² In this case, the court argued that the state is obliged to ensure that, the treatment of inmates takes into account the common law principle, legislation regulating the correctional centres and most importantly the Constitution.²³

¹⁸ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 141.

¹⁹ The South African Interim Constitution of 1993.

²⁰ The South African Constitution of 1996, hereinafter referred to as the Constitution.

²¹ *Minister of Correctional Services v Lee* (316/11) [2012] ZASCA 23; 2012 (1) SACR 492 (SCA); 2012 (3) SA 617 (SCA) (23 March 2012) para 36.

²² *Thukwane v Minister of Correctional Services*, 2003 (1) SA 51 (T).

²³ Ibid at paras 21-23. The entrenchment of the residuum principle into the Constitution was also reiterated by the court in *N and others v Government of Republic of South Africa and others* (No 1) 2006 (6) SA 543 (D) para 20.

Apart from the Constitution, inmates' socio-economic rights are protected by the Correctional Services Act,²⁴ Regulations²⁵ and the National Health Act.²⁶ The Correctional Services Act and its Regulations oblige the state to ensure that the treatment of inmates takes into account the conditions of detention consistent with human dignity.²⁷ The National Health Act obliges the Director General of Health to follow the National Health Policy when providing inmates with health care services.²⁸

Other than the Constitution, Legislation and Regulations, these rights are protected by several International and regional instruments adopted by South Africa. The international instruments include the International Covenant on Civil and Political Rights (ICCPR);²⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR);³⁰ Convention on the Rights of persons with Disability (CRPD);³¹

²⁴ Correctional Services Act 111 of 1998, hereinafter referred to as the Correctional Services Act, as amended by Correctional Services Amendment Act 34 of 2001; Correctional Services Amendment Act 25 of 2008 and; Correctional Services Matters Amendment Act 5 of 2011.

²⁵ Correctional Services Regulations No. 26626, 30 July 2004. Correctional Services Regulations No. 35032, 27 February 2012.

²⁶ National Health Act 61 of 2003.

²⁷ Chapter iii of the Correctional Services Act, (note 24) and chapter ii of the Regulations No. 26626, (note 25) above.

²⁸ Section 21(2) (b) (vi) of the National Health Act, (note 26) above.

²⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

³⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);³² the Convention on the Elimination of all forms of Discrimination against Women (CEDAW);³³ Convention on the Rights of the Child (CRC);³⁴ Convention against Discrimination in Education.³⁵ The regional instruments include the African Charter on Human and Peoples' Rights (ACHPR);³⁶ African Charter on the Rights

December 1966, entered into force 3 January 1976. This is a non-binding international instrument since South Africa has only signed and not ratified it. However, it is obliged to refrain from acts which would defeat its object and purpose as required by Article 18 of the Vienna Convention on the Law of Treaties, adopted by the General Assembly on 22 May 1969 and opened for signature on 23 1969, entered into force on 27 January 1980.

³¹ Convention on the Rights of Persons with Disability, adopted by the United Nations General Assembly on 13 December 2006, opened for signature on 30 March 2007, entered into force on 3 March 2008.

³² International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Resolution 2106 (XX), opened for signature on 21 December 1965, entered into force on 4 January 1969.

³³ Convention on the Elimination of All forms of Discrimination against Women, adopted by the UN General Assembly on 18 December 1979, entered into force on 3 September 1981.

³⁴ Convention on the Rights of the Child, adopted by General Assembly resolution 44/25, opened for signature, ratification and accession on 20 November 1989, entered into force on 2 September 1990.

³⁵ Convention against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 14 November to 15 December 1960, entered into force on 22 May 1962.

³⁶ African [Banjul] Charter on Human and Peoples' Rights, adopted by the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986.

and Welfare of the Child (ACRWC);³⁷ and the Protocol to the ACHPR on the Rights of Women in Africa.³⁸

The background on these rights demonstrates the journey and challenges towards their constitutional recognition. It is for this reason that this study attempts to critically analyse whether their enforcement complies with the Constitution and international norms and standards.

1.2 PROBLEM STATEMENT

While South Africa is one of the countries that constitutionally protect inmates' socio-economic rights, there are still some challenges on the implementation and enforcement of these rights. The annual Judicial Inspectorate report for 2009 to 2010 categorically stated that inmates are detained under inhumane conditions in violation of their rights such as their right to adequate accommodation, nutrition, reading material and medical treatment.³⁹ The courts also tend to ignore the constitutional imperatives of interpreting inmates' socio-economic rights.

³⁷ African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity in 1990, entered into force on 29 November 1999.

³⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the African Union on 11 July 2003, entered into force 25 November 2005.

³⁹ Judicial Inspectorate for the Department of Correctional Services Annual Report for the period 1 April 2009 to 31 March 2010, 12, available at, <http://www.pmg.org.za/files/docs/101116jics.pdf>, accessed on 2 February 2011.

In *N and Others v Government of Republic of South Africa and Others (No 1)*⁴⁰ having applied the standard of reasonable test that "...the issue boils down to whether the respondents are taking reasonable steps or measures to ensure that the applicants are receiving adequate medical treatment",⁴¹ the court held that the state's failure to remove restrictions that prevented inmates from accessing the anti-retrovirals (ARVs) on time amounted to the violation of inmates' right to adequate medical treatment. While this judgment is commended for enforcing inmates' right to adequate medical treatment, it ignores the constitutional imperatives to (1) embrace the intention of the constitutional drafters which framed this right without internal limitation clauses; and (2) to embrace the two stages approach of interpreting the Bill of Rights which requires the court to determine if the right, having unpacked its content, has been violated and if it has been violated, the court should then determine if such contravention is justified under the limitation clause.⁴²

⁴⁰ *N and Others v Government of Republic of South Africa and Others (No 1)*, (note 23) above.

⁴¹ Ibid at para 25. This standard of reasonable test was applied by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46, 2000(11) BCLR 1169 para 38; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) para 39 and; *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) para 50.

⁴² *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995) para 21, emphasis added. Kentridge J and Spitz D, 'Interpretation', in Chaskalson M et al (eds), *Constitutional law of South Africa*, 1996, Ch 11, 32.

In *Lee v Minister of Correctional Services*,⁴³ the Constitutional Court correctly promoted the constitutional values of state accountability, responsiveness and the rule of law⁴⁴ when it found that the unlawfulness of the defendant's negligent omission which included (1) the state's failure to take reasonable measures to reduce overcrowding in order to reduce the risk of spreading TB in the correctional centre; (2) the state's failure to screen and isolate inmates with TB violated inmates' rights including their right to be provided with adequate accommodation. However, the court ignored the constitutional imperative to promote the value of human dignity in its judgment.

On the other hand, in *Huang & Others v The Head of Grootvlei prison & Another*,⁴⁵ the court successfully enforced inmates' right to a cultural food by finding that the denial of Chinese inmates to cook their food in accordance with their tradition amounted to the violation of their right to adequate nutrition. However, the court, contrary to the Constitutional Court's jurisprudence,⁴⁶ did not engage in the process of determining whether the inmates' belief in their traditional food was based on a

⁴³ *Lee v Minister of Correctional Services*(CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012) para 65.

⁴⁴ *Ibid* at para 70.

⁴⁵ *Huang & Others v The Head of Grootvlei prison & Another* 2008 JOL 21089 (O) Case No 992/2003 (ZAFSHC) (Unreported judgement of 15 May 2003).

⁴⁶ The relevance of determining a sincere belief on the part of the applicant was stressed by the Constitutional Court in *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 37; *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) para 52.

sincere belief which could be objectively supported. Further, the 2012 Regulations limit the entitlement to cultural or religious food only to remand detainees in contravention of the right to equality guaranteed by section 9 of the Constitution.⁴⁷

Finally, in *Nabolisa v Minister of Correctional Services*,⁴⁸ the court successfully enforced inmate's right to education by ordering the state to allow Nabolisa (inmate) to have access to his computer in order to download internet for study purposes at his expense. This means that the Department of Correctional Services (DCS) is obliged to ensure that inmates have access to internet for study purposes. However, the question that remains is whether the state is obliged to provide them with the internet access at its expense and whether the institutions of higher learning are also constitutionally obliged to ensure that registered inmates have the internet access for their studies.

The research problem can therefore be stated as follows:

Is the manner in which inmates' socio-economic rights are enforced constitutional and in line with international norms and standards?

⁴⁷ Correctional Services Regulations No. 35032, (note 25) above.

⁴⁸ *Nabolisa v Minister of Correctional Services* 13/7446, decided in May 2013.

1.3 AIM AND OBJECTIVES OF THE STUDY

1.3.1 The broad aim

This study intends to critically analyse whether South Africa's protection and enforcement of inmates' socio-economic rights contribute to their protection, as required by the Constitution, compared with foreign and international norms and standards.

1.3.2 The specific objectives

In order to achieve the broad aim of this study, the study will investigate:

- (1) the extent to which South Africa protects and enforces inmates' socio-economic rights.
- (2) the extent to which international law protects and enforces inmates' socio-economic rights.
- (3) the comparative perspective on the protection and enforcement of inmates' socio-economic rights and;
- (4) the extent to which South Africa measures up to international norms and standards.

1.4 RESEARCH QUESTIONS

In relation to the aim and objectives of this study, the following research questions will be addressed:

-What are inmates' socio-economic rights and what is their relationship with civil and political rights?

-Are their socio-economic rights protected at the international and regional levels and what is the situation in a foreign comparative law?

-Are their socio-economic rights justiciable and enforceable and what is the state of the South African jurisprudence?

-Is South Africa on par with international norms and standards in relation to the protection and enforcement of their socio-economic rights?

-Does South Africa's protection and enforcement of their socio-economic rights compare well with other countries?

-Is the manner in which the South African courts have enforced and interpreted their socio-economic rights contributing to their protection as required by the Constitution and international norms and standards?

-To what extent does international law that protects their socio-economic rights become part of South African law?

-Is it necessary or obligatory for the courts to follow the two stages approach of interpreting their right to adequate medical treatment?

-Are they entitled to adequate nutrition that takes into account their cultural or religious beliefs?

-Should the courts consider their subjective or objective beliefs when determining whether their right to a cultural or religious food has been violated?

-Is the restriction of a religious or cultural food to pregnant or lactating remand detainees constitutional?

-Does overcrowding amount to the violation of inmates' right to adequate accommodation?

-Is it necessary for the courts to promote the value of human dignity over and above other Constitutional values when determining whether overcrowding in the correctional centre violates inmates' right to adequate accommodation?

-Can inmates also demand access to the internet for study purposes at the expense of the state?

-Are the institutions of higher learning obliged to ensure that inmates have access to the internet for study purposes?

-Should the courts' interpretation of inmates' right to further education apply the two stages approach of interpreting the Bill of Rights?

1.5 ASSUMPTIONS, HYPOTHESIS AND THE SCOPE OF THE STUDY

1.5.1 Assumptions

This study is based on a number of assumptions. An inmate, as any human being, is entitled to human rights, which include socio-economic rights. These rights are protected at domestic and international levels. At the national level, they are enshrined in the Constitution, particularly in the Bill of Rights and other pieces of legislation. At the international level, they are protected by international instruments at the United Nations level and at the regional level. The violation of these rights entitles inmates to a relief. The judiciary is constitutionally mandated to enforce them. The protection of these rights at the national level should be in line with international instruments. This study, therefore, does not intend to prove whether inmates' socio-economic rights are constitutionally protected and impose an obligation on the state to fulfil them or not. It purports to critically examine South Africa's protection and enforcement of these rights.

1.5.2 Hypothesis

The study revolves around the hypothesis that the Bill of Rights enshrines the rights of all the people in South Africa, including inmates' socio-economic rights. Since the collapse of apartheid, South Africa has done a great deal to protect inmates' socio-economic rights in line with a number of international and regional instruments. From a comparative law perspective, South Africa has performed better than many other countries and the judiciary has been particularly active in this regard. However, much more still remains to be done to ensure that inmates enjoy their socio-economic rights as protected by the Constitution and several human rights instruments.

1.5.3 Scope of the study

As stressed earlier, the Constitution guarantees a number of inmates' socio-economic rights which impose a positive obligation on the state to fulfil them. These rights are also protected at the international and regional levels. They are justiciable and enforceable. The judiciary plays a crucial role in protecting them. This is a thesis presented in the College of Law, Department of Public, Constitutional and International Law at the University of South Africa. It is, therefore, a legal study dealing with the protection of a specific component of the population, namely the inmates. The study will not focus on the protection of all the rights of inmates but on their socio-economic rights only. These are the rights to adequate medical treatment, accommodation, nutrition and the right to education. Moreover, although reference will be made to the protection of inmates' socio-economic rights in other countries,

the study is limited to the protection and enforcement of inmates' socio-economic rights in South Africa.

1.6 JUSTIFICATION FOR THE STUDY

Correctional centres around the world are experiencing challenges on the provision of health care services, accommodation, nutrition and education. The challenges, on the provision of health care services in the correctional centres, are based on the fact that "a significant proportion of prisoners in most countries are members of groups that suffer social, economic or ethnical/racial discrimination....suffer disproportionately from poor health status".⁴⁹ However, the international bodies are attempting to reprimand states that are not respecting inmates' health. In 2002, Committee on Economic, Social and Cultural Rights it recommended that, the states of Trinidad and Tobago, Brazil and Yemen should take measures to improve medical standards in detention.⁵⁰

In its Concluding Observations on Argentina, the Committee on the Rights of the Child raised its concern on the lack of adequate health and education services for

⁴⁹ Lines R, (note 8) above at 5. This was also affirmed by the Supreme Court of Appeal in *Minister of Correctional Services v Lee*, (note 21) above at para 11.

⁵⁰ Lines R, (note 8) above at 15, citing Committee on Economic, Social and Cultural Rights 'Concluding Observations: Trinidad and Tobago' (2002) UN Doc E/2003/22 45 paras 274 and 297; Committee on Economic, Social and Cultural Rights 'Concluding Observations: Brazil' (2003) UN Doc E/ 2004/22 28 paras 144 and 177 and Committee on Economic, Social and Cultural Rights 'Concluding Observations: Yemen' (2003) UN Doc E/ 2004/22 55 paras 361 and 380.

children in the correctional centres.⁵¹ However, the structures of the correctional centres are to blame for the poor delivery of health care services. The correctional centres are designed in such a way that render inmates to be vulnerable or susceptible to infectious and non-infectious diseases which include tuberculosis, sexually transmitted infections, HIV/AIDS, mental disorder and chronic untreated conditions.⁵² They are also reported to have (1)“...poorly ventilated cells which provide favourable conditions for expelled organisms and congestion, with prisoners being confined in close contact for as much as 23 hours every day”;⁵³ (2) deficient health care services, problems of sanitary, disease-control and infrastructural problems.⁵⁴

This situation is worsened by the correctional centres officials’ failure, at times, to immediately perform inmates’ health assessment when they are admitted.⁵⁵ It is also

⁵¹ Idem, citing the Committee on the Rights of the Child ‘Concluding Observations: Argentina’ (2002) UN Doc CRC/C/121 8 para 87.

⁵² Idem. According to Jacobi J V, “Prison health, public health: obligations and opportunities”, *American Journal of law, Medicine, and Ethics*, 2005, 31, 450, prison conditions in the United States of America, characterized by communicable diseases and mental disorder, do not adhere to the conditions consistent with human dignity.

⁵³ *Minister of Correctional Services v Lee*, (note 21) above at para 11.

⁵⁴ Report of the Human Rights Committee regarding human rights’ violation for detainees in Colombia, United Nations Human Rights Committee 99th UNCHR session, Geneva, Switzerland, July 2010, para 113, available at, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LAU_FIU_Colombia.pdf, accessed on 11 February 2011.

⁵⁵ Judicial Inspectorate for Correctional Services’ annual report for the period 1 April 2009 to 31 March 2010, (note 39) above.

worsened by the prevalence of HIV/AIDS in many correctional centres in Africa. Malawi is reported to have 74% of HIV positive inmates.⁵⁶ Sub-Saharan African countries are alleged to have above 25% of HIV positive inmates.⁵⁷ In Zimbabwe, the percentage of HIV inmates is standing at 27%, which is a “figure almost double the national prevalence rate”.⁵⁸ Further, contrary to the recommendations of the WHO, UNODC and UNAIDS,⁵⁹ Zimbabwe, out of fear of sodomy, does not make condoms available in its correctional centres.⁶⁰

⁵⁶ Irinnews, “Rwanda: New HIV awareness drive targets prisoners”, available at, <http://www.irinnews.org/printreport.aspx?reportid=88152>, accessed on 23 January 2014.

⁵⁷ Idem.

⁵⁸ Community News, “HIV wreaks havoc in prisons”, 12 May 2013, available at, <http://www.thestandard.co.zw/2013/05/12/hiv-wreaks-havoc-in-prisons> accessed on 13 December 2013.

⁵⁹ World Health Organization, United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS, “Effectiveness of Interventions to Address HIV in Prisons: Prevention of sexual Transmission”, Geneva 2007, 15, available at, <http://www.unodc.org/documents/hiv-aids/EVIDENCE%20FOR%20ACTION%202007%20sexual%20transmission.pdf>, accessed on 10 May 2014.

⁶⁰ Community News, (note 59) above. However, it is now commendable that cases pertaining to HIV/AIDS issues are beginning to reach the courts. There is a case involving an HIV positive social right activist Douglas Muzanenhamo in which the court reserved judgment. In this case, Muzanenhamo argued that his CD4 count dropped from 8000 to 579 as a result of being denied medication. He also argued that he was provided with drugs that were not prescribed by a doctor. This case is available at, <http://www.voazimbabwe.com/content/zimbabwe-hiv-aids-social-activist-doglas-muzan...> accessed on 13 December 2013.

Rwanda, also out of fear of sodomy, prohibits the distribution of condoms in the correctional centres,⁶¹ contrary to the recommendations of the WHO, UNODC and UNAIDS.⁶² Kenya was reported to have inadequate supply of ARVs and inadequate food which contributed to the ineffectiveness of available medicine⁶³ and led to the death of 187 inmates in 2009.⁶⁴ Further, “a large proportion of these men come from poor communities with low educational standards and high rates of unemployment, homelessness and crime, all associated with increased risk of HIV”.⁶⁵ In Rwanda, there is a high risk for HIV due to homosexuality and “the sharing of non-sterile sharp instruments for tattooing”.⁶⁶

⁶¹ Binagwaho A, “Access to HIV prevention in Rwandan prisons”, *Health and Human Rights: An International Journal*, 2013, available at, <http://www.hhrjournal.org/2013/08/29/access-to-hiv-prevention-in-rwandan-prisons>, accessed on 13 January 2014.

⁶² World Health Organization, United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS, (note 60) above.

⁶³ United States Department of State, “2012 Country Reports on Human Rights Practices – Kenya”, 2013, available at, <http://www.refworld.org/docid/517e6e1d9.html>, accessed on 20 December 2013.

⁶⁴ Idem.

⁶⁵ Berger J and Bulbulia A, “Guidelines for the prevention and treatment of HIV in arrested, detained and sentenced persons”, *The Southern African Journal of HIV Medicine*, 2008, 22.

⁶⁶ Irinnews, (note 56) above.

Moreover, in some of Zambian correctional centres, there is still some dissatisfaction at the treatment of inmates with fresh wounds, sexually transmitted infections and those who are on Anti-Retroviral Therapy (ART).⁶⁷ Furthermore, Zimbabwe's correctional centres are characterized by outdated regulations, lack of medications and the lack of specialized medical personnel.⁶⁸

The challenges on the provision of adequate accommodation in the correctional centres emanate from overcrowding. South Africa is reported to be one of the highest per capita correctional centre populations in the world.⁶⁹ Even awaiting trial disabled inmates sometimes share a cell designed for 32 inmates with 87 other inmates.⁷⁰

⁶⁷ Human Rights Commission, "Cruel, inhuman and degrading treatment and punishment of inmates at Isoka Prison in Muchinga", 2013, available at, <http://www.lusakatimes.com/2013/08/21/cruelinhuman-and-degradingtreatment-and-pun...> accessed on 13 December 2013.

⁶⁸ Human Rights Report, Zimbabwe, "Prison and Detention Center Conditions", 2013, available at, http://harare.usembassy.gov/human_rights_report_2013.html, accessed on 20 May 2014.

⁶⁹ Judicial Inspectorate for Correctional Services' annual report for the period 1 April 2009 to 31 March 2010, (note 39) above.

⁷⁰ Raphaely C, "Help for South Africa's Prisoner A", *Guardian Africa network*, 2013, available at, <http://www.guardian.co.uk/world/2013/mar/08/south-africa-disability-prison?INTCMP=SRCH> Help for South Africa's Prisoner A, Friday 8 March 2013 05.00 GMT, accessed on 01 May 2013.

Cameroon, Zambia, Burundi, Kenya and Rwanda are also deemed to have the world's most overcrowded correctional centres.⁷¹ Zambia in October 2009 was reported to be over 275 percent of capacity.⁷² In Kenya, the Legal Resource Foundation (LRF), in October 2009, reported a total number of inmates to be 50,608, consisting of 2,672 women and 47,936 men in 89 correctional centres with a designed capacity of 22 000 inmates in Kenya.⁷³ The situation did not change in 2010 in Kenya as the LRF listed overcrowding as one of the factors contributing to poor conditions in the correctional centres.⁷⁴ Colombia's 40.7% of crowded conditions in which inmates were forced to live was found to have violated their right to integrity, protected by Article 10(1) of the ICCPR.⁷⁵ In Honduras, overcrowding was deemed to be one of the factors that contributed to the fire that killed inmates on 14 February 2012.⁷⁶

⁷¹ Sakim J, "Prisons in Africa: an evaluation from a human rights perspective", *SUR International Journal on Human Rights*, 2008, Vol. 9, 26.

⁷² Human Rights Watch Report, Zambia, "Unjust and Unhealthy, HIV, TB, and Abuse in Zambian Prisons", 2010, 28, available at, <http://www.hrw.org/reports/2010/04/27/unjust-and-unhealthy-0>, accessed on 10 May 2014.

⁷³ United States Department of State, (note 63) above.

⁷⁴ *Idem*.

⁷⁵ Report of the Human Rights Committee regarding human rights' violation for detainees in Colombia, (note 54) above at para 74, available at, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LAU_FIU_Colombia.pdf, accessed on 11 February 2011.

⁷⁶ Human Rights Watch, Honduras, "Overhaul Prison Conditions", February 15 2012, available at, <http://www.hrw.org/news/2012/02/15/honduras-overhaul-prison-conditions>, accessed on 13 December 2013.

The factors that contribute to overcrowding differ from country to country. In South Africa, it is associated with the improper utilization of medical parole.⁷⁷ The court, in *Stanfield v Minister of correctional services*, endorsed this as follows:

The facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons indicate a shocking state of affairs. Despite the huge increase in the prevalence of HIV/AIDS and other terminal diseases in our prisons, only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002. I associate myself fully with the call by Inspecting Judge Fagan that the release of terminally ill prisoners should receive far more attention, if not priority attention, than is the case at the present time.⁷⁸

In Ghana, overcrowding is reported to be worsened by the fact that “approximately 3,000 inmates are awaiting trial and have not been convicted of a crime”.⁷⁹ It is also worsened by “...inadequate police investigations, too few public defenders, absence or shortage of judges, inability of defendants to pay lawyers’ fees, sentencing policies that result in long custodial sentences, lost case files and lack of implementation of ‘non’-custodial sentences”.⁸⁰ In Malawi, overcrowding is reportedly

⁷⁷ Jansen R and Achiume ET, “Prison conditions in South Africa and the role of public interest litigation since 1994”, *SAJHR*, 2011, 27, 187.

⁷⁸ *Stanfield v Minister of Correctional Services* 2004 (4) SA 43 (C) para 128.

⁷⁹ Amnesty International, “Ghana urged to meet international prison standards”, 25 April 2012, available at, <http://www.amnesty.org/en/news/ghana-improve-infrastructure-reduce-overcrowding-and-increase-prison-monitoring-meet-internatio>, accessed on 13 December 2013.

⁸⁰ Amnesty International, “Prisoners are bottom of the pile: The human rights of inmates in

caused by the fact that “many inmates crowding the cells were on remand for petty offences, waiting for their cases to be heard for months, others, years”.⁸¹ In Zimbabwe overcrowding is deemed to be caused by “outdated infrastructure and judicial backlogs”.⁸²

Other accommodation challenges experienced by inmates include the following: failure to separate female inmates from male inmates and children in Kenya’s small correctional centres and police stations;⁸³ female inmates are, at times, denied sanitary towels, underwear and to be with their children unless they are nursing;⁸⁴ in some correctional centres, there is a lack of access to medical care, special food and beds;⁸⁵ there is also inadequate lighting, ventilation, mattresses, warm clothing; and the lack of access to clean water in Zimbabwe.⁸⁶ Furthermore, in South Africa, correctional centres, sometimes, fail to provide disabled inmates with their needs.⁸⁷ A disabled inmate, in South Africa, was reported to have been denied bowel or

Ghana”, 25 April 2012, 12, available at,

<http://www.amnesty.org/en/library/asset/AFR28/002/2012/en/d5616444-cfd1-482d-bcc5-2a338bb68456/afr280022012en.pdf>, accessed on 13 December 2013.

⁸¹ Nyasa Times Reporter, “Malawi dehumanising prison conditions worries Norway”, 2013, available at, <http://www.nyasatimes.com/2013/09/24/malawi-dehumanising-prison-conditions-worries...>, accessed on 13 December 2013.

⁸² Human Rights Report, Zimbabwe, (note 67) above.

⁸³ United States Department of State, (note 63) above.

⁸⁴ *Idem*.

⁸⁵ *Idem*.

⁸⁶ Human Rights Report, Zimbabwe, (note 67) above.

⁸⁷ Raphaely C, (note 70) above.

bladder control and had to wear nappies brought in by his family and had to “drag himself around on crutches as he had no wheelchair”.⁸⁸ It took the South African Human Rights Commission (SAHRC) to interfere in a case where an inmate complained that he was being placed in a correctional centre which had no access facilities for physically impaired persons.⁸⁹ The SAHRC ordered the DCS to design a plan for development of access for disabled inmates. Moreover, England was also reported to have put the disabled inmates’ life at risk by keeping him in the correctional centre that was "an unsuitable environment for those recovering from physical illness".⁹⁰

The provision of nutrition in the correctional centres is also a major challenge. As recently as 2011, in Zambia, the correctional centres were alleged to be providing inmates with insufficient and nutritionally inadequate food.⁹¹ Consequently, inmates either relied on their relatives for food or trade work for food.⁹² Pregnant inmates

⁸⁸ Idem.

⁸⁹ Nhlapo CM, Watermeyer B and Schneider M, Disability and human rights: the South African Human Rights Commissions, in Watermeyer B, Swartz L, Lorenzo T, Schneider M and Priestley M (Eds) *Disability and Social Change: A South African agenda*, 2006.

⁹⁰ Allison E, “Disabled prisoners' lives put at risk by poor care and treatment in jail”, The Guardian, 2012, available at, <http://www.theguardian.com/society/2012/sep/18/disabled-prisoners-lives-risk-treatment-jails>, accessed on 20 February 2014.

⁹¹ Todrys KW and Amon JJ, “Health and human rights of women imprisoned in Zambia”, *BMC International Health and Human Rights*, 2011, 11(8), available at, <http://www.biomedcentral.com/1472-698X/11.8>, accessed on 13 December 2013.

⁹² Idem.

were not provided with food support during pregnancy.⁹³ However, hopefully a pending decision, in the *Zambian High Court in Mwanza and Another v Attorney General*, will provide recommendations on the provision of food in the correctional centres.⁹⁴ This case concerned two HIV-positive prisoners who are on anti-retroviral treatment and who are complaining about poor prison conditions in Lusaka correctional centre. Their complaint is based, among other things, on the state's failure to provide them with food for them to be able to take their anti-retroviral treatment. They argued that two meals a day which consist of maize meal for breakfast and porridge with beans or anchovies for lunch and the rotten or uncooked food violated their constitutional rights and their rights under international law.

In 2008, Zimbabwe experienced an economic crisis and as a result its correctional centres were alleged to have been hit by hunger and disease. This situation was summarized as follows:

In 2008, prisoners at Bulawayo Remand Prison described receiving one meal a day consisting of a small piece of sadza (Zimbabwe's staple food—a stiff porridge of maize meal) and half a cup of watery boiled cabbage. At times the meal was reduced to cabbage alone, at times to nothing. Desperation meant that “the fighting over food was horrific”, as one former prisoner put it: “Some guys would snatch other guys' food and stuff it in their mouths before they'd get beaten... Prisoners traded sex for food and ate food normally regarded as waste; those with resources traded for food and other commodities with guards. Prison officers

⁹³ Idem.

⁹⁴ *Mwanza and Another v Attorney General*, heard on December 2012, available at, <http://www.southernafricalitigationcentre.org/2012/12/05/zambia-high-court-hears-case-on-rights-of-hiv-positive-prisoners-update-from-the-courtroom/> accessed on 30 June 2014.

asked visitors to bring more food, but only a tiny minority of prisoners had relatives who could afford to feed them.⁹⁵

In 2013, the Zimbabwe Lawyers for Human Rights reported that since January 2013, more than 100 inmates have died as a result of food shortage.⁹⁶ This unpleasant situation was attributed to a lack of funds.⁹⁷ The reason is because “out of \$1.2 million required to purchase monthly food rations, Zimbabwe Prisons and Correctional Services was only...receiving an allocation of \$300 000”.⁹⁸

South African correctional centres also experience the challenges of nutrition. Recently, the High Court, Supreme Court of Appeal and the Constitutional Court found the state to have violated inmates’ rights as a result of, among other things, its failure to take reasonable steps of hiring more nursing staff in order to provide, among other things, adequate nutrition to those inmates who were undernourished and vulnerable to TB.⁹⁹

⁹⁵ Alexander J, “Death and disease in Zimbabwe’s prisons”, *The Lancet*, 2009, Vol. 373, Issue 96668, available at, [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(09\)60592-4/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(09)60592-4/fulltext), accessed on 13 December 2013.

⁹⁶ Human Rights Report, Zimbabwe, (note 68 above). This was also affirmed by Zimbabwe Lawyers for Human Rights, “Zim prisoners die due to food shortages”, 3 December 2013, available at, <http://mg.co.za/article/2013-12-03-zim-prisoners-die-due-to-food-shartages-says-rights-g...> accessed on 13 December 2013.

⁹⁷ *Idem.*

⁹⁸ *Idem.*

⁹⁹ *Lee v Minister of Correctional Services* (10416/04) [2011] ZAWCHC 13; 2011 (6) SA 564

Kenya's correctional centres are reported to be providing inmates with three inadequate meals a day.¹⁰⁰ They also experience challenges relating to water shortages and inadequate sanitary facilities.¹⁰¹ In Malawi, it was only declared in 2009 by the court in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security and Commissioner of Prisons* that Malawi had outdated policy including the Prisons Act and the Prison Regulations on the minimum standards of food in the correctional centres and had to be changed.¹⁰² It is disturbing to note that South Africa is the only country if not one of the few countries in Africa which protects and enforces pregnant and lactating remand detainees' right to a cultural or religious food.

There are also many challenges on the provision of education in the correctional centres. In 2010, Colombia's correctional centres were reported to have been lacking enough educational programs as only 31 out of the 143 national correctional centres had carried out an educational model designed to rehabilitate inmates.¹⁰³ Further,

(WCC); 2011 (2) SACR 603 (WCC) (1 February 2011). *Minister of Correctional Services v Lee*, (note 21) above. *Lee v Minister of Correctional Services*, (note 43) above.

¹⁰⁰ United States Department of State, (note 63) above.

¹⁰¹ *Idem*.

¹⁰² Extracted from *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons* 2009 MWHC 31, available at, <http://www.malawilii.org/mw/judgement/high-court-general-division/2009/31> accessed on 09 December 2013.

¹⁰³ Report of the Human Rights Committee regarding human rights violation for detainees in Colombia, (note 54) at para 65.

educational programs in the correctional centres do not benefit the entire inmate population as it is reported that, “of the 16,467 inmates, the programs only “assisted 1,636 illiterate inmates; 3,600 inmates were in the elementary program; 3,521 inmates were in high school; 206 interns were taking higher education distance-learning courses; and 643 inmates were scheduled to validate and/or take the State ICFES exam”.¹⁰⁴ Challenges facing correctional centre education in Colombia include the lack of trained teaching staff.¹⁰⁵

As far as Zimbabwe is concerned, ZACRO argued that Zimbabwe’s correctional centres lack the provision of education to inmates due to the break-down of social relations and support.¹⁰⁶ Education in USA correctional centres is also not satisfactory since it is deemed to be “... fading into historical memory”.¹⁰⁷ In South Africa, the challenge around education includes “...the dwindling attendance at classes over the course of the semester and the related issue of lack of control over attendance, lack of study space, the lack of history and literature classes in some classes and the inability by the prison to control against adult prisoners living in the

¹⁰⁴ Idem.

¹⁰⁵ Ibid at para 66.

¹⁰⁶ ZACRO, “Zimbabwean jails in deplorable state”, 2008, available at, www.sokwanele.com/system/files/zacroreport_13102008.pdf, accessed on 13 March 2014.

¹⁰⁷ Lockard J and Rankins-Robertson S, “The Right to Education, Prison-University Partnerships, and Online Writing Pedagogy in the US”, *Critical Survey*, 2011, Vol. 23, No. 3, 25, available at,

http://www.academia.edu/3758037/The_Right_to_Education_Prison-University_Partnerships_and_Online_Writing_Penology_in_the_US, accessed on 4 February 2013.

juvenile section”.¹⁰⁸ It is also disturbing to note that only South Africa and few other countries around the World recognize inmates’ right to internet access for study purposes.

Despite these challenges facing inmates and correctional centres around the world, inmates, unlike ordinary people, cannot demonstrate in the streets, to demand their socio-economic or essential services. What is even worse is that public opinion and the media support the politicians’ fears of protecting inmates’ rights in the penal policy still exist.¹⁰⁹ Further, in some countries, the organizations fighting for inmates’ rights do not get the necessary funding to enable them to do their work.¹¹⁰ The USA’s funding towards correctional centres “represent tiny fraction of overall support”.¹¹¹ In fact, “only about 0.1 percent of the US government’s HIV funding to Uganda in 2010 was used to strengthen the HIV treatment to prisoners”.¹¹²

What is also concerning is that very little is written about inmates’ socio-economic rights in South Africa. It is only Liebenberg’s book on the adjudication of socio-

¹⁰⁸ Gast M, “Education and the South African Juvenile Justice System”, *Reading for Child and Youth Care Workers*, November 2001, issue 34, available at, <http://www.cyc-net.org/cyc-online/cycol-1101-gast.html>, accessed on 18 March 2013.

¹⁰⁹ Judicial Inspectorate for Correctional Services’ annual report for the period 1 April 2009 to 31 March 2010, (note 39) above.

¹¹⁰ Todrys K, “Invisible Prisoners: The Fight for Human Rights”, *JURIST-Hotline*, Sept. 4, 2012, available at, <http://jurists.org/hotline/2012/09/katherine-todrys-invisible-prisoners.php>, accessed on 13 December 2013.

¹¹¹ Idem.

¹¹² Idem.

economic rights which partly analyzes the adjudication of these rights.¹¹³ Society should not lose sight of the fact that as long as inmates' needs are not provided, they will always, when released, take their negative effects home with them.¹¹⁴ Against this background, it is worth reflecting on inmates' socio-economic rights in order to contribute to their protection and enforcement in post-apartheid South Africa.

1.7 LITERATURE REVIEW

There is a wide variety of literature on the protection and promotion of inmates' rights in general and socio-economic rights in particular. However, this study focuses on the gap in the said research in relation to the protection and promotion of inmates' socio-economic rights at an international and domestic level. On the protection and enforcement of inmates' right to adequate medical treatment, the literature lacks a critical analysis on the court's application of the reasonable standard test when determining whether it has been violated. The literature on inmates' right to adequate accommodation lacks the analysis of the importance of promoting the value of

¹¹³ Liebenberg S, *Socio- Economic rights adjudication under a transformative constitution*, 2010.

¹¹⁴ Muntingh L, "Prisons in South Africa's constitutional democracy", *Centre for the study of Violence and Reconciliation, Criminal Justice Programme*, 2007, 5, available at, <http://www.csvr.org.za/docs/correctional/prisonsinsa.pdf>, accessed on 7 September 2012, citing Gibbons J and Katzenbach N, *Confronting confinement: The Commission on Safety and Abuse in America's Prisons*, Vera Institute of Justice, 2006, 11. This is also echoed by Jacobi J, (note 52) above 448 when the author argued that, "the prevention of health effects that flow from mistreatment of prisoners' health conditions is for the benefit of all in the society".

human dignity when determining whether overcrowding in the correctional centres amounts to the violation of this right. Inmates' right to adequate nutrition does not critically analyse the need for the courts to determine an inmates' sincere belief when interpreting whether their right to a cultural or religious food has been violated. It also lacks a critical analysis of the constitutionality of the Regulations which restrict the right to cultural or religious food to pregnant or lactating remand detainees. In addition, the literature on inmates' right to education does not analyse in detail whether inmates can demand access to an internet for study purposes and the obligation to ensure that they have access to the internet also extend to the institutions of higher learning.

Van Zyl Smit in his book entitled, *South African Prison Law and Practice*, discussed, among other things, inmates' rights and their treatment and training.¹¹⁵ However, this book is now outdated as it analysed inmates' rights during the apartheid period when there was an absence of a human rights culture.¹¹⁶

A thorough analysis of inmates' rights under the constitutional dispensation was provided by Mubangizi. In his doctoral thesis entitled, *The Rights of Prisoners under the South African Constitution: Compatibility with International Norms and Standards*,¹¹⁷ he analysed inmates' rights from the international, comparative and South African law perspectives. He concluded that while South Africa's protection of

¹¹⁵ Van Zyl Smit D, *South African Prison Law and Practice*, 1992.

¹¹⁶ Mubangizi JC, *The Rights of Prisoners Under the South African Constitution: Compatibility with International Norms and Standards*, LLD thesis, University of Durban Westville, 2001,13.

¹¹⁷ Idem.

inmates' rights complied with international norms and standards, some of their rights were not realized in practice. However, as much as his thesis analysed inmates' rights from a constitutional perspective, it was written more than a decade ago and therefore does not cover the recent developments on the subject, in particular on socio-economic rights.

The same argument can also be advanced on Mubangizi's subsequent articles on the rights of inmates. In his article written in 2001 and entitled, "The Constitutional rights of prisoners in South Africa: the law versus the practice"¹¹⁸ he argued that, while inmates' rights in South Africa were generally not sufficiently protected and implemented, some aspects of their rights were quite well implemented in practice. Furthermore, in another article written in 2002 and entitled, "The Constitutional rights of prisoners in South Africa: A critical review"¹¹⁹ he argued that the obligation of the state to fulfil inmates' rights depends on the availability of the resources. It should also be mentioned that these articles, discussed above, analysed inmates' rights in general without a particular focus on their socio-economic rights.

Apart from Mubangizi, other authors who have analysed inmates' rights from the constitutional perspective include Kalinich and Clack in their article entitled "Transformation: from apartheid to a democracy-South African corrections";¹²⁰

¹¹⁸ Mubangizi, J.C, "The Constitutional rights of prisoners in South Africa: the law versus the practice", *SACJ*, 2001, Vol. 14, Issue 3, 310.

¹¹⁹ Mubangizi J.C, "The Constitutional rights of prisoners in South Africa: A critical review", *De Jure*, 2002, Vol. 1, 42.

¹²⁰ Kalinich and Clack, "Transformation: from apartheid to a democracy-South African corrections", *Acta Criminologica*, 1998, Vol. 11 (2), 64.

Corder and Van Zyl Smit in their article entitled, "Privatized Prison and the Constitution,"¹²¹ Muntingh in his first article entitled, "A guide to the rights of inmates as described in the Correctional Services Act and Regulations";¹²² and; Muntingh in his second article entitled, "Prisons in South Africa's constitutional democracy"¹²³

Kalinich and Clack analyzed inmates' rights in terms of the Constitution of 1996. They also analyzed the historical commonality between South African and American Correctional Systems. Corder and Van Zyl Smit, in their article, argued that privatized correctional centres were also obliged to protect and respect inmates' rights guaranteed by the Constitution. Muntingh, in his first article, provided a detailed overview of inmates' rights as described in the Constitution, Correctional Services Act and Regulations. In his second article, he identified four requirements that should be complied with for correctional centres to be compatible with a constitutional democracy. One of those requirements was that correctional centres should not violate the rights of inmates. That could be achieved, Muntingh further argued, through human rights education and training of both staff and inmates; criminalizing torture and; incorporating the Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into the various policies, regulations and orders of the DCS.

¹²¹ Corder and Van Zyl Smit, "Privatized Prison and the Constitution", *SACJ*, 1998, Vol. 11, 476.

¹²² Muntingh L, "A guide to the rights of inmates as described in the Correctional Services Act and Regulations", *CSPRI*, 2006 (revised 2010), available at, <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/227/MuntinghCPA2010.pdf?sequence=1>, accessed on 10 May 2014

¹²³ Muntingh L, (note 114) above.

At an international level, chapter two of Mubangizi's thesis provides a useful analysis of the protection and promotion of inmates' rights from an international law perspective.¹²⁴ Though this chapter generally focuses on the analysis of inmates' rights in 2001 and does not specifically analyse inmates' socio-economic rights, it constitutes a point of departure on the analysis of inmates' socio-economic rights.

Inmates' rights in general are analyzed by Viljoen in his article entitled, "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities".¹²⁵ Having analyzed the work of the Special Rapporteur on the correctional centres, Viljoen suggests various strategies that could be adopted for the office of the Special Rapporteur to successfully carry out its work of promoting and protecting the rights of inmates in Africa.

The comparative analysis of inmates' rights in general includes articles by Bukurura and Mubangizi. In his paper, entitled, "Protecting Prisoners' Rights in Southern Africa: An Emerging Pattern",¹²⁶ Bukurura analysed case law, Constitution and

¹²⁴ Mubangizi JC, (note 116) above.

¹²⁵ Viljoen F, "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities", *Human Rights Quarterly* 2005, 27 (1) 125, available at, https://muse.jhu.edu/journals/human_rights_quarterly/v027/27.1viljoen.pdf, accessed on 10 May 2014.

¹²⁶ Bukurura S, "Protecting Prisoners' rights in Southern Africa: An Emerging Pattern", published in relation with the Pan-African Conference on Penal and Prison Reform in Africa, Burkina Faso, September 2002, available at, http://www.penalreform.org/wp-content/uploads/2002/06/rep-2002-southern-african-prisoners-en_01.pdf, accessed on 10 May 2014.

legislation protecting inmates' rights in South Africa, Namibia, Swaziland, Botswana and Tanzania. He argued that it took an international and regional pressure for these countries to adhere to international standards protecting inmates' rights.

In an article entitled, "The constitutional rights of prisoners in selected African countries: a comparative review", Mubangizi analyzed the constitutional protection and the enforcement of inmates' rights in Zimbabwe, Namibia, Zambia and Uganda. He argued that only Ugandan courts had been vigorous in enforcing inmates' rights.¹²⁷ The Australian's perspective on the protection of inmates' rights held in private prisons was provided by Naylor.¹²⁸ The author's opinion was that, though international and domestic standards are included in private correctional centre contracts, it was not clear whether they gave rise to enforceable rights or became terms of the contract. He concluded that there must be a continuing analysis, evaluation, and monitoring of private correctional centres by the state and by the community.

The relevant literature on inmates' socio-economic rights which this study seeks to develop includes Chapters 10 and 12 of the South African Human Rights

¹²⁷ Mubangizi J, "The constitutional rights of prisoners in selected African countries: a comparative review", *The Comparative and international law journal of Southern Africa*, 2002, Vol. 35, Issue 3, 269.

¹²⁸ Naylor B, "Prisons, privatisation and human rights", available at <http://www.law.monash.edu.au/castancentre/conference2001/papers/naylor.html>, accessed on 21 October 2011.

Commission Reports entitled, “Rights of Prisoners –period: April 2000-March 2002”.¹²⁹

Chapter 10 examines inmates’ socio-economic rights such as the right to adequate medical treatment, accommodation, nutrition and education in terms of the Constitution, Correctional Services Act and in terms of international law. It concludes by analysing the response of the DCS aimed at fulfilling the obligation imposed by these rights. Chapter 12 critically examines whether Government, through the DCS, has complied with both its constitutional and international obligations to respect, protect, promote and fulfil prisoners’ rights in terms of section 35(2)(e) of the Constitution. Having identified the loopholes in the measures adopted by the Government to give effect to inmates’ socio-economic rights, the Human Rights Commission Reports provided some recommendations.

At an international level, the protection and enforcement of inmates’ socio-economic rights that this study intends to develop, includes an article by Livingstone entitled,

¹²⁹ South African Human Rights Commission, ‘Prisoners’ Rights’ in South African Human Rights Commission Reports, *Rights of Prisoners –Period: April 2000-March 2002*, Ch 10, available at, http://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter_10.pdf, accessed on 10 May 2014. South African Human Rights Commission, ‘Rights of prisoners’ in South African Human Rights Commission Reports, *Rights of Prisoners –Period: April 2000-March 2002*, Ch 12, available at, http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_12.pdf, accessed on 10 May 2014.

“Prisoners’ Rights in the Context of the European Convention on Human Rights”,¹³⁰ and a book by Sarkin entitled “Human Rights in African prisons”.¹³¹ Livingstone summarised the correctional centre conditions which were found to have violated Article 3 of the European Convention on Human Rights which prohibit torture, inhuman or degrading treatment or punishment. These conditions include overcrowding, lack of facilities, violence and poor medical care. The author concluded by arguing that cases dealing with this Article 3 are likely to offer a remedy to the inmates.

Sarkin analysed the challenges facing correctional centres in Africa. In doing that, the book examines and addresses some of the challenges facing African correctional centres and how the regional human rights system is dealing with human rights concerns in such centres. One of the challenges highlighted by the book is overcrowding. In addition, the book provides some recommendations on how African correctional centres can be improved in Africa.

¹³⁰ Livingstone S, “Prisoners’ Rights in the Context of the European Convention on Human Rights”, *Punishment and Society*, 2000, 2, 309, available at, <http://pun.sagepub.com/content/2/3/309.full.pdf+html>, accessed on 08 December 2011.

¹³¹ Sarkin J, *Human Rights in African prisons*, 2008.

The comparative perspective on the protection and promotion of inmates' socio-economic rights includes Ngoma's dissertation which critically examined socio-economic rights of inmates in Zambia in the context of international minimum standards,¹³² and the book edited by Van Zyl Smit and Dunkel also contains papers that analysed 26 countries national reports on the protection and enforcement of inmates' rights.¹³³ Ngoma analysed the laws of Zambia including its Constitution and inmates' socio-economic rights under international law. He also reflected on socio-economic rights in South Africa and India. The conclusion of the study was that, the protection of inmates' socio-economic rights in Zambia did not comply with international law. The purpose of the book, edited by Van Zyl Smit and Dunkel, among others, is to achieve international cooperation in reducing prison population and improving conditions in prisons around the world.

The relevant literature on inmates' right to adequate medical treatment which lacks a critical analysis on the courts application of the reasonable standard test when interpreting this right and which this study seeks to develop is analysed below. Mdumbe's article entitled, "Socio-economic Rights: Van Biljon versus Soobramoney"¹³⁴ analysed the courts' interpretation of inmates' right to adequate medical treatment and the right to health care services in *Van Biljon v Minister of*

¹³² Ngoma PTM, *A Critical Examination of the Socio-Economic Rights of Prisoners in Zambia in the Context of International Minimum Standards*, LLM dissertation, University of Pretoria, November 2011.

¹³³ Van Zyl Smit D and Dunkel F, *Imprisonment Today and Tomorrow, International Perspectives on Prisoners' rights and Prison Conditions*, 2nd ed, 2001.

¹³⁴ Mdumbe F, "Socio-economic Rights: Van Biljon versus Soobramoney", *SAPL*, 1998, 13, 460.

*Correctional Services*¹³⁵ and *Soobramoney v Minister of Health (Kwazulu-Natal)*.¹³⁶ Mdumbe argued that, inmates' entitlements, in terms of section 35 (2) (e) and 27 (1), could be limited by the non-availability of the resources which could only be justified by section 36 of the Constitution.¹³⁷ Liebenberg endorsed Mdumbe's argument when she argued that, lack of resources on the part of the state should comply with section 36 in order for it to be exempted from its obligation of fulfilling inmates' right to adequate medical treatment.¹³⁸ The same argument was also indirectly endorsed by Maseko and Singh when they argued that, the lack of resources on the part of the state and which constitutes the main obstacle to inmates' attempt to access their health care, does not exempt the state from fulfilling its obligation in terms of the Constitution.¹³⁹

On the same right to adequate medical treatment, this study also seeks to develop the following literature. Liebenberg's argument, in her book, that the case of *N v Government of the Republic of South Africa and Others (No 1)*¹⁴⁰ "failed to engage in a normative interpretation of section 35(2) (e) and its interrelationship with section 27 in relation to detained persons".¹⁴¹ Hassim's article entitled, "The 5 star prison hotel?"

¹³⁵ *Van Biljon v Minister of Correctional Services* 1997 (4) SA 411 (C).

¹³⁶ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

¹³⁷ Mdumbe F, (note 134) above.

¹³⁸ Liebenberg S, (note 113) above.

¹³⁹ Singh A and Maseko TW, "The protection of prisoners' right to health care services in South African Law: Is it adequate?", *Journal for Juridical Science*, 2006, 31(1), 80.

¹⁴⁰ *N and others v Government of Republic of South Africa and others (No 1)*, (note 23) above.

¹⁴¹ Liebenberg S, (note 113) above at 264-265.

Right of access to ARV treatment for HIV positive prisoners in South Africa".¹⁴² Having analysed the law that protects inmates' right to adequate medical treatment and the case of *N and others v Government of Republic of South Africa and others (No 1)*,¹⁴³ Hassim argued that there was very little effort on the part of the Government to ensure adequate medical treatment for HIV positive inmates. The author further argued that there was a lack of co-ordination between the Department of Health and the DCS on the provision of health care services in the correctional centre. This was evidenced by the Department of Health's system which made it compulsory for health services to be delivered in facilities outside the correctional facilities. The author then concluded that this litigation would prevent unnecessary deaths and improve co-ordination in the implementation of laws and policies between government departments.

This study also seeks to develop Maseko's argument in his dissertation entitled, "The protection of prisoners' rights to health care services: Do prisoners realize these rights in practice?".¹⁴⁴ He argued that though the Constitution protects inmates' rights including their right to adequate medical treatment, inmates were not satisfied with the provision of medical treatment, psychological treatment and nutrition in Westville correctional centre.

¹⁴² Hassim A, "The 5 star prison hotel? Right of access to ARV treatment for HIV positive prisoners in South Africa", *International Journal of Prison Health*, 2006, 2(3),157.

¹⁴³ *N and others v Government of Republic of South Africa and others (No 1)*, (note 23) above.

¹⁴⁴ Maseko T, *The Protection of Prisoners' Rights to Health Care Services: Do Prisoners Realize these Rights in Practice?*, LLM dissertation, University of KwaZulu-Natal, 2004.

The argument by Motala and McQuoid-Mason in an article entitled, “Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?”.¹⁴⁵ They argued that the values of the Constitution oblige the state to adopt a holistic approach when providing antiretroviral therapy for inmates. That “includes comprehensive HIV/AIDS care and prevention, treatment of opportunistic infections access to nutritional supplements, access to palliative care and compassionate release”.¹⁴⁶ Muntingh and Mbazira’s article which focused on the importance of the time frames within which the state has to comply with the court’s judgment in fulfilling inmates’ right to adequate medical treatment.¹⁴⁷ Having critically analysed the case of *N v Government of the Republic of South Africa and Others (No 1)*,¹⁴⁸ they commended the court’s judgment for binding the Government to a time frame within which it should ensure that, all HIV positive inmates were provided with ARVs.

¹⁴⁵ Motala N and McQuoid-Mason D, “Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?”, *The South African Journal of Bioethics and Law*, 2013, Vol.6, No. 2, available at, <http://www.sajbl.org.za/index.php/sajbl/artilce/view/290/311>, accessed on 13 December 2013.

¹⁴⁶ Ibid at 1.

¹⁴⁷ Muntingh L and Mbazira C, “Prisoners’ right of access to anti-retroviral treatment”, *ESR Review*, 2006, Vol. 7, No. 2, 14.

¹⁴⁸ *N and others v Government of the Republic of South Africa and Others (No 1)*, (note 23) above.

Van Zyl Smit's chapter in the book entitled, "Imprisonment Today and Tomorrow, International perspectives on Prisoners' Rights and Prisons Conditions".¹⁴⁹ In this chapter, the author commended the dramatical change in the legal framework protecting inmates' rights and stressed the problems associated with inmates' medical treatment in South African correctional centre system. Berger and Bulbulia's article entitled, "Guidelines for the prevention and treatment of HIV in arrested, detained and sentenced persons"¹⁵⁰ criticised the Guidelines for failing to provide guidance on the prevention and treatment of HIV infection in the correctional centres. However, the article's lack of the analysis of the enforcement of inmates' right to adequate medical treatment is understandable as the article was written for a journal of HIV medicine.

Albertus in an article entitled, "Palliative care for terminally ill inmates: Does the State have a legal obligation?" argued that, the state's obligation to provide inmates with palliative care could be inferred from the right to health care guaranteed by sections 27 and 35(2) of the Constitution.¹⁵¹

Pieterse in his article entitled, "The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in

¹⁴⁹ Van Zyl Smit D, 'South Africa', in Dirk Van Zyl Smit and F. Dunkel (eds), *Imprisonment Today and Tomorrow, International Perspective on Prisoners' Rights and Prison Conditions*, 2001, 589.

¹⁵⁰ Berger J and Bulbulia A, "Guidelines for the prevention and treatment of HIV in arrested, detained and sentenced persons", *The Southern African Journal of HIV Medicine*, 2008, 23.

¹⁵¹ Albertus C, "Palliative care for terminally ill inmates: Does the State have a legal obligation?", *SACJ*, 2012, Vol. 1, 67.

South African prisons”¹⁵² analyzed the cases in which the courts granted inmates bail on the basis that the correctional centres’ conditions violated their rights. He then commended the courts for protecting inmates’ right to adequate medical treatment without applying the standard of reasonable test which is generally applied when dealing with socio-economic rights. Barie in his article entitled, “Access of incarcerated persons to medical treatment as a socio-economic right in South Africa”¹⁵³ also praised the court’s approach of not applying the standard of reasonable test by arguing that it is a progressive approach on the realization of inmates’ socio-economic rights.

At an international level, the literature on inmates’ right to adequate medical treatment is written in the form of chapters, research paper and articles and therefore understandably does not focus on the protection and enforcement of this right in detail. Mubangizi’s chapter in a book entitled, “International Human Rights Protection for prisoners: A South African perspective”¹⁵⁴ partly analysed inmates’ right to medical treatment from an international law perspective.

¹⁵² Pieterse M, “The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons”, *Journal of African law*, 2006, 50, 2, 118, available at, <http://journals.cambridge.org/action/displayFulltext?type=1&fid=543132&jid=JAL&volumeId=50&issueId=02&aid=543128>, accessed on 25 October 2010.

¹⁵³ Barrie G N, “Access of incarcerated persons to medical treatment as a socio-economic right in South Africa”, *TSAR*, 2008, 1,125.

¹⁵⁴ Mubangizi J.C, ‘International Human Rights Protection for prisoners: A South African Perspective’, in Mechthild Nagel and Seth N. Asumah (eds) *Prisons and Punishment--Reconsidering Global Penalty Africa*, 2007, Ch 14.

The research paper by Odongo and Gallinetti, entitled, “The treatment of children in South African prisons—A report on the applicable domestic and international minimum standards” only enriched the study of child inmates’ rights to adequate medical treatment from an international law perspective.¹⁵⁵ Having identified the gaps in policy and practice in South African Correctional Centres, the authors recommended the implementation of international minimum standards on the treatment of child inmates in relation to, among other things, their medical and social services.

Hein van Kempen’s article entitled, “Positive obligations to ensure the human rights of prisoners”¹⁵⁶ analyzed the international obligation imposed by international law instruments such as the ICCPR, ECHR, and the ACHR as well as the ACHPR to fulfill inmates’ right to health care. The author concluded that, while this right is protected at an international law level, it is subjected to vague and subjective restrictions. Accordingly the author argued that there should be, at least, some

¹⁵⁵ Odongo G and Gallinetti J, “The treatment of children in South African prisons—A report on the applicable domestic and international minimum standards”, *CSPR Research Paper No. 11*, 2005, available at, [http://cspri.org.za/publications/researchreports/The%20Treatment%20of%20Children%20in%20South%20African%20Prisons%20%20A%20Report%20on%20the%20Applicable%20Domestic%20and%20International%20Minimum%20Standards%20\(Research%20Paper%20No.%2011\).pdf](http://cspri.org.za/publications/researchreports/The%20Treatment%20of%20Children%20in%20South%20African%20Prisons%20%20A%20Report%20on%20the%20Applicable%20Domestic%20and%20International%20Minimum%20Standards%20(Research%20Paper%20No.%2011).pdf), accessed on 24 June 2013.

¹⁵⁶ Hein van Kempen P, “Positive obligations to ensure the human rights of prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family Under the ICCPR, the ECHR and the AfCHPR”, 2008, available at, http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/Stavern/05_Stavern_Contribution%20Van%20Kempen.pdf, accessed on 8 February 2011.

express conditions of proportionality and necessity into the limitation clause of the basic principle in order to protect inmates' right to health care.

Having thoroughly discussed inmates' right to health, Lines in an article entitled, "The right to health of prisoners in international human rights law"¹⁵⁷, concluded that the challenge on the fulfilment of inmates' right to health is the absence of a consistent implementation practice, through reporting procedures and before judicial and quasi-judicial bodies. Accordingly, Lines argued, there is a need for the enactment of a Second Optional Protocol to the UN Convention against Torture which focuses on health standards in prisons.

A chapter by Slama, Wolff and Loutan only pointed out some issues that could prohibit access to health in the correctional centre and the impact of the political environment on inmates' health and rehabilitation opportunities.¹⁵⁸ It essentially investigated international standards that could serve as a guide to health professionals on the treatment of inmates in the correctional centres. The reason, according to the article, is that health care professionals, working in the correctional centres, could contribute to protecting and improving inmates' rights to health care.

¹⁵⁷ Lines R, (note 8) at 3.

¹⁵⁸ Slama S, Wolff H, and Loutan L, 'The Right to Health in Prisons: Implications in a Borderless World', in Clapham A and Robinson M (eds), *Realizing the Right to health*, 2009, available at, http://www.swisshumanrightsbook.com/SHRB/shrb_03_files/11_453_Slam_Wolff_Loutan.pdf, accessed on 12 December 2011.

Further, an article by Reyes focuses on the analysis of inmates' right to health and their right to a healthy environment.¹⁵⁹ Having outlined the international instruments that protect this right, the author argues that violence and high-risk lifestyles experienced by inmates violates their right to live in a safe environment. The author further argued that the fact that sexual violence or drug injection and sharing of injection equipment could lead to an inmate acquiring HIV, obliges the states to ensure that interventions to guard against the spread of HIV are put in place.

Moreover, Rodley and Pollard's book entitled, *The treatment of Prisoners Under International Law*¹⁶⁰ and Atabay's book entitled, *Handbook on Prisoners with Special Needs*,¹⁶¹ focused on the negative impact of torture on inmates' rights in particular their right not to be subjected to cruel, inhuman and degrading treatment and summarized the main needs of inmates with special needs and possible states' responses to those special needs in line with the international standard, respectively.

At a comparative level, there is also literature on the analysis of inmates' right to adequate medical treatment which, unfortunately, focuses on the laws of different

¹⁵⁹ Reyes H, "Health and Human Rights in prisons", *International Committee of the Red Cross*, 2001, available at, <http://www.icrc.org/eng/resources/documents/misc/59n8yx.htm> , accessed on 13 January 2014.

¹⁶⁰ Rodley N S and Pollard M, *The treatment of Prisoners Under International Law*, 3rd ed, 2009.

¹⁶¹ Atabay T, *Handbook on Prisoners with Special Needs*, 2009, available at, <http://www.refworld.org/docid/4a0969d42.html> accessed on 6 July 2014.

countries. However, it could be used as a reference when interpreting inmates' right to adequate medical treatment.

Viljone in his book entitled, *International Human Rights Law in Africa*, partly analyzed the decision of the Federal High Court of Nigeria in *Odafe and others v Attorney – General and others*¹⁶² where the court found that overcrowded conditions as well as the failure of the state to provide medical treatment to those diagnosed as HIV/AIDS carriers violated Article 16 of the ACHPR which provides for health care and Article 5 which protect people from being tortured or treated in a cruel, inhuman or degrading treatment.¹⁶³ He argued that, this case could have been resolved on the issue of torture alone, in particular mental torture. His reasoning was that “HIV positive prisoners continued detention in overcrowded conditions amongst other inmates who might at any moment attack them, as well as the failure of the state to provide medical treatment to those diagnosed as HIV/AIDS carriers, amounted to torture and therefore constituted a violation of the Nigerian Constitution”.¹⁶⁴

¹⁶² *Odafe and Others v Attorney –General and Others* 2004 AHRLR 205 (NgHC 2004) paras 33 and 37.

¹⁶³ Viljone F, *International Human Rights Law in Africa*, 2007, 556-557.

¹⁶⁴ *Idem*.

Another interesting analysis of inmates' rights including their right to health care from a Nigerian perspective is an article by Olokooba and Ademola entitled, "An overview of the rights of prisoners under the Nigerian law". This article provides an overview of the rights of inmates under the Nigerian law.¹⁶⁵ Having analysed some of the rights of inmates in Nigeria which includes, among others, their right to food, clothing and health care, they pointed out some problems facing inmates in exercising their rights. One of those problems is illiteracy on the part of the inmates, based on the belief that once they are found guilty of breaking the law they cease to enjoy rights. The article further discussed the remedies for inmates whose rights have been violated. It also provided some recommendations which include ensuring that the correctional centres authorities respect inmates' rights and that a law should be enacted to punish the correctional centres authorities who maltreat the inmates.

Further, having discussed Ghana's human rights obligation from national and international law perspectives, Amnesty International argued that the conditions in the correctional centres in Ghana fail to comply with national and international law.¹⁶⁶ In particular, Amnesty international argued that the conditions included the state's failure to reduce overcrowding and to provide inmates with adequate health care and food, violate the ICCPR, ICESCR and the ACHPR.

¹⁶⁵ Olokooba SM and Ademola OW, "An overview of the rights of prisoners under the Nigerian law", *Confluence Journal of Jurisprudence and International law*, available at, <https://unilorin.edu.ng/publications/olokobasm/An%20Overview%20of%20the%20Rights%20of%20Prisoners%20under%20the%20Nigerian%20Law.pdf>, accessed on 10 May 2014.

¹⁶⁶ Amnesty International, (note 81) above.

In Rwanda, in an article entitled, “Access to HIV prevention in Rwandan prisons”, Binagwaho argued that while inmates are protected by the right to health care, guaranteed by the 2003 Constitution of Rwanda, there is still a gap in the delivery of care to HIV positive inmates in the correctional centres.¹⁶⁷ The reason, according to the author, is that inmates are encouraged to engage in paid work, to partly reduce their sentences and which may engage them in sexual activities. The other reason is that inmates in Rwanda are denied access to condoms.

Further, in an article entitled, “Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners’ Rights”,¹⁶⁸ Richard analysed the implications of judicial deference in Australia, United Kingdom and United States of America on inmates’ rights. He argued that, despite the progress that has been made in the development of an inmates’ rights jurisprudence, the courts are still reluctant to become involved in the internal decision-making processes of correctional centres in these countries.

Moreover, a USA perspective on inmates’ right to adequate medical treatment is provided by Jacobi in an article entitled, “Prison Health, Public Health: Obligations and Opportunities”;¹⁶⁹ and an article by Weidman entitled, “The culture of judicial

¹⁶⁷ Binagwaho A, (note 65) above.

¹⁶⁸ Richard E, “Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners’ Rights”, *Australian Journal of Human Rights*, 2001, Vol. 7(1), 91, available at, <http://www.austlii.edu.au/au/journals/AJHR/2001/5.html>, accessed on 10 May 2014.

¹⁶⁹ Jacobi J V, (note 52) above , 447.

deference and the problem of Supermax prisons".¹⁷⁰ Jacobi argued that, inmates' litigation serves as a first step towards the determination whether the court's interpretation of inmates' socio-economic rights is constitutional.¹⁷¹ Weidman argued that the courts' culture of deference to the policies of the correctional centre administrators in the correctional centres' affairs conflict with the courts' obligation to protect inmates' constitutional rights. Having examined, among other things, the constitutional problems presented by Supermax prisons and three Supermax cases involving Eight Amendment challenges to conditions of confinement, the author criticizes the courts' respect for the culture of deference when interpreting these cases. The author then concluded that a line of cases declaring that Supermax conditions are constitutionally significant for due process purposes might provide support for an argument that Supermax conditions are also constitutionally significant for Eighth Amendment purposes.

The literature on inmates' right to adequate accommodation and which lacks the analysis of the importance of promoting the value of human dignity when determining whether overcrowding in the correctional centres amounts to the violation of this right is provided by the following paragraphs.

De Vos in his Chapter entitled, "The right to housing"¹⁷² argued that, adequate facilities, for the purposes of inmates' right to adequate accommodation, must also at

¹⁷⁰ Weidman MM, "The culture of Judicial Deference and the problem of Supermax prisons", *UCLA L. Rev.* 2003-2004, 51,1505.

¹⁷¹ Jacobi J V, (note 52) above.

¹⁷² De Vos, 'The right to housing', in Brand D and Heyns C (eds), *Socio-economic rights in South Africa*, 2005, Ch 3.

least encompass those adequate facilities envisaged by the Rules of the DCS. Mclean held that, while the fulfilment of inmates' right to adequate accommodation is subject to the availability of resources, lack of funding could not be used to justify the absence of accommodation to inmates or accommodation which is inconsistent with their right to dignity.¹⁷³

Steinberg in an article entitled "Prison Overcrowding and the constitutional right to adequate accommodation in South Africa"¹⁷⁴ argued that, inmates' right to adequate accommodation entitles them to argue that the lack of the available space in the correctional centre violates their rights during sentencing stage. The author argued this as follows:

The merits of such litigation are twofold. First, it would draw the courts into establishing a jurisprudence on accommodation standards. And second, it would work towards establishing a very important principle in South African case law: that a sentence violates the right to a fair trial insofar as the state cannot implement it in accordance with constitutional standards; and thus — perhaps most important as regards the development of a remedy that addresses the systemic problem — that sentencing regimes should be guided, in part, by the availability of prison space.

¹⁷³ McLean K, 'Housing', in Woolman S et al, *Constitutional Law of South Africa*, 2nd ed, 2008, Vol. 4, Ch 55.

¹⁷⁴ Steinberg J, "Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa", *the Centre for the Study of Violence and Reconciliation*, 2005, available at, <http://www.csvr.org.za/docs/correctional/prisoncovercrowding.pdf>, accessed on 19 February 2008.

Ballard and Dereymaeker in their Civil Society Prison Reform Newsletter entitled “Conditions of detention and prison overcrowding: a few lessons from abroad”,¹⁷⁵ analysed the negative impact of overcrowding on inmates’ rights from a comparative law perspective. They further argued that, overcrowding violates this right in a number of ways as it results in the shortage of sufficient ventilation and ineffective rehabilitative services which cannot be rescued under section 36 of the Constitution.

The violation of inmates’ rights as a result of overcrowding in the correctional centres is also echoed by Singh in an article entitled, “A world of Darkness: Polarisation of Prisoners”.¹⁷⁶ Having discussed some of the rights that inmates are entitled to and conducted interviews and administered questionnaires in the Westville correctional centre, Singh argued that inhuman conditions that are caused by overcrowding violate inmates’ rights. This is also echoed by Van der Westhuizen in his thesis entitled, *The Influence of Overcrowding in South African Prisons on the Rehabilitation of Transgressors*. Having argued that overcrowding amounts to a violation of the Constitution as it prohibits the effective rehabilitation of the inmates, the author suggested various ways which could reduce overcrowding in the South African correctional centres.¹⁷⁷

¹⁷⁵ Ballard C and Dereymaeker G, “Conditions of detention and prison overcrowding: a few Lessons from abroad”, *Civil Society Prison Reform Newsletter*, 2011, Issue No. 39.

¹⁷⁶ Singh S, “A World of Darkness: Polarisation of Prisoners”, *Alternation*, 2006, 13, 2.

¹⁷⁷ Van der Westhuizen BM, (Translated title): *The Influence of Overcrowding in South African Prisons on the Rehabilitation of Transgressors*, DLitt et Phil thesis, University of South Africa, 2005.

Blom and Maodi in their article entitled, “Only a matter of time before overcrowding in prisons flood the Courts”, analyzed the decision of the High court in *Lee v Minister of Correctional Services*, the decision of the Supreme Court of Appeal in *Minister of Correctional Services v Lee* and the decision of the Constitutional court in *Lee v Minister of Correctional Services*.¹⁷⁸ They then argued that more cases of inmates who contract all sorts of diseases including HIV in the overcrowded correctional centre would come to the courts.

Van Zyl Smit in a chapter entitled, “Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa”, analysed the various judgements of the Constitutional court and the Supreme Court of Appeal on laws that impact on overcrowding in the correctional centres.¹⁷⁹ He then argued that overcrowding is caused by courts’ refusal to grant accused bail as a result of the public pressure to keep unconvicted offenders behind bars.

Odongo and Gallinetti, in an article entitled, “The treatment of children in South African prisons—A report on the applicable domestic and international minimum standards”¹⁸⁰ partly analyzed child inmates’ right to adequate accommodation from an international law perspective. They recommended, as a result of the gap in policy and practice in South African correctional centres, the implementation of

¹⁷⁸ Blom O and Maodi W, “Only a matter of time before overcrowding in prisons flood the Courts”, *Without Prejudice*, 2013, Vol 13, Issue 2, 60.

¹⁷⁹ Van Zyl Smit D, ‘Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa’, in Bill Dixon and Elrena van der Spuy (eds), *Justice Gained? Crime and Crime Control in South Africa's Transition*, 2004, CH 9.

¹⁸⁰ Odongo G and Gallinetti J, (note 155) above.

international minimum standards on the treatment of child inmates in relation to, among other things, their physical environment and accommodation.

The following paragraphs analyse the literature on inmates' right to adequate nutrition which lacks the critical analysis of inmates' right to a cultural food. While Mubangizi in his thesis, partly analysed inmates' right to adequate nutrition, he does not focus on their right to cultural food. However, this is understandable because the thesis was written more than a decade ago and lacks the current development of the law in this regard.¹⁸¹

The more relevant argument on inmates' right to cultural food which this study seeks to develop is Liebenberg's argument that the case of *Huang & Others v The Head of Grootvlei prison & Another*¹⁸² represents "...the good illustration of the fact that socio-economic rights are not commodities intended solely to meet people's physical needs, but in many circumstances, also protect the expressive, cultural and religious dimensions of human identity".¹⁸³

At a comparative level, inmates' right to nutrition was analysed by Naim.¹⁸⁴ Unfortunately, this article analysed this right from an American perspective. Naim discussed the constitutional protection of inmates' access to food and their access to special diet either for health or religious reasons. The author further discusses the

¹⁸¹ Mubangizi JC, (note 116) above.

¹⁸² *Huang & Others v The Head of Grootvlei prison & Another*, (note 45) above.

¹⁸³ Liebenberg S, (note 113) above at 265.

¹⁸⁴ Naim C, "Prison Food Law", *Food and Drug Law*, Spring 2005, available at <http://leda.law.harvard.edu/leda/data/733/Naim05.html>, accessed on 5 December 2011.

challenges facing the court's enforcement of the correctional centres' food laws ranging from the fact that the courts' enforcement only occurs after an inmate has filed a law suit and won the case; financial constraints prohibiting inmates from acquiring the services of a good lawyer and; reliance on non-profit organizations with limited ability to take and find cases with merit. Consequently, the author complained about the lack of legislation governing the provision of food in the correctional centre. Such a lack of legislation, according to the author, left the determination of the amount of food to be provided in the correctional centre in the hands of the judges, who do not have the necessary expertise and guidance on how to design correctional centre food law.

The literature on inmates' right to education does not analyse in detail whether inmates can demand access to the internet for study purposes and the obligation to ensure that they have access to the internet also extend to the institutions of higher learning.

The relevant literature on inmates' right to education that this study seeks to develop is an article by Jansen and Achume which is entitled, "Prison Conditions in South Africa and the role of public interest litigation since 1994".¹⁸⁵ This study seeks to develop their opinion that the court's acceptance, in *Thukwane v Minister of Correctional Services*¹⁸⁶, of an argument that, internet access could not be managed

¹⁸⁵ Jansen R and Achume ET, "Prison Conditions in South Africa and the role of public interest litigation since 1994", *SAJHR*, 2011, 27, Issue 1,189.

¹⁸⁶ *Thukwane v Minister of Correctional Services*, (note 22) above.

in a secure way in the correctional centre, amounted to its failure to protect inmates' right to education, in particular, their right to have access to the internet.

In an article entitled, "The treatment of children in South African prisons—A report on the applicable domestic and international minimum standards" Odongo and Gallinetti partly discussed child inmates' rights to education from an international law perspective.¹⁸⁷ As a result of the gaps in policy and practice in South African correctional centres, the authors recommend the implementation of international minimum standards on the treatment of child inmates in relation to their educational programmes. Such international minimum standards, according to the authors, should include, among other things, a daily programme involving at least four hours of education and participation in social education programmes and the legal education in the Correctional Centre in order to assist child inmates to understand their rights.

In the article entitled, "Education in prison",¹⁸⁸ Sagel-Grande examined the main international legal instruments applicable to inmates' right to education. The author also discussed the effectiveness of inmates' right to education in relation to their resettlement in the community. The author further analysed the research result, found in three Dutch correctional centres concerning the inmates' views and experiences with education, vocational training and work during the execution of their sentence. The author then concluded by analysing some results of the experiments with multi-media and e-learning in the correctional centre.

¹⁸⁷ Odongo G and Gallinetti J, (note 155) above.

¹⁸⁸ Sagel-Grande I, "Education in prison", *Acta Criminologica*, 2002, Vol. 15(1), 93.

In his article entitled, "Imprisonment and Internet-Access - Human Rights, the Principle of Normalization and the Question of Prisoners Access to Digital Communications Technology",¹⁸⁹ Smith examined the extent to which digital communication technology should be made available for inmates. The author concluded *inter alia* that a complete internet ban could not be justified, and that internet restrictions had to be balanced with freedom of expression as well as the right to privacy and family life.

At a comparative level, inmates' right to education is analyzed by Lockard and Rankins-Robertson in their article entitled, "The Right to Education, Prison–University Partnerships, and Online Writing Pedagogy in the US".¹⁹⁰ The authors discussed the inmates' right to education in the USA. Having analysed the inmates' right to education and disappearance of post-secondary education in the US Correctional Centres, the authors argued that there should be an online educational programme where the Officials of the Correctional Centre serve as a link between inmates' writings and their educators' comment in order to promote the realization of the inmates' right to education in the USA.

¹⁸⁹ Smith P S, "Imprisonment and Internet-Access - Human Rights, the Principle of Normalization and the Question of Prisoners Access to Digital Communications Technology", *Nordic Journal of Human Rights*, issue 04/2012, 429-453, English abstract version, available at, <http://www.idunn.no/ts/ntmr/2012/04/>, accessed on 23 April 2013.

¹⁹⁰ Lockard J and Rankins-Robertson S, (note 107) above.

In an article entitled, “A world without internet: A new framework for analyzing a supervised release condition that restricts computer and internet access,”¹⁹¹ Gillet analysed cases where the courts have ruled on the justification of limiting computer and internet access as a condition of supervised release. The author then argued that the courts have not analysed this issue using the theory of unconstitutional conditions. The author concluded by arguing that the condition of supervised release is constitutional if it is intended to protect the public and if the computer-monitoring and internet-filtering technology is maximized to reduce First Amendment infringement.

Another comparative perspective which also stressed the relevance of internet access in the correctional centre is an article by Chigunwe entitled, “Access and Inclusion of Inmates to education through Open and Distance Learning Mode”.¹⁹² While the author praises the Zimbabwe Prison Services for providing inmates not only with basic literacy but also primary, secondary education and vocational training, the author also suggests the need for partnership between Zimbabwe Prison Services (ZPS) and institutions of higher learning, offering an open and distance learning in order to provide inmates with post-secondary education. Education in Zimbabwe correctional centres also include primary and secondary

¹⁹¹ Gillett G, “A world without internet: A new framework for analyzing a supervised release Condition that restricts computer and internet access”, *Fordham Law Review*, 2010, Vol. 79, 217.

¹⁹² Chigunwe G, “Access and inclusion of Inmates to Education through Open and Distance Learning Mode”, *Greener Journal of Educational Research*, 2014, Vol. 4(1), available at, <http://www.gjournals.org/GJER/GJER%20PDF/2014/March/1218131037%20Chigunwe.pdf>, accessed on 15 May 2014.

education, which includes courses such as agriculture, woodwork, music, peace keeping, human rights and conflict management skills.

While drawing extensively on the literature outlined above, the thrust of this study is different in that, it seeks to critically analyse whether the protection and enforcement of inmates' socio-economic rights comply with the Constitution compared with international norms and standards. This critically analysis stresses the relevance or the need for the courts to consider the constitutional imperatives when interpreting inmates' socio-economic rights.

1.8 DEFINITION OF CONCEPTS

1.8.1 Inmates

In terms of the Correctional Services Amendment Act, an inmate “means any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody or is en route from one correctional centre or remand detention facility to another correctional centre or remand detention facility”.¹⁹³ So for the purposes of this study, prisoners are referred to as inmates.

¹⁹³ Section 1 of the Correctional Services Act 111 of 1998 as amended by section 1 of the Correctional Services Amendment Act 5 of 2011.

1.8.2 The correctional centre

The Correctional Services Amendment Act defines the correctional centre as a “place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to placement under protective custody, and all land, outbuildings and premises adjacent to any such place and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of incarceration, detention, protection, labour, treatment or otherwise, and all quarters of correctional officials used in connection with any such correctional centre”.¹⁹⁴ It also includes a place used as a police cell or lock up.¹⁹⁵ So, this study refers to “prisons” as the “correctional centres”.

1.8.3 Sentenced offender and unsentenced offender

Sentenced offender means “a convicted person sentenced to incarceration or correctional supervision”,¹⁹⁶ while an unsentenced offender means “any person who is lawfully detained in a correctional centre and who has been convicted of an offence, but who has not been sentenced to incarceration or correctional supervision”.¹⁹⁷

¹⁹⁴ Section 1 of the Correctional Services Act 111 of 1998 as amended by section 1 of the Correctional Services Amendment Act 25 of 2008.

¹⁹⁵ Idem.

¹⁹⁶ Idem.

¹⁹⁷ Idem.

1.8.4 Remand detainee

A remand detainee is “a person detained in a remand detention facility awaiting the finalisation of his or her trial, whether by acquittal or sentence, if such person has not commenced serving a sentence or is not already serving a prior sentence” and a person detained for the purposes of extradition in terms of section 9 of the Extradition Act 67 of 1962.¹⁹⁸

1.8.5 Inmates with disability

Inmates with disability refers to inmates who suffer from a physical, mental, intellectual or sensory impairment which prohibit them from operating in an environment developed for people without any disability.¹⁹⁹

1.8.6 Socio-economic rights

These are rights that empower inmates to demand certain basic needs in order to lead a dignified life.²⁰⁰ This empowerment is based on the fact that, as inmates, they are dependent on the state for their basic needs. As such, unlike their civil and political rights, these rights oblige the state or privatized correctional centres not only to respect, protect but also to fulfil their socio-economic rights. This means that

¹⁹⁸ Section 1 of the Correctional Services Act 111 of 1998 as amended by section 1 of the Correctional Services Amendment Act 5 of 2011.

¹⁹⁹ Section 1 of the Correctional Services Amendment Act 25 of 2008.

²⁰⁰ Khoza S, *Socio-economic rights in South Africa: A resource book*, 2nd ed, 2007, 20, emphasis added.

should the state or privatized correctional centres violate these rights, inmates will be entitled to an effective remedy.²⁰¹

1.9 RESEARCH METHODOLOGY

This study will make use of the legal methodology which focuses on a review of law books and journal articles. This method is neither qualitative nor quantitative since it entails a systematic inquiry that includes a historical-legal research²⁰² which involves reliance on precedent and which requires that focus be placed on the past in order to answer the question under investigation.²⁰³ Essentially it relies on primary sources, such as the constitutions, statutes, regulations and case law.

Case law is regarded as a logical starting point of primary sources since it incorporates the place of constitutions, statutes, and regulations.²⁰⁴ It involves judges who are also responsible for interpreting other primary sources of law in different circumstances.²⁰⁵

²⁰¹ Idem, emphasis added.

²⁰² Russo C, "Legal research: An emerging paradigm for inquiry", *Perspectives in Education*, 2005, Vol. 23 (1), 42.

²⁰³ Idem.

²⁰⁴ Idem.

²⁰⁵ Idem.

The importance of the legal method is that a world “without law and where “doctors of law” are banned is a world doomed to disappear in a particularly violent manner”.²⁰⁶

However, the primary concern with this approach is that it is more concerned with the rules enacted to regulate the functioning and organization of institutions than with their functioning with the facts and political practice.²⁰⁷

1.10 RESEARCH PLAN

This work critically analyses the extent to which South Africa measures up to the protection and enforcement of inmates’ socio-economic rights by international norms and standards. In doing that, this study consists of five chapters. Chapter one deals with the historical background on inmates’ socio-economic rights. It also analyses the research problem and points out the objectives of the study and its hypothesis. Further, an overview of the justification for the study and the methodology are provided.

Chapter 2 analyses inmates’ socio-economic rights from an international and a regional perspective. This chapter also discusses extensively the status and

²⁰⁶ Mangu A, *The Road to Constitutionalism and Democracy in Post-Colonial Africa: The case of the Democratic Republic of Congo*, LLD thesis, University of South Africa, 2002, 91, citing Leclerq Cl, *Institutions politiques et droit constitutionnel*, Paris: Libraire Technique, 3eme ed, 1981,17-18.

²⁰⁷ Ibid at 79.

application of international and regional human rights law that protect inmates' socio-economic rights.

Chapter 3 deals with the protection and enforcement of inmates' socio-economic rights in South Africa.

Chapter 4 analyses the comparative perspective on the protection and enforcement of inmates' socio-economic rights in Malawi, Zimbabwe and the USA. The selection of Malawi and Zimbabwe is based on the fact that they form part of the Southern African Development Community (SADC), while the selection of the USA is justified by its contribution to the protection and enforcement of inmates' rights, including their socio-economic rights over the years. Chapter 5 provides, conclusion and recommendations.

1.11 Chapter Conclusion

This chapter analyses the background towards the constitutional recognition of inmates' socio-economic rights in South Africa. Having sets out the problem statement, aim and objective of the study, the critical questions, assumptions, theoretical framework, scope of the study, justification of the study and literature review, this chapter discusses the research methodology. It concludes by briefly discussing the research plan which outlines the chapters of this study. The next chapter analyses the extent to which international law protects and enforces inmates' socio-economic rights.

CHAPTER TWO

INMATES' SOCIO-ECONOMIC RIGHTS FROM AN INTERNATIONAL AND A REGIONAL PERSPECTIVES

2.1 INTRODUCTION

The world's inmate population stands at over 9 million²⁰⁸ and one out of every 700 people in the world is in the correctional centre.²⁰⁹ It is for this reason that inmates' socio-economic rights are protected at both domestic and international levels.²¹⁰ The international protection of these rights emanates from the principle that inmates do not part with their rights when they enter the correctional centres.²¹¹ This means that inmates should not be subjected to physical, mental abuse and inhuman conditions in the correctional centres.²¹² It is against this background that this chapter analyses

²⁰⁸ Lines R, (note 8) above at 5, citing Walmsley, R, *World prison population list*, 6th ed, International Centre for Prison Studies, London, UK, 2005.

²⁰⁹ Sarkin J, (note 131) above at 1, citing Walmsley R, "Global incarceration and prison trends", *Forum on Crime and Society*, 2003, 3 (1/2), 65-67.

²¹⁰ Mubangizi J C, (note 154) above at 157, emphasis added.

²¹¹ Principle 5 of the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990. The Human Rights Committee on the rights of persons deprived of their liberty, General Comment 21, Article 10 (Forty-fourth session, (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994) para 3.

²¹² Coyle A, *A Human Rights Approach to Prison Management Handbook for prison staff*, 2002,36, emphasis added.

the international and regional protection and enforcement of inmates' socio-economic rights. This analysis includes the role played by the binding international law such as the conventions or treaties (both at an international and regional level) in protecting and enforcing these rights. It also includes the protection and enforcement of these rights by non-binding international law such as the United Nations and regional declarations, Guidelines, Principles, resolutions, Rules, and Reports. Furthermore, the role of the European Court, Inter-American Court and Inter-American Commission, the African Commission and the decisions or observations of the Human Rights Committees in the protection and enforcement of these rights is also analyzed.

The last part of this chapter examines the South African domestication of international law that is relevant to the protection and promotion of these rights. However, the analysis of the protection and enforcement of these rights in terms of international humanitarian law is beyond the scope of this chapter.

2.2 INMATES' SOCIO-ECONOMIC RIGHTS FROM AN INTERNATIONAL PERSPECTIVE

2.2.1 Inmates' right to health

Inmates' right to health is protected and enforced by a number of international treaties and bodies which serve as a guide for health care professionals working in the correctional centres.²¹³ Within the United Nations system, this right is entrenched

²¹³ Slama S, Wolff H, and Loutan L, (note 158) above at 188.

in Article 25 of the Universal Declaration of Human Rights (UDHR), which guarantees the right of everyone to a standard of living adequate for the health and well-being of himself and his family.²¹⁴

It is also protected by Article 12 of the ICESCR, which obliges state parties to ensure that inmates have access to the highest attainable standard of physical and mental health in the correctional centres.²¹⁵ In terms of Committee on Economic, Social and Cultural Rights, this obligation includes ensuring that inmates are provided with equal and timely access to basic preventive, curative, rehabilitative health services, appropriate treatment of prevalent diseases and essential drugs²¹⁶ which constitutes the essential minimum level of this right.²¹⁷ The obligation to fulfil this right, however,

²¹⁴ Universal Declaration of Human Rights, adopted by General Assembly resolution 217 A (III), Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

²¹⁵ International Covenant on Economic, Social and Cultural Rights, (note 30) above, emphasis added. This provision, according to Lines R, (note 8) above at 12, drew its inspiration from the Preamble to the Constitution of the World Health Organization (WHO), which provides that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.

²¹⁶ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), para 17, emphasis added. This obligation is also underscored by Guideline 44 of the UN International Guidelines on HIV/AIDS and Human Rights, Joint United Nations Programme on HIV/AIDS (UNAIDS), 2006, 100.

²¹⁷ Ibid at para 43. This was also echoed by Hunt P and Khosla R in their article entitled, "The

depends on the availability of the resources and on progressive realisation.²¹⁸ However, state parties have an immediate obligation to take steps to fulfil this right and to prohibit discrimination against inmates on access to health services.²¹⁹

Apart from the UDHR and ICESCR, this right is also protected by Article 24 (1) of the CRC.²²⁰ This Article obliges state parties to ensure that children in the correctional centres have access to the highest attainable standard of health. It also obliges states parties to ensure that children have access to facilities for the treatment of their illness and rehabilitation of their health. According to Lines, this Article which protects children's right to health is crucial because majority of children in detention come from poor communities with the risk of poor health and limited access to health care.²²¹

human right to medicines", *International Journal on human rights*, 2008, 100, citing the Committee on Economic, Social and Cultural Rights, General Comment 14, *ibid* at para 12, when they argued that "...access to medicines forms an indispensable part of the right to the highest attainable standard of health".

²¹⁸ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, (note 30) above.

²¹⁹ Committee on Economic, Social and Cultural Rights, General Comment 14, (note 215) above at para 30.

²²⁰ Convention on the Rights of the Child, (note 34) above.

²²¹ Lines R, (note 8) above at 4.

Other international instruments that protect this right include the ICERD,²²² CEDAW,²²³ CRPD²²⁴ and ICCPR.²²⁵ Article 5 (e) (iv) of the ICERD guarantees the right of everyone to equality before the law in the enjoyment of the right to, among others, public health and medical care. Article 12 (1) of the CEDAW obliges states parties to ensure that women which may also include women inmates have access to health care services including family planning. For inmates with disability, this right is also protected by Article 25 of the CRPD which obliges state parties to take all appropriate measures to ensure that people with disabilities have access to health services that are gender-sensitive and to health-related rehabilitation.

The ICCPR, unlike other international instruments, protects this right through the interpretation of some of its provisions. Article 6 which guarantees the right to life, Article 7 which guarantees the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and Article 10 which guarantees the right to be treated with humanity were interpreted as imposing an obligation on states parties to fulfil this right.

In *Lantsova v Russia*, the HRC found that the death of the deceased as a result of poor conditions at the pre-trial detention centre which included among other things, inadequate medical treatment violated Articles 6, paragraph 1, Article 7 and Article

²²² International Convention on the Elimination of All Forms of Racial Discrimination, (note 32) above.

²²³ Convention on the Elimination of All Forms of Discrimination against Women, (note 33) above.

²²⁴ Convention on the Rights of Persons with Disability, (note 31) above.

²²⁵ International Covenant on Civil and Political Rights, (note 29) above.

10, paragraph 1 of the ICCPR.²²⁶ In *McCallum v South Africa*, the HRC found that assaulting an inmate, stripping him naked, disallowing him to see a doctor for a certain period and denying him an HIV test violate his rights not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and to be treated with humanity.²²⁷

The right to be treated with humanity was interpreted to incorporate this right in *Dennis Lobban v Jamaica*²²⁸ and *Sahadath v Trinidad and Tobago*.²²⁹ In *Dennis Lobban v Jamaica*, the HRC found that unfavourable conditions such as, among others, very poor quality of food and drink, the absence of a doctor, and general lack of medical assistance violated inmates' right to be treated with humanity.²³⁰ In *Sahadath v Trinidad and Tobago*, the HRC found that the shortage of psychiatric care, among other things, amounted to the violation of inmates' right to be treated with humanity.²³¹

Apart from the HRC cases, this relationship was also stressed by its Concluding Observations. In its Concluding Observation in India, the HRC found that poor health

²²⁶ *Lantsova v Russia* HRC, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002).

²²⁷ *McCallum v South Africa*, Communication No. 1818/2008, U.N. Doc. CCPR/C/100/D/1818 (2010) para 6.8.

²²⁸ *Dennis Lobban v Jamaica*, Communication No. 797/1998, U.N. Doc. ICCPR/C/80/D/797/1998 (2004).

²²⁹ *Sahadath v Trinidad and Tobago* (2 April 2002) UN Doc CCPR/C/684/1996.

²³⁰ *Dennis Lobban v Jamaica*, (note 228) above.

²³¹ *Sahadath v Trinidad and Tobago*, (note 229) above at para 9.

conditions in the correctional centre, violated, inter alia, Article 10 (1) of the ICCPR.²³² In its Concluding Observation in Mongolia, the HRC found that inhuman conditions, such as the lack of timely medical care, in the detention centre violated Article 10 (1) of the ICCPR.²³³ It then recommended that steps be taken to improve conditions in the correctional centre in order to avoid damaging the health of inmates.²³⁴ In its Report in Colombia, the HRC found that the unhealthy conditions of detention which made access to health services difficult for inmates violated article 10(1) of the ICCPR.²³⁵

This relationship was also emphasised by the UN Working Group on Arbitrary Detention interpreted this right as incorporating inmates' right to health as follows:

....persons deprived of their liberty during criminal proceedings are detained in conditions that are not compatible with human dignity and may amount to inhuman or degrading treatment.... the Working Group cannot disregard that such inadequate conditions of

²³² UN Human Rights Committee, Concluding observations: India, 04 August 1997, CCPR/C/79/Add.81, para 26

²³³ UN Human Rights Committee, Concluding Observations: Mongolia, 25 April 2000, CCPR/C/79/Add.120, para 12.

²³⁴ Idem.

²³⁵ UN Human Rights Committee Report regarding human rights' violation for detainees in Colombia, (note 54) above at 12, citing Concluding Observations to the Republic of Moldova (2002), Republic of Moldova, ICCPR, A/57/40 Vol. I (2002) 76, para 84(9); Georgia, ICCPR, A/52/40 Vol. I (1997) 40, para 243; Guyana, ICCPR, A/55/40 Vol. I (2000) 53, paras 369, 371 and 372, found that, the unhealthy conditions of detention which made access to health services difficult for inmates violated Article 10(1) of the International Covenant on Civil and Political Rights, (note 29) above.

detention have a negative impact on the exercise of rights that squarely fall within its mandate.... a detainee who has to endure detention conditions that affect his or her health, safety or well-being is participating in the proceedings in less favourable conditions than the prosecution...²³⁶

The non-binding international standards which protect this right include the Standard Minimum Rules for the Treatment of Prisoners (SMRTP),²³⁷ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,²³⁸ the UN Rules for the protection of Juveniles Deprived of their Liberty (UN JDL Rules);²³⁹ the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;²⁴⁰ the UN

²³⁶ Working Group on Arbitrary Detention' (1 December 2004) UN. Doc.E/CN.4/2005/6, at paras 68-69.

²³⁷ The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

²³⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly Resolution 43/173, 76th plenary meeting, 9 December 1988.

²³⁹ UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the United Nations General Assembly on 14 December 1990.

²⁴⁰ The Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 37/194 of 18 December 1982.

international Guidelines on HIV/AIDS;²⁴¹ the Declaration on the Elimination of Violence against Women;²⁴² the Declaration of the Rights of the Child²⁴³ and; the WHO, UNODC and UNAIDS' Interventions to Address HIV in the correctional centres.²⁴⁴

The SMRTP and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment oblige states to examine inmates when they are admitted into the correctional centres. The purpose of this exercise is to determine their physical or mental illnesses and to make appropriate arrangements.²⁴⁵ The Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment oblige states to provide inmates with quality medical treatment that is afforded to the public.²⁴⁶ UN International Guidelines on HIV/AIDS and Human Rights require states to move as

²⁴¹ UN International Guidelines on HIV/AIDS and Human Rights, (note 216) above.

²⁴² The Declaration on the Elimination of Violence against Women, adopted by UN General Assembly Resolution 48/104 of 20 December 1993.

²⁴³ The Declaration of the Rights of the Child, adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959.

²⁴⁴ World Health Organization, United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS, (note 75) above.

²⁴⁵ Rule 24 of the Standard Minimum Rules for the Treatment of Prisoners, (note 237) above and Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (note 238) above.

²⁴⁶ Principle 1 of the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (note 240) above.

quickly as possible towards realising access to HIV prevention, treatment, care and support at the domestic and global levels.²⁴⁷ This guideline requires the states to enact interventions aimed at fighting against HIV/AIDS as it is easily transferred through sexual violence or drug injection and sharing of injection equipment in the correctional centres.²⁴⁸

The Declaration on the Elimination of Violence Against Women obliges states to ensure that women have access to the highest standard attainable of physical and mental health and that they are not subjected to torture, or other cruel, inhuman or degrading treatment or punishment.²⁴⁹ Child inmates' health care is protected by the Declaration of the Rights of the Child which obliges states to provide them with adequate medical services.²⁵⁰ For all inmates, the WHO, UNODC and UNAIDS' enacted interventions to address HIV which include ensuring that HIV positive inmates receive care, support and treatment equivalent to that available to people living with HIV in the community, including ART.²⁵¹

²⁴⁷ Guideline 28 of the UN International Guidelines on HIV/AIDS and Human Rights, (note 216) above.

²⁴⁸ Reyes H, (note 159) above.

²⁴⁹ Article 3 of the Declaration on the Elimination of Violence against Women, (note 242) above.

²⁵⁰ Principle 4 of the Declaration of the Rights of the Child, (note 243) above, emphasis added.

²⁵¹ World Health Organization, United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS, (note 60) above at 6.

However, the implementation of this right, through reporting procedures and before judicial and quasi-judicial bodies is questioned for its lack of consistency.²⁵² Hence, Lines advocates for the creation of an international instrument (a Second Optional Protocol to the UN Convention against Torture) that codifies the rights of prisoners to health care within international law.²⁵³

2.2.2 Inmates' rights to accommodation

Inmates' rights to accommodation are implicitly protected by Article 10 (1) of the ICCPR, which guarantees the right to be treated with humanity and with respect for inherent dignity.²⁵⁴ This was stressed by the HRC in a number of its Concluding Observations and cases. In its Concluding Observations on Senegal,²⁵⁵ Georgia,²⁵⁶ Mongolia,²⁵⁷ India,²⁵⁸ and Colombia,²⁵⁹ HRC found that overcrowding in the correctional centres violated Article 10(1) of the ICCPR. In *Lantsova v Russian*

²⁵² Lines R, (note 8) at 36, citing Toebe B, "Towards an Improved Understanding of the International Human Right to Health", *Human Rights Quarterly*, 1999, 21.3, 665.

²⁵³ Lines R, (note 8) at 39.

²⁵⁴ International Covenant on Civil and Political Rights, (note 29) above.

²⁵⁵ UN Human Rights Committee, Concluding Observations: Senegal, (1998) UN Doc A/53/40, para 64.

²⁵⁶ UN Human Rights Committee, Concluding Observations: Georgia, (1997) UN Doc A/52/40 vol I 40, para 243.

²⁵⁷ UN Human Rights Committee, Concluding Observation: Mongolia, (note 231) above para 12.

²⁵⁸ UN Human Rights Committee, Concluding observations: India, (note 230) above para 26.

²⁵⁹ UN Human Rights Committee Report regarding human rights' violation for detainees in Colombia, (note 53) para 74.

Federation, the HRC found the violation of Article 10(1) of the ICCPR as the result of poor correctional centre conditions, which included, among other things, overcrowding as follows:

regarding the conditions of detention, the Committee notes that the State party concedes that prison conditions were bad and that detention centres at the time of the events held twice the intended number of inmates. The Committee also notes the specific information received from the author, in particular that the prison population was, in fact, five times the allowed capacity..... The Committee finds that holding the author's son in the conditions prevailing at this prison during that time entailed a violation of his rights under article 10, paragraph 1 of the Covenant.²⁶⁰

In *Steve Shaw v Jamaica*, the HRC found that overcrowding in the police cell also violated Articles 10 (1) of the ICCPR.²⁶¹

Apart from the ICCPR, these rights are protected by Article 9 of the CRPD, which protects the right of people with disability including disabled inmates.²⁶² This Article obliges the state parties to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”. It also obliges the state

²⁶⁰ *Lantsova v Russian Federation*, Communication No.763/1997,U.N.Doc.CCPR/C/74/D/763/1997 (2002) para 9.1.

²⁶¹ *Steve Shaw v Jamaica*, Communication No. 704/1996, UN. Doc. CCPR/C/62/D/704/1996 (4 June 1998).

²⁶² Convention on the Rights of Persons with Disability, (note 31) above.

parties to identify and remove obstacles and barriers to accessibility to, among other things, buildings, roads, indoor and outdoor facilities including medical facilities, information, communications and services such as electronic services and emergency services. This obligation, however, has to be fulfilled progressively and subject to the available resources.²⁶³

The non-binding international standards that protect these right include the SMRTP,²⁶⁴ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²⁶⁵ and Economic and Social Council's (ECOSOC) Resolution on International Cooperation aimed at the Reduction of Prison Overcrowding and the Promotion of Alternative Sentencing.²⁶⁶ The SMRTP oblige the states to keep different categories of inmates in separate institutions which take into account, among other things, their sex, age, and the necessities of their treatment.²⁶⁷ It also obliges the states to ensure that sleeping accommodation in the correctional centres meets the requirements of health which takes into account climatic conditions, cubic content of air, minimum floor space, lighting, heating and ventilation.²⁶⁸ Furthermore, the SMRTP obliges the states to ensure that there is

²⁶³ Article 2 of the Convention on the Rights of Persons with Disability, (note 31) above. .

²⁶⁴ Standard Minimum Rules for the Treatment of Prisoners, (note 237) above.

²⁶⁵ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (note 238) above.

²⁶⁶ Economic and Social Council Resolution on International Cooperation aimed at the Reduction of Prison Overcrowding and the Promotion of Alternative Sentencing, 1998/23, 44th plenary meeting on 28 July 1998.

²⁶⁷ Rule 8 of the Standard Minimum Rules for Treatment of Prisoners, (note 237) above.

²⁶⁸ Rule 10 of the Standard Minimum Rules for Treatment of Prisoners, (note 237) above.

artificial ventilation, windows which allow entrance of fresh air and natural light which enables inmates to read or work.²⁶⁹ Lastly, the SMRTP obliges the states to ensure that sanitary installations are adequate to enable inmates to comply with the needs of nature in a clean and decent manner.²⁷⁰

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment obliges the states to ensure that inmates are treated in a humane manner and with respect for their inherent dignity.²⁷¹ They also oblige the states to ensure that inmates' accommodation does not subject them to torture and cruel, inhuman or degrading treatment or punishment.²⁷² Furthermore, they oblige the states to ensure that inmates' accommodation is not detrimental to their health.²⁷³ The ECOSOC's Resolution requests international and regional financial institutions to adopt measures aimed at reducing overcrowding in the correctional centres.²⁷⁴

²⁶⁹ Rule 11 of the Standard Minimum Rules for Treatment of Prisoners, (note 237) above.

²⁷⁰ Rule 12 of the Standard Minimum Rules for Treatment of Prisoners, (note 237) above.

²⁷¹ Principles 1 and 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (note 238) above.

²⁷² *Idem*, emphasis added.

²⁷³ *Idem*.

²⁷⁴ Economic and Social Council Resolution on International Cooperation aimed at the Reduction of Prison Overcrowding and the Promotion of Alternative Sentencing, (note 266) above.

2.2.3 Inmates' right to nutrition

Inmates' right to nutrition is protected by Article 25 of the UDHR, which guarantees the right of everyone to a standard of living adequate for the health and well-being of himself including food.²⁷⁵ This right is also protected by Article 11 of the ICESCR, which obliges the states parties to ensure that adequate food is available to satisfy the dietary needs of individuals.²⁷⁶ This obligation includes ensuring that inmates are provided with "... minimum essential food which is sufficient, nutritionally adequate and safe..."²⁷⁷ However, the obligation to fulfil this right is subject to states' available resources and progressive realisation.²⁷⁸

This right is also implicitly incorporated in Articles 7 and 10 of the ICCPR, which guarantee the right not to be treated in an inhuman or degrading way and the right to be treated with humanity and with respect for inherent dignity, respectively.²⁷⁹ This was stressed by the HRC in its Concluding Observations on Nigeria,²⁸⁰ in *Mukong v Cameroon*²⁸¹ and *Lantsova v Russian Federation*.²⁸² In its Concluding Observations

²⁷⁵ Universal Declaration of Human Rights, (note 213) above.

²⁷⁶ International Covenant on Economic, Social and Cultural Rights, (note 30) above.
Committee on Economic, Social and Cultural Rights, General Comment 12, The right to adequate food, (Twentieth Session), Geneva, 26 April-14 May 1999, at para 8.

²⁷⁷ Ibid at para 14, emphasis added.

²⁷⁸ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, (note 30) above, emphasis added.

²⁷⁹ International Covenant on Civil and Political Rights, (note 29) above.

²⁸⁰ UN Human Rights Committee, Concluding Observations: Nigeria, (1997) Fifty-first Session Supplement No. 40 (A/51/40) Vol I.

²⁸¹ *Mukong v Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991

on Nigeria, the HRC found that poor conditions which include lack of sanitation, adequate food, and clear water in the correctional centre violated Article 10 of the ICCPR.²⁸³ In *Mukong v Cameroon*, the HRC found that the authorities' refusal to feed an inmate for several days violated article 7 of the ICCPR.²⁸⁴ In *Lantsova v Russian Federation*, Article 10 (1) was found to have been violated as a result of inadequate food caused by overcrowding in the correctional centre.²⁸⁵

Other international instruments that protect this right include CEDAW,²⁸⁶ CRC²⁸⁷ and CRPD.²⁸⁸ Article 12 (2) of the CEDAW obliges states parties to provide pregnant women with appropriate services which include adequate nutrition during pregnancy and lactation. Article 27 of the CRC obliges states parties to ensure that every child has access to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 28 of the CRPD places a positive obligation on the states parties to provide disabled inmates with an adequate standard of living which includes adequate food without discrimination.

(1994).

²⁸² *Lantsova v Russian Federation*, Communication No. 763/1997, U.N. Doc.CCPR/C/74/D/763/1997 (2002).

²⁸³ UN Human Rights Committee, Concluding Observations: Nigeria, (note 289) at para 285.

²⁸⁴ *Mukong v Cameroon*, (note 281) above.

²⁸⁵ *Lantsova v Russian Federation*, (note 282) above.

²⁸⁶ Convention on the Elimination of All Forms of Discrimination against Women,(note 33) above.

²⁸⁷ Convention on the Rights of the Child,(note 34) above.

²⁸⁸ Convention on the Rights of Persons with Disability, (note 31) above.

Rules 6, 20 and 42 of the SMRTP constitute the non-binding international standards that protect this right. Rules 6 and 42 oblige states to provide inmates with special diet that takes into account their religious belief. Rule 20 obliges states to provide inmates with drinking water and food of nutritional value adequate for their strength and health. Apart from the SMRTP, this right is also protected by Principle 3 of the UN Basic Principles for the Treatment of Prisoners²⁸⁹ and Guidelines 6 and 101 of the UN International Guidelines on HIV/AIDS and Human Rights.²⁹⁰

2.2.4 Inmates' rights to education

Inmates' rights to education are protected by Article 26 of the UDHR, which provides:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

These rights are also protected by Article 13 of the ICESCR, which guarantees the right of everyone to primary education, secondary education, technical and vocational education, higher education and fundamental education. This Article imposes a positive obligation on states parties to ensure that inmates are provided with education in the correctional centres. The states parties' obligation to fulfill inmates' rights to education is subject to availability of the resources and progressive

²⁸⁹ Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990.

²⁹⁰ UN International Guidelines on HIV/AIDS and Human Rights, (note 215) above.

realization.²⁹¹ However, states parties have an immediate obligation to provide inmates with these rights without discrimination.²⁹²

Apart from the ICESCR, these rights are also protected by Article 10(3) of the ICCPR. This Article obliges state parties to ensure that their correctional centres treat inmates in a manner that considers their reformation and social rehabilitation. This obligation, therefore, requires state parties to provide inmates with quality education that will play a role in their rehabilitation.

These rights are also protected by Articles 9 and 24 of the CRPD,²⁹³ Articles 28 and 29 of the CRC,²⁹⁴ Article 1 of the Convention against Discrimination in Education,²⁹⁵ and Article 10 of the CEDAW.²⁹⁶ Article 28 of the CRC obliges states parties to provide child inmates with primary, secondary, higher education including vocational education. Article 29 obliges state parties to provide child inmates with education aimed at developing their personality and talent to full potential. Article 1 of the Convention against Discrimination in Education prohibits discrimination against

²⁹¹ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (note 30) above.

²⁹² Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003) para 31, emphasis added.

²⁹³ Convention on the Rights of Persons with Disability, (note 31) above.

²⁹⁴ Convention on the Rights of the Child, (note 34) above.

²⁹⁵ Convention against Discrimination in Education, adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

²⁹⁶ Convention on the Elimination of All forms of Discrimination against Women, (note 33) above.

inmates in education. The prohibited discrimination includes depriving them access to education, limiting their education to an inferior standard, establishing or maintaining separate educational systems or institutions for them, and inflicting educational conditions which are incompatible with their dignity. Discrimination in education against women inmates is also prohibited by Article 10 of the CEDAW which obliges state parties to ensure that women have equal rights with men in education.

International standards that protect these rights include the SMRTP,²⁹⁷ the UN JDL,²⁹⁸ the Basic Principles for the Treatment of Prisoners,²⁹⁹ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,³⁰⁰ the Declaration on the Right to Development,³⁰¹ and the UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet.³⁰²

The SMRTP protects these rights by obliging states to provide them with further education and compulsory education,³⁰³ which are integrated with the educational

²⁹⁷ Standard Minimum Rules for the Treatment of Prisoners, (note 237) above.

²⁹⁸ UN Rules for the Protection of Juveniles Deprived of their Liberty, (note 239) above.

²⁹⁹ The Basic Principles for the Treatment of Prisoners, (note 289) above.

³⁰⁰ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (note 238) above.

³⁰¹ Declaration on the Right to Development A/RES/41/128, 97th Plenary meeting, 4 December 1986.

³⁰² UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet, adopted by the General Assembly, Human Rights Council, twentieth session, Agenda item 3, A/HRC/20/L.13, 29 June 2012.

³⁰³ Rule 77(1) of the Standard Minimum Rules for the Treatment of Prisoners, (note 237) above.

system of the country.³⁰⁴ For young inmates, the right to be provided with compulsory education is also protected by Rule 38 of the UN JDL Rules. Furthermore, Rule 39 obliges the states to provide child inmates who are above compulsory school age with access to educational programmes. Lastly, the UN JDL Rules also oblige the states to ensure that correctional centres have libraries for child inmates to access instructional and recreational books and periodicals.³⁰⁵

Principle 6 of the Basic Principles for the Treatment of Prisoners imposes a positive obligation on the states to ensure that inmates take part in cultural activities and education aimed at the development of their personality. Principle 28 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment obliges states to provide inmates with education subject to available resources. Article 8(1) of the Declaration on the Right to Development obliges states to ensure, inter alia, equality of opportunity for all in their access to education. The UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet calls upon states to promote and facilitate access to the internet and to promote, protect and enjoy human rights on the internet.³⁰⁶ These rights include the right to education and the right to freedom of opinion and expression. The Special Rapporteur argued this as follows:

³⁰⁴ Rule 77(2) of the Standard Minimum Rules for the Treatment of Prisoners, (note 237) above.

³⁰⁵ Rule 41 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, (note 239) above.

³⁰⁶ UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet, (note 302) above.

The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education.....Thus by acting as a catalyst for individuals to exercise the right to freedom of opinion and expression, the internet also facilitates the realization of a range of other rights.³⁰⁷

According to the Special Rapporteur, the right to freedom of expression “was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression”.³⁰⁸ In addition, Smith argued that this future technological development may also include inmates’ access to the internet.³⁰⁹ Smith further argued that internet restrictions had to be balanced with freedom of expression as well as the right to privacy and family life.³¹⁰

³⁰⁷ Report of the Special Rapporteur (Frank La Rue) on the Promotion and protection of the Right to Freedom of Opinion and Expression, Human Rights Council , Seventeenth session, Agenda item 3, 16 May 2011, para 22.

³⁰⁸ Ibid at para 21.

³⁰⁹ Smith P S, (note 189) above.

³¹⁰ Idem.

2.3 INMATES' SOCIO-ECONOMIC RIGHTS FROM A REGIONAL PERSPECTIVE

2.3.1 Inmates' right to health

2.3.1.1 The European system

The European system protects and promotes inmates' right to health through Article 3 of the European Convention of Human Rights (ECHR) which guarantees the right of everyone not to be subjected to torture or to inhuman or degrading punishment.³¹¹ This was confirmed by the European Court when it interpreted this right as incorporating a positive obligation on the states parties to provide inmates with medical treatment. In *Melnik v Ukraine*,³¹² the European Court found the violation of Article 3 of the ECHR as a result of the state's failure to provide an inmate suffering from tuberculosis with adequate and timely treatment. In *Lorgov v Bulgaria*,³¹³ the European Court also found the violation of Article 3 of the ECHR as a result of the delay in providing adequate medical assistance in an emergency situation. Even in *Kudla v Poland*³¹⁴ in which the European Court did not find the violation of Article 3 of the ECHR, it did stress that this article imposes an obligation on the state to

³¹¹ European Convention on Human Rights, drafted by the European Council in 1950, entered into force on 3 September 1953.

³¹² *Melnik v Ukraine*, application no. 72286/01, judgement of 28 March 2006.

³¹³ *Lorgov v Bulgaria*, application no. 40653/98, judgment of 11 March 2004, paras 85-87.

³¹⁴ *Kudla v Poland*, application no. 30210/96, judgement of 26 October 2000.

ensure that a “prisoner’s health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance”.³¹⁵

The Charter of Fundamental Rights of the European Union protects this right through its Article 4 which guarantees the right not to be subjected to torture or to inhuman or degrading punishment³¹⁶ and which has been interpreted by the European Court as incorporating this right in the cases discussed above. This Charter also protects this right through its Article 35 which guarantees the right of access to health care.

The European system also protects this right through its non-binding European Prison Rules which oblige the states to ensure, among other things, that sick inmates have access to a specialist treatment and a psychiatric treatment.³¹⁷ It also protects this right through its non-binding Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).³¹⁸ These Standards oblige the states to ensure that inmates have access to medical treatment required to treat life-threatening diseases.³¹⁹ They also impose an obligation on the states to ensure that inmates, when they are admitted to the

³¹⁵ Ibid at para 94.

³¹⁶ Charter of Fundamental Rights of the European Union, (2000/C364/01), proclaimed by the European Parliament, the Council and the Commission at the Nice European Council on 7 December 2000, entered into force on 1 December 2009.

³¹⁷ Rules 46.1 and 47.2 of the European Prison Rules, Recommendation Rec(2006)2, adopted by the Committee of Ministers on 11 January 2006.

³¹⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards ---CPT/Inf/E (2002) 1 – Rev. 2013.

³¹⁹ Ibid at 26, at para 31.

correctional centre, are examined by a medical doctor and that they have access to health care services without delay.³²⁰ For child inmates, this obligation also include ensuring that medical doctors, nurses, psychologists, social workers and teachers who have regular contact with them, provide them with support and therapy.³²¹

2.3.1.2 The Inter-American system

The Inter-American human rights system protects inmates' right to health through the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.³²² Article 10 of this Protocol provides that "everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being". This provision, according to Lines, made use of the language derived from the World Health Organization (WHO) Constitution.³²³

This right is also protected by Article 5(2) of the American Convention on Human Rights (ACHR) which guarantees everyone's right not to be treated in an inhuman or degrading treatment.³²⁴ This was affirmed by the Inter-American Court in *Caesar v*

³²⁰ Ibid at 28, extracted from the 3rd General Report [CPT/Inf (93) 12], at para 33.

³²¹ Ibid at 83, extracted from the 9th General Report [CPT/Inf (99) 12] at para 38.

³²² Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, adopted on 17 November 1988, entered into force 16 November 1999.

³²³ Lines R, (note 8) above at 12.

³²⁴ American Convention on Human Rights, adopted on 22 November 1969, entered into force on 18 July 1978.

*Trinidad and Tobago*³²⁵ which found an inmate's right not to be treated in an inhuman or degrading treatment to have been violated by the state's failure to provide an inmate with a timely treatment for his haemorrhoid condition.

The non-binding Inter-American instruments that protect this right are the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.³²⁶ These Principles impose a positive obligation on the states to provide inmates with the highest possible level of physical, mental, and social well-being, which include adequate medical, psychiatric, and dental care.³²⁷ This obligation includes ensuring that inmates are examined medically when they are admitted into the correctional centre;³²⁸ impartial medical personnel is available on a permanent basis³²⁹ and; that inmates have access to health education, immunisation, prevention and treatment of infectious, endemic, and other diseases.³³⁰ Furthermore, the Principles oblige the state to implement special measures in order to meet the particular health needs of the elderly, women including their pre-natal and post-natal

³²⁵ *Caesar v Trinidad and Tobago*, (Judgment) Inter-American Court of Human Rights Ser. C (11 March 2005).

³²⁶ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Approved by the Inter-American Commission on Human Rights during its 131st regular period of sessions, held from March 3-14, 2008.

³²⁷ Principle x.

³²⁸ Principle ix.

³²⁹ Principle x.

³³⁰ *Idem*.

care, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases”.³³¹

Lastly, these Principles oblige states to ensure that health care services in the correctional centre comply with the public health system in order to ensure that, public health policies and practices are applied in the correctional centres.³³²

2.3.1.3 The African system

The African human rights system protects inmates’ right to health in Article 16 of the ACHPR which guarantees everyone’s right to health.³³³ This right was enforced by the African Commission in *Media Rights Agenda v Nigeria*, where it held that, “denying a detainee access to a doctor and providing no medical help when the prisoners’ health was deteriorating violates prisoners’ right to health in terms of article 16 of the African Charter”.³³⁴ This right is also protected by Articles 4 and 5 of

³³¹ Idem.

³³² Idem.

³³³ African [Banjul] Charter on Human and Peoples’ Rights, (note 36) above.

³³⁴ *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 90 and 92. Other cases where the African Commission found the violation of Article 16 of the ACHPR as a result of the State’s failure to provide inmates with medical treatment are *Odafe and others v Attorney-General and Others*, (note 177) above para 33, *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003), para 83, *International PEN and Others v Nigeria* (1998) African Commission on Human and Peoples’ Rights, Comm. Nos. 137/94, 139/94, 154/96, and 161/97 (1998) para 112, and *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine de l’Homme, Les Témoins de Jehovah v Zaire* (1996)

the ACHPR which guarantee the right to life and the right to not to be treated in a cruel, inhuman or degrading manner. This was affirmed by the African Commission in *Malawi African Association and Others v Mauritania*.³³⁵ In this case, the African Commission found that the death of some of the inmates as a result of being locked up in overpopulated cells which lacked hygiene and access to medical care, amounted to torture, cruel, inhuman and degrading treatment and violated their right to life.

Other African instruments which protect this right are the African Charter on the Rights and Welfare of the Child (ACRWC),³³⁶ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.³³⁷ Article 14 of the ACRWC obliges the state parties to ensure that child inmates are provided with the best attainable state of physical, mental and spiritual health. This obligation includes providing them with adequate nutrition and safe drinking water. Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa obliges the states parties to adequate, affordable and accessible health services, including information, education and communication programmes to women inmates. This obligation also includes the establishment of the pre-natal,

African Commission on Human and Peoples' Rights Comm Nos. 25/89, 47/90, 56/ 91, 100/93 (1995) para 47.

³³⁵ *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

³³⁶ African Charter on the Rights and Welfare of the Child, (note 37) above.

³³⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (note 38) above.

delivery and post-natal health and nutritional services for women during pregnancy and breast-feeding.

The non-binding African instruments that protect this right include the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,³³⁸ the African Commission on Human and People's Right's Resolution on Prisons in Africa,³³⁹ the African Charter on Prisoners' Rights³⁴⁰ and the Kampala Declaration on Prison Health in Africa.³⁴¹

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa specifically obliges the states to ensure that inmates have access to medical services and that their treatment complies with international standards guided by the SMRTP.³⁴² The African Commission on Human and People's Right's Resolution on Prisons in Africa explicitly interpreted this right as protecting all categories of persons including

³³⁸ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by African Commission on Human and Peoples' Rights, 32nd Session, held in Banjul, The Gambia, from 17 - 23 October, 2002.

³³⁹ African Commission on Human and People's Right's 'Resolution on Prisons in Africa', Right Res. 19(XVII) 95, 13-22 March 1995.

³⁴⁰ African Charter on Prisoners' Rights, adopted at the Fifth Conference of the Central, Eastern and Southern African Heads of Correctional Services (CESCA), eleventh session, held in Windhoek, Namibia, from 16-25 April 2002.

³⁴¹ Kampala Declaration on Prison Health in Africa, Kampala Conference, in Kampala, Uganda, held from 12-13 December 1999.

³⁴² Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (note 339) above.

inmates, detainees and other persons deprived of their liberty.³⁴³ The African Charter on Prisoners' Rights protect this right through its Article 6 which prohibits inhuman and degrading punishment because this right has been interpreted by the African Commission as incorporating inmates' right to health in *Malawi African Association and Others v Mauritania*³⁴⁴ discussed above. The Kampala Declaration on Prison Health in Africa recommends that correctional centres should have primary health care for inmates and a confidential clinical health record.³⁴⁵

2.3.2 Inmates' right to adequate accommodation

2.3.2.1 The European system

The European system protects and promotes inmates' right to accommodation through Article 3 of the European Convention of Human Rights (ECHR), which guarantees the right of everyone not to be subjected to torture or to inhuman or degrading punishment.³⁴⁶ This was affirmed by the European Court in a number of cases which include *Geld v Russia*,³⁴⁷ *Novoselov v Russia*,³⁴⁸ *Vincent v France*,³⁴⁹

³⁴³ African Commission on Human and People's Right's Resolution on Prisons in Africa, (note 340) above.

³⁴⁴ *Malawi African Association and Others v Mauritania*, (note 336) above.

³⁴⁵ Kampala Declaration on Prison Health in Africa, (note 342) above.

³⁴⁶ European Convention of Human Rights, (note 311) above.

³⁴⁷ *Geld v Russia*, application no. 1900/04, judgment of 27 June 2012.

³⁴⁸ *Novoselov v Russia*, application no. 66460/01, judgment of 2 June 2005.

³⁴⁹ *Vincent v France*, application no. 6253/03, Judgement of 24 October 2006.

Kalashnikov v Russia,³⁵⁰ *Price v The United Kingdom*,³⁵¹ and *Engel v Hungary*.³⁵² In *Geld v Russia*, the European Court found that the exceeding of a capacity of a cell by a number of inmates which resulted in them taking turns with each other to rest violated Article 3 of the ECHR.³⁵³ In *Novoselov v Russia*,³⁵⁴ the European Court found that Article 3 was violated by overpopulated cells that measured 42 m² and accommodated up to 51 inmates who had to take turns in sleeping on about 30 bunk beds. In *Vincent v France*,³⁵⁵ the European Court found that keeping a disabled applicant in a place which had doors that were so narrow that he could not pass through in a wheelchair, and a place where he could not enter the library without assistance and could not shower for more than a month when the essential alterations were delayed violated Article 3 of the ECHR.

In *Kalashnikov v Russia*,³⁵⁶ Article 3 of the ECHR was found to have been violated by a number of factors which included that inmates had to sleep taking turns, on the basis of eight-hour shifts of sleep per inmate; sharing a bed with two other inmates; the absence of adequate ventilation in the applicant's cell in which inmates were permitted to smoke and that; the applicant had to use the toilet in the presence of other inmates. In *Price v The United Kingdom*,³⁵⁷ the European Court held that the

³⁵⁰ *Kalashnikov v Russia*, application no. 47095/99, judgement of 15 October 2002.

³⁵¹ *Price v The United Kingdom*, application no. 33394/96, judgement of 10 July 2001.

³⁵² *Engel v Hungary*, application no. 46857/06, judgement of 20 May 2010.

³⁵³ *Geld v Russia*, (note 348) above, at paras 24, 26 and 31.

³⁵⁴ *Novoselov v Russia*, (note 349) above.

³⁵⁵ *Vincent v France*, (note 350) above.

³⁵⁶ *Kalashnikov v Russia*, (note 351) above.

³⁵⁷ *Price v The United Kingdom*, (note 352) above

following factors amounted to the violation of Article 3: the applicant was forced to sleep in her wheelchair due to the fact that the police cell was not suitable for a disabled person as it contained a wooden bed and a mattress and that; the applicant could not reach the emergency buttons and light switches. In *Engel v Hungary*,³⁵⁸ the European Court found that the fact that the applicant had to be assisted by cell mates when using the toilet, bathing, getting dressed or undressed violated Article 3 of the ECHR.

This right is also protected by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,³⁵⁹ which prohibits torture and inhuman or degrading punishment. This was endorsed by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), when it held that overcrowding in the correctional centres was inhuman and degrading.³⁶⁰

The Charter of Fundamental Rights of the European Union protects this right through its Article 4 which guarantees the right not to be subjected to torture or to inhuman or degrading punishment³⁶¹ and which has been interpreted by the European Court as incorporating this right in the cases discussed above.

³⁵⁸ *Engel v Hungary*, (note 353) above.

³⁵⁹ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted by Council of Europe on 26 November 1987, entered into force on 1 February 1989.

³⁶⁰ European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above.

³⁶¹ Charter of Fundamental Rights of the European Union, (note 316) above.

The non-binding European instruments that protect this right include the European Prison Rules³⁶² and CPT Standards.³⁶³ The European Rules, just like the SMRTR, oblige the states to ensure that sleeping accommodation respects human dignity and meets the requirements of health and hygiene which include climatic conditions, floor space, and cubic content of air, lighting, heating and ventilation.³⁶⁴ They further impose an obligation on the states to ensure that there is the entrance of fresh air unless there is adequate air conditioning system and that; windows enable inmates to read or work by natural light.³⁶⁵ Moreover, states are obliged to separate untried inmates from sentenced inmates; male inmates from females and young inmates from older inmates.³⁶⁶

The CPT standards impose an obligation on the states to ensure that inmates who have transmissible diseases are kept in a place which has material conditions that are conducive to the improvement of their health.³⁶⁷ They further oblige states to ensure that there is no overcrowding in the correctional centres and that there should be natural light, ventilation and hygiene in such centres.³⁶⁸ States are also required

³⁶² European Prison Rules, Recommendation Rec (2006), (note 318) above.

³⁶³ European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above.

³⁶⁴ Rule 18.1 of the European Prison Rules, Recommendation Rec (2006), (note 318) above.

³⁶⁵ Rule 18.2 of the European Prison Rules, Recommendation Rec (2006), (note 318) above.

³⁶⁶ Rule 18.8 of the European Prison Rules, Recommendation Rec (2006), (note 318) above.

³⁶⁷ European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above at 26, para 31, extracted from the 11th General Report (CPT/Inf (2001) 16].

³⁶⁸ Idem.

to prohibit the segregation of HIV positive inmates from other inmates in the correctional centre unless there is a medical justification for such segregation.³⁶⁹ Furthermore, states should ensure that “police cells intended for single occupancy for stays in excess of a few hours: in the order of 7 square metres, 2 metres or more between walls, 2.5 metres between floor and ceiling.”³⁷⁰ The states should also ensure that there is 9 to 10 square metres of floor space in the correctional centre and as a minimum standard, there should be 4 square metres per inmate in a communal cell and 6 square metres per inmate in a single cell.³⁷¹ Lastly, states are obliged to ensure that women inmates are held in accommodation that is separate from men’s accommodation.³⁷²

2.3.2.2 The Inter-American system

Just like the European system, the Inter-American system protects inmates’ right to adequate accommodation through Article 5 of the ACHR which prohibits cruel or degrading treatment.³⁷³ This was affirmed by the Inter-American Court in *Caesar v*

³⁶⁹ Ibid at 34, para 56, extracted from the 3rd General Report (CPT/Inf (93) 12).

³⁷⁰ Ibid at 8, para 43 , extracted from the 2nd General Report (CPT/Inf (92)3).

³⁷¹ Steinberg J, (note 190) above, citing CPT "Report to the Polish government on the visit to Poland carried out by CPT from 30 June to 12 July 1996," ; CPT "Report to the Albanian government on the visit to Albania carried out by the CPT from 9 to 19 December 1997", ; CPT "Report to the Slovakian government on the visit to Slovakia by the CPT from 9–18 October 2000".

³⁷² European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above at 90, para 24, extracted from the 10th General Report (CPT/Inf (2000)13).

³⁷³ American Convention on Human Rights, (note 325) above.

Trinidad and Tobago.³⁷⁴ In this case, the Inter-American Court found the right not to be treated in a cruel and inhuman manner to have been violated by the fact that an inmate shared a hot cell, with little ventilation, with 4 or 5 other men; the cell had no toilet facilities, and; that an inmate slept on the floor with a thin mat or on an old piece of carpet. This was also endorsed by the Inter-American Court in *McKenzie, Downer and Tracey, Baker, Fletcher, Rose v Jamaica*.³⁷⁵ In this case, Article 5 of the ACHR was found to have been violated by overcrowding, inadequate sanitation, poor lighting and ventilation in the correctional centres. In *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*,³⁷⁶ the Inter-American Court also found that unpleasant conditions which included serious overcrowding, sleeping of inmates sitting or standing up, cells that lacked adequate hygiene, natural light and sufficient ventilation violated Article 5 of the ACHR.

The Inter-American system also protects this right through the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.³⁷⁷ Principle xii obliges states to provide inmates with, among other things, “adequate

³⁷⁴ *Caesar v Trinidad and Tobago* (note 326) above at para 49 (16).

³⁷⁵ *McKenzie, Downer and Tracey, Baker, Fletcher, Rose v Jamaica* 12.023, 1112.044, 12.107, 12.126, 12.146 (13 April 2000) paras 286-287.

³⁷⁶ *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*,³⁷⁶ Judgement of June 21, 2002, Inter-Am.Ct.H.R., (Ser.C)No. 94 (2002), para 154

³⁷⁷ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (note 327) above.

floor space, daily exposure to natural light, ventilation and heating ...and separate beds”.

2.3.2.3 The African system

Just like the European and Inter-American systems, the African system protects inmates’ right to adequate accommodation through the right not to be tortured, or treated in a cruel, inhuman or degrading punishment, guaranteed by Article 5 of the ACHPR.³⁷⁸ This was affirmed by the African Commission on Human and People’s Rights in *Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*, as follows:

...The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this article. Aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell... were also in contravention of this article.³⁷⁹

In *John D. Ouko v Kenya*,³⁸⁰ the African Commission on Human and People’s Rights found that the detention facility with 2 by 3 metre basement cell violated Article 5 of the ACHPR. Furthermore, in *Huri-Laws v Nigeria*, the African Commission found

³⁷⁸ African [Banjul] Charter on Human and Peoples' Rights, (note 36) above.

³⁷⁹ *Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi* (1994) African Commission on Human and Peoples' Rights Comm Nos. 64/92, 68/92, 78/92 (1995) para 7.

³⁸⁰ *John D. Ouko v Kenya*, African Commission on Human and Peoples' Rights, Comm. No 232/99 (2000).

that, detaining a member of the Civil Liberties Organisation in a sordid and dirty cell amounted to inhuman and degrading treatment in violation of Article 5 of the ACHPR.³⁸¹

This right is also protected by Article 13 of the ACRWC.³⁸² This article obliges states parties to ensure that the disabled child is entitled to special measures of protection under conditions that ensure his or her dignity and self-reliance in line with his or her physical and moral needs. It further obliges states parties to ensure that disabled child inmates have access to training in order to achieve social integration, and cultural or moral development.³⁸³ Lastly, it obliges the states parties to take measures aimed at ensuring freedom of movement and access to public buildings for disabled children including disabled inmates.³⁸⁴ However, the states parties' obligation to fulfil this right is subject to the availability of the resources on a progressive basis.³⁸⁵

The non-binding African standards which protect this right include the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,³⁸⁶ the Body of Principles for the Protection of All

³⁸¹ *Huri-Laws v Nigeria* 225/98 [(2000) AHRLR273 (ACHPR 2000)] reported in the 14th Annual Activity Report 2000-2001.

³⁸² African Charter on the Rights and Welfare of the Child, (note 37) above.

³⁸³ Article 13, emphasis added.

³⁸⁴ *Idem*, emphasis added.

³⁸⁵ *Idem*.

³⁸⁶ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (note 339) above.

Persons under Any Form of Detention or Imprisonment,³⁸⁷ the Kadoma Declaration on Community Service,³⁸⁸ Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa,³⁸⁹ and the African Charter on Prisoners' Rights.³⁹⁰

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa oblige the states to take steps to reduce overcrowding in places of detention by inter alia, encouraging the use of non-custodial sentences for minor crimes. They also oblige the states to ensure that pre-trial detainees are held separately from convicted inmates and that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.³⁹¹ Principles 1 and 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which prohibit cruel, inhuman or degrading treatment was deemed to be relevant on the protection of this right by the African Commission in *John D. Ouko v Kenya*,³⁹² when it held that the detention facility with 2 by 3 metre basement cell violated it.

³⁸⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (note 238) above.

³⁸⁸ The Kadoma Declaration on Community Service, International Conference on Community Services Orders in Africa, held in Kadoma, Zimbabwe, from 24 to 28 November 1997.

³⁸⁹ Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa, the Ouagadougou conference, in Ouagadougou, Burkina Faso, held from 18-20 September 2002.

³⁹⁰ African Charter on Prisoners' Rights, (note 341) above.

³⁹¹ Guidelines 34-37 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (note 339) above.

³⁹² *John D. Ouko v Kenya*, (note 381) above.

The Kadoma Declaration on Community Service requests the states to eliminate overcrowding through sentences that promote community service for inmates. On other hand, the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa,³⁹³ recommends the elimination of overcrowding through a strategy which target both sentenced and unsentenced inmates. The African Charter on Prisoners' Rights protects this right through its right not to be subjected to inhuman and degrading punishment,³⁹⁴ which has been interpreted by the African Commission as incorporating inmates' right to adequate accommodation in the cases discussed above.

2.3.3 Inmates' right to nutrition

2.3.3.1 The European system

The European system protects inmates' right to adequate nutrition through Article 3 of the ECHR,³⁹⁵ which guarantees the right not to be tortured or be subjected to inhuman or degrading treatment. This was affirmed by the European Courts' decisions in a number of cases which include *Ilascu and Others v Moldova and Russia*³⁹⁶ and *Nevmerzhitsky v Ukraine*.³⁹⁷ In *Ilascu and Others v Moldova and*

³⁹³ Ougadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa, (note 390) above.

³⁹⁴ Article 6 of the African Charter on Prisoners' Rights, (note 341) above.

³⁹⁵ European Convention on Human Rights, (note 311) above.

³⁹⁶ *Ilascu and others v Moldova and Russia*, application no. 48787/99, judgment of 8 July 2004.

³⁹⁷ *Nevmerzhitsky v Ukraine* application no. 54825/00, judgment of 05 April 2005.

Russia, it found the violation of Article 3 of the ECHR due to the fact that inmates were denied food for two days. In *Nevmerzhitsky v Ukraine*, it found that force-feeding an inmate, using handcuffs, a mouth-widener, and a special rubber tube inserted into the food channel without medical justification amounted to torture within the meaning of Article 3 of the Convention.

The Charter of Fundamental Rights of the European Union protects this right through its Article 4 which guarantees the right not to be subjected to torture or to inhuman or degrading punishment³⁹⁸ which has been interpreted by the European Court as incorporating this right in the cases discussed above. This right is also protected by Article 9 of the ECHR which obliges states parties to respect the right to freedom of thought, conscience and religion. This was stressed by the European Court in *Jakobski v Poland* when it interpreted this right as imposing a positive duty on the state to take reasonable and appropriate measures to ensure that inmates have access to diet that takes into account their religion.³⁹⁹ This case concerned an inmate who was refused meat-free meals on the basis of his religious dietary requirements as a Buddhist. The court found that the correctional centre authorities' refusal to provide him with a diet violated Article 9 of the ECHR. The court also stressed that an inmate's claim for a religious food should be motivated or inspired by a religion that incorporates a certain level of cogency, seriousness, cohesion and importance.⁴⁰⁰ Thus, an act or belief that is based on an inmate's personal belief does not fall within the scope of Article 9 of the ECHR. This case also stressed that,

³⁹⁸ Charter of Fundamental Rights of the European Union, (note 316) above.

³⁹⁹ *Jakobski v Poland* application no. 18429/06, judgment 7 December 2010.

⁴⁰⁰ *Idem*.

for a state to successfully raise the point that a decision to make special arrangements for one inmate within the system can have financial implications for the custodial institution, it must satisfy the court that it has struck a fair balance between the interests of the institution, other inmates and the particular interests of the applicant.

The Charter of Fundamental Rights of the European Union protects this right through its Article 10 which guarantees the right to freedom of thought, conscience and religion⁴⁰¹ which has been interpreted by the European Court as incorporating this right in the case discussed above.

The European standards which protect this right include the European Prison Rules,⁴⁰² WHO/Europe's recommendation⁴⁰³ and the Standards of the CPT.⁴⁰⁴ Rule 22 of the European Prison Rules obliges the states to provide inmates with diet that takes into account their age, health, physical conditions, religion and culture.⁴⁰⁵ WHO/Europe's recommendation requires the states to ensure that pregnant and breastfeeding women inmates, substance users, teenagers and elderly people have

⁴⁰¹ Charter of Fundamental Rights of the European Union, (note 316) above.

⁴⁰² European Prison Rules, Recommendation Rec (2006), (note 318) above.

⁴⁰³ WHO, Regional Office for Europe, "Prison and health--nutrition", available at, <http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/activities/nutrition>, accessed on 20 June 2014.

⁴⁰⁴ European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above.

⁴⁰⁵ European Prison Rules, Recommendation Rec (2006), (note 318) above.

access to their dietary requirements.⁴⁰⁶ The Standards of the CPT oblige state parties to provide ante-natal and post-natal care which includes providing dietary needs of pregnant women inmates.⁴⁰⁷ They also oblige the state parties to ensure that food should be of quality and should be served under satisfactory conditions which include decent eating arrangement and serving of food at the correct temperature.⁴⁰⁸

2.3.3.2 The Inter-American system

Inmates' right to nutrition is protected by Article 26 of the ACHR, which obliges the state parties to adopt measures to progressively achieve the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards.⁴⁰⁹ Article 34 of the Charter of the Organization of American States⁴¹⁰ protects this right by obliging states to dedicate their efforts to achieve, among other things, proper nutrition and the availability of food. While Article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, protects this right by providing that "everyone has the

⁴⁰⁶ WHO, Regional Office for Europe, (note 404) above.

⁴⁰⁷ European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) Standards, (note 319) above at 92 , para 26, extracted from the 10th General Report [CPT/Inf (2000) 13].

⁴⁰⁸ Ibid at 48, para 35, extracted from the 8th General Report [CPT/Inf (98) 12].

⁴⁰⁹ American Convention on Human Rights, (note 325) above.

⁴¹⁰ The Charter of the Organization of American States, signed at the Ninth International Conference of American States, held in Bogota, Colombia, on 30 April 1948, entered into force on 13 December 1951.

right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development”.⁴¹¹

The Inter-American standards that protect this right include the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.⁴¹²

Principle xi obliges states to provide inmates with food “in such a quantity, quality and hygienic conditions so as to ensure adequate and sufficient nutrition with due consideration to their cultural and religious concerns as well as to any special needs or diet determined by medical criteria”.

2.3.3.3 The African system

Just like the Inter-American system, inmates’ right to adequate nutrition is protected by Article 26 of the ACHPR, which obliges states parties to take measures to guarantee “the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter”.⁴¹³ The states parties’ obligation to fulfil this right is also imposed by Article 60 of the ACHPR which encourages the African governments to accept the ICESCR and implement the right to food that the ICESCR protects.

⁴¹¹ Article 12 (1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted on 17 November 1988, entered into force 16 November 1999.

⁴¹² Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (note 327) above.

⁴¹³ African [Banjul] Charter on Human and Peoples' Rights, (note 36) above.

Furthermore, this right is also protected by the right not to be tortured or treated in an inhuman and degrading way which is guaranteed by Article 5 of the ACHPR. In *Malawi African Association and others v Mauritania*,⁴¹⁴ the African Commission found that the unpleasant conditions which included, among others, that inmates were not fed and that their state of health deteriorated due to lack of sufficient food constituted a violation of the right not to be tortured or treated in an inhuman or degrading manner. In *Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*, the African Commission held that the extremely poor quality of food and denial of access to adequate medical care, among other things, violated the right not to be subjected to torture and cruel, inhuman and degrading punishment.⁴¹⁵

Apart from the ACHPR, this right is guaranteed by Article 14 of the ACRWC which obliges state parties to realize, to the best of their ability and with all available resources, the child's right to, among other things, nutrition and safe water.⁴¹⁶

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa⁴¹⁷ and the African Charter on Prisoners' Rights⁴¹⁸ constitute the non-binding African standards that protect this

⁴¹⁴ *Malawi African Association and others v Mauritania*, (note 336) above at paras 116-117.

⁴¹⁵ *Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*, (note 380) above.

⁴¹⁶ African Charter on the Rights and Welfare of the Child, (note 37) above.

⁴¹⁷ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (note 339) above.

⁴¹⁸ African Charter on Prisoners' Rights, (note 341) above.

right. The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa oblige the states to take steps to ensure that the treatment of all persons deprived of their liberty is in conformity with international standards guided by the SMRTP.⁴¹⁹ The African Charter on Prisoners' Rights⁴²⁰ protects this right through its Article 6 which guarantees the right not to be subjected to inhuman and degrading punishment. The reason is that the African Commission has interpreted this right in the African Charter on Human and People's rights as incorporating inmates' right to adequate nutrition in the cases discussed above.

2.3.4 Inmates' right to education

2.3.4.1 The European system

The European system protects inmates' right to education through Article 14 of the Charter of Fundamental Rights of the European Union,⁴²¹ which guarantees the right of everyone to education and vocational training. It is also protected by Article 2 of the First Protocol of the European Convention on Human Rights⁴²² which provides that "no person shall be denied the right to education." The non-binding European

⁴¹⁹ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (note 339) above.

⁴²⁰ African Charter on Prisoners' Rights, (note 341) above.

⁴²¹ Charter of Fundamental Rights of the European Union, (note 316) above.

⁴²² First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ETS No. 155), which entered into force on 1 November 1998.

standard that protects this right is the European Prison Rules.⁴²³ These Rules oblige states to “provide all prisoners with access to educational programmes which are as comprehensive as possible”.⁴²⁴ This includes giving priority to inmates “with literacy and numeracy needs, who lack basic or vocational education”⁴²⁵ and to “young prisoners and those with special needs”.⁴²⁶ These Rules further require states to ensure that every correctional centre has a “library for the use of all prisoners, adequately stocked with a wide range of both recreational and educational resources, books and other media”.⁴²⁷ Most importantly, states should ensure that inmates’ education is “integrated with the educational and vocational training system of the country so that after their release they may continue their education and vocational training without difficulty”.⁴²⁸ Furthermore, these Rules oblige the states to ensure that child inmates who are subject to compulsory education are provided with such education.⁴²⁹

2.3.4.2 Inter-American system

The Inter-American system protects inmates’ right to education through Article 26 of the ACHR.⁴³⁰ This Article obliges the state parties to adopt progressive measures of

⁴²³ The European Prison Rules Recommendation Rec (2006), (note 318) above.

⁴²⁴ Rule 28(1).

⁴²⁵ Rule 28(2).

⁴²⁶ Rule 28(3).

⁴²⁷ Rule 28(5).

⁴²⁸ Rule 28(7).

⁴²⁹ Rule 35(2).

⁴³⁰ American Convention on Human Rights, (note 325) above.

an economic and technical nature, with a view to achieving the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards.⁴³¹ This right is also protected by Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which obliges state parties to ensure that everyone has the right to education directed towards the full development of his or her human personality and human dignity.⁴³² This obligation includes the provision of free compulsory primary education available and accessible; secondary education including technical and vocational secondary education accessible higher education; basic education for those people who have not received or completed the whole cycle of primary instruction; and special instruction and training to persons with physical disabilities or mental deficiencies. Further, this Protocol obliges states parties to ensure that this right is provided on an equal basis without discrimination of any kind for reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.⁴³³

⁴³¹ Article 26.

⁴³² The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, (note 412) above.

⁴³³ Article 3.

The non-binding Inter-American standards, which protect this right include the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas⁴³⁴ and the American Declaration of the Rights and Duties of Man.⁴³⁵ Principle xiii of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas obliges states to provide free primary or basic education for inmates by taking progressive steps, to the maximum of their available resources, to promote secondary, technical, vocational, and higher education which operate in close coordination and integration with the public education system.⁴³⁶ Moreover, this Principle also obliges states, depending on the available resources, to ensure that, correctional centres have libraries with sufficient books, newspapers, educational magazines, and appropriate equipment and technology.

Article 12 of the American Declaration of the Rights and Duties of Man provides that “every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity....to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society”.⁴³⁷ This Declaration further obliges states to provide education on an equal basis without distinction as to race, sex, language, creed or any other factor.⁴³⁸

⁴³⁴ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (note 327) above.

⁴³⁵ American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

⁴³⁶ Principle xiii of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (note 327) above.

⁴³⁷ American Declaration of the Rights and Duties of Man, (note 436) above.

⁴³⁸ Article 5 of the American Declaration of the Rights and Duties of Man, (note 436) above.

2.3.4.3 The African system

The African system protects inmates' right to education through Article 17 of the ACHPR,⁴³⁹ which provides that "every individual shall have the right to education". This right is also protected by Article 11 of the ACRWC,⁴⁴⁰ which guarantees children's right to education which is directed to, among other things, (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups; and (c) the promotion of the child's understanding of primary health care. This right has to be provided on an equal basis without discrimination on the basis of race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.⁴⁴¹ However, the obligation to fulfil this right requires the states to take appropriate measures which include providing free and compulsory basic education; encouraging the development of secondary education and making higher education accessible to all on the basis of capacity and ability.⁴⁴²

African standards which protect this right include the Kampala Declaration on Prison Conditions in Africa⁴⁴³ and the Ouagadougou Declaration and Plan of Action on

⁴³⁹ African [Banjul] Charter on Human and Peoples' Rights, (note 36) above.

⁴⁴⁰ African Charter on the Rights and Welfare of the Child, (note 37) above.

⁴⁴¹ Article 3 of the African Charter on the Rights and Welfare of the Child, (note 37) above.

⁴⁴² Article 11 of the African Charter on the Rights and Welfare of the Child, (note 37) above.

⁴⁴³ Kampala Declaration on Prison Conditions in Africa, Kampala Conference, in Kampala, Uganda, held from 19-21 September 1996.

Accelerating Prisons and Penal Reforms in Africa.⁴⁴⁴ Declaration 7 of the Kampala Declaration on Prison Conditions in Africa, recommends that “prisoners should be given access to education and skills training in order to provide them with a chance to a better reintegration into society after release”.⁴⁴⁵

The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa encourage states to take greater effort to implement the rehabilitative programmes which could include educational programmes aimed at developing inmates.⁴⁴⁶

2.4 THE STATUS AND APPLICATION OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

In South Africa, there are four constitutional provisions which relate to the domestication of international law relevant to the protection and enforcement of inmates’ socio-economic rights. Those provisions relate to the interpretation of the Bill of Rights; the status of international agreements; customary international law; and the application of international law.

⁴⁴⁴ Ougadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa, (note 390) above.

⁴⁴⁵ Kampala Declaration on prison conditions in Africa, (note 444) above.

⁴⁴⁶ Recommendation 3 of the Ougadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa, (note 390) above, emphasis added.

2.4.1 The interpretation of the Bill of Rights

The impact of the international law on the interpretation of the Bill of Rights is regulated by section 39(1) of the Constitution which provides that, “when interpreting the Bill of Rights, a court, tribunal or forum..... (b) must consider international law; and (c) may consider foreign law”. This section does not only “reveal a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, but also demonstrates that international law has a special place in our law which is carefully defined by the Constitution”.⁴⁴⁷ It is worth noting that this section obliges the courts to consider both binding and non-binding international law. This was affirmed by the Constitutional Court in *Government of the Republic and Others v Grootboom and Others*, citing the case of *S v Makwanyane* as follows:

. . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].⁴⁴⁸

⁴⁴⁷ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), para 97.

⁴⁴⁸ *Government of the Republic and Others v Grootboom and Others*, (note 41) above at para

This was also affirmed by the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*, when it held:

International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.⁴⁴⁹

This simply means that for interpretative purposes, the courts could be referred to any international law that is relevant to a particular case that deals with the interpretation of inmates' socio-economic rights. It also means that foreign cases, relevant to an interpretation of inmates' socio-economic rights, could also be referred to. However, the courts will not be bound by those foreign cases as the Constitution simply provides that, foreign law "may" be considered.

26, citing *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

⁴⁴⁹ *Glenister v President of the Republic of South Africa and Others*, (note 447) above at para 96.

2.4.2 The status of international agreements on the enforcement and interpretation of the Bill of Right

International agreements that have an impact on the enforcement and interpretation of inmates' socio-economic rights are regulated by section 231 of the Constitution.⁴⁵⁰ Section 231(1) places the negotiating and signing of international agreements on the national executive. However, the international agreements bind the Republic after they have been approved by resolution in both the National Assembly and the National Council of Provinces,⁴⁵¹ except those that are of a technical, administrative or executive nature, or those which do not require either ratification or accession to be entered into by the national executive.⁴⁵² International agreements of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, however, must be tabled in the National Assembly and the National Council of Provinces within a reasonable time.⁴⁵³ This means that international agreements that protect inmates' socio-economic rights become binding in the South African courts, once they have been negotiated and signed by the executive and approved by a resolution in the National Assembly and the National Council of Provinces. Put differently, unlike in the past where the executive had an exclusive treaty making powers, for these treaties to be binding on South African courts, Parliament has to first ratify them.⁴⁵⁴

⁴⁵⁰ Section 231 of the Constitution, (note 20) above.

⁴⁵¹ Section 231 (2) of the Constitution, (note 20) above.

⁴⁵² Section 231 (3) of the Constitution, (note 20) above.

⁴⁵³ *Idem*.

⁴⁵⁴ Devenish GE, *A commentary on the South African Constitution*, 1998, 324, emphasis added.

It is crucial to note that in terms of section 231(4) international agreements become law in the Republic when they are enacted into law by national legislation except self-executing provisions of agreements that have been approved by Parliament.⁴⁵⁵ This section further provides that these self-executing provisions become law in the Republic unless they are inconsistent with the Constitution or an Act of Parliament. In other words, the self-executing treaties do not need legislative incorporation in order for them to be part of South African law.⁴⁵⁶ However, for these self-executing treaties to be applied domestically, their language should indicate that they are self-executing treaties.⁴⁵⁷

There are three methods governing the process of incorporating international agreements into domestic law, which are: (a) the provisions of the agreement may be embodied in the text of an Act; (b) the agreement may be included as a schedule to a statute; and (c) the enabling legislation may authorize the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.⁴⁵⁸ Once incorporated, these international agreements create ordinary domestic statutory obligations.⁴⁵⁹ In other words, the incorporation of these international agreements does not transform their rights and obligations into constitutional rights and obligations.⁴⁶⁰ Consequently, the statutory obligations and

⁴⁵⁵ Section 231(4) of the Constitution (note 20) above.

⁴⁵⁶ Dugard J, *International law: A South African Perspective*, 4th ed, 2012, 56.

⁴⁵⁷ *Ibid* at 57.

⁴⁵⁸ *Glenister v President of the Republic of South Africa and Others*, (note 447) above at para 99. This is also echoed by Dugard J, (note 456) above at 55.

⁴⁵⁹ *Ibid* at para 181.

⁴⁶⁰ *Idem*.

rights created by the incorporated international agreement are enforceable under the national legislation incorporating the agreement.⁴⁶¹ However, the Constitutional Court in *Glenister v President of the Republic of South Africa and Others* held that rights and duties created by incorporated international agreement are enforceable under the Constitution as follows:

We therefore find that to fulfill its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.⁴⁶²

This is evidenced by the fact that the Constitutional Court proceeded to find that the two challenged pieces of legislation's failure to create a sufficiently independent anti-corruption entity infringes a number of constitutional rights such as the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.⁴⁶³

It is crucial to note that international agreements that have not been incorporated in the domestic law remains binding on South Africa at an international level. In *Glenister v President of the Republic of South Africa and Others*, the Constitutional

⁴⁶¹ Ibid at paras 102 and 181.

⁴⁶² Ibid at para 197.

⁴⁶³ Ibid at para 198.

Court affirmed this by arguing that this provision represents “the Republic’s legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations”.⁴⁶⁴ Ngcobo J in the minority judgment summarized this argument as follows:

The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other states, to take steps to comply with the substance of the agreement.⁴⁶⁵

In terms of section 231 (5), international agreements which were binding on the Republic when this Constitution came into operation are still binding.

2.4.3 Customary international law on the enforcement and interpretation of the Bill of Rights

Customary international law plays a very pivotal role on the interpretation and enforcement of inmates’ socio-economic rights. This is confirmed by section 232 which provides that the “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. As to what constitutes customary international law, Mubangizi argued that it “refers to general state practice regarded as legally binding by the majority of the nations of the world.”⁴⁶⁶ In

⁴⁶⁴ Ibid at 181, citing Dugard J, *International Law: A South African Perspective*, 3 ed, 2005, 59 -62.

⁴⁶⁵ Ibid at para 91.

⁴⁶⁶ Mubangizi JC, (note 116) above at 61.

determining whether a particular rule is accepted as a rule of customary law, Dugard argued that courts should be guided by judicial decisions of international tribunals, South African courts, foreign courts and international law treaties.⁴⁶⁷

Customary international law is deemed to be very crucial for South Africa since "...South Africa is usually not in a hurry to ratify important international human rights agreements and incorporate their provisions into municipal law".⁴⁶⁸

2.4.4 The application of international law

The application of international law in South Africa is regulated by section 233 of the Constitution. This section provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". It is further regulated by two approaches, namely the monism and the dualism.

2.4.4.1 Monism

The monist school emphasizes that the municipal courts should apply the rules of international law without their adoption by the courts or transformation by the legislature.⁴⁶⁹ However, where there is a conflict between international law and

⁴⁶⁷ Dugard J, (note 456) above at 51.

⁴⁶⁸ Mubangizi JC, (note 116) above at 62.

⁴⁶⁹ Dugard J, (note 456) at 42.

municipal law the court should apply the law of its country.⁴⁷⁰ This approach has been in existence in South Africa over many years because English law and Roman Dutch law treated customary international law as part of municipal law.⁴⁷¹ This approach is currently affirmed by section 232 of the Constitution.⁴⁷²

2.4.4.2 Dualism

The dualists' school argues that, international law should only be applied if it has been adopted by the courts or transformed into law by legislation.⁴⁷³ The reason, according to this school, is that there is a difference between South African law and international law. Before 1994, this approach operated in South Africa in relation to treaties as they were negotiated, signed, ratified and acceded to by the executive.⁴⁷⁴ Currently, this position which requires the incorporation of treaties and parliamentary ratification of these treaties is guaranteed by section 231 of the Constitution.⁴⁷⁵

2.5 CHAPTER CONCLUSION

The protection and enforcement of inmates' socio-economic rights, from an international law perspective, are discussed extensively in this chapter. This discussion encapsulates the protection of these rights from international and regional

⁴⁷⁰ Ibid at 43.

⁴⁷¹ Idem.

⁴⁷² Ibid at 50.

⁴⁷³ Ibid at 42.

⁴⁷⁴ Ibid at 53.

⁴⁷⁵ Ibid at 54.

law perspectives. This includes both binding and non-binding international and regional law that protects and enforces these rights. It concludes by examining the South African domestication of international law that is relevant to the protection and promotion of these rights.

The next chapter discusses the manner in which South Africa has adhered to international law in its protection and enforcement of these rights.

CHAPTER THREE

THE PROTECTION AND ENFORCEMENT OF INMATES' SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

3.1 INTRODUCTION

In pursuit of the objective of this study, this chapter analyzes the protection and enforcement of inmates' right to adequate medical treatment, accommodation, nutrition, and education in South Africa. Unlike in the past, these rights are constitutionally protected and they impose a positive obligation on the officials of correctional centres to ensure that inmates have access to them. This obligation is also imposed by section 7 (2) of the Constitution which requires the state to respect, protect and fulfil rights in the Bill of Rights. So, the state's failure to respect, protect and fulfil these rights will amount to the violation of the Constitution.⁴⁷⁶ This obligation also extends to privatized correctional centres,⁴⁷⁷ as they are also required by the Preamble to the Constitution, to treat inmates in a manner that seek to "establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens".⁴⁷⁸ The Supreme Court of Appeal in *Minister of Correctional Services v Lee*, summarized this obligation as follows:

⁴⁷⁶ Muntingh L, (note 114) at 9, emphasis added.

⁴⁷⁷ Corder and Van Zyl, "Privatised Prisons and the Constitution", (note 121) above at 487, emphasis added.

⁴⁷⁸ Preamble to the Constitution, (note 20) above.

A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments...⁴⁷⁹

It is against this background that this chapter seeks to analyze the protection and enforcement of inmates' socio-economic rights from the South African law perspective. In doing that this chapter analyzes the role of the Constitution, the Correctional Services Act, the Regulations and the courts in the protection and enforcement of these rights. Since rights in the "Bill of Rights are inter-related and mutually supporting...affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2",⁴⁸⁰ this chapter concludes by analyzing other rights which are relevant to the protection and enforcement of these rights.

3.2 INMATES' RIGHT TO ADEQUATE MEDICAL TREATMENT

Inmates' right to adequate medical treatment is guaranteed by section 35(2) (e) of the Constitution, which entitles them to conditions of detention consistent with human dignity, including the provision of, among other things, adequate medical treatment at the expense of the state. This right obliges the state to ensure that it provides

⁴⁷⁹ *Minister of Correctional Services v Lee*, (note 21) above at para 36.

⁴⁸⁰ *Government of the Republic of South Africa and Others v Grootboom and Others*, (note 41) above at para 23.

inmates with adequate medical treatment or health care services which includes palliative care.⁴⁸¹

In determining what is “adequate medical treatment”, the court in *Van Biljon v Minister of Correctional Services* argued as follows:

If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'.⁴⁸²

This argument, to a certain extent, is also echoed by the court in *N and Others v Government of Republic of South Africa and Others (No 1)* when it argued that “the respondents have not made the lack of resources an issue. Their case is that they are complying with their obligations...”⁴⁸³ However, Currie and De Waal, cited by Pieterse, argued that this concept includes ensuring that “.... the standard of available medical treatment in prison contributes to conditions of detention that are consistent with human dignity”.⁴⁸⁴ Ngwena, also cited by Pieterse, argues that “this

⁴⁸¹ Albertus C, (note 151) above at 67-68.

⁴⁸² *Van Biljon v Minister of Correctional Services* (note 135) above at 589 para 49.

⁴⁸³ *N and Others v Government of Republic of South Africa and Others (No 1)*, (note 23) above at para 25.

⁴⁸⁴ Quoted by Pieterse M, (note 152) above at 122, citing J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, 4th ed, 2001, 614.

concept should be assessed in the context of a particular prisoner's medical condition, the capacity of detention centres' available health care facilities to provide the medical treatment required by the prisoner, as well as the standard of medical treatment available outside of prisons".⁴⁸⁵ While Pieterse argued that the determination of whether or not this right has been violated includes taking into account the International Standard Minimum Rules as per section 39 of the Constitution.⁴⁸⁶

The right to access to health care services, protected by section 27(1), also obliges the state to provide inmates with medical treatment. This was affirmed by the court in *N and Others v Government of Republic of South Africa and Others (No 1)* as follows:

...The first of these obligations is set out in s 27 of the Constitution, the relevant portions of which read as follows: (1) Everyone has the right to have access to -(a)health care services, including reproductive health care...⁴⁸⁷

However, unlike an inmates' right to adequate medical treatment, this right imposes an obligation on the state to provide inmates with health care services by

⁴⁸⁵ Idem, citing Ngwena C, "Aids in Africa: access to health care as a human right", 15 SA *Public Law* 2000, 15, 1, 17-18.

⁴⁸⁶ Idem, citing Rules 22-23 of the Standard Minimum Rules for the Treatment of Prisoners (1995).

⁴⁸⁷ *N and Others v Government of Republic of South Africa and Others (No 1)*, (note 23) above, para 17.

progressively taking reasonable measures subject to available resources.⁴⁸⁸ Other relevant right includes children's right to basic health care services guaranteed by section 28 (1) (c). The absence of an internal limitation clause in this right means that child inmates should be provided with immediate and effective access to basic health care⁴⁸⁹ which is necessary for their survival.⁴⁹⁰

The right to emergency medical treatment, incorporated in section 27 (3), is another right that obliges the state to provide inmates with medical treatment. Essentially, it obliges the state to provide inmates with access to immediate treatment that is available and necessary.⁴⁹¹ It also obliges the state to ensure that inmates are not refused emergency medical treatment.⁴⁹²

Apart from the Constitution, the obligation to fulfil this right emanates from the Correctional Services Act.⁴⁹³ The Correctional Services Act, unlike the Constitution, specifically obliges the state to provide inmates with health care service, except cosmetic medical treatment subject to the availability of the resources and the

⁴⁸⁸ Section 27(2) of the Constitution, (note 20) above.

⁴⁸⁹ Liebenberg S, (note 113) above at 234, emphasis added. Friedman A, Pantazis A, and Skelton A, 'Children's Rights', in Woolman S et al *Constitutional Law of South Africa*, 2nd ed, Vol. 2, 2006, Ch 47, 47-6, emphasis added.

⁴⁹⁰ Ibid at 233, emphasis added.

⁴⁹¹ *Soobramoney v Minister of Health (Kwazulu-Natal)* (note 136) above, para 20, emphasis added. McLean K, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, 2009, 123.

⁴⁹² Idem.

⁴⁹³ The Correctional Services Act, (note 24) above.

principle of primary health care.⁴⁹⁴ While the Constitutional Court is yet to interpret the impact of this internal limitation on the conditions under which inmates are kept, “it has been noted that its decisions make it clear that the court will be quite sympathetic to constitutional claims based on section 35 because non-compliance with section 35 will have a serious effect on the human dignity of prisoners”.⁴⁹⁵

The Correctional Services Act also obliges the state to allow inmates to have access to their medical practitioners at their expense.⁴⁹⁶ The state is also obliged to ensure that inmates’ health status examination is performed.⁴⁹⁷ This includes testing them for contagious and communicable diseases in order to ensure that those who are sick or injured receive medical attention.⁴⁹⁸ It also includes identifying those who pose, or could reasonably pose, a health risk to others.⁴⁹⁹ The purpose for this health status examination is to enable the DCS to take the necessary steps to

⁴⁹⁴ Section 12 of the Correctional Services Act, (note 24) above. This limitation, according to Van Zyl Smit D, ‘South Africa’ in Van Zyl Smit D and Dunkel F (eds), *Imprisonment Today and Tomorrow, international Perspective on Prisoners’ Rights and Prison Conditions*, 2nd ed, 2001,598, does not matter since the “significant restriction of primary health care on the basis of lack of resources would amount to an infringement of the fundamental right to detention in conditions of human dignity”.

⁴⁹⁵ Odongo G and Gallinetti J, (note 155) above at 26-27, citing De Vos P, Prisoners’ Rights litigation in South Africa since 1994 - a critical evaluation, CSPRI Research Paper No. 3, 2003.

⁴⁹⁶ Section 12(3) of the Correctional Services Act, (note 24) above.

⁴⁹⁷ Section 6(5) of the Correctional Services Act, (note 24) above and Regulation 2(3) of the Correctional Services Regulations No. 26626, (note 25) above.

⁴⁹⁸ Idem.

⁴⁹⁹ Idem.

prevent other inmates from becoming ill.⁵⁰⁰ Should the state fail to fulfil this obligation and the inmate contracts some diseases in the correctional centre, it may be liable for damages. This was stressed by the High Court and Constitutional Court in *Lee v Minister of Correctional Services* when they found the state liable for damages as a result of, among other things, its failure to screen inmates for TB upon their arrival in the crowded Pollsmoor correctional centre.⁵⁰¹ Lastly, the Correctional Services Act also obliges the state to test inmates for contagious and communicable diseases when they are released.⁵⁰²

The Regulations oblige the state to sterilize inmates and to perform abortions for medical reasons.⁵⁰³ They also oblige the state to inspect the correctional centre at least once a month on problems concerning environmental health conditions and health related issues⁵⁰⁴ and to ensure that injured inmates, after release or placement under community corrections, are provided with medical treatment.⁵⁰⁵ With regard to mentally ill inmates the Regulations oblige the state to transfer them to a designated health establishment.⁵⁰⁶ While with regard to mentally ill remand detainees the Correctional Matters Amendment Act obliges the state to provide them

⁵⁰⁰ *Lee v Minister of Correctional Services*, (note 99) above at para 215.

⁵⁰¹ Ibid at para 216. *Lee v Minister of Correctional Services*, (note 43) above at paras 59 and 61.

⁵⁰² Section 45 of the Correctional Services Act as amended by section 23 of the Correctional Services Amendment Act 34 of 2001, (note 24) above.

⁵⁰³ Regulation 7(9) of the Correctional Services Regulations No. 26626, (note 25) above.

⁵⁰⁴ Regulation 7(11) of the Correctional Services Regulations No. 26626, (note 25) above.

⁵⁰⁵ Regulation 7(12) of the Correctional Services Regulations No. 26626, (note 25) above.

⁵⁰⁶ Regulation 6 of the Correctional Services Regulations No. 35032, (note 25) above.

with health care services within the available resources.⁵⁰⁷ The Regulations further oblige the state to provide pregnant women in remand detention with access to pre-, intra- and post-natal services and any additional medication or treatment recommended by the medical practitioner or midwife.⁵⁰⁸

Apart from the Constitution, the Correctional Services Act and the Regulations, the obligation to fulfill this right is imposed by the National Health Act which obliges the Director General of Health to issue and promote health services for inmates and remand detainees, in accordance with the national health policy.⁵⁰⁹

3.2.1 Inmates' right to adequate medical treatment as interpreted by the courts

Inmates' right to adequate medical treatment has been interpreted by the courts in cases involving the failure of the state to provide inmates with ARVs in the correctional centres. The first case was *Van Biljon v Minister of Correctional Services and Others*.⁵¹⁰ This case concerned inmates who were diagnosed as HIV positive with the CD4 counts of less than 500/ml at the time. They argued that the state's failure to provide them with a prescribed anti-viral therapy violated their right to adequate medical treatment. The High Court found in their favour by holding that they were indeed entitled to receive prescribed appropriate anti-viral medication at

⁵⁰⁷ Section 49 D(1) of the Correctional Matters Amendment Act, (note 24) above.

⁵⁰⁸ Regulation 26 D of the Correctional Services Regulations No. 35032, (note 25) above.

⁵⁰⁹ Section 21(2)(b)(vi) of the National Health Act (note 26) above.

⁵¹⁰ *Van Biljon v Minister of Correctional services*, (note 135) above.

the expense of the state. However, the court raised the following crucial points on the provision of ARVs in the correctional centre: the court opined that “adequate medical treatment’ cannot be determined in vacuo and in determining what is ‘adequate’, regard must be had to, inter alia, what the state can afford”.⁵¹¹ The court further opined that this right does not include “optimal medical treatment” or “best available medical treatment”.⁵¹² Furthermore, the court held that this right cannot be determined by what is provided for people outside, and their standard of medical treatment “cannot be determined by the lowest common denominator of the poorest prisoner on the basis that, he or she cannot afford better treatment outside”.⁵¹³

The second case, which dealt with the failure of the state to provide inmates with ARVs was *N and Others v Government of Republic of South Africa and Others (No 1)*.⁵¹⁴ The case concerned HIV positive inmates who complained that despite the fact that they qualified for ARV (Anti-Retroviral) therapy, they were not enrolled in ART (Anti-retroviral Treatment). They then requested the Durban High Court to order the state to remove the restrictions that prevented them and all other similarly situated inmates who met the criteria as set out in the National Department of Health's Operational Plan for comprehensive HIV and AIDS care, Management and Treatment for South Africa (Operational Plan)⁵¹⁵ and National Antiretroviral

⁵¹¹ Ibid at para 49.

⁵¹² Idem.

⁵¹³ Ibid at para 53.

⁵¹⁴ *N and Others v Government of Republic of South Africa and Others (No 1)*, (note 23) above.

⁵¹⁵ Operational Plan for Comprehensive HIV and AIDS care, Management and Treatment for South Africa, published by the National Department of Health in 2003.

Treatment Guidelines⁵¹⁶, from accessing antiretroviral treatments at an accredited public health facility. They also sought that the state should be ordered to provide antiretroviral treatment, in accordance with the Operational Plan, to the applicants and all other similarly situated inmates at an accredited public health facility. The basis for their claim was that the failure of the state to remove the restrictions or the delay in providing them with antiretroviral treatment violated their right to adequate medical treatment read together with the right to access to health care services.

The court ruled in their favour by finding that those restrictions or the delay in providing them with ARVs violated their right to adequate medical treatment. In arriving at its finding, the court applied the standard of the reasonableness test which is normally used to determine the violation of other socio-economic rights. The reasonable standard test was applied as follows:

The respondents have not made the lack of resources an issue. Their case is that they are complying with their obligations...the issue boils down to whether the respondents are taking reasonable steps or measures to ensure that the applicants are receiving adequate medical treatment.⁵¹⁷

Having applied this standard of the reasonableness test, the court held that the state's implementation of the laws and policies was unreasonable in that it was inflexible, characterised by unjustified and unexplained delay, and some of the steps

⁵¹⁶ National Antiretroviral Treatment Guidelines, published by the National Department of Health in 2004.

⁵¹⁷ *N and Others v Government of Republic of South Africa and Others (No 1)*, (note 23) above at para 25.

taken by the respondents were irrational. What was found to be an irrational step is the arrangement which Westville correctional centre (WCC) had reached with the head of the ARV roll-out at King Edward VIII Hospital (KEH). In terms of this arrangement KEH could only see four offenders in one week and this meant that it would take three weeks for all other inmates to get only their first counselling session.

The court then concluded that the treatment and medical care afforded to the applicants and other similarly situated inmates at WCC was neither adequate nor reasonable in the circumstances and violated inmates' rights including their right to adequate medical treatment. It then ordered the government to provide all HIV positive inmates with ARVs within two weeks.

These cases should be commended for compelling the state to provide HIV positive inmates with ARVs in line with international law.⁵¹⁸ Muntingh and Mbazira commended the case of *N and Others v Government of Republic of South Africa and*

⁵¹⁸ As already stressed in chapter 2, Human Rights Committee, Concluding Observations: Mongolia (2000) UN Doc A/55/40 Vol. I 49 para 332 expressed its concern at the lack of timely medical care in violation of article 10 of the ICCPR. Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, (note 216) above para 17, argued that the ICESCR obliges state parties to take steps which include the provision of equal and timely access to appropriate treatment of prevalent diseases, and the provision of essential drugs in order to achieve the full realization of the right to health. Guideline 28 of the UN International Guidelines on HIV/AIDS and Human Rights, (note 216) above also stress the need for states to take steps, and to move as quickly and effectively as possible, towards realizing access for all to HIV prevention, treatment, care and support at both the domestic and global levels. The European Court, in the case of

Others (No 1) for ordering the Government to provide all HIV positive inmates with ARVs within the period of two weeks.⁵¹⁹ However, the judgment of this case was not immune to academic criticism. Motala and McQuoid-Mason argued that the National Department of Health's Operational Plan for comprehensive HIV and AIDS care, Management and Treatment for South Africa (Operational Plan)⁵²⁰ and National Antiretroviral Treatment Guidelines⁵²¹ did not represent the holistic approach to anti-retroviral treatment as required by the constitutional values.⁵²² The reason, they argued, was because the guidelines lacked the “comprehensive HIV/AIDS care and prevention, treatment of opportunistic infections, access to nutritional supplements, access to palliative care and compassionate release”.⁵²³ Hassim argued that the delivery of health services outside the correctional facilities not only represented a

Lorgov v Bulgaria, (note 313) found the violation of Article 3 of the European Convention on Human Rights (note 311) above which guarantees the right not to be subjected in a cruel, inhuman or degrading treatment, as a result of the delay in providing adequate medical assistance in an emergency situation. The European Court considered the delay in providing an inmate with medical treatment as one of the factors that violated Article 3 of the European Convention on Human Rights in *Engel v Hungary*, (note 353) above. In *Odafe and Others v Attorney-General and Others*, (note 162) para 33 and in *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 90 and 92, the African commission found the state's failure to provide HIV positive inmates with HIV treatment and denying them access to a doctor to have violated their right not to be treated in an inhuman and degrading manner and their right to health.

⁵¹⁹ Muntingh L and Mbazira C, (note 147) 14.

⁵²⁰ Operational Plan for Comprehensive HIV and AIDS care, Management and Treatment for South Africa, (note 519) above.

⁵²¹ National Antiretroviral Treatment Guidelines, (note 520) above.

⁵²² Motala N and McQuoid-Mason D, (note 145) above at 42.

⁵²³ *Ibid* at 43.

lack of co-ordination between the Department of Health and the DCS on the provision of health care services in the correctional centre but also indicated a little effort on the part of Government to ensure adequate medical treatment for HIV positive inmates.⁵²⁴ Liebenberg argued that the court failed to “engage in a normative interpretation of section 35(2) (e) and its interrelationship with section 27 in relation to detained persons”.⁵²⁵

The author wishes to argue that this case lacks the constitutional imperatives of interpreting the Bill of Rights. When interpreting the Bill of Rights, the courts are obliged to apply the two stages approach of interpreting the Bill of Rights which requires the court to first determine if there has been a contravention of a guaranteed right (which requires the unpacking of the content of the right in question) and if the answer is in the affirmative, it has to determine if such contravention is justified under the limitation clause.⁵²⁶ So, instead of applying the standard of the reasonable test, the court should have applied the two stages approach of interpreting the Bill of Rights. The reason being, inmates’ right to adequate medical treatment, unlike other socio-economic rights, does not have an internal limitation clause. In other words, it does not have a subsection which obliges the state to take reasonable measures aimed at fulfilling it and which is a subsection considered by the courts when determining the content or the nature of a socio-economic right in question.⁵²⁷

⁵²⁴ Hassim A, (note 142) above at 166-167.

⁵²⁵ Liebenberg S, (note 113) above at 264-265.

⁵²⁶ *S v Zuma and Others*, (note 42) above at para 21, emphasis added.

⁵²⁷ *Mazibuko and Others v City of Johannesburg and Others*, (note 41) above at para

The approach of considering the two stages of interpreting the Bill of Rights is crucial because it enables the court to understand the essentials of inmates' right to adequate medical treatment. The legal question, therefore, should have been whether the Operational Plan and National Antiretroviral Treatment Guidelines constituted adequate medical treatment for inmates as required by section 35(2) (e). Put differently, the legal question should have been whether the delay emanating from the Operational Plan and National Antiretroviral Treatment Guidelines violated

46. However, this approach was criticised by academics: Iles K, *Limiting socio-economic rights: beyond the internal limitations clauses* (2004) 20 SAJHR 455, argues that the question of determining the scope of the right is crucial since it not only enable the state to channel its resources in accordance with what the right requires it to do; McLean K, (note 492) above at 174, argues that, it enables the courts to identify the scope of the right and to determine if the state has complied with an obligation imposed by the right because it is difficult for a court to determine the reasonableness of state action intended to realize it without having some point of reference regarding what the state is obliged to achieve. Bilchitz D, in his article entitled, "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 SAJHR, Issue 1, 6, argue that the court's sidestepping the need to give content to the right in s 27(1) in the case of TAC renders the court to fail to identify the health care services to which one is entitled to claim access or to determine whether these services involve preventative medicine, such as immunisations, or treatment for existing diseases, or both or to determine whether the right entitle one to primary, secondary, or tertiary health care services; Stewart L, *Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socioeconomic rights of others*, *South African Journal on Human Rights*, Vol 24, Issue 3, 2008, 479, citing D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 SAJHR 1, 9, argued that the content of the socio-economic right in question should first be established and once that has been established should an inquiry into the reasonableness of the measures be undertaken.

inmates' right to adequate medical treatment. As mentioned, this interpretative approach of unpacking the content of this right is crucial because, unlike the standard reasonable test which does not engage in the process of determining the content of the socio-economic right in question,⁵²⁸ it obliges the court to unpack the essentials of the right to adequate medical treatment. Pieterse's argument would have been of great assistance in this regard. He argued that the concept of adequate medical treatment should include the availability of health care facilities/centres and the entitlement to the same health care services available to people outside prisons.⁵²⁹ It is on this basis that the court should have found that inmates' right to adequate medical treatment was violated in this case. The reason being that people outside the correctional centres were not subjected to the delay in accessing ARVs and therefore such a delay in accessing ARVs in the correctional centre violated inmates' right to adequate medical treatment.

In short, the court should not have invited the internal limitation clause when determining whether inmates' right to adequate medical treatment was violated. Instead it should have determined whether the state's measures aimed at fulfilling this right were adequate as per the intention of the constitutional drafters. In *Centre for Child Law & Another v Minister of Home Affairs & Others*,⁵³⁰ the court stressed the importance of considering the intention of constitutional drafters when

⁵²⁸ Ibid at para 38; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) , (note 41) above at para 39; and *Mazibuko and Others v City of Johannesburg and Others*, (note 41) above at para 50.

⁵²⁹ Pieterse, (note 152) above at 122, citing Ngwenya C, "Aids in Africa: access to health care as a human right", *SA Public law* 2000,1, 17-18.

⁵³⁰ *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 6 SA 50 (T).

interpreting the Bill of Rights when it argued that children's socio-economic rights impose a direct duty on the state to provide children with the basic necessities of life because they do not have internal limitation clauses.⁵³¹ Though this case dealt with the interpretation of children's socio-economic rights, it emphasized the importance of interpreting any socio-economic right as per the intentions of the constitutional drafters. Further, even the contextual interpretation, which is the preferred method of interpreting socio-economic rights, stresses the importance of considering the textual setting of a right in addition to its social and historical context.⁵³² This interpretative approach would not only have complied with the constitutional imperatives of interpreting the Bill of Rights but would also have strengthened the jurisprudence on the interpretation of this right.

Accordingly, in line with the two stages approach, the next question should have been whether this right was violated in a constitutional manner in terms of section 36. However, the author wishes to argue that the state would not have succeeded in rescuing the violation of this right in terms of section 36. The reason being, the Operational Plan and National Antiretroviral Treatment Guidelines constituted a policy of the Department of Health and therefore did not constitute law for the purposes of section 36. In *Hoffmann v South African Airways*, the court did not embark on the process of determining whether the right to equality was violated in a constitutional manner simply because it did not regard the South African Airways'

⁵³¹ Ibid at para 17. McLean K, (note 492) above at 713.

⁵³² *Government of the Republic of South Africa and Others v Grootboom and Others*, (note 41) above at paras 21-22.

policy that disqualified HIV positive people from qualifying for employment as airline cabin attendant as a law of general application.⁵³³

The court's first sentence, just before applying the standard of reasonable test, that "the respondents have not made the lack of resources an issue" also needs to be tackled. This statement prompts the question whether the state would have successfully persuaded the court to rule in its favour, had it argued that its failure to fulfil this right emanated from the resources constraints. In other words, had the state argued that the reasons for the restrictions which prevented inmates from accessing ARVs emanated from the lack of resources, would it be found not to have violated this right? This question is derived from the fact that it is well accepted by the courts that the state cannot be compelled to fulfil the obligation of a socio-economic right if it does not have sufficient resources to do that.⁵³⁴

However, in answering the question above, the author argues that the state would not have succeeded in pleading resources constraints as a basis for its failure to ensure that inmates had access to ARVs without delays because the delay which restricted inmates from accessing ARVs was not experienced by the members of the public. This means that inmates' access to ARVs constituted part of primary health care that is available to members of the community⁵³⁵ and which had to be provided

⁵³³ *Hoffmann v South African Airways*(CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235, [2000] 12 BLLR 1365 (CC) (28 September 2000) para 41.

⁵³⁴ *Van Biljon v Minister of Correctional services*, (note 135) above at 589 para 49.

⁵³⁵ Section 12 of the Correctional Services Act, (note 24) above.

to inmates because they were available for free to members of the public without any delays.

Inmates' right to adequate medical treatment was also interpreted by the courts in cases involving bail applications. In *S v Vanqa*⁵³⁶ the Transkei High Court granted the appellant bail as a result of, among other things, the state's failure to provide him with asthma treatment after suffering three asthma attacks. This judgement is commended for protecting the right to adequate medical treatment by not applying the standard reasonable test.⁵³⁷ In *S v Mpošana*,⁵³⁸ the appellant applied for bail on the basis that he was incarcerated in a small cell with 14 other remand detainees and that he was denied an opportunity to consult with his own medical practitioner. The High Court found that the magistrate erred in refusing to grant the appellant bail on the basis of insufficient information regarding the identification parade which had not taken place in two months and still to be conducted. On the state's refusal to allow the applicants to consult the medical practitioner of their choice, the court held that:

It is, however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned to either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law.⁵³⁹

⁵³⁶ *S v Vanqa* 2000 (2) SACR 371 (Tk).

⁵³⁷ Pieterse M, (note 152) above at 120 and 126. Barrie G N, (note 153) above 125.

⁵³⁸ *S v Mpošana* 1998 (1) SACR 40 (Tk).

⁵³⁹ *Ibid* at 45.

Inmates' right to adequate medical treatment was also indirectly interpreted by the court in *S v Cloete* when it converted an inmate's sentence of imprisonment to correctional supervision.⁵⁴⁰ The conversion of an inmate's sentence was informed by the fact that he had contracted HIV and that psychological treatment that he needed was not available in the correctional centre.

3.2.2 Limitation of inmates' right to adequate medical treatment

The limitation of this right has to comply with section 36 of the Constitution on the basis that it does not have an internal limitation clause. In other words, its limitation has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account factors listed in section 36. Ngcobo J in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* summarized section 36 as follows:

...a proportionality analysis that takes into account the nature of the right, the nature and extent of the limitation, the importance of the purpose of the limitation, the relationship between the limitation and purpose and the existence of less restrictive means to achieve that purpose.⁵⁴¹

⁵⁴⁰ *S v Cloete* 1995 (1) SACR 367 (W).

⁵⁴¹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) para 113. These factors are also clearly summarized by the Constitutional Court in *Dawood and Another v Minister of Home Affairs*

These factors should also include the consideration of the availability of the resources on the part of the state to fulfil this right.⁵⁴² The reason is because the Correctional Services Act clearly state that the state should fulfil this right subject to the available resources. Moreover, as already mentioned, the non-availability of the resources does not justify the state's failure to fulfil this right.⁵⁴³ This means that resources constraint could play a crucial role in determining whether this right has been violated in a constitutional manner.

3.3 INMATES' RIGHT TO ADEQUATE ACCOMMODATION

Inmates' right to adequate accommodation, just like their right to adequate medical treatment, is guaranteed by section 35(2) (e) of the Constitution. This section imposes a positive obligation on the state to provide inmates with adequate accommodation, consistent with human dignity, at its expense. This obligation begins as soon as inmates are admitted into a correctional centre and ends when they are released.⁵⁴⁴

and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 40.

⁵⁴² Section 12(1) of the Correctional Services Act, (note 24) above.

⁵⁴³ Singh A and Maseko TW, (note 139) above at 91. Barrie GN, (note 153) at 124. Mdumbe F, (note 134) above at 469.

⁵⁴⁴ McLean K, (note 173) above at 55-54.

It is still unclear as to what adequate accommodation entails for the purposes of this right. However, according to De Vos, the determination of adequate accommodation includes considering international standards such as Standard Minimum Rules for the treatment of prisoners and the Rules of the Department of Correctional services.⁵⁴⁵ According to Steinberg, adequate accommodation includes the eradication of overcrowding in the correctional centres as he argued that this right entitles them to argue that the lack of the available space in the correctional centre violates their right to adequate accommodation during sentencing stage.⁵⁴⁶ While Ballard and Dereymaeker argued that this right should be found to be violated by overcrowding as overcrowding results in the shortage of sufficient ventilation and ineffective rehabilitative services.⁵⁴⁷

Apart from the Constitution, the obligation to fulfil this right is imposed by the Correctional Services Act and the Regulations. The Correctional Services Act requires the state to keep inmates in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions adequate for detaining inmates under conditions of human dignity.⁵⁴⁸ This includes ensuring that the accommodation in the correctional centre has a sufficient floor and cubic capacity space that is sufficiently

⁵⁴⁵ De Vos P, (note 172) above at 106, citing *Strydom v Minister of Correctional Services and Others* 1993 3 BCLR 342 (W).

⁵⁴⁶ Steinberg J, (note 174) above.

⁵⁴⁷ Ballard C and Dereymaeker G, (note 175) above. Other authors who argued that overcrowding violate this right include Singh S, (note 176) above at 137 and Blom O and Maodi W, (note 178) above at 60.

⁵⁴⁸ Section 7 (1) of the Correctional Services Act, (note 24) above.

lighted by natural and artificial lighting to enable inmates to move freely, sleep comfortably and to read and write.⁵⁴⁹ This also includes ensuring that inmates are kept in a place with adequate ventilation, separate beds and bedding which not only provide adequate warmth for the climatic conditions but also comply with hygienic requirements.⁵⁵⁰

Further, it includes ensuring that sentenced offenders are kept separately from unsentenced offenders;⁵⁵¹ male inmates are kept separately from female inmates;⁵⁵² children are kept separately from adult inmates,⁵⁵³ inmates of specific age, health categories or security risks are kept separately;⁵⁵⁴ and that children are kept in accommodation appropriate to their age.⁵⁵⁵ However, the head of the correctional centre is allowed to depart from these requirements, except in sleeping accommodation,⁵⁵⁶ if there is a need to provide development, support service or medical treatment.⁵⁵⁷ In other words, the head of the correctional centre could mix sentenced and unsentenced inmates, male and female inmates, and adult and

⁵⁴⁹ Idem.

⁵⁵⁰ Idem.

⁵⁵¹ Section 7(2) of the Correctional Services Act, (note 24) above.

⁵⁵² Idem.

⁵⁵³ Idem.

⁵⁵⁴ Idem.

⁵⁵⁵ Idem.

⁵⁵⁶ Section 7(3) of the Correctional Services Act, (note 24) above.

⁵⁵⁷ Idem.

children inmates in order to provide development or support services and medical treatment.⁵⁵⁸

The Correctional Services Act further obliges the state to ensure that it detains the disabled remand detainees and the aged remand detainees, separately in a single cell or communal cell if there is available accommodation specifically designed for them.⁵⁵⁹ Moreover, the Correctional Services Act requires the state to provide adequate accommodation for disabled inmates by “taking measures, in terms of planning, policy and infrastructure, to accommodate inmates with disabilities for them to exercise the rights and to enjoy the amenities in the correctional centres”.⁵⁶⁰ This obligation should be read together with section 41(4) of the Correctional Services Act which obliges the state to provide, “as far as practicable, other development and support programmes which meet specific needs of sentenced inmates”.

The Regulations oblige the state to ensure that ordinary communal cells are 3,344m², single cells are 5,5m,²⁵⁶¹ hospital communal cells are 4,645 m², hospital single cells are 9,0 m²,⁵⁶² cubic space for people under the age of 10 years is 4,25 m³ and for people who are 10 years and older is 8,5 m³,⁵⁶³ correctional centres for

⁵⁵⁸ Muntingh L, (note 122) above at 18.

⁵⁵⁹ Section 49(B)(1) of the Correctional Matters Amendment Act, (note 24) above and section 49(C)(1) of the Correctional Matters Amendment, (note 24) above.

⁵⁶⁰ Section 16 (3) of the Correctional Services Amendment Act, (note 24) above.

⁵⁶¹ Clause 2 of Chapter 2 of the Standing Orders, extracted from the case of *Lee v Minister of Correctional Services*, (note 502) above.

⁵⁶² Steinberg J, (note 174) above.

⁵⁶³ Muntingh L, (note 122) above at 17, citing B2 Orders which describes how the

males and females built on the same site or in separate sites that are in proximity of each other should have different doors locks and gates,⁵⁶⁴ the keys of a correctional centre for females should be kept by a female correctional official,⁵⁶⁵ and that a male person visiting a correctional centre for females is accompanied by a female correctional official.⁵⁶⁶ The Regulations further oblige the state to ensure that inmates of a particular security classification are detained separately from inmates with a different security classification,⁵⁶⁷ inmates between the ages of 18 and 21 years are detained separately from inmates who are over the age of 21 years, inmates suffering from mental or chronic illness or whose health status is detrimentally affected or whose health status poses a threat to other prisoners, if detained in a communal cell, are detained separately,⁵⁶⁸ inmates are provided with hot and cold water and that partitioned ablution facilities in communal sleeping accommodation and the correctional centre hospitals which have beds, bedding and clothing which comply with effective patient care are provided.⁵⁶⁹

Regulations should be interpreted, Chapter 2, para 2.2.

⁵⁶⁴ Regulation 3 of the Correctional Services Regulations No. 26626, (note 25) above.

⁵⁶⁵ Idem.

⁵⁶⁶ Idem.

⁵⁶⁷ Idem.

⁵⁶⁸ Idem.

⁵⁶⁹ Idem.

3.3.1 Inmates' right to adequate accommodation as interpreted by the courts

Inmates' right to adequate accommodation, unlike their right to adequate medical treatment, has yet to be interpreted by a court in South Africa. However, in *Van Biljon v Minister of Correctional Services*, the court, which determining whether inmates' right to adequate medical treatment was violated, analysed in passing what adequate accommodation entails for the purpose of this right as follows:

...Acceptance of the principle contended for by Mr Scholtz would, therefore, mean that the State is not obliged - in terms of s 35(2) (e) - to provide better accommodation for prisoners than that which is provided for people outside. It is an unfortunate fact of life, however, that there are many people in this country whose accommodation cannot be described as adequate by any standard. What is provided for people outside can therefore be no absolute standard for what is adequate for prisoners.⁵⁷⁰

This could be interpreted to mean that the courts should not consider the accommodation for people outside the correctional centres, when determining whether this right is violated. In other words, the fact that accommodation for people outside the correctional centres is not adequate, does not necessarily mean that inmates should be accommodated under inhuman conditions.

The other case that indirectly interpreted this right is *Lee v Minister of Correctional Services*.⁵⁷¹ This case concerned an inmate who instituted a delictual claim against

⁵⁷⁰ *Van Biljon v Minister of Correctional services*, (note 135) above at para 52.

⁵⁷¹ *Lee v Minister of Correctional Services*, (note 502) above.

the state after he became ill and was diagnosed with tuberculosis (TB) caused by intolerable conditions in the correctional centre including overcrowding. Having applied the common law standard of the reasonable test, the court held that a reasonable person in the position of the state would have taken reasonable steps to deal with overcrowding which facilitated the spread of TB. In protecting inmates' rights including their right to adequate accommodation, the court ruled that the state's failure to take reasonable steps to ensure that an inmate did not contract TB was unlawful as it violated his right to treatment which is not inhuman or degrading and his right to dignity in terms of the common law, the Correctional Services Act of 1959 and the Constitution.⁵⁷²

The Supreme Court of Appeal overruled the High Court's judgment by finding that factual causation could not be established.⁵⁷³ However, it affirmed the need for the protection of inmate's rights including his right to adequate accommodation as follows:

⁵⁷² Ibid at paras 260 and 263.

⁵⁷³ In *Minister of Correctional Services v Lee*, (note 21) above at para 64, the Supreme Court of Appeal stressed the lack of factual causation when it argued that, "The difficulty that is faced by Mr Lee is that he does not know the source of his infection. Had he known its source it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic omission. But in the absence of proof that reasonable systemic adequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease. On that ground I think that the claim ought to have failed".

A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner..... The obligation is also inherent in the right given to all prisoners by s 35(2) (e) of the Constitution to 'conditions of detention that are consistent with human dignity'.⁵⁷⁴

Having overruled the Supreme Court of Appeal's decision on the issue of factual causation,⁵⁷⁵ the Constitutional Court stressed the relevance of the protection of inmate' rights, including the right to adequate accommodation as follows:

....I thus agree that "there is every reason why the law should recognise a claim for damages to vindicate [the prisoners'] rights". To suggest otherwise, in circumstances where a legal duty exists to protect Mr Lee and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in

⁵⁷⁴ Ibid at para 36.

⁵⁷⁵ In *Lee v Minister of Correctional Services*, (note 43) above para 56, the Constitutional Court argued that there is no need for the plaintiff to provide scientific proof in order to establish the existence of factual causation when it argued that, "even if one accepts that the substitution approach is better suited to factual causation, the preceding discussion shows that there is no requirement that a plaintiff must adduce evidence to prove, on a balance of probabilities, what the lawful, non-negligent conduct of the defendant should have been. All that is required is "the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis the plaintiff's loss would have ensued or not". What is required is postulating hypothetical lawful, non –negligent conduct, not actual proof of that conduct. The law recognizes science in requiring proof of factual causation of harm before liability for that harm is legally imposed on a defendant, but the method of proof in a court room is not the method of scientific proof. The law does not require proof equivalent to a control sample in scientific investigation".

conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment.⁵⁷⁶

Essentially, the High Court, Supreme Court of Appeal and the Constitutional Court argued that overcrowding in the correctional centres violates inmates' rights including their right to adequate accommodation. However, they did not promote the value of dignity when interpreting this right. The Constitutional Court only promoted the values of state accountability, responsiveness and the rule of law.⁵⁷⁷ As a result, this prompts the question whether its omission to promote the value of human dignity over and above these values amounted to the violation of the Constitution. The author argues that this question should be answered in the affirmative. Section 39(1) (a) of the Constitution obliges the courts to promote the constitutional values when interpreting the Bill of Rights. This obligation emanates from the presence of the word "must" in this section. In other words, it is mandatory for the courts to promote constitutional values, including the value of human dignity which could have also been promoted in this case. The other reason is that while the Constitution is silent on whether the promotion of one or two applicable constitutional values is sufficient in a particular case, the plural nature of the wording of the provision of section 39 (1)(a) compels the courts to promote all constitutional values applicable in a particular case. By so doing, the court will be implementing the intentions of the constitutional drafters who framed section 39 in the manner that compels the courts to promote constitutional values in order to strengthen South Africa's democracy.⁵⁷⁸

⁵⁷⁶ Ibid at para 65.

⁵⁷⁷ Ibid at para 70.

⁵⁷⁸ The Preamble to the Constitution, (note 20) above, partly recognizes the Constitution as the

Thus, a case, such as this one which involved the determination of whether overcrowding violates inmates' rights, obliges the courts to promote the value of human dignity over and above other applicable constitutional values. In other words, there is no way that the court could ignore the importance of the value of human dignity when determining whether overcrowding violates inmates' right to adequate accommodation in the correctional centres. This is because "the Constitution asserts dignity to contradict our past.... to inform the future, to invest in our democracy the intrinsic worth of all human beings...it is a value that informs the interpretation of many, possibly all, other rights".⁵⁷⁹

Fuo stressed the importance of considering human dignity as a value as follows:

The Preamble to the Constitution and the variety of justiciable socio-economic rights entrenched in the Bill of Rights are hallmarks of the aspirations of the new constitutional objectives to restore lost dignity, attain social transformation and improve the lives of all through *inter alia* the redistribution of resources.⁵⁸⁰

supreme law of the Republic in order to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".

⁵⁷⁹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (note 541) above at para 35.

⁵⁸⁰ Fuo ON, "The significance of the constitutional values of human dignity, equality and freedom in the realisation of the right to social protection in South Africa", ancl-radc annual conference – 'the internationalisation of constitutional law', Rabat, Morocco, 2011-01-20, 3, citing Mokgoro Y "Preface" in Andrews P and Ellmann S (ed) *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*. Liebenberg stressed the importance of this value

Thus, inmates' exposure to inhuman conditions can be completely eradicated if the courts stress the importance of human dignity as a value when interpreting inmates' right to adequate accommodation. Even section 35(2)(e) which specifically protects inmates' rights, including their right to adequate accommodation obliges the courts to consider the value of human dignity when interpreting inmates' rights, including their right to adequate accommodation.⁵⁸¹ Furthermore, the Correctional Services Act and its Regulations also oblige the state to detain inmates under conditions consistent with human dignity which includes ensuring that inmates are kept in a correctional centre that has a sufficient floor and cubic capacity space that is sufficiently lighted by natural and artificial lighting to enable inmates to move freely, sleep comfortably and to read and write.⁵⁸²

Thus, in promoting human dignity as a value in this case, the courts including the Constitutional Court should have argued that keeping inmates in overcrowded cells does not respect or treat them as human beings and therefore violates their rights in particular their right to adequate accommodation.

during the Bill of Rights interpretation by arguing, in her article entitled "The value of human dignity in interpreting socio-economic rights", *SAJHR*, 2005, 21, 12, that failure to uphold the value of human dignity undermines the new constitutional democracy.

⁵⁸¹ Liebenberg S, (note 113) above at 263 also stressed the importance of considering the importance of human dignity when interpreting inmates' right to adequate medical treatment.

⁵⁸² Section 7(1) of the Correctional Services Act, (note 24) above.

3.3.2 Limitation of inmates' right to adequate accommodation

Just like the limitation of their right to adequate medical treatment, the limitation of inmates' right to adequate accommodation has to comply with section 36. This is based on the fact that this right does not have any internal limitation other than "adequate" accommodation.⁵⁸³ Thus, it should be limited in a manner that complies with section 36. McLean argued this as follows:

Since prisoners' right to adequate accommodation is not qualified by progressive realisation and availability of the resources, it may be limited under the general limitation clause in section 36 of the Constitution.⁵⁸⁴

This means, as already argued under the limitation of inmates' right to adequate medical treatment, the limitation of this right should be reasonable and justifiable in an open and democratic society taking into account the factors of section 36.

3.4 INMATES' RIGHT TO ADEQUATE NUTRITION

Inmates' right to adequate nutrition, just like their right to adequate medical treatment and accommodation, is constitutionally protected by section 35(2) (e) of the Constitution. This right implicitly empowers inmates to demand traditional food in the correctional centre. This was indirectly affirmed by the court in *Huang & Others v The Head of Grootvlei prison & Another*⁵⁸⁵ when it found that the correctional

⁵⁸³ De Vos P, (note 172) above at 105.

⁵⁸⁴ McLean K, (note 173) above at 55-54.

⁵⁸⁵ *Huang & Others v The Head of Grootvlei prison & Another*, (note 45) above.

centre's decision to take away a concession that had entitled the Chinese inmates to receive and prepare their own Eastern traditional food was unlawful and in violation of their right to adequate nutrition in terms of section 35(2) (e) of the Constitution. The critical analysis of this case will follow later. Suffice at this stage to say that the court's recognition of this right within the right to adequate nutrition means that inmates' right to tradition food imposes a positive obligation on the state to fulfil it. In other words, inmates are entitled to demand that the state provides them with their traditional food at its expense because all inmates' right guaranteed by section 35(2) (e) impose a positive obligation on the state to fulfil them. This positive obligation on the state to fulfil this right also emanate from the Correctional Services Act which imposes an obligation on it to enact Regulations that give effect to or entitles inmates to have access to cultural food.⁵⁸⁶ It is also derived from the Regulations which currently limit access to cultural food to pregnant or lactating remand detainee.⁵⁸⁷ Apart from the Correctional Services Act and the Regulations, this positive obligation is also imposed by section 7 (1) (e) (ii) of the Children's Act which obliges the state to consider the child's best interests in every matter concerning them, including ensuring that they maintain a connection with their culture or tradition.⁵⁸⁸

Apart from section 35(2) (e), inmates' right to adequate nutrition is protected by sections 30 and 31 of the Constitution. Section 30 entrenches the right of everyone to participate in the cultural life of their choice which respects traditions that may

⁵⁸⁶ Section 8(3) of the Correctional Services Act (note 24) above.

⁵⁸⁷ Regulation 26 D of the Correctional Services Regulations, (note 25) above.

⁵⁸⁸ Children Act 38 of 2005.

include traditional food.⁵⁸⁹ Section 31 protects the right of people who belong to a cultural community to enjoy their culture. Thus, both these sections empower inmates as individuals or as a group to demand access to traditional food in the correctional centre.⁵⁹⁰ In *Christian Education South Africa v Minister of Education* the Constitutional Court indirectly affirmed this argument as follows:

The rights protected by section 31 are significant both for individuals and for the communities they constitute.⁵⁹¹

However, it is crucial to note that unlike section 35(2)(e) which imposes a positive obligation on the state to fulfil inmates' right to adequate nutrition, sections 30 and 31 impose a negative obligation on it to respect or not to interfere with inmates' right to cultural or traditional food. In other words, inmates' right to cultural or traditional food, in terms of sections 30 and 31, does not entitle them to demand that the state provides them with traditional food at its expense. These sections merely entitle them to demand that the state respects or does not interfere with their right to cultural or traditional food. In *Huang & Others v The Head of Grootvlei prison & Another*, the court stressed this negative obligation on the state by ordering it to allow Chinese inmates to cook their traditional food in the correctional centre.⁵⁹²

⁵⁸⁹ Rautenbach C, Van Rensburg FJ, "Pienaar G, Culture (and religion) in constitutional adjudication", PER/PELJ, 2003 (6) 1, 6/112, citing Currie "Minority Rights: Education, Culture, and Language" in Chaskalson et al (eds), *Constitutional Law of South Africa* (Juta Kenwyn 1999) 35.19, emphasis added.

⁵⁹⁰ Ibid at 18/112, emphasis added.

⁵⁹¹ *Christian Education South Africa v Minister of Education* (note 46 above) at para 23.

⁵⁹² *Huang & Others v The Head of Grootvlei prison & Another*, (note 45) above.

Other constitutional rights which are relevant to inmate's right to adequate nutrition include the right to self-determination of a cultural community sharing a cultural heritage protected by section 235 of the Constitution,⁵⁹³ the right to freedom of association protected by section 18 of the Constitution,⁵⁹⁴ the right to have access to sufficient food guaranteed by section 27 (1) (b) and children's right to basic nutrition protected by section 28 (1) (c). The right to sufficient food imposes a positive obligation on the state to fulfil it progressively by taking reasonable measures, subject to available resources.⁵⁹⁵ Children's right to basic nutrition obliges the state to ensure that child inmates have access to basic nutrition immediately because the content of this right is restricted to "basic nutrition" instead of "sufficient food"⁵⁹⁶ and "places the onus on the state to make its case for justification of its conduct".⁵⁹⁷

Religious rights protected by sections 15 and 31 of the Constitution are also relevant to inmates' right to adequate nutrition. Section 15 guarantees everyone's right to freedom of religion, belief and opinion which could be exercised at state or state-aided institutions. Section 31 protects the right of people who belong to a religious community to enjoy their religion. These rights entitle inmates as individuals or as a group to demand access to religious food in the correctional centre.⁵⁹⁸ It is worth

⁵⁹³ Rautenbach C, Van Rensburg FJ, Pienaar G, (note 589 above) at 17/112, emphasis added.

⁵⁹⁴ Ibid at 18/112, emphasis added, citing Devenish A, (note 454) above at 61.

⁵⁹⁵ Section 27(2) of the Constitution, (note 20) above.

⁵⁹⁶ McLean K, (note 492) above at 19, emphasis added.

⁵⁹⁷ Brand D, 'Food', in Woolman et al (eds), *Constitutional Law of South Africa*, 2002, 2nd ed, Ch 56C at 56C-8, emphasis added.

⁵⁹⁸ Idem, emphasis added.

noting that these rights impose a negative obligation on the state to ensure that inmates have access to food that takes into account their religious interests. Sach J, in *Christian Education South Africa v Minister of Education* affirmed the negative obligation imposed by these rights as follows:

“it is achieved indirectly through... negatively enjoining the state not to deny them the rights collectively to profess and practice their own religion...”.⁵⁹⁹

While this case dealt with the interpretation of the right to religion in relation to the provision of education in schools, this court’s interpretation is also relevant on the issue of access to religious food in the correctional centres. However, it is also crucial to note that the state’s positive obligation to fulfill inmates’ right to religious food emanates from the Correctional Services Act and its Regulations. Section 8 (3) of the Correctional Services Act obliges the state to enact Regulations which cater for inmates’ diet that takes into account their religious preferences. In compliance with this section, the Regulations oblige the state to provide pregnant or lactating remand detainees with religious food.⁶⁰⁰

Apart from the Constitution, the Correctional Services Act⁶⁰¹ and the Regulations,⁶⁰² as has been stated above, play a critical role in the protection of inmates’ right to adequate nutrition. The Correctional Services Act obliges the state to provide

⁵⁹⁹ Sach J, in *Christian Education South Africa v Minister of Education*, (note 46) above at para 23, emphasis added.

⁶⁰⁰ Regulation 26 D of the Correctional Services Regulations, (note 25 above).

⁶⁰¹ Correctional Services Act, (note 24) above.

⁶⁰² Correctional Services Regulations No. 35032, (note 25) above.

inmates with adequate diet catering for nutritional requirements of children, pregnant women and any other category of inmates whose physical condition requires a special diet.⁶⁰³ It also obliges the state to provide inmates with the diet that is served at intervals of not less than four and a half hours and not more than six and a half hours.⁶⁰⁴ However, evening meal and breakfast should be served at interval of not more than 14 hours.⁶⁰⁵ The change of a prescribed diet and the intervals, at which the food is served, should be approved only by a medical officer.⁶⁰⁶

The Correctional Services Act further obliges the state to allow the remand detainees to receive food and drinks brought from outside the correctional centre.⁶⁰⁷ It also obliges it to ensure that clean drinking water is available in the correctional centres⁶⁰⁸ and to enact Regulations which entitle inmates to a cultural or religious food.⁶⁰⁹ However, as stated above, the Regulation only obliges the state to provide pregnant or lactating remand detainees with traditional or religious food.⁶¹⁰ While this Regulation should be commended for extending inmates' right to adequate nutrition to religious and traditional food, it is a concern that a pregnant or lactating remand

⁶⁰³ Section 8 (1) of the Correctional Services Act, (note 24) above.

⁶⁰⁴ Section 8(5) of the Correctional Services Act as amended by section 7 of the Correctional Services Amendment Act 34 of 2001, (note 24) above.

⁶⁰⁵ *Idem*.

⁶⁰⁶ Section 8(4) of the Correctional Services Act as amended by section 7(4) of the Correctional Services Amendment Act 25 of 2008, (note 24) above.

⁶⁰⁷ Section 47 of the Correctional Matters Amendment Act, (note 24) above.

⁶⁰⁸ Section 8(6) of the Correctional Services Act, (note 24) above.

⁶⁰⁹ Section 8(3) of the Correctional Services Act, (note 24) above.

⁶¹⁰ Regulation 26 D of the Correctional Services Regulations, (note 25 above).

detainee may lose this benefit once she becomes an inmate. This means that once a pregnant or lactating remand detainee who enjoyed either cultural or religious food as a remand detainee gets sentenced she cannot compel the state to continue to provide her with a religious or traditional food simply because she is no longer a remand detainee. So the absence of the Regulation catering for such an inmate, by far, amounts to the violation of her constitutional right to adequate nutrition and her right not to be unfairly discriminated against by the state.

Section 9 (3) of the Constitution prohibits unfair discrimination on the grounds of culture and religion. So, this inmate could argue that her exclusion from the cultural or religious food to which she had access as a remand detainee amounts to an unreasonable exclusion from the programme which gives effect to the right to cultural or religious food. The reason for this is that the violation of a positive duty imposed by socio-economic rights “involves an allegation of unreasonable exclusion from an existing legislative or other programmes giving effect to socio-economic rights”.⁶¹¹

Further, this Regulation⁶¹² which restricts the access to cultural or religious food only to pregnant and lactating remand detainees also violates section 9(1) of the Constitution.⁶¹³ In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another*, the Constitutional Court stressed that while it is necessary to differentiate between people in order for the state to allocate rights, privileges or

⁶¹¹ Liebenberg S, (note 113) above at 133.

⁶¹² Regulation 26D of the Correctional Services Regulations No. 35032, (note 25) above.

⁶¹³ Constitution, (note 20) above.

benefits, such differentiation must not be arbitrary or irrational nor must it manifest a naked preference.⁶¹⁴ In other words, there must be a rational connection between a differentiating law and the legitimate governmental purpose since a differentiating law or action which does not meet these standards will be in violation of section 9(1).⁶¹⁵

The lack of a rational connection that section 9(1) requires violates the dignity of other remand detainees who do not qualify to be provided with cultural or religious food. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* the court stressed the need to protect ones' dignity when interpreting the right to equality as follows:

....The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways...⁶¹⁶

The Regulations also oblige the state to ensure that inmates are provided with adequate diet which takes into account a balanced spread of food according to the following food groups: (a) grain; (b) fruits and vegetables; (c) dairy; (d) meat and

⁶¹⁴ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, (note 541) at para 53.

⁶¹⁵ Idem. Section 9(1) of the Constitution, (note 20) above, provides that, "everyone is equal before the law and has the right to equal protection and benefit of the law".

⁶¹⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) para 42.

proteins; and (e) fats, oils and sugar.⁶¹⁷ For child inmates, this diet consist of a minimum protein and energy content of 2 800 kilo calories per day,⁶¹⁸ for adult inmates, it consists of a minimum protein and energy content of 2 500 kilo calories per day and for adult females it consists of a minimum protein and energy content of 2 000 kilo calories per day.⁶¹⁹ The Regulations further oblige the state to ensure that pregnant and lactating remand detainees are provided with nutrition or food that takes into account their religious or cultural beliefs.⁶²⁰

3.4.1 Inmates' right to adequate nutrition as interpreted by the courts

The case which has indirectly and partly enforced inmates' right to adequate nutrition is *Lee v Minister of Correctional Services*.⁶²¹ While this case dealt with whether the state should be held vicariously liable for the negligent conduct of the correctional centres' officials, the court enforced inmates' right to nutrition as follows:

It appears to me that in the context of the maximum security prison at Pollsmoor the aforesaid measures would translate into ... the provision of adequate nutrition to those who were undernourished and otherwise vulnerable to TB...⁶²²

⁶¹⁷ Regulation 4 (2) Correctional Services Regulations No. 35032, (note 25) above.

⁶¹⁸ Regulation 4 of the Correctional Services Regulations No. 26626, (note 25) above.

⁶¹⁹ *Idem*.

⁶²⁰ Regulations 26D(6) of the Correctional Services Regulations No. 35032, (note 25) above, which gives effect to section 8(3) of the Correctional Services Act, (note 24) above, which obliges the state, where reasonably practicable, to provide inmates with diet that takes into account religious requirements and cultural preferences.

⁶²¹ *Lee v Minister of Correctional Services* (note 502) above.

⁶²² *Ibid* at paras 247-248.

Thus, part of the reasonable steps that the state had to implement included the provision of nutrition to inmates who were undernourished and vulnerable to TB. The state's failure to take this step, among others, amounted to the violation of inmates' rights including their right to be detained in conditions that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate nutrition.⁶²³ This argument was also affirmed by the Supreme Court of Appeal⁶²⁴ and the Constitutional Court.⁶²⁵

Inmates' right to adequate nutrition, in particular their right to have access to their traditional food, was interpreted by the court in *Huang & Others v The Head of Grootvlei prison & Another*.⁶²⁶ This case concerned applicants (Chinese) who sought an order that they be allowed to receive raw food and to prepare it in accordance with their Eastern tradition in the kitchen of Grootvlei correctional centre at their own expense. They argued that at the beginning of 1999 they had received a concession that entitled them to receive and prepare their own Eastern food. This concession, they further argued, was unlawfully taken away on 14 January 2003 in violation of their right to special food in terms of section 35(2) (e) of the Constitution. The court found that the state's failure to allow them to receive raw food and prepare it in accordance with their Eastern tradition, as required by section 8(3) of the Correctional Services Act which had not yet commenced at the time, amounted to the violation of their right to adequate nutrition. In justifying its reliance on the above

⁶²³ Quoted by the Constitutional Court in *Lee v Minister of Correctional Services*, (note 43) above at para 13.

⁶²⁴ *Minister of Correctional Services v Lee*, (note 21) above at para 58.

⁶²⁵ *Lee v Minister of Correctional Services*, (note 43) above at para 66.

⁶²⁶ *Huang & Others v The Head of Grootvlei prison & Another*, (note 45) above.

mentioned provision of the Correctional Services Act which had not yet come into operation, the court argued that this provision represents a policy of the DCS which is in line with the Constitution.

The court then ordered the state to allow them to receive raw food and prepare it in accordance with their Eastern tradition. It further granted the applicants leave to approach it with the supplemented and amplified papers for an order that their special food be provided at the expense of the state. While the issue of resources constraints was never raised by the state, the court emphasised that resources constraints on the part of the state play an important role in determining whether an inmate's right to adequate nutrition has been violated:

The requirement of adequate nutrition means that the State must supply these within the resources and financial constraints of the State...⁶²⁷

The court's finding demonstrates the commitment on its part to protect and enforce inmates' right to traditional food. Hence, it has been commended for emphasising that socio-economic rights protect cultural and religious aspects of human identity.⁶²⁸ This commitment can also be derived from its advice that the applicants may amend their papers (which they never did) and demand that the state provide them with their traditional food at its expense. However, while its finding is commendable as it protects inmates' right to traditional food, the manner it arrived at it is concerning. What is concerning is that the court found that the correctional centre's decision to

⁶²⁷ Idem.

⁶²⁸ Liebenberg S, (note 113) at 265.

take away a concession which had allowed the Chinese inmates to cook their traditional food in the correctional centre violated section 35 (2) (e). What makes this judgment concerning is that section 35 (2) (e) imposes a positive obligation on the state to provide inmates with adequate nutrition which includes traditional food. So, this section would have been violated if the legal question was whether the state had failed to provide the applicants with their traditional food. So, since the legal question in this case was whether the state's decision to take away a concession which allowed them to cook their traditional food in the correctional centre violated their constitutional rights, the rights that are violated by this decision are cultural rights guaranteed by sections 30 or 31 of the Constitution. The reason being, these sections impose a negative obligation on the state not to interfere with inmates' rights to traditional food. This finding would then present the state with an opportunity to argue that it violated these rights in a constitutional manner in terms of section 36. So the court should not have been misled by the applicants' argument that the decision of the state to take away the concession amounted to the violation of section 35(2) (e).

It is also concerning that the court did not engage in the process of determining whether the applicants' claim to be allowed to cook their traditional food was based on their sincere belief which could be objectively supported.⁶²⁹ In stressing the

⁶²⁹ This approach has already been followed during the interpretation of religious rights in South Africa and abroad. In South Africa, it was stressed by the Constitutional Court in the case of *Christian Education South Africa v Minister of Education* (note 46 above) para 37 when it argued that "...No one in this matter contested that the appellant's members sincerely believe that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children". Some of the international cases in which the consideration

importance of this process when determining whether a cultural right has been violated, the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay*, argued as follows:

the centrality of the practice should be judged with reference to the importance of the belief or practice to the claimant's religious or cultural identity.⁶³⁰

The court proceeded to put into practice this argument in the following paragraphs:

...Even on the most restrictive understanding of culture, Sunali is part of the South Indian, Tamil and Hindu groups ...whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part.⁶³¹

Furthermore, the court stressed the relevance of a sincere belief as follows:

Sunali also endured a large measure of insensitive treatment from her peers, including the prefects of the School, and media exposure, yet continued to stand by her belief. All this points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture.⁶³²

of sincere belief was stressed during the interpretation of the right to religion are the USA Supreme Court case of *Mondrea Vinning-EL, Plaintiff—Appellant v John Evans and Rick Sutton, Defendant—Appellants No 10—1681, 2011 United States Court of Appeal and the European Court case of Jakobski v Poland* application no. 18429/06, judgment 7 December 2010.

⁶³⁰ *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) at paras 52 and 58.

⁶³¹ *Ibid* at para 50.

⁶³² *Ibid* at para 58.

These paragraphs surely oblige the court to either ask whether the claimants had a sincere belief to their traditional food or whether their belief to traditional food could be objectively supported when determining whether inmates' right to traditional food was violated. The reason is that both these questions lead to the same conclusion.⁶³³ In other words, the evidence of a subjective belief cannot be ruled out in cases dealing with cultural rights because for one to belong to a cultural group, he or she has to have a sincere belief in the practice of his or her cultural group that serves his or her interests. This interpretative approach is crucial because South Africa is a developing country and would prohibit the potential abuse of this right by inmates who could demand a baseless cultural food that may have the effect of stretching the limited resources of the correctional centres.

3.4.2 Limitation of inmates' right to adequate nutrition

The limitation of inmate's right to adequate nutrition is not different to the manner their rights to adequate medical and accommodation are limited. In other words, just like their right to adequate medical treatment and accommodation, this right should be limited in a manner that complies with the requirements of section 36. So, the limitation of this right should be reasonable and justifiable in an open and democratic society based on dignity, equality and freedom taking into account the factors listed in section 36. The reason is that this right lacks an internal limitation clause.

⁶³³ Ibid at para 52.

3.5 INMATES' RIGHT TO EDUCATION

The Constitution does not specifically guarantee inmates' right to education as their right to education is implicitly recognized through section 29(1) (a) and (b) which guarantee the right of everyone to basic education and to further education, respectively.⁶³⁴ Inmates' right to basic education imposes both a positive and negative obligation on the state to fulfill it.⁶³⁵ A positive obligation includes ensuring that the state gives inmates access to basic education which includes quality primary education.⁶³⁶ This is an immediate obligation because of the lack of internal limitation such as "the availability of the resources" or "progressive realization" of this right.⁶³⁷ The negative obligation requires the state to allow inmates to exercise this right.⁶³⁸

On the other hand, inmates' right to further education, unlike their right to basic education, imposes an obligation on the state to make it progressively available and

⁶³⁴ During the Interim Constitution, the right to basic education was interpreted as imposing a duty on the state to provide it for everyone in *S v Williams* 1995 3 SA 632 (CC) para 76 and in *Gauteng Provincial Legislature, Ex parte: In re Dispute Concerning the Constitutionality of Certain provisions of the Gauteng School Education Bill* 1995 1996(3) SA 165 (CC), 1996 (4) BCLR 537 (CC) para 9.

⁶³⁵ *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa And Another* (2011 (5) SA 87 (WCC) [2010] ZAWCHC 544; 18678/2007 (11 November 2010) at para 6, emphasis added.

⁶³⁶ Woolman S and Fleisch B, 'The Constitution in the Classroom: Law and Education in South Africa 1994 – 2008', 2009, 127, emphasis added.

⁶³⁷ Malherbe R, "The constitutional framework for pursuing equal opportunities in education", *Perspectives in Education*, September 2004, Vol. 22(3), 16.

⁶³⁸ Woolman S and Fleisch B, (note 636) above, emphasis added.

accessible by taking reasonable measures.⁶³⁹ Contrary to Veriava and Cooman's argument that this right, based on its international protection, should be deemed to refer to all education of a higher level including higher education,⁶⁴⁰ it does not include inmates' higher education. The reason is that the Further Education and Training Colleges Act defines "further education and training" as all learning and training programmes leading to qualifications at levels 2 to 4 of the National Qualifications Framework or levels which are above general education but below higher education as determined by South African Qualification Authority (SAQA) and contemplated in the South African Qualifications Authority Act 58 of 1995.⁶⁴¹

Apart from the right to basic and further education, the state's obligation to fulfill inmates' right to education is imposed by their right to adequate reading material which is guaranteed by section 35(2) (e) of the Constitution.⁶⁴² This right obliges the state to ensure that inmates have access to internet for study purposes. This was affirmed by the court order in *Nabolisa v Minister of Correctional Services*⁶⁴³ that the state should allow inmates to access the internet for study purposes because it constitutes part of reading material that they are entitled to.

⁶³⁹ The relevance of this right to internet access for study purposes was stressed by the court in *Thukwane v Minister of Correctional Services and Others* (note 22) above at paras 23-24.

⁶⁴⁰ Veriava F and Coomans F, 'The right to education', in Brand D and Heyns C (eds), *Socio-Economic Rights in South Africa*, 2005, CH 2, 74-75.

⁶⁴¹ Further Education and Training Colleges Act 16 of 2006.

⁶⁴² Constitution, (note 20) above.

⁶⁴³ *Nabolisa v Minister of Correctional Services*, (note 48) above.

The state's obligation to fulfil inmates' right to education is also imposed by the Correctional Services Act and Regulations. This obligation, in terms of the Correctional Services Act, begins as soon as inmates are admitted in the correctional centre. The state is obliged, after admission, to assess them to determine their educational needs.⁶⁴⁴ Once they are admitted in the correctional centre, the state is obliged to provide those who are illiterate and those who are children with education and training.⁶⁴⁵ The state is also obliged to provide education to those unsentenced children who are subject to compulsory education as required by section 3(1) of the South African Schools Act of 1996.⁶⁴⁶ Further, the state is also obliged to provide education to those child inmates who are not subject to compulsory education,⁶⁴⁷ unless there are good reasons justifying its failure to provide them with it.⁶⁴⁸

The Correctional Services Act further obliges the state to ensure that inmates have access to available reading material which does not compromise the security of the correctional centre.⁶⁴⁹ Furthermore, it obliges the state to ensure that inmates are allowed reading material from outside the correctional centre,⁶⁵⁰ and that they have access to the library literature of constructive and educational value except

⁶⁴⁴ Section 38 (1)(c) of the Correctional Services Act, (note 24) above.

⁶⁴⁵ Section 41(1) and (2) of the Correctional Services Act, (note 24) above.

⁶⁴⁶ Section 19(1)(a) of the Correctional Services Act, (note 24) above.

⁶⁴⁷ Section 19(b) of the Correctional Services Act, (note 24) above.

⁶⁴⁸ Odongo G and Gallinetti J, (note 155) above at 30.

⁶⁴⁹ Section 18(1) and 41(5) of the Correctional Services Act, (note 24) above.

⁶⁵⁰ Section 18(2) of the Correctional Services Act, (note 24) above.

publication, video or audio material, film or computer program that jeopardizes the security of the correctional centre or the safety of any person.⁶⁵¹

The Regulations oblige the state to ensure that education in the correctional centres is provided by a qualified educator or technical educator registered with the South African Council of Educators established in terms of section 4 of South African Council for Educators Act 31 of 2000.⁶⁵² They also oblige the state to ensure that inmates are provided with education and training services in accordance with the educational system of the country.⁶⁵³ The state should also ensure that inmates registered with institutions of higher learning, are permitted to make use of the computers at their own expenses, as long as they do not compromise the security and safety of the DCS, its officials and other inmates.⁶⁵⁴ Moreover, regulation 9 (1)(g) of the Correctional Services Regulations No. 35032 obliges the state to provide sentenced offenders who do not have the ninth grade with educational programmes until they reach the age of 25 years or the ninth grade or adult education.

⁶⁵¹ Regulations 13 (1) and 13(4) of the Correctional Services Regulations No. 26626, (note 25) above.

⁶⁵² Regulations 10 of the Correctional Services Regulations No. 26626, (note 25) above as amended by Regulation 9 of the Correctional Services Regulations No. 35032 (note 25) above.

⁶⁵³ Regulation 10 (b) of the Correctional Services Regulations No. 26626, (note 25) above.

⁶⁵⁴ Order 5: Treatment Programs, Education Programs, extracted from *Thukwane v Minister of Correctional Services*, (note 22) above, para 33.

3.5.2 Inmates' right to education as interpreted by the courts

In South Africa, inmates' right to education has been interpreted by the courts in the cases of *Thukwane v Minister of Correctional Services*⁶⁵⁵ and *Nabolisa v Minister of Correctional Services*.⁶⁵⁶ *Thukwane v Minister of Correctional Services* concerned an inmate detained in the Pretoria local correctional centre, having been convicted of murder and sentenced to a ten-year prison term. This inmate was registered as a final-year LLB student at the University of South Africa and also registered for the National Diploma in Information Technology at the Technikon SA which has now merged with the University of South Africa. He sought an order declaring the provisions of Chapter V of the Treatment Programmes for inmates which denied him access to the internet invalid in as far as they limited his right to further education, as provided for by section 29(1) of the Constitution, in an unreasonable and unjustifiable manner. The reason for this relief, according to the applicant (inmate), was that the provisions of Chapter V of the Treatment Programmes for inmates made choices on his behalf on which courses to follow and at which institutions the courses could be taken. In support of this relief, he averred that in order for him to follow and complete his studies for the diploma, he required access to internet. To have access to internet, he needed a modem and suitable software for his computer, access to which was prohibited by the education programmes. The respondents opposed the granting of this relief prayed for by the applicant on the ground, among others, that internet services cannot be granted because the utilisation of personal computers by inmates could have an effect upon the security and safety of the correctional centre,

⁶⁵⁵ *Thukwane v Minister of Correctional Services*, (note 22) above.

⁶⁵⁶ *Nabolisa v Minister of Correctional Services*, (note 48) above.

its officials and inmates. Furthermore, the respondents argued, allowing inmates access to internet would create difficulties relating to the practical control of the operation of a computer which might lead inmates to visit websites that could cause security risks for the correctional centre. Moreover, the respondent argued that it would be impossible for the correctional centre authorities to give inmates a 24-hour access to internet services.⁶⁵⁷

In finding for the state, the court held that the denial of internet access in the correctional centre complied with the limitation of rights as required by the Constitution on the following grounds: The rights of the applicant which are limited by the above-mentioned provisions of Chapter V of the Treatment Programmes for inmates such as section 12(1)(e) of the Constitution which guarantees the right to freedom and security of the person including the right not to be treated or punished in a cruel, inhuman or degrading way; section 16(1)(d) of the Constitution, which guarantees everyone's right to freedom of expression, including academic freedom and freedom of scientific research; and section 29(1)(b) of the Constitution, which guarantees everyone's right to further education. The purpose of the limitation of the applicant's rights was important in the sense that it protected security, good order and administration of the correctional centre and security and good order of society by assisting in giving effect to the objectives of the Correctional Services Act and the aim of imprisonment. The prohibition to follow subjects or courses which required compulsory access to the internet did not permanently limit the applicant's rights as it only limited his rights during the term of his imprisonment. However, the limitation did not strip the applicant of his rights, as he could still exercise his right to further

⁶⁵⁷ *Thukwane v Minister of Correctional Services*, (note 22) above at para 36.

education, academic freedom and scientific research and his right to choose a trade, occupation or profession after his term of imprisonment had come to an end. The relation between the limitation and its purpose was, in the court's view, well-founded and well balanced and the court was not made aware of any less restrictive means of achieving the purpose of the limitation. Having taken all these factors into account, the court found that the limitation complied with section 36 of the Constitution.

This judgement was criticized for failing to promote inmates' right to the internet access.⁶⁵⁸ While this judgment should be commended for setting out the applicant's relevant rights pertaining to the internet access in the correctional centre, it is disturbing to note that the court, in finding against the applicant, applied section 36 which deals with the limitation of rights. This is the case because the provisions of Chapter V of the Treatment Programmes (DCS policy) which denied the applicant internet access and which were found to have violated the rights of the applicant did not constitute law of general application for the purposes of section 36. In *Hoffmann v South African Airways* the court categorically stated that policy does not constitute law for the purposes of section 36.⁶⁵⁹ As such, having set out the applicant's rights, the court should have found that the provisions of Chapter V of the Treatment Programmes (DCS policy) violated the applicant's right/s to internet access in the correctional centre.

⁶⁵⁸ Jansen R and Achiume ET, (note 185).

⁶⁵⁹ *Hoffmann v South African Airways*, (note 535) above.

The other case that is relevant to the issue of internet access in the correctional centres is *Nabolisa v Minister of Correctional Services*.⁶⁶⁰ In this case, the court ordered the state to allow Mr Nabolisa (inmate) to have access to the internet, at his expense, for study purposes, under supervision. The reason, according to the court, was because internet access forms part of inmates' reading materials. As already stressed, this order obliges the state to ensure that inmates have access to the internet for study purposes. In other words, this order affirms that the state has a negative obligation not to interfere with inmates' rights to the internet access for study purposes. These rights include the right to freedom and security of the person, which includes the rightnot to be treated or punished in a cruel, inhuman or degrading way, the right to freedom of expression, which includes...d) academic freedom and freedom of scientific research and the right to further education, which the state, through reasonable measures, must make progressively available and accessible.⁶⁶¹ However, the courts are yet to decide if the state has a positive obligation to ensure that inmates have internet access for study purposes in the correctional centres. In other words, the courts are yet to decide if these rights impose a positive obligation on the state to provide inmates with internet for study purposes. If the court's order that internet access forms part of inmates' reading materials is anything to by, it seems that inmates can demand internet access for study purposes under their right to adequate reading material. However, as mentioned, it remains to be seen if inmates are entitled to demand internet access for study purposes at the expense of the state.

⁶⁶⁰ *Nabolisa v Minister of Correctional Services*, (note 48) above.

⁶⁶¹ *Thukwane v Minister of Correctional Services and Others*, (note 22) above at paras 23-24.

The question that remains though is whether the obligation to ensure that inmates have internet access for study purposes extends to institutions of higher learning with which inmates are registered. Put differently, can an inmate demand that the institution of higher learning with which he or she is registered provide him or her with internet for study purposes? This question should be answered in the affirmative on the basis that the institution of higher learning is an organ of state as it exercises public power or performs public function in terms of the Higher Education Act 101 of 1997.⁶⁶² This means, the institution of higher learning is bound by the Bill of Rights in terms of section 8(1) of the Constitution which provides that the Bill of Rights applies to all law and binds the state and its organs. As such, it is prohibited from violating the Bill of Rights which has been interpreted to include inmates' rights to internet access⁶⁶³ and that it is obliged to ensure that inmates have access to the internet for study purposes.

Apart from the fact that it is bound by the Bill of Rights as an organ of state, it is also bound by the Bill of Rights as a juristic person. In other words, as a juristic person, it is bound to ensure that inmates have access to internet access for study purposes. This obligation emanates from section 8 (2) of the Constitution which provides that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". So, inmates' right to internet access for study purposes,

⁶⁶² In terms of section 239 of the Constitution, (note 20) above, an organ of state means, among other things, "any other functionary or institution... (ii) exercising power or performing a public function in terms of any legislation".

⁶⁶³ *Thukwane v Minister of Correctional Services and Others*, (note 22) above at paras 23-24.

without a doubt, places a duty on an institution of higher learning as a juristic person to provide inmates with internet access for study purposes. Welsh has correctly argued that the following statement from the case of *Government of the Republic of South Africa and Others v Grootboom and Others* could be interpreted to mean that a juristic person is also bound by the Constitution:

...Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.⁶⁶⁴

The reason, according to Welsh, is as follows:

[I]f a bill of rights is there to create a 'culture of justification' by those who wield political power, one would question the wisdom of letting those who wield other forms of power akin to state power, power, or of a nature resulting in violations of individuals' or group rights, escape similar accountability.⁶⁶⁵

Thus, as a juristic person, the failure of an institution of higher learning to provide inmates with internet for study purposes may violate their rights including section 9(4) of the Constitution which prohibits unfair discrimination by private parties. This is

⁶⁶⁴ Welsh AR, *Obligations of State and Non-state Actors Regarding the Human Rights to Water Under the South African Constitution, Sustainable Development Law and Policy*, 2005, Vol. 5, Issue 1, 63, citing the *Government of the Republic of South Africa and Others v Grootboom and Others*, (note 41) above at para 34.

⁶⁶⁵ Ibid at 62. Welch on the same page further argues that other international instruments that Oblige non-state actors to take steps to ensure the various recognized rights include, the APCRWC and the American Declaration of the Rights and Duties of Man.

the case because such a failure affects or injures inmates' dignity as it takes away an opportunity for them to achieve good results just like other students who have access to the internet.⁶⁶⁶ What may also strengthen their case is that inmates have been subjected to discrimination in the past⁶⁶⁷ and that the court is obliged to promote the value of equality when interpreting a socio-economic right. Liebenberg and Goldblatt summarized the relevance of considering the value of equality during the interpretation of socio-economic rights as follows:

...an interpretative approach to socio-economic rights which integrates the value of equality has significant advantages. An approach to socio-economic rights that is blind to the disparate ways in which a lack of access to social services and economic resources affect different groups, and the consequent need for remedial programmes which take account of these differences, will curtail the transformative potential of our socio-economic rights jurisprudence.⁶⁶⁸

⁶⁶⁶ In *Hoffmann v South African Airways*, (note 535) above, para 27, the court made it clear that "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity".

⁶⁶⁷ Ibid at para 27, the court summarized the factors to be considered when determining the impact of discrimination as follows: "the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim".

⁶⁶⁸ Liebenberg S and Goldblatt B, "The interrelationship between equality and socio-economic Rights under South Africa's transformative constitution", *SAJHR*, 2007, Vol. 23, Issue 2, 351.

However, since inmates are incarcerated by the state, the institution of higher learning will have to work together with the DCS to ensure that inmates have internet access for study purposes in the correctional centre.

3.5.3 Limitation of inmates' right to education

The limitation of inmates' right to adequate reading material and their right to basic education should comply with section 36 because unlike other socio-economic rights, these rights are not subject to any limitation clauses. However, the Western Cape High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* interpreted the right to basic education as though it has internal limitation clauses (reasonableness, progressive realization and available resources).⁶⁶⁹ However, this approach is criticized as it "...conceptually restricts the possibility of enriching the norms for socio-economic rights compliance in the light of the value of substantive equality".⁶⁷⁰

The limitation of inmates' right to further education should take into account its internal limitation clause.⁶⁷¹ According to Veriava and Coomans:

⁶⁶⁹ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*, (note 635) above at para 29.

⁶⁷⁰ Ngwena C and Pretorius L, "Substantive equality for disabled learners in state provision of basic education: a commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*", *SAJHR*, 2012, 28,96.

⁶⁷¹ As mentioned, section 29 of the Constitution, (note 20) above, imposes an obligation on the state to make it progressively available and accessible by taking reasonable measures.

the standard of review with regards to the right to further education is likely to be whether the measures taken to make further education available and accessible are reasonable.⁶⁷²

They further argue that the sufficiency of funding available for the policy or programme's implementation, over and above the criteria for assessing its reasonableness, is also crucial in determining whether the state has violated this right.⁶⁷³

3.6 OTHER RELEVANT CONSTITUTIONAL RIGHTS

3.6.1 The right to conditions of detention consistent with human dignity and the right to human dignity

Inmates' right to conditions of detention consistent with human dignity is guaranteed by section 35(2)(e) of the Constitution, chapter three of the Correctional Services Act and chapter 2 of the Regulations.⁶⁷⁴ Mubangizi correctly argues that this right should be "understood against the background of section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected".⁶⁷⁵ In other words, there is a relationship between this right

⁶⁷² Veriava F and Coomans F, (note 640) above at 74.

⁶⁷³ Idem. This is also echoed by Liebenberg S, (note 113) above at 247 when she argues that "Although the phrase 'within its available resources' does not appear in s29(1)(b), genuine and substantiated resources constraints are implicit in an evaluation of the reasonableness of the state's acts or omissions".

⁶⁷⁴ Correctional Services Regulations No. 26626, (note 25) above.

⁶⁷⁵ Mubangizi JC, (note 116) above at 109-110.

and the right to dignity guaranteed by section 10 of the Constitution. This relationship was stressed by the court in *Strydom v Minister of Correctional Services*.⁶⁷⁶ In this case, the court found that the discontinuation of allowing inmates to adapt the electrical wiring system to power appliances in their cells violated the right, among others, not to be detained in conditions that are inconsistent with human dignity. It was also emphasized by the court in *Stanfield v Minister of Correctional Services and Others*.⁶⁷⁷ In this case, the court held that the DCS's refusal to grant an inmate parole, when there were no medical facilities to cater for his health needs, amounted to the violation of his right to dignity. Further, in *Lee v Minister of Correctional Services*,⁶⁷⁸ the court found that the failure of the state to take reasonable steps to ensure that Mr Lee did not contract TB violated his rights including his right to dignity.⁶⁷⁹

Furthermore, the court in *Minister of Home Affairs and others v Watchenuka* stressed that:

...the freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfillment.⁶⁸⁰

⁶⁷⁶ *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W).

⁶⁷⁷ *Stanfield v Minister of Correctional Services and Others*, (note 80) above.

⁶⁷⁸ *Lee v Minister of Correctional Services*, (note 99) above.

⁶⁷⁹ *Ibid* at paras 260 and 263.

⁶⁸⁰ *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003) para 36.

3.6.2 The right not to be tortured, treated or punished in a cruel, inhuman and degrading way

The right not to be tortured, treated or punished in a cruel, inhuman and degrading way is guaranteed by section 12(1) (d) and (e) of the Constitution. The relevance of this right on inmates' socio-economic rights was affirmed by the court in *Lee v Minister of Correctional Services* above when it found that this right, among others, was violated by the state's failure to take steps to guard against the spread of TB in the correctional centre.⁶⁸¹ It was also stressed by the court, in *Strydom v Minister of Correctional Services*, when it found that the state's refusal to continue to allow inmates to adapt the electrical wiring system to power appliances in their cells also violated this right.⁶⁸² While the court ruled against the internet access in the correctional centres in *Thukwane v Minister of Correctional Services*, it acknowledged the importance of this right when determining whether inmates were entitled to internet access for study purposes.⁶⁸³

3.6.3 The right to equality

Inmates' right to equality is protected by section 9(1) of the Constitution which prohibits inequality by providing that, "everyone is equal and should enjoy equal protection of the law". Accordingly, any law which differentiates or has the effect of disadvantaging inmates by limiting their access to their socio-economic rights

⁶⁸¹ *Lee v Minister of Correctional Services*, (note 99) above.

⁶⁸² *Strydom v Minister of Correctional Services*, (note 676) above.

⁶⁸³ *Thukwane v Minister of Correctional Services and Others*, (note 22) above at paras 23-24.

violates this right unless there is a rational connection between the differentiation and the legitimate governmental purpose that the differentiation is designed to achieve. This was affirmed by the Constitutional Court in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* as follows:

...In this case, the state has chosen to differentiate between citizens and non-citizens. That differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution.⁶⁸⁴

Apart from section 9(1), inmates' right to equality is protected by section 9(3) of the Constitution which prohibits unfair discrimination against them. Unfair discrimination against them will take place when the state fails to formulate or implement a programme to give effect to their socio-economic rights or when it unreasonably excludes them from an existing legislative or other programmes giving effect to their socio-economic rights.⁶⁸⁵ Inmates with disability's unfair discrimination will be deemed to exist on three grounds: (1) when the state denies or remove from them any supporting facility necessary for their functioning; (2) when it fails to eliminate obstacles that unfairly limit or restrict them from enjoying equal opportunities; and (3)

⁶⁸⁴ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, (note 541) above at para 53.

⁶⁸⁵ Liebenberg S, (note 113) above at 133, emphasis added.

when it fails to take steps to reasonably accommodate them with their disability's needs.⁶⁸⁶

3.6.4 The right of everyone to freedom of expression

The right of everyone to freedom of expression is protected by section 16 of the Constitution. This right includes, among others, freedom to receive or impart information or ideas, academic freedom and freedom of scientific research. The importance of this right was acknowledged by the court in *Thukwane v Minister of Correctional Services* when it ruled against internet access in the correctional centre.⁶⁸⁷

3.7 CHAPTER CONCLUSION

This chapter provides an extensive analysis of the protection and enforcement of inmates' rights to adequate medical treatment, accommodation, nutrition and their right to education in South Africa. This analysis also focuses on other rights that should be taken into consideration by the state when fulfilling inmates' socio-economic rights. This chapter's analysis demonstrates that the courts have to consider the constitutional imperatives when interpreting these rights. The interpretation of the right to adequate medical treatment should consider unpacking its content. The interpretation of the right to adequate accommodation should also

⁶⁸⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hereinafter referred to as PEPUDA.

⁶⁸⁷ *Thukwane v Minister of Correctional Services and Others*, (note 22) above at paras 23-24.

promote the value of human dignity as required by the Constitution. In determining whether inmates' right to a cultural food has been violated, it is crucial for the courts to verify an inmate's sincere belief in a cultural food which could also be objectively supported.

The chapter also demonstrates that the Regulations should extend entitlement to cultural or religious food to other inmates. Lastly, it is crucial to note that the obligation to fulfil inmates' right to internet for study purposes also extends to the institutions of higher learning. Pursuant to the objective of this study, the next chapter focuses on the comparative perspective of inmates' socio-economic rights.

CHAPTER FOUR

INMATES' SOCIO-ECONOMIC RIGHTS IN SELECTED COUNTRIES

4.1 INTRODUCTION

The comparative perspective on the protection and enforcement of inmates' socio-economic rights enables countries to learn from each other. This is because almost all countries around the world have moved away from the old societal perspective that inmates have to be punished. On the contrary, they have embraced the concept of inmates' rehabilitation and the protection of their rights. In *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, the High Court sitting as a Constitutional Court in Malawi, for example, summarized this argument as follows:

Prisoners' rights must be understood to mean the rights that prisoners have as human beings as they remain incarcerated in a prison. Thus prisoners, even though they are lawfully deprived of liberty, are still entitled to basic or fundamental human rights.⁶⁸⁸

⁶⁸⁸ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons* (note 92) above. The Zimbabwe Supreme Court, in *Kachingwe and Others v The Minister of Home Affairs and Others* (2005) AHRLR 228 (ZwSC 2005) para 39, citing the cases of *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZSC) and *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others* 1995 (1) SA 703 (ZSC), affirmed the protection of inmates' rights when it argued that "Indeed this Court has held that convicted persons are not, by the mere fact of their conviction, denied the constitutional rights they otherwise possess and that no matter the

This chapter then seeks to analyse the protection and enforcement of inmates' socio-economic rights from a comparative perspective. As indicated in chapter one, countries selected for the purpose of this study include Malawi, Zimbabwe, and the USA. This chapter analyses the manner these countries' constitutions, legislations, regulations and the courts protect and promote these rights.

4.2 INMATES' RIGHT TO ADEQUATE MEDICAL TREATMENT

4.2.1 Inmates' right to adequate medical treatment in Malawi

Inmates' right to adequate medical treatment in Malawi is protected by sections 42(1) (b) and 13 (c) of the Republic of Malawi Constitution. Section 42(1) (b) obliges the state to detain inmates under conditions consistent with human dignity, including the provision of, among other things, adequate medical treatment at its expense.⁶⁸⁹ Section 13 (c) which constitutes the Principles of National Policy obliges the state to "provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care". These Principles are, however, not enforceable. However, the courts stressed their relevance on the interpretation of inmates' rights including this right. In *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*,⁶⁹⁰ the court ruled that it is crucial to have regard to the Directive principles when interpreting the

magnitude of their crime they do not forfeit the protection afforded them by section 15(1) of the Constitution of Zimbabwe".

⁶⁸⁹ Malawi Constitution 1995.

⁶⁹⁰ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

provisions of the Constitution. Furthermore, in *Chimwemwe Mphembedzu v the Republic*,⁶⁹¹ the court stressed the relevance of these Principles on the protection of inmates' right to adequate medical treatment as follows:

This Court, however, concurs with Counsel for the Applicant in his submission that the authorities have a legal and moral obligation to protect the right to health of prison inmates. This court would, however, add that this obligation extends to all other citizens. This is clear from section 13 c) of the Constitution of the Republic of Malawi which provides as follows:

the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goal:

...c) Health:

to provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.

According to Kapindu, the enforceability of these Principles is based on the interpretation of the right to development guaranteed by section 30 of the Constitution and which obliges the state to "take measures to ensure equality of opportunity for all in their access to ... health services..."⁶⁹²

⁶⁹¹ *Chimwemwe Mphembedzu v the Republic* (2011) MWHC 12, available at, <http://www.malawilii.org/mw/judgment/high-court-general-division/2011/12>, accessed on 25 November 2013.

⁶⁹² Kapindu R, "Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities", *AHRLJ*, 2013, Vol. 13 No. 1, 129-130, emphasis added.

Apart from the Constitution of Malawi, this right is protected by section 164(2) (a) of the Prisons Act.⁶⁹³ This section obliges the Chief Commissioner of the correctional centres to ensure proper and efficient administration of penal institutions in accordance with, among other things, the protection of rights. For child inmates, this right is also protected by the Child Care, Protection and Justice Act.⁶⁹⁴ Furthermore, this Act obliges the police officer who is arresting the child to ensure that the child receives medical treatment when necessary.⁶⁹⁵ This Act also obliges the state to ensure that a seriously ill child who is detained in the reformatory centre or safety home is taken to the hospital if such a centre or safety home cannot provide medical treatment for his or her illness.⁶⁹⁶ Moreover, on the advice of a medical officer, the Detention Board is obliged to release a seriously ill child from the place of detention.⁶⁹⁷

There are a number of cases that have enforced inmates' right to adequate medical treatment in Malawi. In *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, the court held that all inmates are entitled to adequate medical treatment regardless of the offence that they committed. The court stressed this as follows:

⁶⁹³ Prisons Act of 1966 of the laws of Malawi.

⁶⁹⁴ Child Care, Protection and Justice Act 22 of 2010.

⁶⁹⁵ Section 90.

⁶⁹⁶ Section 170(1).

⁶⁹⁷ Section 171 (2).

Again it is the right of every prisoner to access medical treatment and such prisoner should not be asked what offence he/she committed as a precondition for getting the medical attention or treatment.⁶⁹⁸

In *Republic v Lambat*⁶⁹⁹ and *Chimwemwe Mphembedzu v the Republic*,⁷⁰⁰ the courts stressed that the accused's state of health should be considered when determining whether he or she should be released on bail. This means that accused persons whose ill health cannot be handled in the correctional centre have a right to apply for bail.

4.2.2 Inmates' right to adequate medical treatment in Zimbabwe

Inmates' right to adequate medical treatment in Zimbabwe is protected by section 50(5) (d) of the Constitution which obliges the state to provide inmates with adequate medical treatment at its expense.⁷⁰¹ The state is also obliged to ensure that inmates are allowed to be visited by their chosen medical practitioner⁷⁰² and that they are not refused emergency medical treatment.⁷⁰³ Other constitutional provisions that are relevant to this right include the following: section 81 (1) (f) of the Constitution which obliges the state to provide children with health care services; section 82 of the

⁶⁹⁸ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above at 34.

⁶⁹⁹ *Republic v Lambat* 2008 MWHC 175.

⁷⁰⁰ *Chimwemwe Mphembedzu v the Republic*, (note 6946) above.

⁷⁰¹ New Zimbabwe Constitution 2013.

⁷⁰² Section 50(5)(c).

⁷⁰³ Section 76(3).

Constitution which enjoins Zimbabwe to ensure that elderly people receive health care and medical assistance;⁷⁰⁴ and section 83 which obliges the state to take appropriate measures within its available resources to ensure that disabled people are given access to medical, psychological and functional treatment. The right to have access to basic health care services is another relevant right.⁷⁰⁵ However, this right obliges Zimbabwe to fulfil it by progressively taking reasonable measures within its available resources.⁷⁰⁶

It is worth noting that this right can be constitutionally limited if the limitation qualifies as a law of general application and is reasonable and justifiable in a democratic society.⁷⁰⁷ The determination of reasonable and justifiable limitation of this right includes taking into account its nature, the purpose of its limitation, the nature and extent of its limitation; the relationship between its limitation and its purpose, and whether there are any less restrictive means of achieving the purpose of its limitation.⁷⁰⁸

It is equally crucial to note that unlike the Malawian High Court, Zimbabwean courts are yet to interpret this right. In fact, the legal fraternity is awaiting the court's judgement in a case in which the court reserved judgment. This case involved an HIV positive inmate whose health deteriorated as a result of being denied his

⁷⁰⁴ Section 82(b).

⁷⁰⁵ Section 76(1).

⁷⁰⁶ Section 76(4).

⁷⁰⁷ Section 86(2).

⁷⁰⁸ Idem.

medication and sometimes given unprescribed drugs.⁷⁰⁹ The cases which have dealt with the issue of medical treatment for HIV positive inmates in the correctional centre and which should play a crucial role in the success of the judgment of this case are the South African case of *N and others v Government of the Republic of South Africa and Others (1)*,⁷¹⁰ the Botswana case of *Tapela and Others v the Attorney-General and Others*⁷¹¹ and the Nigerian case of *Odafe and others v Attorney-General and others*.⁷¹²

In *N and others v Government of the Republic of South Africa and Others (1)*,⁷¹³ discussed in the previous chapters, the court found that inmates' right to adequate medical treatment was violated by the delay experienced by HIV positive inmates in accessing ARVs. In *Tapela and Others v the Attorney-General and Others*,⁷¹⁴ the Botswana High Court found that the state's refusal to provide non-citizens inmates with HAART (Highly Active Retroviral Treatment) violated, among others, the right not to be subjected to torture or inhuman and degrading punishment guaranteed by section 7 of the Constitution of Botswana. It then ordered the state to provide the 1st

⁷⁰⁹ Chiripasi T, "Zimbabwe Lawyers Say Harare Police Station Not for HIV Positive Inmates", 2013, available at, <http://www.voazimbabwe.com/content/zimbabwe-hiv-aids-social-activist-doglas-muzan...> accessed on 13 December 2013.

⁷¹⁰ *N and others v Government of the Republic of South Africa and Others (1)*, (note 23) above.

⁷¹¹ *Tapela and Others v the Attorney-General and Others*, Gaborone High Court MAHGB -000057-14.

⁷¹² *Odafe and Others v Attorney-General and Others*, (note 162) above.

⁷¹³ *N and others v Government of the Republic of South Africa and Others (1)*, (note 23) above.

⁷¹⁴ *Tapela and Others v the Attorney-General and Others*, (note 713) above.

and 2nd applicants and other non-citizen inmates whose CD4 counts complies with the treatment guidelines on HAART.

In the Nigerian case of *Odafe and others v Attorney-General and others*,⁷¹⁵ the Federal High Court of Nigeria found that the state's failure to provide medical treatment for HIV remand detainees amounted to, among other things, the violation of article 16 of the ACHPR which recognizes the right of every individual to enjoy the best attainable state of physical and mental health.

4.2.3 Inmates' right to adequate medical treatment in USA

Inmates' right to adequate medical treatment in the USA is protected through the right not to be subjected to cruel and unusual punishment guaranteed under the Eight Amendment.⁷¹⁶ This was affirmed by the court in *Farmer v Brennan*, Warden, et al as follows:

Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate medical care...⁷¹⁷

This right, therefore, imposes a positive obligation on the state to provide inmates with adequate medical treatment. This right is deemed to have been violated if "...the

⁷¹⁵ *Odafe and others v Attorney-General and others*, (note 162) above at paras 33 and 37.

⁷¹⁶ The Eight Amendment of the Constitution, (note 10) above. *Evans v Bonner* No. CV01-1131 (ADS) 19F.SUPP.2D 252 (2000).

⁷¹⁷ *Farmer v Brennan* 511 U.S. 825, 1994, available at, <http://www.law.cornell.edu/supct/html/92-7247.zs.html>, accessed on 23 January 2014.

deprivation alleged is, objectively, “sufficiently serious...and the official has acted with “deliberate indifference” to inmate’s health or safety”.⁷¹⁸ In other words, the inmate has to objectively indicate that the violation of this right is sufficiently serious and subjectively the state “acted with a sufficiently culpable state of mind”.⁷¹⁹ While there are no settled or precise guidelines to determine the seriousness of an inmate’s medical condition, there are some of the relevant factors in this regard and which are:

- whether a reasonable doctor or patient would perceive the medical need in question as “important and worthy of comment or treatment”;
- whether the medical condition significantly affects daily activities; and
- whether “chronic and substantial pain” exists.⁷²⁰

The subjective part of deliberate indifference to inmates’ health was stressed by the *Evans v Bonner* as follows:

More specifically, a prison official does not act in a deliberately indifferent manner unless that official “knows of and disregards an excessive risk to inmate health or safety”; the official

⁷¹⁸ Idem.

⁷¹⁹ Idem, citing *Wilson v Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).
Smith v Carpenter NO. 01-0294316 F.3d 178 (2003).

⁷²⁰ *Brock v Wright*, 315 F.3d 158, 162 (2d Cir. 2003). A Jailhouse Lawyer’s Manual, ‘Your Right to Adequate Medical Care’, in a Jailhouse Lawyer’s Manual, *Columbia Human Rights Law Review*, 9th ed, Ch 23, 629, 2011, available at, <http://www3.law.columbia.edu/hrlr/jlm/chapter-23.pdf>, accessed on 20 June 2014.

must both be aware of facts from which the inference could be drawn that a "substantial risk of serious harm exists, and he must also draw the inference."⁷²¹

However, this subjective part of deliberate indifference is criticized on the basis that the officials of the correctional centre could deny liability by arguing that they did not know the excessive risk to inmate' health or safety.⁷²²

One of the cases which have successfully enforced this right is *Montgomery v Pinchak*.⁷²³ In this case, the court found that the state's failure to provide Montgomery with antiviral medications, x-rays, and laboratory blood work and prescribed cardiac medication refills necessary for treating his heart and HIV conditions violated his Eight Amendment right. The reason of the court was partly that the officials of the correctional centre were aware that Montgomery was scheduled for a cardiac catheterization but did not perform it ten months after the scheduled date.

However, in *Smith v Carpenter*⁷²⁴ and *Evans v Bonner*⁷²⁵ the applicants failed to satisfy the court that their Eight Amendment rights were violated. In *Smith v*

⁷²¹ *Evans v Bonner*, (note 720) above.

⁷²² Dolovich S, "Without Teeth – Prisoners Rights & Farmer v Brennan for the Constitution in 2020 conference on the Future of Criminal Justice: Prison Conditions and Eight Amendment", Via Balkinization, Sept 29, 2010, available at <http://balkin.blogspot.com/2010/09/constitution-2020-prison-conditions-and.html>, accessed on 21 November 2011.

⁷²³ *Montgomery v Pinchak* 99-5081. 294 F.3d 492 (2002).

⁷²⁴ *Smith v Carpenter*, (note 723) above.

⁷²⁵ *Evans v Bonner*, (note 720) above.

Carpenter, the court found that the fact that Smith was denied HIV medication on two separate occasions while he was incarcerated at Camp Pharsalia, did not amount to the violation of the Eighth Amendment, on the following grounds: he was denied HIV medication for seven days in October 1998; he was denied HIV medication for five days in January 1999; and he could not provide evidence that his HIV infection or health worsened as a result being denied HIV medication on those two occasions.

The case of *Evans v Bonner*, concerned an HIV positive inmate who argued that the fact that he was nauseated, his back was stiff, among other things, as a result of the fact that his prescribed medication for his condition was sometimes given to him hours later than it was supposed to be given to him violated his Eighth Amendment rights. Moreover, having applied the standard of deliberate indifference, the court found that the alleged injury resulting from not getting his medicine “on time” did not amount to a “sufficiently serious” level. The court’s reasoning was that he did not prove medically that the state’s failure to provide him medication on time caused his symptoms. The court further relied on Dr. Frino’s testimony that he did not have to take the medication on time.

The court also concluded that he did not prove that the defendant (Bonner) acted with a sufficiently culpable state of mind. The court, accordingly, found that there was no violation of the Eighth Amendment.

4.3 INMATES' RIGHT TO ADEQUATE ACCOMMODATION

4.3.1 Inmates' right to adequate accommodation in Malawi

The Republic of Malawi Constitution does not specifically guarantee inmates' right to adequate accommodation.⁷²⁶ However, there are constitutional provisions which, to a certain extent, protect this right. Section 42 (2) (g) iii of the Malawi Constitution enjoins the state to separate child inmates from adult inmates in the correctional centre. The state's failure to comply with this provision may result in the release of the child inmates from the correctional centre. This was affirmed by the Malawi High Court in *Moyo v The Attorney General*.⁷²⁷ In this case, the court found that the incarceration of Mr Moyo with adults violated the Constitution and ordered him to be released immediately because he had already served the period of 10 years without the review of his conduct which could have qualified him to be released.

Section 9(3) of the Malawi Constitution which guarantees the right not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment also protects this right. This was affirmed by the High Court of Malawi in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security and Commissioner of Prisons*.⁷²⁸ In this case, the applicant, among other things, complained that he was subjected to torture and cruel, inhuman and degrading

⁷²⁶ Malawi Constitution, (note 691) above.

⁷²⁷ *Moyo v The Attorney General*, High Court of Malawi sitting as the Constitutional Court of Malawi, 26 August 2009.

⁷²⁸ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

treatment or punishment based on, among other things, insufficient or total lack of space in the congested cells and insufficient or total lack of clothing and accessories.

The court found in his favour as follows:

In this case we hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore is unconstitutional.

Consequently, the court ordered the state to comply with this judgment, within a period of eighteen months, by taking concrete steps aimed at reducing overcrowding in the correctional centre by half. Most importantly, the court also ordered Parliament to make adequate financial resources available to the state to enable it to meet the international minimum standards on the treatment of inmates.

While this case protects inmates' rights including their right to adequate accommodation in a positive way, it has received a negative reaction from some authors. Ballard and Dereymaeker criticised it for lacking the supervisory court order.⁷²⁹ In addition, Kapindu criticised it for placing the gist of the argument on the "...violation of the rights to freedom from torture, cruel and inhuman or degrading treatment or punishment —which are in the domain of civil and political rights..."⁷³⁰

According to the author, this "claim could have been based directly on the violation of socio-economic rights" since the issues raised related to such rights.⁷³¹ This

⁷²⁹ Ballard C and Dereymaeker G, (note 175) above.

⁷³⁰ Kapindu R, (note 692) above at 139.

⁷³¹ Idem.

argument, as per the author, finds its justification from section 30 of the Constitution which “could have been invoked to argue that prisoners lacked equal access to basic resources as required under that section.”⁷³²

This right could also be implicitly recognized through section 42(1) (b) of the Malawi Constitution which obliges the state to ensure that inmates are detained under conditions consistent with human dignity. This “essentially entails that, all detention conditions should be humane, healthy and not degrading”.⁷³³

Apart from the Constitution, this right is protected by section 4 of the Children and Young Persons Act.⁷³⁴ This section enjoins the Juvenile Court to have regard to the welfare of the juvenile by among other things, taking steps for removing him from undesirable surroundings. This was affirmed by Malawi High Court in *Moyo v The Attorney General*. In this case, the court found that detaining Mr Moyo who was a child on the 10th of August 1997, at Chiriri correctional centre with adults, amounted to the violation of section 42 (2) (g) (iii) of the Constitution read together with section 4 of the Children and Young Persons Act (Chapter 26:03).

This right is also protected by section 97 of the Child Care, Protection and Justice Act which prohibits mixing children with adults in detention or in a safety home.⁷³⁵

⁷³² Idem.

⁷³³ Muntingh L and Redpath J, “Pre-trial Detention in Malawi: Understanding case flow management and conditions of incarceration”, *Open Society Initiative for Southern Africa publication*, 2011, 45.

⁷³⁴ Children and Young Persons Act (Chapter 26:03).

⁷³⁵ Child Care, Protection and Justice Act 22 of 2010.

4.3.2 Inmates' right to adequate accommodation in Zimbabwe

Inmates' right to adequate accommodation in Zimbabwe is guaranteed by section 50(5) (d) of the new Zimbabwean Constitution.⁷³⁶ This section obliges the state to provide inmates with adequate accommodation at its expense. This obligation, in terms of section 81, includes ensuring that child inmates are kept in conditions that take into account their age and that they are kept separately from detained inmates over the age of eighteen years.

Other rights that are relevant to the protection of this right include the right not to be subjected to torture or to inhuman or degrading punishment guaranteed by section 53 of the new Constitution which used to be section 15(1) of the old Constitution of Zimbabwe.⁷³⁷ In *Kachingwe and Others v The Minister of Home Affairs and Others*,⁷³⁸ the court found that the right not to be subjected to cruel and degrading treatment was violated on the following grounds: the applicants were detained in police cells together with several inmates in one cell measured roughly 24 square meters; the cell in which they were detained had an open toilet bowl which was not partitioned off from the rest of the cell; and they also lacked privacy when using the toilet. As a result, the court then directed the state to take immediate measures to comply with internationally accepted minimum standards in respect of toilets in the police cells.

⁷³⁶ New Zimbabwe Constitution, (note 704) above.

⁷³⁷ *Idem*.

⁷³⁸ *Kachingwe and Others v The Minister of Home Affairs and Others* (2005) AHRLR 228 (ZwSC) 2005.

In *Chituku v Minister of Home Affairs and Others*⁷³⁹ the court awarded damages to the plaintiff as a result of being subjected to inhuman and degrading treatment while he was in police custody. The plaintiff was held under the following conditions: the 4,3 metres long and 3,68 metres wide cell with the holding capacity of 15 people held 24 people overnight; and the policeman could not close the door without pushing him and other detained people closest to the door.

This right can also be read together with disabled people's right to realise their full mental and physical potential. Moreover, the right obliges the state to take appropriate measure to ensure that disabled people realise their mental and physical potential. These measures include, among others, enabling disabled people to become self-reliant, to participate in social, creative or recreational activities and to protect them from exploitation and abuse.

It is worth noting that inmates' right to adequate accommodation can only be limited if the limitation is reasonable and justifiable in terms of section 86(2) of the Zimbabwean Constitution.⁷⁴⁰

4.3.3 Inmates' right to adequate accommodation in USA

Inmates' right to adequate accommodation in the USA, just like their right to adequate medical treatment, is not constitutionally entrenched. However, it is

⁷³⁹ *Chituku v Minister of Home Affairs and Others* [2004] ZWHHC 6.

⁷⁴⁰ New Zimbabwe Constitution, (note 704) above.

implicitly recognised in the right not to be subjected to cruel and unusual punishment, guaranteed by the Eighth Amendment.⁷⁴¹ This was affirmed by the court in *Farmer v Brennan, Warden, et al* as follows:

Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate ... shelter...⁷⁴²

This right, therefore, imposes a positive obligation on the state to provide inmates with adequate accommodation. The state is deemed to have failed to fulfil this obligation if "...the deprivation alleged is, objectively, sufficiently serious...and the official has acted with deliberate indifference to inmate's health or safety".⁷⁴³ This is the case because the actions of the officials of the correctional centre in fulfilling this right are taken under the same constraints as their actions with respect to medical conditions.⁷⁴⁴

Apart from the Constitution, this right is protected by the Prison Litigation Reform Act (PLRA).⁷⁴⁵ This legislation empowers the three judges court to award a "prisoner release order" which includes a temporary restraining order or a preliminary injunctive relief which reduces or limits the population of the correctional centre or

⁷⁴¹ The Eight Amendment of the Constitution, (note 10) above. *Evans v Bonner*, (note 720) above.

⁷⁴² *Farmer v Brennan*, (note 721) above.

⁷⁴³ *Idem*, emphasis added.

⁷⁴⁴ *Wilson v Seiter* 501 U.S. 294, 297 1991.

⁷⁴⁵ Prison Litigation Reform Act, (note 11) above.

“directs the release from or non-admission of prisoners to a prison...”⁷⁴⁶ In other words, this legislation obliges the three judges court to ensure that inmates are not detained in overcrowded correctional centres or in inhuman conditions. However, this order will be granted if the three judges court is satisfied that: (1) “a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order,” and that “the defendant has had a reasonable amount of time to comply with the previous court orders”⁷⁴⁷ and (2) “crowding is the primary cause of the violation of the Federal right,” and that “no other relief will remedy the violation of the Federal right.”⁷⁴⁸

One of the cases in which this order was granted is the case of *Brown, Governor of California, et al. v Plata et al*,⁷⁴⁹ in which the Supreme Court of Appeal granted this order by confirming the judgments of the courts in *Ralph Coleman, et al. v Arnold Schwarzenegger, et al* and *Marciano Plata, et al v Arnold Schwarzenegger, et al*⁷⁵⁰ that California had to reduce its correctional centre population to 137.5% within two years. The court's order in *Ralph Coleman, et al. v. Arnold Schwarzenegger, et al*

⁷⁴⁶ Section 3626 (3) (G) (4).

⁷⁴⁷ Section 3626(a)(3)(A).

⁷⁴⁸ Section 3626(a)(3)(E).

⁷⁴⁹ *Brown, Governor of California, et al. v Plata et al*, (note 9) above.

⁷⁵⁰ *Ralph Coleman, et al. v Arnold Schwarzenegger, et al*, No. Civ S-90-0520 LKK JFM P (E.D.Cal.) and *Marciano Plata, et al v Arnold Schwarzenegger, et al*. No. C01-1351 TEH (N.D. Cal.), available at, <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0028.pdf>, accessed on 10 May 2014.

was based on the fact that it found that overcrowding violated inmates' right to mental health care in California's prisons. While in *Brown, Governor of California, et al. v Plata et al*, the court's order was based on the fact that it found that overcrowding violated inmates' right to medical care.

4.4 INMATES' RIGHT TO ADEQUATE NUTRITION

4.4.1 Inmates' right to adequate nutrition in Malawi

Inmates' right to adequate medical treatment in Malawi is guaranteed by section 42 (1) (b) of the Republic of Malawi Constitution.⁷⁵¹ This section obliges the state to detain inmates under conditions consistent with human dignity which includes the provision of, among other things, adequate nutrition at its expense. The state's obligation to fulfil this right is also imposed by section 13 (b) of Malawi Constitution which constitutes the Principles of National Policy. This section obliges the state to "promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving...adequate nutrition in order to promote good health and self-sufficiency". While the Principles of National Policy are not enforceable, the court in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, stressed their importance when it argued that they should be considered when interpreting the provisions of the Constitution.⁷⁵²

⁷⁵¹ Malawi Constitution, (note 691) above.

⁷⁵² *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

Other than the Constitution, this right is protected by the Third Schedule of the Prison Regulations in the Prison Act⁷⁵³ as amended by Government Notice of 1982.⁷⁵⁴ The Regulations oblige the state to provide the correctional centres with fresh vegetables; fresh peas; beans; sweet potatoes; chillies or peppers; dripping or groundnut oil or groundnuts (shelled) or Red Palm oil; salt and fruit.⁷⁵⁵ They also oblige the correctional centres to provide inmates with these food groups together with ordinary diet of maize meal, or rice or cassava meal or millet meal with peas or beans.⁷⁵⁶ For inmates in Class I and II correctional centres, the state is obliged to provide them with meat or fresh fish or dry fish, cocoa or coffee, sugar and unlimited water.⁷⁵⁷

The state's obligation to fulfil this right is also imposed by section 90 of the Child Care, Protection and Justice Act which obliges it to provide children, which could also include children who are inmates, with nutritious food.⁷⁵⁸

⁷⁵³ Prison Act Chapter 9:02 of 1966 of the laws of Malawi.

⁷⁵⁴ Government Notice No. 31 of 1982.

⁷⁵⁵ Extracted from the case of *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

⁷⁵⁶ *Idem.*

⁷⁵⁷ *Idem.*

⁷⁵⁸ Child Care, Protection and Justice Act 22 of 2010.

This right was enforced by the High Court of Malawi in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security and Commissioner of Prisons*.⁷⁵⁹ In this case, the court found that the insufficient or total lack of diet and insufficient or total lack of foodstuffs alleged by the applicant did not violate inmates' right not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment. The court's reasoning was that the applicant's claim failed to satisfy the court that the state had failed to meet the minimum standards prescribed by the Prison Regulations. However, most importantly, the court recommended some policy reform which had the effect of protecting inmates' right to adequate nutrition. It recommended that: the state adds its cooking utensils and cutlery and repairs its unused cooking pots in order to provide at least two hot meals a day to the inmates on time.

4.4.2 Inmates' right to adequate nutrition in Zimbabwe

Inmates' right to adequate nutrition, in Zimbabwe, is guaranteed by section 50(5) (d) of the new Constitution.⁷⁶⁰ This section obliges the state to provide inmates with, inter alia, adequate nutrition at its expense. Other rights that are relevant to this right are the right to sufficient food guaranteed by section 77 of the Constitution and children's right to nutrition protected by section 81(f) of the Constitution. It is, however, crucial to note that unlike inmates' right to adequate nutrition, discussed

⁷⁵⁹ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

⁷⁶⁰ New Zimbabwe Constitution, (note 704) above.

above, the state is obliged to fulfil the right to sufficient food by taking reasonable measures on a progressive basis and subject to the availability of the resources.

This right is also protected by the Prisons General Amendment Regulations.⁷⁶¹ Section 50 of these Regulations imposes a positive obligation on the state to ensure that inmates are provided with a diet which consists of 1/8 loaf of bread; 100g maize meal porridge; 40ml cooking oil; 200g of fresh vegetables; 500g of maize meal (Sadza) or 200g of rice or 200g of pasta or 200g of samp; 10g of salt; 130g of meat two times a week or 100g of offals (casings) or 200g of fresh fish or 140g of dried fish or 100g of beans five times a week or 100g of fresh peas or cow peas.

It is worth noting that the Zimbabwean courts, unlike the South African and Malawian courts, are yet to interpret this right. However, what is crucial to note is that, in terms of section 86(2) of the Constitution, this right can only be limited if the limitation qualifies as a law of general application and is reasonable and justifiable in a democratic society. In determining whether the limitation of this right is constitutional, the court will take into account its nature, the purpose of its limitation; the nature and extent of its limitation; the relationship between its limitation and its purpose; and whether there are any less restrictive means of achieving the purpose of its limitation.⁷⁶²

⁷⁶¹ Prisons General Amendment Regulations No. 9 of 2011.

⁷⁶² Section 86(2).

4.4.3 Inmates' right to adequate nutrition in the USA

Unlike the Malawian, Zimbabwean and South African Constitutions, the USA Constitution does not specifically entrench inmates' right to adequate nutrition. However, this right is implicitly recognized through the Eighth Amendment right not to be subjected to cruel, inhuman and degrading punishment. This was affirmed by the Court in *Farmer v Brennan, Warden, et al* as follows:

Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food...⁷⁶³

This right, therefore, imposes a positive obligation on the state to provide inmates with adequate nutrition. In addition, the state will be deemed to have violated this right if "...the deprivation alleged is, objectively, sufficiently serious...and the official has acted with deliberate indifference to inmate's health or safety".⁷⁶⁴ The reason is that there is ..."no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement' as ...the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates".⁷⁶⁵

Apart from the Eighth Amendment right, this right is protected by the First Amendment right which is the right to freedom of religion. This right entitles everyone including

⁷⁶³ *Farmer v Brennan*, (note 721) above.

⁷⁶⁴ *Idem*.

⁷⁶⁵ *Wilson v Seiter*, (note 748) above.

inmates to demand food that takes into account their religious beliefs. However, they need to first demonstrate that their demand for religious food is based on their sincere religious belief. This was affirmed by the United States Court of Appeal in *Darrell Theodore KIND, Appellant, v Sheriff FRANK; Sgt. Heinen; Dan Luke; Sgt. Alhgren; Sgt. Wanike, Appellees* as follows:

In a claim arising under the First Amendment's Free Exercise Clause, an inmate must first establish that a challenged policy restricts the inmate's free exercise of a sincerely held religious belief.⁷⁶⁶

They also need to demonstrate that their sincere religious belief emanates from the objective beliefs of the religion to which they belong. In *Mondrea Vinning-EL, Plaintiff—Appellant v John Evans and Rick Sutton, Defendant—Appellants* the United States Court of Appeal affirmed this as follows:

Although sincerity rather than orthodoxy is the touchstone, a prison still is entitled to give some consideration to an organization's tenets. For the more a given person's professed

⁷⁶⁶ *Darrell Theodore KIND, Appellant, v Sheriff FRANK; Sgt. Heinen; Dan Luke; Sgt. Alhgren; Sgt. Wanike, Appellees* No. 02-1969, United States Court of Appeals, Eighth Circuit May 30, 2003. As recently as 2011, the United States Court of Appeal in *Mondrea Vinning-EL, Plaintiff—Appellant v John Evans and Rick Sutton, Defendant —Appellants* (note 629) above, stressed it when it argued that “a prison is entitled to ensure that a given claim reflects a sincere religious belief, rather than a preference for the way a given diet tastes, a belief that the preferred diet is less painful for animals, or a prisoner's desire to make a pest of himself and cause trouble for his captors”.

beliefs differ from the orthodox beliefs of his faith, the less likely they are to be sincerely held.⁷⁶⁷

The test to establish whether inmates' right to demand religious food has been violated was summarised by the United States Court of Appeal in *Charles E Beerheide, Sheldon Perlman, and Allen Isaac Fistell Plaintiffs—Appellees v John W. Suthers Executive Director Colorado Department of Corrections (DOC), Gerals M Gasko Acting Deputy Director, Dona Zavislan Food Services Administration, and Lee Hendrik* as follows:

In determining whether this right has been violated the court must determine: 1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; 2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; 3) what effect accommodating the exercise of the right would have on guards, other prisoners and prison resources generally; 4) whether ready, easy-to-implement alternatives exist that would accommodate the prisoner's rights.⁷⁶⁸

Apart from the First Amendment, inmates' right to demand food that takes into account their religious beliefs is protected by section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁷⁶⁹ This Act provides that "No

⁷⁶⁷ Idem.

⁷⁶⁸ *Charles E Beerheide, Sheldon Perlman, and Allen Isaac Fistell Plaintiffs—Appellees v John W. Suthers Executive Director Colorado Department of Corrections (DOC), Gerals M Gasko Acting Deputy Director, Dona Zavislan Food Services Administration, and Lee Hendrik, Volunteer Services administrator* No. 00-1086 United States Court of Appeals (ten circuit) 2002.

⁷⁶⁹ Religious Land Use and Institutionalized Persons Act, (note 12) above.

government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...”⁷⁷⁰ However, this section does not protect inmates in a situation where the government demonstrates that a burden on them is:(1) in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁷⁷¹

Some of the cases that have enforced inmates’ right to adequate nutrition in the USA include *Prude v Clarke*⁷⁷² and *RE: Margarito Jesus GARCIA, On Habeas Corpus*.⁷⁷³ The case of *Prude v Clarke* concerned an inmate who complained that the officials of the correctional centre fed him nutriloaf diet which made him to vomit, experience stomach pains, constipation and to lose weight.⁷⁷⁴ In finding for the inmate, the Court of Appeal held that “deliberate withholding of nutritious food or substitution of tainted or otherwise sickening food, with the effect of causing substantial weight loss, vomiting, stomach pains, and may be an anal fissureor other severe hardship, would violate the Eighth Amendment”. The reason for this judgment, according to the court, was based on a reasonable inference that the officials of the correctional centre “were aware that the nutriloaf being fed the prisoners when the plaintiff was there was sickening him yet decided to do nothing about it”. Furthermore, the court found that the actions of the officials amounted to “deliberate indifference to a serious health problem and thus state an Eighth Amendment claim”.

⁷⁷⁰ Section 2000CC—1.

⁷⁷¹ *Idem*.

⁷⁷² *Prude v Clarke* 675. 3d 732-Court of Appeals, 7th Circuit 2012.

⁷⁷³ *IN RE: Margarito Jesus GARCIA, On Habeas Corpus* No. C066452. January 11, 2012.

⁷⁷⁴ *Prude v Clarke*, (note 780) above.

The case of *RE: Margarito Jesus GARCIA*, concerned an inmate who argued that he was denied to participate in an existing kosher meals programme (Jewish Kosher Diet Program) in violation of his religion (Messianic Judaism)..⁷⁷⁵ The inmate argued that such a denial violated, inter alia, the RLUIPA as it had the effect of substantially burdening the exercise of his religion. The court held that the denial of his request to participate in the Kosher programme violated his rights under RLUIPA.

4.5 INMATES' RIGHT TO EDUCATION

4.5.1 Inmates' right to education in Malawi

Inmates' right to education in Malawi is protected by section 25(1) of the Malawian Constitution. This section protects the right of everyone, which could also include inmates, to education.⁷⁷⁶ This right is described as elastic as it includes the right to primary, secondary, tertiary education and learning processes suitable for one's development.⁷⁷⁷ Just like other socio-economic rights, this right imposes a positive obligation on the state of Malawi to ensure that inmates have access to education. The obligation to fulfil this right is also imposed by section 13 (f) of the Constitution which constitutes Principles of National Policy which obliges the state to provide adequate resources to the education sector and devise programmes. This rights as enshrined in the Constitution aims to:

⁷⁷⁵ *IN RE: Margarito Jesus GARCIA, On Habeas Corpus*, (note 780) above.

⁷⁷⁶ Malawi Constitution, (note 691) above, emphasis added.

⁷⁷⁷ Chirwa MD, *Human Rights under the Malawian Constitution*, 2011, 262.

- eliminate illiteracy in Malawi;
- make primary education compulsory and free to all citizens of Malawi;
- offer greater access to higher learning and continuing education...”

The relevance of these Principles, as already discussed under inmates’ right to adequate medical treatment, accommodation and nutrition in Malawi, was stressed by the court in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons* when it argued that section 14 of the Constitution compels the courts to have regard to these principles when interpreting the provisions of the Constitution.⁷⁷⁸ Furthermore, section 30 (2) of Malawi Constitution also obliges the state to fulfil the right to development by providing, *inter alia*, education.⁷⁷⁹

The obligation to fulfil this right is also implicitly recognised through section 42(1) of the Malawian Constitution which obliges the state to detain inmates under conditions consistent with human dignity which includes providing them with, among other things, reading and writing materials.⁷⁸⁰

Apart from the Constitution, inmates’ right to education is protected by the Gender Equality Act⁷⁸¹ and the Children and Young Persons Act.⁷⁸² Section 14 of the

⁷⁷⁸ *Masangano v The Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons*, (note 92) above.

⁷⁷⁹ Kapindu R, (note 692) above at 129-130, emphasis added.

⁷⁸⁰ Malawi Constitution, (note 691) above.

⁷⁸¹ Gender Equality Act 2012.

⁷⁸² Children and Young Persons Act (Chapter 26:03).

Gender Equality Act guarantees everyone's right to access to education and training which include vocational guidance at all levels. Furthermore, section 4 of the Children and Young Persons Act enjoins the Juvenile Court to have regard to the welfare of the juvenile by taking steps to, among other things, ensure that proper provision is made for their education and training". The relevance of Section 4 of the Children and Young Persons Act on inmates' right to education was affirmed by the court in passing in *Moyo v The Attorney General* as follows:

"The juvenile so detained must have access to education and all other amenities that will help him develop into a productive citizen. The detention of the juveniles must therefore at all times be premised on the welfare of this child..."⁷⁸³

4.5.2 Inmates' right to education in Zimbabwe

In Zimbabwe, inmates' right to education is protected by section 75 of the new Constitution.⁷⁸⁴ This section guarantees the right of every citizen and permanent resident of Zimbabwe to state funded basic education, adult basic education and further education. Inmates' basic literacy teaches them to read and write, perform basic mathematical computations and vocational training.⁷⁸⁵ The primary and secondary education includes courses such as agriculture, woodwork, music, peace keeping, human rights and conflict management skills.⁷⁸⁶ However, Zimbabwe Prison Services (ZPS) is yet to engage the institutions of higher learning which are

⁷⁸³ *Moyo v The Attorney General*, (note 731) above.

⁷⁸⁴ New Zimbabwe Constitution, (note 704) above.

⁷⁸⁵ Chigunwe G, (note 192) above at 7.

⁷⁸⁶ *Idem*.

offering an open and distance learning in order to provide inmates with post-secondary education.⁷⁸⁷

It is crucial to note that the state's obligation to fulfil this right can be limited if the state is taking reasonable measures, on a progressive basis and within available resources.⁷⁸⁸

This right is also protected by section 83 of the new Constitution which obliges the state to take appropriate measures, within available resources, to provide special facilities for education and state-funded education and training when necessary.⁷⁸⁹

This means that, just like the right to education guaranteed by section 75, the state cannot be compelled to fulfil this right if it lacks the necessary resources to fulfil it.

For child inmates, this right is also protected by section 81 (f) of the new Constitution which guarantees children's rights to education. Unlike the right to education protected by sections 75 and 83, discussed above, this right to education is not subject to internal limitation clauses. This means that it imposes an obligation on the state to provide children, including child inmates, with the right to education immediately.

⁷⁸⁷ Ibid at 8-9.

⁷⁸⁸ Section 75 (4) of the New Zimbabwe Constitution, (note 704) above.

⁷⁸⁹ New Zimbabwe Constitution, (note 704) above.

4.5.3 Inmates' right to education in USA

Unlike South Africa, Malawi and Zimbabwe, the Constitution of the USA does not specifically entrench the right to education. Even the courts are reluctant to define education as a fundamental right.⁷⁹⁰ The United States Court of Appeals in *Smith v Roan Van Boeing, et al* ruled against Smith who had argued that the employees of the Washington State Penitentiary (WSP) violated his First and Fourteenth Amendment rights among others, when they failed to deliver a college correspondence course application and brochures sent to him by "City University" of Bellevue, Washington.⁷⁹¹ The court found that, the policies of the correctional centre which prohibited inmates from entering into contracts with an outside party for goods or services they could not afford or for which they did not intend to pay and which required inmates to seek permission from officials before applying for correspondence courses, among others, demonstrated a legitimate, neutral, and rational governmental objectives.

It is worth noting that education in the USA correctional centres "is treated as a privilege rather than as a human right"⁷⁹² since "prison education claims under the US constitution's eighth (banning cruel and unusual punishment) and fourteenth

⁷⁹⁰ Slessarev-Jamir H, "The status of the "Rights to Education" in the United States", prepared for the MESCE, Corte France July 2011, available at, http://www.academia.edu/873422/The_Status_ofthe_Right_to_Education_in_the_Unite..., accessed on 18 May 2014.

⁷⁹¹ *Smith v Roan Van Boeing, et al* No 94-35016 United States Court of Appeals, Ninth Circuit, decided July 20 1994.

⁷⁹² Lockart J and Rankins-Robertson S, (note 107) above at 24.

(guaranteeing equal protection of law) amendments are meritless”.⁷⁹³ However, inmates are entitled to the General Education Development (GED) which provides a low-level non-academic courses offered through local community colleges. The GED, however, does not provide a solution to challenges facing inmates on education as its classes, vocational training, and workshop re-entry courses are available to only 35% of inmates.⁷⁹⁴

It is also crucial to note that inmates in the USA, except those detained in Ohio Department of Rehabilitation and Corrections,⁷⁹⁵ do not have access to the internet for study purposes. Therefore, Lockart and Rankins-Robertson argue that there is a need for an online educational programme which involves officials of the correctional centre who will serve as a link between inmates’ writings and their educators’ comment in order for inmates’ right to education to be achieved.⁷⁹⁶

4.6 CHAPTER CONCLUSION

This chapter demonstrates the comparative review of inmates’ right to adequate medical treatment, accommodation, nutrition and education from Malawi’s, Zimbabwe’s and USA’s perspectives. This includes the analysis of the protection of these rights by these countries’ Constitution, legislation or regulation and the manner

⁷⁹³ Idem.

⁷⁹⁴ Idem.

⁷⁹⁵ Ohio Dept of Rehab. and Corrections, “Internet access for prisoners”, available at, http://www.drc.ohio.gov/web/administrative_rules/documents/9-51.pdf, accessed on 2 May 2013.

⁷⁹⁶ Lockart J and Rankins-Robertson S, (note 107) above at 33.

the courts have enforced them in some instances. This chapter also demonstrates that while these rights are well protected, these countries still have to do much more in terms of protecting and enforcing them. In particular, it remains to be seen how the Zimbabwean courts will interpret these rights incorporated in its new Constitution. The next chapter concludes the study and provides some recommendations. In other words, it answers the question whether South Africa protects and enforces inmates' socio-economic rights as required by the Constitution, compared with foreign and international law and standards.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter concludes the previous chapters' extensive discussion on the protection and enforcement of inmates' right to adequate medical treatment, accommodation, nutrition and education. In pursuit of the objective of this study which seeks to analyse whether South Africa's protection and enforcement of these rights complies with the Constitution and international norms and standards, this study discusses these rights from the international, South African and comparative law perspectives. The international perspective focuses on the international and regional instruments that protect and enforce these rights. It also analyses the domestication of international law under the South African Constitution. The South African perspective focuses on the critical analysis of the protection, enforcement, and the limitation of these rights. The comparative perspective analyses protection and enforcement of these rights in Malawi, Zimbabwe and the USA.

5.2 SUMMARY OF IMPORTANT FINDINGS OF THE STUDY

On the question whether South Africa's protection and enforcement of inmates' socio-economic rights complies with the Constitution and international norms and standards, the study concludes that South Africa compares favourably with international norms and standards. It has ratified a number of international

instruments that protect inmates' right to adequate medical treatment. It ratified the ACHPR on 9 June 1996, the ICCPR on 10 December 1998, the CRC on 16 June 1995, the CEDAW on 15 December 1995 and the International Convention on the Elimination of All Forms of Racial Discrimination on 10 December 1998. It has also demonstrated its commitment on the protection of this right by incorporated these international instruments and the non-binding international instruments into its Constitution, Correctional Services Act and its Regulations. The relevant provisions of the non-binding international instruments incorporated into its domestic law include those of the African Charter on Prisoners' Rights, SMRTP and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Rules for the protection of Juveniles Deprived of their Liberty (UN JDL Rules), the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN international Guidelines on HIV/AIDS, the Declaration on the Elimination of Violence against Women and; the Declaration of the Rights of the Child, the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, the African Commission on Human and People's Right's Resolution on Prisons in Africa, the Kampala Declaration on Prison Health in Africa.

The comparative analysis on the protection and enforcement of this right also reveals that South Africa is on par with other countries. Just like Malawi and Zimbabwe, it entrenches this right in its Constitution.

South Africa's adherence to international norms and standards which protect inmates' right to adequate accommodation is demonstrated by its ratification of the ACHPR, ACRWC, ICCPR, the CRPD (ratified on 30 November 2007), and the ACRWC (ratified on 07 January 2000). It is also demonstrated by its incorporation of these international instruments, including the relevant provisions of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, the African Charter on Prisoners' Rights, the SMRTP, and the ECOSOC's Resolution on International Cooperation aimed at the Reduction of Prison overcrowding and the Promotion of Alternative Sentencing, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Kadoma Declaration on Community Service, and Ougadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa in its Constitution, the Correctional Services Act, the Correctional Services Amendment Act, the Regulations and PEPUDA.

The comparative perspective also reveals that, just like Malawi and Zimbabwe, it protects this right in its Constitution. It is the only country that specifically protects disabled inmates' right to adequate accommodation through legislation such as the Correctional Services Amendment Act and PEPUDA.

The study also demonstrates that South Africa complies with international norms and standards on the protection of inmates' right to adequate nutrition. It has ratified and incorporated into its domestic law the ACHPR, ACRWC, ICCPR, CEDAW, CRC, CRPD and the relevant provisions of the African Charter on Prisoners' Rights, the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel,

Inhuman or Degrading Treatment or Punishment in Africa, SMRTP and the UN Basic Principles for the Treatment of Prisoners and the UN International Guidelines on HIV/AIDS and Human Rights.

Furthermore, just like Malawi and Zimbabwe, it protects this right in its Constitution. Moreover, it is a step ahead of Malawi and Zimbabwe as it specifically recognizes the right to cultural or religious food of pregnant or lactating remand detainees in the Correctional Services Act and its Regulations.

The study also demonstrates that South Africa, in line with international law, protects inmates' right to education. It has ratified and incorporated the ACHPR, the ACRWC, the ICCPR, the CRPD, the CRC, the Convention against Discrimination in Education, and the CEDAW into its domestic law. Further, it also incorporated into its domestic law the relevant provisions of the Kampala Declaration on Prison conditions in Africa, the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, the SMRTP, the UN Rules for the Protection of Juveniles Deprived of their Liberty, the Principles for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Declaration on the Right to Development, the Declaration on the Right to Development and the UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet.

Further, just like Malawi and Zimbabwe, it impliedly guarantees the protection of this right through the right of everyone to basic and further education. Further, unlike

Malawi and Zimbabwe, the South African court in *Nabolisa v Minister of Correctional Services* ordered the state to allow inmates internet access for study purposes.

5.3 CRITICAL EMERGING CHALLENGES

While South Africa protects inmates' right to adequate medical treatment, accommodation, nutrition, and education in terms of the Constitution and international norms and standards, the enforcement of these rights is still challenge on the South African courts. In other words, the South African courts are battling to enforce these rights in a constitutional manner. In *N and Others v Government of Republic of South Africa and Others (No 1)* the failed to uphold the intention of the constitutional drafters and the two stages approach of interpreting the Bill of Rights when interpreting inmates' right to adequate medical treatment. Further the court gives an impression that resources' constraints serve as a defence for the state's failure to provide inmates with health care services that is available for free in public.

In *Lee v Minister of Correctional Services* the Constitutional Court ignored the constitutional imperative to promote the value of human dignity when interpreting whether overcrowding violates inmates' rights. It is also a challenge that South Africa is yet to finalize the National disability Act which, to a certain extent, will cater for the interests of the disabled inmates.

In *Huang & Others v The Head of Grootvlei prison & Another*, the court did not engage in the process of determining whether the inmates' belief in their traditional food was based on a sincere belief which could be objectively supported when

interpreting inmates' right to traditional food. Further, the 2012 Regulations limit the entitlement to cultural or religious food only to remand detainees in contravention of the right to equality guaranteed by section 9 of the Constitution.

Finally, it is still unclear whether the state is obliged to provide inmates with internet access at its expense and whether the institutions of higher learning are also constitutionally obliged to ensure that registered inmates have the internet access for their studies.

5.4 THE NECESSARY RECOMMENDATIONS TOWARDS EXTENSIVE AND EFFECTIVE PROTECTION AND ENFORCEMENT OF THESE RIGHTS

5.4.1 The right to adequate medical treatment

5.4.1.1 The standard of reasonableness test should be replaced with that of adequateness

South African courts, when interpreting inmates' right to adequate medical treatment, should replace the standard of reasonableness test with that of adequateness. The reason is that the constitutional drafters did not frame this right in a manner that requires the courts to determine whether the state has taken reasonable measures aimed at fulfilling it. Instead they framed it in a manner that requires the courts to determine if the state has taken adequate measures to fulfil it. Further, the courts, when applying the standard of reasonable test, often ignores the importance of unpacking the content of a socio-economic right as it is required by the two stages approach of interpreting the Bill of Rights. Thus, the approach of determining

whether the state has taken reasonable measures aimed at fulfilling this right, followed by the court in *N and Others v Government of Republic of South Africa and Others (No 1)* is not appropriate for the reasons mentioned above. The courts should remember that this right is a special kind of socio-economic right that does not have any internal limitation clause and which requires them to unpack its essentials. Those essentials, as Pieterse argues, include taking into account whether inmates have access to the same health care services available to people outside prisons.⁷⁹⁷

5.4.1.2 The state should not plead resources constraints as a justification for its failure to provide inmates with a particular medical treatment that is available for free in public

Though in *N and Others v Government of Republic of South Africa and Others (No 1)*, the court only raised the issue of the lack of resources but did not pursue it as it was not the state's case, the author recommends that this ground should not be argued by the state in cases such as this one. The reason is that, at the time of the judgment, the ARVs were available for free in public.

⁷⁹⁷ Pieterse M, (note 152) above at 122, citing Ngwena C, "Aids in Africa: access to health care as a human right", *SA Public law* 2000,1, 17-18.

5.4.2 The right to adequate accommodation

5.4.2.1 Overcrowding in the correctional centres should oblige the courts to issue orders releasing inmates

Just like the Malawi Constitutional Court in *Masangano v The Attorney General, Minister of Home Affairs and Internal Security and Commissioner of Prisons*, and the US Supreme court in *Brown, Governor of California, et al. v Plata et al*, South African courts should not hesitate to order the release of inmates as a result of overcrowding in the correctional centre. This is the case because, as argued earlier, overcrowding amounts to the violation of inmates' rights including their right to adequate accommodation. The fact that these orders may interfere with the principle of separation of powers should not discourage the courts from issuing such orders as the Constitution, in particular the doctrine of judicial review, empowers them to issue such orders. This order will constitute an effective remedy which seeks to address the issue of overcrowding in the correctional centres.

5.4.2.2 The promotion of human dignity as a value when interpreting the right to adequate accommodation

As already argued in the previous chapters, South African courts are obliged by section 39(1) of the Constitution to promote the constitutional values when interpreting the Bill of Rights. One of those values is human dignity which the Constitutional Court in *Lee v Minister of Correctional Services* should have also

promoted over and above the constitutional values of accountability, responsiveness and the rule of law.

5.4.2.3 The need to accelerate the process of enacting the Disability Act

While South Africa, to a great extent, protects inmates' right to adequate accommodation, there is a need to speed up the process of enacting the proposed National Disability Act. This Act will strengthen the rights of inmates with disabilities by effecting some necessary amendments to the provisions of the Correctional Services Act that protect inmates with disability' s right to adequate accommodation. It should be remembered that South Africa ratified the CRPD on 30 November 2007 and therefore is obliged by Article 4 of the CRPD to "adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention".

5.4.3 The right to adequate nutrition

5.4.3.1 The determination of sincere beliefs which is objectively supported when interpreting inmates' right to cultural or religious food

Inmates' right to cultural or religious food should be informed by objective beliefs of the cultural group or religion to which he or she belongs. In other words, for the inmates to demand food that takes into account his or her culture or religion he or she should satisfy the court about the existence of such a culture or religion. This

would limit the number of inmates' baseless cases demanding to be provided with a cultural or a religious food. But most importantly, the determination of a sincere belief which is objectively supported would prevent stretching the budget of the Department of Correctional Services for cultural or religious food.

5.4.3.2 Extending the entitlement to religious or cultural food to all inmates

All inmates should be entitled to religious or cultural food. Currently, the Regulations only recognize the right of remand pregnant and lactating detainees to religious or cultural food. The exclusion of other remand detainees from the Regulations amounts to the violation of their rights to equality. Further, the Regulations do not cater for pregnant inmates who were entitled to cultural or religious food when they were remand detainees. In other words, the Regulations do not provide that such inmates will continue to access a cultural or religious food when they become inmates.

5.4.4 The right to education

5.4.4.1 The need to design measures aimed at ensuring inmates' access to internet for study purposes

Institutions of higher learning should design measures aimed at ensuring that inmates have access to the internet for study purposes. This is because the right to equality prohibits institutions of higher learning from unfairly discriminating against

inmates. As an organ of state or as a private entity, an institution of higher learning is obliged to ensure that all their students including inmates have access to the internet for study purposes. This is because inmates are constitutionally entitled to demand internet access.

5.4.4.2 The need for correctional centres to ensure that inmates have access to internet under supervision

In *Nabolisa v Minister of Correctional Services*, the court recently ordered the state to allow inmates internet access for study purposes under supervision. Hence, the recommendation that the correctional centres should ensure that inmates have access to internet under supervision. It is further recommended that South Africa should consider the security features around the internet access in the correctional centres in Norway, Ohio and UK.

In Norway, the internet use in the correctional centres is subjected to certain limitations for security reasons. Inmates in high security correctional centres have access to the internet that is restricted to categories that are considered safe.⁷⁹⁸ Safe categories include an installed communication filter without any plug-ins in order to block attempts to send messages.⁷⁹⁹ Internet access limitation also includes connecting all correctional centres to a national centre where the correctional service

⁷⁹⁸ Hansen B and Breivik P, "Internet for prisoners in Norway", 2014, available at, <http://insidetime.org/internet-for-prisoners-in-norway-2/>, accessed on 3 December 2014.

⁷⁹⁹ Idem.

controls the internet traffic, users and computers.⁸⁰⁰ This ensures that a computer that enters the national centre network, is locked down to restrict unauthorized access to the internet and that the local correctional centre officer read the logs to identify an inmate that needs special security attention.⁸⁰¹

Internet access by inmates with low security risk, however, is not restricted as there is no communication filter.⁸⁰² This type of internet allows inmates to follow the normal school approach outside the correctional centre by using the learning management system (LMS).⁸⁰³

In Ohio, as mentioned in chapter four, the Department of Rehabilitation and Corrections prohibits prisoners from accessing the internet, unless they are under direct supervision and are participating in an approved educational programme that requires the use of internet for training or research purposes.⁸⁰⁴ Only pre-approved sites will be accessible on the computers used by inmates and which are subject to periodic review of the operation of the system, including users of the system and sites accessed by the system.⁸⁰⁵ This means, inmates' access to the internet is restricted only to pre-approved sites.⁸⁰⁶

⁸⁰⁰ Idem.

⁸⁰¹ Idem.

⁸⁰² Idem.

⁸⁰³ Idem.

⁸⁰⁴ Ohio Dept of Rehab. and Corrections, (note 803) above.

⁸⁰⁵ Idem.

⁸⁰⁶ Idem.

In UK correctional centres, apart from the Virtual Campus, there is category –C correctional centre HMP Randy in Nottinghamshire where there is a dedicated staff member who has internet access and acts as a channel between the learner and the provider.⁸⁰⁷

5.5 CONCLUDING REMARKS ON THE ENTIRE STUDY

While South Africa's protection and enforcement of inmates' socio-economic rights in South Africa complies with international norms and standards, there is still more work that needs to be done on the protection and enforcement of these rights. It is the responsibility of the state, the court and the relevant stakeholders including the researchers to change the society's perception that inmates have wronged the society and deserve to be punished. In other words, the court need to remind the society that inmates upon their release become part of the society and that it is the society that benefits when inmates are released as rehabilitated members of the society. The researchers can also fulfil this role by engaging in empirical research on the treatment of inmates in the correctional centres. It is crucial that the courts and the state adhere to the recommendations provided above in order to ensure the protection and enforcement of inmates' socio-economic rights. It must be remembered that South African Constitution is praised as one of the best in the

⁸⁰⁷ Louise T, Distance learning breaches prison walls, 2012, citing Bance S, Head of learning, skills and employment at the HMP Ranby in Nottinghamshire, available at, <http://www.theguardian.com/education/2012/feb/20/distance-learning-for-prisoners>, accessed on 6 March 2013.

world. These praises should be supported by the manner South Africa protects and enforce inmates' socio-economic rights.

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