

**SYSTEMATIC REVIEW OF THEORETICAL AND EVIDENCE-BASED LITERATURE  
ON OFFENDERS' TREATMENT IN SOUTH AFRICA: A PENOLOGICAL  
PERSPECTIVE**

by

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## DECLARATION

I hereby declare that **SYSTEMATIC REVIEW OF THEORETICAL AND EVIDENCE-BASED LITERATURE ON OFFENDERS' TREATMENT IN SOUTH AFRICA: A PENOLOGICAL PERSPECTIVE** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Signature:.....

Date:.....

Dedicated to my late father William Semi Motlalekgosi, brother Bathoeng Andries Motlalekgosi and my friend Moshe Modise Seake whose memories will never fade.  
Gone too soon.

May their souls rest in peace.

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## SUMMARY

The South African Department of Correctional Services has a legislative mandate of detaining offenders in safe custody whilst ensuring their human dignity amongst others. This stems from section 2 of the *Correctional Services Act 111 of 1998* as amended. In addition to that, chapter 3 of this Act makes provision for conditions under which offenders should be treated, conditions of human dignity. This piece of legislation is effectively giving effect to the Bill of Rights as articulated in chapter two of the *Constitution of the Republic of South Africa* of 1996. It is expected of the department to treat offenders according to the provisions of not only this Constitution and *Correctional Services Act 111 of 1998* as amended but also to comply with the international conventions and treaties.

Extensive empirical and non-empirical studies on the treatment of offenders have been conducted by various scholars in the field of penology but not much has been done to bring to the fore knowledge with regard to the developmental trend of the treatment of offenders. It is against this backdrop that a qualitative study through systematic review of literature was conducted to bring together and examine available literature. In other words, a systematic literature review was conducted to determine if there is a developmental trend towards the treatment of offenders in South Africa as required by the prescripts of the law. Furthermore, this study was conducted to also demonstrate the researcher's knowledge in the field of penology.

The focus was on the central theories identified as offenders' rights. The Department of Correctional Services identified eight offenders' rights and sees them as its Constitutional mandate (Department of Correctional Services, 2013:8). This study has found a violation of the offenders' right to equality to be diminishing over time. Apart from that, this study reveals a substantial violation of offenders' rights because out of seven offenders' rights, only one [freedom of religion] appears be successfully protected and promoted by the department. This study further present the recommendations and suggested areas of further research.

**KEY TERMS:** Penology, theories of punishment, offenders' rights, treatment of offenders, legislative framework, prison overcrowding, community participation, corruption in correctional services and prison subculture.

# TABLE OF CONTENTS

<b>SECTION A: OVERVIEW OF STUDY .....</b>	<b>1</b>
<b>CHAPTER 1:.....</b>	<b>1</b>
<b>INTRODUCTION AND BACKGROUND TO THE STUDY .....</b>	<b>1</b>
1.1 INTRODUCTION .....	1
1.2 BACKGROUND TO THE STUDY.....	2
1.3 PROBLEM FORMULATION FOR THE LITERATURE REVIEW .....	6
1.3.1 Research questions .....	6
1.3.2 Inclusion and exclusion criteria.....	6
1.4 DEFINITION OF KEY THEORETICAL CONCEPTS .....	8
1.4.1 Human rights.....	8
1.4.2 Offender.....	9
1.4.3 Offenders' rights.....	9
1.4.4 Humane treatment .....	9
1.4.5 Policy and legislative framework .....	10
1.5 VALUE OF THE RESEARCH .....	10
1.5.1 Value for correctional system .....	10
1.5.2 Value for the broader community .....	10
1.5.3 Value for the academia .....	11
1.6 RESEARCH DESIGN .....	11
1.7 RESEARCH METHODOLOGY.....	12
1.7.1 Study population .....	13
1.7.2 Sample procedure.....	13
1.7.3 Methods of data collection.....	13
1.7.4 Data evaluation .....	16
1.7.5 Data analysis and interpretation .....	17
1.7.6 Public presentation.....	17
1.8 RELIABILITY AND VALIDITY ISSUES.....	18
1.9 ETHICAL CONSIDERATIONS .....	20
1.9.1 Avoiding duplicate publication .....	21
1.9.2 Avoiding plagiarism .....	21
1.9.3 Transparency .....	21

1.10	OUTLINE OF THE STUDY .....	22
1.11	CONCLUSION.....	24
<b>SECTIONB: SYSTEMATIC LITERATURE REVIEW .....</b>		<b>25</b>
<b>CHAPTER 2:.....</b>		<b>25</b>
<b>PENOLOGICAL HISTORICAL PERSPECTIVE OF THE TREATMENT OF OFFENDERS: LEGISLATIVE FRAMEWORK APPROACH .....</b>		<b>25</b>
2.1	INTRODUCTION .....	25
2.2	THE CONCEPT OF ‘PENOLOGY’ DEFINED.....	26
2.3	THE PHILOSOPHICAL PERSPECTIVE OF PUNISHMENT .....	26
2.4	THEORIES OF PUNISHMENT .....	29
2.4.1	Retribution.....	32
2.4.2	Deterrence .....	35
2.4.3	Incapacitation.....	36
2.4.4	Rehabilitation .....	39
2.5	THE POSITION OF CORRECTIONS IN THE CRIMINAL JUSTICE SYSTEM....	41
2.5.1	Legislative framework for the handling of prisoners.....	44
2.5.2	The function of the prison system.....	44
2.5.3	Prison phenomenon .....	44
2.5.4	Treatment of prisoners .....	44
2.6.	HISTORICAL PERSPECTIVE OF THE TREATMENT OF OFFENDERS IN SOUTH AFRICA AS A SOCIAL RESPONSIBILITY .....	45
2.6.1.	Prisons and Reformatories Act 13 of 1911 .....	45
2.6.2.	Penal and Prison Reform Report, 1947.....	50
2.6.3.	Prisons Act 8 of 1959 .....	53
2.6.4.	South African Penal system post 1959.....	55
2.6.5.	The 1990s Prison Developments in South Africa.....	60
2.6.6.	The Correctional Services Act 111 of 1998 .....	64
2.7.	CONCLUSION .....	66

<b>CHAPTER 3:</b>	68
<b>LEGISLATIVE AND POLICY FRAMEWORK FOR THE TREATMENT OF PRISONERS IN THE DEMOCRATIC SOUTH AFRICA</b>	68
3.1 INTRODUCTION	68
3.2 INTERNATIONAL LAW	68
3.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996	72
3.3.1 THE RIGHT TO EQUALITY	74
3.3.2 HUMAN DIGNITY	79
3.3.3 FREEDOM AND SECURITY OF THE PERSON	89
3.3.4 RIGHT TO HEALTH CARE, FOOD, WATER AND SOCIAL SERVICES	93
3.3.5 CHILDREN'S RIGHTS	100
3.3.6 RIGHT TO EDUCATION	104
3.3.7 FREEDOM OF RELIGION, BELIEF AND OPINION	109
3.3.8 ARRESTED, DETAINED AND ACCUSED PERSONS	114
3.4 CONCLUSION	125
<b>CHAPTER 4:</b>	126
<b>ANALYTICAL PERSPECTIVE OF THE IMPLEMENTATION OF THE DEPARTMENT OF CORRECTIONAL SERVICES' LEGISLATIVE AND POLICY FRAMEWORK</b>	126
4.1. INTRODUCTION	126
4.2 THE RIGHT TO EQUALITY	128
4.2.1 ANALYSIS	131
4.3 THE RIGHT TO HUMAN DIGNITY	131
4.4 FREEDOM AND SECURITY OF THE PERSONS	132
4.4.1 ANALYSIS	141
4.5 THE RIGHT TO HEALTH CARE	142
4.5.1 ANALYSIS	148
4.6 CHILDREN'S RIGHTS	149
4.6.1 ANALYSIS	153
4.7 THE RIGHT TO EDUCATION	154
4.7.1 ANALYSIS	157
4.8 FREEDOM OF RELIGION, BELIEF AND OPINION	158
4.8.1 ANALYSIS	160
4.9 THE RIGHT OF THE ARRESTED, DETAINED AND ACCUSED PERSONS	161
4.9.1 ANALYSIS	170

4.10 CONCLUSION.....	172
<b>CHAPTER 5:</b> .....	173
<b>IMPEDIMENTS TO HUMANE TREATMENT OF OFFENDERS IN THE SOUTH AFRICAN CORRECTIONAL ENVIRONMENT</b> .....	173
5.1 INTRODUCTION .....	173
5.2 PRISONS OVERCROWDING: 1995 – 2014 .....	173
5.2.1 Causes of overcrowding of correctional facilities .....	177
5.2.2 What is been done to deal with overcrowding? .....	178
5.2.3 Consequences of overcrowding .....	180
5.3 LACK OF COMMUNITY PARTICIPATION IN CORRECTIONAL MATTERS....	183
5.3.1 The importance of community participation in correctional matters.....	184
5.3.2. Correctional services legislative framework on community participation .....	187
5.3.2.1 The Constitution of the Republic of South Africa of 1996.....	187
5.3.2.2 The Correctional Services Act 111 of 1998 as amended .....	188
5.3.2.3 White Paper on Corrections in South Africa, 2005.....	188
5.3.3 Community Participation status quo in South Africa: 2014 .....	189
5.4 CORRUPTION IN CORRECTIONAL SERVICES.....	191
5.4.1. Corruption in the prison context.....	193
5.4.2 Causes of corruption at prison level .....	197
5.5 PRISON SUBCULTURE .....	199
5.5.1. Prison gangs .....	200
5.5.2 Unrests and riots .....	201
5.5.3 Escapes .....	203
5.5.4 Sexuality in prisons .....	204
5.6 CONCLUSION.....	206
<b>SECTION C: PUBLIC PRESENTATION.....</b>	207
<b>CHAPTER 6:</b> .....	207
<b>LITERATURE REVIEW FINDINGS AND RECOMMENDATIONS</b> .....	207
6.1 INTRODUCTION .....	207
6.2 FINDINGS.....	208
6.3 RECOMMENDATIONS .....	215

6.4 AREAS OF FURTHER RESEARCH..... 218  
6.5 CONCLUSION..... 220  
LIST OF REFERENCES..... 221

## TABLE OF FIGURES

Figure 2.1: Criminal Justice System Chain of events .....	42
Figure 4.1: Male imprisonment per 100 000 of the population: males aged 18 and older up to and including 65 years.....	129
Figure 4.2: Female imprisonment rate per 100 000 of the population: females aged 18 and older up to and including 65 years.....	129
Figure 4.3 Unnatural deaths: inmates: for the past three financial years.....	136
Figure 5.1: National (sentenced & unsentenced) capacity versus occupation.....	176
Figure 5.2: Over-occupancy rate .....	176
Figure 5.3: Systems approach: community participation enablers.....	188
Figure 5.4: Prison subculture.....	200

## TABLE OF TABLES

Table 2.1: The classification of theories of punishment .....	31
Table 3.1: International instruments.....	70
Table 4.2: Findings on acts that amount to torture and cruel, inhuman or degrading treatment or punishment (quarterly report: April to June 2012). .....	138
Table 4.3: Findings on acts that amount to torture and cruel, inhuman or degrading treatment or punishment (quarterly report: January to March 2013).....	139
Table 4.4: Findings on the violation of the right to healthcare services of inmates (quarterly report: April to June 2012). .....	144
Table 4.5: Findings on the violation of the right to healthcare services of inmates (quarterly report: January to March 2013). .....	146
Table 4.6: 2007 and 2012 comparative analysis of statistics of a number of children by crime.....	150
Table 4.7: Findings on the violation of the right to education of inmates (quarterly report: April to June 2012). .....	155
Table 4.8: Findings on the violation of the right to education (quarterly report: January to March 2013). .....	156
Table 4.9: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: April to June 2012). .....	165
Table 4.10: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: January to March 2013)...	167
Table 4.11: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: 01 October 2014 to December 2014).....	169
Table 5.1: Causes of unrests and riots .....	202

## SECTION A: OVERVIEW OF STUDY

### CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 INTRODUCTION

The treatment of offenders in South Africa is informed by the prescripts of the law and therefore if one has to determine how offenders are treated, it has to be done against a certain standard. International and domestic law make provision for a framework that guides the actions of the custodians of offenders across the world. In South Africa, the Department of Correctional Services is guided by the *Constitution of the Republic of South Africa of 1996*, *Correctional Services Act 111 of 1998* as amended and international law [see table 3.1]. The development of these legislative framework and subscription to the international law is as a result of the dawn of democracy in South Africa.

This study focuses on the historical treatment of offenders in South Africa and draws on the following sequence. As a point of departure, this study conducts a systematic literature review with the focus on the penological historical perspective of the treatment of offenders; policy framework for the treatment of offenders in the democratic South Africa; an analysis of the implementation of the department of correctional services' legislative framework; impediments to humane treatment of offenders in the South African correctional environment and ending with the presentation of results, recommendations and an outline of areas of further research.

## 1.2 BACKGROUND TO THE STUDY

As mentioned in the foregoing, the Department of Correctional Services is a custodian of offenders in South Africa. This department is established in terms of section 197(1) of the *Constitution of the Republic of South Africa* of 1996 which states that:

*Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.*

To give effect to the foregoing, the *Public Service Act 103* of 1994 as amended by *Act 30* of 2007 was promulgated. Section 7(2) of this Act makes provision for the establishment of the public service which the Department of Correctional Services is part of. This section states that:

*For the purposes of the administration of the public service there shall be national departments...*

The Department of Correctional Services is responsible for the execution of *Correctional Services Act 111* of 1998 [as amended] amongst others as required by section 197(1) of the *Constitution of the Republic of South Africa* of 1996. In terms of section 2 of the *Correctional Services Act 111* of 1998 as amended, the purpose of the correctional system in South Africa is to contribute to maintaining and protecting, peaceful and safe society by –

- a) *Enforcing sentences of the courts in the manner prescribed by Correctional Services Act 111 of 1998;*
- b) *Detaining all offenders in safe custody whilst ensuring their human dignity; and*
- c) *Promoting the social responsibility and human development of all offenders and persons subject to community corrections.*

The foregoing excerpt of this Act is mandatory and prescriptive in a manner that offenders must be treated. This is effectively consistent to chapter 2 of the *Constitution of the Republic of South Africa* of 1996 that makes provision for the Bill of rights underpinned by the democratic values of human dignity amongst others.

Historically, offenders are generally the worst treated subset of a society and this could be attributed to a perception that they offended the society and therefore must be

punished. On a contrary, this is in fact a contravention of not only the *Correctional Services Act 111* of 1998 as amended, *Constitution of the Republic of South Africa* of 1996 but also the International conventions and treaties [see table 3.1].

There has been substantial empirical and non-empirical studies on the treatment of offenders conducted in the past but little has been done, if anything, to bring to the fore knowledge with regard to the developmental trend of the treatment of offenders in South Africa. Therefore, this study was undertaken to bring together and examine the available literature on the treatment of offenders to determine if there is a developmental trend towards the treatment of offenders. Randolph (2009:2) suggests that literature reviews are also undertaken to demonstrate the researcher's knowledge on a particular field and therefore, this study is also a demonstration that the researcher possesses knowledge in the field of penology.

In addition to the above reasons, Hart (1998:27) outlines a comprehensive list of purposes that a review can serve as follows. These are a clear resemblance of this study:

- distinguishing what has been done from what needs to be done;
- discovering important variables relevant to the topic;
- synthesizing and gaining a new perspective;
- identifying relationships between ideas and practices;
- establishing the context of the topic or problem;
- rationalizing the significance of the problem;
- enhancing and acquiring the subject vocabulary;
- understanding the structure of the subject;
- relating ideas and theory to applications;
- placing the research in a historical context to show familiarity with state-of-the-art developments.

There are two types of research reviews of theoretical and evidence-based literature and they include, *a)* narrative or traditional review and *b)* systematic review (Hammersley, 2013:110; Aveyard, 2010:17; Tranfield, Denyer & Smart, 2003:209). Aveyard (2010:16)

refers to narrative or traditional review as a literature review that is undertaken with no defined method. Denyer & Tranfield (2006:216) offers what could be a definition of narrative review as a review in which the researcher summarises and interpret previous contributions in a subjective and narrative manner. Denyer & Tranfield (2006:216) further state that this type of review have been criticised because the determination of which studies are to be included in the review and the appraisal of the study quality can be subjective. Jesson, Matheson & Lacey (2011:24) attest to this by stating that narrative or traditional reviews are faced with a challenge of being criticised because of the assertion that its design and method are too open and flexible. In other words, there is no obligation to provide a method of report and the author only has to tell the purpose of the review without an indication of how the sources were identified and what is the inclusion and exclusion criteria.

Jesson, Matheson & Lacey (2011:104) defines systematic review as a systematic, transparent means for gathering, synthesising and appraising the findings of studies on a particular topic with the aim of minimising biases associated with single studies. Put differently, Aveyard (2010:14) states that this type of review strives to identify comprehensively and track down all available literature on a topic while describing a clear, comprehensive methodology. Denyer & Tranfield (2006:216) concur with the foregoing but also furthering these by postulating that the validity of the findings of reviews depend on the comprehensiveness of the search and comparability of the studies located [see *infra* section 1.8 of this study]. This means that in order to ensure a rigorous literature review, all available literature must be located through a comprehensive methodology in a transparent manner. In other words searches must follow on a well-defined process.

Notwithstanding assertions by staunch proponents of the review research method such as Hammersley (2013) that literature review begun in the healthcare sector and cannot be used in social sciences, there is an overwhelming contention that this methodology can be and is being applied and growing in other fields such as criminal justice (Jesson, Matheson & Lacey 2011:106). Petticrew (2001:99) regards Hammersley's contention as

a myth while Tranfield, Denyer & Smart, (2003:211) submit that such assertions are based on ontological and epistemological assumptions.

In light of the foregoing comparison between narrative or traditional and systematic reviews, this study adopted systematic review methodology in order to ensure that the results of study are rigorous and scientific. This was conducted by applying five stages which according to Cooper (1982:291) are also applied when conducting primary research with few modifications. These steps include: *problem formulation, data collection, data evaluation, data analysis & interpretation and presentation of results*. Problem formulation is discussed in section 1.3 and the rest of steps addressed in sections 1.7.3, 1.7.4, 1.7.5 & 1.7.6 of this study. Furthermore, Cooper's (1988:109) taxonomy of literature reviews was applied in order to ensure the quality of this study. This taxonomy includes: *focus, goal, perspective, coverage, organisation and the audience*.

As it can be seen from the title and the foregoing background, it becomes clear that the *focus* was on the treatment of offenders in South Africa and therefore the type of review identified for this study are the central theories and how certain intervention has been applied in practice. Furthermore, the *goal* of this study was to identify and analyse central issues of primary research. So, the rationale of this study was to put forth new theories with regard to the trend of the treatment of offenders and to determine how the pertinent legislation is applied in practice. This study dealt with the theories relating to the treatment of offenders and what the Department of Correctional Services has done and still needs to do to promote the humane treatment of offenders. This study is also a demonstration of the fact that the researcher possesses knowledge in the field of penology.

Randolph (2009:5) suggests that once the type of review has been determined and decided on, as in the foregoing paragraph, the focus shifts to problem formulation.

### **1.3 PROBLEM FORMULATION FOR THE LITERATURE REVIEW**

According to Randolph (2009:6) there are two steps in formulating the problem, namely: the determination of research questions and the determination of the inclusion and exclusion criteria. Formulating a problem for the literature review begins with the determination of research questions that will guide the literature review. These questions are usually influenced by the *focus* and the *goals* of study (please see the foregoing section). This sentiment is shared by Jesson, Matheson & Lacey (2011:18) that research questions are a point of departure in any research project and they provide a direction for the research investigation.

#### **1.3.1 Research questions**

It is against the preceding backdrop that the following research questions for this study were developed:

1. What is the philosophical historical perspective of the treatment of offenders in South Africa?
2. What are the central theories that have been used to explain humane treatment of offenders?
3. How are offenders treated in South Africa?
4. Are there any impediments to humane treatment of offenders that needs to be addressed?

#### **1.3.2 Inclusion and exclusion criteria**

The second step in the formulation of a problem for the literature review concerns itself with an explicit determination of the inclusion and exclusion criteria. In other words, the researcher has to determine which literature should be reviewed and which literature should not be reviewed (Randolph, 2009:6). According to Boote & Beile (2005:7) novice researchers such as doctoral students have the onus to convince the readers that they

have thoroughly mined the existing literature and purposefully decided what to review (see *infra* section 1.7.2 of this study). A determination of the inclusion and exclusion criteria makes it easier for the researcher to identify relevant material for review and also enhance the transparency and the rigour of the review (Hagen-Zanker & Mallett, 2013:8). This means that novice researchers ought to have standards against which their work can be rigorously measured.

Randolph (2009:6) states that a particular criteria for the inclusion and exclusion of literature are influenced by the review's *focus*, *goal* and the *coverage*. The *focus* and the *goal* of this study as articulated in the second last paragraph of the previous section determined the inclusion and exclusion criteria of this study as it can be seen below. Furthermore, this study's criteria was influenced by *coverage* as one of the characteristics of the taxonomy of literature review (Cooper, 1988:109). In the main, this study concentrated on works that have been important to the topic under discussion - *Systematic review of theoretical and evidence-based literature on offenders' treatment in South Africa: A penological perspective*. These included materials that initiated a line of investigation and engendered important debate.

In light of the above, the criteria for inclusion and exclusion of literature below was developed. The researcher acknowledges that this criteria made it easier to identify relevant literature for the review.

The following inclusion criteria were used for the review in this study:

- Literature that is written in English language only.
- Primary studies that used quantitative and qualitative methodologies as well as a mixture of the two methodologies.
- Philosophical studies of penology.
- Grey literature which includes organisational/institutional reports and non-academic research.
- Legislation, policy documents and law cases (reports).
- Literature published between 1911 and 2014.

The following exclusion criteria were used for the review in this study:

- Literature published after 2014 such as the Mandela Rules launched on 7 October 2015 and Justice Cameron's report on Pollsmoor Correctional centre published on 13 August 2015. The Mandela Rules are actually a new name for the United Nations Standard Minimum Rules for the Treatment of Offenders which were extensively used in this study. The two documents were published when this study was at an advanced stage and could not be considered but the researcher takes note of such developments.
- Personal documents such as letters, diaries and autobiographies because personal documents are in most cases written for money or prestige and if it is driven by such ulterior motives, then their authenticity becomes questionable.

## **1.4 DEFINITION OF KEY THEORETICAL CONCEPTS**

This section of study is referred to by Williamson (2013) as the operationalisation of research concepts or variables which means to define the concepts or variables so that they can be measured or expressed in quantitative or qualitative terms. This is usually done to remove any potential ambiguities in written work or research. The following concepts are defined for the purpose of this study:

### **1.4.1 Human rights**

Human rights are those rights that belong to all in a society merely because they are human beings (Luyt, Jonker & Bruyns, 2010:165). In this study this concept is used to mean the fundamental rights that an individual is inherently entitled to just because they are human beings.

#### **1.4.2 Offender**

For the purpose of this study, offender refers to both sentenced and unsentenced offender. Sentenced offender means a convicted person sentenced to incarceration or correctional supervision and 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 (Department of Correctional Services, 1998).

#### **1.4.3 Offenders' rights**

According to Luyt, Jonker & Bruyns (2010:188) these are specific rights that are most relevant to and vulnerable in the correctional environment. In this study, offenders' rights refers to the rights identified by the Department of Correctional Services in the 2012/2013 – 2016/2017 strategic plan. These include:

- The right to Equality
- The right to Human Dignity
- The right to Freedom and Security of the person
- The right to Health Care Services
- Children's rights
- Right to Education
- Freedom of religion
- Right to Humane Treatment and to communicate and be visited by family, next of kin etc. (Department of Correctional Services 2013:8)

#### **1.4.4 Humane treatment**

This refers to the treatment of offenders according to the requirements of chapter 3 of *Correctional Services Act 111 of 1998* as amended and its regulations (see *infra* section 3.3.2 of this study).

#### **1.4.5 Policy and legislative framework**

For the purpose of this study, these refer to the legislation that guides the activities of the Department of Correctional Services such as the *Constitution of the Republic of South Africa of 1996*, *Correctional Services Act 111 of 1998* as amended, correctional services regulations, the *White Paper on Correctional Services* of 2005 and internal policies.

### **1.5 VALUE OF THE RESEARCH**

Offenders' treatment in most penal systems across the globe has been a conundrum with most communities calling for severe punishment of those who offended them. This is with the expectation that such punishment should be exercised by the correctional services. On the one hand, this is a clear demonstration of lack of awareness on issues that pertain to the correctional services and on the other hand, a demonstration of the fact that correctional services is not doing enough to bring awareness about its role in the criminal justice system. This study acknowledges the research work done on the treatment of offenders by academia hence the evaluation and analysis of such.

#### **1.5.1 Value for correctional system**

The results of this study can assist the Department of Correctional Services to have an understanding on how it is treating offenders over the years and whether there is any interventions required to fully comply with the requirement of the law. Furthermore, this can lead to the development and implementation of internal policies aimed at involving communities in the activities of correctional services.

#### **1.5.2 Value for the broader community**

Public participation in correctional activities has always been a challenge even during the apartheid regime due to negative public perception about correctional services. The

results of this study will be of value to the community in that members of the community will be better informed and knowledgeable about what the role of correctional system is. This will lead to active community participation resulting in successful offenders' reintegration after imprisonment and reduced recidivism.

### **1.5.3 Value for the academia**

Data collection and analysis methods in this study brings a significant contribution to the body of knowledge within the academic circles. These methods can be replicated by researchers and undergraduates alike in advancing research. The penological historical perspective, policy framework on the treatment of offenders and impediments to the humane treatment of offenders discussed in this study contributes to the body of knowledge. Furthermore, suggested areas of further research can also play a pivotal role in advancing research interests.

## **1.6 RESEARCH DESIGN**

Research design is defined by Mouton (2001:55) as a plan or blueprint of how the researcher intends to conduct the research. Babbie (2005:87) supports Mouton's definition and further outlines a criteria to be met when a research project is undertaken by stating that this section of a research project requires a succinct articulation of what the researcher wants to find out and determine the best way to do that. An articulation of what the researcher wants to find out is in a form of problem formulation in section 1.2 of this study. From this section, it becomes clear that the research design is descriptive in nature. The descriptive nature of this study lies in:

- the penological historical perspective of the treatment of offenders in South Africa,
- policy framework for the treatment of offenders,
- analytical perspective of the implementation of the legislative and policy framework and

- Impediments to humane treatment of offenders.

The foregoing was addressed through a plan in a form of a methodology. The following section addresses such a plan.

## **1.7 RESEARCH METHODOLOGY**

According to Leedy and Ormrod (2005:94), there is a wide variety of research methodologies but accedes that many researchers tend to categorise research into two broad categories, namely; quantitative and qualitative research. Quantitative research methodologies usually start with a specific hypothesis to be tested, use a standardised procedure to collect some form of numerical data and use statistical procedures to analyse and draw conclusions from the data. Qualitative research methodologies often start with research questions rather than specific hypotheses, collect an extensive amount of verbal data from a small number of participants, organise those data in a coherent manner and use verbal descriptions to portray the situation studied. Patton and Cochran (2007:2) attest to the latter by stating that qualitative research is characterised by its aims, which relate to understanding some aspect of social life and its methods which generate words, rather than numbers as data for analysis.

This study identified central issues relating to the treatment of offenders, discussed the policy framework for the treatment of offenders and ultimately answered research questions as articulated in section 1.3.1 of this study. What this study did not do is to test any hypothesis. This qualified it to be classified as a qualitative study although the literature reviewed was in some instances quantitative and mixed methods in nature. As part of the research methodology, population, sample, data collection, data evaluation, data analysis and interpretation and the method of presentation is outlined below.

### **1.7.1 Study population**

Bless, Higson-Smith & Kagee (2006:98) defines the population as the entire set of objects or people which is the focus of the research and about which the researcher wants to determine some characteristics. De Vos et al (2005:194) see population as the totality of persons, events, organisation units, case records or other sampling units which the research problem is concerned. Due to the nature of this study, literature review study, the population is basically literature such as books, peer-reviewed articles, grey literature, press reports, legislation, policy documents, law reports and internet based material. Since the available body of literature is extensive, it was almost impossible to conduct what Cooper (1988:110) refers to as an exhaustive coverage where the researcher intend to include the entire literature. This therefore warranted a sample to be drawn from the population.

### **1.7.2 Sample procedure**

According to Seaberg as quoted by De Vos et al (2005:194) sample refers to a small portion of the total set of objects, events or persons which together comprise the subject of study. A sample procedure for this study was informed by the inclusion and exclusion criteria as articulated in section 1.3.2 of this study. In addition, the *focus* and the *goal* of this study as per Cooper's taxonomy of literature review is the treatment of offenders as the central theories. Therefore, from the three sample approaches (exhaustive review with selective citation; representative sample and purpose sample) offered by Cooper (1988:111), a purpose sample was deemed to be appropriate for this study. This is further supported by Leedy & Ormrod (2013:152) by stating that qualitative researchers are intentionally non-random in their selection of data sources. Instead they are purposeful in selecting those individuals or objects that will yield the most information about the topic under investigation.

### **1.7.3 Methods of data collection**

Various authors offer a variety of data collection methods which include participants' observations, interviews and questionnaires (De Vos, et al 2005:274–315; Goddard &

Melville, 2001:41–49; Leedy & Ormrod; 2005:145–146 & 184–185 and Bless, Higson-Smith & Kagee, 2006:114-124). These data collection methods are used mainly in qualitative research. This study took note of the available data collection methods but its nature, which is literature review, dictate the data collection method. It is the method that De Vos et al (2005:314) claim to be neglected by researchers called *documents* and *secondary* studies. Sources of *document* studies include personal documents, official documents, mass media and archival material. Neuman (2014:49) refers to *secondary* studies as the re-examination and analysis of quantitative data that have been gathered by government agencies or other organisations. Hox & Boeije (2005:596) identify official statistics, administrative records or other accounts kept routinely by organisations as the sources of *secondary* studies.

The goal of the data collection stage is not only to collect an exhaustive, semi exhaustive, representative or pivotal set of relevant articles but also to outline how the data were collected (Randolph, 2009:6). In this study, the researcher reworked on the available pivotal set of relevant literature that included both document and secondary studies. Data was collected from the following sources according to inclusion and exclusion criteria articulated in section 1.3.2 of this study:

- Penology text-books
- Journal articles
- Conference proceedings
- Theses and dissertations
- Strategic plans
- Annual reports
- Quarterly reports
- Trend analysis reports
- Commissions of enquiry reports
- Parliamentary reports
- Domestic and international law
- Law cases (court judgements)
- Newspaper articles & media speeches

- Civil Society Groups Reports
- Research reports

The researcher utilised the University of South Africa (UNISA) and Tshwane university of Technology (TUT) libraries to get the text books. Librarians from the two libraries were helpful in accessing text-books and other on-line material. The Promoter of this study also played a pivotal role in directing the researcher to the relevant sources and at times availing such sources.

In today's era, computers are important tools in almost every aspect of our lives. Data is readily available from the internet. UNISA & TUT library websites makes provision for electronic resources through OPEC catalogue which helped extensively in locating sources in these two libraries as well as on universal data bases which include Ebscohost, Emerald Management Plus, JUTA LAW (South African Law Reports), LexisNexis Butterworths, Sabinet Online and Sage Online.

Of course these databases have an extensive multi-disciplinary data and therefore, the researcher used the following key words to retrieve data:

- Treatment of offenders
- Theories of punishment
- Offenders'/Prisoners' rights
- Prison overcrowding
- Community participation in prison matters
- Prison subculture

All sources consulted and reviewed were purposefully selected to address the research questions articulated in section 1.3.1 of this study and a record of all sources was kept. This record was compiled according to UNISA's School of Criminal Justice Standardised Referencing Style. i.e In-Text Referencing and a comprehensive List of References. In-Text referencing can be witnessed throughout the study and a comprehensive List of Reference at the end of this study.

#### 1.7.4 Data evaluation

In literature review this stage follows data collection. This is according to Cooper (1982:296) a stage when critical judgements are made about the quality of data points. In other words, what data contributes to address the research questions? What is the data's provenance with regard to the authors' credentials? According to Randolph (2009:7) this data is determined by the *focus* and *goal* of the review.

The collected data as per the inclusion criteria focuses on the treatment of offenders in South Africa and therefore the evaluation was based on whether the data relates to the treatment of offenders. The point of departure was to look at all the data that speaks to the historical perspective of the treatment of offenders in South Africa, the treatment of offenders as a legislative requirement and the impediments to humane treatment of offenders. The essence to these theories lies in the promotion and protection of the rights of offenders as provided for by not only the constitution of the *Republic of South Africa* of 1996 but also the international treaties and conventions.

All the listed sources in this study were evaluated and found to play a major role in addressing the research questions of this study. Annual reports by government departments are presented and scrutinised in the national parliament, commissions' reports are compiled by competent people capable of investigating matters of concern aimed at resolving national problems. These commissions are mostly appointed by the State President. Law cases are compiled as a result of court proceedings which involves a thorough scrutiny and interpretation of the relevant laws.

Furthermore, authors of each source evaluated are credible because:

- They write for reputable institutions which are recognised by the *Constitution of the Republic of South Africa* of 1996. Who wants to employ authors with questionable credentials?
- Dissertations and theses are unpublished work of students with the guidance of professional promoters or supervisors working for reputable academic institutions.
- Journal articles are peer reviewed.

### **1.7.5 Data analysis and interpretation**

Randolph (2009:8) postulates that this stage of literature review is when the reviewer attempts to make sense of the data evaluated. To Cooper (1982:297) this is a stage when data points are synthesized into a unified statement about the research questions. Due to the fact that the study's focus is on the treatment of offenders and the *goal* is the identification of central issues, data analysis was conducted throughout the study, particularly in chapter 2, 3, 4 and 5. Analysis and interpretation in this study focused mainly on:

- Policy documents
- Legislation
- Statistics from annual and quarterly reports of government and other institutions
- Research studies
- Case law

Critical issues relating to the rights of offenders from the above were critically analysed by paying attention to the contributions made by these sources in addressing the research questions. This was done by using evidence. In other words, referring to sources when making a point. This also enhanced the validity and reliability of study and avoided plagiarism. While referring to sources about the central issues of study, the researcher also stated original views about such central issues.

### **1.7.6 Public presentation**

De Vos et al (2005:322) refers to this stage as report writing. This is when the research findings are recorded. The availability of this report helps the reader - categorised by Randolph (2009:8) as the primary audience and other scholars as the secondary audience - to evaluate the reliability and validity issues (see infra section 1.8 of this study) of the study. Cooper (1982:299) and Randolph (2009:8) assert that there is no formal guidelines describing how to structure the report. In other words, reviewers are at liberty to decide how much and what format to use for the particular review. It is in this light that the report is presented in the following manner for this study:

- Historical – the report is presented in a chronological order in terms of the progression. How offenders are treated in South Africa dating back to 1911 to 2014.
- Thematic – the report also followed a thematic approach using identified offenders' rights which are central issues for this study.

## 1.8 RELIABILITY AND VALIDITY ISSUES

The two concepts are seen by Lincoln & Guba (1985:316) as intertwined by stating that there can be no validity without reliability and a demonstration of validity is sufficient to establish reliability. Golafshani (2003:601) accedes that reliability is a concept used for testing or evaluating quantitative research but contends that it is most often used in all kinds of research. In both quantitative and qualitative research, the credibility of studies need to be tested and demonstrated. Stenbacka (2001:551) draws a distinction by stating that reliability is a concept to evaluate quality in quantitative study with a purpose of explaining while quality concept in qualitative study has the purpose of generating understanding. Patton (2002:14) further outline the difference by submitting that in quantitative research, credibility depends on an instrument construction and in qualitative research, credibility depends on the ability and efforts of the researcher

Notwithstanding the foregoing submissions confirming the use of reliability in both quantitative and qualitative research, there is a fair stir about the importance and the relevancy of not only reliability but also validity in qualitative research. For instance, Stenbacka (2001:552) opines that if qualitative study is discussed with reliability as a criterion, the consequences is rather that the study is no good and even misleading and since reliability issues concern measurements then it is of no relevance in qualitative research. Contrary to Stenbacka's submission above, stands an argument confirming Golafshani's and Patton's submissions in the foregoing paragraph that credible explanations are central to all research.

More like reliability, the term validity has also received debates about its application in quantitative and qualitative research. Cresswell & Miller (2000:124) adopted Schwandt's (1997) definition of the term validity as how accurately the account represent participants' realities of the social phenomena and is credible to them. Stenbecka (2001:551) states that the basic validity question is whether the intended object of measurement is actually measured and further contends that if this is to be seen as a definition then validity has proven itself to be useless in qualitative research because a qualitative method seeks for a certain quality that is typical for a phenomenon.

Winter (2000) argues that there is no single form or concept that can universally be claimed to define this term. Winter (2000) further suggests that the validity measure can be applied differently depending on the researcher's beliefs as to what stage of the research process is in need of validation. This could be a reference to measurement, observations, scores or relationship between scores rather than the whole research process.

This study took cognisance of the use and the applicability of 'reliability' and 'validity' in research. It can be deduced from the foregoing that reliability and validity issues concern themselves with the quality of study. In order to satisfy this, this study adopted Golafshani's (2003:602) suggestion that if the issues of reliability, validity, trustworthiness, quality and rigour are meant to differentiate between good from bad research, then testing and increasing the reliability, validity, trustworthiness, quality and rigour will be important to research in any paradigm.

Reliability and validity issues of this study are dependent on the logical and systematic approach of this study itself. In other words, this study followed on a well-defined process which includes the development of research questions and the determination of the inclusion and exclusion criteria of the review literature as defined in section 1.3 of this study.

The researcher saw it important to apply the following criteria for increased reliability and validity:

Triangulation - the researcher searched for convergence among multiple and different sources of information to form themes or categories. In this study corroborative evidence was collected from literature as acknowledged in-text and listed in the list of references (Cresswell & Miller, 2000:126).

The audit trail – this study is a formal study in a form of a thesis and will therefore be examined for a qualification purpose. Audit trail as a criterion for reliability and validity is about a provision of a clear documentation of research decisions and activities (Cresswell & Miller, 2000:126). This is clearly outlined in sections 1.3 and 1.7 of this study.

## **1.9 ETHICAL CONSIDERATIONS**

Various research authors define ethics as a concept that concerns itself with what is wrong and what is right, what is acceptable and what is unacceptable in the conduct of research. These authors agree that what could be acceptable to one individual, could be unacceptable to another and it is therefore crucial that a code of conduct be developed to regulate the conduct and behaviour of people involved in research (Mouton, 2001:238; Babbie, 2005:62 and Bless, Higson-Smith & Kagee, 2006:140).

A common practice in most research disciplines such as education, criminology, medicine and related areas of study with regard to ethics is the use of human subjects. Ethical issues which must usually be taken into consideration include:

- Protection from harm
- Informed consent
- Right to privacy
- Honesty with professional colleagues (Leedy & Ormrod, 2013:105).

Due to the nature of this study, consideration of ethics in respect of human subjects was irrelevant and not applied but ethical clearance was granted by UNISA College of Law Research Ethics Review Committee as it is procedural to obtain such clearance. This is so because the population of study was literature as outlined in section 1.6.3 of this study. Instead, this study considered the following ethical issues as outlined by Wager & Wiffen (2011:131 - 133):

### **1.9.1 Avoiding duplicate publication**

This study was conducted for the purpose of obtaining a qualification through the University of South Africa (UNISA) and not for the purpose of peer reviewed publication. Therefore, this study couldn't be sent out to journals for publication before the said qualification was obtained.

### **1.9.2 Avoiding plagiarism**

Plagiarism means using somebody else's words, images, data, ideas or other original creations without acknowledgement or permission and claiming them as your original work. This amount not only to dishonesty but also documentary theft, a criminal offence (Leedy & Ormrod, 2013:105). In this study, the researcher gave credit where it belongs by acknowledging all the material used in this study. This was done according to UNISA tutorial letter 102/2015 on the Standardised Referencing Style (In-Text and a List of References).

### **1.9.3 Transparency**

To Wager & Wiffen (2011:133) transparency is about providing information about funding and competing interest and declaring all sources of funding. Competing interest could constitute a problem if it has an influence on the researchers' responsibility in the publication process. Although Hammersley (2013:114) is vehemently critical about the use of transparency in literature review, Armitage & Keeble-Allen (2008:104) submit that transparency is an important aspect when conducting literature review. This is in light of

the fact that an explicit procedure of conducting literature review is outlined. This study is funded by the researcher's employer, Tshwane University of Technology and the researcher doesn't have any conflict of interest and can therefore not be influenced or biased in any manner.

## **1.10 OUTLINE OF THE STUDY**

This study was developed and structured in three sections. Section A: Overview of the study and it covers introduction and background to study. Section B: Systematic Literature Review. This section effectively addresses the steps in conducting a literature review as outlined in section 1.2 of this study. It is divided into three chapters which are: Penological historical perspective of the treatment of offenders; Policy framework for the treatment of offenders in the democratic South Africa; Analytical perspective of the implementation of the Department of Correctional Services' legislative and policy framework and Impediments to humane treatment of offenders in South Africa. Section C: Public Presentation. This section covers only one chapter which is based on the results and recommendations of study. A synopsis of these chapters is as follows:

### **SECTION A: OVERVIEW OF STUDY**

#### **CHAPTER 1: INTRODUCTION AND BACKGROUND TO STUDY.**

This chapter introduces the reader to the study by providing a background to the study. This includes the role of the Department of Correctional Services in South Africa giving rise to the formulation of the problem – which outlines research questions and an explicit inclusion and exclusion criteria for literature review. Subsequent to that, the key theoretical working concepts are identified and defined. Furthermore, this chapter outlines the value for this study, research design & methodology, reliability & validity issues as well as ethical considerations.

## **SECTION B: SYSTEMATIC LITERATURE REVIEW**

### **CHAPTER 2: PENOLOGICAL HISTORICAL PERSPECTIVE OF THE TREATMENT OF OFFENDERS**

This chapter offers a detailed definition of the concept of penology, extensive discussion of the philosophical perspective of punishment, theories of punishment, the position of corrections in the criminal justice system and ends with a discussion of a historical perspective of the treatment of offenders in South Africa.

### **CHAPTER 3: POLICY FRAMEWORK FOR THE TREATMENT OF OFFENDERS IN THE DEMOCRATIC SOUTH AFRICA**

A point of departure of this chapter is a discussion of international law. In relation to that, central issues of this study as alluded to in chapter 1 of this study are identified and critically discussed. These central issues are based on the provisions of the *Constitution of the Republic of South Africa of 1996*.

### **CHAPTER 4: ANALYTICAL PERSPECTIVE OF THE IMPLEMENTATION OF THE DEPARTMENT OF CORRECTIONAL SERVICES' LEGISLATIVE AND POLICY FRAMEWORK**

On the basis of chapter 3, which is based on the applicable law to the treatment of offenders, an analysis of the implementation of such law is conducted in this chapter. This analysis follows on the central issues as identified in the preceding chapter.

### **CHAPTER 5: IMPEDIMENTS TO HUMANE TREATMENT OF OFFENDERS IN THE SOUTH AFRICAN CORRECTIONAL ENVIRONMENT**

Based on the analysis conducted in the preceding chapter, this chapter presents the impediments to humane treatment of offenders in South Africa. These include prison overcrowding; lack of community participation in correctional matters; corruption in correctional services and prison subculture.

## **SECTION C: PUBLIC PRESENTATION**

### **CHAPTER 6: LITERATURE REVIEW RESULTS AND RECOMMENDATIONS**

The last step in a literature review study is the presentation of results and recommendations of study. These results are presented in the following manner:

- Historical – the report is presented in a chronological order in terms of the progression. How offenders are treated in South Africa dating back from 1911 to 2014.
- Thematic – the report also followed a thematic approach using identified offenders' rights which are central issues for this study.

#### **1.11 CONCLUSION**

An overview of any study is critical because it provides a framework and enlighten the reader about what the study entails. In this study, a discussion of the key steps in doing a literature review study played an important role in achieving this. These steps are applied throughout the study. Problem formulation step is applied in chapter 1 (current); data collection, data evaluation, data analysis & interpretation is applied in chapter 2, 3, 4 and 5. Presentation of results step is applied in chapter 6 of this study. The following chapters of the study deals with other steps of the systematic literature review which includes: data collection, data evaluation and data evaluation and interpretation. This is done with the focus on the penological historical perspective of the treatment of offenders, policy framework for the treatment of offenders in the democratic South Africa, analysis of the implementation of the Department of Correctional Services' legislative framework and the impediments to humane treatment of offenders in the South African correctional environment. Ultimately, the findings, recommendations and suggested areas of further research are presented in chapter 6.

## SECTION B: SYSTEMATIC LITERATURE REVIEW

### CHAPTER 2:

## PENOLOGICAL HISTORICAL PERSPECTIVE OF THE TREATMENT OF OFFENDERS: LEGISLATIVE FRAMEWORK APPROACH

### 2.1 INTRODUCTION

On the basis of the preceding chapter and central to this study is the treatment of inmates in South African correctional centres. It is in this light that this chapter discusses the historical perspective of the treatment of inmates. This discussion is based on the evolution of the legislative framework of the Department of Correctional Services of South Africa as informed by the international conventions and treaties expressing the underlying guidelines for the treatment of offenders. This evolution starts right from the enactment of the *Prisons and Reformatories Act 13 of 1911* up to and subsequently the promulgation of the *Constitution of the Republic of South Africa* of 1996 leading to the enactment of the current legislation, *Correctional Services Act 111 of 1998* as amended.

Before that is tackled, it is important to bring to the forth an understanding of the underlying principles of penology as it has a direct bearing on the said discussion. Therefore, it can only make sense that this study draw on the concept of the philosophical perspectives of legal punishment as an element of penology overlapping into discussion of the position and the role of *corrections* in the Criminal Justice System (CJS) from the history of *treatment of offenders'* perspective as a social responsibility in South Africa.

## 2.2 THE CONCEPT OF 'PENOLOGY' DEFINED

The concept of *penology* is defined by various scholars over the years as it can be seen in the following submissions. According to Cilliers et al (1993:2) penology refers to the specialist sub-section of criminal justice which concerns itself with the punishment and treatment of transgressors. They furthermore state that *penology* is referred to by others as *corrections science* or *corrections*. Joyce (2006:321) defines *penology* as a scientific study of punishment which seeks to provide an understanding of the issues that underlie penal strategies. Over and above the latter definition, Seiter (2011:5) states that the term generally included a much broader focus than simply punishment and effectively covered the theories, activities and operations of carrying out the criminal sentence, whether in a prison or in the community. Ericson (1991) in Nettmann (2013:71) also offers what could be considered the definition of *penology* as the study of the disposition of criminal offenders including sentencing and the policies and practices of managing offenders under sentence.

A thorough scrutiny of the foregoing definitions by various scholars reveals common characteristics such as punishment and treatment of offenders. The latter will be discussed in detail in Chapter 3. Below is a discussion of the former, punishment.

## 2.3 THE PHILOSOPHICAL PERSPECTIVE OF PUNISHMENT

The concept of punishment has been a conundrum for centuries. In an attempt to comprehend it, it is imperative to begin by focusing on its historical origin and definition ending with an attempt to answer the seemingly popular question, 'why punishment' or what purpose does punishment serve? The answer to this question will draw on the South African context as developed from international trends.

In the primitive times, groups of people lived together in units based on blood relationships or local units (clans). These clans were not subject to any higher political authority. When

a member of one group was wronged by a member of another group, people took matters in their own hands and retaliated. This is what Alexander (1922:235) refers to as instinctive rather than rational action against those who have wronged. Alexander further states that the sense of loss or wrong occasioned by acts which constitute latter-day crimes was appeased only by a vengeance which demanded immediate and summary reprisal. Carney (1974:55) concurs with this by submitting that formalised and purposely imposed punishment was unknown in primitive societies. Comforted by a consistent tradition, advancing civilisation with time found no other remedy than severe physical punishment.

As civilisation sailed into the eighteenth and nineteenth centuries, scholars such as Beccaria and Bentham respectively advanced the theory that treatment of the criminal is to be determined by the crime committed and not by the nature of the criminal. This is subsequent to the era that saw the prevalence of Plato's theory who justified punishment solely upon the grounds that the criminal was thereby through a severe chastening made better and the example of his extreme punishment acted as a deterrent to others. Before Plato, the ancient Greek theories conceived that exact justice demanded a punishment literally 'in kind'. Meaning that one who commits arson was burned to death and he who kills with a stone was likewise stoned to death (Alexander, 1922:238).

The above contrasting perspectives are a clear representation of evolutionary nature of the concept punishment from the primitive times to the recent times. In an attempt to unpack the evolutionary nature of this concept, it is imperative to begin by defining this concept itself. Alexander (1922:235) defines punishment as a pain, suffering, loss, confinement or other penalty inflicted on a person for an offence by the authority to which the offender is subject.

Rabie & Strauss (1981:6) define punishment as a sanction of the criminal law with two outstanding characteristics, namely; a) intentional infliction of suffering upon an offender and b) expression of the community's condemnation and disapproval of the offender and his conduct.

Samaha (2011:21) refers to punishment as intentionally inflicting pain or other unpleasant consequences on another person and further submits that punishment takes many forms in everyday life. For instance, a school expels a student for cheating amounts to punishment. A question can then be raised as to whether this kind of punishment can be classified as 'social punishment'? This question is elicited by Samaha's terminology as 'criminal punishment' and for it to qualify as such, penalties must meet the following four criteria:

- They have to inflict pain or other unpleasant consequences;
- They have to prescribe a punishment in the same law that defines the crime;
- They have to be administered intentionally;
- The state has to administer them.

It is the researcher's view that there are two distinct features in the definition of this concept. Firstly, there is an element of the evolutionary nature of the concept of punishment. This view stems from the foregoing definitions by various scholars. For the purpose of this study, the definition of this concept is traced back from 1922 by Alexander, 1981 by Rabie & Strauss to 2011 by Samaha. Secondly, a closer scrutiny of the above definitions reveals two similar elements, namely; 'infliction of pain or suffering' and the 'who inflicts that pain or suffering'.

Although Samaha (2011:22) doesn't see a need to explain the foregoing, it is imperative at this stage to put this definition into perspective. An infliction of pain means sentencing by the state using prescribed framework that guides sentencing or punishment. Unlike in the primitive times, the infliction of the pain is administered by the state as an independent third party and that is what is making the current punishment different from the primitive times because in the primitive times people took matters in their hands and retaliated. Samaha (2011:22) further contends that the one popular element of the definition, 'pain or suffering' is broad and vague because it does not tell what kind of, or how much pain or suffering. This contention is noted and will not form part of this study due to the nature of this study itself but rather the focus is now on the question of what purpose does punishment serve?

There are various submissions regarding terminology of the foregoing. For instance, Carney (1974:59) sees the purpose of punishment as *philosophies of punishment*. Malan *et al* (1993:45) see them as *the purpose of criminal justice*. Carlson, Hess & Orthmann (1999:14) refer to them as *the purposes of corrections*. Joyce (2006:321) refers to them as the *aims of punishment*. Seiter (2011:28) calls them the *sentencing goals of corrections*. Nettmann (2013:72) refers to them as *sentencing objectives*.

Notwithstanding the different terminology by various scholars, Rabie & Strauss (1985:18) point out that the above question is answered by the theories of punishment because they reveal important clues to the purpose of punishment. The following section deals with the theories of punishment within the South African context.

## 2.4 THEORIES OF PUNISHMENT

Snyman (1991:16) poses rather pertinent questions to say, why the police go to the trouble of tracking down the suspect of crime and why the court and the legal practitioners have to painstakingly establish whether the accused is guilty of a crime committed or not? The answer to these questions is simply to punish the accused if found guilty. Snyman further poses a follow-up question to say, why should the offender be punished? This is the same question stated earlier in the foregoing section 2.3. The answers to this question lie in the following theories of punishment.

According to Rabie & Strauss (1985:18) there are a number of theories of punishment that belong to two groups, i.e. the *absolute theory of retribution* and the *relative theories of prevention*. Theories belonging to the latter include:

- Individual prevention [incapacitation; individual deterrence; rehabilitation; social defence].

- General prevention [general deterrence; the socialising function of the criminal sanction; the habituating function of the criminal sanction; the informative function of the criminal sanction; the morale sustaining function of punishment].

Rabie and Strauss further submit that, theories of punishment can belong to a combination of the *absolute theory of retribution* and the *relative theories of prevention* referred to as the *integrative theories*.

Snyman (1991:16) concurs with the foregoing but unlike Rabie & Strauss, there is a succinct stance by Snyman that theories of punishment are divided into three classifications. Firstly is the *absolute [retributive] theory*; secondly, the *relative theory* and lastly, the *unitary theory*. The *relative theory is classified into*:

- *Preventive*;
- *Deterrent [individual and general deterrence] and*;
- *Reformative*.

Contrary to the foregoing submissions, Burchell & Milton (2005:68) are of the view that theories of punishment are classified into two schools identified as *retributive theories* and *utilitarian theories*. *Retributive theories* include:

- Appeasement of society: revenge;
- Expiation or atonement;
- Denunciation and;
- Just desserts.

*Utilitarian theories* include:

- Prevention/incapacitation;
- Deterrence: Individual deterrence and general deterrence;
- Reinforcement;
- Reformation/rehabilitation.

According to Samaha (2011:22), theories of punishment are classified into two schools. Namely, *retribution theory* and *prevention theory*. The *prevention theory* is further classified into the following:

- General and special deterrence;
- Incapacitation and;
- Rehabilitation.

Table 2.1: The classification of theories of punishment

Rabie & Strauss (1985:18)	Snyman (1991:16)	Burchell & Milton (2005:68)	Samaha (2011:22)
Three classifications: <ul style="list-style-type: none"> <li>• Absolute theory</li> <li>• Relative theory</li> <li>• Intergrative theory</li> </ul>	Three classifications: <ul style="list-style-type: none"> <li>• Absolute theory</li> <li>• Relative theory</li> <li>• Unitary theory</li> </ul>	Two classifications: <ul style="list-style-type: none"> <li>• Retributive theory</li> <li>• Utilitarian theory</li> </ul>	Two classifications: <ul style="list-style-type: none"> <li>• Retribution theory</li> <li>• Prevention theory</li> </ul>
• Individual prevention (incapacitation; individual deterrence; rehabilitation; social defence)	• <i>Preventive</i>	• Appeasement of society: revenge	• General and special deterrence
• General prevention (general deterrence; the socialising function of the criminal sanction; the habituating function of the criminal sanction; the informative function of the criminal sanction; the morale sustaining function of punishment).	• <i>Deterrent (individual and general deterrence)and</i>	• Expiation or atonement	• Incapacitation
	• <i>Reformative.</i>	• Denunciation	• Rehabilitation.
		• Just desserts	
		• Prevention/incapacitation	
		• Deterrence: Individual deterrence and general deterrence	
		• Reinforcement;	
		• Reformation/rehabilitation	

The foregoing contrasting submissions by various scholars as to whether there are two or three classifications of the theories of punishment are of no significance and just academic to make them more comprehensive and over and above that, the third classification is a mere combination of all theories. What is important to take note of is the academic development and the individualisation of the terminology used to refer to these theories over the years. The point is, they are more of the same as it can be witnessed from the above table 2.1 and for the purpose of this study, given its nature, the following

theories are discussed subsequent to an outline of what can be coined 'characteristics' of the theories of punishment:

#### **2.4.1 Retribution**

According to Snyman (1991:19), this theory is the oldest of all theories of punishment. From various literature consulted, it can only make sense that one develops the characteristics of the retribution theory which are essentially answering the question 'why punishment?' as follows:

- It is based on the premise that the commission of a crime disturbs the balance of the legal order which will only be restored once the offender is punished for his/her crime. Therefore, punishment must automatically follow upon the commission of a crime (Carney, 1974:61; Carlson, Hess & Orthmann, 1999:15; Joyce, 2006:324; Seiter, 2011:28).
- It is a reflection of the community's condemnation of crime (Snyman, 1989:18). JRank (2014) further state that retribution is justified to protect the legitimate rights of both society and the offender.
- It presupposes that the offender merely gets what he /she deserve. Based on the Old Testament principle of *an eye for an eye and tooth for a tooth (lex talionis)* (Carney, 1974:61; Joyce, 2006:324).
- According to this theory, punishment must be proportionate to the harm done or of the violation of the law. i.e. punishment should fit primarily the moral gravity of the crime and to a lesser extent, the characteristics of the offender punishment [let punishment fit the crime] (MariSluste, 2014; Joyce, 2006:325).

This theory has come under criticism for reasons that can be termed *the disadvantages of retribution theory*. These include:

- It is a manifestation of a primitive urge to seek revenge (Carlson, Hess & Orthmann, 1999:15; Seiter, 2011:28).
- It is often difficult to ascertain what punishment will equal the harm caused or the rule violated because the nature of the harm may differ from that of any of the

possible forms of punishment which may be imposed. Simply put, the principle of *lex talionis* has limited applicability (Seiter, 2011:28). For instance, what punishment can be imposed for contempt of court or prostitution?

- Certain conduct such as the technical violation of rules pertaining to public welfare, e.g. parking offences or urinating in public, although it constitute a crime, it is not considered by society to be morally wrong. The proportional sanctions would be based on the erroneous assumption that there is public consensus in the ranking of the moral gravity of particular types of crime (Snyman, 1989:19).

It will be a fallacy to start to think that this theory cannot be applied in a given situation due to its period of existence. Despite, the above shortcomings, the application of this theory in many countries, particularly in South Africa has come handy and of course with a consideration of legal developments such as the abolishment of capital punishment for instance.

Marisluste (2014) submits that an example of retributive principles being used as the basis for punishment involves mandatory sentencing policies and sentencing guidelines systems in the United States of America. This proves to be applicable in the South African context because of the existence and application of the *Criminal Law Amendment Act 105 of 1997* as well as the sentencing guidelines (framework) of 2000. The *Criminal Law Amendment Act 105 of 1997* list certain serious crimes such as murder, robbery and rape and describes the actual situations in which mandatory sentences, including life imprisonment for murder and rape must be imposed, except where courts find compelling and substantial circumstances which justify a lesser sentence (Neser, 2001).

In its report on project 82: sentencing framework, the South African Law Commission (2000:40) further makes provision for the purpose of sentencing and sentencing principles. The purpose of sentencing is to punish convicted offenders for the offences of which they have been convicted by limiting their rights or imposing obligations on them in accordance with the requirements of *Criminal Law Amendment Act 105 of 1997*.

According to Terblanche (2003:859) this statement seems to demonstrate a clear stand in favour of retribution as a dominant sentencing consideration.

The sentencing principles are comprehensively summed up by Terblanche (2003:859) as originally outlined by the South African Law Commission (2000:859) as follows:

- The general principle is that the seriousness of the crime should determine the severity of the sentence. The seriousness of a particular offence has to be established in relation to other offences and not in a vacuum. Proportionality between all offences is therefore required.
- The seriousness of the offence committed is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed. Roughly speaking, this means taking into account the amount of harm involved [or potentially involved] in the commission of crime and the extent to which the offender can be blamed for this harm.
- Subject to the principle of proportionality sentences must seek to offer the optimal combination of restoring the rights of the victims of crime; protecting the society and giving the offender the opportunity to lead a crime free life in the future.
- The sentence proportionate to the seriousness of the offence may be adjusted 'to a moderate extent' by the presence or absence of previous convictions related to the current offence.

It is in light of the foregoing that the researcher is of the view that South Africa is in full support and apply the principles of retribution theory. The question could be asked as to where does penitentiary penology fit with regard to this theory? This question stems from the fact that correctional services does not impose sentences but rather implement decisions of the judicial process or carry out the sentences [punishment] of the court in terms of section 2 (a) of the *Correctional Services Act, Act 111 of 1998* as amended.

Terblanche's (2003:859) interpretation of the purpose of sentencing could be extended to include part of the purpose of sentencing that highlights the role of corrections with regard to retribution. Custodial or non-custodial sentences as a form of punishment imposed are

eventually the responsibility of correctional services and therefore, limiting the rights of the convicted persons or imposing obligations as part of the purpose of sentencing, should be seen as the role of corrections.

#### **2.4.2 Deterrence**

Evidentially, this theory is classified under the utilitarian philosophy by the likes of Burchell & Milton (2005:74) and JRank (2014). This classification is termed differently as *relative theory* by Snyman (1991:16) and as *preventive theory* by Samaha (2011:22). It was promoted and explained by Beccaria in the eighteenth centuries and Jeremy Bentham in the nineteenth centuries as noted by Matetoa (2012:58). It is based on a rational conception of human behaviour in which individuals freely choose between alternative courses of action to maximize pleasure and minimize pain (Marisluste, 2014).

Snyman (1991:20) contends that a distinction must be drawn between individual and general deterrence. Similarly, Cole (1989) in Cilliers et al (1993:45) distinguishes between special and public deterrence. This means that deterrence operates on an *individual [special]* and *general [public]* deterrence. Matetoa (2012:58) offers a comprehensive description of the two types of deterrence as follows: *Individual [special]* deterrence on the one hand focuses on an individual offender and emphasises that the punishment imposed should discourage the offender from committing further crimes while on the other hand, *general [public]* deterrence focuses on the community at large and points out that punishment that an individual offender receives should deter the community from committing such an offence.

Punishment imposed with an intention to deter an offender or the community from committing the same offence could either be custodial or non-custodial. Custodial punishment means incarceration and non-custodial punishment means serving of a sentence in the community under strict supervision. Although Marisluste's (2014) assertion that punishments have the greatest potential for deterring misconduct when they are severe, certain and swift in their application, the question that ought to be asked

is whether incarceration, as a form of punishment, can deter an offender from committing crime or whether incarceration perpetuates criminal behaviour?

It's a well-known fact that South Africa's prisons are infested with subculture phenomena [see Chapter 5 of this study]. This should be viewed with the seriousness it deserves as it has for a while been a challenge for the South African penal system. The practice of sexual malpractices, assaults, murder, drug abuse etc...in prisons is undeniable and therefore incarceration under these conditions will clearly not deter offenders from committing crimes but promote criminal behaviour while imprisoned. Apart from that, although there is no record of the rate of recidivism in South Africa, recidivism has been a cause for concern questioning the effectiveness of not only deterrence theory but also the rehabilitation programmes in prisons.

It is the researcher's view that although this theory is practiced in South Africa as a justification of punishment, it is not effective in the current penal system due to the alluded reasons articulated in the foregoing paragraph. Deterrence could have been effective before the dawn of democracy wherein everyone enjoys the basic human rights, including the right to life in South Africa.

The above is attested by Cilliers et al (1993:45) by stating that in the previous century cruel methods of punishment were used. Methods used to carryout death sentence included the gallows, crucifixion, fracturing limbs, piercing with a steel pin and strangulation. These served as an individual [special] deterrent for inmates to prevent them from committing further crimes. Usually these cruel methods of punishment were performed in public to serve as a general [public] deterrent for the community.

### **2.4.3 Incapacitation**

Incapacitation is sometimes referred by others as public protection & prevention. Execution, mutilation and transportation were used in the older law while capital punishment, imprisonment and certain types of physical mutilation are used in modern

law (Burchell & Milton, 2005:73). This submission is congruent to Matetoo's (2012:59) argument that the idea behind incapacitation is to restrict the individual's movement either temporarily or permanently and prohibit him/her from committing crime. Von Hirsch (1995:418) further extends the foregoing to include incapacitating an *allegedly dangerous* individual.

While countries such as Alabama, California, Florida, Kentucky, Texas, Washington etc...in the United States of America, Botswana etc...are in favour of the death penalty and other types of incapacitation, the most widely known and practiced type of incapacitation is incarceration. According to Marisluste (2014) several new forms of incapacitation have emerged. These include shock incarceration programmes [short term incarceration] of juvenile offenders to show them the pains of imprisonment and scare them into a future life of conformity, work release programmes and placement in halfway houses as well as intensive-supervision probation. Cornelius (2000) as cited by Matetoo (2012:60) also identifies *selective incapacitation* as the latest model of incapacitation. This model is designed to target criminal offenders thought to have greatest probability of repeat offending. Matetoo further refers to C-max in Pretoria as an example of *selective incapacitation*.

Like retribution and deterrence, incapacitation has its share of shortcomings. Critics of this theory argue that it merely shifts criminality from outside prisons to inside prisons and it is always temporary (Samaha, 2011:26). Rabie & Strauss (1985:24) further asserts that this theory is based on an unproven hypothesis that a person who committed a certain crime is dangerous and will probably repeat his/her criminal behaviour unless he/she is in some way restrained and that this theory does not provide a satisfactory answer to the question, how long must the offender be kept incapable of committing crimes?

Burchell & Milton (2005:74) offers what could be seen as the requirements to justify incapacitation and a response to the above shortcomings. These include:

- The likelihood of further crimes should be investigated before punishment is motivated by this theory.

- A balance between the protection of the society and the offender's welfare must be achieved.
- Punishment should seek more positively to reform or rehabilitate the offender and deter others from crime.

The dawn of democracy in South Africa saw the promulgation of the *Constitution* of 1996 containing the *Bill of Rights* [see a selected number of these Rights as discussed in chapter 3 of this study] which every citizen is entitled to including offenders. This *Constitution* made a way for the abolishment of the death sentence and other degrading and inhumane treatment of offenders. Congruent to this is the promulgation of *Correctional Services Act 111 of 1998* [as amended] of which chapter 3 makes provision for the treatment of offenders consistent with human dignity.

In support of this theory, section 276 (1) of the *Criminal Procedure Act , Act 51 of 1977* as amended is clear by stating that.....*the following sentences may be passed upon a person convicted of an offence, namely-*

- b) Imprisonment, including imprisonment for an indefinite period.....*
- h) Correctional supervision;*
- i) Imprisonment from which such a person may be placed under correctional supervision in the discretion of the commissioner or parole board (South Africa, 1977).*

The foregoing is a clear indication that South Africa is in favour of the incapacitation theory particularly with regard to incarceration despite persistent challenge of prison overcrowding [see chapter 5 of this study]. Furthermore, the Department of Correctional Services embarked on pilot projects of *halfway house* and *electronic monitoring* as incapacitation methods in 2012 and now claimed to be a success (Department of correctional Services, 2012). The Department of Correctional Services also makes provision for a programme called Social Reintegration. With this programme, the Department provides services focused on the offenders' preparation for release; their effective supervision after release on parole and correctional supervision; direct

sentences for correctional supervision; and the facilitation of their social reintegration into their communities (Department of Correctional Services, 2014).

#### **2.4.4 Rehabilitation**

Various scholars agree that rehabilitation theory focuses on an offender's personality and not the crime. For instance, Snyman (1991:22) submits that according to this theory, the purpose of punishment is to reform the offender as a person, so that he/she may become a normal law abiding member of the community once again. Cilliers et al (1993:45) share the same sentiment by submitting that this theory refers to attempts made to change positively the offender's disposition and future behavioural patterns. These attempts may be through programmes directed at tackling offending behaviour often delivered in prisons (Joyce, 2006:323).

According to Samaha (2011:27), rehabilitation theory is based on two assumptions. The first is determinism; that is, forces beyond the offenders' control cause them to commit crimes and therefore cannot be blamed for committing such crimes. Second, therapy by experts can change offenders [not just their behaviour] so that they won't want to commit any more crimes.

Rehabilitation theory like retribution, deterrence and incapacitation has been under stern criticism. Shwartz (1983) as quoted by Samaha (2011:27) points out that it has been criticised because firstly, it is based on false or at least unproven assumptions. Secondly, it makes no sense to brand everyone who violates the criminal law as sick and needing treatment and lastly, rehabilitation is regarded as inhumane because the cure justifies administering large doses of pain. Rabie & Strauss (1985:27) further criticises rehabilitation theory by submitting that what may be the best treatment with a view to the reformation of the offender, may be in conflict with the necessity to deter others from committing such a crime.

Notwithstanding the above criticism, it is evident that South Africa is in favour of rehabilitation as a punishment theory. It's a well-known fact that South Africa is one of the countries that is undoubtedly faced with the challenges of unemployment and poverty. Research has proved that there is a relationship between unemployment, poverty and crime and therefore, it is inevitable that South Africa's crime rate is influenced by unemployment and poverty. Evidential to this is the overcrowding of prisons in South Africa [see section 5.2.1 of this study].

Paragraph 4.2 of the *White Paper on Corrections, 2005* is succinct about rehabilitation as an objective of South African correctional system. Packer in Rabie & Strauss (1985:27) asserts that we can use prisons to educate the illiterate, to teach men a useful trade, and to accomplish similar benevolent purposes. The plain disheartening fact is that we have very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behaviour.

Despite this, the South African Department of Correctional Services makes provision for following programmes in the interest of rehabilitating offenders:

- Care: the purpose of this programme is to provide needs-based care programmes and services that are aimed at maintaining the personal wellbeing of incarcerated persons in the department's care
- Development: the purpose of this programme Development provides needs-based personal development programmes and services to all offenders. Personal Development of offenders involves programmes and services that are aimed at developing skills and social development competencies, including technical training, recreation, sports, education and the operation of prison farms and production workshops.

An earlier submission by Rabie and Strauss that there is very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behaviour is rather premature. The question that ought to be asked is with regard

to the sufficiency, if ever available and the effectiveness of such programmes aimed at rehabilitating offenders [see chapter 4 of this study].

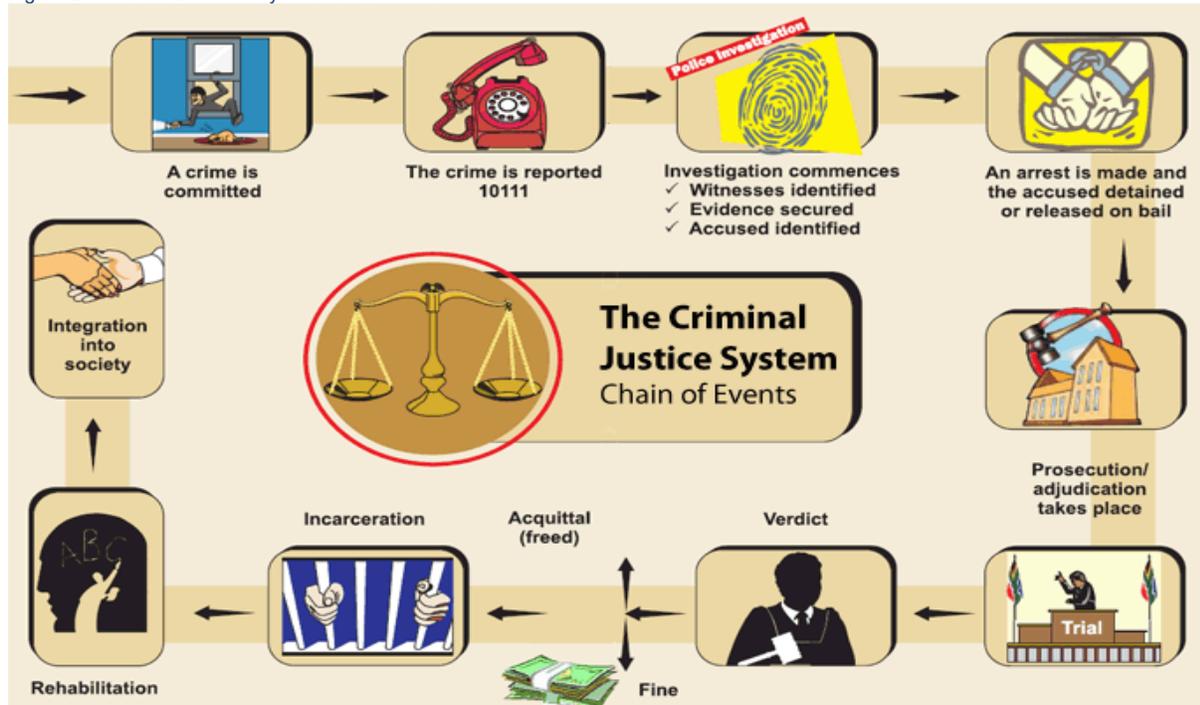
Although section 276 (1)(f) of *Criminal Procedure Act , Act 51 of 1977* as amended is succinct about *fine* as a form of punishment, the researcher finds it interesting that not much, if nothing at all, is said regarding a *fine* either as part of the above theories of punishment or as punishment theory on its own.

Just as Cavadino & Dignan (2006:3) acknowledge the fact that dimensions of punishment are increasingly vital and inherently problematic, it is equally important to understand that the above theories of punishment should not be seen as a process but rather understand them as an attempt to justify punishment. Their application within the South African context is dependent on the role of each component of the Criminal Justice System as discussed below.

## **2.5 THE POSITION OF CORRECTIONS IN THE CRIMINAL JUSTICE SYSTEM**

In South Africa and other countries such as the United States of America, Canada, India etc...there is a clear division of the responsibilities of the components of the Criminal Justice System which includes the police [law enforcement], prosecution, courts and correctional institution as identified by Cilliers et al (1993:50). Below figure 2.1 is demonstration of the Criminal Justice System process in South Africa.

Figure 2.1: Criminal Justice System Chain of events



Source: Department of Justice and Constitutional Development, 2014

According to Cilliers et al (1993:50), law enforcement involves detecting and arresting alleged offenders, prosecution involves charging and prosecuting alleged offenders, courts involves determining the accused's guilt or innocence and sentencing on conviction as well as correctional institutions which involves inflicting punishment and treatment with a view to change behavioural change.

According to Luyt, Jonker & Bruyns (2010:1) imprisonment is a form of punishment. Imprisonment is imposed by the courts in accordance with section 276 (1)(b)(h)(i) of the *Criminal Procedure Act , Act 51 of 1977* as mentioned earlier. This is only after they [courts] found the accused guilty of an offence as it can be seen from *supra* diagram 2.1. This is what Cilliers et al (1993:50) claim to be the responsibility of the correctional institutions.

Van Zyl Smit (1992:102) notes that the purpose of imprisonment arising from the functions of the Department of Correctional Services of South Africa is that they do not include the punishment of any category of prisoner. This statement is further attested by Coetzee &

Gericke (1997:15) by stating that, in the past and even until recently, prisons were focused on punishing prisoners but the new government has decided that prisons should concentrate on rehabilitation. This is what Van Zyl Smit (1992:104) refers to as the truth of the adage usually attributed to the English penal administrator Alexander Patterson that people are sent to prisons **as** punishment not **for** punishment. This is in line with the purpose of the correctional system of South Africa as stipulated in section 2(a) of the Correctional Services Act 111 of 1998 as amended.....*enforcing the sentences of the courts in a manner prescribed by this Act.*

The above is basically an overlap of section 2.2 of this study and furthermore, it is also worthy to mention that penology as a field of study has the right of existence as it tests positively against six requirements as outlined by Cilliers et al (1993:6). Naser (1980:39 – 44) as quoted by Cilliers et al (1993:7) further identify the following specialist field: *fundamental, judicial, community based and penitentiary penology*. These specialist fields are pertinent to this discourse particularly *penitentiary* penology as it addresses *inter alia* the following as outlined by Cilliers et al (1993:8):

- Policy in respect of institutional handling of prisoners;
- Aim, function and organisation of prison systems;
- Prison community and subculture, their artificiality and influence on aspects such as group formation, social codes, development of prison personality, violence and revolt, relationships between prisoners and prison officials, escapes and stress;
- Needs assessment and classification of prisoners;
- Prison programmes and the manner in which prisoners are treated;
- Safe custody;
- Rights, privileges, concessions and the role of punishment and discipline;

For the purpose of this study, the above can be reclassified and tied to this study as follows:

### **2.5.1 Legislative framework for the handling of prisoners**

The South African Department of Correctional Services has a social responsibility over prisoners which have been executed according to the legislation over the years. These include the *Correctional Services Act 111 of 1998* as amended, *White Paper on Corrections of 2005* as well as the *Correctional Services Regulations* as discussed throughout this study.

### **2.5.2 The function of the prison system**

The function of the prison system in relation to this study can be witnessed from this very same chapter and chapter 3 of this study. Chapter 3 effectively discusses issues of the treatment of prisoners which cannot be complete without any mention of the function of the prison system.

### **2.5.3 Prison phenomenon**

Challenges of the prison system as discussed in chapter 5 of this study are essentially prison phenomena. For example, prisons overcrowding, poor community participation, prison corruption and correctional centre subculture.

### **2.5.4 Treatment of prisoners**

The treatment of prisoners from a historical point of view is discussed below and the treatment of prisoners in the democratic dispensation discussed in chapter 4 of this study.

## **2.6. HISTORICAL PERSPECTIVE OF THE TREATMENT OF OFFENDERS IN SOUTH AFRICA AS A SOCIAL RESPONSIBILITY**

The South African Department of Correctional Services' sustainability and survival is dependent on the availability of financial resources amongst others. This resource is generated through tax collection from citizens who in turn expect a certain level of service from the department. A guiding framework in a form of the legislation is a vital tool if the department wants to meet the citizens' expectations thereby fulfilling its social responsibilities with regard to the prisoners, personnel, community and the environment.

Van Niekerk in Bruyns *et al* (2003:58) views social responsibility as the concern of the organisation with the welfare and protection of various interest groups, including the community at large. For the purposes of this study, social responsibility of the Department of Correctional Services is limited to prisoners as discussed below.

The next section deals with the historical perspective of the treatment of offenders as a social responsibility required by the legislation.

### **2.6.1. Prisons and Reformatories Act 13 of 1911**

A year after the inception of the Union of South Africa in 1910, legislation in a form of *Prisons and Reformatories Act 13 of 1911* was enacted. The aim was *to consolidate and amend the laws relating to convict prisons, gaols, reformatories, and industrial schools and for other purpose* (Prisons Department, 1911:549). This was after the amalgamation of the four British colonies which included Cape colony, Natal colony, Transvaal colony and Orange River colony (Wikipedia, 2014). For the record, it is important to note that the administration of Prisons was removed from under the Department of Justice in 1911 following the 1909 decision that it functions as a sub-department of justice. The two departments were again merged in 1930 and demerged again in 1937. The administration of the two departments was once more merged in 1940 (Cilliers *et al*, 1997:67).

According to Van Zyl Smit (1992:20), this Act was authored by Jacob de Villiers Roos who was appointed the Director of Prisons in 1908. Roos was according to Van Zyl Smit (1992:24) a proponent of the rehabilitation theory and a staunch believer in racial segregation in prisons.

It is during this period that saw an introduction of two systems in terms of the release of inmates from prison. The one system allowed for the remission of part of a sentence subject to good behaviour by inmates and the other is a system of probation that allowed for the early release of inmates, either directly into the community or through an interim period in a work colony or similar institution. There was much talk of rehabilitation but very little actually materialised. Punishment for transgressions within correctional centres was harsh and it included whippings, solitary confinement, dietary punishment and additional labour. Racial segregation within correctional centres was prescribed by legislation and it was vigorously enforced throughout the country (South Africa, 2005:25).

*Prisons and Reformatories Act 13 of 1911* is detailed and made provision for the following: Administration of Prisons Department and Appointment of Officers; Convict and Hospital Prisons; Local Gaols & Road Camps; Powers and Duties of Officers of Convict Prisons and Gaols, and Discipline of Convicts and Prisoners; Trial of Offences committed in Convict Prisons and Gaols; Sentences of imprisonment and carrying out of the same in Prisons and Gaols; Reformatories and the Treatment of Juvenile Adult Offenders; Government Industrial Schools; Inebriate and Retreats.

The above outline of this Act and its contents constantly refers to the treatment of 'convicts' and prisoners. It is however, not succinct as to the meaning of such treatment except an emphasis on the separation of convicts and prisoners along racial & gender lines as well as on hard labour as punishment as it can be witnessed from below abstracts of this Act. This is attested by Van Zyl Smit (1992:24) by stating that hard labour was an additional sentence to sentences of imprisonment. Van Zyl Smit (1984:146) regard this as one of the most significant features of the concrete system of punishment.

In terms of **section 83 (2)**, *In every inebriate reformatory males shall, as far as practicable, be kept separate and apart from females and white persons shall be kept separate from coloured persons.*

**Section 88 (1)(r)** *...as to the manner in which sentences of hard labour, spare diet, corporal punishment, solitary confinement, or any other sentences are to be carried out;*

**Section 91 (1)**, *in any convict prison or gaol –*

*(b) as far as possible, white and coloured convicts and prisoners shall be confined in separate parts thereof and in such a manner as to prevent white convicts or prisoners from being within view of coloured convicts or prisoners. Wherever possible coloured convicts or coloured prisoners of different races shall be separated;*

**(2)** *Any institution which may be established under this Act may be restricted to the detention or treatment therein of a specified race or class of prisoners.*

**Section 93 (1)** *Subject to the employment upon public works as far as possible, the Director may contract with any authorities, any divisional council, or municipal council or other public body, or with any person or body of persons, for the employment of convicts and prisoners who are under sentence of hard labour, upon such terms and conditions as may be agreed between such parties, and any place in respect of which such employment is contracted for shall be deemed to be a convict prison or gaol for the purpose of offences committed by convicts and prisoners, the officers in charge of them or by any other person.*

Although there is no sufficient historical theory about the use of labour and purpose thereof in prisons during this era and given the available theory about the preferential treatment of Europeans, it can be said that *Prisons and Reformatories Act 13 of 1911* was not only aimed at consolidating and amending the laws relating to convict prisons, gaols, reformatories, and industrial schools but also to punish convicts and inmates through hard labour with no payment, particularly non-Europeans. According to Venter (1959:9) this practice later changed and prisoners were paid nine pence per day.

Racial segregation and labour was in fact seen by Venter (1959:3) as an improvement of the general conditions in penal institutions. Venter (1959:4) further notes that despite improvement of the general conditions in penal institutions, punishment and not rehabilitation continued to be the order of the day for convicts. This is clearly not what Roos aspired to achieve, rehabilitation. It is the researcher's view that this was created by the fact that Roos' rehabilitative intent was directed at European and not non-European prisoners. Roos' efforts to advocate and implement rehabilitation policy were like an attempt to fetch a drop of water from the ocean because European prisoners were in small numbers thus making it difficult to notice Roos' efforts. According to Van Zyl Smit (1992:28) this meant that Roos' aspirations were not fulfilled and the *Prisons and Reformatories Act 13 of 1911* had not introduced a new era in prisons in South Africa.

According to Van Zyl Smit (1992:26) the question of general prison reform begun to re-emerge as a public issue in the early 1940's. Much of the pressure for reform during this era came from welfare organisations such as South African Prisoners' Aid Association and the Social Services Association. In 1943 the emergence of the reformist in the likes of Mrs. VML Ballinger and Dr. HM Simons with the support of prominent figures such as Judge FET Krause, A. Paton, J. Lewin and Rev. HP Junod saw the turn of events which in today's terminology is called '*turnaround strategy*'.

In their memorandum, Ballinger and Simons highlighted the need for prison reform in South Africa. To substantiate this, they identified two major reasons why the South African prison system had not undergone radical change years ago. Firstly, the greater portion [85%] of the prison population is non-European who ought not to be there at all because they are sent to gaol for offences under laws such as the *Native Taxation and Development Act*, the *Masters and Servants Act*, the *Pass Laws* and the *Native Urban Areas Act*. The researcher unreservedly agrees with this argument for two reasons. Firstly, it would be impossible to notice any reformation efforts if they were not directed to the majority population in prisons. Secondly, there had been official attempt to keep outside observers out of the prisons so that they should not be subject to scrutiny (Van Zyl Smit, 1992:27). Again this submission is very true and testimony to this is the current

geographical position of prisons in South Africa. They are located remotely from communities and this gave prison authorities a mentality that they are in their own world and can therefore do as they wish without being seen. This is surely not in the interest of reformation.

It is most probably in light of the foregoing that Ballinger and Simons made the following proposals as outlined by Van Zyl Smit (1992:27):

- Prison housing should be drastically improved. Communal cells in which all blacks were held should be abolished and replaced with single cells.
- A programme of housing reform had to be built on the decriminalisation of the laws controlling Africans. The Pass laws must go and imprisonment for municipal by-law offences must cease.
- The hiring of convicts to private employers should be abolished. This should be coupled to the abolition of the statutory offences aimed at non-Europeans which were the primary cause of overcrowding.
- There was a great need for intelligent rehabilitative work among **all** convicts and that can only be possible if the militarist character of prison management were abolished.
- Prisoners' aid and after care must be instituted for all prisoners and not merely for Europeans.

With these proposals, it became clear that Ballinger and Simons were anti most of the provisions of *Prisons and Reformatories Act 13 of 1911*. This effectively declared Roos' aspirations and work futile and rhetoric.

In response to the above, a judicial commission known as the Lansdown Commission on Penal and Prison Reform was appointed in 1945. This commission's report was published in 1947. Relevant excerpts of this report are discussed below.

### **2.6.2. Penal and Prison Reform Report, 1947**

According to Van Zyl Smit (1992:26) the immediate push for the appointment of the Penal and Prison Reform Judicial Commission came from the Penal Reform Committee of the South African Institute of Race Relations. This committee had the following objectives:

- To urge greater use by the courts of remedial and rehabilitative measures in place of imprisonment.
- To demand the abolition of racial discrimination resulting in unequal sentences.
- To suggest improvements in prison regulations and the abolition of spare diet, solitary confinement and corporal punishment.

This is the same committee that requested Ballinger and Simmons to compile a memorandum on the need for penal reform in South Africa which is why it is not surprising that their [Ballinger and Simmons] proposals are congruent to the objectives of this committee.

It was in 1945 when a judicial commission was appointed under the chairmanship of Judge Charles William Henry Lansdown. This commission was tasked to investigate and report on *inter alia* the following as deemed relevant to this study:

- The classification and proper control of prisons and other penal institutions and of the persons confined therein.
- The means available and used within prisons and other penal institutions for the maintenance of discipline, in particular corporal punishment, physical restraint, spare diet and solitary confinement.
- The development of suitable forms of education for all prisoners and their training in handicrafts and in agricultural and other pursuits with a view to their better adaptation to social life and how far and by what means such training maybe given outside prison.
- The remuneration of prisoners by means of gratuities or otherwise.
- The use of convict labour by private persons and authorities other than government (Lansdown, 1947:viii).

The Penal Reform Committee which later reconstituted and became the Penal Reform League reviewed the development of the Penal Reform since the publication of the report of the Lansdown Commission. The league recognised the improvements in the housing, recreational and educational facilities for the non-Europeans during the annual meeting on 9<sup>th</sup> June 1950 (Hoernlé, 1950:1). No wonder why the likes of father Huddleston, a radical priest, referred to the Lansdown commission report as one of the best South Africa ever had (Van Zyl Smit, 1992:29).

Van Zyl Smit (1992:28) outlines a comprehensive summation of the developments in respect of the Lansdown Commission's recommendations as follows:

- There was a consensus that housing conditions were unsatisfactory and therefore single cell system will be introduced gradually. (see also paragraphs 668 (8) and 831 of the commission's report).
- The commission agreed that short sentences of imprisonment as a result of the contravention of statutory laws caused overcrowding but warned that any argument or activity which tends to encourage disobedience of these laws was to be condemned (see paragraph 533 of the commission's report). There is no apparent recommendation to this effect because the commission contends that it is not its function to inquire into or to comment upon the necessity or desirability of any of the laws.
- The commission agreed with the reformers that prisoners should not be hired out effectively scrapping the 6d-a-day scheme. The commission also saw the importance of rehabilitation thus extending literacy as well as after-care to all blacks (see also paragraphs 908, 830 and 1092 of the commission's report).
- Furthermore, the commission was not in favour of the militarisation of the prison services (see also paragraphs 755(3) of the commission's report).

The foregoing development was undoubtedly a step in the right direction. It was in fact victory for the reformers because only one (abolishment of statutory laws perpetuating overcrowding exacerbated by the abolishment of the hiring of convicts) out of five proposals was not achieved. It couldn't have been expressed well than Van Zyl Smit

(1992:29) by stating that certainly reformers were enthusiastic. It is worthy to mention at this point that it is with the recommendation of this commission that the Administration of Prisons be separated from the Department of Justice and this recommendation was implemented in 1952 (Cilliers, 1997:67).

The hope for a legitimate prison system in South Africa and enthusiasm of the reformers was short-lived when the government of the United Party in 1947 (even before the commission presented its report) reinstated farm labour. This was done through a 9d-a-day scheme replacing a 6d-a-day scheme as also noted by Corry (1977:138). Despite a significant increase of pay in the farm labour scheme, in its final report, the commission was highly critical of this new scheme (Van Zyl Smit, 1992:29).

As if the United Party government reinstatement of farm labour was enough. In 1948 the Nationalist Party ascended to power and became the government of the day. It was during this time that this government was positively hostile to the general approach by the commission. There was rampant abuse which included whipping and prisoners forced to dance naked in front of others. All these received widespread publicity throughout the country and abroad. In response to this, the government was to tighten up the prison administration. This meant the reorganisation of the prison services on fully military lines by the government (Van Zyl Smit, 1992:29). This was a clear message sent to the commission that it does not have a say or whatsoever in the running of government and to cement that, a new legislation, *Prisons Act 8 of 1959*, was enacted (See *infra* section 2.6.3).

The researcher is astonished by the Penal Reform League convening a meeting on the 9<sup>th</sup> June 1950 to review the Lansdown Commission's report. This was two years after the Nationalist Party came into power and run the government. This effectively means that this meeting was convened with a full knowledge of the government's position about the commission's report. This turn of events can be viewed as a waste of time because clearly, nothing materialised from the Lansdown Commission.

### **2.6.3. Prisons Act, Act 8 of 1959**

This Act was enacted in March 1959 in order to consolidate, amend and repeal the laws relating to prisons as listed in the schedule of this Act (Prisons Department, 1956:62). This Act further makes provision for the following: Establishment, Administration and Functions of the Department, and Appointment, Powers, Discipline and removal of Personnel; Establishment and Administration of Prisons; Duties of Members of the Prisons Services in Relation to the Reception of Prisoners and the carrying out of Sentences in Prisons; Penalties for Certain Specific Offences and Rewards for the Recapture of Escaped prisoners; Trial of Offences under this Act; Functions and duties of prisons Boards and Release of Prisoners; Removal, Training and Treatment of Prisoners; Detention and Treatment of Civil Debtors and Certain other Classes of prisoners; General Provisions.

According to paragraph 2.4.1 of the *White Paper on Corrections of 2005*, this Act reflected little transformation of the prison system. Although this White Paper does not specify the transformation it refers to, one can rely on Van Zyl Smit's articulation in this regard. Van Zyl Smit (1992:31 – 32) states the following about this Act. This can be construed to mean transformation the White Paper is referring to:

- This Act ended a 9d-a-day labour scheme and replaced it with a system of parole. Although the parole system was internally accepted, it meant something different in the Union then. In other words, African prisoners were in real terms in a very similar position to that in which they had been under a 6d-a-day scheme.
- This Act defined the functions of the Prisons Service in section 2(2) from which the purpose of imprisonment could be clearly deduced.
- This Act did reduce the age limit and maximum number of strokes.

In addition to the above, paragraph 2.4.1 of the *White Paper on Corrections of 2005* states that this Act made provision for the following:

- Continued and extended racial segregation within prisons in line with the national policy of differential treatment signalled in by apartheid.

- Entrenched the military character of the prisons' management and made provision for commissioned and non-commissioned officers.
- Closed the prison system off from inspection by outsiders by prohibiting reporting and publishing of photographs.

Despite the notable difference in the provisions of this Act from *Prisons and Reformatories Act 13 of 1911*, such as the functions of the Prison Services which the researcher believes was as a result of an attempt to comply with the United Nations Minimum Standard Rules and a reduction of the age limit and maximum number of strokes, this Act sustained and formalised the position of Roos' philosophy and subsequently the Nationalist Party government by way of introducing the apartheid policies and effectively ignoring the United Nations Standard Minimum Rules. This is further attested by Van Heerden (1996) as quoted by the Civil Society Prison Reform Initiative (2003:5) that the treatment of prisoners reflected the separatist ideology of the apartheid regime. Black and white prisoners were separated from one another and received different treatment.

Evident to the foregoing is the provision of section 23 (as stated below) of the *Prisons Act 8 of 1959* and section 91 of the *Prisons and Reformatories Act 13 of 1911* (see also supra section 2.6.1).

23. (1) *In every prison-*

- (a) *men and women prisoners shall be detained in separate parts thereof and in such manner, as far as possible, as to prevent those of one sex from seeing, conversing or holding any communication with those of the other sex;*
  - (b) *as far as possible, white and non-white prisoners shall be detained in separate parts thereof and in such manner as to prevent white and non-white prisoners from being within view of each other; and*
  - (c) *wherever practicable, non-white prisoners of different races shall be separated.*
- (2) *Any prison or any portion thereof may be restricted to the detention, training or treatment therein of a specified race or class of prisoners.*

It is rather disappointing to note that the same Nationalist Party government recklessly ignored the non-treaty standards of an international organisation, the United Nations, which South Africa was not just a member but a founding member before being

suspended in 1974. This means the *Prisons Act* 8 of 1959 was promulgated while South Africa was a member state to the United Nations. Instead, this government decided to use the propaganda tactics as factually claimed by Van Zyl Smit (1992:32). This transpired when Mr. Verster, the then Director of Prisons produced a booklet in 1958 in which he claimed the following:

The prisons system of the Union of South Africa is conducted in conformity with the basic principle of non-discrimination on grounds of race, colour, sex, language, religion, political outlook, national or social religion, birth or other status. All laws, regulations, etc, appertaining to penal institutions and the manner in which prisoners confined therein are to be treated, refer specifically to 'prisoners' in the widest sense of that word without any discrimination whatsoever...

This was a deliberate act of misleading the global community about the status quo in the Union of South Africa because there were manifest examples of discriminatory provisions in the regulations and in the practices of the 1950s as correctly put by Van Zyl Smit (1992:32).

#### **2.6.4. South African Penal system post 1959**

In terms of paragraph 2.4.2 of the *White Paper on Corrections of South Africa* of 2005, prisons were not used to detain prisoners on a large scale as a means of controlling political unrest prior 1960. This subsequently changed and the incarceration of political detainees and sentenced political prisoners became a significant feature of prison reality. This led to an increasing attack on the legitimacy of the prison system.

According to Van Zyl Smit (1992:33 - 34) this attack from detainees and prisoners made a considerable impact as they were questioning reasons for their incarceration. This sort of denunciation increased in 1964 when the African National Congress (ANC) issued a pamphlet entitled *Brute Force: Treatment of Prisoners in South African Gaols*. Central to this pamphlet was an attack on the prison authorities about the use of prisoners on white farms and the general conditions of imprisonment of not only political prisoners but also the non-political prisoners. To substantiate this claim, this pamphlet included a note 'smuggled out' by Nelson Mandela about the conditions at Pretoria Central Prison. In response to this, the South African government flatly denied that it held political prisoners and claimed that all prisoners were treated equally as per Mr. Verster's claim in his booklet

published in 1958. It was during this time (1964) that prisoners detained for the purposes of interrogation were denied access to reading and writing material as attested by Van Zyl Smit (1998:402).

It is interesting to notice that the South African government chose to blatantly ignore the Lansdowne Commission's recommendations and the United Nations' Standard Minimum Rules for the treatment of Prisoners. Instead, it continuously attempted to hide with a stick of matches and play some 'hide & seek' games. Notwithstanding that, persistence and dedication of what Van Zyl Smit calls the new generation of political prisoners eventually paid off when political prisoners' account of prison conditions received international attention through the South African newspapers. This was when international organisations such as the Red Cross, the United Nations and Amnesty International turned their attention to the prisoners' plight in South Africa. What did the then government do? Simply shying away from reality and viewed an intervention by the international groups as meddling in South Africa's internal affairs (Van Zyl Smit, 1992:34).

In responding to that, the government amended section 44 of the *Prisons Act of 1959* in 1965 to make it an offence not only to publish false information about prisons or prisoners but also in terms of section 12 to place an onus of proving that reasonable steps were taken to verify such information upon the accused (Van Zyl Smit, 1998:405). According to Van Zyl Smit (1992:35), political prisoners expressed their incomprehension of decisions not to allow prisoners to study law or have access to news or current events through legal interventions.

The response by the government at the time was to grant even wider powers to prison authorities. For instance, with these powers, prison authorities amended the regulation that a library...shall be at the disposal of **all** prisoners detained in a particular prison and the regulation which stated that a library...may in the discretion of the commissioner of prisons be placed at the disposal of **all** the prisoners detained in such prison (Van Zyl Smit, 1992:36).

These regulations although succinct with the inclusion of 'all' prisoners, they meant something different as this was all propaganda and the discretion by the commissioner could mean an abandonment of rule 40 of the United Nations Standard Minimum Rules for the Treatment of Prisoners as correctly put by Van Zyl Smit (1992:36)

Subsequent to the amendment of the *Prisons Act*, the government issued a report through the Department of Foreign Affairs in 1969, titled: *The Prison Administration in South Africa*. In this report, the government purported to advocate the conditions of prisons and further made allegations of an attempt to discredit the South African prison system. Such allegations can be seen from the excerpt of this report quoted by Matetoea (2012:99):

*During recent years the South African prison system has been subjected to numerous attacks including sweeping allegations of ill-treatment of prisoners especially those who are referred to as political prisoners. Some of these accusations originated in South Africa in the form of newspaper articles based on statements made by ex-prisoners and warders. In many instances parts of these articles were published out of context in newspapers abroad and were also seized upon by individuals, groups and organisations whose purpose is to malign South Africa. In certain cases where false and inaccurate particulars had been published in South Africa by persons knowing them to be false or without taking reasonable steps to verify them, legal proceedings were instituted. One such case was that of an ex-head warder, J.A. Theron, who in an affidavit sworn to before an attorney, made various allegations of maltreatment and brutality meted out to prisoners. Needless to say, the facts and much of the evidence have emerged from such cases such as this is seldom mentioned by South African detractors. This is not surprising in view of the general political vendetta which is being waged against South Africa by certain organisations and groups inimical to the present order in South Africa and which is carried on in the United Nations and some of its organs.*

Newspaper coverage of prison conditions ceased in 1970 as a result of the major newspaper conviction in court for allegedly not complying with section 44 and 12 of the *Prisons Act of 1959* in the case of *S v. South African Associated Newspapers*. Despite this, newspapers continued to hint that something was seriously wrong in South African prisons but could not report on it (Van Zyl Smit, 1998:407).

In 1979, the continued use of the courts by political prisoners saw the reformist story of change in the prison law emanating from one of the land-mark cases, namely: *Goldberg v. Minister of Prisons 1979 (1) SA 14 (A)*. It was in this case that Judge Corbett gave a powerful dissenting judgement in which he argued for the recognition of the fundamental rights of all prisoners. This judgement also elicited a massive academic comment which signified the importance of the rights of prisoners (Van Zyl Smit, 1992:36).

The foregoing was after the publication of the Viljoen Commission report in 1976 which according to Van Zyl Smit (1992:37) also had an impact on the evolution of prison law. Over and above the abolishment of the two indeterminate sentences, namely imprisonment for corrective training and imprisonment for the prevention of crime as per the Viljoen's Commission proposal, parole board was introduced.

These are in the view of the researcher the only distinct aspects of the Viljoen's commission report particularly with regard to the treatment of prisoners in South Africa. This is so because a perusal of this report reflects mostly the substitution, amendment and deletion of certain sections of the *Prisons Act of 1959* and the *Criminal Procedure Act of 1955*. Furthermore, this report did not really make a difference as the then *status quo* in terms of the treatment of prisoners was maintained. Evidence to this is the following:

- In terms of paragraph 2.111 the commission recommended that influx control and curfew laws if not decriminalised, should be depenalised so as to prevent large scales of arrests and trials of offenders under these laws.

Two questions ought to be asked. Firstly, how genuine is this recommendation given the fact that the Viljoen Commission of Enquiry into Policy Relating to the Protection of Industries published in 1958 reported that the system of influx control reduces the scope of employers to select suitable employees? (Horrel, "n.d":47). Secondly, how did this commission help the South African penal system with the high prison population thereby ameliorating the conditions of imprisonment?

- Paragraphs 2.106 – 2.110 of this report is testimony to the fact that this commission did not do much with regard to a continued treatment of prisoners along racial lines except acknowledging the recommendations by academics and legal philosophers that the *Immorality Act 23 of 1957* be repealed. This did not see the light of day because this was a reflection of the long standing policy of consecutive Government of South Africa.
- Sub-paragraph 6 and 12 under paragraph 5.1.6.15 of this report bears testimony to a continued forced prison labour and corporal punishment respectively (Viljoen, 1976).

Attack on the legitimacy of the prison system of South Africa did not cease as attested by Van Zyl Smit (1992:38) that these attacks continued into the early 1980s. For the record, it is worth mentioning that the Department of Prisons once again became part of the Department of Justice in 1980. Not only the pass laws and prison labour but also the prison conditions remained the targets for critics of the government and of the prison system in particular. A prison litigation (although lost on the merits) involving Mr. N. Mandela in 1983 as noted by Van Zyl Smit (1998:403) is but just one example of these attacks.

According to paragraph 2.5.1 of the *White Paper on Corrections of South Africa of 2005*, there was yet another report by a Judicial Inquiry into the Structure and Functioning of the Courts in 1984. This report reflected exactly the same view with the Viljoen report that incarceration of prisoners as a result of influx control measures was a major cause of the overcrowding in prisons but this one with condemnation of the influx control measures. As a result of this, the pass laws were finally abolished in 1986 (Van Zyl Smit, 1992:39).

It was in 1984 when the Prisons Service entered into an agreement with the Newspaper Press Union which represented the major South African newspapers. This agreement was of doubtful legality, for it purported to ensure that the newspapers could publish unedited accounts of prison life and escape prosecution on condition that they first submitted them to the prison authorities and also gave equal prominence to their response. This arrangement was effective and accounts of prison conditions, including serious allegations of maltreatment, began to appear in South African newspapers, accompanied routinely by denials from the authorities (Van Zyl Smit, 1998:403).

In June 1985, A Member of Parliament, Helen Suzman, who was also a campaigner about the prison conditions, read out an account of conditions in one prison to the South African parliament. In addition to that, the Amnesty International also obtained information about the conditions in other prisons which appeared to be in clear contravention to the Rights of the convicted and unconvicted prisoners under the South African prison regulations and United Nations Standard Minimum Rules for the Treatment of Prisoners (Amnesty

International, 1986:7.18 – 7.19). A month later on 21<sup>st</sup> July, a State of Emergency was declared.

The declaration of State of Emergency was more like the state response to Helen Suzman and the Amnesty International because according to Van Zyl Smit (1992:39) this State of Emergency also brought with it extensive further restrictions on news reporting including news in prisons. This was seen by the government attackers from within and outside South Africa as recognition of failure to achieve legitimacy by the government and the State of Emergency was lifted in 1990 after some interventions such as the refusal of the International Red Cross to visit sentenced political prisoners because it was denied access to emergency detainees and other prisoners as well as litigations.

In terms of paragraph 2.5.3 of the *White Paper on Corrections of 2005* there were important amendments made to prison legislation two years after the lifting of the State of Emergency in 1988. For instance, references to race were all excluded and racial segregation of the prison population was almost totally abolished. Although patterns of labour use inside prisons were persistent, two positive developments unfolded during the year 1988. Firstly, a submission by Corry (1977:157) as quoted by Van Zyl Smit (1998:406) that outstations were closed down. Secondly, Van Zyl, 1996 as quoted by Van Zyl Smit (1998:406) submits that the practice of hiring out short-term prisoners to farmers was discontinued.

### **2.6.5. The 1990s Prison Developments in South Africa**

As correctly put by Van Zyl Smit (1998:407), the long battle for the recognition of prisoners' rights and responses of an increasingly sophisticated prison management have been played out in very different circumstances in the 1990s. Simply put, the 1990s saw a middle ground found between the attackers of government, human rights activists and the government. This was a landmark achievement that saw the recognition of prisoners' rights.

The then President of South Africa in February 2, 1990 announced the unbanning of political parties and significant to this announcement was the release of political prisoners and the reconsideration of the death penalty (Cape Times as quoted by Van Zyl Smit, 1998:407). This according to Van Zyl Smit (1992:40) had a direct impact on prison law and practice in South Africa. This impact brought about the following in the South African penal system:

- The amendment of the *Criminal Procedure Act* in 1990 to restrict the imposition of the death penalty;
- The lifting of the *State of Emergency* in 1990 aimed at reducing the number of unsentenced political detainees in prisons;
- The amendments made to the *Prisons Act of 1959* in 1990 effectively abolishing apartheid in the prison system particularly racial discrimination;
- The amendments to the prison *Regulations* effectively abolishing the remaining overtly racially discriminatory measures and;
- The modification of the *Internal Security Act* in 1991 aimed at reducing the number of unsentenced political detainees in prisons.

Prior to the foregoing, the top management of prisons decided that prisons services belongs to the security field rather than to the social field of the government sector in 1988. In April 1990, the Minister of Justice and Prisons announced that the creation of alternative community-based sentence options should be researched and developed. In November 1990 the mission statement and strategies were approved by government following a strategic planning session which produced such mission statement. This mission statement reads: '*To promote community order and security by the control over, detention and dealing with prisoners and persons under correctional supervision in the most cost-effective and least restrictive manner*' (Cilliers et al, 1993:73 – 74).

Once again Prison Services was separated from the Department of Justice and renamed the Department of Correctional Services in 1990 (Van Zyl Smit, 1992:41) giving effect to the new mission statement of the department.

An inclusion of correctional supervision in the new mission statement of the department which meant supervision of offenders within the community marked a historical and positive change in the department. According to Dissel & Ellis (2002) this change marked the beginning of prison transition period. It is during this period that the Department of Correctional Services officially committed to a policy that aims to make prisons more humane places than they were under apartheid, with a view to rehabilitating offenders and reintegrating them back into society. Witskrif (1991:9) as quoted by Cilliers et al (1993:74) see this as an economical and justifiable penological system.

To give effect to the foregoing i.e. the imposition and execution of correctional supervision, the *Criminal Procedure Act of 1977* and *Prisons Act of 1959* were again amended in 1991 (Cilliers et al, 1993:74). Amongst other amendments, Van Zyl Smit (1992:41) notes the change of the name of the latter Act to *Correctional Services Act of 1959* which saw the removal of many of the restrictions on the use of prison labour. Van Zyl Smit (1998:408) further notes that words like 'prisons' were replaced with 'Correctional Centres' including the name of the department itself as referred to above. In addition to the foregoing observation of Van Zyl Smit, words such as 'prisoners' were replaced with 'offenders' or 'inmates' (South Africa, 2008). Although this in in line with international standard, section 35 (2) the *Constitution of the Republic of 1996* still refers to 'prisoners'.

Late 1991 saw an announcement of the first constitutional talks to discuss amongst others a united South Africa sharing a common citizenship, the healing of the division of the past, the creation of an environment helpful to peaceful constitutional change by eliminating violence and promoting free political participation, discussion and debate. This meeting was called the Convention for a Democratic South Africa (CODESA I). Subsequently, CODESA II started to enable a continuation of the negotiations but ended after the withdrawal of the African National Congress as a result of Boipatong massacre and later Bisho massacre in 1992 but participated after realising the need for its participation to find political settlement later that year. An agreement on many issues was reached, and an *Interim Constitution* for South Africa was initiated on 18 November 1993. This *Interim Constitution* was mainly intended to provide a historic bridge between the past and the

future and facilitate the continued governance of South Africa and was duly endorsed by the last apartheid Parliament and became the *Constitution of the Republic of South Africa*, Act 200 of 1993 (South African History Online, 2014).

What was significant with this *Interim Constitution* is that it made provision for civil and political rights as it contained the Bill of Rights which guarantees the rights protected by international human rights conventions. This Constitution provided that everyone shall enjoy all universally accepted fundamental rights, freedoms and liberties. It is important to note that this Constitution is not selective in terms of who should enjoy fundamental rights but very succinct in including all people irrespective of their colour, race or origin. This means prisoners are also entitled to these rights. So, the 1993 Interim Constitution brought about the human rights culture into the correctional system of South Africa. This meant that the treatment of prisoners will be different. Different in that, prisoners will be entitled to the fundamental human rights unlike in the apartheid past (please see Chapter 3 of this study).

In 1994 South Africa observed its first general elections. According to the Institute for Security Studies (1998) as quoted by Singh (2005:30) these elections brought the African National Congress' commitment to transform South African society at all levels. This transformation would be based on non-racialism and non-sexism principles and also focusing on human rights, rehabilitation of prisoners and demilitarisation of correctional services. It is the researcher's view that the abolition of the death penalty in 1995 was the results of an acknowledgement and recognition of human rights, section 11 of the *Constitution of the Republic of South Africa* 1996 - the *right to life* in particular.

According to Singh (2005:31), the transformation of the department in the first five years of the new democracy entailed *inter alia* the following:

- The demilitarisation of the correctional system in order to enhance the department's rehabilitation responsibilities on 1 April 1996;
- Progressive efforts to align itself with correctional practices and processes that have proved to be effective in the international correctional arena;

- The introduction of independent mechanisms to scrutinize and investigate the Department of Correctional Services' activities, such as the appointment of an Inspecting Judge.

The demilitarisation of the correctional services meant the removal of all visible signs of militarism, ranks, titles and military hierarchy (Dissel & Kollapen, 2002). To date, correctional officials no longer salute in a militaristic manner and ranks are no longer used in the department. Furthermore, the Department adopted the titles [such as director, deputy director, assistant director etc...] used in the entire public service although partially because the department still refers to the accounting officer (Director General) and the Deputy Director General as the Commissioner and Deputy Commissioner respectively.

According to Singh (2005:33), a milestone in the history of the Department was the promulgation of new legislation in the form of the *Correctional Services Act 111 of 1998* which signified a total departure from the 1959 Act. It is important to note that this Act's focus was primarily on the realignment of the Departmental activities with the international standard and the *Constitution of the Republic of South Africa of 1996* as it can be seen in the below discussion.

#### **2.6.6. The Correctional Services Act 111 of 1998**

The *Correctional Services Act 111 of 1998* was published on 27 November 1998 with the following objectives:

- To change the law governing the correctional system and giving effect to the Bill of Rights in the *Constitution of the Republic of South Africa* of 1996, and in particular its provisions with regard to prisoners;
- Recognising international principles on correctional matters;
- Regulating the release of prisoners and the system of community corrections; in general, the activities of the Department of Correctional Services;
- Providing for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services,

In addition to the above objectives of this Act, Singh (2005:33) also submits that the Department of Correctional Services outlined the following important features of this Act in its 1999 annual report:

- The entrenchment of fundamental rights of prisoners;
- Special emphasis on the rights of women and children;
- A new disciplinary system for prisoners;
- Various safeguards regarding the use of segregation and force;
- A framework for treatment, development and support services;
- A refined community-involved release policy;
- Extensive external monitoring mechanisms; and
- Provision for public and private sector partnerships in terms of the building and operating of prisons.

As it can be witnessed from the foregoing, the introduction of this Act marked a complete repeal of the *Correctional Services Act 8 of 1959* and new direction for the Department. What is symbolic about this new Act amongst others is firstly, the recognition of the rights of offenders. This is a prescription and the guidelines with regard to the treatment of prisoners. It is also influenced by the international instruments such as the United Nations Standard Minimum Rules, Basic Principles for the Treatment of Prisoners etc...

Chapter 3 [Custody of all offenders of all prisoners under conditions of human dignity] of this Act addresses all issues of basic human rights as enshrined in the *Constitution of the Republic of South Africa* of 1996 [see Chapter 3 of this study]. Chapter three of this Act comprises the General Requirements, Discipline and Security in respect of the treatment of prisoners. Secondly, the above provision sounds convincing and good in paper but given the history of the South African penal system, a question should be asked as to what guarantee does the penal society has that the treatment of prisoners will be guided by the above provisions of the law? Chapters nine and ten of this Act make provision for the establishment of the Judicial Inspectorate and appointment of the Independent Prison Visitors as the monitoring mechanisms in respect of the treatment of prisoners [see chapter 4 of this study].

It is the researcher's observation that the two symbolic features of this Act amongst others are central and important in the treatment of prisoners.

A decade after this Act was promulgated, *Correctional Services Amendment Act 25 of 2008* was promulgated to amend the *Correctional Services Act, 1998*, so as to insert, substitute, amend or delete certain definitions; to make further provision for the manner in which inmates are detained and the manner in which correctional centres are managed; to authorise the national council to determine, under certain conditions, the period before an offender may be placed on parole; to make further provision for matters relating to correctional supervision and parole boards and the judicial inspectorate; to provide for compliance management and monitoring of relevant prescriptions, a departmental investigation unit and a unit dealing with the institution of disciplinary procedures; to further regulate matters relating to officials of the department of correctional services and the powers of the minister to make regulations; and to provide for matters connected therewith.

## **2.7. CONCLUSION**

The punishment of those who offended the society is a historical phenomenon and has been practiced in many countries across the globe. It is of the utmost importance that it is done within the prescript of the existing laws which are legitimate to the society governing it. The theories of punishment such as retribution, deterrence, incapacitation and rehabilitation should be seen to serve not only a certain purpose but also to be proportionate in order for them to be justified. Prisons in South Africa were used to perpetuate the apartheid evils, enforcing laws such as the *Native Taxation and Development Act*, the *Masters and Servants Act*, the *Pass Laws* and the *Native Urban Areas Act*. This led to unnecessary massive prison overcrowding and later forced prison labour in an attempt to reduce overcrowding in prisons. Punishment meted out to prisoners in South Africa, particularly the so called non-Europeans was serving little if not

no purpose at all. The penal system of South Africa was unjust and cruel as racism was unshakably deep rooted in this system. The kind of treatment of prisoners in the apartheid past can be traced back in 1911 when *Prisons and Reformatories Act 13 of 1911* repealed by the *Prisons Act 8 of 1959* were promulgated. The current democratic dispensation saw a significant change in the South African penal law and practice. This was after the promulgation of the *Interim Constitution of 1993* and subsequently the *Constitution of the Republic of South Africa of 1996* paving the way for the promulgation of the *Correctional Services Act 111 of 1998* as amended by *Correctional Services Amendment Act 25 of 2008*. In the next chapter, the treatment of prisoners in the democratic dispensation of South Africa is discussed in the context of the *Constitution of the Republic of South Africa of 1996*.

## **CHAPTER 3: LEGISLATIVE AND POLICY FRAMEWORK FOR THE TREATMENT OF PRISONERS IN THE DEMOCRATIC SOUTH AFRICA**

### **3.1 INTRODUCTION**

On the basis of a historical penological perspective of the treatment of offenders, it is imperative to now turn the focus on the treatment of prisoners in the current dispensation in South Africa. This chapter extensively discusses the rights of prisoners enshrined in Chapter two of the *Constitution of the Republic of South Africa of 1996* as a framework for the treatment of prisoners in South African penal system and examines the policy position of the Department of Correctional Services in the democratic dispensation.

There are about twenty-seven rights outlined in Chapter two of the *Constitution of the Republic of South Africa of 1996*. Not all of these rights are discussed in this chapter but only those deemed relevant to this study, the treatment of prisoners. Over and above that, reference will be made to the relationship of these rights and the applicable international law. Before that is done, it is important to articulate on a background of the international law.

### **3.2 INTERNATIONAL LAW**

International law is defined by Stratton (2009:1) as the universal system of rules and principles concerning the relations between sovereign states, and relations between states and international organisations such as the United Nations. These rules and principles of international law are increasingly important to the functioning of the interdependent world and include areas such as human rights amongst others. According to Schreuer (2000:2), this area of human rights is new and emerged in the 20<sup>th</sup> centuries and deals with the treatment of individuals and groups, international criminal law and

international economic law. Stratton (2009:1) further states that the rules and principles of international laws regulate and shape behaviour of the states, prevent violations by the states, and provide remedies for violations when they occur.

It can be deduced from the foregoing that human rights, whether old or new, as one of the rules and principles of international law is an important tool that guides the treatment of individuals and groups including prisoners. This means that every member state operations, particularly with regard to the treatment of prisoners, should be centred on the respect and promotion of human rights. It is also important to note that international law draws a distinction between these rights. According to Ball (2011), this distinction is important and has a significant impact upon how these rights are interpreted and applied. This distinction is based on whether a right is absolute or non-absolute and whether a right is derogable or non-derogable. The latter is informed by article 4.1 of the *International Covenant on Civil and Political Rights* as it states that:

*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin* (United Nations, 1966:174).

Section 37 (5)(C) of the *Constitution of the Republic of South Africa* of 1996 also makes reference to this distinction. It is therefore important to make reference to this distinction in the discussion of these rights.

It must be remembered that South Africa was suspended from the United Nations - the custodian of the international law - activities in 1974 due to its apartheid policies and 20 years later, the suspension was lifted in 1994 after the general elections. This means that South Africa is currently a fully-fledged member state of the United Nations and therefore bound by the international law as earlier alluded to by Stratton.

The Department of Correctional Services in South Africa, the custodian of the penal system, is subsequently by implication also bound by international laws. According to the

Department of Correctional Services' Strategic Plan 2012/13 – 2016/17 (2012:8), the *Constitution of the Republic of South Africa of 1996* compels the department to comply with certain sections in terms of the treatment of offenders. These sections are discussed in details in section 3.3.1 to 3.3.8 below.

It is furthermore important to note that international laws are not passed through a normal legislative process as there is no international parliament to pass laws and therefore, international law emanates from various sources such as treaties or conventions amongst others. Some of these instruments including those of the African Union will be referred to in this study to demonstrate the relationship between them and the relevant laws in South Africa. Relevant to this study are listed and embedded below in table 3.1 for ease reference:

Table 3.1: International instruments

YEAR	INSTRUMENT TITLE	ELECTRONICALLY ACCESSABLE INSTRUMENT
1948	United Nations Universal Declaration of Human Rights, 1948.	 Universal Declaration of Human Rights.pdf
1955	United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955.	 UN Standard Minimum Rules.pdf
1966	United Nations International Covenant on Civil and Political Rights.	 International Covenant on Civil & P
1966	United Nations International Covenant on Economic, Social and Cultural Rights, 1966.	 ICESCR.pdf

<b>1975</b>	Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	 Protection of All Persons from Being Si
<b>1981</b>	African Charter on Human Rights and Peoples rights	 African Charter on Human & Peoples Rigl
<b>1988</b>	United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, 1988.	 Body_of_Principles_f or_the_Protection_of
<b>1990</b>	United Nations Basic Principles for the Treatment of Prisoners, 1990.	 Basic_Principles_for_the_Treatment_of_Pr
<b>1990</b>	Convention on the Rights of the Child, 1990.	 UN Convention on the Rights of the chil
<b>1990</b>	United Nations Convention on the Rights of the Child, 1990.	 UN Convention on the Rights of the chil
<b>1990</b>	United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990.	 United Nations Rules for the Protection of .
<b>1996</b>	The African Union Kampala declaration on prison conditions in Africa, 1996.	 kampala-declaration 1996.pdf
<b>1999</b>	African Charter on the Rights and Welfare of the Child, 1999.	 African_Charter_on_the_Rights_and_Wlef

### 3.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Two years after the dawn of democracy in South Africa, the *Constitution of the Republic of South Africa of 1996* was mistakenly promulgated as an Act of parliament - Act 108 of 1996 - but later corrected to become the supreme law of the Republic (Van Heerden, 2007:40). This is subsequent to the promulgation of an *interim Constitution of 1993* as alluded to in supra section 2.6.5 of this study.

Chapter two of the *Constitution of the Republic of South Africa* of 1996 makes provision for the Bill of Rights explained by section 7 below.

7. (1) *This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
- (2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
- (3) *The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*

It is the researcher's view that in the main South African Constitution is developed in conjunction with the international law referred to in section 3.2 of this study. One can simply say that international laws naturally supersedes domestic laws. This view is informed by a thorough scrutiny of sources of international laws identified throughout this study and below section 231(5) of the *Constitution of the Republic of South Africa* of 1996.

*231. (5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.*

The above section 7 of the Constitution is clear in terms of the application of the Bill of Rights. The Bill of Rights applies to ***all people in our country***. This means prisoners are also entitled to the full enjoyment of the Bill of Rights, which are of course subject to limitations in terms of section 36 of the *Constitution of the Republic of South Africa of 1996* **unless** if such rights are declared to be Absolute Right. Ball (2011:1) refers to such rights as rights that cannot be limited in any way, at any time, for any reason. This is attested by O'Brien *et al* (1981) as quoted by Luyt, Jonker & Bruyns (2010:165) stating

that fundamental rights follow the inmate through the walls which incarcerate him, but always with appropriate limitations. This is referred to by others as the *residuum principle*. This is also confirmed by judgements in most court cases particularly those concerning the treatment of inmates. For instance, in the case of *S v Makwanyane and Another 1995 (6) BCLR 665 (KH)* the court stated the following:

Prisoners retain those absolute natural rights relating to personality, to which every man is entitled. Their freedom had been greatly impaired by the legal process of imprisonment but they are entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further legal encroachment upon it. Prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.

Not everyone in South Africa share the above sentiment as this can be seen from the following research conducted by the Institute of Security Studies:

*In Port Elizabeth, white focus group participants felt that convicted prisoners should 'lose all their rights except their basic human rights'. All agreed that prisoners should have no privileges such as television or sport. That is, prisoners should not have a normal social life. Black focus group participants thought that prisoners should not be able to watch television, but that they should have access to medical care. Coloured and Asian focus group participants in the city felt that a convicted criminal should have no rights.*

*Farmers in Graaff-Reinet argued that prisoners should have no more rights than basic human rights such as the right to food, a place to sleep and toilet facilities. No privileges should be given to convicted prisoners other than family visits as the children of prisoners should have the right to see their parent. Female black and coloured focus group participants in Graaff-Reinet thought that convicted prisoners had the right to be educated and to be taught new skills. However, they should not have the right to privileges such as access to television and sport.*

*White focus group participants in Grahamstown felt that prisoners had the right to medical care. This could lead to a situation, however, where a criminal received medical care from the state and the victim did not. Prisoners' privileges should be controlled and earned. Coloured focus group participants in the town thought that prisoners had too many rights. Prisons were full during the winter as people wanted to be incarcerated in order to receive a hot meal and a warm bed. Prisoners should have only their basic needs met. Some felt that prisoners should have a right to watch television or to play sport. If such 'entertainment' rights were taken away, prisoners might find other more destructive ways to entertain themselves. Others argued that prisoners should have no privileges even if the boredom drove them insane.*

*Umtata focus group participants stated that prisoners had a right to life, but should have no right to watch television or read newspapers. Many unemployed people committed crimes to be sent to prison where they were assured of three meals per day, warm water, a bed and access to television (Institute of Security Studies, 2000)*

It is the researcher's view that whilst the above findings are valid, they are a true reflection of the level of knowledge the general public hold in respect of the treatment of offenders. It is in this light that a massive education outreach program be embarked on not only for members of the public but also correctional officials.

With reference to section 7(2) as outlined above, the Department of Correctional Services as part of the state, must respect, protect, promote and fulfil the rights of offenders. According to Luyt, Jonker & Bruyns (2010:166) the main aim in protecting human rights is to recognise and affirm the human dignity of all people and to protect the individual against the strong collective powers of the state. In its strategic plan 2012/13 – 2016/2017, the Department of Correctional Services commits to ensure the appropriate protection of human rights of inmates, particularly of special categories of inmates (Department of Correctional Services, 2012:8). The next subsections of this study discuss such rights.

### **3.3.1 THE RIGHT TO EQUALITY**

The history of South Africa and its current social demographics – made up of different races - cannot be ignored when the concept of equality is raised. As it can be seen from the previous chapter of this study, discrimination and unequal treatment was the order of the day facilitated by the apartheid regime in all social facets. In *Brink v Kitshoff NO (CCT15/95) ZACC 9, 1996 (4) SA 197*, the court highlights the inseparability of 'equality' and South Africa's history in the following excerpt:

[40]... Section 8 [of the interim *Constitution of the Republic of South Africa*] is the product of our own particular history...Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly ninety percent of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided.

Dlamini (1988:40) relates what could be considered a relevant example in the criminal justice sector to the fore going by stating that unequal application of criminal law was especially visible in the imposition of the death penalty under apartheid because there

was a greater likelihood that a black person would be hanged for killing a white person or for raping a white woman than would a white who had killed a black or raped a black woman.

Fortunately the right to equality in South Africa is protected by section 9 of the *Constitution of the Republic of South Africa of 1996* as outlined below and classified as non-derogable in terms of section 37 (5) of the said constitution. This simply means that the State is not allowed to suspend part of (subsection 3: with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language) this right under any circumstances.

9. (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

In an attempt to comprehend the above section of the Constitution, the South African Department of Justice and Constitutional Development construe it as follows:

Every person is entitled to equal treatment by the courts. No one is above the law and all persons are impartially subject to the law. However, the conduct of the law or government (the executive) that differentiates between people or categories of people may be justified if it reasonably serves a legitimate government purpose (Department of Justice and Constitutional Development, 2014:6).

Although this interpretation is correct, it should also make reference to all organs of state instead of limiting the treatment of persons by courts only. It should not be read in a disintegrated manner. It should mean that all organs of state, including the Department of

Correctional Services must not only observe this provision but also promote and protect it in the treatment of inmates. So, the right to equality should be fully read and clearly understood. Currie & De Waal (2005:244) warns that the basis of discrimination is not one of the listed grounds nor can it be seriously argued that it is an attribute or characteristic that could impair human dignity or anything comparable.

Currie & De Waal (2005:244) further emphasise that the equality clause does not prohibit discrimination but rather **unfair** discrimination. In the case of *Harsken v Lane NO and others (CCT 9/97)(1997) ZACC 12*, the court asked what makes discrimination **unfair**. A simple answer to this question is that the determining factor is the impact of the discrimination on its victims. Currie & De Waal (2005:244) argues that the value of dignity is of central importance to understanding unfair discrimination. To them, **unfair** discrimination is a differential treatment that is hurtful and demeaning and occurs when the law or conduct for no good reason treats some people as inferior or incapable or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation. A demonstration of this sort of treatment was more prevalent in the apartheid past in South Africa as section 23 (1)(b) of the *Prisons and Reformatories Act, Act 13 of 1911* made provision for the separation of offenders along racial lines.

To give effect to section 9(4) (as outlined above) of *Constitution of the Republic of South Africa of 1996*, the *Correctional Services Act 111 of 1998* as amended was promulgated. Section 7(2)(b)(c) of this Act states that:

- (b) *Male inmates must be kept separate from female inmates.*
- (c) *Inmates who are children must be kept separate from adult inmates and in accommodation appropriate to their age.*

In addition to the above, particularly section 9(4), the *Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* was promulgated. This Act preamble that section 9 of the *Constitution of the Republic of 1996* provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote

the achievement of equality. This Act further preamble that South Africa has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. These include:

Section 6 (1) of the United Nations Standard Minimum Rules and Principle 2 of the Basic Principles for the Treatment of Prisoners:-

*...there shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (United Nations, 1955:1; 1990).*

Concomitant to the foregoing is Principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:-

*...these principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status (United Nations, 1988:298).*

To give effect to the above domestic and international legislative requirements, the Department of Correctional Services outlines inter alia the following values as part of its strategic overview in its Strategic Plan for 2015/2016 – 2019/2020:

- Justice which is underpinned by the principles of fair treatment; justice for all; fairness and equality before the law.
- Equity which is underpinned by the principles of non-discrimination; affirmative action; gender equality and integration of disability issues.

Furthermore, paragraph 3 of the correctional services regulations states that:

- (f) *Whenever separate prisons for males and females are established on the same site or on separate sites but in proximity of each other, or whenever separate sections of a prison are available for the reception of male and female prisoners, the following requirements must be observed:*
- (i) *The locks of the doors and gates of the prison or section for males and those of the prison or section for females must not correspond.*
  - (ii) *The keys of a prison or section for females must be permanently in the possession of a female correctional official.*

- (iii) *Any male person visiting a prison or section for females must be accompanied by a female correctional official during the full period of such visit.*
- (g) *Prisoners of a particular security classification must be detained separately from prisoners with a different security classification.*
- (h) *Prisoners between the ages of 18 and 21 years must be detained separately from prisoners who are over the age of 21 years.*

Furthermore, according to Redribbon (2014) the Department of Correctional Services has committed itself to a policy of non-discrimination in handling prisoners particularly those with HIV. It developed a policy on managing HIV/AIDS in prisons in 1996. In 2000, a new Management Strategy on HIV/AIDS in Prisons was developed. These policy and strategy are based on:

- Human rights principles such as the right to equality and non-discrimination.
- The fundamental rights in the Bill of Rights.
- World Health Organisation (WHO) Guidelines on the treatment of prisoners.

There is a constant use of the word 'separately' from the foregoing particularly with regard to the provisions of the department's regulations and the *Correctional Services Act 111 of 1998* as amended. This does not mean that the treatment of inmates should be different, demeaning, hurtful or have a negative impact on certain group of people. This is referred to as a fair discrimination as argued by Currie and De Waal.

Although the foregoing is a good indication of the department's commitment to comply with the domestic and international prescripts from a policy perspective, it is imperative to practically implement such requirements in a real life situation. An analysis of this is conducted in the next chapter of this study.

### 3.3.2 HUMAN DIGNITY

The right to equality in South Africa is protected by section 10 of the *Constitution of the Republic of South Africa of 1996* as outlined below and entirely classified as non-derogable in terms of section 37 (5) of the *Constitution of the Republic of South Africa of 1996*.

10. *Everyone has inherent dignity and the right to have their dignity respected and protected.*

This right can be coined ‘the one sentence, the mother of all rights’. This assertion is premised on the fact that the rights accorded to prisoners are embedded on the principle of human dignity as it can be seen from the discussion of certain identified rights in this study. In fact, human dignity is considered by section 1 of the *Constitution of the Republic of South Africa of 1996* as the founding value of the Republic of South Africa and this according to Chaskalson (2002:134) qualifies this right to carry more weight than enumerated rights.

Currie & De Waal (2005:273) also submits that human dignity is the source of a person’s innate rights to freedom and to physical integrity from which a number of other rights flow. Liebenberg (2005:22) demonstrate this by making reference to a number of court cases in which individuals and groups approach courts for relief entailing threats to life, health and the ability to function in a society. Liebenberg further argues that a failure by society to respond in proportion to the seriousness of the deprivations faced by its members represents a failure to value their fundamental dignity as human beings. This simply means that the right to human dignity can never be fulfilled when people don’t have access to housing, health, care, food or water for instance.

Luyt, Jonker & Bruyns (2010:200) concurs with the above submissions by stating that human dignity can be regarded as central to and the foundation of all fundamental rights. Chaskalson (2002:134) further postulates that respect for human dignity implies respect for the autonomy of each person and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.

The above submissions by various scholars are an indication of the importance and weight carried by the right to dignity and are all informed by the Constitutional Court of South Africa in the case of *S v Makwanyane and another 1995 (6) BCLR 665 (KH)* in which the following were pointed out:

Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the bill of rights.

The rights to life and dignity are the most important of all human rights and source of all other personal rights in the bill of rights.

The protection of human dignity is inherent in the protection of virtually all rights.

Furthermore, in the same case of *S v Makwanyane and another 1995 (6) BCLR 665 (KH)*, the court agreed with the United States Supreme Court and German Federal Constitutional Court that:

- i. even the vilest criminal remains a human right possessed of common human dignity and
- ii. respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishment.

Inmates must be provided with services such as health, food, care, shelter and not to be treated in a humiliating, cruel and degrading manner. They must be treated with respect. It is therefore vital that the South African penal system considers chapter two of the *Constitution of the Republic of South of 1996* in the treatment of prisoners thereby complying with international requirements such as:

Principle 1 of the Basic Principles for the Treatment of Prisoners:

*All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.*

Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

*All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human persons.*

From a policy position, the South African Department of Correctional Services is guided by *Correctional Services Act 111 of 1998* as amended. This Act gives effect to the provisions of the Constitution as outlined above. Chapter three (3) of this Act makes provision for the requirements of the treatment of prisoners under conditions of human dignity while chapter two (2) of the correctional Services Regulations breaks these requirements to bring more meaning to them as it can be seen from below table 3.2.

Table 3.2: General requirements of all inmates under conditions of human dignity and its regulations

GENERAL REQUIREMENTS OF ALL INMATES UNDER CONDITIONS OF HUMAN DIGNITY.	CORRECTIONAL SERVICES REGULATIONS OF THE GENERAL REQUIREMENTS OF ALL INMATES UNDER CONDITIONS OF HUMAN DIGNITY.
<p><b>Admission to a Correctional Centre (discussed under sections 3.3.2, 3.3.4 and 3.3.8 of this study).</b></p>	<ol style="list-style-type: none"> <li>1) (a) The Head of the Correctional Centre or any correctional official authorised by him or her must take into safekeeping the money, valuables and any other articles in the possession of an inmate on admission to the Correctional Centre or during the period of incarceration.</li> <li>(b) The National Commissioner may prescribe by the Order the conditions for and circumstances under which taking into safekeeping, release or disposal of such money, valuables or other articles may take place.</li> <li>2) Every inmate who is admitted to a Correctional Centre must bath or shower as soon as possible after admission, as prescribed by the Order.</li> <li>3) (a) Every inmate and every cared-for child must, within twenty-four hours after admission and before being allowed to mix with the general inmate population, undergo a health status examination by either a correctional medical practitioner or registered nurse, who must record the health status of such inmate or child and confirm such person's medical history if necessary.</li> <li>(b) If a registered nurse has conducted such a medical examination, he or she must refer the case of the inmate or cared-for child to the Correctional Medical Practitioner as soon as reasonably possible if any of the following conditions are identified: <ol style="list-style-type: none"> <li>i. the inmate or cared-for child who, upon admission to the Correctional Centre had been injured, was ill or has complained that he or she is injured or ill;</li> <li>ii. the inmate or cared-for child is using prescribed medication or receives medical treatment;</li> <li>iii. the inmate or cared-for child is receiving continued or ancillary medical treatment;</li> <li>iv. the inmate is pregnant; or</li> <li>v. there exists any other condition with regard to the inmate or cared-for child which the registered nurse on reasonable grounds believes requires the Correctional Medical Practitioner to issue the admission report.</li> </ol> </li> <li>(c) The Correctional Medical Practitioner or registered nurse must screen all inmates admitted to the Correctional Centre for communicable, contagious or obscure diseases and record the presence thereof, as prescribed by the Order.</li> <li>(d) The Head of the Correctional Centre must facilitate the process of proper placement of a child who has been admitted with a female inmate and the Department of Social Development must immediately be informed of such female inmate as contemplated in Section 20(1A) of the Act.</li> <li>(e) Treatment of inmates must at all times be in accordance with binding, international instruments relating to their treatment.</li> <li>4) (a) The registered nurse must upon admission record any medical assistance device in possession of an inmate.</li> <li>(b) Such device may not be removed without the written instruction of the attending medical practitioner.</li> <li>5) Any medicine in possession of an inmate must be recorded and handed to the registered nurse who must deal with it as prescribed by the Order.</li> </ol>

	<p>6) (a) The possession of an emergency identification locket or bracelet by an inmate or cared-for child and the condition identified by it must be recorded by the registered nurse.</p> <p>(b) Such a locket or bracelet may be worn by the inmate unless it constitutes a security risk.</p> <p>7) An inmate may only mix with the general inmate population after being medically assessed.</p>
<p><b>Accommodation (discussed under sections 3.3.2, 3.3.3, 3.3.4 and 3.3.5 of this study).</b></p>	<p>1) In every Correctional Centre provision must be made for general sleeping and in-patient hospital accommodation, consisting of single or communal cells or both.</p> <p>2) (a) All cell accommodation must have sufficient floor and cubic capacity space to enable the inmate to move freely and sleep comfortably within the confines of the cell.</p> <p>(b) All accommodation must be ventilated in accordance with the National Building Regulations SABS 0400 of 1990 issued in terms of Section 16 of the Standards Act, 1993 (Act No. 29 of 1993).</p> <p>(c) Any cell utilised for the housing of inmates must be sufficiently lighted by natural and artificial lighting so as to enable an inmate to read and write.</p> <p>(d) (i) In every Correctional Centre there must be sufficient, accessible ablution facilities that must be available to all inmates.</p> <p>(ii) Such facilities include access to hot and cold water for washing purposes.</p> <p>(iii) In communal sleeping accommodation ablution facilities must be partitioned off.</p> <p>(e) (i) Every inmate must be provided with a separate bed and with bedding which provides adequate warmth for the climatic conditions and which complies with hygienic requirements as prescribed by the Order.</p> <p>(ii) In equipping a Correctional Centre hospital, provision must be made for a standard range of hospital beds, bedding and clothing that specifically suit the needs for effective patient care.</p> <p>(f) Whenever separate Correctional Centres for males and females are established on the same site or on separate sites, but in proximity of each other, or whenever separate sections of a Correctional Centre are available for the reception of male and female inmates, the following requirements must be observed:</p> <p>(i) The locks of the doors and gates of the Correctional Centre or section for males and those of the correctional centre or section for females must not correspond.</p> <p>(ii) The keys of a Correctional Centre or section for females must be permanently in possession of a female correctional official.</p> <p>(iii) Any male person visiting a Correctional Centre or section for females must be accompanied by a female correctional official during the full period of such visit.</p> <p>(g) Inmates of a particular security classification must be detained separately from inmates with a different security classification.</p> <p>(h) Inmates between the ages of 18 and 21 years must be detained separately from inmates who are over the age of 21 years.</p> <p>(i) Inmates suffering from mental or chronic illness or whose health status will be affected detrimentally or whose health status poses a threat to other inmates if detained in a communal cell, must be detained separately on request of the Correctional Medical Practitioner or registered nurse.</p>
<p><b>Nutrition (discussed under sections 3.3.1, 3.3.2, 3.3.4, 3.3.5 and 3.3.8 of this study)</b></p>	<p>1) Each sentenced offender must be provided with a diet consisting of a minimum protein and energy content of:</p> <p>(a) 2 000 kilo calories per day for adult females;</p> <p>(b) 2 500 kilo calories per day for adult males; and</p> <p>(c) 2 800 kilo calories per day for children, between the ages of 13 and 18 years of which at least 0.8 grams per kilogram of bodyweight per day must be from the protein group.</p> <p>2) The diet must provide for a balanced distribution of food items according to the following food groups, namely:</p> <p>(a) grain;</p> <p>(b) fruits and vegetables;</p> <p>(c) dairy;</p> <p>(d) meat and protein; and</p> <p>(e) fats, oils and sugar.</p>

	3) Food must be stored, prepared, cooked and served in compliance with the provisions of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972) and the principles of good hygiene.
<b>Hygiene (discussed under sections 3.3.1, 3.3.4, 3.3.5 and 3.3.8 of this study)</b>	This requirement is not specifically covered by the regulations but seem to be covered under clothing and bedding.
<b>Clothing &amp; bedding (discussed under sections 3.3.1, 3.3.3, 3.3.5, 3.3.7 and 3.3.8 of this study)</b>	<p>1) On admission to a Correctional Centre, a sentenced offender must be provided with a complete outfit of clothing and bedding as prescribed by the Order and only the clothing issued may be worn, except when otherwise determined by the National Commissioner.</p> <p>3) An inmate may be allowed to wear for religious or cultural purposes such attire as prescribed by the order.</p>
<b>Exercise (discussed under sections 3.3.1, 3.3.5 and 3.3.8 of this study)</b>	<p>1) The Correctional Medical Practitioner must certify whether the following categories of inmates are fit to exercise:</p> <p>(a) an inmate who is injured, ill or complains that he or she is injured or ill;</p> <p>(b) an inmate who receives any prescribed medicines and/or medical treatment;</p> <p>(c) an inmate who receives continued or additional medical treatment; and</p> <p>(d) an inmate who is pregnant.</p> <p>2) In respect of each inmate other than an inmate mentioned in sub-regulation (1), a Correctional Medical Practitioner or registered nurse must issue a certificate stating whether or not the inmate is fit for exercise.</p> <p>3) If a registered nurse in considering whether an inmate is fit for exercise, is of the opinion that the inmate is subject to any condition which should be evaluated by a Correctional Medical Practitioner, the registered nurse must refer the inmate to the Correctional Medical Practitioner for a decision as to whether the inmate concerned is fit for exercise.</p>
<b>Health care (discussed under sections 3.3.1, 3.3.2, 3.3.4, 3.3.5 and 3.3.8 of this study)</b>	<p>1) (a) Primary healthcare must be available in a Correctional Centre at least on the same level as that rendered by the State to members of the community.</p> <p>(b) When a Correctional Centre is built, specifications must set for that part of the facility which will be utilised for the purposes of healthcare.</p> <p>2) The services of a Correctional Medical Practitioner and a dental practitioner must be available at every Correctional Centre.</p> <p>3) The Correctional Centre's Correctional Medical Practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary.</p> <p>4) A registered nurse must attend to all sick sentenced offenders and remand detainees, which shall include pregnant women and the mentally ill, as often as is necessary, but at least once a day.</p> <p>5) If an inmate is attended to by his or her own medical practitioner of choice, such medical practitioner must provide written reports to the Correctional Medical Practitioner made pursuant to the findings of any special examination, diagnoses, proposed treatment, interventions and treatment regimes that may be prescribed by the medical practitioner.</p> <p>6) Upon the illness of or injury to an inmate, resulting in the inmate's hospitalisation or his or her removal to an institution for treatment of a mental affliction, the Head of the Correctional Centre must inform the inmate's spouse, partner or next of kin accordingly.</p> <p>7) (a) An inmate may not, even with his or her consent, be subjected to any medical, scientific experimentation or research.</p> <p>(b) An inmate may not participate in clinical trials, except with the National Commissioner's approval given on application made by the inmate.</p> <p>8) (a) A request from an inmate to donate or receive an organ or tissue by donation, in accordance with the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983) must be approved by the National Commissioner.</p> <p>(b) A request from a person to receive any form of artificial fertilization in terms of the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983) from an inmate must be approved by the National Commissioner. An inmate may not receive any form of artificial fertilisation.</p> <p>9) (a) An inmate may not be sterilised at State expense unless the procedure is required for medical reasons as certified by the Correctional Medical Practitioner.</p> <p>(b) The National Commissioner may approve an abortion at State expense only in the circumstances contemplated in Section 2(1)(b)(i), (ii) or (iii) and 2(1)(c) of the Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).</p>

	<p>10) (a) The provision of medical assistance devices, but not including surgical implants, to inmates at State expense must be prescribed by the Order.</p> <p>(b) All medical assistance devices issued to or received by an inmate from outside the Correctional Centre must be recorded.</p> <p>11) The Correctional Medical Practitioner, environmental health officer or registered nurse must inspect the Correctional Centre at least once a month and report as prescribed by the Order to the National Commissioner on problems concerning environmental health conditions and health related issues.</p> <p>12) (a) After release or placement under community corrections an injured inmate is entitled to medical treatment at departmental expense for an injury sustained in Correctional Centre until the injury is healed.</p> <p>(b) Such a person may be required to report to a Correctional Centre for further treatment after release or placement under community corrections.</p> <p>(c) A person injured after release or placement under community corrections is not entitled to treatment at Departmental expense.</p> <p>13) (a) An offender who is certified in terms of Chapter VII of the Mental Healthcare Act, 2002 (Act No. 17 of 2002), may not be detained in a Correctional Centre and must be transferred to a designated health establishment as defined in Section 1 of that Act.</p> <p>(b) Before the transfer of such an inmate, the inmate must be placed under the special care of the Correctional Medical Practitioner.</p> <p>(c) A person who is directed by a court in terms of Sections 77 or 78 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) to be detained pending the decision of a Judge in Chambers in terms of Section 47 of the Mental Healthcare Act, 2002 (Act No. 17 of 2002), must be transferred as soon as possible to a designated health establishment in terms of Section 42 of that Act.</p>
<p><b>Contact with community (discussed under sections 3.3.1 and 3.3.8 of this study)</b></p>	<p>1) The Head of the Correctional Centre must give special attention to the development and maintenance of good family relationships between inmates and their family members and other relatives.</p> <p>2) The Head of the Correctional Centre must convey any important information regarding an inmate's family, relatives or friends that may come to his or her attention, to the inmate as soon as practicable.</p> <p>3) On admission to a Correctional Centre or when an inmate is transferred, subject to the provision of Regulation 25(1)(b), the Head of the Correctional Centre must, allow the inmate to notify his or her spouse, partner or next of kin in the manner prescribed by the Order, unless otherwise requested in writing by the inmate.</p> <p>4) The Head of the Correctional Centre may authorise a correctional official, in writing, that communications between an inmate and a member of the public, including letters and communications, including electronic communications, in the course of a visit, be opened, read, listened to or otherwise intercepted with the assistance of an agency mandated by legislation, or blocked if not a subject of a legal privilege, by a correctional official, mechanical device, or electronic device, where the Head of the Correctional Centre believes on reasonable grounds:-</p> <p>(a) that the communications contain or will contain evidence of-</p> <p>(i) an act that will jeopardise the security of the Correctional Centre or the safety of any person; or</p> <p>(ii) a criminal offence or a plan to commit a criminal offence; and</p> <p>(b) that the interception of such communication is the least restrictive measure available in the circumstances.</p> <p>5) Where a communication is intercepted under sub-regulation (4), the Head of the Correctional Centre or the correctional official designated by him or her must as soon as reasonably practicable after such interception inform the inmate, in writing, of the reasons for the interception and give the inmate an opportunity to make representations with respect thereto, unless the information would adversely affect an ongoing investigation, in which case the inmate must be informed of the reasons and given an opportunity to make representations with respect thereto on completion of the investigation.</p>
<p><b>Religion, belief and opinion (discussed under sections 3.3.1, 3.3.5, 3.3.7 and 3.3.8)</b></p>	<p>This requirement is not specifically covered by the regulations.</p>

<p><b>Death in correctional centre (discussed under sections 3.3.1, and 3.3.8)</b></p>	<ol style="list-style-type: none"> <li>1) <ol style="list-style-type: none"> <li>(a) The Head of the Correctional Centre must keep a record and report all deaths in Correctional Centre, such record and report must reflect all the particulars required by the Order.</li> <li>(b) A deceased inmate must be buried by the Head of the Correctional Centre at a burial place in the magisterial district where he or she was detained, but the National Commissioner may, upon written request of the spouse, partner or next of kin allow them to remove and bury the deceased at their own expense.</li> <li>(c) The National Commissioner may for humanitarian reasons at the written request of the spouse, partner or next of kin, allow the body of the deceased inmate to be transported at State expense to another magisterial district. The cost of the burial is to be borne by the person requesting the transportation as prescribed by the Order.</li> </ol> </li> </ol>
<p><b>Correction, development &amp; care programmes and services (discussed under 3.3.1, 3.3.2, 3.3.4, 3.3.5, 3.3.6, 3.3.7 and 3.3.8)</b></p>	<ol style="list-style-type: none"> <li>1) <ol style="list-style-type: none"> <li>(a) Social work services must be rendered to sentenced offenders and persons under community corrections who have a need for such services by a social worker duly registered as such in terms of the Social Work Act, 1978 (Act No. 110 of 1978).</li> <li>(c) If the need for social work services arises at a Correctional Centre or community corrections office where those services are not available, the relevant Head of the Correctional Centre or Head of Community Corrections, as the case may be, must take the necessary steps to ensure that those services are made available as soon as possible to cater for that need.</li> </ol> </li> <li>2) <ol style="list-style-type: none"> <li>(a) Education and training services must be rendered to sentenced offenders who have a need for such services, subject to paragraph (b), those services will be rendered in accordance with education and training programmes.</li> <li>(b) The education of sentenced offenders must be in accordance with the educational system of the country.</li> <li>(c) A qualified educator or technical educator registered with the South African Council of Educators established in terms of Section 4 of South Africa Council for Educators Act, 2000 (Act No. 31 of 2000), must render those services.</li> <li>(e) If such a qualified educator or qualified correctional official is not available, the National Commissioner may appoint a temporary educator or voluntary worker with educational or technical qualifications and registered with the South African Council of Educators.</li> <li>(f) All sentenced offenders who have not obtained the ninth grade as contemplated in Section (3)(1) of the South African Schools Act, 1996 (Act No. 84 of 1996), must attend educational programmes until such offender reaches the age of 25 years or the ninth grade or adult education and training level 4, as registered on the national qualifications framework contemplated in the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), whichever occurs first. The Department must, within its available resources, ensure that such offenders are provided with the necessary resources to enable them to comply with this requirement.</li> </ol> </li> <li>3) <ol style="list-style-type: none"> <li>(a) Psychological services must be available to all sentenced offenders and persons under community corrections who have a need for such services. Psychologists and psychometrics who are to be trained as counsellors must be registered in terms of the Health Professions Act, 1974 (Act No. 56 of 1974).</li> <li>(b) If such psychologists and psychometrists are not available at a correctional centre and the need for such services arise, the Head of the Correctional Centre must take the necessary steps to ensure that such services are available. An inmate may also utilise his or her psychologist of choice, but at own expense.</li> </ol> </li> </ol>
<p><b>Access to legal advice (discussed under sections 3.3.1; 3.3.5 and 3.3.8).</b></p>	<ol style="list-style-type: none"> <li>1) An inmate may consult with his or her legal practitioner in connection with legal matters subject to the conditions determined by the National Commissioner.</li> <li>2) A consultation contemplated in sub-regulation (1) is subject to the following: <ol style="list-style-type: none"> <li>(a) A legal practitioner must lodge proof of his or her identity and status as legal practitioner at the request of the Head of the Correctional Centre;</li> <li>(b) Such a consultation must take place only between 08h00 and 15h30 unless the Head of the Correctional Centre, due to the existence of urgent or exceptional circumstances has given his or her prior permission;</li> </ol> </li> </ol>

	<ul style="list-style-type: none"> <li>(c) The consultation must take place in sight, but out of earshot of a correctional official;</li> <li>(d) The legal practitioner may be allowed to utilise his or her own interpreter, secretary or typist; and</li> <li>(e) If a particular legal practitioner is refused access to the inmate, the inmate may request to consult with another legal practitioner.</li> </ul>
<b>Reading Material (discussed under sections 3.3.1; 3.3.5, 3.3.6 and 3.3.8).</b>	<ol style="list-style-type: none"> <li>1) A properly organized library containing literature of constructive and educational value, as prescribed by the Order, must as far as reasonably practicable, be established and maintained at every Correctional Centre.</li> <li>2) An inmate may receive reading material from outside the Correctional Centre in the manner as prescribed by the Order.</li> <li>3) A correctional official may inspect an envelope or package sent or received by an inmate to the extent necessary to determine whether the envelope or package contains any article that may pose a danger to the security of the Correctional Centre or the safety of any person, but the correctional official may not read the contents of the envelope or package, except in the circumstances contemplated in Regulation 8(4).</li> <li>4) The Head of the Correctional Centre or a correctional official designated by him or her may prohibit: <ul style="list-style-type: none"> <li>(a) the entry into the Correctional Centre or the circulation within the Correctional Centre of any publication, video or audio material, film or computer program that he or she believes on reasonable grounds would jeopardise the security of the Correctional Centre or the safety of any person; and</li> <li>(b) the use by an inmate, including the display of, any publication video or audio material, film or computer program that he or she believes on reasonable grounds-: <ul style="list-style-type: none"> <li>(i) would likely be viewed by other persons; and</li> <li>(ii) would undermine a person's sense of personal dignity by demeaning the person or causing personal humiliation or embarrassment to a person, on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.</li> </ul> </li> </ul> </li> <li>5) (a) Documents and correspondence between inmates and their legal practitioners may not be censored if they relate to legal matters.</li> <li>(b) Documents and correspondence between inmates and their legal practitioners that purport to relate to legal matters may be examined only to determine whether in fact they do relate to such matters.</li> </ol>
<b>Children (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5; 3.3.6; 3.3.7 and 3.3.8).</b>	This requirement is not specifically covered by the regulations.
<b>Mothers of young children (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.6; 3.3.7 and 3.3.8).</b>	This requirement is not specifically covered by the regulations.
<b>Complaints and requests (discussed under sections 3.3.1; 3.3.3 and 3.3.8).</b>	This requirement is not specifically covered by the regulations but seem to be covered under discipline of inmates.
<b>Disciplinary infringements, procedures and penalties (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.5; 3.3.6 and 3.3.8).</b>	This requirement is not specifically covered by the regulations but seem to be covered under discipline of inmates.
<b>Safe custody (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.5; and 3.3.8).</b>	<ol style="list-style-type: none"> <li>1) The National Commissioner determines the security measures applicable at Correctional Centres.</li> <li>2) (a) An inmate who is removed temporarily from a Correctional Centre must at all times be in the safe custody of a correctional official subject to paragraph (b).</li> <li>(b) Where an inmate temporarily removed from a Correctional Centre is to appear before a Court, or for purposes of a criminal investigation he or she may be placed in the safe custody of a member of the South African Police Services instead.</li> <li>3) If an inmate is temporarily removed from a Correctional Centre, all necessary precautions must be taken to protect him or her from public abuse or curiosity.</li> </ol>

<p><b>Searches (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.5 and 3.3.8).</b></p>	<ol style="list-style-type: none"> <li>1) A search contemplated in Section 27(2) (b), (c), (d) and (e) of the Act: <ol style="list-style-type: none"> <li>(a) must be undertaken in the Correctional Centre hospital, clinic or public hospital depending on the procedure necessary to conduct the search;</li> <li>(b) will not include the administering of dormitories or enemas;</li> <li>(c) and must at all times be witnessed by a correctional official of the same gender as the inmate, who must record the outcome of the search.</li> <li>(d) Searches of inmates that require medical technology, as well as body cavity searches, must be referred to a health establishment as defined in the National Health Act, 2003 (Act No. 61 of 2003) with the required resources.</li> <li>(e) If it is found that the foreign body that was swallowed or inserted in a bodily orifice is not excreted by normal bodily processes, the inmate must be interviewed to determine the type of foreign body swallowed or inserted and be referred to the nearest private or public health establishment as defined in the National Health Act, 2003 (Act No. 61 of 2003) in consultation with a health care professional for assessment and removal thereof.</li> </ol> </li> <li>2) <ol style="list-style-type: none"> <li>(a) Any inmate detained for the purposes of a search contemplated in terms of Section 27(2)(e) of the Act must be detained in a single cell.</li> <li>(b) Every such inmate must be visited at least once a day by the Head of the Correctional Centre, and his or her health status assessed at least once every four hours by a registered nurse.</li> </ol> </li> </ol>
<p><b>Identification (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.5; and 3.3.8).</b></p>	<ol style="list-style-type: none"> <li>1) The name, age, height, mass, full address, distinctive marks of an inmate and other particulars as may be required must be recorded in the manner prescribed by the Order.</li> <li>2) The fingerprints, photographs and biometric data of an inmate must be taken, as prescribed by the Order;</li> <li>3) <ol style="list-style-type: none"> <li>(a) Where necessary an inmate may be taken to a medical practitioner to ascertain his or her age as contemplated in Section 28(1)(e) of the Act.</li> <li>(b) In the case of a person serving a life sentence and it is disputed whether such a person has reached the age of 65, the Head of the Correctional Centre must refer the person to a medical practitioner and if the assessment of the medical practitioner is different from what the age on any document professes to be, the National Commissioner must make a determination.</li> </ol> </li> </ol>
<p><b>Security classification (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5; 3.3.6; 3.3.7 and 3.3.8 of this study).</b></p>	<p>This requirement is not specifically covered by the regulations.</p>
<p><b>Segregation (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<p>This requirement is not specifically covered by the regulations.</p>
<p><b>Mechanical restraints (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<ol style="list-style-type: none"> <li>1) If an inmate is restrained by means of mechanical restraints a correctional official may only use one or more of the following mechanical restraints: <ol style="list-style-type: none"> <li>(a) handcuffs;</li> <li>(b) leg-irons and-cuffs;</li> <li>(c) belly chains;</li> <li>(d) plastic cable ties;</li> <li>(e) electronically activated high-security transport stun belts; or</li> <li>(f) patient restraints, where applicable.</li> </ol> </li> <li>2) An electronically activated high security transport stun belt may only be used for the purpose of restraining an inmate when outside a cell.</li> </ol>
<p><b>Use of force (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<p>This requirement is not specifically covered by the regulations.</p>
<p><b>Non-lethal incapacitating devices (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<ol style="list-style-type: none"> <li>1) The only non-lethal incapacitating devices that may be used by trained correctional officials are the following: <ol style="list-style-type: none"> <li>(a) Chemical agents;</li> <li>(b) Electronically activated devices; or</li> <li>(c) Rubber missiles.</li> </ol> </li> <li>2) <ol style="list-style-type: none"> <li>(a) An inmate may under no circumstances be allowed to handle any type of chemical agent used for incapacitating inmates.</li> <li>(b) Gas masks must be issued to correctional officials who are involved in a situation in which chemical agents are used.</li> </ol> </li> </ol>

	<ul style="list-style-type: none"> <li>(c) The Head of the Correctional Centre or the Head of Community Corrections must decide when chemical agents in the form of either cartridges or grenades must be used.</li> <li>(d) The Head of the Correctional Centre or the Head of Community Corrections must decide to which correctional officials chemical agents or spray-cans may be issued in the performance of their custodial duties.</li> <li>(e) The seal of the chemical agent canister may only be broken if it is to be used.</li> <li>(f) Chemical agent grenades may only be used in the open air, in buildings chemical agent cartridges and chemical agent canisters must be used.</li> <li>(g) If chemical agents are used, measures must be applied, if necessary, to provide inmates with first aid or medical treatment.</li> </ul>
<p><b>Firearms (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<ul style="list-style-type: none"> <li>1) Whenever a firearm is fired, except for the purpose of training, the correctional official must report the incident and the action taken, in the manner prescribed by the Order, to the Head of the Correctional Centre, or the Head of Community Corrections as soon as practicable.</li> <li>2) When correctional officials armed with firearms report for duty they must load their firearms according to the prescribed firearm training instructions. The same procedure must be followed with the unloading of firearms after completion of duty.</li> <li>3) When correctional officials handle firearms they must adhere to the general safety measures in the manner prescribed by the Order and training manuals.</li> </ul>
<p><b>Other weapons (discussed under sections 3.3.1; 3.3.2; 3.3.3; 3.3.4; 3.3.5 and 3.3.8 of this study).</b></p>	<ul style="list-style-type: none"> <li>1) Other weapons that may be used are: <ul style="list-style-type: none"> <li>(a) Baton-type equipment; and</li> <li>(b) Pyrotechnical equipment.</li> </ul> </li> <li>2) The use of such weapons is restricted to the purposes described in Sections 33(3) and 34(3) of the Act.</li> <li>3) <ul style="list-style-type: none"> <li>(a) Batons may only be used by correctional officials trained in the specific techniques for the use of batons.</li> <li>(b) Such training must be done by qualified trainers and correctional officials must receive refresher training at least once every six months.</li> <li>(c) The Head of the Correctional Centre or the Head of Community Corrections decides to which correctional officials batons may be issued.</li> </ul> </li> <li>4) If batons are issued it must be recorded in a register and the use thereof be dealt with as prescribed by the Order.</li> <li>5) <ul style="list-style-type: none"> <li>(a) Pyrotechnical equipment may only be issued to trained correctional officials appointed by the National Commissioner as members of Emergency Support Teams and then only for purpose of training or during emergency situations.</li> <li>(b) Pyrotechnical equipment may only be used on the direct instructions of the Emergency Support Team leader.</li> <li>(c) The issuing of pyrotechnical equipment must be recorded in a register.</li> <li>(d) Such equipment must be used according to the procedures prescribed in the Orders.</li> <li>(e) <ul style="list-style-type: none"> <li>(i) Apart from the initial training correctional officials authorised to use pyrotechnical equipment must receive refresher training at least on quarterly basis.</li> <li>(ii) All training must be done by a qualified person.</li> </ul> </li> </ul> </li> </ul>

Sources: Chapter 3 of Correctional Services Act, Act 111 of 1998 (as amended) and Chapter 2 of Correctional Services Regulation of 2012.

There is a notable discrepancy with regard to the requirements outlined in the Act and the Regulations. Issues such as hygiene; religion, belief & opinion; children; mothers of young children as well as complaints & requests are not visibly addressed by the regulations. Although this should be a cause for concern due to the fact that this can be a breeding ground for the violation of the rights of inmates, it stand to reason that the department has made good strides in terms of the policy position as it can be seen from below discussion of individual inmates' rights. The treatment of inmates doesn't solely depend on the

availability of policies or programmes but on the practical implementation of such. This is dealt with in the subsequent chapter of this study.

### 3.3.3 FREEDOM AND SECURITY OF THE PERSON

The right to freedom and security of the person is protected under section 12 of the *Constitution of the Republic of South Africa of 1996* as outlined below. An attempt to demonstrate the position of the South African penal system with regard to compliance to not only this provision of the Constitution but also with regard to the applicable international law is highlighted in the below discussion. This discussion limits itself to section 12(1)(b)(c)(d)(e) and (12)(2)(b)(c) only. This is so because these sections are deemed to be more pertinent to this study as they deal with issues relating to the treatment of offenders and this doesn't render the rest of this section irrelevant or unimportant. An understanding of the identified sections of the *Constitution of the Republic of South Africa of 1996* lies in their thorough definitions and interpretations.

**12. (1) Everyone has the right to freedom and security of the person, which includes the right -**

- (a) not to be deprived of freedom arbitrarily or without just cause;**
- (b) not to be detained without trial;**
- (c) to be free from all forms of violence from either public or private sources;**
- (d) not to be tortured in any way; and**
- (e) not to be treated or punished in a cruel, inhuman or degrading way.**

**(2) Everyone has the right to bodily and psychological integrity, which includes the right -**

- (a) to make decisions concerning reproduction;**
- (b) to security in and control over their body; and**
- (c) not to be subjected to medical or scientific experiments without their informed consent**

According to Ball (2011:1), the right to be free from torture and other cruel, inhuman or degrading treatment or punishment is classified as an absolute right, meaning it cannot be limited. Section 37 (5) and article 4 paragraph 2 of the *International Covenant for Civil*

*and Political Rights* further classify subsections (1)(d)(e) and (2)(c) as non-derogable, meaning that it cannot be suspended for any reason.

In terms of the identified subsections of this right, the South African Department of Correctional Services is bound to ensure that prisoners are not incarcerated in its detention facilities without trial and to be free from any form of violence neither from fellow prisoners nor correctional officials. To affirm the former, paragraph 4.3.4.9 of the *Draft White Paper on Remand Detention Management in South Africa of 2013* states that:

*The Department of Correctional Services must ensure that all the Remand Detainees under its custody honour their next court dates, which are reflected in the J7.*

This is consistent with the requirement of humane treatment of prisoners.

According to Easton (2011:73), torture under the original *United States of America Bill of Rights of 1689* meant barbarous punishments such as disembowelling but now interpreted as the deliberate imposition of extreme mental and physical suffering. It is furthermore defined as cruel and unusual punishment.

In its declaration on the *Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the United Nations (1975) defined torture as follows:

*1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.*

*2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.*

Rodley (2002:468) opines that the foregoing definition vividly depicts three key pillars, namely;

- 1) the relative intensity of pain or suffering inflicted: it must not only be severe, it must also be an aggravated form of already prohibited (albeit undefined) cruel, inhuman or degrading treatment or punishment;
- 2) the purposive element: obtaining information, confession, etc.;
- 3) the status of the perpetrator: a public official must inflict or instigate the infliction of the pain or suffering.

In their publication of a framework for action under Convention against Torture (CAT) and Optional Protocol to the United Nations Convention against Torture (OPCAT) on the prevention and combating torture in South Africa, the Centre for the Study of Violence and Reconciliation and the Civil Society Prison Reform Initiative (2008:3) outlined the following three conditions and one exception for an act to qualify as torture emanating from the foregoing definition by the Convention:

- It must result in severe mental and/or physical suffering;
- It must be inflicted intentionally;
- It must be committed by or with the consent or acquiescence of a public official;
- It excludes pain and suffering as a result of lawful actions.

Easton (2011:73) interpretation of the definition of torture by the United Nations is that the treatment has to reach a sufficient level of severity to constitute torture and there has to be intentional ill-treatment causing intense mental or physical suffering. Torture will always involve inhuman and degrading treatment.

From Easton's interpretation above, there is an element of the second part with regard to the definition as per the focus of this study that refers to "inhuman and degrading treatment" meaning that one cannot divorce the two concepts. This is consistent with the 1975 United Nations declaration definition. Furthermore, Rodley (2002:474) highlights the fact that the 1975 United Nations Declaration against Torture included "*aggravated*

*form of other ill-treatment*” and later in 1984 the starkest dropping of the reference to the latter (torture being an aggravated form of other ill-treatment) by the Convention.

Rodley (2002:474) attributed the foregoing to firstly; what seemed to be an acknowledgement that there may be other understandings of torture that would be wider rather than narrower as per the provision of paragraph two of article one of Convention Against Torture, secondly; there are aspects that go beyond torture to cover other ill-treatment just as the full title of the Convention indicates and lastly that Article 16 explicitly referring to cruel, inhuman and degrading treatment or punishment not amounting to torture providing for a number of the Convention articles to be applicable to not only torture but to such other ill-treatment.

The Centre for the Study of violence and Reconciliation & Civil Society Prison Reform Initiative (2008:5) pose the following questions which are in fact a demonstration of the complexity of the concept of torture. These questions are further considered to be vexing and believed that they will keep courts and scholars occupied for decades to come:

What is then the relationship between torture and cruel, inhuman or degrading treatment? When does cruel, inhuman or degrading treatment become torture? Can acts that do not in themselves constitute torture, amount to torture when applied over a prolonged period? When does cruel, inhuman or degrading treatment become torture?

An initial definition of the concept of torture in the *United States of America Bill of Rights* from 1689 to date is an indication of a continuous attempt to bring an understanding of the complex dynamics associated with this concept to interested parties. It can be deduced from the foregoing that there exists a general concurrence that there is a relationship between ‘torture’ and ‘cruel, inhuman or degrading treatment’ and therefore the two concepts cannot be separated. The challenge here is the measurement. How does one quantify torture, cruelty, inhuman or degrading treatment? Should this question be left to the judiciary or legislative authority?

South Africa's recent enactment of the *Prevention and Combating of Torture of Persons Act 13 of 2013* which is aimed at giving effect to South Africa's international obligations such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading treatment or punishment (South Africa, 2013:1) is laudable and long overdue. However, this Act is only limiting itself to only section 12(1)(d) of the *Constitution of the Republic of South Africa* of 1996 dealing only with torture and being selective in complying with the United Nations imperatives. Furthermore, the definition of "torture" contained in section 3 of this Act is tautological of the United Nations definition without any indication of a relationship between torture and cruel, inhuman and degrading treatment.

Acknowledging the key challenges in this Act would go a long way in understanding its implications and relationship between torture and cruelty, inhuman and degrading treatment particularly in the correctional services context. South African correctional system does not have a policy on the prevention and combating of torture and inhuman and degrading treatment of inmates except an emphasis of the right to dignity and safe custody of inmates by the *Correctional Services Act 111 of 1998* as amended and the *White Paper on Corrections, 2005*. In other words, the phrasing 'torture and other ill-treatment' has not entered the policy jargon of the Department of Correctional Services (Article 5 Initiative 2014). An analysis of cases suggesting to be acts that amount to torture and cruel, inhuman or degrading treatment or punishment is done in the next chapter.

### **3.3.4 RIGHT TO HEALTH CARE, FOOD, WATER AND SOCIAL SERVICES**

The right to health care services in South Africa is contained in section 27 of the *Constitution of the Republic of South Africa* of 1996 as it can be seen below. This right is not classified as either absolute or non-derogable by both the *Constitution of the Republic of South Africa* of 1996 and international tools. This means this right can be limited in terms of section 36 of the said Constitution and be suspended by the state. However, this can only be done under certain circumstances in terms of section 37 of the Constitution in question.

27. (1) *Everyone has the right to have access to -*
- (a) *health care services, including reproductive health care;*
  - (b) *sufficient food and water; and*
  - (c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- (3) *No one may be refused emergency medical treatment.*

Luyt, Jonker & Bruyns (2010:213) see this right as not merely enough food and water to survive but rather as adequate food and water that make it possible to lead a healthy life. This is congruent to section 35(2)(e) of the *Constitution of the Republic of South Africa of 1996* that *everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity including at least exercise and the provision at the state expense of adequate accommodation, nutrition, reading material and medical treatment.*

Although Luyt, Jonker & Bruyns did not see fit to define the concept of 'adequacy' as submitted in the supra paragraph, there has been an extensive academic argument by scholars of jurisprudence about this concept. One could simply ask a question how 'adequate' is 'adequate'? These arguments are elicited by the court's contention that what is adequate medical treatment is determined by what the state can afford (*Van Biljon and Others v Minitser of Correctional Services and Others (11778/96) 1997(4) SA 441(C)*).

Singh & Maseko (2006:90) argue against the court's contention in *Van Biljon and others (11778/96) 1997(4) SA 441(C)* case saying that the standard of adequacy in section 35(2)(e) (referred to above), in terms of international law, should not be informed by resources availability at the first stage of analysis but what are accepted basic standards of medical treatment for prisoners in international and comparative law. To substantiate this submission, Singh & Maseko (2006:90) cited the case of *Mukong v Cameroon* which makes reference to the United Nations' Standard Minimum Rules for the Treatment of Prisoners. To further strengthen their argument, Singh & Maseko (2006:87) referred to

section 39(1)(b), *interpretation of Bill of Rights* and section 233, *the Application of International Law of the Constitution of the Republic of South Africa of 1996*.

Barnes (2009:44) argues that the court could have taken a literal approach to the term 'adequate'. This means that the court could have simply looked at the meaning of the term 'adequate'. While Collins Cobuild Advanced Dictionary (2009:18) defines adequate as good enough to be used, Oxford Advanced Learner's Dictionary (2010:17) refers to this concept as enough in quantity or good enough in quality for a particular purpose or need. To comprehend this definition, Barnes (2009:44) submits that for health treatment to be of quality, it must comply with recognised medical standards and the quantity must be sufficient for the health treatment.

It is clear from the foregoing that the two scholars of jurisprudence holds differing but critical views about the court's submissions with regard to the concept of 'adequacy' in the case of *Van Biljon and others*. The researcher is sceptical about Singh and Maseko's argument because it is based on unspecified United Nations' Standard Minimum Rules as referred to in the case of *Mukong v Cameroon*. Below are relevant [to medical services] excerpts of the United Nations' Standard Minimum Rules which doesn't seem to include any provision relating to Singh & Maseko's submission that standard of health adequacy should not be determined by resources availability. Furthermore, their argument relies only on the submissions made in the case of *Mukong v Cameroon* and chose to ignore the case of *Harris v Thigpen* cited in the case of *Van Biljon and Others*. Should their argument be considered to be valid, then the need to amend the *Constitution of the Republic of South Africa of 1996* will be inescapable to enlist the right to health care (of those detained) as a non-derogable because that will mean that even if the minister proved (in the case of *Van Biljon and others*) that there is no resources to cater for this right, the Department could have been on the wrong. The point is, this right is not absolute, can be limited and can be derogated under certain circumstances in terms of the *Constitution of the Republic of South Africa of 1996*.

Barnes argument that the point of departure could have been a literal definition of the concept 'adequacy' holds waters. The researcher fully agrees with this submission because the definition of this concept could have led to a decision to refer the issue of adequacy determination to the relevant fraternity just as in the case of *E N and Others v Government of the Republic of South Africa and Others (4576/2006) 2007 SA 74 (D)* wherein the court agreed in principle that it cannot prescribe treatment and therefore left that function for the medical fraternity.

According to the South African Human Rights Commission (2004:8), the right to health is a fundamental human right essential for the exercise of other human rights.

It is the researcher's view that if any society should live harmoniously, it will be a society that respects the human dignity of every individual in that society. The question that ought to be asked is whether this right can be limited or derogated in a democratic society based on human dignity?

This right is guaranteed by various international and regional human rights instruments. For instance, rules 22 – 26 of the United Nations Standard Minimum Rules of 1955 state that:

**22.** (1) *At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.*

(2) *Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.*

(3) *The services of a qualified dental officer shall be available to every prisoner.*

**23.** (1) *In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.*

*(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.*

**24.** *The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.*

**25.** *(1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.*

*(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.*

**26.** *(1) The medical officer shall regularly inspect and advise the director upon:*

- a) The quantity, quality, preparation and service of food;*
- b) The hygiene and cleanliness of the institution and the prisoners;*
- c) The sanitation, heating, lighting and ventilation of the institution;*
- d) The suitability and cleanliness of the prisoners' clothing and bedding;*
- e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities (United Nations, 1955).*

Article 12 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) states that:

*The States Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

Principle 24 of the United Nations Body of Principles of 1988 states that:

*a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment and thereafter medical care and treatment shall be provided whenever necessary. This care shall be provided free of charge (United Nations, 1988).*

The treatment of offenders in South Africa with regard to health care services is considered to be just as important right (section 27(1)(a) and (b)) afforded by the *Constitution of the Republic of South Africa* of 1996. To give effect to the foregoing section

and section 27(2), the *National Health Act 61 of 2003* was enacted. Section 2(c)(i) of this Act makes provision for the objects of this act which *inter alia* include the following:

2. ....to regulate national health and to provide uniformity in respect of health services across the nation by -
  - (c) protecting, respecting, promoting and fulfilling the rights of -
    - (i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care.

This is consistent with the obligation that the state must facilitate and implement legislative and other measures in recognition of the right to health and adopts a national health policy with detailed plans on how to realise this right (Tomasevski, 1995 as quoted by the South African Human Rights Commission, 2000).

It is mandatory for the South African Department of Correctional Services to comply with the above provisions of the international conventions, the *Constitution of the Republic of South Africa of 1996* as well as the National Act as outlined above. In its Health Care Policy, the Department of Correctional Services has acknowledged that incarcerated individuals including awaiting trial detainees in custody of the department have the right to adequate health care services as stipulated in the *Constitution of the Republic of South Africa of 1996* and in all applicable Legislation and Conventions (Department of Correctional Services, 2005:6)

Furthermore, the department outlines the following policy objectives in this regard:

- To provide clear and concise guidelines for the administration of health care and the treatment of offenders;
- To provide a framework for health care delivery to ensure access to standard health care to all correctional centres;
- To ensure that health care services staff are aware of their responsibilities for the care and treatment of patients and management of the service;
- To provide guidelines on the scope/extent of health care to be provided to offenders;

- To guide both internal and external service providers on the scope of health care within correctional services;
- To define the levels of health care to be provided to offenders in all correctional centres;
- To ensure that services are accessible to all offenders who need them regardless of their age, gender, sexuality, ethnicity or health status;
- To ensure that correctional health services are clinically effective and resources are used efficiently;
- To deliver a quality of care and treatment equivalent to that provided to the general population;
- To guide the allocation of resources in order to meet the needs of all offenders including awaiting trial detainees;
- To ensure the establishment of efficient and effective internal and external referral mechanisms.

It is also worth to mention that in its new organisational structure, the South African Department of Correctional Services has two separate Directorates dealing with Health Care, namely; Primary Health Care and HIV/AIDS under the leadership of the Deputy Commissioner: Personal wellbeing. It was previously called Programme 4: Care. This is a step into the right direction because this will ensure effective health care services in that the entire service is broken into smaller and manageable components. This could be attributed to court order in the case of *E N and Others v Government of the Republic of South Africa and Others(4576/2006) 2007 SA 74 (D)* that:

The respondents (including the Department of Correctional Services) remove, with immediate effect, the restrictions that prevent the applicants and all other similarly situated prisoners as Westville Correctional Centre who meet 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, from accessing Anti-Retroviral Treatment at an accredited public health facility.

The respondents (including the Department of Correctional Services) provide, with immediate effect, Anti-Retroviral Treatment in accordance with the aforesaid Operational plan to the applicants and all other similarly situated prisoners at Westville Correctional Centre at an accredited public health facility.

However, it is astonishing to notice that the Strategic Plan 2012/13 – 2016/17 of the department is still reflecting programme 4: Care, with the following objectives:

- Provide appropriate nutritional services to inmates;
- Provide access to health care services;
- Improve the treatment for inmates who have been diagnosed with mental illness;
- Increasing access to medical treatment for inmates diagnosed with communicable diseases, hypertension and diabetes;
- Effective procurement of appropriate waste management services;
- Provision of necessary requirements for personal hygiene (Department of Correctional Services 2012:22).

Apart from this astonishing discovery, the departmental policy and the above objectives are mum about section 27 (1)(b) of the *Constitution of the Republic of South Africa of 1996*.....*sufficient food and water*. Could this be because the department has a separate policy on food and water? An analysis of the practical implementation of this constitutional requirement is done in the next chapter

### 3.3.5 CHILDREN'S RIGHTS

Section 28 of the *Constitution of the Republic of South Africa of 1996* makes provision for the children's rights as outlined below. Although the International Covenant on Civil and Political Rights is silent in respect of children's rights classification (see article 4 of the International Covenant on Civil and Political Rights), the *Constitution of the Republic of South Africa of 1996* is succinct and loud about children's right particularly with regard to the certain parts (subsection (1)(d) and (e), subparagraphs (i) and (ii) of subsection (1)(g)) of this right classified as non-derogable in terms of section 37(5) of the said Constitution.

28. (1) *Every child has the right -*

- (a) *to a name and a nationality from birth;*
- (b) ***to family care or parental care, or to appropriate alternative care when removed from the family environment;***
- (c) ***to basic nutrition, shelter, basic health care services and social services;***

- (d) **to be protected from maltreatment, neglect, abuse or degradation;**
- (e) *to be protected from exploitative labour practices;*
- (f) *not to be required or permitted to perform work or provide services that -*
  - (i) *are inappropriate for a person of that child's age; or*
  - (ii) *place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
- (g) **not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -**
  - (i) **kept separately from detained persons over the age of 18 years; and**
  - (ii) **treated in a manner, and kept in conditions, that take account of the child's age;**
- (h) *to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
- (i) *not to be used directly in armed conflict, and to be protected in times of armed conflict.*

(2) *A child's best interests are of paramount importance in every matter concerning the child.*

**(3) In this section 'child' means a person under the age of 18 years.**

The correctional services responsibility with regard to the treatment of children offenders should be as lawful as possible thereby protecting and promoting the rights of child offenders in terms of subsections (1)(b)(c)(d)(g) and (i) as well as (3) as highlighted above. These identified subsections of this right are also deemed relevant to this study in that they imply the treatment of children offenders.

It's a well-known fact that criminal activities ranging from minor to serious crimes occurs at local, regional and international level in communities across the world. It is unfortunate that children are also involved in crime. They are in most cases involved through influential forces such as peer pressure, the elderly influence etc...The reality is that when one engage in criminal activities the chances are that they will go through the Criminal Justice System process and possibly end up in the custody of correctional services as offenders. In a media statement dated 30<sup>th</sup> August 2012, the then Minister of correctional services said that it was extremely concerning that children who normally should not be in prisons

(correctional centres) have committed serious crimes ranging from murder, rape and theft (Department of Correctional Services, 2012).

The foregoing paragraph is a clear demonstration of the fact that children under these circumstances are removed from the family environment and put in custody of the department of correctional services. Therefore, it is the responsibility of the department of correctional services to provide basic nutrition, shelter, basic health care services and social services and to protect children from maltreatment, neglect, abuse or degradation as also required by sections 27 and 12 of the *Constitution of the Republic of South Africa* of 1996 respectfully.

In addition to the above considerations, the Department of Correctional Services must officially consider and comply with *Children's Act 38 of 2005* and *Child Justice Act 75 of 2008* as passed by South African Parliament in its treatment of child offenders. The two Acts are aimed at giving effect to the international obligations and the *Constitution of the Republic of South Africa* of 1996. These include the following:

Article 37 of the *United Nations Convention on the Rights of Children* states that:

*Any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so.*

Article 40(1) of the *United Nations Convention on the Rights of Children* states that:

*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

Rule 29 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states that:

*In all detention centres juveniles should be separated from adults, unless they are members of the same family.*

Rule 31 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states that:

*Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.*

Section 28 (g)(i)(ii) of the *Constitution of the Republic of South Africa of 1996* states that:  
.....every child has the right to be kept separated from detained persons over the age of 18 years.  
.....to be treated in a manner, and kept in conditions, that take account of the child's age.

Furthermore, section 28(3) of the *Constitution of the Republic of South Africa of 1996* states that ..... 'child' means a person under the age of 18 years. This is in line with article 1 of the *United Nations Convention on the Rights of the Child* that a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (United Nations, 1989). Consistent to this definition is a definition by article 2 of the *African Charter on the Rights and Welfare of the Child* (Organisation of African Union, 1990), Rule 11(a) of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

In its situational analysis of children in prisons in South Africa, the Community Law Centre (2000:11) reported that the Department of Correctional Services has a different definition from that of the *United Nations Convention on the Rights of the Child* and the South African Constitution. There is no source to this statement and therefore this amounts to the misrepresentation of facts because the Department of Correctional Services definitions of a child in chapter 1 of the *Correctional Services Act 111 of 1998* and paragraph 11.2.1 of the *White Paper on Corrections, 2005* are not only consistent with the *United Nations Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child* and the *Constitution of the Republic of South Africa of 1996* but also further draws a distinction between children – those below 18 years of age and juveniles – those between the age of 18 & 25 (Department of Correctional Services, 2015).

The Department of Correctional Services policy position with regard to the right of children is clear as per paragraph 11.2.1 of the *White Paper on Corrections, 2005* as it states that:

*The Department's position on children in detention is that different age groups of children require different service delivery and should, as far as possible, be accommodated separately. The Department must align its policy with that of the other integrated justice system departments to ensure that appropriate policies are in place for the various age categories of children. Children should not be in*

*correctional centres, and should as far as is possible be diverted from the criminal justice system. Where this is not an option, they should be accommodated in secure care facilities that are designed for children.*

Furthermore, section 19 [dealing with children] of the *Correctional Services Act 111 of 1998* is only referring to the treatment but quiet about the separation of children and adults which is dealt with under section 7 [accommodation]. So, the policy transition since the apartheid era in terms of the treatment of children offenders in South Africa is commendable but the question that should be asked is the practicality of implementing such policies. This question is dealt with in the following chapter of this study.

### **3.3.6 RIGHT TO EDUCATION**

The right to education is contained in section 29 of the *Constitution of the Republic of South Africa* of 1996 as outlined below.

29. (1) *Everyone has the right -*

- (a) *to a basic education, including adult basic education; and*
- (b) *to further education, which the state, through reasonable measures, must make progressively available and accessible.*

(2) *Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -*

- (a) *equity;*
- (b) *practicability; and*
- (c) *the need to redress the results of past racially discriminatory laws and practices.*

This right is not classified as absolute nor non-derogable which means that it can be limited in terms of section 36 of the *Constitution of the Republic of South Africa* of 1996 and be suspended by the state under certain circumstances.

As defined by the United Nations Committee on Economic, Social and Cultural Rights, education is both a human right in itself and an indispensable means of realizing other

human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make (United Nations, 2014).

In his report to the Human Rights Council on access to education, Special Rapporteur, Vernor Muñoz (2009) quoted a prisoner as saying

*“We cannot imprison a person for many years without providing an avenue for change... Indeed change will have occurred but certainly not how it was envisioned. For we will have created an envious, frustrated, delusional, pent-up, angry and de-humanized individual who will certainly seek revenge”* (United Nations, 2014).

It will be a fallacy to think that when one is incarcerated education ceases to exist and that education is only meant for the so called law abiding citizens. People who wronged the society and serving their punishment in prisons as well as those awaiting trial are entitled to the right to education. According to the Human Rights Commission of South Africa (2012:7) access to quality education enjoys priority status on the national development agenda. This means every citizen of the Republic should have access to education which is currently being prioritized by government as one of most important sectors.

According to the Prison Administration (1969:44) as quoted by Morodi (2001:8) the educational system prisoners undertake is the one integrated with that of the entire country with the purpose that upon their release they may go on to further their education without hardships. For the benefit of the psychological as well as physiological health of prisoners cultural and recreational activities are being provided in prisons.

This is placing certain responsibilities on to the Department of Correctional Services of ensuring that every inmate in its care receives basic education, including adult basic education as well as further education. This is according to Morodi (2001:9) an international practice in the submission that prisoners throughout the world are accorded with an opportunity to further their education while serving their sentences so as to ensure their successful reintegration into the society. Most prisoners emerge from designated backgrounds with little or no knowledge at all and undergo vocational training in various fields such as carpentry, bricklaying and candle manufacturing while serving their sentences. It should be noted that not all prisoners fall under this category though. Some prisoners belonged to various fields of specialization or professions such teaching, lawyers, accountants, police officers, business people or respected leaders. Education as an essential tool in prison helps to prepare prisoners for life after prison for self-supporting purposes and not to go back to crime.

The departmental responsibilities with regard to the provision of basic, adult and further education emanate from the *Constitution of the Republic of South Africa* of 1996 as outlined above and international instruments which South Africa is a member state. The latter is what Morodi (2001:9) referred to as an international practice particularly member state to organisations such as United Nations and African Union. These international instruments make provision for the following with regard to the right to education:

Rule 77 of the United Nations Standard Minimum Rules (1955) states that:

*77. (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.*

*(2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.*

Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966) states that:

*1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship*

*among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(a) Primary education shall be compulsory and available free to all;*

*(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

*(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

*(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

Article 17(1) of the African Charter on Human and Peoples Right (1981) states that:  
*Every individual shall have the right to education.*

Paragraph 6 of the Basic Principles for the Treatment of Prisoners (1990) states that:

*6. All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.*

The South African Correctional System heeded the call and complied on paper with international obligations with regard to the right under discussion (offenders' rights to education). This can be witnessed from the following three legal documents.

Firstly, section 16 of the *Correctional Services Act 111* of 1998 states that:

*16 (1) Department may provide correction, development and care programmes and services even when not required to do so by this Act.*

*(2) In all instances, when the Department does not provide such services, the National Commissioner must inform inmates of services available from other sources and put inmates who request such services in touch with appropriate agencies.*

*(3) The Department must take measures, in terms of planning, policy and infrastructure, to accommodate inmates with disabilities in order to enable such inmates, where practicable to fully exercise the rights and to enjoy the amenities to which every inmate is entitled.*

*(4) The Department must take measures, in terms of planning, policy and infrastructure, in order to create an environment sensitive to the gender of all inmates.*

Secondly, paragraph 9.9 of the *White Paper on Corrections* of 2005 states that:

*9.9.1 In order to improve the levels of illiteracy amongst offenders in South Africa, and in particular the youth, the Department places significant emphasis on the provision of literacy classes and basic schooling for offenders. The constitutional imperative for schooling is not a right that is curtailed by incarceration, and between the Department of*

*Education and the Department of Correctional Services, literacy, schooling and basic adult education are priorities.*

- 9.9.2 *International instruments indicate that education in a correctional environment must be in line with the educational system of the general society, and provision must be made for the continuity of the educational activity of people incarcerated in prison, and for those who are released on parole.*

Thirdly, the Correctional Services Regulations is more specific in terms of what needs to be done in terms of the promotion and protection of the right to education of inmates.

Paragraph 10 of these regulations states that:

- 2) (a) *Education and training services must be rendered to sentenced offenders who have a need for such services, subject to paragraph (b), those services will be rendered in accordance with education and training programmes.*
- (b) *The education of sentenced offenders must be in accordance with the educational system of the country.*
- (c) *A qualified educator or technical educator registered with the South African Council of Educators established in terms of Section 4 of South Africa Council for Educators Act, 2000 (Act No. 31 of 2000), must render those services.*
- (e) *If such a qualified educator or qualified correctional official is not available, the National Commissioner may appoint a temporary educator or voluntary worker with educational or technical qualifications and registered with the South African Council of Educators.*
- (f) *All sentenced offenders who have not obtained the ninth grade as contemplated in Section (3)(1) of the South African Schools Act, 1996 (Act No. 84 of 1996), must attend educational programmes until such offender reaches the age of 25 years or the ninth grade or adult education and training level 4, as registered on the national qualifications framework contemplated in the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), whichever occurs first. The Department must, within its available resources, ensure that such offenders are provided with the necessary resources to enable them to comply with this requirement*

To give effect to the above, the Department of Correctional Services developed the following three (3) educational programmes:

1. Early Childhood Development

Although the focus of education in the Department of Correctional Services is mainly on sentenced offenders, the necessary support services and systems are provided to Mother and Child Care units in terms of Early Childhood Development (ECD).

2. Awaiting-Trial Detainees, Parolees and Probationers

The Directorate Formal Education is only responsible for providing administrative support, study guidance, counselling and other relevant support in terms of studies to awaiting-trial detainees, parolees and probationers. During the re-integration process the official in charge of education links the probationer with the community learning centres where practicable.

3. All Sentenced offenders

3.1 General Education and Training

#### 3.1.1 Children of School-going age:

It is compulsory for children of school-going age to attend school. Education opportunities should be provided to these children (15 years and younger) sentenced to imprisonment. Learning methodologies that will meet the needs of these children and contribute towards their personal growth are utilized in Correctional centres. The curriculum as prescribed by the Department of Education is followed.

#### 3.1.2 Pre Adult Basic Education and Training (ABET) and ABET level 1 - 4:

Pre-ABET programmes is a compulsory part of the ABET field and provide opportunities to learners to learn to read and write. This course serves as a bridging phase to ABET level 1. ABET is available from level one (1) up to level four (4). The programme is presented by trained ABET practitioners (educators, functional officials / trained offender facilitators).

#### 3.2 Further Education and Training (FET)

This programme is offered in cooperation and in line with national and provincial departments of education and the DCS is bound by the directives and curricula of these departments. Free education, up to and including grade 12 (including N1-N3 business studies) is provided to all sentenced juveniles and also to adult learners where resources permit or education qualifications can be obtained by means of distance learning in the learners own time and at his/her own expense.

#### 3.3. Higher Education and Training (HET)

All courses/subjects/study fields that falls in this band should be done through distance learning in the offenders own time and at his/her own expense and includes, diplomas, occupational certificates, first degrees, higher diplomas, professional qualifications, higher degrees, further research degrees and doctorates.

#### 3.4. Computer Based Learning

The purpose for the establishment of computer based learning centres is to provide learners with a secure environment to utilize technology for study purposes, to train offenders to become computer literate as well as to use the centre within a multimedia approach to train students in relevant courseware packages / applications. (Department of Correctional Services, 2014).

The legislation, policies, regulations and programmes available are a good sign of compliance particularly on paper. The practical implementation of such is of the utmost importance. An analysis of the implementation of such programmes is undertaken in the subsequent chapter of this study.

### **3.3.7 FREEDOM OF RELIGION, BELIEF AND OPINION**

In South Africa, right to freedom of religion is protected by section 15 of the *Constitution of the Republic of South Africa* of 1996 as outlined below. Although section 37 of this Constitution does not classify this right as non-derogable, article 4(2) of the International

Covenant on Civil and Political Rights classify it as non-derogable (United Nations, 1966:174). This means that this right cannot be suspended for any reason.

15. (1) *everyone has the right to freedom of conscience, religion, thought, belief and opinion.*

(2) *Religious observances may be conducted at state or state-aided institutions, provided that -*

(a) *those observances follow rules made by the appropriate public authorities;*

(b) *they are conducted on an equitable basis; and*

(c) *attendance at them is free and voluntary.*

(3)(a) *This section does not prevent legislation recognising*

(i) *marriages concluded under any tradition, or a system of religious, personal or family law; or*

(ii) *systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.*

According to the Department of Correctional Services Strategic Plan 2012/2013 – 2016/2017, one of the departmental legislative mandates is to comply with the below section 31 of the *Constitution of the Republic of South Africa* of 1996 (Department of Correctional Services, 2013:8).

31 (1) *Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -*

(a) *to enjoy their culture, practise their religion and use their language; and*

(b) *to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*

The Department of Correctional Services incorrectly identifies the above section of the Constitution as the right to freedom of religion (Department of Correctional Services, 2014:8). One can only assume that this is a mistake of confusing the two sections. Essentially, the two sections are constitutional mandates and must be addressed as such. Perhaps the department should note that section 31 should be read against the background of section 15 as asserted by Currie and De Waal (2005:630)

Devenish (1999:163) refers to this right as the right of a person to believe in and practice whatever faith he or she chooses. In addition to that, Dickson (1985) as quoted by

Devenish (1999:163) defines religious freedom as the right to entertain religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination. Devenish (1999:163) further noted that the above definition should include the right of an individual to have no religious belief.

The right to freedom of religion like other rights is also important to be afforded to inmates and be protected and promoted by the Department of Correctional Services. The Colombian Human Rights Law Review (2009) is straight and forward about this by stating that while in prison, you have the right to observe and practice the religion of your choice. However, this definition does not include the right of an individual to have no religious belief. It is particularly important as it also plays a role in the rehabilitation of inmates. Luyt, Jonker & Bruyns (2010:208) opine that freedom of religion implications to correctional environment are that officials must not enforce their personal beliefs or religion on inmates no matter how good their intentions and that religious programmes or services that inmates are subjected to must provide for their diverse convictions.

Implications of freedom of religion of inmates go beyond the foregoing submission and always been problematic in prisons not only in South Africa but also in America and other European countries for the following reasons:

- Firstly, there is often courts disagreement about what qualifies as a religion or religious belief (Boston , 1995 as quoted by American Civil Liberties Union, 2005);
- Secondly, there is confusion as to what is deemed to be a violation of freedom of religion in terms religious diet, grooming, worship services, religious jewellery or even access to a chaplain before execution leading to extensive court cases (Hudson Jr., 2002).

What seem to be unique in the South African penological context is the nature of the composition of religious society due to its diversity. For instance, rastafarism is yet to be accepted as a religious practice not only in prisons but across the Republic of South

Africa. This in turn raises a question as to whether the right to freedom of religion is indeed protected and promoted like other religious denominations such as Christians or Muslims.

Despite the challenges that this right poses for the Department of Correctional Services, it is imperative to comply not only with the provision of the *Constitution of the Republic of South Africa of 1996* but also with the following international obligations:

Rule 41 of the United Nations Standard Minimum Rules (1955) states that:

41. (1) *If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.*
  - (2) *A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.*
  - (3) *Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.*
42. *So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.*

Article 18 of the International Covenant on Civil and Political Rights (1966) states that:

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

Article 8 of the African Charter on Human and Peoples' Right (1981) states that:

*Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.*

Paragraph 3 of the Basic Principles for the Treatment of Prisoners (1990) states that:

*It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.*

Section 14 of the *Correctional Services Act 111 of 1998* as amended makes provision for the right to freedom of religion, belief and opinion as it states that:

- (1) *A prisoner must be allowed freedom of conscience, religion, thought, belief and opinion.*

- (2) *may attend religious services and meetings held in the prison freely and voluntarily and may have in his or her possession religious literature.*
- (3) *Where practicable, places of worship must be provided at every prison for prisoners of religious denominations.*
- (4) *No prisoner maybe compelled to attend religious services or meetings or to part in religious practices.*

The researcher suggest that the above section be read in conjunction with section 38(1)(d) of the same Act which states that:

- (1) *As soon as possible after admission as a sentenced prisoner, such prisoner must be assessed to detemine his or her—*
  - (d) *religious needs...*

Furthermore, Paragraph 9.7.2 of the *White Paper on Corrections of 2005* also makes provision for the right of offenders to religion as it states that:

*A correctional sentence-plan should be based on the total needs of the specific offender which includes inter alia the needs in terms of emotional well-being of the offender.*

According to Landman, Luyt & Du Preez (2006:329) the Department of Correctional Services has an existing religious policy which they believe is compromised by the following two factors:

- Firstly, there are 26 full-time official prison chaplains in its service to minister 240 prisons. This makes a ratio of 1:9.  
The question that ought to be asked is whether this is sufficient or according to international standard?
- Prisoners did not see religion as falling within their rights as bodily beings but as a conflict between souls and dogmatic truths.

Landman, Luyt & Du Preez (2006:333) suggest that the following should be incorporated in the existing inmates' religious policy. It is the researcher's view that these be regarded as the policy gaps:

- Prisoners have a need to discuss their physical needs in God-talk, and a need for a theology of the incarcerated body.
- Prisoners need guidance in integrating spirituality and sexuality.

- Prisoners need encouragement to develop themselves as moral agents within a context where gangs rule, and where sexual activity is aimed at gaining power.
- Alternative spiritualities, such as prostitute spiritualities and gay spiritualities, should be regarded with respect and should be seen within a viable variety of spiritual bondings in prison settings.
- Prisoners need to be guided spiritually towards forming healthy relationships within a context where survival may mean forcefully forming unhealthy (that is, unbalanced) relationships

According to the 1997 annual report of the Department of Correctional Services, religious care programme forms part of the Development Services provided to inmates. This programme aims at providing for the spiritual needs of prisoners and personnel. Religious care services are in a form of large group gatherings, small group sessions and personal interviews (Department of Correctional Services, 1997).

Apart from the policy gaps identified by Landman, Luyt and Du Preez (2006:333), it can be safely said that the Department of Correctional Services sufficiently comply with the international obligations and the *Constitution of the Republic of 1996*. An analysis of the practical implementation of these legislative and policy directives is conducted on the following chapter of this study.

### **3.3.8 ARRESTED, DETAINED AND ACCUSED PERSONS**

The right of arrested, detained and accused persons is protected by section 35 of the *Constitution of the Republic of South Africa of 1996* as outlined below. While the *International Convention for Civil and Political Rights* is silent regarding the classification of these rights, section 37 of the *Constitution of the Republic of South Africa of 1996* identify the following subsections to be classified as non-derogable: subsections (1)(a), (b) and (c) and (2)(d); the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) subsection (4); and subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

35. (1) *Everyone who is arrested for allegedly committing an offence has the right -*
- (a) *to remain silent;*
  - (b) *to be informed promptly -*
    - (i) *of the right to remain silent; and*
    - (ii) *of the consequences of not remaining silent;*
  - (c) *not to be compelled to make any confession or admission that could be used in evidence against that person;*
  - (d) *to be brought before a court as soon as reasonably possible, but not later than -*
    - (i) *48 hours after the arrest; or*
    - (ii) *the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;*
  - (e) *at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and*
  - (f) *to be released from detention if the interests of justice permit, subject to reasonable conditions.*
- (2) ***Everyone who is detained, including every sentenced prisoner, has the right***
- (a) ***to be informed promptly of the reason for being detained;***
  - (b) ***to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;***
  - (c) ***to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
  - (d) ***to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;***
  - (e) ***to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and***
  - (f) ***to communicate with, and be visited by, that person's -***
    - (i) ***spouse or partner;***
    - (ii) ***next of kin;***
    - (iii) ***chosen religious counsellor; and***
    - (iv) ***chosen medical practitioner.***
- (3) *Every accused person has a right to a fair trial, which includes the right -*
- (a) *to be informed of the charge with sufficient detail to answer it;*
  - (b) *to have adequate time and facilities to prepare a defence;*
  - (c) *to a public trial before an ordinary court;*
  - (d) *to have their trial begin and conclude without unreasonable delay;*
  - (e) *to be present when being tried;*
  - (f) *to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;*

- (g) *to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (h) *to be presumed innocent, to remain silent, and not to testify during the proceedings;*
- (i) *to adduce and challenge evidence;*
- (j) *not to be compelled to give self-incriminating evidence;*
- (k) *to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;*
- (l) *not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;*
- (m) *not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;*
- (n) *to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
- (o) *of appeal to, or review by, a higher court.*

(4) *Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.*

(5) *Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.*

In its strategic plan the Department of Correctional Services identified what it refers to as section 35 – the right to humane treatment and to communicate and be visited by family, next of kin etc. (Department of Correctional Services, 2012:8). This is effectively delimiting its focus to only section 35(2)(e)(f) of the *Constitution of the Republic of South Africa of 1996*. Although there is no stated reason to that, it can only be assumed that the department is aware of its responsibilities with regard to subsections (a)(b)(c) and (d). Please see above excerpts of this section. Apart from that, the identified subsections are the interest of this study.

According to Devenish (1999:511) subsection 35(2)(e) concerns the right to conditions of detention that are consistent with human dignity (see also *supra* section on human dignity), including at least exercise and the provision, at state expense, of adequate

accommodation, nutrition, reading material and medical treatment (see *supra* section on the right to health care services). In line with that, it can only make sense to submit that subsection 35(2)(f) concerns the right to contact with the outside world.

The conditions of detention consistent with human dignity discussed throughout this chapter can be directly linked to the treatment of incarcerated people in South Africa. Aspects such as exercise, accommodation, nutrition, reading material and medical treatment as well as contact with the outside world are of importance and can be used as a yardstick to determine the treatment of those incarcerated.

Within the prison administration context, the right to contact with the outside world is just as important. Coyle (2009:99) argues that people who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact with their families. Just as it is a right for the prisoner, it is equally a right for the family members who are not in prison. They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships are maintained and developed.

These are not only requirements by the *Constitution of the Republic of South Africa of 1996* as outlined in the Department of Correctional Services strategic plan 2012/2013 – 2016/2017 (2012:8) but also the following international obligations:

Article 12 United Nations Universal Declaration of Human Rights (1948) states that:  
*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...*

Rule 21 of the United Nations Standard Minimum Rules (1955) states that:

21. (1) *Every prisoner who is not employed in outdoor work shall have at least one suitable exercise in the open air daily if the weather permits.*
- (2) *Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.*

Rule 9 - 14 of the United Nations Standard Minimum Rules (1955) states that:

9. (1) *Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.*
  - (2) *Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.*
10. *All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.*
11. *In all places where prisoners are required to live or work,*
  - (a) *The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;*
  - (b) *Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.*
12. *The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.*
13. *Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.*
14. *All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.*

Rule 20 of the United Nations Standard Minimum Rules (1955) states that:

20. (1) *Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.*
- (2) *Drinking water shall be available to every prisoner whenever he needs it.*

Rule 40 of the United Nations Standard Minimum Rules (1955) states that:

40. *Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.*

Rule 37 - 39 of the United Nations Standard Minimum Rules (1955) states that:

37. *Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.*

38. (1) *Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.*
- (2) *Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.*
39. *Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.*

Article 23 of Internal Covenant on Civil and Political Rights (1966) states that:  
*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*

Article 5 of the African Charter on Human and Peoples Rights (1981) states that:  
*Every individual shall have the right to the respect of the dignity inherent in human being and to the recognition of his legal status.*

Paragraph 3 of the Basic Principles for the Treatment of Prisoners (1990) states that:  
*All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.*

To give effect to the above international obligations and section 35(2) of the *Constitution of the Republic of 1996*, chapter 3 of the *Correctional Services Act 111 of 1998* as amended makes provision for the general requirements of custody of offenders that is consistent with human dignity. Paragraph 10.7.2 of the *White Paper on Corrections, 2005* further offers an interpretation of section 35(2) of the Constitution to mean that the department has an obligation to provide access to healthcare for inmates.

In addition to this, the Correctional Services Regulations was published. To be more specific, these regulations address section 35(2) as follows:

**6. Exercise**

- (1) The Correctional Medical Practitioner must certify whether the following categories of inmates are fit to exercise:
- (a) an inmate who is injured, ill or complains that he or she is injured or ill;
  - (b) an inmate who receives any prescribed medicines and/or medical treatment;

- (c) an inmate who receives continued or additional medical treatment; and
  - (d) an inmate who is pregnant.
- (2) In respect of each inmate other than an inmate mentioned in sub-regulation (1), a Correctional Medical Practitioner or registered nurse must issue a certificate stating whether or not the inmate is fit for exercise.
- (3) If a registered nurse in considering whether an inmate is fit for exercise, is of the opinion that the inmate is subject to any condition which should be evaluated by a Correctional Medical Practitioner, the registered nurse must refer the inmate to the Correctional Medical Practitioner for a decision as to whether the inmate concerned is fit for exercise.

### 3. Accommodation

- (1) In every Correctional Centre provision must be made for general sleeping and in-patient hospital accommodation, consisting of single or communal cells or both.
- (2)
- (a) All cell accommodation must have sufficient floor and cubic capacity space to enable the inmate to move freely and sleep comfortably within the confines of the cell.
  - (b) All accommodation must be ventilated in accordance with the National Building Regulations SABS 0400 of 1990 issued in terms of Section 16 of the Standards Act, 1993 (Act No. 29 of 1993).
  - (c) Any cell utilised for the housing of inmates must be sufficiently lighted by natural and artificial lighting so as to enable an inmate to read and write.
  - (d)
    - (i) In every Correctional Centre there must be sufficient, accessible ablution facilities that must be available to all inmates at all times.
    - (ii) Such facilities include access to hot and cold water for washing purposes.
    - (iii) In communal sleeping accommodation ablution facilities must be partitioned off.
  - (e)
    - (i) Every inmate must be provided with a separate bed and with bedding which provides adequate warmth for the climatic conditions and which complies with hygienic requirements as prescribed by the Order.
    - (ii) In equipping a Correctional Centre hospital, provision must be made for a standard range of hospital beds, bedding and clothing that specifically suit the needs for effective patient care.
  - (f) Whenever separate Correctional Centres for males and females are established on the same site or on separate sites, but in proximity of each other, or whenever separate sections of a Correctional Centre are available for the reception of male and female inmates, the following requirements must be observed:
    - (i) The locks of the doors and gates of the Correctional Centre or section for males and those of the Correctional Centre or section for females must not correspond.

- (ii) The keys of a Correctional Centre or section for females must be permanently in the possession of a female correctional official.
- (iii) Any male person visiting a Correctional Centre or section for females must be accompanied by a female correctional official during the full period of such visit.
- (g) Inmates of a particular security classification must be detained separately from inmates with a different security classification.
- (h) Inmates between the ages of 18 and 21 years must be detained separately from inmates who are over the age of 21 years.
- (i) Inmates suffering from mental or chronic illness or whose health status will be affected detrimentally or whose health status poses a threat to other inmates if detained in a communal cell, must be detained separately on request of the Correctional Medical Practitioner or registered nurse.

#### **4. Nutrition**

- (1) Each sentenced offender must be provided with a diet consisting of a minimum protein and energy content of:
  - (a) 2 000 kilo calories per day for adult females;
  - (b) 2 500 kilo calories per day for adult males; and
  - (c) 2 800 kilo calories per day for children, between the ages of 13 and 18 years of which at least 0.8 grams per kilogram of bodyweight per day must be from the protein group.
- (2) The diet must provide for a balanced distribution of food items according to the following food groups, namely:
  - (a) grain;
  - (b) fruits and vegetables;
  - (c) dairy;
  - (d) meat and protein; and
  - (e) fats, oils and sugar.
- (3) Food must be stored, prepared, cooked and served in compliance with the provisions of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972) and the principles of good hygiene.

#### **13. Reading Material**

- (1) A properly organised library containing literature of constructive and educational value, as prescribed by the Order, must as far as reasonably practicable, be established and maintained at every Correctional Centre.
- (2) An inmate may receive reading material from outside the Correctional Centre in the manner as prescribed by the Order.
- (3) A correctional official may inspect an envelope or package sent or received by an inmate to the extent necessary to determine whether the envelope or package contains any article that may pose a danger to the security of the Correctional Centre or the safety of any person, but the correctional official may not read the contents of the envelope or package, except in the circumstances contemplated in Regulation 8(4).
- (4) The Head of the Correctional Centre or a correctional official designated by him or her may prohibit:

- (a) the entry into the Correctional Centre or the circulation within the Correctional Centre of any publication, video or audio material, film or computer program that he or she believes on reasonable grounds would jeopardise the security of the Correctional Centre or the safety of any person; and
  - (b) the use by an inmate, including the display of, any publication video or audio material, film or computer program that he or she believes on reasonable grounds -
    - (i) would likely be viewed by other persons; and
    - (ii) would undermine a person's sense of personal dignity by demeaning the person or causing personal humiliation or embarrassment to a person, on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.
- (5) (a) Documents and correspondence between inmates and their legal practitioners may not be censored if they relate to legal matters.
- (b) Documents and correspondence between inmates and their legal practitioners that purport to relate to legal matters may be examined only to determine whether in fact they do relate to such matters.

## **7. Healthcare**

- (1) (a) Primary healthcare must be available in a Correctional Centre at least on the same level as that rendered by the State to members of the community.
- (b) When a Correctional Centre is built, specifications must set for that part of the facility which will be utilised for the purposes of healthcare.
- (2) The services of a Correctional Medical Practitioner and a dental practitioner must be available at every Correctional Centre.
- (3) The Correctional Centre's Correctional Medical Practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary.
- (4) A registered nurse must attend to all sick sentenced offenders and remand detainees, which shall include pregnant women and the mentally ill, as often as is necessary, but at least once a day.
- (5) If an inmate is attended to by his or her own medical practitioner of choice, such medical practitioner must provide written reports to the Correctional Medical Practitioner made pursuant to the findings of any special examination, diagnoses, proposed treatment, interventions and treatment regimens that may be prescribed by the medical practitioner.
- (6) Upon the illness of or injury to an inmate, resulting in the inmate's hospitalisation or his or her removal to an institution for treatment of a mental affliction, the Head of the Correctional Centre must inform the inmate's spouse, partner or next of kin accordingly.
- (7) (a) An inmate may not, even with his or her consent, be subjected to any medical, scientific experimentation or research.
- (b) An inmate may not participate in clinical trials, except with the National Commissioner's approval given on application made by the inmate.

- (8) (a) A request from an inmate to donate or receive an organ or tissue by donation, in accordance with the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983) must be approved by the National Commissioner.
- (b) A request from a person to receive any form of artificial fertilization in terms of the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983) from an inmate must be approved by the National Commissioner. An inmate may not receive any form of artificial fertilisation.
- (9) (a) An inmate may not be sterilised at State expense unless the procedure is required for medical reasons as certified by the Correctional Medical Practitioner.
- (b) The National Commissioner may approve an abortion at State expense only in the circumstances contemplated in Sections 2(1)(b)(i), (ii) or (iii) and 2(1)(c) of the Termination of Pregnancy Act, 1996 (Act No.92 of 1996).
- (10) (a) The provision of medical assistance devices, but not including surgical implants, to inmates at State expense must be prescribed by the Order.
- (b) All medical assistance devices issued to or received by an inmate from outside the Correctional Centre must be recorded.
- (11) The Correctional Medical Practitioner, environmental health officer or registered nurse must inspect the Correctional Centre at least once a month and report as prescribed by the Order to the National Commissioner on problems concerning environmental health conditions and health related issues.
- (12) (a) After release or placement under community corrections an injured inmate is entitled to medical treatment at departmental expense for an injury sustained in Correctional Centre until the injury is healed.
- (b) Such a person may be required to report to a Correctional Centre for further treatment after release or placement under community corrections.
- (c) A person injured after release or placement under community corrections is not entitled to treatment at Departmental expense.
- (13) (a) An offender who is certified in terms of Chapter VII of the Mental Healthcare Act, 2002 (Act No. 17 of 2002), may not be detained in a Correctional Centre and must be transferred to a designated health establishment as defined in Section 1 of that Act.
- (b) Before the transfer of such an inmate, the inmate must be placed under the special care of the Correctional Medical Practitioner.
- (c) A person who is directed by a court in terms of Sections 77 or 78 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) to be detained pending the decision of a Judge in Chambers in terms of Section 47 of the Mental Healthcare Act, 2002 (Act No. 17 of 2002), must be transferred as soon as possible to a designated health establishment in terms of Section 42 of that Act.

## **8. Contact with Community**

- (1) The Head of the Correctional Centre must give special attention to the development and maintenance of good family relationships between inmates and their family members and other relatives.
- (2) The Head of the Correctional Centre must convey any important information regarding an inmate's family, relatives or friends that may come to his or her attention, to the inmate as soon as practicable.
- (3) On admission to a Correctional Centre or when an inmate is transferred, subject to the provision of Regulation 25(1)(b), the Head of the Correctional Centre must, allow the inmate to notify his or her spouse, partner or next of kin in the manner prescribed by the Order, unless otherwise requested in writing by the inmate.
- (4) The Head of the Correctional Centre may authorise a correctional official, in writing, that communications between an inmate and a member of the public, including letters and communications, including electronic communications, in the course of a visit, be opened, read, listened to or otherwise intercepted with the assistance of an agency mandated by legislation, or blocked if not a subject of a legal privilege, by a correctional official, mechanical device, or electronic device, where the Head of the Correctional Centre believes on reasonable grounds-:
  - (a) that the communications contain or will contain evidence of:
    - (i) an act that will jeopardise the security of the Correctional Centre or the safety of any person; or
    - (ii) a criminal offence or a plan to commit a criminal offence; and
  - (b) that the interception of such communication is the least restrictive measure available in the circumstances.
- (5) Where a communication is intercepted under sub-regulation (4), the Head of the Correctional Centre or the correctional official designated by him or her must as soon as reasonably practicable after such interception inform the inmate, in writing, of the reasons for the interception and give the inmate an opportunity to make representations with respect thereto, unless the information would adversely affect an ongoing investigation, in which case the inmate must be informed of the reasons and given an opportunity to make representations with respect thereto on completion of the investigation.

This is certainly a reflection of good intention by the Department of Correctional Services. The practical application of the said legislative and policy framework in terms of the treatment of inmates remains to be seen. An analysis of such application is discussed in the next chapter.

### 3.4 CONCLUSION

The treatment of offenders in South Africa in the 21 years of the democratic dispensation is based on the principles of democracy, which *inter alia* include the recognition of human rights. The human rights of South African citizens are contained in chapter 2 of the *Constitution of the Republic of South Africa* of 1996, giving effect to the international requirements. The department of Correctional Services, like every other state department, is entrusted with the responsibility of promoting and protecting these human rights, the rights of prisoners in particular. To achieve this, the Department of Correctional Services promulgated *Correctional Services Act 111 of 1998* and the *White Paper on Correctional Services* of 2005 and other relevant documents to guide its activities. The legislative and policy framework of South Africa's penal system cannot be enough only on paper without implementation. Therefore the next chapter embark on an analysis of the practical implementation of the international instruments, the *Constitution of the Republic of South Africa* of 1996 as well as *Correctional Services Act 111 of 1998* and the *White Paper on Correctional Services* of 2005.

**CHAPTER 4:**  
**ANALYTICAL PERSPECTIVE OF THE IMPLEMENTATION OF THE DEPARTMENT  
OF CORRECTIONAL SERVICES' LEGISLATIVE AND POLICY FRAMEWORK**

**4.1. INTRODUCTION**

On the basis of the preceding chapter, which discusses the legislative and policy framework for the treatment of prisoners, an analysis of the implementation of such legislative and policy framework is conducted in this chapter. This is done using available literature such as research articles and evidence based documentation produced by various institutions such as the South African Human Rights Commission (SAHRC), Judicial Inspectorate of Correctional Services (JICS), Civil Society groups as well as other related documents which were published between 1997 and 2014.

The above institutions are legal entities and considered to be legitimate because they are established in terms of the provision of the relevant laws of the country. For instance, chapter 9 of the *Constitution of the Republic of South Africa of 1998* makes provision for establishment of the State Institutions Supporting Constitutional Democracy. Amongst others is the Human Rights Commission. This Commission has the following functions in terms of section 184 of the *Constitution of the Republic of South Africa of 1996*:

184. (1) *The Human Rights Commission must -*
- (a) *promote respect for human rights and a culture of human rights;*
  - (b) *promote the protection, development and attainment of human rights; and*
  - (c) *monitor and assess the observance of human rights in the Republic.*
- (2) *The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power -*
- (a) *to investigate and to report on the observance of human rights;*
  - (b) *to take steps to secure appropriate redress where human rights have been violated;*

- (c) *to carry out research; and*
- (d) *to educate.*

By virtue of the fact that the foregoing functions are provisions of the supreme law of South Africa, they become binding. Of particular interest are sections 184 (1)(a); (b); 2(a) and (c) due to their pertinence to this study. In other words, researched information produced by the Human Rights Commission is used in this study.

Another institution is the Judicial Inspectorate for Correctional Services which is established with one objective in terms of section 85(2) of the *Correctional Services Act 111 of 1998* as alluded to elsewhere in this study but for the sake of clarity, this provision is outlined below:

- 85. (2) *to facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons.*

The Judicial Inspectorate for Correctional Services conducts inspections *in loco* through Independent Correctional Centre Visitors (ICCVs) and reports on the findings of such inspections. The Independent Correctional Centre Visitors physically walk into a correctional centre to observe the conditions of imprisonment and interview inmates and officials. This process is transparent and objective because there is as extensive consultation with the relevant authorities during and after inspections. It is in this light that the findings of the inspections of the inspectorate are considered valid and therefore used in this study.

The analysis will follow a similar approach used in the previous chapter. In other words, this study focused on the central theories identified as offenders' rights.

## 4.2 THE RIGHT TO EQUALITY

As it can be seen from the discussion of this right in the previous chapter, the Department of Correctional Services complies with the pertinent provisions by the international obligations, *Constitution* of the Republic of 1996 and the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* in terms of its legislative framework.

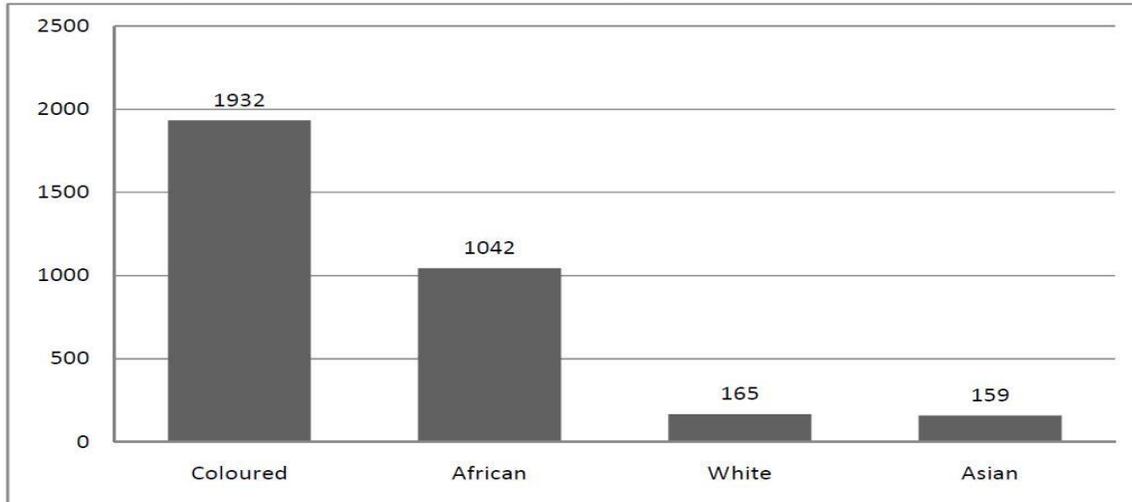
This right essentially means that no inmates should be treated less favourably because of their gender, race, sexual orientation, pregnancy, disability or age. These issues are carefully considered by the Department of Correctional Services in terms of its policy position.

According to the Department of Correctional Services annual report (2013:33), there are 242 correctional centres (prisons) across the country. There seem to be confusion regarding the composition of male and female correctional centres. According to South Africa online (2014), there are eight (8) correctional centres for female offenders only and eighty-six (86) correctional centres for both male and female offenders while Wikipedia (2014) claims that there are eight (8) women-only prisons and seventy two (72) prisons for both male and female offenders and thirteen (13) prisons for young offenders. Despite this confusion, it is evident that there is certainly separation of inmates on the basis of age and gender as required by the legislation and policies.

It is worth mentioning that separations on the basis of age and gender are considered not unfair discrimination. This separation is in the best interest and wellbeing of inmates. It cannot be morally correct to allow male and female inmates to share the cells. This may lead to massive rape cases. Furthermore, it is also imperative to separate children from adult inmates to alleviate violence resulting from infighting for limited resources and facilities such as basins, showers etc...This is an international practice as per the international obligations. It will be unfair discrimination if inmates are separated along racial lines as witnessed in the apartheid regime treatment of inmates (see chapter 2 of this study).

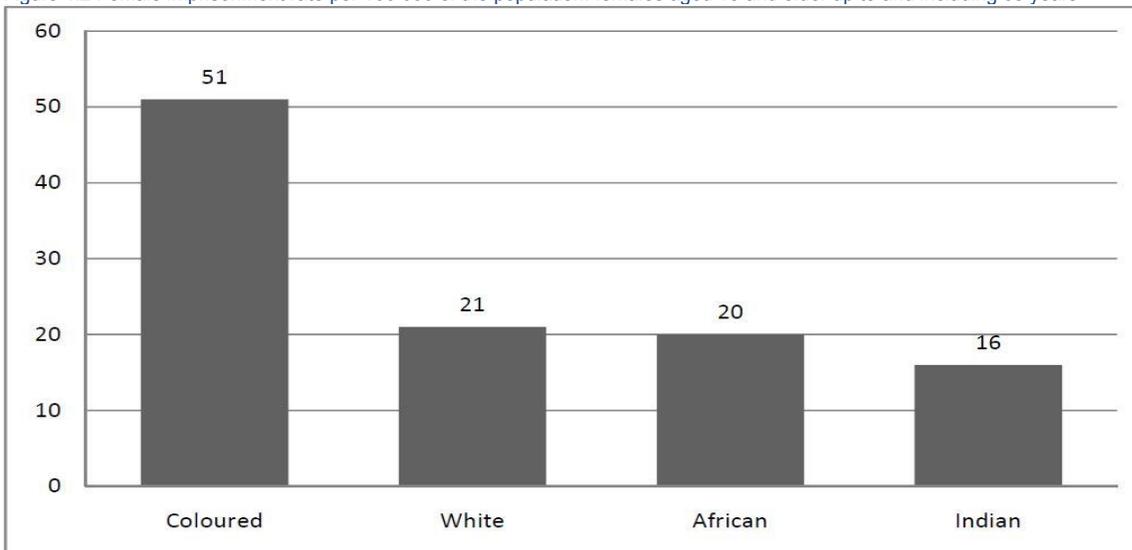
According to Civil Society Prison Reform Initiative (2013:12) South Africans are not imprisoned at an even rate and there are substantial differences in respect of age, race and gender as it can be viewed from the figures below.

Figure 4.0:1: Male imprisonment per 100 000 of the population: males aged 18 and older up to and including 65 years



Source: Civil Society Prison Reform Initiative (2013:13)

Figure 4.2 Female imprisonment rate per 100 000 of the population: females aged 18 and older up to and including 65 years



Source: Civil Society Prison Reform Initiative (2013:14)

There is no evidence that seeks to suggest that there is still favourable treatment of inmates on the basis of race as it used to be in the apartheid regime.

Cases that seek to suggest violation of the right to equality occurred mostly within five (5) year period after the promulgation of the *Constitution of the Republic of 1996*. Pete

(1997:230) submits that throughout 1997 and 1998 many juvenile offenders remained imprisoned within adults' prisons under conditions that left much to be desired. The latter is attested by the South African Human Rights Commission report of the National Prison Project that the requirement for separation from adult prisoners is not always adhered to due to overcrowding (South African Human Rights Commission, 1998:31). In the same report, the South African Human Rights Commission noted differences in the living conditions and facilities on offer for male and female prisons. Female prisoners tend to be less demanding than their male counterparts and this led to a tendency to be discriminated against by the authorities (South African Human Rights Commission, 1998:34 – 35).

In its 3<sup>rd</sup> Economic & Social Rights Report, the South African Human Rights Commission acknowledge the Department of Correctional Services efforts to put some measures in place to separate children from adult prisoners but adamant that such measures were not adequate and lack plan of action (implementation) (South African Human Rights Commission, 2001:373).

Recent reports by Judicial Inspectorate for Correctional Services are sporadic and limited evidence to the violation of this right is traceable. In 2012 child inmates were still housed with juvenile inmates in Emthonjeni Juvenile (Judicial Inspectorate for Correctional Services, 2012:16). Another reported case relates to right to the full and equal enjoyment of all rights. In terms of the Judicial Inspectorate for Correctional Services quarterly report of Jan-March 2013, the Independent Correctional Centre Visitors found that the food rations between sentenced and un-sentenced inmates differ, with remand detainees getting a smaller portion rendering them less favoured (Judicial Inspectorate for Correctional Services, 2013:21).

### **4.2.1 ANALYSIS**

The foregoing theoretical basis is a clear demonstration that there is a historical development in terms of the treatment of prisoners with regard to respect for the right to equality. There is a gradual improvement in the way prisoners are treated in South Africa. For instance, there are separate prisons for male and female managed and administered by male and female officials respectively. Furthermore, the South African Department of Correctional Services does not only make a distinction between children and adults but further makes a classification of juveniles. In other words, not only there is a separation of children, those below 18 in terms of the requirements of the law, but also those between 18 and 25 classified and separated from adults as juveniles.

Given the fact that there are no recent serious reports such as discrimination on the basis of race and perhaps a certain high percentage of correctional centres housing inmates of different age and gender together, it can therefore be concluded that the Department of Correctional Services is in the right direction to treating inmates in accordance with the legislation and policy requirements.

### **4.3 THE RIGHT TO HUMAN DIGNITY**

As it can be seen from the discussion of the right to dignity in the previous chapter, this right is central to most of rights if not all of them. This simply means violation of any condition consistent with this right amount to a disregard and disrespect of the right to human dignity. Therefore, an analysis of the identified rights is an analysis of the right to human dignity. Table 4.1 below outlines these conditions as sourced from chapter 3 of *Correctional Services Act 111 of 1998* as amended.

Table 4.1: Link between conditions consistent with human dignity and inmates rights

<b>Conditions consistent with human dignity</b>	<b>Prisoners' rights as discussed in the previous and current chapter of this study.</b>
<b>Admission</b>	Not applicable
<b>Accommodation</b>	The rights of the arrested, detained and accused persons
<b>Nutrition</b>	The right to health care services; children's rights; The rights of the arrested, detained and accused persons
<b>Clothing and bedding</b>	The rights of the arrested, detained and accused persons
<b>Exercise</b>	The rights of the arrested, detained and accused persons
<b>Healthcare</b>	The right to health care services; children's; The rights of the arrested, detained and accused persons rights
<b>Contact with community</b>	The rights of the arrested, detained and accused persons
<b>Death in prison</b>	Freedom and security of persons
<b>Development and support services</b>	The right to education; freedom of religion
<b>Recreation</b>	The rights of the arrested, detained and accused persons
<b>Access to legal advice</b>	The rights of the arrested, detained and accused persons
<b>Reading material</b>	The rights of the arrested, detained and accused persons
<b>Discipline</b>	Not applicable
<b>Safe custody</b>	Freedom and security of persons
<b>Searches</b>	Freedom and security of persons
<b>Identification</b>	Not applicable
<b>Mechanical restraints</b>	Freedom and security of persons
<b>Non-lethal incapacitation</b>	Freedom and security of persons
<b>Fire arms &amp; other weapons</b>	Not applicable

Source: Chapter 3 of Correctional Services Act 111 of 1998 as amended and DCS strategic plan (2012:8).

#### **4.4 FREEDOM AND SECURITY OF THE PERSONS**

For the purpose of this study, freedom and security of the persons refers to the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. The preceding chapter discuss this human right with regard to the requirements in terms of the national and international instruments followed by the

position of the South African Department of Correctional Services. It is within this context that this section of study looks at compliance to these requirements.

Pete (1997:241) quoted the then Minister of Correctional Services as saying the conditions of incarceration in South Africa are cruel. In its 3<sup>rd</sup> economic & social rights report, the South African Human Rights Commission (2001:366) reminded us that detention without trial and torture were the order of the day during the apartheid era. The perpetration of torture was directed at black people whose safety and security was compromised due to overcrowding.

According to the Centre for the Study of Violence and Reconciliation and Civil Society Prison Initiative (2008:6), common law crimes such as assault and attempted murder have been used to prosecute officials because South Africa did not have the crime of torture. Article 5 Initiative (2014) further identify grievous bodily harm, indecent assault or rape as offences classified as torture. This is according to the Committee against Torture as quoted by the Centre for the Study of Violence and Reconciliation and Civil Society Prison Initiative (2008:6) inadequate to prosecute perpetrators of torture. Coyle (2009:34) submits that actions which amount to torture include routine unlawful use of force and beatings.

Furthermore, the Centre for the Study of Violence and Reconciliation (2007:12) highlights a continuous failure by the Department of Correctional Services to comply with the international and even national requirements with regard to the prevention and combating torture against prisoners by stating that there is nothing been done in the Department of Correctional Services and this is a representation of a further failing in respect of the treaty obligations.

Despite the unavailability of the (internal) policy aimed at preventing and combating torture and inhuman and degrading treatment of inmates, the Department of Correctional Services has a strategic objective of providing safe and secure conditions for inmates, personnel and the public. The focus is on the reduction of inmates' escapes, assaults,

unnatural deaths and overcrowding (Department of Correctional Services, 2012:19). Section 4 (2)(a) of *Correctional Services Act 111 of 1998* and paragraph 10.2 of the *White Paper on Corrections of 2005* further makes provision for the safety of inmates in South African correctional facilities.

In an attempt to deal with the scourge of torture against people who are deprived of their liberty, a Portfolio Committee on Correctional Services convened and invited various stakeholders to a meeting in 2011. Stakeholders such as the Civil Society Prison Reform Initiative (CSPRI), Institute for Security Studies (ISS) & Omega Research Foundation, Association for the Prevention of Torture (APT) as well as South African Human Rights Commission participated and made submissions with regard to the prevalence of torture in prisons. Their submissions were centred on the Judicial Inspectorate for Correctional Services 2009/210 annual report. Reference was made to 2 189 complaints of assaults by correctional officials (Civil Society Prison Reform Initiative, 2011:8; Association for Prevention of torture, 2011:3; Institute for Security Studies & Omega Research Foundation, 2011:2).

According to the Civil Society Prison Reform Initiative (2011:8) there is no information on the results of the investigation of the complaints referred to above but if these were accepted at face value, it means that there are on average six (6) assaults per day in South Africa's prisons. This is an unacceptably high level of violence directed at prisoners and each of them potentially a violation of the absolute prohibition of torture. In light of the foregoing, the Civil Society Prison Reform Initiative (CSPRI) made the following recommendations amongst others:

- Department of Correctional Services' **policies** regarding the custody, treatment, care and management of prisoners must be **re-fashioned** so as to best fulfil the state's obligation to prevent torture in such circumstances.
- **legislative amendments** in the form of increased mandatory investigative powers on the part of the Judicial Inspectorate for Correctional Services be **explored**, including, at the very least, the power of the Judicial Inspectorate to investigate

- cases of torture and refer them to the South African Police Services (SAPS) and the National Prosecuting Authority (NPA) for further investigation and prosecution.
- South Africa ratify the Optional Protocol to the United Nations Convention Against Torture (OPCAT) in order to enable the eradication and prevention of torture and Cruel Inhuman or Degrading Treatment (through the Sub-Committee), for, as the European experience indicates, regular visits, reports and recommendations from independent oversight bodies, reduces the potential for acts of torture in places where people are deprived of their liberty (Civil Society for Prison Reform Initiative, 2011:18 – 21).

The Institute for Security Studies & Omega Research Foundation (2011:2) further makes reference to the findings of Judicial Inspectorate for Correctional Services that the unlawful use of force by correctional officials appear to be a common practice within many prisons in South Africa. This argument is based on the fact that the Department of Correctional Services reported 11 cases of homicide of inmates by officials in its 2009/2010 annual report. The Institute for Security Studies and Omega Research Foundation believe these homicides and other cases of torture and cruel inhuman and degrading treatment that do not come to light are as a result of the usage of a range of equipment by officials on inmates including electroshock shields, batons, teargas and restraints. It is in this light that the Institute for Security Studies and Omega made the following recommendations:

- That the Department of Correctional Services abolish the use of electronically activated high security transport stun belts to help fulfil its constitutional duty to protect inmates from torture.
- Stun shields and stun guns/batons should be prohibited for use in Correctional Centres. Other alternatives, such as non-electrified capture shields, should be assessed for use instead.
- The use of chains and leg irons be prohibited in Correctional Centres. This would not affect the ability of Correctional Officers to effectively use legitimate means of

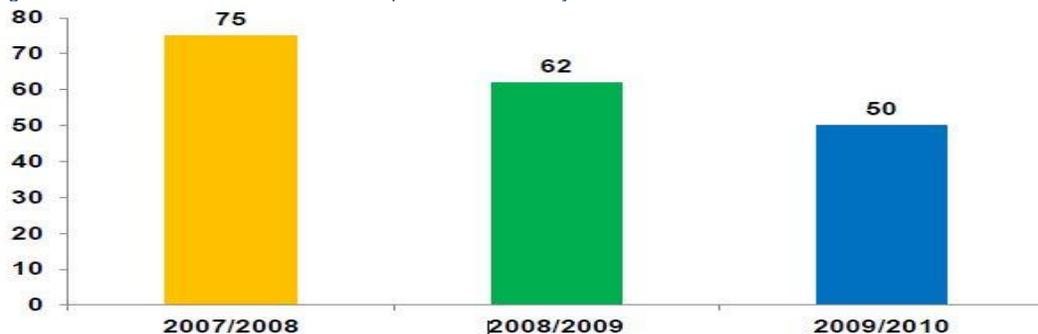
restraint where necessary and appropriate (Omega Research Foundation & Institute for Security Studies, 2011:3-5).

The foregoing is consistent with Committee Against Torturer that the use of certain forms of equipment such as electroshock stun belts and restraint chairs can be a violation of the United Nations Convention Against Torture (UNCAT) (Article 5 Initiative, 2013:91).

Paragraph 7 of the Association for the Prevention of Torture (2011) submission raises concern with positive acts or omissions conducted by officials on inmates which may amount to torture or ill-treatment. The Association for the Prevention of Torture made illustration of the acts of assault committed by officials on inmates, resulting sometimes in severe injury or death. Another aspect to be concerned about is the failure of the correctional officials to protect inmates against assaults and sexual assaults committed by fellow inmates.

The Association for the Prevention of Torture (2011) submission on the use of force is not taking a tougher stand like the submission made by the Institute for Security Studies and Omega. It only refers to the number of complaints of assaults by correctional officials and further highlighted the Department of Correctional Services liabilities in terms of civil claims of R988, 558, 000 related to bodily injury or assaults. This is of course a lot of money which could have been put for good use. The Association for the Prevention of Torture (APT) further noted the fluctuation of unnatural deaths over three years as it can be viewed from the figure 4.3 below.

Figure 4.3: Unnatural deaths: inmates: for the past three financial years



Source: Department of Correctional Services (2010:21)

The Association for the Prevention of Torture (APT) argues that despite the decrease of unnatural deaths, it is an indication of a continued use of excessive force by correctional officials and inadequate independent, prompt and impartial investigation. Furthermore, the issue of segregation and solitary confinement was raised as a concern that amounted to torture, inhuman and cruel degrading treatment and Association for the Prevention of Torture (APT) refers to the problem of non-compliance with the provisions of section 30 of the *Correctional Services Act 111 of 1998* as amended, notably failure to inform the Inspecting Judge of segregation, when segregation has been extended, and periods of extension which have been extended without a correctional medical practitioner or psychologist certifying that such extension would not be harmful to the health of the inmate. Association for the Prevention of Torture (APT) also submitted the following recommendations which are more similar to the ones submitted by other participants of the meeting:

- It is important that South Africa domesticate the United Nations Convention Against Torture (UNCAT) and enact legislation to criminalise torture as soon as possible. This will send a signal of the seriousness within which torture is considered in the country and provide mechanisms for the state to deal with violations.
- That the state should ratify the Optional Protocol to the Convention. While existing oversight mechanisms do exist over prisons, these could be strengthened by the requirements of the Optional Protocol to the United Nations Convention Against Torture (OPCAT). In addition, the National Preventive Mechanism (NPM) will have oversight over all other places of detention.

In its submission, the South African Human Rights Commission (2011:13) highlighted the need for South Africa to develop and implement a torture prevention mechanism and the establishment of the National Preventative Mechanism (NPM) as per the requirement of the Optional Protocol to the United Nations Convention against Torture (OPCAT).

As part of its legislative mandate, the Judicial Inspectorate for Correctional Services (2012:9-20) conducted twenty three (23) general inspections for a quarter between 10

April and 30 June 2012 in all six (6) Department of Correctional Services regions. The following table is a representation of a summary of the investigation findings on acts amounting to torture and cruel, inhuman or degrading treatment or punishment:

Table 4.2: Findings on acts that amount to torture and cruel, inhuman or degrading treatment or punishment (quarterly report: April to June 2012).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS
<b>Barberton Town (Juvenile)</b>	24 April 2012	A number of members on inmate assaults were identified which the Head of Correctional Centre advised were in the process of being investigated.	The matter was referred to the area commissioner by the head of prison after a long awaited feedback who was then supposed to provide feedback on 13 August 2012
<b>Potchefstroom</b>	08 May 2012	Gangsterism is rife among remand detainees	The centres gang management strategies are in place
<b>Klerksdorp</b>	09 May 2012	Gangsterism is rife among remand detainees	The centres gang management strategies are in place
<b>Christiana</b>	10 May 2012	All cases of segregation are not reported to the inspectorate.	IT challenges at the centre were resolved and reporting of all segregations is done.
<b>Van Rhynsdorp</b>	29 May 2012	Inmates were found sleeping on the floor	There is currently (6/07/14) no inmates sleeping on the floor. The challenge regarding the reduction of remand detainees was discussed with the local magistrate.
<b>Emthonjeni</b>	18 June 2012	Gangsterism is problematic.	The matter was elevated to the regional commissioner because feedback provided by the Head of Correctional Centre did not address specific findings.
<b>Mount Ayliff</b>	20 June 2012	The centre is overcrowded	The status is unclear
<b>Mount Fletcher</b>	21 June 2012	Non-compliance with section 32 of <i>Correctional Services Act 111 of 1998</i> as amended regarding the reporting of the use of force	The use of force was reported in terms of the feedback from DCS on 02 August 2012

Source: Judicial Inspectorate for Correctional Services (2012:9-20).

In addition to the above, the Judicial Inspectorate for Correctional Services (2013:10-22) conducted twenty nine (29) inspections in all six (6) DCS regions and 15 investigations in five (5) of the six (6) DCS regions for a quarter between 01 January and 31 March 2013. The following table is a representation of a summary of the inspection and investigation

findings on acts amounting to torture and cruel, inhuman or degrading treatment or punishment:

Table 4.3: Findings on acts that amount to torture and cruel, inhuman or degrading treatment or punishment (quarterly report: January to March 2013).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS
<b>INSPECTIONS</b>			
<b>Ebongweni Maximum</b>	23 January 2013	The injury register revealed that a total of 12 cases of alleged assaults by officials on inmates for 2012 were recorded.	The matter was to be monitored through visits after an address by the area commissioner on 28 February 2013.
<b>Pretoria Local</b>	22 January 2013	There is a trend that Remand Detainees arriving at the centre from SAPS cells have injuries.	Status is unclear.
<b>Caledon</b>	18 January 2013	One of the challenges management is facing is gangsterism.	The matter was to be monitored through visits subsequent to a report by the head of correctional centre on 19/02/13 that gang management plan is implemented and effective.
<b>Ficksburg</b>	27 March 2013	Some inmates sleep on the floor due to overcrowding.	Status is unclear.
<b>INVESTIGATIONS ON ALLEGATIONS OF SERIOUS VIOLATION OF INMATES' RIGHTS</b>			
<b>Modderbee</b>	03 January 2013	Unnatural death: Inmate committed suicide.	Officials found to have been negligent in their duties to be subjected to a disciplinary hearing pending the DCS investigation report.
<b>Johannesburg Medium C.</b>	08 January 2013	Mechanical restraints: this is after officials found a cell phone cover in the toilet.	Transfer of the inmate was being processed as requested.
<b>Groenpunt Maximum</b>	09 – 11 & 21 – 22 January 2013	Riots and arson: this due to the complaints and requests of the inmates not promptly attended to or not attended at all.	Awaiting the DCS investigation report on 05/04/13.
<b>Johannesburg Medium A.</b>	31 December 2012 & 02 January 2013	Assault – official on inmate: this occurred during the search at the centre.	DCS investigation report to be furnished to the Inspectorate.
<b>Pretoria</b>	23 January 2013	Use of force: this is after the inmate found in possession of a cell phone. The inmate allegedly overpowered the officials whilst in leg irons.	DCS internal investigation report to be furnished to the Inspectorate.
<b>Pretoria central</b>	28 January 2013	Assault: an inmate assaulted some officials and later the	DCS investigation report to be furnished to the Inspectorate.

		inmate was assaulted by the DCS EST.	
<b>St. Albans Medium</b>	28 January 2013	Homicide (3) and assaults – inmate by inmate (73) due to gang violence.	DCS investigation report was received on 03/05/ 2013 by the mandatory reporting unit.
<b>Groenpunt</b>	29 January 2013	Homicide and assault – official on inmate: an inmate died unnatural death after stabbing an official and two other inmates hospitalised due to severe injuries.	DCS investigation report to be furnished to the Inspectorate as soon as it is finalised.
<b>Nigel male</b>	29 January 2013	Assault – official on inmate: an unspecified number of inmates were hospitalised after an alleged assault by the EST officials.	An internal DCS investigation was underway.
<b>Pollsmoor</b>	30 January 2013	Assault – inmate on inmate: an unspecified number of inmates were hospitalised for injuries sustained due to gang violence.	DCS investigation report to be furnished to the Inspectorate.
<b>Durban Medium A.</b>	26 – 28 February 2013	Homicide: medical and death reports reveals the nature of injuries (because of assault by DCS officials) as follows: laceration to the forehead, extensive bruises and swelling on the right arm, bruises and lacerations on the left arm, right leg fractured and bruised, right hand fractured and back of the head swollen. Bruises were also evident on his upper back.	The investigation by the DCS was incomplete on 03/04/13 and will be submitted the regional commissioner on completion.
<b>Grootvlei</b>	08 – 12 February 2013	Suicide: the inmate committed suicide while on segregation which was not immediately reported to the inspectorate. His death was also not reported.	The case was handed to the Mandatory reporting unit on 18-2-2013 under D-62-2013 for further handling.

Source: Judicial Inspectorate for Correctional Services (2013:10-22).

The most recent allegation of the act of torture and cruel, inhuman or degrading treatment or punishment was reported in the media. Raphaely (2014:22) reported the following allegations of mass-beatings, electric-shock, torture and assaults of 200 inmates of Port Elizabeth's St Albans prison as witnessed on the pictures below. Similar incidents also happened in 2005 in the same prison:

- One inmate was shocked twice on his testicles by a female warder using a hand held device.
- Inmates were forced to lie naked on the floor with their face in the other inmates' anus.
- They were beaten with batons and shocked with shields.



Source: Daily Maverick (2014)

#### 4.4.1 ANALYSIS

The perpetration of acts amounting to torture, cruel or degrading treatment of prisoners in South Africa can be traced back to the years of apartheid (see chapter 1 of this study). Although the Department of Correctional Services has over the years developed a strategic objective of providing safe and secure conditions for inmates, personnel and the public with the focus on the reduction of inmates' escapes, assaults, unnatural deaths and overcrowding, the recommendations by the civil societies to the Portfolio Committee seem not to have been considered. The Judicial Inspectorate for Correctional Services reports outlined above and other cases of act that amount to torture, cruel or degrading treatment of prisoners are evidential to the fact that the Department of Correctional Services is far from achieving its strategic objectives with regard to the safety of not only prisoners but also officials. This renders the Department of Correctional Services a transgressor of the right to freedom of security of the person.

The foregoing statement is informed by the following facts:

- South African prisons are overcrowded and riddled with prison subculture. (See chapter 5 of this study). With this condition, it is almost impossible to guarantee the safety and security of inmates.
- South Africa is yet to ratify the Optional Protocol to the United Nations Convention Against Torture (OPCAT) meaning that the establishment of the National Preventative Mechanisms (NPM) is almost impossible. Chain irons, electronic stun belts are still being used.
- The Department of Correctional Services doesn't have specific internal policy on the prevention and combating of torture and inhuman or degrading treatment or punishment despite the enactment of the *Prevention and Combating of Torture of Persons Act 13 of 2013*.

#### **4.5 THE RIGHT TO HEALTH CARE**

The South African Department of Correctional Services compliance with international and national instruments from a policy perspective is commendable, particularly with a consideration of the newly established organisational structure, existing policy objectives (See supra section 3.3.4 of this study) and the correctional services regulations.

Notwithstanding the foregoing, the South African Human Rights Commission found the following in its National Prison Project published in 1998:

- That the food prepared for inmates was so bad that it was hardly edible (South African Human Rights Commission, 1998:15).
- That the conditions of detention are in direct contravention of the provision of not only the *Constitution of the Republic of 1996* but also Chapter 3 of the *Correctional Services Act 111 of 1998* as amended particularly with regard to the provision of adequate accommodation (South African Human Rights Commission, 1998:13).

- That the Majority of prisons are overcrowded and in a serious state of disrepair that they pose a health hazard (South African Human Rights Commission, 1998:13).
- That the majority of prisons have basic medical facilities that are largely sufficient for taking care of the medical needs of prisons but also that there is a large number of approved but vacant positions for nursing staff (South African Human Rights Commission, 1998:20).
- That there is lack of recreational facilities in the majority of prisons (South African Human Rights Commission, 1998:27).

In its 3<sup>rd</sup> Economic & Social Rights Report, the South African Human Rights Commission had the following to report with regard to the right to health care services of inmates. This is two years after the publication of the report of the National Prisons Project:

- That the Department of Correctional Services position is that it had not instituted any new policy nor programme but indicated changes to comply with the Standard Minimum Rules with regard to prisoners' accommodation (South African Human Rights Commission, 2001:371).
- According to the South African Human Rights Commission (2001:371) there is no new information provided by the Department of Correctional Services on policy measures instituted for the provision of adequate nutrition except that the Department reported that it provided food to prisoners as prescribed by the World Health Organisation and the American Nutritional Council.
- The Department's failed to outline new measures put in place with regard to nutrition but other sources indicated that a revised manual for food handlers was developed to serve as an internal training tool. It was meant to empower prisoners working in prison kitchens with the necessary skills and knowledge and to also assist in the improvement of services and hygiene in prison kitchens (South African Human Rights Commission, 2001:374).

In its 7<sup>th</sup> report on Economic and Social Rights, the South African Human Rights Commission has found that there is insufficient access to health care for vulnerable groups such as prisoners (South African Human Rights Commission, 2010:ix).

In its second quarterly report for the period 01 April to 30 June 2012, the Judicial Inspectorate for Correctional Services outlines the following findings of its investigations subsequent to twenty three (23) general inspections conducted in all of the department's regions:

Table 4.4: Findings on the violation of the right to healthcare services of inmates (quarterly report: April to June 2012).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS AS PER THE DEPARTMENT'S FEEDBACK
<b>Nelspruit</b>	25 April 2012	The centre does not have a dentist, psychologist or pharmacist.	One doctor for the region and one sessional doctor was appointed for the centre.
<b>Potchefstroom</b>	08 May 2012	<ol style="list-style-type: none"> <li>1. Shortage of staff, especially nurses, doctor and social workers.</li> <li>2. The kitchen was in need of extensive refurbishment.</li> </ol>	<p>The need for nurses and social workers was registered but due to a lack of funds, all vacant posts were abolished by the Head office.</p> <p>The need to renovate the kitchen was registered at the Limpopo/Mpulanga/North-West Regional office.</p>
<b>Klerksdorp</b>	09 May 2012	Shortage of a doctor and professional staff.	There is one clinical doctor for the Area. The need for nurses and social workers was registered but due to a lack of funds, all vacant posts were abolished by the Head office
<b>Christiana</b>	10 May 2012	<ol style="list-style-type: none"> <li>1. Shortage of social workers and nurses.</li> <li>2. The clinic requires upgrading.</li> <li>3. There is no doctor at the centre.</li> </ol>	<p>There is one clinical doctor for the Area. The need for nurses and social workers was registered but due to a lack of funds, all vacant posts were abolished by the Head office.</p> <p>The need to upgrade the clinic was registered with the Department of public works.</p>
<b>Van Rhynsdorp</b>	29 May 2012	<ol style="list-style-type: none"> <li>1. Inmates were found sleeping on the floor.</li> <li>2. Meals to inmates are not provided according to section 8 of the <i>Correctional Services Act 111 of 1998</i> as amended.</li> </ol>	<p>There is currently no inmates sleeping on the floor.</p> <p>New officials were appointed at the centre to ensure inmates are served with three meals a day.</p>
<b>Calvinia</b>	30 May 2012	The centre has no on-site medical staff appointed but makes use of the services of a nurse who visit the centre once a week.	Response to the findings were to be provided on 13 August 2012.

<b>Uppington</b>	31 May 2012	There is a shortage of nurses since the abolishment of three nursing posts at the centre.	These posts were abolished to a general clean-up of Persal system to comply with Treasury regulations. The head of regional Human resources will engage the head office to look into the matter.
<b>Springbok</b>	01 June 2012	A mentally ill inmate was awaiting classification in terms of the Mental Health Care Act.	The matter was referred to the judicial authority for a legal decision.
<b>Ekuseni Youth Development Centre</b>	2 June 2012	Nurses are only readily available in case of emergency.	A standby list for nurses was compiled and a Department's vehicle is available 24 hours a day to collect nurses in an emergency situation. External service providers (911) are also available.
<b>Emthonjeni</b>	18 June 2012	<ol style="list-style-type: none"> <li>1. There is a need for psychological services for inmates.</li> <li>2. Irregular supply of toiletries to inmates.</li> </ol>	Feedback was provided by the centre but did not address specific findings.
<b>Elliotdale</b>	18 June 2012	<ol style="list-style-type: none"> <li>1. There is a need for medical and professional staff such as doctor, nurses and social workers.</li> <li>2. The clinic needs expansion.</li> <li>3. Kitchen equipment is not in working order.</li> </ol>	Feedback was provided by the centre but did not address specific findings.
<b>Devon</b>	19 June 2012	<ol style="list-style-type: none"> <li>1. The clinic section is too small.</li> <li>2. Inmates do not have access to adequate psychological services.</li> <li>3. The kitchen is in an unhygienic state.</li> </ol>	No response to the findings from the Head of Correction as on 7 August 2012.
<b>Lusikisiki</b>	19 June 2012	There is a need for permanent appointment of medical staff at the centre.	No feedback provided because the Area Commissioner claimed that he experienced challenges with the Department's Information Technology System.
<b>Nigel</b>	20 June 2012	Food preparation is inadequate.	No feedback from the centre as on 2 July 2012.
<b>Mount Ayliff</b>	20 June 2012	<ol style="list-style-type: none"> <li>1. There is a need for medical and professional staff.</li> <li>2. The clinic needs to be expanded.</li> <li>3. There is an unreliable supply of water.</li> </ol>	No feedback provided because the Area Commissioner claimed that he experienced challenges with the Department's Information Technology System.

<b>Mount Fletcher</b>	21 June 2012	<ol style="list-style-type: none"> <li>1. Alleged riots occurred in February due to complaints about inadequate food (maggots in porridge).</li> <li>2. There is an urgent need for the structural maintenance of the kitchen and its contents.</li> <li>3. There is no reliable water supply.</li> </ol>	The Area commissioner's office to provide a report regarding the riots of inmates about inadequate food. No further feedback provided because the Area Commissioner claimed that he experienced challenges with the Department's Information Technology System.
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Source: Judicial Inspectorate for Correctional Services (2012:10 – 20).

In addition to the above, the Judicial Inspectorate for Correctional Services (2013:10-22) conducted twenty nine (29) inspections in all six (6) departmental regions and 15 investigations in five (5) of the six (6) departmental regions for a first quarterly report for the period 01 January to 31 March 2013. The following table is a representation of a summary of the inspection findings on the violation of the right to health care services of inmates:

Table 4.5: Findings on the violation of the right to healthcare services of inmates (quarterly report: January to March 2013).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS
<b>Ncome Medium A</b>	09 January 2013	The centre experiences an acute shortage of human resources in the medical sector.	There was no response from the department at the time of the report submission to the portfolio committee.
<b>Glencoe</b>	10 January 2013	There is a shortage of nurses and social workers.	A letter addressed to the Area Commissioner regarding the appointment of professional staff sent on 19 February 2013.
<b>Helderstroom</b>	17 January 2013	There is more than 14 hours' difference between supper and breakfast. This is in contravention of section 8(5) of Correctional Services Act 111 of 1998 as amended.	The Head of Correctional Centre indicated that this was as a result of 'Operation Vala' and has been addressed.
<b>Ebongweni Maximum</b>	23 January 2013	The medical staff reported that the centre's ventilation system causes health risk to inmates	The matter was to be monitored through the Independent Correctional Centre Visits.
<b>Mafikeng</b>	24 January 2013	There are no nurses employed at the centre.	The appointment of nurses was in process as on 12 March 2013.

<b>Kokstad</b>	07 February 2013	<ol style="list-style-type: none"> <li>1. Some equipment in the kitchen is non-functional.</li> <li>2. There is shortage of professional staff.</li> </ol>	The Head of Correctional Centre confirmed on 14 February that the kitchen equipment was repaired and that a memorandum regarding the appointment of professional staff was sent to the Area Commissioner.
<b>Voorberg Medium A</b>	18 February 2013	The kitchen was infested with cockroaches.	Reply from the department was awaited since recommendations were sent to the Area and Regional Commissioners on 22 February 2013.
<b>Butterworth</b>	13 March 2013	There is no medical doctor visiting the centre.	The Regional Commissioner indicated that only primary healthcare is practiced at the centre and inmates are referred to the public hospital should the need arise.
<b>Ficksburg</b>	27 March 2013	<ol style="list-style-type: none"> <li>1. Kitchen equipment is non-functional.</li> <li>2. There is shortage of professional staff as there is no one to dispatch medicine when the nurse is on leave.</li> </ol>	Status is unclear because the Head of correctional Centre was still to respond to the findings.
<b>Kroonstad Female</b>	19 March 2013	Expired medicine was found at the hospital.	The medicine was returned to the pharmacy. There seem to be a suggestion that the pharmacy distribute expired medicine.
<b>Groenpunt Youth Development</b>	20 March 2013	<ol style="list-style-type: none"> <li>1. Some kitchen equipment is found to be non-functional.</li> <li>2. Expired medicine was found at the hospital.</li> </ol>	The centre does not have kitchen <i>per se</i> and the food is delivered from the medium centre. Expired TB injections were not in use as there is currently no TB patients at the centre.
<b>Buffeljagsrivier</b>	28 March 2013	Inmates were served with only two meals per day.	The Head of Correctional Centre indicated that inmates were provided with three meals a day as from 15 April 2013.

Source: Judicial Inspectorate for Correctional Services (2013:10-22).

#### 4.5.1 ANALYSIS

The Department of Correctional Services has gradually developed from a complete no policy on the health care of inmates in 2000 to a situation where there is an existing policy regarding the protection and promotion of the right to healthcare of inmates to date. This means that there was a gross violation of the right to health care services of inmates because there was no policy to guide the activities of the department to protect and promote this right since the dawn of democracy in South Africa. The above research findings by the South African Human Rights Commission from 1998 until 2010 point to the violation of inmates' rights to health care services. This is further attested by the following examples of court cases:

- *B and others v Minister of Correctional Services and others (11778/96) 1997(2) SA 574 (C)* - the Department of Correctional Services had no firm guidelines relation to anti-viral treatment of HIV positive prisoners.
- *Stanfield v Minister of Correctional Services (5075/2003) 2004 (4) SA 43 (C)* – an Independent Visitor for the Judicial Inspectorate for Correctional Services testified that the prison hospital did not have facilities to treat and care for terminally ill patients and did not provide twenty four hour medical surveillance. Furthermore, the Independent Visitor rarely saw a doctor on the premises and patients who become ill overnight would invariably have to wait till the next morning for a day duty nursing staff to make necessary arrangements for them to see a doctor or visit an outside hospital.

In addition to the above findings, the Judicial Inspectorate for Correctional Services, an independent institution from the Human Rights Commission, found a gross violation of inmates' right to health care service. This is informed by the fact that the majority of inspections viz. 16 out of 23 - this translates to 70% of inspections - during the second quarter of 2012 reflect a violation of the right to health ranging from overcrowding which perpetuates negative imprisonment conditions (see *infra* section 5.2 of this study) to shortage and even unavailability in some instances of health care workers such as doctors and nurses. 12 out of 29, about 41% of such inspections during the 1<sup>st</sup> quarter of 2013

further reflects a violation of this right. Although there is a downward trend of statistics for the periods in question, these numbers are unacceptably high and must be addressed accordingly.

#### **4.6 CHILDREN'S RIGHTS**

Section 3.3.5 of this study extensively discusses children's right with particular focus on the pertinent provisions of national and international instruments and the extent to which the South African correctional system complies with such instruments. In other words, what the South African Department of Correctional Services is doing with regard to children that end up in their custody. It is important at this point to put the following in perspective for the sake of clarity:

- a) Children referred to in this study are those who committed offences and not children who are in the department's facilities because their mothers serve a prison sentence.
- b) Distinction is made between children and juveniles. According to the Department of Correctional Services (2014) children are those who are 18 years and below and juveniles are those who are between 18 and 25 years old. This study focuses only on those who are 18 years and below, children.

In its situational analysis report on children in prison in South Africa, Community Law Centre (2000:3) published the following statistics representing the number of children by crime in South African prisons as provided by the department in 1997. This is compared – in the following table 4.6 - to statistics published on the last day of 2011/2012 financial year representing the number of children in South African prisons (Department of Correctional Services, 2012).

Table 4.6: 2007 and 2012 comparative analysis of statistics of a number of children by crime.

Type of crime - 2007	Percentage	Type of crime - 2012	Percentage
<b>Economic</b>	48%	<b>Economic</b>	26%
<b>Aggressive</b>	32%	<b>Aggressive</b>	48%
<b>Sex</b>	15.4%	<b>Sex</b>	22%
<b>Narcotics</b>	1.9%	<b>Narcotics</b>	1%
<b>Other</b>	2.7%	<b>Other</b>	3%

Source: Community Law Centre (2000:3) and Department of Correctional Services (2012)

Table 4.6 above show a decreasing trend in economic and narcotics related crimes between 2007 and 2012. This could be attributed to the application of the diversion programmes as it is suggested by the Community Law Centre (2000:3). Furthermore, this table shows an increasing trend in aggressive, sex and other crimes. This is worrisome turn of events given the fact that children are not supposed to be in prisons in the first place as required by the law.

It is an undeniable fact that children end up in detention even if it must be considered as a measure of last resort as required by law. For instance, Humanium (2014) reported that United Nations Children’s Fund (UNICEF) estimates that more than one million children are affected across the world. This is attested by De Boer-Buquicchio (2009) during the 2009 Janusz Korczak lecturer by stating that over one million children are deprived of their liberty around the world. Humanium (2014) further states that the percentage of children among all detainees varies from 0.5% to 30% depending on the country. In South Africa, children constitute 0.6% of the incarcerated population (Department of Correctional Services, 2014).

It must be acknowledged that the said percentage of imprisoned children in South Africa is reasonable as compared to other countries that have laws allowing for an imposition of life without parole sentence on children. These countries include inter alia Australia, Cuba, Argentina, Sri Lanka etc...(Agyepong, 2010:83). United States of America also used this practice until 2012 (Yale Law School, 2013:3). South Africa has mechanisms to deal with child offenders such as diversion programmes which were initiated back in the early 1990s (Institute for Security Studies, 2003:1). This is congruent to section 28(1)(g) of the *Constitution of the Republic of South Africa of 1996*. Although this is a good story to tell,

the question that ought to be asked is whether the Department of Correctional Services is indeed making provision for the following:

- appropriate alternative care for child offenders,
- basic nutrition, shelter, basic health care services and social services;
- protection from maltreatment, neglect, abuse or degradation;
- separate detention from persons over the age of 18 years and
- treated in a manner, and kept in conditions, that take account of the child's age.

It is clear from the foregoing that children are entitled to and should enjoy all other rights as discussed in this study and cannot be repeated. For instance the right to equality (see *supra* 4.2), right to human dignity (see *supra* 4.3), freedom and security of persons (see *supra* 4.4), health care services (see *supra* 4.5), right to education (see *infra* 4.7), freedom of religion, belief & opinion (see *infra* 4.8) and rights of arrested, detained & accused persons (see *infra* 4.9). This is attested by Humanium (2014) by stating that children also have the right to education, health care, freedom of religion and any aid they require including psychological, physical and judicial that should be protected as much as possible. Therefore, children rights cannot be separated from all other rights as provided for in Chapter 2 of the *Constitution of the Republic of South Africa of 1996*.

For the purpose of this study, the practical application of section 28(g)(i)(ii), separate detention of children from persons over the age of 18 years and the treatment of child offenders in a manner that takes account the child offenders' age, is analysed. This is in relation to the role that the Department of Correctional Services play in so far as child prisoners are concerned. Apart from this role, Civil Society Prison Reform Initiative (2005:11) suggests that the departmental officials who are engaged in professional activities, such as educators or social workers, can make themselves available to sentencing officers to provide evidence on whether the prison environment is suitable for a particular individual case.

Humanium (2014) emphasises the importance of separating children from adults in order to protect them from harmful influences and risky situations. To corroborate this,

Humanium (2014) makes reference to frightening research statistics that children who are imprisoned with adults are five times more likely to be sexually harassed and twice as likely to be physically abused.

According to the Community Law Centre of the University of Western Cape as cited by Pete (1997:231) South Africa fell far below international standards for the detention of children. This is so because children were detained with adult offenders, gangsterism, rape and overcrowded sleeping quarters were the order of the day.

Although the South African Human Rights Commission did not draw a distinction between children and juveniles in its national prisons project report of 1998, it has found that the requirement for the separation from adult prisoners is not always adhered to and this is because of the problem of overcrowding in 16 prisons that were visited (South African Human Rights Commission, 1998:31).

Out of twenty-two (22) so called 'juvenile' facilities visited by the Community Law Centre of the University of Western Cape in the year 2000, only five facilities were complying with the requirement of separation from adult prisoners (Community Law Centre, 2000:7–10). The rest of facilities were characterised by 'mixed generation' prisoners where children were sharing facilities - such as recreational and educational - with juveniles due to the design of the facility itself. Children and adults are separated by gates and corridors and in some instances separation is based on whether a prisoner is sentenced or awaiting trial. Over and above that, the problem of overcrowding seem to be persistent and exacerbating poor conditions under which children serve their sentences.

A year after the foregoing findings by the Community Law Centre, Kiessl (2001:11) found that 73,3% of inmates from 16 detention facilities declare that their accommodation complies with the principle of separation. This is indeed a milestone in terms of the practical application and compliance with the relevant domestic and international laws. It is however cautioned that Kiessl study focused only on accommodation and not on other services such as recreation and education. Furthermore, Kiessl did not draw a distinction

between children and juveniles because juveniles were used in cases where children numbers were not enough in terms of the sample (Kiesl, 2001:7).

In its second quarterly report for the period 01 April to 30 June 2012, the Judicial Inspectorate for Correctional Services found only one non-compliance to the principle of separation out of twenty three (23) general inspections conducted in all of the department's regions where children were not housed separately from juveniles in Emthonjeni juvenile prison (Judicial Inspectorate for Correctional Services, 2012:16).

In 2013 the Judicial Inspectorate for Correctional Services conducted twenty nine (29) inspections in all six (6) departmental regions and 15 investigations in five (5) of the six (6) departmental regions for a first quarterly report for the period 01 January to 31 March 2013. Only one case of non-compliance to the principle of separation in Bethal prison was reported.

Although some findings of the recent quarterly report of the Judicial Inspectorate for Correctional Services - 01 October to 31 December 2014 - are pending, there is no reported case of non-compliance to the principle of separation (Judicial Inspectorate for Correctional Services, 2014).

#### **4.6.1 ANALYSIS**

It is an unescapable fact that a significant number of children end up imprisoned despite mechanisms put in place to ensure that imprisonment should be considered as the last resort. In the late 1990s there was a visible disregard for requirement of the law -domestic and international - that children must be separated from juveniles and adults when imprisoned. This could be attributed to the apartheid legacies and lack of practical policies with regard child prisoners.

The separation of children from juveniles and adults was gradually considered and practiced in most prisons in South Africa over the years. To date, a very limited number,

if nothing at all, is reported with regard to non-compliance to the principle of separation. Therefore, these turn of events can be construed to mean that over time, the Department of Correctional Services will be fully complying with the requirements of the law with regard to the right of child prisoners.

#### **4.7 THE RIGHT TO EDUCATION**

Section 3.3.6 of this study is articulate to the extent of the Department of Correctional Services' compliance with the requirements of the law. The protection, promotion respect and fulfilment of the right to education cannot be sufficient without implementation otherwise the penal system of the Republic of South Africa won't be serving its purpose of rehabilitating inmates. See supra section 2.4.4 of this study. It is against this backdrop that an analysis of the implementation of the law is undertaken.

According to the Department of Correctional Services' 1997 annual report, the department had 100 975 sentenced inmates in its detention facilities but only 10 916 representing 11% of inmates were on the department's formal education programme (Department of Correctional Services, 1997).

In its National Prison Project of 1998, the South African Human Rights Commission reported very poor educational facilities in the majority of prisons and non-existent in some prisons. Most prisons have ignored the basic human right to education for prisoners (South African Human Rights Commission, 1998:22).

In its 2002/2003 annual report, the Department of Correctional Services indicated its sentenced inmates' population to be 125 655 out of which the department set a target of 11 400 representing only 9% inmates to be placed in its education programmes and achieved 21 346 representing 17% inmates (Department of Correctional Services, 2003).

A year later, the Judicial Inspectorate for Correctional Services recorded 2 988 complaints relating to rehabilitation programmes in its 2003/2004 annual report (Judicial Inspectorate for Correctional Services, 2004).

In its second quarterly report for the period 01 April to 30 June 2012, the Judicial Inspectorate for Correctional Services outlines the following findings of its investigations subsequent to twenty three (23) general inspections conducted in all of the department's regions:

Table 4.7: Findings on the violation of the right to education of inmates (quarterly report: April to June 2012).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	DEPARTMENT'S FEEDBACK
<b>Barberton Town (Juvenile)</b>	24 April 2012	There is a shortage of professional staff especially teachers and psychologists.	Feedback received from the Head of Correctional centre was incomplete.
<b>Hewequa Juvenile</b>	17 May 2012	Out of 191 inmates incarcerated in this facility, only 91 (representing 48%) are attending school.	A complete action plan to involve every inmate at the centre in educational programmes was received from the Regional Commissioner's office.
<b>Ekuseni Youth Development Centre.</b>	02 June 2012	Out of 518 juvenile inmates, only 165 inmates participate in educational and vocational programmes.	All inmates at the centre are encouraged to attend programmes but cannot be compelled to attend.
<b>Devon</b>	19 June 2012	Inmates do not have access to formal education.	No feedback received from the department at the time of the publication of this report.

Source: Judicial Inspectorate for Correctional Services (2012:10 – 20).

In addition to the above, the Judicial Inspectorate for Correctional Services (2013:10-22) conducted twenty nine (29) inspections in all six (6) departmental regions and 15 investigations in five (5) of the six (6) departmental regions for a first quarterly report for the period 01 January to 31 March 2013. The following table is a representation of a summary of the inspection findings on the violation of the right to education of inmates:

Table 4.8: Findings on the violation of the right to education (quarterly report: January to March 2013).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	DEPARTMENT'S FEEDBACK
<b>Ncome Medium A</b>	09 January 2013	The centre experiences an acute shortage of human resources in the education sector.	There was no response from the department at the time of the report submission to the portfolio committee and publication.
<b>Ermelo</b>	19 March 2013	There is shortage of professional staff especially educators.	No posts are financed for educators and custodial officials are used as teachers.
<b>Sterkspruit</b>	25 March 2013	Only 9 out of 72 inmates are engaged in ABET classes while other inmates have limited access to rehabilitation and educational programmes	Rehabilitation programmes are rendered to all inmates. The 9 inmates found engaged in ABET classes were the only ones eligible for ABET.

Source: Judicial Inspectorate for Correctional Services (2013:10-22).

The Judicial Inspectorate for Correctional Services recently conducted 24 inspections in all six Department of Correctional Services' Management Regions. The finding of these inspections are documented in a quarterly report for the period 01 October 2014 to December 2014. Although these findings are pending, only one finding relates to the treatment of inmates with regard to education where inmates complained that they are not offered any skills programmes nor workshops (Judicial Inspectorate for Correctional Services, 2014:15).

In its 2013/2014 annual report, the Department of Correctional Services reported to have accommodated 107 696 sentenced inmates in its facilities during 2013/2014 financial year (Department of Correctional Services, 2014:28). In its Strategic Plan of the period between 2013/2014 to 2016/2017, the department identified only 16 929 – out of 107 696 representing 16% of inmates who are illiterate and should be put on Adult Education and Training. The department went further to set itself a target of 11 372 (67.2%) from the identified illiterate inmates (Department of Correctional Services, 2014:28).

#### 4.7.1 ANALYSIS

It is clear from the foregoing that the South African Department of Correctional Services is not doing enough to promote and protect inmates' right to education. This statement is premised on the fact that the department did not accommodate a sufficient number of inmates in its education programmes. This is despite inmates interest in empowering themselves with education which showed an upward trend from 1997 to 2014. In 1997, a dismal 11% was on the education programmes of the department.

The department continued to identify a very limited number of inmates who are claimed to be illiterate. For 2013/2014 financial year, it identified 16 929, for 2014/2015 financial year, it identified 16 760 and for 2015/2016 financial year, it identified 16 592 in the face of an ever increasing inmate population. It is the researcher's view that the numbers presented by the department are not a true reflection of the real situation because in 2003 the Judicial Inspectorate for Correctional Services received just less than 3000 complains relating to rehabilitation and in addition to that, a year earlier 21 346 inmates were put on educational programmes while the department targeted 11 400. In 2014 only 98 876 inmates were involved in the rehabilitation programmes which include the Adult Education and Training, Further Education and Training and Skills Training. The question is what happens to the remaining 12 820 sentenced inmates?

The Department consistently identify a limited number of inmates and set itself a very low target from which it deviated citing reasons such as the unavailability of educators and reluctance of inmates to participate in educational programmes. If education is considered to be a rehabilitation tool then the department should seriously consider its obligations in terms of the requirements of the national and international laws. To be more specific, the department should know that education should be: i) equally accessible, ii) compulsory to a certain level and iii) must be in line with the national education standards (see section 3.3.6 of this study) otherwise if these are not observed as it is currently the situation, then the department is in violation of the inmates' right to education.

#### 4.8 FREEDOM OF RELIGION, BELIEF AND OPINION

Section 3.3.7 of this study addresses the issue of the department's compliance with the prescripts of the law with regard to freedom of religion. It outlines the available legislative framework aimed at giving effect to not only sections 15 and 31 of the *Constitution of the Republic of South Africa* of 1996 but also to international instruments. So, clearly the department is compliant from a policy perspective and this warrant an analysis of a practical application of such requirements of the law.

According to its 1997 annual report, religious care programmes for inmates in South Africa is done through the involvement of various religious communities and this is seen as an important component of this service and a network of 1 991 religious workers from 71 different churches and religions was established. As alluded to in the previous chapter (see section 3.3.7 of this study), services rendered in the religious care programme includes large group gatherings, small group sessions and personal interviews for inmates. 27 027 large group gatherings were conducted, 20 422 small group sessions were conducted and 23 490 personal interviews were conducted. All with the involvement of religious workers and chaplains (Department of Correctional Services, 1997).

Two years later, the department reported in its 1999 annual report that it had the service of 2 096 religious workers representing 71 different churches. 33 158 large group gatherings were conducted, 22 025 small group sessions were conducted and 46 153 personal interviews were conducted. All with the involvement of religious workers and chaplains (Department of Correctional Services, 1999).

According to the 2003/2004 annual report, religious or spiritual care services covers a broad spectrum of an inmate's spiritual needs on a personal and communal level. Personal spiritual needs receive attention in individual conversation and small group meetings with the chaplain and/or spiritual workers with the following intended objectives:

- The offender's experience of his/her punishment, his/her adaptation to life in the correctional facility and the process of leading him/her to a life free from criminality.
- Support in times of crisis and with regard to problems pertaining to his/her faith.

- Recovery and maintenance of his/ her relationship with him/herself, his/her marriage partner, family, extended family and friends, the creator and nature.

The communal experience of faith receive attention through large group sessions with the following objectives:

- Fellowship in the greater group
- Expansion of knowledge of the faith
- The communal practice of Spiritual customs and rituals (Department of Correctional Services, 2004:33).

In its 2007/2008 annual report, the Department of Correctional Services succinctly outlined a strategic objective in promotion of the right to freedom of religion. This strategic objective was to provide a comprehensive needs based care programmes to ensure the wellbeing of persons in the department's care and its measurable objective was the number of offenders participating in spiritual care programmes and services. Interestingly, the target set was 165 700 and was exceeded by 256 (Department of Correctional Services, 2008:59).

According to the Department of Correctional Services' Strategic Plan for the period between 2010/11 and 2014/15, a measurable objective in respect of the promotion of the right to freedom of religion is to ensure the personal well-being of incarcerated persons by providing various needs based services. The strategy is to implement Spiritual Care needs based programmes and impact instrument in two management areas per region over the 2010/2011 financial year (Department of Correctional Services, 2011:54).

In its 2010/2011 annual report, the department managed to implement 53.8% (7 of 13) spiritual care programmes from a target of 69.2% (9 of 13) spiritual care programmes. The target for inmates' participation in the spiritual care programmes was 51.29% (83 822 out of 163 427 offenders). Interestingly, the target was exceeded as the department achieved 55.16% (90 151 out of 163 427 offenders). Furthermore, Spiritual Care data collection tool was reviewed, consulted and finalised for implementation. Total number of 51 officials, including Regional Heads Development and Care, Coordinators and

Chaplains, were trained to implement the tool in regions; the new programme 'Building Healthy Relationships' was developed; 61 Officials were trained for the implementation of Spiritual Care Pre-Release and Anger Management Programmes in 3 Regions and the Spiritual Care Family Life Programme was piloted in Boksburg and Zonderwater Management Areas. 198 859 Spiritual Care sessions were held and include 54 003 Church/faith services, 51 266 groups sessions and 93 590 individual pastoral sessions from a target of 185000 Sessions (Department of Correctional Services, 2011:57– 60).

In terms of the Departments' Strategic Plan of 2013/2014 – 2016/2017, the strategic objective to promote the right to freedom of religion is to correct the offender behaviour through access to correctional programmes and spiritual services (Department of Correctional Services, 2014:17). According to the 2013/2014 annual report, the department has set a target of 52% (81 035 out of 155 836) of inmates to have access to spiritual care services. Instead, the department achieved 77.77% (120 668 out of 155 1690 inmates who had access to spiritual care services (Department of Correctional Services, 2014:48).

#### **4.8.1 ANALYSIS**

As a point of departure, it is worth mentioning that not much if there is any reported case or any investigation conducted in relation to the violation of the right to freedom of religion particularly by the Judicial Inspectorate for Correctional Services and other institutions such as the Human Rights Commission. What is documented through research is the work of Landman, Luyt and Du Preez (2006:333) who identified what the researcher calls the 'religious policy gaps' of the department. Should these policy gaps be considered and be applied in practice, particularly with regard to the respect to prostitute and gay spiritualities, then sexual malpractices as a prison subculture will be formally legalised and will in the opinion of the researcher exacerbate the challenge of gangsterism in prisons.

What is observable from the foregoing practical application of the requirement of the law is that the department has gradually and practically implemented what is required by the

law in that inmates are allowed to attend and observe religious gatherings of their choice. In 1997 the department did not have measurable objectives with regards to the provision of religious services and participation by inmates but what is commendable is that a relationship with religious workers from different churches was established. There was an increasing trend of the involvement of religious workers and religious services rendered in 1999.

A sign of progressive development towards accelerated religious care services rendered was visible in 2004 when objectives of such services were developed. In 2008, strategic measurable objectives were developed to determine the number of inmates who participate in spiritual or religious care programmes. A target for inmates to participate in such programmes was set in 2008, 2011 and 2014 and interestingly, targets for these respective years were exceeded and more religious care sessions were held. In addition, additional chaplains were appointed and officials trained to work in spiritual care programmes.

Therefore, the department cannot be seen to be violating the right to freedom of religion and this can also be confirmed by the fact that there was not much reported incidence that seeks to suggest the violation of this right.

#### **4.9 THE RIGHT OF THE ARRESTED, DETAINED AND ACCUSED PERSONS**

Section 3.3.8 of this study is articulate in respect of the available legislative requirements and compliance to such requirements by the South African Department of Correctional Services. For the purpose of this study an analysis is based on section 35(2) of the *Constitution of the Republic of South Africa of 1996* with specific reference to the respect and promotion of the right of inmates to exercise, adequate accommodation, nutrition and contact with the community. This section of the *Constitution of the Republic of South Africa of 1996* is generally assumed to be the only right afforded to prisoners and has

accordingly received more attention by many scholars. This right is also covered by other rights as discussed in this study such as the right to human dignity; health care, food and water; housing; children rights, education etc... but what makes it different is the fact that it is more specific because it refers to detained persons, prisoners.

Pete (1997) wrote a research paper based on prisoners' rights which is effectively a consolidation of various newspaper reports about the South African prisons conditions. Although Pete did not see the need to verify such reports, it is worth making reference to such reports here. There is generally a sense of the violation of the right to exercise and adequate accommodation because of the strict departmental regulations which allowed for only one hour of exercise in handcuffs in a small cage.

According to the 1997 Annual Report of the Department of Correctional services, the provision of custodial services is one of the purpose objectives of the Department and a realisation of this objective is dependent on the provision of accommodation to prisoners. The available accommodation was 99 407 in 1997 and the total prison population was at 142 410 (Department of Correctional Services, 1997). Some of the worst case scenarios as cited by Pete (1997) include the following:

- in October 1997, Leeukop prison cells did not have hot water, most toilets did not flush and there was an average of between 30 and 33 prisoners in a cell.
- In November 1997, Pollsmoor prison 200% overcrowded where some cells designed to hold 16 prisoners were forced to hold 62 prisoners, prisoners received only two meals a day with a 19 hour period wait for the next meal and often toiletries not provided for all prisoners.

In addition to the above, Pete (1997) quoted the then minister as saying that the majority of South Africa's prisons conditions are inhumane because of overcrowding where cells built to house 18 inmates contain 65 inmates.

In its 1998 National Prison Project, the South African Human Rights Commission found that the conditions of imprisonment in the majority of prisons fall short of the constitutional right to adequate accommodation. This finding is based on the following observations:

- At Rustenburg and Thohoyandou Prisons, due to overcrowding and the lack of accommodation, some prisoners sleep on cement floors.
- At George Prison the excessive number of prisoners resulted in serious overcrowding to the extent that prisoners complained of insufficient oxygen in the cells.
- Mdantsane Prison also has no beds for 323 prisoners who sleep on mats on the damp floors. In fact, during the inquiry it was found that the Eastern Cape Province had a shortage of over 1 800 beds for prisoners who are thus forced to sleep on mats on the floor.
- Pretoria, Vereeniging and Brits Prisons, in comparison, were considered to be relatively clean with little overcrowding.
- St Alban's Prison in East London and Bethal Prison in Mpumalanga were described as overcrowded (South African Human Rights Commission, 1998:12 - 13).

With regard to the right to adequate nutrition, the South African Human rights Commission found that the department did not have a standard dietary prison policy. Prisons have different dietary policies and common complaints received from prisoners included the following:

- not enough food
- no provision for those who do not eat pork
- dinner is served at 14h00 and no provision is made for evenings by which time everyone is hungry again
- food ranges from poorly prepared or inedible, to too little or rotten (South African Human Rights Commission, 1998:12-14).

The right of inmates to communicate with and be visited by a spouse or partner, next of kin, chosen religious councillor and medical practitioner is generally adhered to despite

the unavailability of a standard regulation with that regard. Complaints received include the following:

- telephone calls are inhibited
- visits are too short and too few
- lack of contact visits
- suspicion that members do not post letters to their families
- lack of adequate visiting facilities in some prisons
- censoring of letters in and out of prison
- different treatment for black and white prisoners, with the latter often allowed contact visits (South African Human Rights Commission, 1998:15).

According to the South African Human Rights Commission (1998:27), there is a serious lack of recreation facilities in the majority of prisons such as Senekal and Brandfort prisons where there are no recreational facilities except television sets; Grootvlei prison where there is no recreational facilities including television sets and insufficient books in the library and in Sasolburg prison where there are no formal sporting activities prescribed by the authorities.

In 2001, the South African Human Rights Commission released the 3<sup>rd</sup> Economic and Social Rights report which covered prisoners' rights and concluded that the provision of conditions consistent with human dignity including adequate accommodation, nutrition, education and medical treatment remained a challenge to prison authorities with the main problem being overcrowding (South African Human Rights Commission, 2001:370).

Mubangizi (2001:203) found the following in respect of the right of prisoners to exercise, adequate nutrition, reading material and communication:

Only 53.2% of the respondents indicated that they were allowed to exercise and play some games; 86.7% of all respondents indicated that the food was very little and very bad; 18.4% said that they were provided with newspapers and books to read; 61.4% said they were allowed to write and receive letters while 54.8% were allowed to make and receive calls and lastly 94.8% said they were allowed visitors. These statistics are based

on a survey conducted involving four (4) prisons, namely; Westville, Johannesburg, Pollsmoor and St. Albans prisons. These findings were based on the responses of 4000 questionnaires which were equally distributed and administered to 2000 sentenced prisoners and 2000 Awaiting Trial Detainees in all four prisons.

According to the 2003/2004 Department of Correctional Services Annual Report, the department had 114 787 accommodation capacity and had an actual prisoner population of 187 640 on 31 March 2004. This means its facilities were 72 853 (63.4%) overpopulated (Department of Correctional Services, 2004:25).

In 2005, the Jali Commission released a report which demonstrate overcrowding as a persisting challenge for the Department of Correctional Services. This report stated that prison conditions are sometimes unsanitary and unbearable in that one toilet is shared by approximately sixty (60) prisoners. Prisoners also have to share beds, sometimes two (2) prisoners to one bed, whilst others sleep on the concrete floor and sometimes with only one blanket to share. This is according to the commission a State violation of the basic human rights of prisoners, which is unconstitutional and cannot be condoned in our new democracy (Jali, 2005:630).

In its second quarterly report for the period 01 April to 30 June 2012, the Judicial Inspectorate for Correctional Services outlines the following findings of its investigations subsequent to twenty three (23) general inspections conducted in all of the department's regions. The following table is a representation of a summary of the inspection findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community:

Table 4.9: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: April to June 2012).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS AS PER THE DEPARTMENT'S FEEDBACK
<b>Barberton maximum</b>	24 April 2012	Plumbing needs urgent attention particularly ablution facilities and running hot water.	The initial response from the head of Correctional Centre was incomplete and later referred to Area Commissioner.

<b>Potchefstroom</b>	08 May 2012	The visitors' facility is too small for the centre population.	The need to expand the visitors' area and renovate the kitchen was registered at the Limpopo/Mpulanga/North-West Regional office.
<b>Klerksdorp</b>	09 May 2012	Dysfunctional speakers in the visiting facility.	Plans for the total repair and renovation of the centre is with the drawing committee and must still be approved (DPW project no. WCS040754).
<b>Van Rhynsdorp</b>	29 May 2012	<ol style="list-style-type: none"> <li>1. Inmates were found sleeping on the floor.</li> <li>2. Meals to inmates are not provided according to section 8 of the <i>Correctional Services Act 111 of 1998</i> as amended.</li> </ol>	<ol style="list-style-type: none"> <li>1. There is currently no inmates sleeping on the floor.</li> <li>2. New officials were appointed at the centre to ensure inmates are served with three meals a day.</li> </ol>
<b>Calvinia</b>	30 May 2012	The centre does not have visiting facilities.	Response to the findings were to be provided on 13 August 2012.
<b>Kirkwood</b>	04 June 2012	Inmates have limited or no contact with families.	Inmates are housed in Kirkwood temporarily and will be transferred back to St. Albans as soon as the renovations are finalized.
<b>Elliotdale</b>	18 June 2012	Kitchen equipment is not in working order.	Feedback was provided by the centre but did not address this specific finding.
<b>Devon</b>	19 June 2012	The kitchen is in an unhygienic state.	No response to the findings from the Head of Correction as on 7 August 2012.
<b>Lusikisiki</b>	19 June 2012	There is neither a visiting facility nor waiting area for visitors to the centre.	No feedback provided because the Area Commissioner claimed to have experienced challenges with the Department's Information Technology System.
<b>Nigel</b>	20 June 2012	<ol style="list-style-type: none"> <li>1. Food preparation is inadequate.</li> <li>2. Speakers at the non-contact visiting area need repairs.</li> </ol>	No feedback from the centre as on 2 July 2012.
<b>Mount Ayliff</b>	20 June 2012	<ol style="list-style-type: none"> <li>1. The centre is overcrowded.</li> <li>2. There is an unreliable supply of water.</li> </ol>	No feedback provided because the Area Commissioner claimed to have experienced challenges with the Department's Information Technology System.
<b>Mount Fletcher</b>	21 June 2012	<ol style="list-style-type: none"> <li>1. Alleged riots occurred in February due to complaints about inadequate food (maggots in porridge).</li> </ol>	The Area Commissioner's office to provide a report regarding the riots of inmates about inadequate food. No further feedback provided because the Area

		<ol style="list-style-type: none"> <li>2. A need to appoint a reliable contractor for delivery of perishables, e.g. beef and fish.</li> <li>3. There is an urgent need for the structural maintenance of the kitchen and its contents.</li> <li>4. There is no reliable water supply.</li> </ol>	Commissioner claimed that he experienced challenges with the Department's Information Technology System.
<b>Wolmaransstad</b>	21 June 2012	<ol style="list-style-type: none"> <li>1. The plumbing system in general requires maintenance including the water tank which has been leaking for over 1 year.</li> <li>2. There appeared to be a lack of storage space for bedding and clothing.</li> </ol>	The Area commissioner indicated that feedback will be given regarding the other findings without any time line specification.

Source: Judicial Inspectorate for Correctional Services (2012:10 – 20).

In addition to the above, the Judicial Inspectorate for Correctional Services (2013:10-22) conducted twenty nine (29) inspections in all six (6) departmental regions and 15 investigations in five (5) of the six (6) departmental regions for a first quarterly report for the period 01 January to 31 March 2013. The following table is a representation of a summary of the inspection findings on the violation of the right of inmates to exercise, adequate accommodation, nutrition and contact with the community.

Table 4.10: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: January to March 2013).

<b>PRISON VISITED</b>	<b>DATE</b>	<b>SUMMARY OF FINDINGS</b>	<b>STATUS</b>
<b>Helderstroom</b>	17 January 2013	There is more than 14 hours' difference between supper and breakfast, contra to section 8(5) of the Correctional Services Act 111 of 1998 as amended.	The deviation regarding meals was a result of "operation Vala" and has been addressed.
<b>Rooigrond</b>	25 January 2013	The centre is old and dilapidated. Some of the equipment in the kitchen is non-functional. The sewerage system also needs to be repaired urgently.	On 12 March 2013, the Area Commissioner confirmed that maintenance has been effected.
<b>Port Shepstone</b>	06 February 2013	The centre is dilapidated and needs to be renovated urgently.	The Area Commissioner furnished a complete maintenance schedule

			with timeframes on 11 March 2013.
<b>Kokstad</b>	07 February 2013	Some equipment in the kitchen is non-functional.	The Head of Correctional Centre confirmed on 14 February that the kitchen equipment was repaired.
<b>Graaf – Reinett</b>	19 February 2013	The centre is dilapidated with cracked walls, toilets, and showers in need of repair.	The centre is registered for repair and renovations.
<b>Middleburg</b>	20 February 2013	The hot water system at the centre is ineffective.	A water softener system was installed at the centre to deal with high levels from the municipal water supply.
<b>Leeuwkop Med.</b>	21 February 2013	The centre is still an old corrugated structure. It needs urgent repairs/maintenance especially the plumbing system and replacing broken windows in the cells.	The details about the maintenance to be done was provided by the Head of Correctional Centre.
<b>Modderbee</b>	25 February 2013	There are 46 speakers at the booths in the non-contact visitors' area; 15 were non-functional during the inspection.	No action taken except that the letter regarding the recommendations was sent to the Head of Correctional Centre and copied to the Area and the Regional Commissioner.
<b>Butterworth</b>	13 March 2013	The centre is dilapidated and in dire need of extensive repairs/renovations including the security fence	The centre was renovated in 2011 and the peeling of paint has been registered with the Department of Public Works.
<b>Ficksburg</b>	27 March 2013	<ol style="list-style-type: none"> <li>1. The centre is in an appalling condition with kitchen equipment not functioning. There is a lack of hot water in some cells. The visiting area is insufficient and cells are cockroach infested.</li> <li>2. Some inmates sleep on the floor due to overcrowding</li> <li>3. Inmates complain that the food rations between sentenced and un-sentenced offenders differ, with remand</li> </ol>	The letter was to be sent to the department by the inspectorate regarding the findings and recommendations.

		detainees getting a smaller ration.	
<b>Buffeljagsrivier</b>	28 March 2013	Inmates were served with only two meals per day.	The Head of Correctional Centre indicated that inmates were provided with three meals a day as from 15 April 2013.

Source: Judicial Inspectorate for Correctional Services (2013:10-22).

The Judicial Inspectorate for Correctional Services recently conducted 24 inspections in all six Department of Correctional Services' Management Regions. The findings of these inspections are documented in a quarterly report for the period 01 October 2014 to December 2014. Although the findings of other centres are pending, the following could be confirmed in relation to the right of offenders to exercise, adequate accommodation, nutrition and contact with the community.

Table 4.11: Findings on the right of inmates to exercise, adequate accommodation, nutrition and contact with the community (quarterly report: 01 October 2014 to December 2014).

PRISON VISITED	DATE	SUMMARY OF FINDINGS	STATUS
<b>Mt. Fletcher</b>	28 October 2014	Inmates also complained that the food ratio for especially people on special medical diets does not seem to be sufficient.	
<b>Fort Beaufort</b>	29 October 2014	Contact visits take place in a court yard and are not suitable, especially during adverse weather conditions. The centre and cells are in need of paint.	The department reported that the region is identifying a suitable space and alternatives will be in place for adverse weather conditions. This centre is listed for renovations in the regional priority list for capital projects.
<b>Ngqeleni</b>	29 October 2014	The centre is dilapidated with urgent general maintenance to be done especially regarding painting of the kitchen and the interior of the cells. The plumbing and hot water systems of the centre should also be renovated.	The department reported that the Ngqeleni Correctional Centre has been registered to Public Works Department for renovation.
<b>Umtata Medium</b>	29 October 2014	The centre is designed to accommodate 720 inmates but on the day of the inspection, 1 406 inmates were found to be	The department reported that the Correctional Centre is implementing overcrowding strategies to reduce overcrowding in

		incarcerated at the centre (195% overcrowded).	the Centre and the closure of Mqanduli has impact to the overcrowding of this Centre.
<b>Grootvlei Medium</b>	27 October 2014	The centre was designed to accommodate 890 inmates but on the day of the inspection, 1 960 inmates were found to be incarcerated at the centre (220% overcrowded).	No response received from the department at the time of publication.
<b>Thohoyandou</b>	24 November 2014	The previous findings of the Inspectorate regarding water shortages at the centre were confirmed during the visit.	
<b>Maphumulo</b>	24 November 2014	The centre is dilapidated and in need of general repairs.	No response received from the department at the time of publication.
<b>Kranskop</b>	26 November 2014	The centre is dilapidated and in need of general repairs.	No response received from the department at the time of publication.
<b>Potchefstroom (male &amp; female)</b>	09 December 2014	The male Juvenile unit is extremely overcrowded with some juveniles sleeping two in a bed.	The issue of overcrowding was brought to the attention of the HRDF and was dealt with immediately whereby some juvenile's offenders were transferred to C-Unit.

Source: Judicial Inspectorate for Correctional Services (2014:15 – 27).

#### 4.9.1 ANALYSIS

As pointed out at the beginning of this section, the analysis is based on section 35(2) of the *Constitution of the Republic of South Africa* of 1996 as it is deemed to be relevant to this study. Furthermore, this analysis is delimited to certain provisions of the said subsection. This include the right to adequate accommodation, nutrition, exercise and contact with the community. This is so because other provisions are dealt with in other sections of this study.

It is almost impossible to guarantee prisoners right to adequate accommodation amid the ever persisting challenge of prisons overcrowding in South Africa. This is a challenge that

can be traced back in the apartheid regime (please see chapter 2 of this study) and to date, it remains a serious challenge to the department (please see chapter 5 of this study).

Although there is no available specifics to what constitute a violation of the right to adequate accommodation, particularly with regard to litigations, there is a general consensus by researchers such as Brivik (2005:35), Steinberg (2005), Muntingh (2007:15) confirming that overcrowding essentially violates the rights of prisoners to adequate accommodation in that overcrowding hampers effective services aimed at promoting and protecting the rights of offenders thereby ensuring treatment consistent with the requirements of the law.

Therefore, prison overcrowding essentially denies prisoners their right to adequate accommodation which directly and indirectly have a bearing on other rights such as the right to exercise, adequate nutrition and contact with the community. This is attested by Judge Hannes Fagan in an interview with De Vos conducted on 06 May 2003 (DeVos, 2003:30).

Except the technical requirements found to be dysfunctional and visitors' facilities being small in other prisons, findings about practical application of the right to contact with the community has been catered for and this should be acknowledged. This is informed by recent inspectorate's findings which point to the fact that the department is taking corrective actions such as the renovations of a number of prisons, development and implementation of the strategy to reduce prisons overcrowding. The questions that ought to be asked is whether the department could have taken the said corrective measures to ensure dignified offender treatment wasn't it because of the findings and recommendations of the correctional services inspectorate?

#### **4.10 CONCLUSION**

The protection and promotion of prisoners' rights in South Africa as identified by the Department of Correctional Services South Africa is crucial if respect for the international law and domestic law has to be observed. It is in fact an obligation not to only observe such laws but also to practically implement them. From a policy position, the South African Department of Correctional Services has done well as discussed in chapter 3 of this study. The implementation of the provisions of laws aimed at ensuring humane treatment of offenders still lacks. From the foregoing analysis, it becomes clear that the department is gradually moving towards the protection and promotion of offenders rights in South Africa. However, much still needs to be done in respect of other rights such as the right to human dignity, freedom and security of persons, the right to health care services, the right to education and the rights of detained persons particularly the right to adequate accommodation.

An analysis of the practical implementation of the requirements of the law proves to be a challenge for the department. In other words there is still persistent violation of offenders' rights in South Africa and thereby compromising humane treatment of offenders. This is further exacerbated by unnecessary red tape of referring the findings and recommendations to the Area and/or Regional Commissioners. This begs the question as to whether Heads of Correctional Centres have the capacity to deal with such findings and recommendations.

The researcher acknowledges the fact that this could be because of factors that needs to be addressed in the long term. It is in light that the next chapter discusses such factors which are effectively impediments to humane treatment of offenders.

## **CHAPTER 5: IMPEDIMENTS TO HUMANE TREATMENT OF OFFENDERS IN THE SOUTH AFRICAN CORRECTIONAL SYSTEM**

### **5.1 INTRODUCTION**

As alluded to in the previous chapter, which is based on the analysis of the practical implementation of the requirements of the law, there is an apparent persistent violation of the rights of offenders in South Africa as envisaged in chapter 2 of the *Constitution of the Republic of South Africa* of 1996. It is against this backdrop that this chapter describes the impediments to the humane treatment of offenders in South Africa.

The correctional system of South Africa is no different from any other organisation in either the public or private sector. It has its fair share of challenges manifesting in the support and core business services related issues alike. Support services include *inter alia*, human resources management and finance branches while the core business includes amongst others incarceration, rehabilitation, care and successful social integration of offenders. As pointed out earlier, this study describes the challenges impeding the successful operation of the core business of the Department of Correctional Services. These include amongst others overcrowding of prisons, community participation in correctional matters, corruption in prisons and prison subculture.

### **5.2 PRISONS OVERCROWDING: 1995 – 2014**

The history of South African penal system portrays prison overcrowding as a long standing challenge that amongst others led to the establishments of the Lansdown Commission (please see section 2.6.2 of this study). For the purpose of this study, prison overcrowding between 1995 and 2014 is discussed. Offenders' rights in South Africa are

recognised by chapter 2 of the *Constitution of the Republic of South Africa* of 1996 (see section 3.3 of this study). The treatment of offenders must be consistent to the provisions of the said chapter of the Constitution which was initially promulgated as an interim Constitution and adopted in 1996 as the democratic Constitution subsequent to the democratic elections in 1994 hence the scope of this section is from 1995 to 2014 as per the inclusion and exclusion criteria of this study.

The concept of prison overcrowding received a significant amount of attention from the academia, civil society and the government with specific reference to its definition. Could this be attributed to Giffard (2005) response to Steinberg's paper during a plenary session that overcrowding needs to be understood on other levels?

This essentially means understanding overcrowding beyond the mere definition as Giffard bluntly puts it that too often we understand it as the relationship between two numbers: The ratio approved capacity and the actual number of offenders. This study takes note of the arguments submitted during the plenary session and other related submissions and will limit a discussion on overcrowding to the definition of the concept, causes and consequences of overcrowding in prisons.

Luyt (2008:182) defines overcrowding as the amount of the population that exceeds design capacity. Shabangu (2006:10) refers to overcrowding as the state of accommodating more than 100% of the prison capacity or approved accommodation per cell. It is clear from the two definitions that when an amount exceeds the design capacity then there is a problem. Sloth-Nielson (2007:395) regard it as both structurally and socio-politically deep-rooted problem while the then Minister of Correctional Services, Honourable Sbu Ndebele demonstrate the intensity of this problem by pointing out that urgent answers to this challenge must be searched (IOLnews, 2013).

In 1995 correctional facilities were designed to accommodate 94 381 but was sitting at 112 572 leaving these facilities with 19.3% overcrowding (Luyt, 2008:182). According to Pelsler as quoted by Morodi (2001), 236 correctional facilities were established to

accommodate 100 384 offenders and in April 2000, the correctional facilities population was at 172 271. This translates to 71,6% overcrowding. By the end of February 2011, the actual accommodation capacity was 118 154 against the inmate population of 162 162. This means these facilities were overcrowded by 37.25% (Department of Correctional Services, 2013).

The then Minister of correctional services, Honourable Sbu Ndebele, was again quoted by City Press during a national colloquium on overcrowding in correctional centres hosted by the Department of Correctional Services in November 2012 saying South Africa's prisons are overcrowded and overused. He was alluding to the fact that the total inmate population was almost 160 000 while the approved bed space was only about 120 000 resulting in an over occupancy rate of about 25% (City Press, 2012). Fuzier (2011) affirms the above by pointing out that South Africa is a country with the largest number of inmates in Africa and ranked number nine in the world.

In its annual report, the Department of Correctional Services (2013:62) claim to have exceeded its 2012/2013 financial year target of reducing overcrowding by 32%. This is a misrepresentation of facts if not typing error because the department only managed to achieve 28.48% of the 32% target, meaning an underachievement of 3.52%. The inmate population during the 2012/2013 financial year was 162 026 with the actual capacity of 119 545 converting to over occupancy rate of 26.2%.

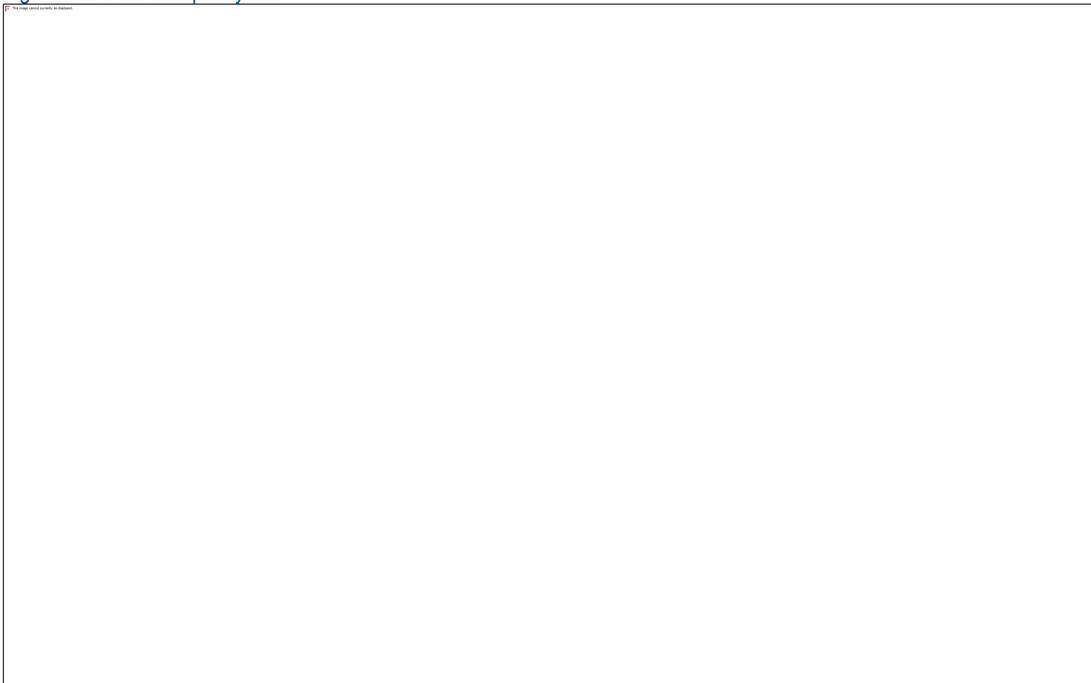
It is evident from the above that the over occupancy rate is fluctuating from 19.3% in 1995 to 26.2% in 2013 as it can be seen in the following figures. This can be attributed to the building of new correctional centres since 2009, diversion programmes and remission of sentences.

Figure 5.1: National (sentenced & unsentenced) capacity versus occupation



Sources: Morodi (2001); Luyt (2008); City Press (2012); Department of Correctional Services (2013)

Figure 5.2: Over-occupancy rate



Sources: Morodi (2001); Luyt (2008); City Press (2012); Department of Correctional Services (2013)

Although South Africa is a country with the largest inmates population in Africa, other countries in Africa should be more concerned about the over occupancy rate of their correctional facilities. For instance, in 2010, Morocco accommodated about 80 000

inmates in facilities designed for less than half that number (Bamford, 2010). Nigeria's prisons were so congested that the governors agreed to consider commencing with the execution of death row of prisoners as the last resort to decongest prisons across the country (Faith, 2010). Chakwe (2010) reported that Zambian prisons are 275% full. It is so full that prisoners are unable to sleep at night.

It can be safely concluded from the foregoing that overcrowding of correctional facilities is not a unique challenge to the South African correctional system. It affects most of the correctional systems across the globe, especially Africa. This is an undesirable situation caused by certain factors and leading to certain consequences.

### **5.2.1 Causes of overcrowding of correctional facilities**

The following are reasons why correctional facilities are overcrowded:

- Awaiting trial detainees (ATDs) (Fagan, 2005:33) (Dissel & Ellis, 2002). This is what the former Minister Ndebele called an over-use of imprisonment (City Press, 2012). A staggering 50 000 (31%) of the population in South Africa's correctional facilities are the Awaiting Trial Detainees. According to Fuzier (2011), this can be attributed to the fact that the vast majority of this population were arrested on the basis of reasonable suspicion or belief that they committed crime.
- The introduction of the Minimum Sentence legislation, Criminal Law Amendment Act 105 of 1997 (Fagan, 2005:33). This is further attested by Desai quoted by City Press as saying that overcrowding has worsened in part due to the number of offenders serving life sentence since 1995 (City Press, 2012).
- Changes in the release policy. These are the changes as a results of transformation in the country from the apartheid regime with the application of the provisions of *Correctional Services Act 8* of 1959 to the democratic dispensation with the application of *Correctional Services Act 111* of 1998 as amended. This implied that the earliest that parole can be considered has moved from one-third to half and for many prisoners to four-fifths of their sentence. For those serving life, it has gone up from 10 to 20 and now 25 years (Fagan, 2005:33).

- Changes in the law relating to bail. In 1996, the bail laws were amended to shift the onus onto a person accused of a serious offence to prove why he or she should be released on bail pending the trial. This made it more difficult for people to be granted bail, particularly in the case of indigent accused who are not represented during bail hearings (Dissel & Ellis, 2002).
- Socio-economic circumstances such as unemployment and poverty. Research has proved that there exist a relationship between unemployment, poverty and crime (Melick, 2003:35; Calvo-Armengol & Zenou, 2003:174). Although it is not in the interest of this study to determine whether unemployment and poverty cause crime or crime causes unemployment and poverty, it is worthy to mention that unemployment and poverty are potential socio-economic factors that can lead to increased crime rate. One can see this from the logic made by the Gauteng Treasury (2010:5) that unemployment leads to a lack of income and in the absence of income people are more likely to commit crimes in order to obtain income. The recent release of unemployment statistics in South Africa show an increased rate of unemployment (from 25% in the second quarter to 25.5% in the third quarter of 2015) which will most probably lead to increased crime rate. The implication is that, people will likely commit crime and end up in the already soaring levels of overcrowded prisons.
- Sluggish work pace by the court system to process cases affecting the awaiting trial detainees. Terreblanche (2004) quoted Judge Fagan, the former inspecting judge as saying that there are 40 000 people stuck in prison for years because the courts do not work fast enough.

### **5.2.2 What is been done to deal with overcrowding?**

As one of the role players in the successful rehabilitation and social integration of offenders, the Department of Correctional Services has a mammoth task of dealing with overcrowding as it has dire consequences (see infra 5.2.3) in the general administration of the correctional system. The following are efforts by the Department of Correctional Services to deal with overcrowding in South Africa's prisons:

- The first thing to do in dealing with any problematic situation is to acknowledge that the problem exists. The Department of Correctional Services outshone itself in this regard and this can be witnessed in Chapter 7 of the *White Paper on Corrections in South Africa, 2005*. For the mere fact that department is aware that they are dealing with an ever increasing number of people admitted in the correctional facilities, to the researcher, it is a clear acknowledgement of the problem of overcrowding. Furthermore, overcrowding management has always been part of the departmental strategic plans over the years.
- The Department of Correctional Services offers skills development and educational opportunities to offenders during incarceration. This is done with the aim of ensuring that upon release offenders are better positioned to be employed or start their own business. In doing this, recidivism is minimised with the hope that there will be a reduction in population numbers in correctional facilities.
- The Department of Correctional Services hosted a colloquium in November 19 & 20 November, 2012 titled: '*Towards Finding Solutions for South Africa's High Rate of Incarceration and Breaking the Cycle of Crime*' Amongst others overcrowding of correctional centres was discussed and recommendations made.

These recommendations ranged from suggested amendments to the law, review of operational issues and changes in attitude of all involved in the detention of South Africa's inmate population (Department of correctional services, 2012). This is indeed a very commendable initiative but the results of this colloquium remains to be seen because on 29 May, 2013, the then Minister of Correctional Services, Sbu' Ndebele said during the budget vote speech, that an action plan has since been developed to address recommendations from the colloquium (Ndebele, 2013).

During the Correctional Services Budget Vote speech on 16 July 2014, Advocate Michael Masutha, the Minister of Justice and Correctional Services stated that there is a reduction of inmate population by 31 000 from 187 036 in 2004 to 157 170 by the end of March 2014 (Department of Correctional Services, 2014). It is

not clear whether this reduction could be attributed to the implementation of the colloquium recommendations.

- Transferring of inmates to other correctional facilities where there is lesser inmates' population. This may not be an ideal thing to do as it may sound because it can lead to inmates lodging complain about the transfer to a correctional centre where they may never get any visits due to travelling distance by family members. This again is not in line with the provision of the *White Paper on Corrections, 2005* of promoting healthy familial relations and effectively a violation of section 35(2)(f) of the *Constitution of the Republic of South Africa of 1996* (see section 3.3.8 of this study).
- The Department of Correctional Services pledged to work hand-in-hand with the Department of Justice & Constitutional Development to reduce the amount of time spent by Awaiting Trial Detainees. This is in line with the provisions of the *White Paper on Remand Detention Management in South Africa* of 2013.
- Department of Correctional Services planned to build 8 additional correctional centres since the launch of prison building project in 2002. In 2009, only 1 was completed and 7 others still work in progress. In its 2013/2014 annual report, the department indicated that there is no bed space created (Department of Correctional Services, 2014:43). This means that the 2009 status quo remains.
- Releasing of offenders on special measures such as presidential pardons and special remissions.
- Introduction of the Electronic Monitoring System. This measure is commendable for its success during the pilot project as alluded by the Minister of correctional services during his budget vote speech in 2013 (Ndebele, 2013).
- Establishment of the Ministerial Task Team to look into overcrowding of correctional centres (Parliamentary Monitoring Group, 2011).

### **5.2.3 Consequences of overcrowding**

Overcrowding of correctional facilities can have dire consequences on the general administration of the correctional system. The following are identified by various authors as consequences of overcrowding:

- Overcrowding and staff shortage can lead to increased stress levels amongst correctional officials (Tapscott, 2006:10). It is the researcher's view that overcrowding and staff shortage be viewed as two intertwined concepts. This view is informed by Tapscott (2008:78) articulation that most staff shortages emanate from the fact that personnel numbers are based on how many offenders the prison have been built to accommodate rather than on how many they actually accommodate. This means correctional officials are overworked and that is a potential source of stress amongst correctional officials exacerbated by the already stressful, negative and unnatural environment as postulated by Coetzee (2014:18)
- Threat to the implementation of the *White Paper on Corrections* of 2005 (Muntingh, 2009:204). Tapscott (2006:10) is more specific by pointing out that overcrowding impedes effective implementation of comprehensive rehabilitation programmes while Brivik (2005:30) concurs by stating that it retards rehabilitation. According to National Institute of Crime Prevention and Reintegration of Offenders (2014:17) there are 208 offenders for every social worker, 1 565 offenders for every psychologist and 227 offenders for every educator. This is attributed to overcrowding which makes it practically impossible to render effective rehabilitation programmes in correctional facilities.
- Gross violation of offenders' human rights as protected by chapter 2 of the *Constitution of the Republic of South Africa of 1996*. Chapter 4 of this study extensively discusses this aspect.
- Increased serious crime rate resulting from the release of offenders on remission and amnesty in order to reduce overcrowding. This is referred to as recidivism and normally used to measure the effectiveness of the rehabilitation programmes. While Ballington (1998) as quoted by Muntingh (2001) is convinced that between 85% and 94% of released offenders will reoffend, the Open Society Foundation for South Africa states that on average, 20% of released offenders reoffended between the year 1999 and 2009. In 2012 a newspaper article painted a picture of heinous crime of the rape of two grandmothers and two other murders committed by a released offender on special remission (Mdletshe, 2012:2).

- Turns correctional centres into crime-promoting institutions (Fagan, 2005:33). This is referred to by others as 'universities of crime'. An offender is admitted to a correctional centre to serve a minimal sentence after committing a minor offence, first offence for that matter, and released as a graduate to commit even more serious crimes. Brivik (2005:30) sees it as a breeding ground to create more criminals.

As stated elsewhere in this study (see section 3.3.5), children somehow end up in the custody of the Department of Correctional Services as offenders. According to Chater (2009:5) when such offenders enter correctional facilities, they are immersed in a culture and a community of offending, cut off from the opportunities that could help them move on. Contrasted with the experience of the increasing numbers of young adults entering higher education, the common description of prisons as 'universities of crime' is more appropriate than ever. This is clearly in contrast to the wish of Shabangu (2006:6) that correctional centres in South Africa be seen as universities where criminals graduate as law abiding citizens who have learned socially acceptable and crime free lifestyles.

The causes and consequences of prisons overcrowding identified in the foregoing are impediments to the effective functioning of the penal system of South Africa. Services such as offender rehabilitation becomes almost impossible which effectively imply a violation of offenders' rights to education for instance. The promotion and protection of all offenders' rights can be facilitated by the community involvement in correctional matters but lack of such involvement or participation can be an impediment to the promotion and protection of offenders' rights.

### **5.3 LACK OF COMMUNITY PARTICIPATION IN CORRECTIONAL MATTERS**

There is a general misconception that community participation is a concept applicable only to a particular sector such as the municipality. Community participation proved to be a success story in other components of the Criminal Justice System such as the South African Police Department. The success of the police in dealing with crime can be attributed to active community participation through Community Policing Forums (CPF's).

In penology, community participation is referred to as a partnership between the community, prison officials and the prisoners undergoing punishment to assess, identify and implement the areas and possibilities of reform in prisons (Commonwealth Human Rights Initiative, 2008:9). Jayal (2001) as quoted by Williams (2006:197) refers to community participation as a direct involvement of ordinary people in the affairs of planning, governance and overall development of programmes at grassroots level. Mnyani (1994) defines it as a partnership between civilian individuals within the community and the prison authorities.

Although the latter definition is not detailed in that it only refers to the partnership between the individual civilians and prison authorities without details of the kind of partnership and what the frame of reference is, there is a clear indication that there should be a relationship between the community and the prison authorities.

In penology, community participation ensures that the gap between the expectations of community members and that of prison officials can be bridged by bringing the two in close contact and initiating a meaningful dialogue about the mutual problems and concerns. Unless this is done, both community and prison officials will continue to nurture a hostile attitude towards each other (Commonwealth Human Rights Initiative, 2008:9).

Due to the nature of the geographical location of most prisons in South Africa, which are secluded from the communities, there is an inherent misconception that these institutions are not public service institutions hence the hostility between the community and the

prison authorities. Research has also further proved that there is lack of communication between the community members and the Department of Correctional Services (Zondi, 2012:763).

Community participation in correctional matters has been a challenge that can be described as historical in terms of the government transition from apartheid regime to the democratic South Africa. Community participation in correctional matters such as the rehabilitation and treatment of offenders, parole, restorative justice, social integration and community corrections is just as important. Williams (2006:198) outlines a historical snapshot of community participation in South Africa which is a demonstration that community participation has always played a pivotal role in terms of the relationship with the authorities.

### **5.3.1 The importance of community participation in correctional matters**

Community participation in the correctional matters plays a pivotal role in reducing the crime rate and ensuring effective offender rehabilitation thereby protecting and promoting the rights of offenders resulting in lesser correctional centre population. In support of this theory, Tapscott (2009:2) opines that effective governance of any correctional institution is a function not only of the state's administrative efficiency but also of the extent to which society at large understands and engages in the challenges faced in combating crime and in incarceration and rehabilitating offenders.

Community participation is essential not only for combating crime but also for the effective functioning of the parole system and restorative justice process. According to Cilliers (2008:534), the Department of Correctional Services believes that close liaison and cooperation with society as a whole is a pre-requisite for effective corrections and a more just, humane and safe society.

The Commonwealth Human Rights Initiative (2008:11) also offers the following reasons why community participation in correctional matters is important:

- Educate the society about what prisons can or cannot do;
- Make the functioning of prisons transparent;
- Protect, educate and advocate prisoners' rights and duties;
- Adhere to international human rights standards in the treatment of prisoners;
- Ensure better allocation of resources.

It is important to note that community participation in correctional matters is an issue considered important by the international bodies such as commonwealth and the United Nations of which South Africa is a member state. Therefore, South Africa should consider the above reasons and practically implement them by conducting intensive community outreach programmes that will teach the community about the operations of the correctional system, the rights of offenders and mobilise for better allocation of resources such as financial and human resources.

Countries such as Botswana, Philippine and Japan for instance are well in advanced stages of involving communities in correctional matters.

Botswana considers the community as a very important resource in the treatment of offenders to an extent that community participation in correctional matters forms an important part of its department's Strategic Plan for 2010 – 2016. This Strategic Plan contains the following strategic objectives amongst others:

- The Botswana Prison Services will strengthen partnership with the communities, volunteers and other stakeholders in order to provide coordinate supervision of programmes.
- The Botswana Prison services will improve communication in order to strengthen partnership with the community, volunteers and other stakeholders to intensify effective and efficient two way communication (Letsatle, 2011:155).

To give effect to the above strategic objectives, Letsatle (2011:155) commended actions taken by Commissioner Motlalekgosi who lobbied the *Bogosi* (chieftainship), private businesses, non-governmental organisations and faith-based organisations as well as

artists, athletes and other individuals that are seen as key stakeholders. The Commissioner has furthermore held a series of events including breakfast *Kgotla* (public) meetings that were aimed at sensitising the community to the needs of the department.

The Philippine corrections system considers public participation as a measure undertaken to improve the treatment of offenders. The then President Fidel Ramos declared the last week of October as a National Correctional Consciousness Week. This initiative has played a great role in generating public awareness on the plight of inmates and their need for rehabilitation. It educates the community on the situations prevailing in prisons/jails and making the people aware that prisoners are human beings that should be accorded full respect for their human rights (Alvor, 2005:80).

According to Teramura (2002:107) the Correction Bureau, an interior organ of the Ministry of Justice in Japan also regards community involvement in corrections matters as one of the keys to achieve better treatment and rehabilitation of offenders. In Japan there are two distinct types of community involvement in the rehabilitation of offenders. Firstly, Community Participation Program in Japan was introduced in 1992 as educational measure for juvenile offenders to broaden their perspective of society whereby juvenile offenders engage themselves in the practice together with other young persons from the community. It is in this programme where young persons from the community give advice to the offenders and building constructive relationship between offenders and the community.

Secondly, community involvement are through an active participation of volunteers in the rehabilitation process collectively named the participatory model. Categories includes amongst others the Volunteer Visitors, Volunteer Probation Officers and Juridical Person for Offenders' Rehabilitation. What interests the researcher is the fact that participation of volunteers is legislated. The Volunteer Probation Officer Law was enacted in 1950 and the Law for Offenders Rehabilitation Services which makes provision for the establishment of the juridical person was enacted in 1995.

In South Africa, community participation in correctional matters is just as important. It is for this reason that it forms part of the policy legislation. Below is a description of the legislative framework on community participation in correctional matters in South Africa.

### **5.3.2. Correctional services legislative framework on community participation**

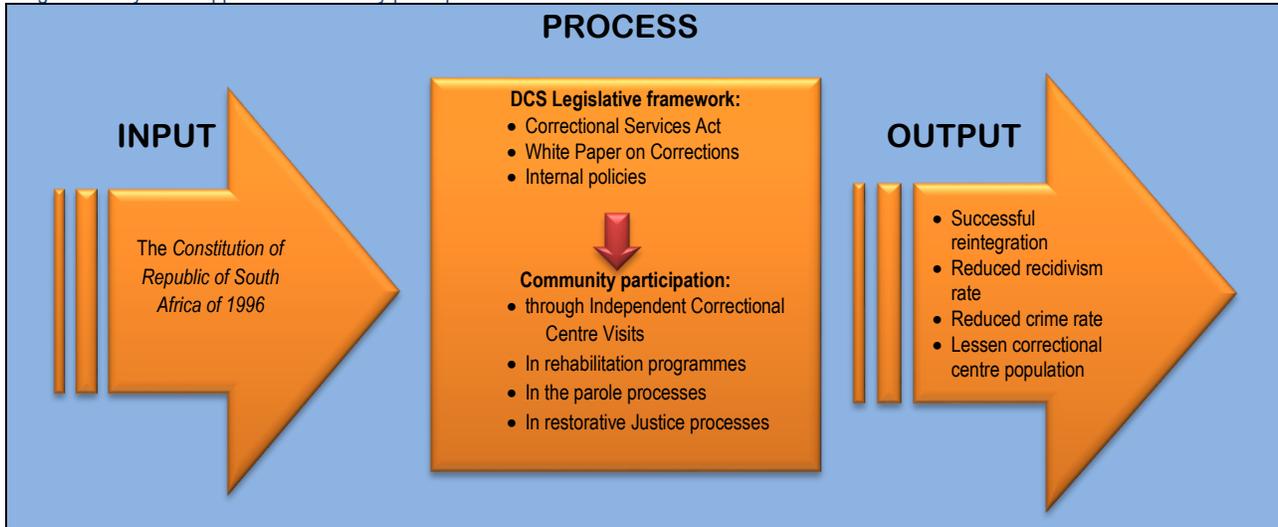
The dawn of constitutional democracy in South Africa in 1994 saw the repeal of most of apartheid legislations which inter alia includes the *Correctional Services Act 8 of 1959* [see chapter 2 of this study]. Chapter VI of this Act made provision for the establishment of structures such as Institutional Committee, Correctional Boards, Parole boards and advisory Council on Correctional Services (1959:56). A simple comparison of these structures and the current ones established in terms of *Correctional Services Act 111 of 1998* [as amended] highlights the issue of community involvement. While there was complete lack of community participation in correctional services matters in the apartheid regime, particularly the black majority, the current legislation makes provision for such participation as discussed below.

#### **5.3.2.1 The Constitution of the Republic of South Africa of 1996**

According to section 195(1)(e) of the *Constitution of the Republic of South Africa of 1996*, the public must be encouraged to participate in public policy. This can be considered a community enabler to be involved in the activities of the government. It will only be a wish if government departments and agencies do not create an environment within which the public can participate in its activities. Community participation within the correctional services environment, as a constitutional obligation, could be a tool to promote and protect the rights of offenders and this can be better understood from below figure 5.3, a systems approach perspective.

In order to give effect to the above provision of the *Constitution of the Republic of South Africa of 1996*, the *Correctional Services Act 111 of 1998* as amended by *Correctional Services Act 25 of 2008* and the *White Paper on Corrections, 2005* were promulgated as the legislative framework of the Department of Correctional Services.

Figure 5.3: Systems approach: community participation enablers



### 5.3.2.2 The Correctional Services Act 111 of 1998 as amended

In 2007, the Department of Correctional Services made a presentation to the portfolio committee on correctional services to motivate why *Correctional Services Act 111 of 1998* had to be amended. Amongst other reasons presented is to enable public participation in rehabilitation and re-integration of offenders into community (Luyt, 2008:178).

The *Correctional Services Act 111 of 1998* as amended by *Correctional Services Act 25 of 2008*, makes provision of the establishment of the Judicial Inspectorate for Correctional Services (JICS) in terms of section 85 (1). Subsection 2 further makes provision for the object of the Judicial Inspectorate which is to facilitate the inspection of correctional centres in order that the inspecting judge may report on the treatment of inmates and conditions in correctional centres. The Judicial Inspectorate does this through Independent Correctional Centre Visitors (ICCV) and Visitors' Committee (VC) as legally established in terms of section 92 and 94 of this Act respectively. The functions of the Visitors' Committee (VC) includes inter alia the promotion of community interest and involvement in correctional matters.

### 5.3.2.3 White Paper on Corrections in South Africa, 2005

Chapter 3 of the *White Paper on Corrections of 2005* is dedicated to correction as a societal responsibility. This provision asserts the need for the involvement of the society

in correctional matters with the focus on families as a primary role player and the community (schools, churches and organisations) as the secondary role players. Public support through participation or involvement in rehabilitation programmes of the Department of Correctional Services is emphasised by paragraph 3.3.10 of this White Paper. This sort of participation advocacy by the community in correctional matters is aimed at ensuring a healthy relationship between the offenders and the community in order to ensure the successful reintegration of offenders into functional communities upon release. The successful reintegration will further be supported by the changed behaviour of offenders as a result of rehabilitation programmes supported by the community.

As it can be seen from the foregoing, community participation in correctional matters plays an important role in the protection and promotion of the rights of offenders. This is in line with the requirements of the legislative framework such as the *Constitution of the Republic of South Africa of 1996*, *Correctional Services Act 111 of 1998* as amended and the *White Paper on Correctional Services* of 2005 and therefore, lack of community participation in correctional matters can be a breeding ground for the violation of the rights of offenders.

### **5.3.3 Community Participation status quo in South Africa: 2014**

In 1998, the year Judicial Inspectorate for Correctional Services was established, it was expected of it to present its annual report to account on its mandate. There is no apparent report on the involvement of the community and this could be because the Judicial Inspectorate for Correctional Services was at an infant stage of development hence only an outline of the characteristics of an ideal Independent Correctional Centre Visitor in its annual report. According to this annual report an ideal Independent Correctional Centre Visitor should be responsible, reliable, public-spirited persons of integrity, interested in the promotion of the social responsibility and human development of prisoners (Judicial Inspectorate for Correctional Services, 1999).

In its report to the portfolio committee on correctional services, the Judicial Inspectorate for Correctional Services claim to have had a high level of community participation

towards the end of 2010/2011 financial year but the impact of community involvement was not assessed (Judicial Inspectorate for Correctional Services; 2011). This was a futile exercise because there is no apparent evidence of community participation in correctional matters. Instead, this report makes reference to the Legal Aid South Africa as an example of community participation in correctional matters.

In its 2012/2013 annual report, the Judicial Inspectorate acknowledges its responsibility to promote the community's interests and involvement without evidence of the actual involvement. It further refers to the appointment of the Directorate: Management Regions to assist in the promotion of community involvement in correctional matters (Judicial Inspectorate, 2013:66). Although this is a bold step in the right direction to involve the community in correctional matters, there is no evidential proof of the actual community involvement at the grassroots level in 15 years of its existence.

The foregoing argument is supported by firstly, a call by the then Minister of Correctional Services for communities to take part in the process of Parole Boards (Department of Correctional Services, 2009). Secondly, the signing of a service delivery agreement between the then Minister of Correctional Services and the state President in 2010 to improve the dismal levels of victim and community participation in the administration of parole (Department of Correctional Services, 2011) and lastly another call by the former Minister on communities to play their part in ensuring that offenders are successfully integrated back into society (Department of Correctional Services, 2012).

In 2000, the Department of Correctional Services hosted a symposium titled 'Correctional Services: A Collective Social Responsibility'. The objectives of the symposium include inter alia the creation of a firm foundation for a coherent and cohesive role playing by all sectors of society and the achievement of national consensus on the humane development and rehabilitation of all offenders and their reintegration into the community as productive and law abiding citizens (Department of Correctional Services, 2001:v).

It is currently not clear as to what the achievements of the symposium are. To the researcher, there seems to be no coordinated effort to promote community participation in correctional matters. If the Judicial Inspectorate for Correctional Services was not part of the symposium then clearly there is a problem because the inspectorate was already established at that time. Five years after the promulgation of the *White Paper on Corrections* of 2005, which makes provision for a platform for community participation in chapter 3, there were concerns raised by the participants during the round table discussion that the Department of Correctional Services was not open to engage communities on correctional matters (Civil Society Prison Reform Initiative, 2009).

The foregoing is a clear indication that there is lack of community participation in correctional matters and therefore rendering it an impediment to the protection and promotion of offenders rights as discussed in chapter 3 and 4 of this study.

#### **5.4 CORRUPTION IN CORRECTIONAL SERVICES**

As a point of departure, it is important to define and contextualise the concept of corruption in order to provide a background to corruption in prisons as an impediment to humane treatment of offenders.

Corruption is defined differently by many scholars and institutions such as Tanzi (1998:8) who define corruption as the abuse of public power for private benefit and further categorises acts of corruption as follows:

- Bureaucratic or petty or political;
- Cost reducing to the briber or benefit-enhancing;
- Briber-initiated or bribee-initiated;
- Coercive or collusive;
- Centralised or decentralised;
- Predictable or arbitrary and involving cash payments or not.

Khan as quoted by Chr. Michelson and Norwegian Institute of International Affairs (2000:12) define corruption as a behaviour that deviates from the formal rules of conduct governing the actions of someone in a position of public authority because of private motives such as wealth, power or status.

The Civil Society Prison Reform Initiative (2006:07) offers a legal definition of corruption in the public sector context as the use of public office for private gain. In addition to this definition, the Civil Society Prison Reform Initiative takes note that this definition is expanded by the provision of the Public Services Anti-Corruption Strategy to reflect the following essential characteristics and components:

- The abuse of power;
- The fact that it occurs in the public, private and non-profit sectors;
- That private gain is not the only motive.

Transparency International (2014) defines corruption as the abuse of entrusted power for private gain.

In view of the above and for the purpose of this study, it can only make sense to extend the definition of this concept to include the level at which it occurs and also the fact that it occurs in the private sector (privately run prisons) as well. Therefore this concept can be defined as an intentional act of the abuse of public power contravening a set of predetermined rules for private benefit practiced at all levels of the public and private organisations.

This study takes cognisance of the occurrences of corruption in the Department of Correctional Services at all management levels but for the purpose of this study, the focus is on corruption at the lower management level. This is usually at the prison level between officials and offenders.

#### **5.4.1. Corruption in the prison context**

The Civil Society Prison Reform Initiative (2006:18) distinguishes between three types of corruptions in the prison system. Namely;

- Corruption between correctional officials and offenders;
- Corruption between correctional officials and the Department of Correctional Services as the employer and;
- Corruption between external agents, officials and the department.

Souryal (2009:29) categorises corruption as follows:

- Acts of misfeasance – these are legitimate acts that correctional officials are supposed to be doing yet they willingly violate for personal gain. It is more likely committed by high ranking officials in the prison hierarchy. Example of this category includes the behaviour of an executive director who co-opts with a private company the prison contracts with or utilizes its services.
- Acts of malfeasance – these are criminal acts of misconduct that officials knowingly commit in violation of the state laws and/or agency rules and regulations. Such violations are usually committed by officials at lower or middle management level. McCarthy (2012:272) identifies theft, embezzlement, trafficking in contraband, extortion, official oppression and the exploitation of inmates or their families for money, goods or services as acts of malfeasance.
- Acts of nonfeasance – These are acts of omission or avoidance knowingly committed by officials who are responsible for carrying out such acts. McCarthy (2012:272) identifies two types of acts of nonfeasance. Firstly, selectively ignoring inmate violation of institutional rules, such as permitting inmates to engage in sexual activities with visitors or looking the other way when drugs are smuggled into the facility by visitors in return for payment and secondly, failure to report or stop other employees involved in misconduct.

For the purpose of this study, the focus is on corruption between correctional officials and offenders. This is what Souryal (2009:29) refers to as acts of malfeasance and acts of nonfeasance. The Civil Society Prison Reform Initiative (2006:19) classify the following

as corruption relating to the warder-prisoner relationship similar to what is identified by McCarthy (2012:272) under acts of malfeasance and acts of nonfeasance:

- Trade in contraband;
- Trafficking in people;
- Access to services and utilities;
- Abuse of power;
- Sexual assault and exploitation of prisoners;
- Theft from prisoners;
- Assistance in escape and irregular release;
- Contract killings;
- Assault, intimidation and killing of prisoners and;
- Gangsterism and organised crime

Chapter 15 of *Correctional Services Amendment Act, 25 of 2008* classify 18 offences in the correctional system of South Africa. Out of these, only 5 can possibly be identified as pertinent to this study. In other words, actions that qualify as corruption at the prison level. Namely;

- *Aiding escapes;*
- *Unauthorised removal of inmate from correctional centre;*
- *Giving or receiving money or other consideration;*
- *Supplying certain articles to offenders and;*
- *Selling or supplying articles to offenders* (Department of Correctional Services, 2008)

In line with the provisions of the above Act, annexure A of the *Correctional Service Regulations* (with amendments incorporated) makes provision for the Code of Conduct/Acts of Misconduct which can be considered as the guiding rules of the department and again, the following are considered to be relevant to this study in relation to corruption at the prison level. An employee will be guilty of misconduct if he or she among other things:

- *Endangers the lives of self or others by disregarding safety rules or regulations;*

- *Commit an act of theft, bribery, fraud corruption or any combination thereof;*
- *Accepts any compensation in cash or otherwise from a member of the public, another employee or an offender for performing his or her duties without written approval from the department (Department of Correctional Services, 2012:84).*

The current regime prioritised to fight corruption when it ascended to power in 2009. This was a good intent given the challenge of corruption throughout the public service. It will be unjust and unfair to overlook the Department of Correctional Services' achievements in dealing with corruption as stated in its annual report, firstly, the successful establishment of the Departmental Investigating Unit, secondly, a report of a conviction rate of 88.9% (97 out of 109 officials) found guilty of corruption and maladministration in 2009/2010 financial year (Department of Correctional Services, 2010:46) and a conviction rate of 86% as reported in the department's 2012/2013 annual report (Department of Correctional Services, 2013:38)

The establishment of the Code Enforcement Unit [CEU] which handled 74 cases according to the Annual Trend analysis report is also worth commending although such cases are not specified as to whether they are of corruption, fraud, theft or maladministration (Department of Correctional Services, 2011:2).

The above is indeed a good story to tell although it is not clear where this success is found in terms of the levels or the type of corruption in question. Is it correctional official-offender related? Is it correctional officials-employer related? Is it corruption between external agents, officials and the department? It is furthermore disappointing to see the official Strategic Plan 2012/13 – 2016/17 of the department being silent about corruption. Does this simply mean the department does not have plans to deal with corruption particularly at an operational level, official-offender related?

The above question can be answered by the following instances demonstrating how the system is riddled with corruption. These are the most recent examples of corrupt practices in media reports after the release of the Jali Commission report in 2005 which found

corruption to be out of control at all levels. This begs the question as to whether the recommendations of the Jali Commission were even considered:

- A senior female correctional official being paid money in exchange of sexual intercourse with offenders in Kokstad maximum correctional centre in 2010 (Memela, 2010).
- In 2010, the then Minister was quoted saying the department continues to be faced with serious levels of ill-discipline amongst some of officials. The Minister was referring to the New Generation Correctional Centre in Kimberly incidence of collusion with offenders (South African Government News Agency, 2010).
- In 2011, Daily Sun reported that an official was busted by a Close Circuit Television (CCTV) escorting an offender who still had 27 years of prison sentence left in Queenstown correctional centre (Sangotsha, 2011).
- Early 2013, the Inkatha Freedom Party called for the department to implement more stringent measures in the fight against smuggling of dangerous weapons, drugs and cell-phones into correctional centres. This was following a stabbing of one offender during violence in Pollsmoor correctional centre (AllAfrica, 2013).
- In a report submitted by Deneysville South African Police Services, it is confirmed that the cause of the riots which left 9 officials and 50 offenders injured, was as a result of corruption by officials (The South African Human Rights Commission, 2013:21).

A closer look at above examples highlight a gross violation of the relevant prescripts of the law but such occurrences of acts of corruption in correctional centres is not a unique challenge to the South African correctional system. It affects countries across the globe and this does not justify it. For instance, in 2013, it was reported in the media that 75% of the correction officers in one detention centre engage in corrupt practices including racketeering, drug and money laundering as well as cell-phone smuggling in Baltimore, Washington (Marimow, 2013). In 2006, claims of corruption by prison officers ranges from bringing mobile phones and drugs into jail to accepting cash payments from inmates for transfers to less secure prisons in England (Purdy, 2006). While countries such as New Zealand views corruption by correction officers as gross and serious breach of authority

that undermine its penal system, countries such as England seem to not consider it as serious because no action is taken against corrupt practices in prisons (The New Zealand Herald, 2014).

Shocking as it may be, a question can be asked as to what causes such greedy behaviour that may compromise offenders' rights? The next section addresses this question.

#### **5.4.2 Causes of corruption at prison level**

A closer look at the definition of the concept of corruption [see supra 5.4], there is a clear indication of an element of contravention of any predetermined rules that constitute unethical conduct. Steinberg & Austern as cited by the Department of Public Service and Administration (2006:24) offers the following reasons of unethical conduct in the public service which the researcher believe are also applicable in the private sector:

- Good intentions – some public official do things that they are not supposed to do or fail to do things that they are meant to do in an attempt to help others.
- Ignorance of laws, codes, policies and procedures – Many public officials simply do not know the laws and directives that deal with what is right and wrong in their work.
- Ego power trips - Some employees think they know what is best, regardless of what the department has decided.
- Greed - Some individuals exploit their position at work to enrich themselves.
- It comes with the territory - Some staff feel there is nothing wrong with using opportunities at work to enrich themselves.
- Friendship - In some cases, employees abuse their position in the public service to assist their friends out of a misplaced sense of loyalty.
- Ideology - People with strong ideological convictions might believe that any means can be justified as long as it leads to the right outcome for them.
- Post-employment 'revolving door' - Some public servants engage in unethical behaviour in an attempt to secure a job outside the public service – for example, awarding tenders to certain companies that they hope will employ them in future.

- Financial problems and pressures - People with financial problems at home sometimes engage in unethical practises to cope with their problems.
- Exploiting the exploiters - Some staff feel that they are being exploited by their bosses and so believe that they are entitled to do anything to turn the tables on their 'exploiters'.
- Going along - Some people feel that, since others act unethically at work, they are entitled to join in.
- Survival - Some would do anything to ensure that they maintain and defend their current positions.

The foregoing reasons for corruption are essentially general to not only the public service but also to the private sector. Scholars in the penological field further identify causes of corruption at an operational level of correctional services, at the prison level. According to McCarthy (2012:273), the causes of corruption in prisons include opportunities for corruption and incentives for corruption while Johnson (2010) identifies low pay, low education, the thin blue line, friendship, gang membership, opposite sex and reciprocity as the causes of corruption in prisons.

In its Annual Trend Analysis report, the Department of Correctional Services (2011:4) established the following root causes of the perpetration of corruption, fraud, theft and serious maladministration:

- Greed
- Unethical relationship between departmental officials and offenders
- Laxity on the part of managers to enforce internal controls
- The collapse of social morals and work ethics as well as inadequate searching of officials and visitors and their belongings upon entering correctional centres
- The over-indebtedness also contributes in leading officials to commit wrong doing.

The causes of corruption in prisons as identified by the Department of Correctional Services seem superficial and not considerate of the genuine causes identified by different reputable institutions and scholars such as the Department of Public Service and

Administration (2006:24), McCarthy (2012:273), Johnson (2010) and the Jali Commission (2005).

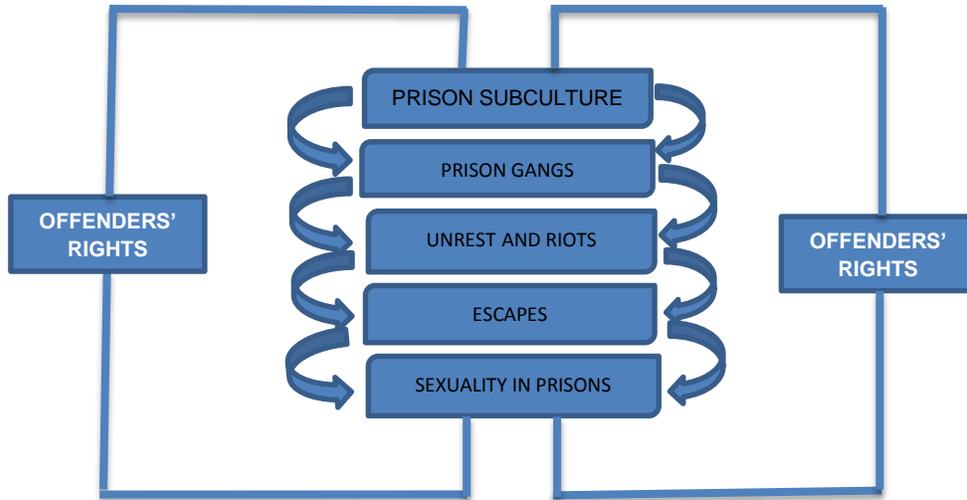
Causes of corruption as identified by various scholars can certainly be related to the South African correctional system. For instance, the minimum requirement to be appointed as a correctional official at an entrant level is a mere Grade 12 (National Senior Certificate). Studies show that higher levels of education decrease the likelihood of criminal behaviour (Schmallegger, 2009 in Johnson, 2010). The same requirement determines the salary level of an individual once appointed which is typically low as pointed out by Johnson (2010).

It is in light of the foregoing that the researcher hold a view that it cannot be possible that offenders' rights are protected and promoted and therefore, corruption is an impediment to the humane treatment of offenders.

## **5.5 PRISON SUBCULTURE**

This concept is defined by Carney (1974) in Coetzee & Gericke (1997:118) as a social system with a strong class system, a strict code of behaviour and a value system that differs from the code of behaviour of prison authorities. This subculture leads to certain phenomena which are interrelated and they include inter alia gang activities, unrests and riots, escapes and sexual activities. Figure 5.4 below is a representation of the prison subculture demonstrating the interrelatedness of these phenomena. From this diagram, it is clear that prison subculture is as a result of the establishment of prison gangs which perpetuates unrests & riots, escapes and sexuality in prisons. All these have a bearing on the human rights of offenders. It is the responsibility of the Department of Correctional Services to protect and promote such right as required by law.

Figure 5.4: Prison subculture



### 5.5.1. Prison gangs

Levan (2011:105) argues that there are various definitions for prison gangs but a generally accepted description is that a prison gang operates within the prison system as a criminally orientated entity that threatens or perceived to threaten the orderly management of a prison. According to Coetzee & Gericke (1997:121) gang activities are one of the greatest problems that the correctional services in South Africa have to prevent because they are largely responsible for the prison subculture.

For the purpose of this study and deriving from the foregoing, this phenomenon can be referred to as a group of inmates organised along certain lines of common interests and for the need of protection from the danger posed by other inmates thereby promoting activities that are anti-institutional rules that are in most cases tantamount to criminal activities.

This phenomenon is not unique to the South African penal system. Gangs are found in most correctional facilities across the globe. According to Levan (2011:107) there are more than 100 known prison gangs in the United States of America. In South Africa, there are at least 5 known prison gangs whose origin can be traced back to the nineteenth centuries. According to the Jali Commission these gangs are divided into two categories.

Namely, 'number gangs' which include '28', '27' and '26' as well as the 'non-number gangs' which include the 'air force' & 'Big 5'. They are identified by their respective modus operandi, signs and goals. Prison gangs normally begin as street gangs and end up in incarceration where they tend to develop further (Jali, 2005:151 – 156).

As in South Africa, American prison gangs are responsible for much of the violence, distribution of drugs, manufacturing of weapons and loan sharking in the prisons (Jali Commission, 2005:176). The Jali Commission found an intense existence of gangs in South Africa's prisons which is an indication of a challenge that the Department of Correctional Services is faced with. Despite the department's effort such as the development of a strategy that led to the establishment of the Gang Management Task Team to deal with gang activities in South Africa, they have become a cause for concern. This is because there was a 10% increase of gang related incidents against the set target during 2012/2013 financial year (Department of Correctional Services, 2013:53).

### **5.5.2 Unrests and riots**

Unrests and riots are two intertwined concepts. According to Hartung & Floch (1956:52) riots are a sign of unrests. This simply means that unrests result from riots. Byrne, Hummer & Taxman (2008:19) classify these concepts as violence and further cite Correction Compendium (2002) in defining riots as any action by a group of inmates that constitutes a forcible attempt to gain control of a facility or area within a facility.

This is a good definition but it is the researcher's view that it should indicate the cause of the said action and therefore this concept can be defined as any action by a group of inmates aimed at destabilising a correctional facility or any part of a facility as a result of any form of discontent that was not attended to by the prison authorities within a reasonable time frame.

The history of unrests and riots can be traced back in the 1950's in the United States of America (Hartung & Floch, 1956:51). As Coetzee & Gericke (1997:131) note it, this

phenomenon was relatively infrequent in the past in South Africa. This can be attributed to the apartheid practices because it is a well-known fact that the majority of prisoners during the apartheid regime and even now are black Africans who were most oppressed by the apartheid policies making it almost impossible for them to raise their concerns in any way if there was any.

Back in the 1950's, the causes of this phenomenon included poor, insufficient or contaminated food; inadequate, insanitary or dirty housing as well as sadistic brutality by prison officials in the United States of America (Hartung & Floch, 1956:51). In South Africa, common causes include unnatural environmental conditions; inadequate institutional management; inadequate facilities and non-institutional causes (Coetzee and Gericke, 1997:132).

The foregoing causes of unrest and riots are somewhat related irrespective of the country or place. In other words, the causes of unrest and riots in prisons are similar in any prison setting and have a long standing history. This can be better understood from the following table 5.1:

Table 5.1: Causes of unrests and riots

<b>CAUSES OF UNREST AND RIOTS</b>		
<b>HARTUNG &amp; FLOCH, 1956</b>	<b>COETZEE &amp; GERICKE, 1997</b>	<b>PRACTICAL EXAMPLES THAT LED TO UNRESTS &amp; RIOTS IN PRISONS</b>
Poor, insufficient or contaminated food	Inadequate facilities such as recreation, eating, sleeping facilities etc...	<ul style="list-style-type: none"> <li>• Rotten food, overcrowding and official brutality triggered some of the 1952 riots in the United States (Hartung &amp; Floch, 1956:52).</li> <li>• During the meeting convened on 15 November 2011 to discuss the civil society partnership with the South African Department of Correctional Services and investigation of unrests in prisons, it transpired that inmates at Odi centre burned blankets and an office because they felt that their complaints about the conditions (lack of clothing, bedding and hot water, cockroaches and bad food) had fallen on deaf ears. Management had done nothing. In Grootvlei, 23 remandees refused to go to court and presented a memorandum that expressed</li> </ul>
Inadequate, insanitary or dirty housing	Inadequate institutional management such as open lines of communication between inmates and management.	
Sadistic brutality	Inadequate institutional management such as open lines of communication between inmates and management.	
	Non-institutional causes such as voting rights being denied.	
	Unnatural environmental conditions	

		<p>dissatisfaction with care. They complained about been assaulted when making statements. The issue had been raised and nothing had happened (Parliamentary Monitoring Group, 2011)</p> <ul style="list-style-type: none"> <li>• Inmates daily recount and routine mistreatment from guards and a system of rules that were abused by guards to punish inmates and lack of educational opportunities and slave labour they were forced to perform was the major spark for the riot in American prisons in 1971 (Slade, 2012:1).</li> <li>• Inmates' complaints and grievances at Groenpunt correctional centre failed to be adequately and timeously address and this led to the riots that took place between 7<sup>th</sup> and 10<sup>th</sup> January 2013 (South African Human Rights Commission, 2013:37).</li> </ul>
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Source: Various sources as acknowledged in the table.

It is clear from the above table that Hartung & Floch identified what was relevant during the 1950's and Coetzee & Gericke identified additional two causes which according to the stated examples are existent to date. This is a clear indication that this still poses a challenge for the Department of Correctional Services despite its effort to deal with it.

Furthermore, it is astonishing to see that this phenomenon did not receive attention by the Jali commission in 2005 as it forms part of the mandate of this commission in that unrest and riots relate to other issues under investigation by this commission. For instance, unrests and riots can be caused by corruption and linked to gangs in a correctional facility. Smit & Cilliers (1998:221) further postulate that it can lead to escapes.

### 5.5.3 Escapes

Killinger and Cromwell (1979) in Coetzee & Gericke (1997:136) define escape as any unauthorised departure of a prisoner from custody. Coetzee & Gericke (1997:136) further coined their own definition referring to escape as an action of a prisoner whereby the prisoner escapes from safe custody, whether inside or outside the prison.

Reasons associated with escapes include tension inside the prison, need for freedom, need for autonomy, escape because the opportunity arises, disappointment, victimisation, deviations or abnormalities, need for heterosexual relationship, continued criminal tendencies, riots, approaching placement or release date, fear of accepting responsibility, escape in order to display masculinity or bravado (Coetzee & Gericke 1997:137). Escapes in South Africa are usually organised by the Air Force gang (Human Rights Watch, 1994:52).

Escapes are dangerous and expensive in nature. They can be used to measure the security strength of any given prison as well a compliance with the legislative mandate and strategic outcome which is to protect the society through the incarceration of offenders under conditions consistent to human dignity.

In its 2013 annual report, the Department of Correctional Services claims to have successfully managed to keep escapes below the 50 mark representing the lowest escape figures in over 10 years (Department of Correctional Services, 2013:51). This achievement must be commended. However, escape should be considered a zero-tolerance and for the department to continuously work on strategies to keep escapes to a minimum is a sign of acknowledgement of this challenge.

#### **5.5.4 Sexuality in prisons**

Sex is a natural and an inborn activity. It is therefore worth pointing out that it is almost impossible for a human being to resist nature. When nature calls, it must be responded to. Every human being has sexual desires. This desire can be fulfilled by sexual intercourse irrespective of its orientation. In other words, it could either be homosexual or heterosexual.

Offenders are natural beings and therefore have sexual desires. Since the nature of a prison dictate confinement according to classification, male offenders are separated from female offenders. This will naturally instigate homosexual relationship. According to

Coetzee & Gericke (1997:135) this kind of relationship is regarded as sexual malpractice and forbidden in South African prisons hence it is referred to as a subculture. On the contrary, the Centre for the Study of Violence and reconciliation (2009:3) regards this as a myth in that there is no prison policy that makes consensual sex between inmates an offence. Therefore, this practice will always persist for as long as prisons are infested with gangs such as '28' whose modus operandi is homosexual relationship (Human Rights Watch, 1994:52).

In its investigation, the Jali Commission found that correctional services officials are well aware of the fact that this phenomenon is prevalent and that it contributes to the incidence of HIV/Aids in correctional centres (Jali Commission, 2005:445). It has furthermore found that there is a problem with the implementation of policies relating to this phenomenon (Jali Commission, 2005:445).

In response to the above findings of the Jali Commission, the department is going about testing offenders for HIV and even setting certain targets in its strategic plan (Department of Correctional Services, 2012:22). This is rather unfortunate because this is a reactive measure (when the damage is done, inmates testing positive after sexual malpractice which is in most cases involuntary) instead of being proactive by considering and implementing the commission's recommendations.

The foregoing is a clear indication that prison subculture remains a challenge faced by the Department of Correctional Services in South Africa. As it can be seen from above description, gang activities, unrests and riots, escapes and sexual activities pose a serious security risk and ultimately a violation of offenders' rights and therefore impediments to the humane treatment of offenders.

## 5.6 CONCLUSION

If the Department of Correctional Services aspires to be seen to protect and promote the offenders' rights, then it must consider and deal with the foregoing impediments to humane treatment of offenders. These impediments have a bearing not only to its legislative mandate but also importantly, the rights and wellbeing of inmates. This is a requirement not only by the *Constitution of the Republic of South Africa of 1996* but also the United Nations Standard Minimum Rules as it can be seen from chapter 3 of this study.

The department's acknowledgement of these impediments should be commended however, this can never be sufficient to rid-off such impediments. In order to protect and promote the offenders' rights, it is crucial that certain measures be applied to deal with these impediments. These measures can only be taken if the department is fully knowledgeable about what its position is and what to do with regard to the protection and promotion of offenders' rights as identified, discussed and analysed in chapter 3 and 4 of this study. It is in this light that the following chapter present the findings and recommendations of this study.

## **SECTION C: PUBLIC PRESENTATION**

### **CHAPTER 6: LITERATURE REVIEW FINDINGS AND RECOMMENDATIONS**

#### **6.1 INTRODUCTION**

In this chapter the findings and recommendations of the study are presented. These findings and recommendations followed a systematic process normally applied in a literature review study. The presentation of research findings follows the data collection, data evaluation, data analysis and interpretation steps as stated in chapter 1 of this study. This step of literature review studies usually comes immediately after a synthesis of the data points.

Results of this study are presented using a historical and thematic approach. The focus of this study was on the treatment of offenders in South Africa dating back from 1911 to 2014 hence the findings are presented historically. Furthermore, the type of review in this study is based on the central theories and therefore the findings will also be presented thematically. These central theories are offenders' rights as outlined in section 1.4.3 of this study. This also links up with the research questions as answered in chapters 2, 3, 4 and 5 of this study.

Subsequent to the presentation of the findings of study, recommendations are identified which necessarily emanate from the findings. Petticrew & Roberts (2006:260) affirmation that turning findings into recommendations and targeting the recommendations to specific groups in systematic review is a logical step that could not be disputed. Ultimately, through the findings and recommendations, areas of possible future research are highlighted.

## 6.2 FINDINGS

According to Kotz & Cals (2013:945), results sometimes referred to as the findings of study, should be presented in a clear and concise manner. Ryan (2006:94) asserts that findings require evidence that is able to convince the primary and secondary audience of the existence of a certain kind of knowledge or phenomenon. This is in light of the principle of public scrutiny (Welman, Kruger & Mitchell, 2005:237) where readers can evaluate the reliability and validity issues of study amongst others.

### HISTORICAL APPROACH

#### FINDING 1: HISTORICAL PERSPECTIVE OF OFFENDERS' TREATMENT

The application of the theories of punishment in the South African Criminal Justice System seem to be prevalent with some modifications informed by the legislative developments over the years. Evident to this finding is the existence of and the application of the *Criminal Law Amendment Act 105 of 1997* and the Sentencing Framework of 2000.

The treatment of offenders in South Africa was based on the provisions of *Prisons and Reformatories Act 13 of 1911* during the apartheid era. This Act made provision for the treatment of offenders along racial lines (Venter, 1959:3; Van Zyl Smit, 1992:24; Department of Correctional Services, 2005:25). Please see section 2.6.1 of this study.

In 1959, the *Prison Act 8 of 1959* was enacted. This is following the appointment of the Lansdown Commission which released a report that was effectively against the treatment of offenders along racial lines. Notwithstanding this report, the treatment of offenders became even worse with dehumanising acts including offenders forced to dance naked in front of others. Treatment of offenders along racial lines continued in view of advancing section 23 of the *Prisons Act 8 of 1959*. The inhumane treatment of offenders continued despite the Nationalist Government subscription to the principles of the United Nations'

Standard Minimum Rules (Van Zyl Smit, 1992:31 – 32; Civil Society Prison Reform Initiative, 2003:5). Please section 2.6.2 and 2.6.3 of this study.

In 1976, the Viljoens Commission report was published which was a reflection of a continued treatment of offenders along racial lines (Viljoen, 1976; Van Zyl Smit, 1992:37). The plight of offenders in South African prisons started to change as a result of litigations in 1979 (Van Zyl Smit, 1992:37).

In 1985, a State of Emergency was declared. This is following persistent attack on the legitimacy of the prison system in South Africa. In 1988 the State of Emergency was lifted and this saw the exclusion of reference to race and racial segregation abolished in the prison system of South Africa (Van Zyl Smit, 1992:39; Department of Correctional Services, 2005).

The Year 1990 saw the dawn of the recognition of offenders' rights and the amendments to the *Prisons Act of 1959* as well as Regulations effectively abolishing the treatment of offenders along racial lines (Van Zyl Smit, 1992:40; Dissel & Ellis, 2002).

In 1993, the apartheid Parliament endorsed the interim Constitution after extensive talks with various political party representatives. This Constitution contained the bill of rights which guaranteed the rights of all people including offenders as protected by human rights conventions.

The year 1994 saw the first general elections in South Africa. It is through these elections that the African National Congress ascended to power and committed to non-racialism and non-sexism principles with the focus on human rights (Singh, 2005:30).

In 1998, the *Correctional Services Act 111* of 1998 was promulgated. This Act, chapter 3 to be more specific, signified a total break-away from the *Prisons Act 8* of 1959 and an introduction and embracing the culture and the spirit of the respect and promotion of the

rights of offenders as entrenched in the *Constitution of the Republic of South Africa of 1996* (Singh, 2005:33; Department of Correctional Services, 1998).

What is significant about the finding on the treatment of offenders is that, it is historical. History must be told. It makes the penal system what it is today. It is with this history that the country can look back and reflect on the achievements with regard to the treatment of offenders. The treatment of offenders show a developmental trend from the apartheid era with racial discrimination to the current dispensation that fully recognise the rights of offenders.

## **THEMATIC APPROACH**

### **FINDING 2: THE RIGHT TO EQUALITY**

A systematic review of literature reveals a developmental trend over the years with regard to the right to equality. In 1997, Pete (1997:230) and the South African Human Rights Commission (1998:31) reported a violation of the offenders' right to equality with adults imprisoned together with children. In other words, the requirement for separation of children from adults was not adhered to. In 1998, the South African Human Rights Commission (1998:373) acknowledged the Department of Correctional Services' efforts to separate children from adult offenders.

Between 2012 and 2013, the Judicial Inspectorate for Correctional Services reported sporadic occurrences that seek to suggest the violation of offenders' right to equality. This relates to the incidence of Emthonjeni Juvenile where children were incarcerated with juvenile inmates (Judicial Inspectorate for Correctional Services, 2012:16). In 2013, the Judicial Inspectorate for Correctional Services (2013:21) found that the food rations between sentenced and un-sentenced inmates differ with remand detainees getting smaller portions.

Therefore, the treatment of offenders in respect of the right to equality will hopefully be fully consistent with the requirements of the relevant prescripts of the law with time. Please see section 4.2 of this study.

### **FINDING 3: THE RIGHT TO HUMAN DIGNITY**

The researcher found that the right to human dignity is essentially central to most the rights afforded to the offenders in South Africa and therefore, findings on other offenders' rights are somehow linked to the offenders' right to human dignity. Please see section 4.3 of this study.

### **FINDING 4: FREEDOM AND SECURITY OF PERSONS**

A systematic review of literature reveals that from 1997 to 2014 the South African Department of Correctional Services has been on the wrong side of the law perpetrating acts that amount to torture (Pete, 1997:241; South African Human Rights Commission, 1999:366; Centre for the Study of Violence and Reconciliation, 2007:12; Centre for the Study of Violence and Reconciliation & Civil Society Prison Initiative, 2008:6; Civil Society Prison Reform Initiative, 2011:8; Association for Prevention of Torture, 2011:3; Institute for Security Studies & Omega Research Foundation, 2011:2; Association for the Prevention of Torture, 2011; South African Human Rights Commission, 2011:13; Judicial Inspectorate for Correctional Services, 2012:9 – 20; Judicial Inspectorate for Correctional Services, 2013:10 – 22; Raphaely, 2014:22).

The overwhelming evidence from literature point to the fact that the Department of Correctional Services is doing very little if nothing at all to promote and protect the offenders' right to freedom and security of persons. This renders the *Prevention and Combating of Torture of Persons Act 13 of 2013* ineffective. Please see section 4.4 of this study.

## **FINDING 5: THE RIGHT TO HEALTH CARE**

A systematic review of literature with the right to health care as a central issue of focus reveals that the Department of Correctional Services is in contravention of the offenders' right to healthcare services despite its existing good policies (South African Human Rights Commission, 1988:13 – 27; South African Human Rights Commission, 2000:371 & 374; South African Human Rights Commission, 2010:ix; Judicial Inspectorate for Correctional Services, 2012:10 – 20; Judicial Inspectorate for Correctional Services, 2013:10 – 22).

The apparent violation of the offenders' right to healthcare services while there are existing health care policies is rather disappointing because this could mean deliberate ignorance of such policies, lack of capacity to interpret and implement such policies or lack of resources. Please see section 4.5 of this study.

## **FINDING 6: CHILDREN'S RIGHTS**

A systematic literature review reveals a decreasing trend in the numbers of children in the custody of the Department of Correctional Services in South Africa and this can be attributed to the implementation of diversion programmes thereby complying with the requirements of the law that detention must be considered as a measure of last resort (Community Law Centre, 2000:3).

This study also found that the rights of child offenders cannot be separated from all other rights afforded to all offenders. Despite the department's existing policy classifying children and juveniles separately, there is substantial evidence from literature that proves that the South African Department of Correctional Services is violating the child offenders' rights from 1997 to 2013 (Pete, 1997:231; South African Human Rights Commission, 1998:31; Community Law Centre, 2000:7 – 10; Kiessl, 2001:11; Judicial Inspectorate for Correctional Services; 2012:16; Judicial Inspectorate for Correctional Services; 2013:16).

Furthermore, there is an improvement with regard to compliance with the principle of separation of child offenders from adult and juvenile offenders as there was only one reported case of non-compliance in 2013 and no case of non-compliance reported in 2014. The separation of child offenders from adults and juvenile offenders as required by law seem to be on track in the South African correctional system and this could mean that the Department of Correctional Services will be fully complying with all other relevant requirements in respect of the promotion and protection of the right of child offenders. Please see section 4.6 of this study.

## **FINDING 7: THE RIGHT TO EDUCATION**

Systematic review of literature reveals that the department has been in violation of the offenders' rights to education between 1997 and 2014. There is a report of very poor facilities in the majority of correctional centres and non-existent in some correctional centres. The department is continuously setting itself a low target to achieve with regard to offenders who should participate in the rehabilitation programmes, educational programmes in particular. This is certainly not in the interest of promoting and protecting the offenders' right to education (Department of Correctional services, 1997; South African Human Rights Commission, 1998:22; Department of Correctional Services, 2003; Judicial Inspectorate for Correctional Services, 2004; Judicial Inspectorate for Correctional Services, 2012:10 - 20; Judicial Inspectorate for Correctional Services, 2004:10 – 22; Judicial Inspectorate for Correctional Services, 2014:15; Department of Correctional Services, 2014:28).

The recent reports on the offenders' right to education is mostly about human resources shortage and very limited number of offenders who participate in educational programmes. Please see section 4.7 of this study.

## **FINDING 8: FREEDOM OF RELIGION, BELIEF AND OPINION**

A systematic review of literature with regard to the offenders' freedom of religion, belief and opinion reveals a gradual advancement and protection of this right that can be tracked back from 1997 to 2014. The Department of Correctional Services has done well in upholding offenders' freedom of religion wherein it exceeded its target of hosting more religious care sessions during 2008, 2011 and 2014 (Department of Correctional Services, 1997; Department of Correctional Services, 1999; Department of Correctional Services, 2004; Department of Correctional Services, 2008; Department of Correctional Services, 2011; Department of Correctional Services, 2014:48).

There is not much reported through research or investigation except the work of Landman, Luyt and Du Preez (2006:329) who identified what the researcher refers to as 'the policy gaps'. This study relied on the department's grey literature such as annual reports. See section 4.8 of this study.

## **FINDING 9: THE RIGHT OF THE ARRESTED, DETAINED AND ACCUSED PERSONS**

A systematic review of literature with regard to the right of the detained persons reveals a violation of this right dating back from 1997 to 2014. The right of the detained persons covers amongst others the right to human dignity, health care, food and water, exercise, housing, education and the right to communicate with and be visited by a spouse or partner, next of kin, chosen religious councillor and medical practitioner. A violation of this right by the Department of Correctional Services ranges from strict departmental regulations allowed for only one hour of exercise in hand cuffs in a small cage in 1997 to water shortages, poor nutrition and overcrowding in 2014 (Pete 1997; South African Human Rights Commission, 1998:12 – 15 & 27; South African Human Rights Commission, 2000:370; Mubangizi, 2001:201 – 204; Department of Correctional Services, 2004:25; Jali, 2005:630; Judicial Inspectorate for Correctional Services,

2012:10 – 20; Judicial Inspectorate for Correctional Services, 2013:10 – 22; Judicial Inspectorate for Correctional Services, 2014:15 – 27) .

This study has also found that part of the right of the detained persons, the right to communicate with and be visited by a spouse or partner, next of kin, chosen religious councillor and medical practitioner, is significantly adhered to by the department

The protection and promotion of the right of the detained persons in South Africa is clearly compounded by a persistent challenge of overcrowding of correctional facilities. In other words, the Department of Correctional Services will always appear to be the violator of the right of the detained persons due to overcrowding. For instance, if a housing unit, with one toilet, is designed for 8 offenders and is occupied by more than 16 offenders, it is practically impossible that it will be hygienic thereby creating a breeding ground for diseases. Please see section 4.9 and 5.2 of this study.

### **6.3 RECOMMENDATIONS**

1. In view of the penological historical perspective of the treatment of offenders, this study recommends that penal system history of South Africa be continuously taught as part of the undergraduate studies in Criminology and Correctional Services subjects. It must be formally documented as part of a prescribed textbook.
2. To the Department of Correctional Services, the right to equality seem to mean the separation of child offenders from juvenile and adult offenders. The right to equality goes beyond that and therefore this study recommends that an understanding of this right as applied within the penological context be developed to mean that all offenders must be treated equally in all respects.

3. It is undesirable to see offenders being subjected to acts of torture in South Africa's correctional facilities more so that the democratic dispensation guarantees the rights of every citizen including offenders. This happens despite the existence of the *Prevention and Combating of Torture of Persons Act 13 of 2013*. According to the Wits Justice Project (2015) South Africa is yet to ratify the Optional Protocol to the United Nations Convention Against Torture (OPCAT) as on September 2014.

It is against this backdrop that this study recommends that South Africa urgently ratify, if not yet done, the Optional Protocol to the United Nations Convention Against Torture (OPCAT) which will enable the establishment of an independent oversight mechanism in a form of National Preventative Mechanisms (NPM). This will help reduce the current levels of acts of torture.

This study further recommends that *Prevention and Combating of Torture of Persons Act 13 of 2013* be amended to include all subsections of section 12 of the *Constitution of the Republic of South Africa of 1996* as it is currently limiting itself to only subsection (1)(d). See section 3.3.3 of this study. This Act must also be widely published particularly to the most affected parties such as those managing detention facilities.

4. In view of the available healthcare policies that seeks to protect and promote offenders' right to healthcare services in the South African correctional system, it is logical to expect that the department uphold and defend offenders' right to health care but instead, the opposite is observed throughout the country's correctional facilities. Therefore this study recommends that a campaign for resources be launched. This campaign should include the recruitment of healthcare professionals including dieticians. This can be achieved with the support of sufficient budget allocation given the fact that healthcare professionals are better paid elsewhere in the private sector.

5. Child offenders are entitled to all other rights afforded to all offenders. These rights include inter alia, the right to education, health care services and freedom of religion. What is distinctive and a responsibility of the Department of Correctional Services about this right is that children should be separated from juveniles and adults offenders. This clearly means children end up in correctional facilities even if this should be a measure of last resort as required by law. This study therefore recommend that diversion programmes be intensified through public awareness campaigns which should cover areas sensitizing parents of their responsibilities over their children.
  
6. A limited number of offenders involved in educational programmes as determined by the Department of Correctional Services and resources shortage makes the department appear to be violating the offenders' right to education. It is in this light that this study recommends an increased budget allocation to enable the department to address the challenge of resource shortages. A refurbished or a newly built education facility may entice reluctant offenders to enroll themselves on educational programmes.
  
7. The Department of Correctional Services' efforts to involve offenders in religious programmes is paying off as many religious care sessions are hosted throughout the country's correctional facilities. This means the department is complying with the prescripts of the law. However, this study recommends that, section 15 and 31 of the *Constitution of the Republic of South Africa of 1996* be read together. These two sections should form part of the departmental policy on religion which should also clarify what qualifies as a religion or religious belief and what is deemed to be a violation of freedom of religion in terms of religious diet, grooming, worship services and religious jewelry amongst others.
  
8. Recent reports on the infringement of the right of the detained person are more focused on adequate accommodation, nutrition, reading material, medical treatment and the right of offenders to communicate with and be visited by a

spouse or partner, next of kin, chosen religious councillor and medical practitioner. Efforts to afford offenders adequate accommodation, nutrition, reading material, medical treatment might of course be impeded by persistent challenge of overcrowding of correctional facilities. It is in the researcher's knowledge that a prison building project was launched in 2002. The plan was to build 8 correctional facilities and to date only 1 is completed (please see section 5.2.2 of this study). Seeing that only one facility is built in 13 years, it is compelling to recommend that the department investigate the delay and facilitate the process to expedite the completion of these facilities. The availability of these facilities will significantly reduce overcrowding of correctional facilities.

This study further recommends that the department also focus on subsection (2) (a) (b) (c) & (d). Please see section 3.3.8 of this study.

If the above recommendations are to go a long way, it is of the utmost importance that training and re-training of correctional officials be conducted on a continuous basis. This will enable them to better understand the importance of professionalism in the correctional environment thereby promoting and protecting the offenders' rights.

#### **6.4 AREAS OF FURTHER RESEARCH**

As alluded to in section 1.5.3 of this study, suggested areas of further research is crucial to any research project as it brings value not only to the academia but also to the industry and community because it is through research that solutions to problems are found. Therefore, this section of study outline the possible areas of further research as follows:

1. The violation of many of offenders' right are as a result of challenges relating to policies in that:
  - In some cases the policies are non-existent and
  - If they are existent, they are not fully implemented.

It is in light of this that this study suggest a further study to develop a model for accelerated policy development and implementation.

2. The other factor that makes it difficult for the Department of Correctional Services to protect and promote offenders' rights is a persistent challenge of overcrowding in correctional facilities. In addition to that, impediments to humane treatment of offenders such as lack of community participation in correctional matters, corruption in correctional services and correctional centre sub-culture must be considered. It can be through research that these challenges can be alleviated. The researcher is aware of many scholars' and the industry's efforts to find solutions to these challenges through research, correctional centres overcrowding in particular. Therefore, this study suggest a literature review study on overcrowding of correctional facilities. This study will help determine the overcrowding trends and causal factors of fluctuating trends. Armed with this information, possible solutions to a challenge of overcrowding in correctional centres can be found.
3. Offenders' rights are violated through acts that are tantamount to torture and this could be attributed to the fact that South Africa is yet to ratify the Optional Protocol to the United Nations Convention Against Torture (OPCAT). The ratification will enable the establishment of an independent oversight mechanism in a form of National Preventive Mechanism (NPM). This calls for a feasibility study on the establishment of the National Preventive Mechanism. Furthermore, a policy impact analysis should be conducted. This is in reference to the *Prevention & combating of Torture of Persons Act 13 of 2013*.
4. Despite the available mechanisms to comply with the prescripts of law that prescribe correctional facilities to be a measure of last resort, children end up in correctional facilities (see table 4.6 of this study). Therefore, another area of further research is a study to determine the effectiveness of diversion programmes in South Africa.

## **6.5 CONCLUSION**

The South African Department of Correctional Services outlines eight (8) offenders' rights in its 2012/2013 – 2016/2017 Strategic Plan (please section 1.3.3 of this study). This study has found a violation of the right to equality to be diminishing over time. One can only hope that there will be no incidence of the violation of offenders' right to be treated equally in the near future. The right to human dignity cut across all other offenders' rights and therefore discussed under those rights. In other words, a violation of any other right as identified, is a violation of the right to human dignity. Out of 7 offenders' rights, only one (freedom of religion) appears to be successfully protected and promoted by the department. This should be a cause for concern and hence this study presented recommendations and suggested areas of further research.

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