**UNIVERSITY OF VENDA**

**SCHOOL OF LAW**

**DEPARTMENT OF PUBLIC AND INTERNATIONAL LAW**

# AN EVALUATION OF INMATES AND OFFENDERS' RIGHTS TO FREEDOM AND SECURITY OF A PERSON IN THE CORRECTIONAL SYSTEM OF SOUTH AFRICA.

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE LL.M. DEGREE**

**BY**

**MUSEKENE L.A**

**STUDENT No: 9208077**

**SUPERVISOR: PROFESSOR MOTHIBI K .A.**

# DECLARATION

I Musekene L. A hereby declare that the LLM Dissertation titled:

**AN EVALUATION OF INMATES AND OFFENDERS' RIGHT TO FREEDOM AND SECURITY OF A PERSON, IN THE CORRECTIONAL SYSTEM OF SOUTH AFRICA**

submitted in partial fulfilment of the LLM degree is my own original work, contains no plagiarism and has, to the best of my knowledge, not previously been submitted by me or any other student to this or any other institution.

Signature: Musekene L.A.

Student Number: 9208077

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**Abstract**

The characterisation of inmates within a correctional service system as second-class citizens or marginalised citizens is not far-fetched. This is a reality when one considers the negative stigmatisation that is automatically conferred upon them by virtue of the guilty verdict found against them by a competent court of law. These “guilty offenders” are thus deprived of certain liberties and placed in incarceration with others who are in a similar predicament as them. However it is only typical that such an arrangement can lead to offenders being placed with other offenders who outmatch them in terms of their potential to resort to violence, thus making each incarcerated inmate a potential victim of violence. Therefore, it is only prudent that one endeavours to evaluate the efficacy of the protective measures designed to mitigate this threat to the safety and wellbeing of inmates and offenders. To this end this study analyses both international and national instruments promulgated as a palliative means to the aforementioned threat.

**Key words**: Offenders, Inmates, Prison/Correctional centre, Rights, Assault.

# CHAPTER 1

# GENERAL ORIENTATION

## 1.1 Introduction

The right to freedom and security of a person forms one of the basic human rights and is intrinsically linked to other non-derogable rights such as the right to human dignity.[1] Paragraphs *d* and *e* of *subsection* 1 of *section* 12 of the Constitution of South Africa which prohibit the infliction of any forms of torture on a person and outlaws cruel, degrading and inhuman punishment form part of the recognised non-derogable rights in South Africa.[2] It is the researcher's contention that these rights are not negated by the fact that a rights bearer has been imprisoned. It is based on this notion that an inquiry into the extent that the right to freedom and security of offenders incarcerated in the correctional system of South Africa are protected, was necessary.

The researcher concurs with the view of Mayhew who argues that the incarceration of an offender has the undeniable effect of depriving the prisoner the choice of whom, where and how he is to live.[3] This deprivation inadvertently places the correctional services system of South Africa in the role of being the "ultimate provider", a role that sees the system assuming an obligation to ensure the bodily security of the offender. Therefore section 12(1)(c) of the constitution should be construed as exhorting the state

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[1] *Section* 12 (1), The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution of South Africa) provides for "everyone's" 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 violence from either public or private source;
d) Not to be tortured in any way; and
e) Not to be treated or punished in a cruel, inhuman or degrading way.

The same constitution in section 37 (5) tabulates rights that it regards as non-derogable in which no departure from or curtailment of the expressed right is permitted.

[2] *Section* 37(5), The Constitution of the Republic of South Africa, 1996.

[3] Mayhew S J, 'Prisoners' Rights: Personal Security' (1970) 42 *University of Colombia Law Review* 305.

to refrain from inflicting violence on the inmate and also fostering an environment that discourages other individuals from doing the same.[4]

Attention is drawn to the fact that in the past prisons were utilised as tools of social and political control and were generally places of great vulnerability for inmates who had to reside in settings perverted to advance the racist and authoritarian ideologies of the apartheid regime.[5] It is therefore imperative that correctional centres in a post democratic South Africa that unequivocally advocates for the supremacy of the constitution be run in a manner that reflects the ethos of the constitution.

It is important to note that as per the advocacy of Winston Churchill, the state of a democratic society can be depicted through an observation of how it treats its citizens.[6] It is therefore imperative that if South Africa is to live up to the constitutional mandate of living in a society that fosters a healing from past injustices, that this also be reflected through its reform of a prison system that was exploited as a weapon of emitting grave injustices on its inmates who were largely black political prisoners.

In South Africa, the inmates and offenders in the system are still at risk of being subjected to violence brought about by the presence of gangs.[7] Inmates including juveniles complain of being forcefully sodomised, an act/violation that is attributable to the prevalence of gangsterism in the South African prisons.[8] The South African Human

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[4] Currie I and De Waal J *The Bill of Rights Handbook 6th edition* Juta and Co: Cape Town 2016, p281.

[5] Muntingh L, 'Prisoners in the South African Constitutional Democracy' (2007) *The Centre for the Study of Violence and Reconciliation,* p6.

[6] Winston Spencer Churchill was a British statesman who was esteemed as a "prisoners' friend" due to his fervent advocacy for criminal justice reform; his passion for reform was set ablaze by his experience as a prisoner of war. See generally: https://www.charleskochinstitute.org/blog/winston-churchill-prisoners-friend/ accessed on 5 May

[7] Report of the National Prisons Project of the South African Human Rights Commission, p36 available at https://www.sahrc.org.za/home/21/files/Reports/The%20Nationals%20Prisons%20Project%20of%20SAHRC.1998.pdf accessed on 5 May, 2020.

[8] Note above.

Rights Commission (SAHRC) noted with concern how gangsterism appeared to be an accepted norm with instances wherein it seemed to be acquiesced by senior prison officers who turn a blind eye to its presence.[9] This indifference to the presence of gangsterism is disconcerting when one factors in the notion that an analytical introspection of the constitution evidences a proscription of punishment that fosters the commission of violence against a prisoner.[10] It is therefore prudent to pursue a study that aims at evaluating the measures that have been promulgated to ensure the safety of inmates and offenders.

### 1.2. Statement of the problem

It is common course that correctional centres are populated by people who have been tried and found guilty of contravening the law. These people are considered to be the reprobates of society and are susceptible to stigmatisation and likely relegated to the status of second-class citizens. It is therefore not surprising that they are more vulnerable to ill-treatment. It is equally important to consider that inmates are likely to reside with other offenders who are more prone to violence, thus potentially turning them into victims during their period of incarceration. Prison deaths are another phenomenon that is likely to happen in correctional centres because of the violence that occurs there. The stigmatisation and ill-treatment either by other inmates and offenders or by correctional officials have an impact on the rehabilitation of these offenders. Correctional centres are seen as “universities” of criminal behaviour which means instead of being rehabilitated, offenders learn more about criminal behaviour. The increase of recidivism which contributes to high crime rate in our country can be linked to the treatment that offenders receive in correctional centres. This research contributes to exposing the gap between the laws, policies and regulations on the rights of offenders and the actual reality of what is happening in correctional facilities. It is upon this premise that an evaluation of the legislative measures guarding inmates against this danger was necessitated.

[9] Note above p37.

[10] Devenish G, *A Commentary on the South African Bill of Rights,* Butterworths: Durban 1999, p124.

### 1.3 Aim and objectives of the study

People do not go to correctional centres voluntarily. They are forced, after being found guilty or their case being remanded by a court of law. Once they are in the correctional centres they are under the care, supervision and authority of the centres. As discussed earlier, offenders in the South African correctional services systems are, by virtue of their incarceration unable to determine where they live and who they reside with. This phenomenon places a burden on the system to ensure their safety. While the South African Constitution articulates everyone's right to security, incarcerated inmates and offenders run the risk of having these rights infringed due to their status in society.

Thus, the aim of this study was to:

I. Evaluate the legislative framework that ensures the protection of the right to freedom and security of incarcerated inmates and offenders in the South Africa correctional system.

This research, therefore, fulfilled the following objectives:

i. It traced the historical basis and rational of protecting prisoners.
ii. It examined international and national legislative framework protecting prisoners.
iii. It analysed the extent that South African law complies with international standards and its efficacy.
iv. It exposed the degree of compliance and/or non-compliance of South African correctional system to the protection of offenders' right to freedom and security of a person
v. It analysed the impact of protection or violation of offenders' right to security of a person on their rehabilitation

With these objectives, it was imperative that specific research questions that have to be answered be articulated.

### 1.4. Research Questions

In order to achieve the objectives discussed above, the main research question was as follows:

Does the South African correctional system comply with the right of a person to freedom and security of a person, in its treatment of inmates and offenders?

The following are the sub-questions that are answered by this research:

i. Where do inmates and offenders' rights emanate from?
ii. What are the international and national instruments that protect the rights of inmates and offenders?
iii. To what extent does the South African law comply with international standards?
iv. Are there any violations of inmates and offenders' right to freedom and security of a person, that are happening in South African correctional system?
v. What is the impact of either upholding or violating the offenders' right to freedom and security of a person, on their rehabilitation?

### 1.5. Definitions of concepts

In the pursuit of answering the research questions posed above, some key words need to be defined. These words are: inmate, offender/prisoner, assault, non-derogable right and sodomy.

#### 1.5.1. Inmate

Unlike in the past, today the correctional service differentiates inmate from prisoner now referred to as offender. The word inmate refers to an unsentenced person who is admitted into a correctional centre awaiting trial. In the correctional centre they wear yellow uniform.

#### 1.5.2. Prisoner/offender

The words offender and prisoner are sometimes used interchangeably. The point is that the word prisoner was used in the past when correctional centres were called prisons. Today we have offenders who are committed to correctional centres. According to the Oxford dictionary a prisoner refers to a person legally committed to a prison as

punishment for a crime and/ or awaiting trial.[11] This definition also applies to offender. In a correctional centre male offenders wear orange uniform while female offenders wear blue uniform.

### 1.5.3. Prison

The word prison is used synonymously with correctional services facility. A prison is defined as a building in which people are legally held as punishment for a crime they have committed or while they await trial.[12]

### 1.5.4. Assault

Refers to an act that threatens physical harm to a person, whether or not actual harm is done.[13] The legal concept of assault factors in threats, verbal abuse or harassment that have the effect of making the victim fear that they would be physically attacked.[14]

### 1.5.5. Non-derogable rights

Refers to a set of rights enshrined in the constitution which are absolute and no departure from the affirmed rights is permitted.[15]

## 1.6. Literature Review

Literature review is very important in any research project because it exposes the gap of information and knowledge that exists around the topic. Quite often inexperienced researchers think literature review is making few quotations from other writers around the topic, which is wrong. The purpose of literature review is to review what other writers have said about the matter under research, agreeing and disagreeing with what they have said, exposing the strength and weaknesses in their work and of course learning from their scholarly writings.

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[11] *Oxford Dictionary of English*, Oxford University Press, 2019

[12] Note above.

[13] Note above.

[14] 'Your Right to Be Free from Assault by Prison Guards and Other Prisoners' (2011) 9 Jailhouse Law Manual 654

[15] *Section* 37(5)(c), The Constitution of the Republic of South Africa,1996.

Scholars have contributed significantly to the importance of respecting the rights of prisoners in particular the right of an inmate to be free from bodily harm. Although there is literature available on the rights of prisoners in general, little has been written in the South African context in terms of the right alluded to above.

Mayhew contends that the right of a prisoner to be secure does not only relate to the protection from bodily injury but that it also envisages a prisoners' right to recover any losses should he suffer injury.[16] His discussion is within the context of the American context when he delves into the institution of civil action by state prisoners' in state courts.[17] This study differs with Mayhew's, in that its main aim was to evaluate the legislation of South Africa in terms of the protections it affords its inmates and offenders serving their terms of conviction.

Makou *et al* in a fact sheet pertaining to South African prisons do provide empirical data regarding the number of prison facilities and the population thereof.[18] It is important to note that this study goes beyond a mere discussion of the state of affairs in South African correctional centres but instead ventures to make an in depth analysis of the current framework of South African legislation and contrast it with international standards. This research exposed the relationship between overcrowding in correctional facilities and the violence that occurs there.

Sarkin gives an overview of the state of prisons in Africa by examining the historical development of prisons from colonial times and considers the legacy that colonialism has left in prisons on the continent.[19] The article also examines a range of issues in prisons throughout Africa including pre-trial detention, overcrowding, resources and

[16] Mayhew supra p305.

[17] Note above.

[18] https://africacheck.org/factsheets/factsheet-the-state-of-south-africas-prisons/ accessed 7 May 2020.

[19] Sarkin J 'Prisons in Africa: An evaluation from a human rights perspective' *Sur, Rev. int. direitos human. vol.5 no.9 São Paulo Dec. 2008.*

governance, women and children in prison, and rehabilitation.[20] This study however limited itself to a legal analysis of the South African Legal framework surrounding the rights of prisoners not to suffer bodily harm. The researcher believed that there is a connection between the ill-treatment of offenders and how Africans were treated by colonialists, in particular those who were suspected of having committed crimes.

Muntingh argues that there are four requirements that need to be satisfied in order to make prisons compatible with a constitutional democracy, as understood in South Africa, and these are:

i. Firstly, the prison system must have an underlying philosophical framework derived from the Constitution. Such a philosophical framework needs to set out the justification and purposes of imprisonment.
ii. Secondly, prisons must not violate the rights of prisoners listed in the Table of Non-Derogable Rights (section 37) and the rights enumerated in section 35 in the Constitution.
iii. Third, the executive must be accountable in respect of prisons.
iv. Four, prisons must function in a transparent manner.[21]

As long as correctional centres are seen as places for bad people who have to pay for the wrongs they have committed, the protection of offenders' rights will always be a debatable issue. It is upon the second requirement that this study dwelled much upon, that is the violation of the prisoner's right to safety from bodily integrity. The right to security of a person is linked to other rights such as right to life, human dignity, health care and privacy. Other scholars and researchers can take the inquiry further, focusing on these other related rights.

In summation, there is little literature that has attempted to make an evaluation of the efficacy of South Africa legal jurisprudence that mitigates the risk of prisoners incurring bodily harm while incarcerated in the correctional services system.

[20] Note above.

[21] Muntingh supra note 5.

### 1.7. Methodology

This study employs a methodology that is popularly referred to as doctrinal legal research or the Black Letter Law approach.[22] In defining the concept of "Doctrinal Research" Duncan traced the root meaning of the approach to the Latin word '*doctrina*' meaning instruction, knowledge or learning.[23] The author submits that the doctrine in question entails concepts and various principles, which include cases, statutes and rules.[24] It justifies and makes coherent, segment of the law that is part of a larger system. Doctrinal research is simply desktop based. Apart from focusing on legislations, white papers, case law and works of other writers, the researcher also uses his knowledge of activities that occur inside correctional centres from media reports.

Having outlined the relevant methodology, it is necessary to identify the potential limitations that may constitute an impediment to the outcome of an effective study.

### 1.8. Limitations of the study

This research is not an empirical research which means it does not employ quantitative methods such as questionnaires and interviews which allow a researcher to interact with a certain target population. This simply means that the researcher did not have an opportunity to get the views of inmates and offenders on the matter being researched. Even if the researcher would have wanted to employ such methods, the restrictions that are in place now in our country because of coronavirus and lockdown, would have been a challenge. Because of their nature, there is limited number of cases that are reported by offenders against the correctional system. This research aims at evaluating the South African legal framework against international jurisprudence yet there has not been an international tribunal that has had to interpret the international instruments pronouncing the rights of prisoners. Every research project requires money to be

[22] Murphy W T & S Roberts 'Introduction to the Special Issue of Legal Scholarship' (1987) Vol. 50 No. 6 *Modern Law Review*, 677.

[23] Duncan N 'Defining and Describing What we do: Doctrinal Legal Research' (2012) Vol. 17 No. 1 *Deakin Law Review*, 84.

[24] Note above.

completed. Although this did not bring mediocrity to this research, the researcher was challenged in that regard.

### 1.9. Significance of the study

This research contributes to the existing body of knowledge in as far as the rights of offenders in general and their right to security of a person in particular. The research lays a foundation for further studies at doctoral level, on the right of offenders to freedom and security of a person. Policy makers and correctional officials in general can learn more from this research especially about the history of offenders' rights, their importance to the process of rehabilitation and their contribution to reduction of crime in the country. It stimulates further research in the relationship between the correct application of prison regulations and laws and behaviours of offenders in correctional facilities and after their release. Lawyers, psychologists and criminologists who are interested in good treatment of offenders and reduction of reoffending can benefit from the information discovered in this research.

### 1.10. Structure

This dissertation is structured into five chapters. The paragraphs below offer a brief insight on the issues that are discussed in different chapters.

**CHAPTER ONE: GENERAL ORIENTATION**

This is the introductory chapter which offers an insight on the prevalence of violations and alleged violations of prisoners' rights in terms of *section 12* of the South African Constitution.

**CHAPTER TWO: THE EMANATION OF AND INTERNATIONAL RECOGNITION OF INMATES AND OFFENDERS' RIGHTS**

This chapter explores the emanation and rationality of the protection of prisoners' rights and it zooms in on the right to bodily security of an incarcerated person. The chapter analyses all the international instruments and measures that advocate for the protection of prisoners' rights

**CHAPTER THREE: SOUTH AFRICAN LEGISLATIONS ON PRISONERS' RIGHTS**

This chapter analyses the national legislations in South Africa and evaluate their efficacy in ensuring the protection of rights for inmates currently in the South African correctional system with specific focus on the right to security.

**CHAPTER FOUR: IMPACT OF EITHER PROTECTION OR VIOLATION OF OFFENDERS' RIGHT TO SECURITY OF A PERSON, ON THEIR REHABILITATION**

This chapter examines the impact that the protection or the violation of offenders' right to security of a person has on their rehabilitation. The focus is on whether offenders come out of correctional centres being hardened criminals or changed and rehabilitated persons.

**CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

This chapter concludes the study by summarising all the issues discussed in the preceding chapters. It offers possible recommendations that are aimed at improving the legislation that best enables the realisation of the right to bodily security of South African inmates and offenders.

# CHAPTER 2

# THE EMANATION OF AND INTERNATIONAL RECOGNITION OF INMATES AND OFFENDERS' RIGHTS

## 2.1 Introduction

The preceding chapter recognised the mandate that a state must protect an inmate who is incarcerated in their custody. The promotion and recognition of prisoner's rights necessitates an inquiry into the feasibility of ensuring the observance of human rights in an institution that has been established for the sole purpose of limiting one of the said fundamental rights of a citizen in a democratic state. The introduction of rights in environment where inhabitants are deprived of liberty seems to be paradoxical in nature. It is therefore of necessity to investigate the emanation and rationality of this proclivity. This chapter therefore looks at how the drive for the promotion of prisoners' rights began.

## 2.2 The Birth of Prisoner's rights

The formal recognition of prisoner's rights by the international community is said to have been birthed by the revelation of the ill treatment of the detainees of World War II.[25]The year 1949 ushered in a general proclivity towards the protection of prisoner's rights as it was marked by the "codification of the laws of war" in the Geneva Conventions of 1949.[26] The most relevant of these conventions being the Geneva

[25] International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards? California Western International Law Journal, Volume 26, Nö 1, 1995.

[26] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T.3115, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter referred to as Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950;) [hereinafter referred to as Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter referred to as Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T.

Convention III which was the first international instrument to specifically articulate the protections that must be afforded every prisoner of war; it provided that prisoners of war must be at all times humanely treated.[27]

Although the scope and application of this convention was limited to prisoners of war, it was later rationalised and posited that its provisions were indicative of what constituted the basic definitions and relevant standards that preluded the dawning norms of customary international law for all prisoners.[28] This rationale was premised on the absurdity of the notion that a prisoner who is taken in the midst of an armed international conflict or a civil disturbance would be entitled to better treatment than the one afforded to a prisoner incarcerated as a result of criminal or administrative processes during a time of peace.[29]

Support of this notion can be inferred from how the various international treaties, conventions and documents developed after the Geneva Conventions, made an effort in some part to address the issue of prisoners' rights. While some of the aforementioned instruments do find exclusive application to prisoners,[30] others give few prisoner-specific articulations in their general human rights provisions.[31]

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3517, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter referred to as Geneva Convention IV].

[27] Geneva Convention III note 24 above at article 13: Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

[28] Bernard S.M, *An Eye For An Eye: The Current Status of International Law on the Humane Treatment of Prisoners* ,25 RUTGERS L.J. (1994) at 766.

[29] See Bernard note 26 above.

[30] *First UN. Congress on the Prevention of Crime and the Treatment of Offenders [Aug. 22-Sept. 3, 1955], Standard Minimum Rules for Treatment of Prisoners,* Aug. 30, 1955, Annex I, at 67, U.N. Doc. A/CONF/6/1 (1956), *adopted by* E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1,at 11, U.N. Doc. E/3048 (1957) [hereinafter referred to as Standard Minimum Rules]; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,* G.A. Res. 43/173,

As alluded to above, the existence of minimum standards applicable to incarcerated persons is no longer a bone of contention owing to the vast number of international instruments that have been promulgated over the past decades; however it is necessary that the researcher embarks on a synoptic discussion of the development of treaties, conventions and instruments relating to the treatment of prisoners in order to give more insight.

### 2.3 American Declaration of the Rights and Duties of Man

At the time the American Declaration was drafted, the United Nations was concurrently drafting the Universal Declaration of Human Rights (UDHR) while the Organisation of American States was drafting the analogous, Regional American Declaration of the Rights and Duties of Man; however, it was the American Declaration that preceded the UDHR.[32] The American Declaration has two Articles dealing with the treatment of prisoners, namely Article XXV[33] which deals with the protection of persons from arbitrary arrest and Article XXVI[34] designed to ensure the right to due processes of law is upheld. Two critical terms may be elicited from these two provisions and these are the cornerstone of any protection of prisoner rights.

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U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter referred to as Body of Principles]

[31] *Ninth International Conference of American States [March 30-May 2, 1948], American Declaration of the Rights and Duties of Man,* O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) [hereinafter referred to as American Declaration] and the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71(1948).

[32] The Universal Declaration was adopted on December 10, 1948 approximately seven months after the American Declaration was adopted on May 2, 1948.

[33] The American Declaration note 29 above at Article XXV provides: No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

[34] Every accused person is presumed to be innocent until proven guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Article XXV affords “every individual who has been deprived of his liberty . . . the right to humane treatment during the duration of his custody.” While Article XXVI advocates against “. . .cruel, infamous and unusual punishment.”

### 2.4 Universal Declaration of Human Rights(UDHR)

The Universal Declaration was adopted on the 10th of December 1948 and despite not being legally binding on States at the time of its inception, it presently wields great persuasive force; it is important to note that scholars from decades ago began to argue for its recognition as part of customary international law due to wide state practice.[35] The UDHR sets off by bestowing to everyone – without distinction - the freedoms and rights set forth in the declaration.[36] The UDHR reprobates torture and inhumane punishment in Article 5.[37] The wording of this article is regurgitated by later instruments such as the Convention Against Torture[38] and the International Covenant on Civil and Political Rights.[39]

[35] Higgins R, The Development Of International Law Through The Political Organs Of The United Nations 2-10 (1963); Humphrey J.P , The Universal Declaration Of Human Rights, In Human Rights: Thirty Years After The Universal Declaration 29 (B.g. Ramcharan ed., 1979); Sohn, the new international law: protection of the rights of individuals rather than states, 32 am. u. l. rev. 1, 17 (1982)

[36] Article 2 of the Universal Declaration note 29 above states: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

[37] Article 5 of the Universal Declaration note 29 above states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[38] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72 (1984) (entered into force June 26, 1987) [hereinafter referred to as Convention Against Torture].

[39] International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter referred to as ICCPR]

## 2.5 European Convention for the Protection of Human Rights and Fundamental Freedoms

The Regional European Convention for the Protection of Human Rights and Fundamental Freedoms and its five protocols were signed in 1950 but only entered into force in 1953.[40] Despite not having provisions that specifically address prisoners' rights, their protection may be inferred from Articles 3[41] and 15.[42] Article 3 prohibits any form of "torture or degrading punishment" while Article 15 prohibits the derogation from Article 3 even in "times of war or other public emergencies threatening the life of the nation." The European interpreting bodies have been seized with several opportunities to interpret this wording.[43] In a bid to oust the ambiguity inherent in the wording "cruel, inhumane or degrading treatment and punishment," the European Commission on human rights had the following to say in the Soering case:

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[40] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europe. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter referred to as European Convention].

[41] *Note above* at Article 3 states: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[42] *Note above* at Article 15 states:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons thereof. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

[43] See generally, *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 489, paras. 104-05 (1989); *Ireland v. United Kingdom,* 2 Eur. H.R. Rep. 25, 79, paras. 162-63 (1978); *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, 10, paras. 29-30 (1978); *McFeeley v. United Kingdom*, 3 Eur. H.R. Rep. 161, 194-95, paras. 40-41 (1980); The Greek Case, 12 Y.B. Eur. Conv. on Human. Rights. 1 (1972).

the concepts of inhuman and degrading treatment have been elucidated in the following ways by both the Commission and the European Court of Human Rights. The notion of inhuman treatment covers at least such treatment as deliberately causing severe suffering, mentally or physically. Furthermore, treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his own will or conscience.[44]

The Commission went further to draw attention to how the European Commission on Human Rights stressed, in its prior adjudication of cases, that:

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the European Convention for Protection of Human Rights and Fundamental Freedoms]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[45]

In *Tyrer v. United Kingdom,* the European Court of Human Rights found a violation of Article 3 by looking at all the circumstances surrounding the "judicial birching" of a juvenile as punishment for a crime.[46] In holding that the punishment would be a

[44] *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 489, para. 104 (1989) (citing Ireland v. United Kingdom, Commission Report, 2 Eur. H.R. Rep 25, 79, para. 162).

[45] *Note above.* at 489, para. 105 (citing *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, 79, para. 162; *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep 1, 10, paras. 29-30); *see also McFeeley v. United Kingdom*, 3 Eur. H.R. Rep. 161, paras. 40-41 (1980); The Greek Case, 12 Y.B. Eur. Cony. on H.R. 1(1972).

[46] Section 56(1) of the Petty Sessions and Summary Jurisdiction Act 1927 set forth the punishment for assault for which the defendant in *Tyrer* was convicted. The penalty included a fine and up to six months in prison, *"and in the case of a male child (i.e. aged 10-13) or male young person (i.e. aged 14-16) to be whipped in addition to or instead of either of these." Id.* at 4. The Act provided that a forty-inch birch rod not exceeding nine ounces in weight was to be used for males between 14 and 20 years old and that the punishment be inflicted privately as soon as practicable after the sentence. In the *Tyrer* case, the defendant was sentenced to three strokes of the birch. *Id.* at 3. After waiting for the doctor to declare the defendant fit to receive the punishment, the birching was carried out in the presence of the defendant's father and the doctor. He was made to take down his trousers and underpants and bend over a table; two policemen held him while a third administered the punishment, pieces of the birch breaking at the first stroke. His father had to be restrained from attacking one of the police officers. The applicant's skin was raised but not cut and he was sore for about a week and a half afterwards.

violation of Article 3, the Court emphasized various factors including the possible adverse psychological effects and mental anguish suffered in anticipation of the punishment.[47]

This rationality marked a departure from the conventional view of attributing alleged violations of Article 3 to matters pertaining to the physical conditions of confinement.[48] The court developed the "totality of conditions" analysis when enquiring into the alleged violation of Article 3; it found the risk of exposure to the "death row phenomenon to be synonymous with what constitutes "cruel and degrading punishment."[49] It could therefore be inferred from this holding, that the Court was willing to find that, even though the specific treatment (i.e.: "birching" or the death penalty) was not in its entirety a violation of Article 3 at the time, the underlying adverse psychological effect could, in itself, be a violation. The use of the "totality of conditions" test in evaluating possible "cruel, inhuman or degrading treatment" enabled the court to extend its evaluation to both physical conditions and

[47] The court noted that there had been a delay of several weeks between the time of the conviction and the actual administration of the punishment and an additional delay at the police station. Therefore, according to the court, the defendant "was subjected to the mental anguish of anticipating the violence he was to have inflicted upon him" which caused humiliation sufficient to attain "the level inherent in the notion of 'degrading punishment.'" Thus, the court concluded that the judicial birching amounted to a violation of Article 3 of the Convention.

[48] For a discussion of the prior cases and their holdings, see Renee E. Boxman, *The Road to Soering and Beyond: Will the United States Recognize the "Death Row Phenomenon?",* 14 Houston. Journal. International Law. 151, 156-60 (1991).

[49] See generally, *Soering v. United Kingdom* note 41 above at 478 par. 111. The Court held that the Convention cannot be read to include a general prohibition of the death penalty. [Since the Convention is meant to be read as a whole, reading Article 3 as prohibiting the death penalty would be in direct conflict with Article 2(1) which allows executions. Abolition of the death penalty, however, was a goal of the European Court of Human Rights.] However, where circumstances would lead to "ever-present and mounting anguish of awaiting execution" and "increasing tension and psychological trauma" caused by the long period of time spent on death row in conditions which amount to solitary confinement, treatment would go beyond the threshold set by Article 3. [Conditions on death row were described as follows: "A death row prisoner is moved to the death house 15 days before he is due to be executed. The death house is next to the death chamber where the electric chair is situated. Whilst a prisoner is in the death house, he is watched 24 hours a day. He is *isolated and has no light in his cell.* The lights outside are permanently lit."]

psychological effects when making a proclamation on whether or not Article 3 has been violated.

In *Hilton v. United Kingdom,'* the Human Rights Commission used a "totality of conditions" test to determine if solitary confinement constituted a breach of the Article 3 prohibition against inhuman or degrading treatment or punishment.[50] The majority held that even though the conditions were extremely unsatisfactory, the treatment did not amount to a violation of Article 3 because, *inter alia,* the solitary confinement of the prisoner was often at his own request for fear of hostilities from other prisoners.[51] The Commission evaluated the adverse psychological effects caused by the isolation conditions but did not find the effects sufficient to cross the Article 3 threshold. Four on the Commission dissented stating that "the general treatment of the applicant in its cumulative effect, constituted degrading treatment contrary to Article 3 of the Convention" despite the fact that the prisoner was uncooperative and difficult.[52]

**2.6 International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR which entered into force in 1978 also has two provisions that are applicable to prisoners. Article 7 prohibits torture and "cruel, inhuman, or degrading treatment or punishment."[53] Article 10(1) provides that "[all] persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[54] It is worthy to note that like the European Cnvention discussed

[50] *Hilton v. United Kingdom* 3 European Human Reports 108 (1978); See also pages 125 -127 paragraphs 88 – 102

[51] *Note above* at 124 -125 paras 93-94

[52] *Note above* at 128

[53] Article 7 of the ICCPR note 37 above states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[54] Article 10 of the ICCPR note 37 above states:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

above, the ICCPR fails to elucidate within the statute what constitute "cruel and inhumane punishment."

Also of concern is the ratification of the United States that was done with the express reservation to Article 7. The reservation reads:

> that the United States considers itself bound by Article 7 to the extent that cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.[55]

According to Human Rights Watch and the ACLU, the reservation limits the protection provided to prisoners by Article 7. Though neither the terms used in the ICCPR nor the U.S. Constitution are clearly defined, the language of Article 7 is considered to be more expansive than its Eighth Amendment counterpart.[56] This consideration is premised on the deliberations of the Human Rights Committee that evaluated complaints brought to it with regards to the First Optional Protocol of the International Covenant on Civil and Political Rights.[57] In deciding how to evaluate

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(b) accused juveniles shall be separate from adults and brought as speedily as possible for adjudication

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

[55] United Nations, Multilateral Treaties deposited with the Secretary General 133 (1994) (status as of Dec. 31, 1993). On June 1, 1992, President Bush signed the instrument of ratification. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 Weekly Compres. Doc. 1008 (June 5, 1992). The instrument of ratification was deposited at the United Nations on June 8, 1992 and the Covenant entered into force for the United States on September 8, 1992. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause,* 42 DEPAUL L. REV. 1287, 1291 (1993).

[56] See Williams P.R , Treatment Of Detainees: Examination Of Issues Relevant To Detention By The United Nations Human Rights Committee 28-29, 35 (1990); McGoldrick D, The Human Rights Committee: Its Role In The Development Of The International Covenant On Civil And Political Rights 369, 389 n.99 (1991).

[57] First Optional Protocol to the International Covenant on Civil and Political Rights, December 16, 1996, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force, Mar. 23, 1976).

Article 10 which states that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” the human Rights Committee looked at three potential values that underlie the guarantee of human dignity;[58] namely: that "almost every detainee will someday return to live in society, therefore the goal of detention should be to reform the detainee, or at least to make him no more dangerous than he was when he entered the detention facility.[59] Second, compliance with a specific measure must be viewed by looking at whether, not only the letter of the treatment meets the standard, but also whether "the spirit and ends... are consistent with preserving the right to human dignity.”[60] Finally, the right to human dignity gives the Committee justification to evaluate a vast array of detention practices that may not fall under any other provision of the ICCPR.[61] Thus the committee can examine specific issues under the purview of the right to human dignity.[62]

To ensure the prevention of cruel, inhuman or degrading treatment or punishment under Article 7, the Committee looked for procedural safeguards on decisions to punish detainees and on the types of punishments administered particularly solitary confinement, corporal punishment and prison labour. The Committee interpreted Article 7 protection to go "far beyond torture as normally understood.”[63] Distinctions made between torture and other ill-treatment only depended on the kind, purpose and severity of the particular practice.[64]

Though the Committee failed to state explicitly that mental or psychological suffering can amount to torture, this implication may be inferred from the holding in *Estrella v.*

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[58] See Williams note 54 above at 28 – 29.

[59] *Note above* at 28.

[60] *Note above* at 29.

[61] *Note above.*

[62] *Note above.*

[63] See Rodley N.S, The Treatment of Prisoners Under International Law Annexes I-8e (1987)

[64] Examples of *physical* suffering were found in abundance in the communications received by the Committee. They include cases describing, *inter alia,* permanent physical damage due to broken bones, *'planton'* (prisoner forced to stand for many hours at a time), electric shock, and *'submarino'* (pushing prisoner's hooded head into water). These were all been deemed violations of Articles 7 and 10. Moreover, the Committee evaluated claims of ill-treatment consisting primarily of *mental* suffering and has found violations of both articles 7 and 10. See generally Rodley note 61 above.

*Uruguay,* in which the Committee found that non-physical torture can amount to a violation of the ICCPR.[65] The Committee has gone as far as to state that "even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article 7".[66] According to the Committee "the use of solitary confinement presents a problem for reformation and treatment in a humane manner because it deprives the prisoner of valuable and necessary contact with his peers" which impedes the prisoner's social and mental health.[67]

The committee would receive numerous communications alleging violations of Articles 7 and 10 due to solitary confinement.[68] One such example involves a case where a hostage was kept in a damp, windowless cell underground for twenty-four hours a day with only a mattress, the Committee found violations of both relevant articles.[69] Another example lies in the communication wherein the petitioner alleged that his brother was held for one month in "La Isla," a prison wing of small

[65] See McGoldrick note 54 above at 369 and 389.

[66] *Annual Report of the Committee to the General Assembly,* [1981-1982] II Y.B. Human. Rights. Committee., 383, U.N. Doc. CCPR/3/Add.1 (1989).

[67] See Williams note 54 above at 35 – 36.

[68] Admissible communications may originate from a person or group of persons who can be reasonably presumed to be victims of certain kinds of violations, or from any person or group of persons who have reliable knowledge of those violations, or non-governmental organizations acting in good faith. These communications shall be admissible if "there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms." *Question of the Violation of Human Rights and Fundamental Freedoms,* E.S.C. Res. 1, U.N. ESCOR Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 24th Sess., Agenda Item 3(a), U.N. Doc. E./CN.4/Sub.2/L.549/Rev.1 (1971). For further discussion on the procedural aspects of communications to the Human Rights Committee, see Jakob Th. M611er, *Petitioning the United Nations, I* UNIVERSAL HUM. RTS. 57 (1979); HOWARD TOLLEY, THE U.N. Commission On Human Rights 124-32 (1987); For a historical perspective on the procedures under ECOSOC Resolutions 1235 and 1503, see TON J.M. Zuijdwijk, Petitioning The United Nations: A Study N Human RIGHTS (1982).

[69] Communication No. 63/1979, Selected Decisions of the Human Rights Committee Under the Optional Protocol, U.N. GAOR Human Rights Comm., 2d to 16th Sess., U.N. Doc. CCPR/C/OP/1, at 101 (1985).

windowless cells where artificial light was left on for twenty-four hours a day.[70] The Committee found violations of "Article 7 and 10(1), because Gustavo Raul Larrosa Bequio [had] not been treated in prison with humanity and with respect for the inherent dignity of the human person."[71]

Generally, an introspection of the Committee's evaluations regarding the humane treatment requirement, reveals a proclivity towards the utilization of the "totality of conditions" test that was employed by the European Convention as discussed above.

### 2.7 American Convention on Human Rights

The Organisation of American States (OAS) developed this regional code of human rights protections that entered into force in 1978.[72] Article 5 of this convention guarantees the right to humane treatment.[73] Similar to the previously discussed conventions, despite criminalising "cruel, inhumane or degrading punishment or

[70] Communication No. 88/1981, Selected Decisions of the Human Rights Committee Under the Optional Protocol, U.N. GAOR Human Rights Comm., 17th to 32d Sess., U.N. Doc. CCPR/C/OP/2, at 118-121 (1985).

[71] *Note above.*

[72] American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1 doc. 65, Rev. 1,Corr.2 (1970), *reprinted in* 9 I.L.M. 673 (1970), entered into force July 18, 1978 [hereinafter referred to as American Convention].

[73] Article 5, American Convention note 70 above states:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

treatment," no light is shed on ambits of this term within the convention itself. Guidance is therefore sought from the Inter-American Court of Human Rights for an elaboration on the meaning of the term.

The Court found, in the case of Velasquez, that prolonged isolation and deprivation of communication, [were] in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person" detained and, thus, a violation of the right to humane treatment."[74] This finding serves as an indicia of the Court's willingness to extend its evaluation of potential violations to include not just physical harm but also psychological effects of the treatment emitted on the incarcerated individual.

### 2.8 Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment was opened for signatures in 1984 but only came into force in 1987.[75] The convention sets off by providing the definition of torture in Article 1 and it reads:

The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[76]

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[74] *Velasquez Rodriguez Case,* 9 Human. Rights. Law.Journal. 212 (1988) at 269 par 159.

[75] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. EICN.4/1984f72, Annex (1984) [hereinafter referred to as Convention Against Torture]. The Convention entered into force in June 26, 1987.

[76] Article 1 of the Convention Against Torture note 73 above.

The promulgation of this convention marked a significant stride in the advancement of prisoners' rights as it is common cause that the greatest magnitude of torture victims is usually those who are imprisoned or otherwise detained.[77] Despite ushering in a comprehensive definition of what constitutes torture, the convention is criticised for its failure to quantify the ambits of "cruel, inhuman and degrading punishment or treatment."[78] The Convention Against Torture is therefore considered to fall significantly short of a "bill of rights" for prisoners.[79]

The Convention Against Torture implores state parties to take effective measure that prevent the occurrence of torture; it further, unequivocally forbids parties from justifying the use of torture.[80] Although it is disappointing to note that the enforcement of the Convention Against Torture is not backed by a particular sanction but merely realised through moral suasion and the fear of being the subject of negative public sentiment.[81] It is considered to be gravely ill-founded to arrive to a

[77] See Bernard note 26 above at 766.

[78] *Note above.* The Convention against torture, in Article 16 merely obligates states to prevent acts of cruelty within its jurisdiction it does not outline what these acts are. The Article reads:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

[79] *Note above*

[80] See Article 1 of the Convention Against Torture note 73 above.

[81] See Bernard note 26 above at 767 who goes further to note that:

Parties are required to report within one year on measures taken to meet their obligations. Subsequent reports are required every four years. 39 Parties may, but are not required to, subject themselves to the competence of the United Nations Committee Against Torture to hear complaints against them from other state parties or from individuals. Even after the United Nations Committee Against Torture has received "reliable information which appears to it to contain well-founded indications that torture is being systematically practised," the committee's authorization to act is quite limited.

conclusion that the enforcement provisions reduce the obligations of the convention to appear merely precatory as the issue of enforcement in the international sphere has always been problematic due to the considerations of state sovereignty[82].

### 2.9 African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights entered into force in 1986;[83] The prohibition of torture and cruel and degrading punishment is governed by Article 5 which reads:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Again, like with the previously discussed human rights instruments, the African Charter does not offer an elaborate definition of what the confines of humane treatment are; this results in context being subject to interpretation.

### 2.10 Conclusion

It is clear from the discussion above that the protection of prisoners' rights is no longer just an emerging norm but is rapidly evolving into a principle of customary international law. Similarly, the discussion above evidences that definition of what constitutes "cruel, inhuman and degrading punishment or treatment" is still mirky and subject to judicial interpretation on an international scale. It is therefore necessary to explore how this has been dealt with within the South African jurisprudence.

[82] *Note above.*

[83] African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1982).

# CHAPTER 3
# SOUTH AFRICAN LEGISLATIONS ON PRISONERS' RIGHTS

## 3.1 Introduction

The previous chapter traced the inception of the advocacy of prisoners' rights in legal history and it further went on to established why there is a need to protect prisoners. It is upon this premise that it is necessary to establish whether South Africa has promulgated legislations that afford inmates within the correctional service system protection from varying abuses and human rights violations. After embarking on such an enquiry, it is also necessary to measure this legislations (if any) against the international set standard. This chapter therefore takes a close introspection of the South African legislations that have been enacted to protect prisoners.

## 3.2 The Constitution of the Republic of South Africa

With South Africa being a democratic country that believes in the supremacy of its constitution, it is necessary to set off an analysis of the legislation on prisoner's rights by examining the provision of the Constitution of South Africa, 1996 which sets out these rights in section 35.[84] Of these substantial provisions, this study naturally

[84] *Section* 35 of the Constitution of South Africa. Comprehensively lists the rights of accused, detained and arrested persons as follows:

(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) 48hours 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 or the detention to continue, or to be released and

(f) to be released from detention if the interests of justice permits, 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 al. 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;

(I) 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;

(m) 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

(n) 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.

identifies and seeks to examine the ambits of subsection 2 paragraph (e) which states that accused, detained and arrested persons have the right:

> 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.[85]

It must be noted that although section 35 does not specifically reprobate violence against the arrested or detained, it is submitted that this prohibition is inferred in the advocacy for "conditions consistent with human dignity".[86] The wording of the constitution echoes that of the international legislation discussed in the preceding chapter in that it places emphasis on the detention satisfying the standards of human dignity. However, it offers no elaborate definition on what is considered to be "consistent with human dignity" when one considers the unique position of a prisoner who by the very nature of his status is being denied his right to liberty as penance for contravening the laws that govern society.

As the constitution merely offers a blueprint of the minimum standards that ought not to be violated, it is common cause that the legislature is empowered to promulgate laws that ought to further enhance and articulate the protections afforded by the Constitution. It is upon this basis that it is necessary to examine the Correctional Services Act that was promulgated to give effect to the Bill of rights in the Constitution.

### 3.3 Correctional Services Act No. 111 of 1998

As highlighted above the Correctional Services Act was established with the aim *inter alia* of "ensuring the safe custody of prisoners under human rights conditions and providing for the "rights and obligations of sentenced prisoners.[87] A close

[85] See note above.

[86] See note above.

[87] See the long title of the Correctional Services Act No. 111 of 1998 which states that the Act is meant to:

To provide for a correctional system; the establishment, functions and control of the Department of Correctional Services; the custody of all offenders under conditions of human dignity; the rights and obligations of sentenced offenders; the rights and obligations of unsentenced offenders; a system of community corrections; release from correctional centre and placement under correctional

introspection of the specific provisions of the Act denotes that satisfying the conditions consistent with human dignity as affirmed by the constitution is a multifaceted task. This notion can be deduced from the heading of Chapter of the Correctional Services Act.[88] the While sections 26 – 35 deal with the security concerns of an inmate the author notes that security considerations can also be depicted from *section 7* which not only spells out the minimum standards of accommodation but also establishes the grounds upon which inmates should be segregated.[89]

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supervision, on day parole and parole; a National Council for Correctional Services; a Judicial Inspectorate; In dependant Correctional Centre Visitors; an internal service evaluation; officials of the Department; public-private partnership correctional centre; penalties for offences; the repeal and amendment of certain laws; and matters connected therewith.

[88] Chapter III of the Correctional Services Act note 87 above is titled: CUSTODY OF ALL OFFENDERS UNDER CONDITIONS OF HUMAN DIGNITY. This chapter is further divided into three parts namely: PART A which deals with general requirements; PART B which deals with disciplinary issues and Part C which addresses security concerns of the inmate.

[89] See *section 7* of the Correctional Services Act note 87 above which states:

(1) Inmates must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be adequate for detention under conditions of human dignity.

[Sub-s. (1) substituted by s. 6 (a) of Act No. 25 of 2008.]

(2) (a) Sentenced inmates must be kept separate from persons awaiting trial or sentence.

(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.

(d) The National Commissioner may detain inmates of specific age, health or security risk categories separately.

(e) The National Commissioner may accommodate inmates in single or communal cells depending on the availability of accommodation.

(f) Where there is a danger of persons who are awaiting trial or sentence defeating the ends of justice by their association with each other, the National Commissioner must detain them apart.

[Sub-s. (2) amended by s. 6 of Act No. 32 of 2001 and substituted by s. 6 (b) of Act No. 25 of 2008.]

(3) There may be departures from the provisions of subsection (2) (*a*) to (*c*) if such departures are approved by the Head of the Correctional Centre and effected under supervision of a correctional official and are undertaken for the purpose of providing development or support services or medical treatment, but under no circumstances may there be departures in respect of sleeping accommodation.

It is the author's submission that safety concerns are embedded in the rationality to separate sentenced inmates and those awaiting trial;[90] separating males from females, inmates who are children from adults is also indicative of safety considerations of persons who find themselves in custody.

Having inferred inmate's safety considerations from the dictates of the minimum expected standard of accommodation it is essential to focus our attention to Part C of Chapter III of Correctional Services Act dealing with the safety of the inmate.

The Act, as a point of departure under security considerations, deals with the safe custody of the inmate. Section 26 states:

> (1) The right of every inmate to personal integrity and privacy is subject to the limitations reasonably necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates.
>
> (2) In order to achieve the objectives referred to in subsection (1) and subject to the limitations outlined in sections 27 to 35, a correctional official may—
>
> (a) search the person of an inmate, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the correctional centre or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings;
>
> [Para. (a) substituted by s. 20 of Act No. 25 of 2008.]
>
> (b) take steps to identify the inmate;
>
> (c) . . . . . .
>
> [Para. (c) deleted by s. 13 (b) of Act No. 32 of 2001.]
>
> (d) apply mechanical means of restraint; and
>
> (e) use reasonable force.
>
> [Sub-s. (2) amended by s. 13 (a) of Act No. 32 of 2001.]

[90] See *section* 7 (2) (a)

> (3) In order to achieve the objectives referred to in subsection (1) and subject to the limitations outlined in sections 27 to 35, the National Commissioner may classify and allocate accommodation to inmates.
>
> [Sub-s. (3) added by s. 13 (c) of Act No. 32 of 2001.]

It has been conceded above that meeting the threshold of conditions consistent with human dignity is a very broad and substantive task requiring multiple considerations as envisaged by sections 4 – 35 of the Correctional Services Act; however, attention is drawn to the wording of section 26 (1) above which emphasizes the inmates' right to personal integrity and privacy subject to certain limitations. It is submitted that personal integrity is synonymous with human dignity and thus it follows, in accordance with section 26 (2) that in order to ensure the safety of inmates and also in pursuit of achieving incarceration conditions that do not infringe the human dignity of the said inmates, correctional services officers may:

> search the person of an inmate, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the correctional centre or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings;[91]

It stands to reason, judging from the contents above that in order to protect the livelihood of other inmates and the correctional officers themselves, a correction is empowered to search the inmate himself to ensure that he is not in possession of any weapons or objects that may pose a danger to other persons within the facility.[92] It is also submitted that the searching and seizure of dangerous objects found within the confounds of an inmate's occupational space is done with the aim of curtailing harm that may ensue on other prisoners or officers working within the facility.[93]

Although the efficacy of such measures of protections is questionable, it is apparent that the Correctional Services Act, at least on paper has established mechanisms aimed at offering protections and making a correctional centre a safe environment for rehabilitation to take place. The Act, in instances where contraband and objects

[91] Section 26 (2) (a) of the Correctional Services Act note 87 above.

[92] See note above.

[93] See note above.

determined to “pose a threat to the security of the centre” are found, empowers the correctional services officer who found them, to take reasonable steps to identify to whom the said objects belong .[94] This identification process is necessary in order to ensure that a disciplinary hearing is instituted against the perpetrator who is deemed to be in possession of the illegal objects as this is considered to be a disciplinary infringement.[95]

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[94] Section 26 (2) (b) of the Correctional Services Act note 87 above.

[95] The Correctional Services Act note 87 above in section 23 lists the following as grounds constituting disciplinary infringements:

(1) An inmate commits a disciplinary infringement if he or she—

(a) replies dishonestly to legitimate questions put by a correctional official or other person employed in a correctional centre;

(b) disobeys a lawful command or order by a correctional official or fails to comply with any regulation or order;

(c) is abusive to any person;

(d) fails or refuses to perform any labour or other duty imposed or authorised by this Act;

(e) is careless or negligent with regard to any labour or duty imposed or authorised by this Act;

(f) uses insulting, obscene or threatening language;

(g) conducts himself or herself indecently by word, act or gesture;

(h) commits an assault;

(i) communicates with any person at a time when or a place where it is prohibited;

(j) makes unnecessary noise or causes a nuisance;

(k) without permission leaves the cell or other assigned place;

(l) in any manner defaces or damages any part of the correctional centre or any article therein or any state property;

(m) possesses an unauthorised article;

(n) commits theft;

(o) creates or participates in a disturbance or foments a mutiny or engages in any other activity that is likely to jeopardise the security or order of a correctional centre;

(p) professes to be a member of a gang or takes part in gang activities;

(q) makes a dishonest accusation against a correctional official or fellow inmate;

(r) conceals, destroys, alters, defaces or disposes of an identification card, document or any issued article;

(s) commits an act with the intention of endangering his or her life, injuring his or her health or impairing his or her ability to work; or

(t) attempts to do anything referred to in this section.

[Sub-s. (1) amended by s. 17 (a) of Act No. 25 of 2008.]

Some of the listed grounds constituting disciplinary infringements serve as tools that aid correctional services officers in emitting their mandate to identify perpetrators who wield objects that are potentially of safety concern to other persons within the correctional services centre. A correctional services officer may, as part of the "reasonable steps" alluded to in section 26 (2) (b) of the act,[96] interrogate inmates in order to establish the true owner of dangerous objects that may be found during their searches. Questions posed during the interrogation compel an inmate to answer truthfully as it is considered an offence to give false answers to questions legitimately posed by a correctional services officer.[97]

It is submitted that the reprobation of abusive behaviour towards other inmates[98] and the condemnation of inmates possessing unauthorised articles is a testament of the unequivocal stance against violence that correctional services system has and endeavours to enforce.[99] As part of the enforcement of this mandate, the Correctional Services Act provides for disciplinary proceedings to be instituted against suspected offenders and these proceeding may be conducted by a disciplinary official, a Head of the Correctional Centre or an authorised official. If found guilty, the maximum imposable sanction will vary dependant on who conducted the hearing.[100]

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(2) An inmate who assists, conspires with or incites another person to contravene a provision of subsection (1) commits a disciplinary infringement.

[96] See Section 26 (2) (b) of the Correctional Services Act note 87 above.

[97] See Section 23 (1) (a) of the Correctional Services Act note 87 above.

[98] See Section 23 (1) (c) of the Correctional Services Act note 87 above.

[99] See Section 23 (1) (m) of the Correctional Services Act note 87 above

[100] See Section 24 of the Correctional Services Act note 87 above which sets out the disciplinary procedure and penalties as follows:

(1) Disciplinary hearings must be fair and may be conducted either by a disciplinary official, a Head of the Correctional Centre or an authorised official.

[Sub-s. (1) substituted by s. 12 of Act No. 32 of 2001.]

(2) (a) A hearing before a Head of the Correctional Centre or the authorised official must be conducted informally and without representation.

[Para. (a) substituted by s. 18 (a) of Act No. 25 of 2008.]

(b) At such hearing the inmate must be informed of the allegation against him or her, whereupon the inmate has the right to refute the allegation.

(c) The proceedings of a hearing contemplated in paragraph (a) must be recorded in writing by a correctional official.

[Sub-s. (2) substituted by s. 12 of Act No. 32 of 2001.]

(3) Where the hearing takes place before the Head of the Correctional Centre or the authorised official, the following penalties may be imposed severally or in the alternative:

(a) A reprimand;

(b) a loss of gratuity for a period not exceeding one month;

(c) restriction of amenities for a period not exceeding seven days.

[Sub-s. (3) substituted by s. 12 of Act No. 32 of 2001.]

(4) At a hearing before a disciplinary official an inmate—

(a) must be informed of the allegation in writing;

(b) has the right to be present throughout the hearing, but the disciplinary official may order that the accused inmate be removed and that the hearing continue in his or her absence if, during the hearing, the accused inmate acts in such a way as to make the continuation of the hearing in his or her presence impracticable;

(c) has the right to be heard, to cross-examine and to call witnesses;

(d) has the right to be represented by a legal practitioner of his or her choice at his or her own expense, unless a request to be represented by a particular legal practitioner would cause an unreasonable delay in the finalisation of the hearing in which case the inmate may be instructed to obtain the services of another legal practitioner; and

(e) has the right to be given reasons for the decision.

[Sub-s. (4) substituted by s. 12 of Act No. 32 of 2001 and amended by s. 18 (b) of Act No. 25 of 2008.]

(5) Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative:

(a) a reprimand;

(b) a loss of gratuity for a period not exceeding two months;

(c) restriction of amenities not exceeding 42 days;

(d) in the case of serious or repeated infringements, segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity and restriction of amenities as contemplated in paragraphs (b) and (c).

[Para. (d) substituted by s. 18 (c) of Act No. 25 of 2008.]

(6) The penalties referred to in subsections (3) and (5) may be suspended for such period and on such conditions as the presiding official deems fit.

(7) (a) At the request of the inmate proceedings resulting in any penalty other than a penalty contemplated in subsection 5 (d) must be referred for review to the National Commissioner.

(b) The National Commissioner may confirm or set aside the penalty and substitute an appropriate order for it.

[Sub-s. (7) substituted by s. 18 (d) of Act No. 25 of 2008.]

It is also of importance when examining the safe custody considerations provided by the Correctional Services Act, to scrutinise sections 27 – 35 of the Act as they serve as limitation clauses to the scope of power given to a correctional services officer mandated with ensuring the realisation of a secure correctional services community, the safety of fellow correctional officials and the safe custody of all inmates.[101]

### *3.3.1. Section 27:* Searches.

The aforementioned section outlines the manner in which the correctional services officer should conduct a search in instances where such search is scheduled or conducted as part of the officer acting upon a reasonable suspicion that such inmate is in possession of objects that threaten the security of those within the facility.[102]

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[101] See Section 26 (2) of the Correctional Services Act note 87 above which clearly emphasises the need to observe the dictates of sections 27 – 35 of the act while the correctional officer is in pursuit of achieving the objects of sub-section (1) of section 26.

[102] See Section 27 of the Correctional Services Act note 87 which states: (1) The person of an inmate may be searched by a manual search, or search by technical means, of the clothed body.

(2) Upon reasonable grounds, the person of an inmate may be searched in the following ways:

(a) A search by visual inspection of the naked body;

(b) search by the physical probing of any bodily orifice;

(c) a search by taking a body tissue or body excretion sample for analysis;

(d) a search by the use of an X-ray machine or technical device, by a qualified technician, if there are reasonable grounds for believing that an inmate has swallowed or excreted any object or substance that may be needed as an exhibit in a hearing or may pose a danger to himself or herself or to correctional officials or to the security of the correctional centre; and

(e) by detaining an inmate for the recovery by the normal excretory process of an object that may pose a danger to that inmate, to any correctional official, to any other person or to the security of the correctional centre.

[Para. (e) substituted by s. 14 (a) of Act No. 32 of 2001.]

(3) A search of the person of an inmate contemplated in subsection (2) is subject to the following restrictions:

(a) The search must be conducted in a manner which invades the privacy and undermines the dignity of the inmate as little as possible;

(b) a correctional official of the same gender as the inmate must conduct the search and correctional officials of the other gender must not be present;

(c) all searches must be conducted in private;

(d) searches contemplated in subsections (1) and (2) must be authorised by the Head of the Correctional Centre but searches in terms of subsection (2) (b), (c), (d) and (e) must be executed or

The searches may take the form of manual searches by a correctional services officer or may be technical through the use of X-Ray machines and or other sophisticated machinery such as magnetic resonance imaging machine by a qualified technician.[103] Such searches however must be conducted in private by a correctional services officer of the same gender as the inmate being searched and conducted in a manner that strives to least undermine the dignity of the inmate.[104]

### *3.3.2. Section 28: Identification*

The Act in the aforementioned section details the steps that may be followed in a bid to ascertain the identity of an inmate and states the following:

> (1) To ensure safe custody the following steps may be taken to identify an inmate:
> (a) the taking of finger and palm prints;
> (b) the taking of photographs;
> (c) the ascertaining of external physical characteristics;
> (d) the taking of measurements;
> (e) referral of the inmate to the correctional medical practitioner to ascertain the age of the inmate; and
> (f) the attachment of an electronic or other device to the body of the inmate in the manner prescribed by regulation.
> [Para. (f) added by s. 15 (c) of Act No. 32 of 2001. (Editorial Note: In terms of s. 15 (c) of Act No. 32 of 2001, para. (d) must be added. It is suggested that para. (f) was in fact meant.)]
> The inmate may request that, at his or her own expense, his or her private medical practitioner be present at an investigation referred to in paragraph (e).
> [Sub-s. (1) amended by s. 22 (a) of Act No. 25 of 2008.][105]

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supervised by a registered nurse, correctional medical practitioner or medical practitioner, depending on the procedure necessary to effect the search.
[Sub-s. (3) amended by s. 14 (b) of Act No. 32 of 2001.]
(4) A correctional official or person conducting a search in terms of this section may seize anything found

[103] See section 27 (1) note above.

[104] See section 27 (3) note above

[105] See Section 28 (1) of the Correctional Services Act note 87 above.

In establishing the nexus between some of these steps with the safe custody of inmates it is important to rationalise the importance of ascertaining the age of an inmate especially when one considers how the Act mandates segregation on the basis of age the rationality of which has been discussed above. Equally capturing the finger and palm prints of inmates is necessary as they form a database that can be consulted in cases of violence against other inmates where a weapon is used and yet no one is forthcoming in terms of claiming its ownership.[106]

### *3.3.3. Section 29: Security classification*

Section 29 of the Act requires a determination regarding the risk an inmate will pose to others to be made in order to determine where the said inmate will be housed. The section reads:

> Security classification is determined by the extent to which the inmate presents a security risk and so as to determine the correctional centre or part of a correctional centre in which he or she is to be detained.
>
> [S. 29 substituted by s. 23 of Act No. 25 of 2008.][107]

It is submitted that the rationalisation of making a threat assessment of an inmate is centred on the dictates of prudency that would render it unconscionable to mix violent offenders with non-violent offenders.

### *3.3.4. Section 30: Segregation*

In terms of section 30, the segregation of an inmate may vary with regards to its duration and may result from *inter alia* medical grounds, penance for displays of violence or threats of violence by the inmate or in some instances upon the written request of the inmate.[108] It is clear that while the segregation – in a singular cell –

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[106] See Section 28 (2) of the Correctional Services Act note 87 above which states: Identification data obtained in this way must be included in the inmate's personal file.

[107] See Section 29 of the Correctional Services Act note 87.

[108] See Section 30 of the Correctional Services Act note 87 which outlines the following:

(1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7 (2) (e), is permissible—

(a) upon the written request of an inmate;

[Para. (a) substituted by s. 24 (b) of Act No. 25 of 2008.]

may be prompted as a result of the violent behaviour of the inmate, care should be

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(b) to give effect to the penalty of the restriction of the amenities imposed in terms of section 24 (3) (c), 5 (c) or 5 (d) to the extent necessary to achieve this objective;

[Para. (b) substituted by s. 24 (b) of Act No. 25 of 2008.]

(c) if such detention is prescribed by the correctional medical practitioner on medical grounds;

(d) when an inmate displays violence or is threatened with violence;

[Para. (d) substituted by s. 24 (b) of Act No. 25 of 2008.]

(e) if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and

[Para. (e) substituted by s. 24 (b) of Act No. 25 of 2008.]

(f) if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.

[Sub-s. (1) amended by s. 16 (a) of Act No. 32 of 2001 and by s. 24 (a) of Act No. 25 of 2008. Para. (f) substituted by s. 16 (b) of Act No. 32 of 2001.]

(2) (a) An inmate who is segregated in terms of subsection (1) (b) to (f)—

(i) must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day; and

(ii) must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.

[Para. (a) amended by s. 24 (c) of Act No. 25 of 2008.]

(b) Segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.

(3) A request for segregation in terms of subsection (1) (a) may be withdrawn at any time.

(4) Segregation in terms of subsection (1) (c) to (f) may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of subsection (5), exceed seven days.

(5) If the Head of the Correctional Centre believes that it is necessary to extend the period of segregation in terms of subsection (1) (c) to (f) and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend the period of segregation for a period not exceeding 30 days.

(6) All instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge.

(7) An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.

[Sub-s. (7) substituted by s. 24 (d) of Act No. 25 of 2008.]

(8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.

(9) Except in so far as it may be necessary in terms of subsection (1) (b) segregation may never be ordered as a form of punishment or disciplinary measure

observed in terms of the duration of the segregation. Section 30 (9) discourages using segregation as a method of emitting punishment or as a disciplinary measure thus suggesting that segregation should be used as a preventative measure rather than a punitive one.

### *3.3.5. Section 31: Mechanical restraints*

In accordance to this section, the decision to use mechanical restraints on an inmate should only be taken when such an inmate is deemed to be either a threat to others or to the property in the correctional services facility.[109] It follows that this is a

[109] See Section 31 of the Correctional Services Act note 87 above articulates the following:

(1) If it is necessary for the safety of an inmate or any other person, or the prevention of damage to any property, or if a reasonable suspicion exists that an inmate may escape, or if requested by a court, a correctional official may restrain an inmate by mechanical restraints as prescribed by regulation.

[Sub-s. (1) substituted by s. 25 (*a*) of Act No. 25 of 2008.]

(2) An inmate may not be brought before court whilst in mechanical restraints, unless authorised by the court.

[Sub-s. (2) substituted by s. 25 (*b*) of Act No. 25 of 2008.]

(3) (*a*) When an inmate is in segregation and mechanical restraints are to be used, such use of mechanical restraints must be authorised by the Head of the Correctional Centre and the period may not, subject to the provisions of paragraphs (*b*) and (*c*), exceed seven days.

[Para. (*a*) substituted by s. 25 (*c*) of Act No. 25 of 2008.]

(*b*) Mechanical restraints may only be used for the minimum period necessary and this period may not, subject to the provisions of paragraph (*c*), exceed seven days.

(*c*) The National Commissioner may extend such period for a maximum period not exceeding 30 days after consideration of a report by a correctional medical practitioner or psychologist.

(*d*) All cases of the use of mechanical restraints must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge.

[Para. (*d*) added by s. 25 (*d*) of Act No. 25 of 2008.]

(4) . . . . . .

[Sub-s. (4) deleted by s. 25 (*e*) of Act No. 25 of 2008.]

(5) An inmate who is subjected to such restraints may appeal against the decision to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.

[Sub-s. (5) substituted by s. 25 (*f*) of Act No. 25 of 2008.]

(6) Mechanical restraints may never be ordered as a form of punishment or disciplinary measure.

(7) Mechanical restraints in addition to handcuffs or leg-irons may only be used on inmates when outside their cells.

measure that is utilised when absolutely necessary and this can be further inferred from the wording of subsection 3 paragraph b which only permits the imposition of the restraints to the minimum period necessary.[110] Similar to the case of segregation as discussed above, the use of mechanical restraints should not be done as a punitive measure but should be used in order to prevent harm from occurring to other inmates or to the property of the correctional services centre.

### *3.3.6. Section 32: Use of force*

Due to the nature of some of the inmates housed in a correctional services facility, a correctional services officer may find himself in a situation that may necessitate the use of force. This necessity may arise as a result of the following:

I. Self defence
II. The defence of another
III. The prevention of a prisoner from escaping
IV. The prevention of destruction of property

It is important to realise that as part of protecting other inmates from violence while in the custody of the South African correctional services system, a correctional services officer may in extenuating circumstances use the minimum force necessary to subdue an inmate that is endangering the life of another by virtue of aggressive or violent behaviour.[111] However the use of force is not taken lightly and should be used

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[Sub-s. (7) added by s. 17 of Act No. 32 of 2001 and substituted by s. 25 (*f*) of Act No. 25 of 2008.]

[110] See note above.

[111] See Section 32 of the Correctional Services Act note 87 above which governs the use of force as follows:

(a) Every correctional official is authorised to use all lawful means to detain in safe custody all inmates and, subject to the restrictions of this Act or any other law, may use minimum force to achieve this objective where no other means are available.

(b) A minimum degree of force must be used and the force must be proportionate to the objective.

(c) A correctional official may not use force against an inmate except when it is necessary for—

(i) self-defence;

(ii) the defence of any other person;

(iii) preventing an inmate from escaping; or

(iv) the protection of property.

[Sub-s. (1) substituted by s. 26 (a) of Act No. 25 of 2008. Para. (c) added by s. 18 (a) of Act No. 32 of 2001.]

only when approved by the head of the correctional centre or in instances where the correctional services officer reasonably believes that such use of force would have been approved by the head of the correctional centre and that the delay resulting from the seeking of preapproval would defeat the need to use such force.[112]

### *3.3.7. Section 33: Non-lethal incapacitating devices*

Non-lethal incapacitating devices may take the form of *inter alia* tear gas, electric tazer guns and pepper spray. These should only be issued to correctional services officers with the consent of the head of the correctional services facility and are to be strictly utilised by trained personnel.[113] The circumstances in which a correctional officer may utilise these devices is subject to the following:

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(2) Force may be used only when authorised by the Head of the Correctional Centre, unless a correctional official reasonably believes that the Head of the Correctional Centre would authorise the use of force and that the delay in obtaining such authorisation would defeat the objective.

(3) If, after a correctional official has tried to obtain authorization, force is used without prior permission, the correctional official must report the action taken to the Head of the Correctional Centre as soon as reasonably possible.

(4) Any such permission or instruction to use force may include the use of non-lethal incapacitating devices or firearms, subject to the restrictions set out in sections 33 and 34.

(5) If force was used, the inmate concerned must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical practitioner.

[Sub-s. (5) substituted by s. 18 (b) of Act No. 32 of 2001 and s. 26 (b) of Act No. 25 of 2008.]

(6) All instances of use of force in terms of subsections (2) and (3) must be reported to the Inspecting Judge, immediately.

[Sub-s. (6) added by s. 26 (c) of Act No. 25 of 2008.]

[112] See Section 32 (2) of the Correctional Services Act note above.

[113] See generally Section 33 of the Correctional Services Act note 87 above which outlines the parameters under which non-lethal incapacitating devices maybe used as follows:

(1) Non-lethal incapacitating devices may only be issued to a correctional official on the authority of the Head of the Correctional Centre.

[Sub-s. (1) substituted by s. 19 (*a*) of Act No. 32 of 2001.]

(2) Such devices may only be used by a correctional official specifically trained in their use.

(3) Such devices may be used in the manner prescribed by regulation and then only—

(*a*) if an inmate fails to lay down a weapon or some other dangerous instrument in spite of being ordered to do so;

[Para. (*a*) substituted by s. 27 (*a*) of Act No. 25 of 2008.]

I. Where an inmate fails to comply with an instruction to lay his weapon down or any dangerous weapon he might be wielding.
II. Where the security of the correctional services centre is threatened or the safety of other inmates
III. Where an inmate attempts to escape[114]

It can be easily deduced from the circumstances in which these devices are permitted to be used that their legal sanction is meant for cases wherein a correctional officer is protecting the lives of other inmates. It thus stands to reason that the use of non-lethal incapacitating devices is a mechanism that may be employed to ensure the security of other inmates.

### *3.3.8. Section 34: Firearms*

The governance of the use of firearms in a correctional services facility draws inspiration from sections 32 and 33 in that their issuance and use require the prior approval of the head of the correctional services centre.[115] However, the fact that

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(*b*) if the security of the correctional centre or safety of inmates or others is threatened by one or more inmates; or

[Para. (*b*) substituted by s. 27 (*a*) of Act No. 25 of 2008.]

(*c*) for the purpose of preventing an escape.

(4) Whenever such devices are used, their use must be reported in writing and as prescribed by regulation.

(5) Tear-gas grenades and cartridges fired by firearms or launch-tubes may not be fired or launched directly at a person or into a crowd.

[Sub-s. (5) added by s. 19 (*b*) of Act No. 32 of 2001.]

(6) Whenever a correctional official decides to use tear-gas he or she must be convinced that its use in the specific situation meets the requirements of minimum and proportionate force as required by section 32 (1) (*b*).

[Sub-s. (6) added by s. 19 (*b*) of Act No. 32 of 2001.]

(7) If an inmate has been affected by tear-gas he or she must receive medical treatment as soon as the situation allows.

[Sub-s. (7) added by s. 19 (*b*) of Act No. 32 of 2001 and substituted by s. 27 (*b*) of Act No. 25 of 2008.]

[114] See note above.

[115] See Section 34 of the Correctional Services Act note 87 above which governs the use of firearms as follows

(1) A firearm may only be issued to a correctional official on the authority of the Head of the Correctional Centre or the Head of Community Corrections.

firearms are to be used as a last resort cannot be over emphasized and almost similar to the prescripts on non-lethal incapacitating devices, there are prevailing conditions that ought to be in subsistence before a correctional services officer may use a firearm and they are as follows:

I. When acting in self-defence;
II. When acting in defence of another
III. When preventing an inmate from escaping.[116]

Section 34 also articulates the procedure that ought to be followed where possible before a correctional services officer uses his firearm on another. Where possible, provided that such procedure does not defeat the objects and necessity of using the firearm, a correctional services officer must:

I. Issue a verbal warning to the inmate;

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(2) A firearm may only be used by a correctional official specifically trained in its use.
(3) Firearms may only be used as a last resort and then only—
(*a*) in self-defence;
(*b*) in defence of any other person;
(*c*) to prevent an inmate from escaping; or
[Para. (*c*) substituted by s. 28 of Act No. 25 of 2008.]
(*d*) when the security of the correctional centre or the safety of inmates or other persons is threatened.
[Para. (*d*) substituted by s. 28 of Act No. 25 of 2008.]
(4) Before a firearm is fired, the following procedure must be adhered to, if circumstances permit:
(*a*) A verbal warning must be given;
(*b*) if the warning is of no effect, a warning shot must be fired;
(*c*) if the warnings are of no effect, the line of fire should be directed in such a manner that the probable result will not be a fatal injury.
(5) Weapons equipped for firing rubber-type ammunition may only be issued to trained correctional officials and then only for training purposes or during emergency situations.
(6) (*a*) Rubber-type ammunition may as a general rule only be fired at a distance of more than 30 metres from a person.
(*b*) If such ammunition is fired at less than 30 metres from a person, the line of fire must be directed at the lower body of the person.
(*c*) Rubber-type ammunition may not be fired within a building.
(7) Whenever a firearm is used, its use must be reported in writing and as prescribed by regulation.
[S. 34 substituted by s. 20 of Act No. 32 of 2001.]

[116] See Section 34 (3) of the Correctional Services Act note above.

II. Where the verbal warning serves no effect, the correctional officer must fire a warning shot

III. Where such warning wields no positive results, the correctional officer must attempt to fire a shot that will not fatally would the inmate.[117]

The section also provides for the use of ammunition with rubber bullets, however, the issuance of these is limited to trained correctional services officers only or they are issued for training purposes or in the midst of an emergency.[118]

It can thus be deduced from the stringent measures provided before a firearm is used that this should be a last resort measure and used in order to safeguard the life of another human being.

#### *3.3.9. Section 35 Other weapons*

This section serves to cater for the use of weapons falling outside the scope of firearms or non-lethal incapacitating devices. The section mandates that such use is only permissible only when the national commissioner has provided regulations governing their use. The section is worded as follows:

> (1) The use of weapons other than non-lethal incapacitating devices or firearms may be authorised by the National Commissioner as prescribed by regulation.
>
> (2) Such regulations must prescribe the training, manner of use, control and reporting procedures

### 3.4. Conclusion

It is evident from the analysed sections that thought and considerations has been given towards ensuring the safe custody of inmates within the correctional services system. It is further inferred from the provisions that the legislature intended on ensuring that inmates are not only safe from violence perpetrated by one inmate to another but also that they are protected from excessive force being emitted on them by the very correctional officers mandated to ensure their wellbeing while they are in custody.

[117] See Section 34 (4) of the Correctional Services Act note above

[118] See Section 34 (5) of the Correctional Services Act note above.

# Chapter 4

# IMPACT OF THE VIOLATION OF AN OFFENDERS' RIGHT TO SECURITY OF A PERSON, ON THEIR REHABILITATION

## 4.1 Introduction

The preceding chapter evinces that legislation has been enacted to ensure appropriate safeguards for "societal reprobates" that find themselves as inmates in the South African Correctional Services system. This chapter seeks to explore whether the rehabilitation of an inmate will be affected if the right to his security is infringed. The Chapter will therefore discuss the theories of punishment with special emphasis on rehabilitation and instances of alleged violations of the right to security as a prelude to the determination of whether or not a violation of the aforementioned right to security will have a bearing on his rehabilitation.

## 4.2 Theories of Punishment

It is common cause – as alluded to in the first chapter – that the limitation of basic rights such as freedom of movement, privacy and dignity is a consequential effect flowing from the incarceration of an offender.[119] In order to justify this infringement, scholars have posited varying rationalities that are commonly referred to as theories of punishment.[120] These theories are generally categorised into three, namely: the absolute theory, the relative theories and the combination/unitary theory. It is necessary, in order to give the reader context, to discuss these theories and situate the theory that rehabilitation forms part of.

### *4.2.1 The retributive theory*

Simply put, the aforementioned theory advocates for the punishment of an offender on the rationale that such an offender deserves it.[121] Proponents of this theory consider the commission of a crime as an act that disturbs the legal balance in a society; consequently, the perpetrator owes a debt to society that can only be purged through incarceration.[122] The theory does not attempt to justify the retribution

[119] See Mayhew note 3 above.

[120] Snyman CR *Criminal Law* (2014) p10.

[121] See Snyman note 120 above.

[122] Snyman note 120 above, goes further by offering a more intricate elaboration of the theory. According to Snyman, the legal order creates a phenomenon wherein every person bears a certain

embedded in a criminal sanction with a purported future benefit but rather paints the retribution as an essential characteristic of the sanction.[123]

It is important to note that there is a proclivity to stigmatise the meaning of the term retribution with the primitive interpretation of "an eye for an eye" however modern philosophers and scholars are contrary to this notion as they favour an interpretation that considers retribution as a means of restoring legal balance.[124] It is further submitted that retribution is an unequivocal denunciation and condemnation of a crime by society and thus the retributive theory is sometimes referred to as the expressive theory of punishment.[125]

### *4.2.2 The preventative theory*

The preventative theory forms part of the category of relative theories and has a literal meaning in that its purpose is to prevent the perpetration of further crime. Although it is conceded that this theory tends to interlink with deterrent and reformative theories that will be subsequently discussed below, it is submitted that there are specific punishments that do not necessarily serve the interests of deterrence and reformation, namely capital punishment, life imprisonment and forfeiture (for example the forfeiture of a driver's license).[126] Such punishments are aimed at incapacitating the offender from committing the same crime again. It is argued that should an offender be incarcerated for life, he is removed from the

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advantage while simultaneously being burdened with an obligation. A person living in a society where there is legal order has inherent legal protections that restrain other members from infringing upon his basic rights or interests. The enjoyment of this right is premised on "other members" exercising restraint and self-control thus wherein a member lacks the requisite restraint and consciously acts in an unlawful manner, such an act tips the scales of justice in a disproportionate manner that awards him an unjustified advantage over other members. It is argued that the criminal perpetrator knowingly denounces his duty to uphold the law – a duty that is still upheld by others – and yet he still benefits from the "advantages" of being in a legal order.

[123] See note above.

[124] See Snyman note 120 above at p13.

[125] *Ibid.* It is posited that the commission of a crime by the offender sends out message that denotes dominion which the perpetrator has over the victim. Punishment that is retributive I nature therefore serves a counter message cancelling the false message of dominance that is said to have been sent out by the commission of the crime; in this vein, punishment therefore constitutes an expression of solidarity with the victim and also the notion of maintaining justice in general.

[126] See Snyman note 120 above at p15.

society he has wronged and therefore is no longer in a position to ever harm the said society again.

It must be noted that in order for this theory to work, the court must be in a position to make a prior determination of people who pose such a grave danger to society that their permanent or in the very least long incarceration is warranted.[127] The efficacy of this theory is a subject of concern as a pragmatic analysis will denote the difficulty associated with requiring a court to make such a determination without the relying on factors such as previous convictions.[128]

#### *4.2.3 The individual deterrence theory*

As suggested by the name, the sole purpose of the theory of individual deterrence is to serve an impediment to the offender's commission of another crime. The theory is only concerned with the offender as an individual and does not concern itself with ensuring that the society as a whole refrains from the commission of the crime.[129] The essence of the theory is centred on the notion that punishment will impart a lesson on the offender that will prevent him from committing further acts; however, the high crime recidivism rates in South Africa seem to suggest that this theory is largely ineffective.[130]

#### *4.2.4 The Theory of General Deterrence*

Unlike the previously discussed theory, the focus of this theory is on achieving the prevention of crime by society. It is postulated that the incarceration of a criminal sends out a stern message that the commission of crime will not be tolerated, and neither will it go unpunished; consequently, this message will instil fear in the community, fear that is thought to constantly resonate in their minds and thereby oust any proclivities towards the transgression of the law.[131] The efficacy of this theory is not centred in the severity of the punishment emitted on offenders, but rather lies in the efficacy of policing in the community.[132] In order to arouse the effect

[127] See note above.

[128] See note above.

[129] See note above.

[130] See note above.

[131] See note above at 16.

[132] See note above

of general deterrence, the societal members must believe that if they commit a crime, they will be identified, hunted down, convicted and incarcerated.[133]

It therefore stands to reason that a breakdown or inefficiency in the criminal justice system will adversely impact on the efficacy of the theory itself.[134]

Like any other theory, the theory of general deterrence is not immune to criticism and the following factors have been levelled against this theory:

I. It fails to cater for crimes that are committed in the spur of the moment as the theory, like any utilitarian theory, presupposes that man is governed by pleasure and will prefer something that is painless over something that is painful; the theory therefore rationalises that a man will always stop to consider the pros and cons of act before he embarks on performing it.
II. There is no substantial empirical evidence to support the main tenet of the theory, that is, that the theory is centred on the notion that a person refrains from committing a crime as a result of seeing the punishment that is imposed on others who contravene the law in society; however this notion is largely unproven as to prove it would require a state in which no criminal sanction is imposed on offenders in order to determine the number of people who would commit crime in such a status quo.
III. The theory fails to fully integrate and account for culpability which is a characteristic that is trite in apportioning criminal liability. Reliance on this theory will not account for those who transgress the law while lacking the requisite *mens rea* as their punishment would still act as a deterrent to others.[135]

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[133] See note above

[134] See Snyman note 120 above at 16 who best exemplifies this with the following illustration: If the police fail to trace the offenders (as result of, for example, understaffing, bad training or corruption), the state prosecutor fails to prove an accused's guilt in court (as a result of, for example, shortages of personnel, bad training, or lack of professional experience), or the prison authorities cannot ensure that a convicted offender serves his sentence and does not escape before the expiry of his sentence period, the deterrent theory cannot operate effectively. Snyman submits that prospective offenders will then think that it is worth taking a chance by committing the crime, since the chances of their being brought to justice are relatively slim.

[135] Snyman expands on this assertion by giving an illustration of how the incarceration of an insane being – one who is ideally regarded as being *doli incapax* – would probably have the effect of instilling

IV. Reliance on this theory opens the door to the possibility of a perpetrator being the recipient of a sentence that exceeds the proportion of the harm he would have caused.[136] This assertion is founded on the fact that in most cases, a court must impose a harsh sentence in order to ensure that the gravity of the sentence is enough to create a deterrent effect on the community.[137] Such an act will be in direct contradiction of the deterministic origins of the theory of general deterrence which unlike the prescripts of the theory of retribution, view an accused as a free and responsible agent whom when being punished must get his "just desserts".

### *4.2.5 The Reformative Theory*

Synonymous with the rehabilitative theory, the reformative theory is of recent origin and centred on using punishment as a means of rehabilitating the offender into a law-abiding citizen.[138] The theory focusses on the offender and does not give much concern to the crime nor the harm that occurred as a result of the crime.[139] The emanation of this theory is largely credited to sociological and psychological sciences that attempt to attribute the commission of a crime to a personality defect of the offender or psychological factors arising from his upbringing.[140]

There have been several definitions that have attempted to outline what rehabilitation entails; it has been submitted that criminal rehabilitation is part of many correctional centres' programs and may be described as the process of aiding and enabling inmates to identify and detach themselves from factors that caused them to

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fear in the community and thereby preventing them from committing crime yet the commission of the crime in this instance was not premised on the offender intentionally disregarding the rights of the victim nor the pain and pleasure associated with his conviction should he be caught. See generally Snyman note 120 above at 17.

[136] See note above.

[137] See note above.

[138] See note above.

[139] See note above.

[140] It is submitted that those subscribing to the rehabilitation theory are of the school of thought that some of the contributing factors that contribute to crime are: an unhappy or broken parental home, a disadvantaged environment or bad fluences from friends and family. See note above.

commit crime in the first instance.[141] According to Murhula and Singh, rehabilitation must treat every single contributing factor that is considered of significance in leading a person to commit crime as this will enable an offender to live a life free of crime upon their release.[142] Sechrest *et al* define rehabilitation as a result of any planned intervention that lessens an inmate's criminal behaviour;[143] while Sections 4.2.1 and 4.2.2 of the South African White Paper on Correction, define the concept of rehabilitation as consequential of a procedure that joins together the correction of actions considered to be an offence, the development of the offender and the promotion of the dictates social responsibility and value in the offender.[144] This view is premised on the notion that rehabilitation is a complete phenomenon that fosters a reduction in recidivism through its advocacy and encouragement of social responsibility and social justice. The view is also echoed in Balfour's definition wherein it is submitted that rehabilitation entails a process of imparting inmates with an appreciation and sense of responsibility for their wrongful actions in order to enable them to deviate from the commission of such acts.[145]

Typically, as is the case with all theories, the rehabilitation theory has the following criticisms levelled against it:

i. There may be instances wherein there will be a disproportion between the punishment and the harm inflicted in that the application of the theory may lead to long periods of incarceration in order to allow the system to have enough time to rehabilitate the offender even in instances where the crime committed would have warranted a lesser incarceration time frame.[146]

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[141] Murhula and Singh, 'A critical Analysis on Offenders Rehabilitation Approach in South Africa 2019 African Journal of Criminology and Justice Studies Vol.12, No.1 p22.

[142] See note Above.

[143] Sechrest, L., White, S., & Brown, E. (1979). The rehabilitation of criminal offenders: Problems and prospects. Washington, DC: National Academy of Sciences.

[144] https://www.gov.za/sites/default/files/gcis_document/201409/corrections1.pdf Draft White Paper on corrections in South Africa [accessed on 30 March 2021]

[145] Balfour, B. (2003). The use of Drama in the Rehabilitation of Violent Male Offenders. New York: The Edwin Mellen Press

[146] See Snyman note 120 above at 18

ii. The uncertainty that is attached to postulating the duration of the rehabilitation of the offender.[147]

iii. The rehabilitation process is likely to be most effective when employed on younger offenders as they are more likely to change their behaviour in comparison to offender that are more advanced in years.[148]

iv. The high recidivism rates are indicative of how rehabilitation of an offender is an ideal as opposed to a reality. Proponents of this notion are of the opinion that despite best efforts, some people simply cannot be changed.

v. It has been submitted that a complete and sincere application of the theory would not wait for an offender to actually commit a wrongful action as the need to rehabilitate a person should be triggered at the moment that the person begins to show signs that they are likely to commit unlawful acts.[149]

Despite these criticisms, the Correctional Service Act and the White paper on corrections are indicative of South Africa's proclivity towards rehabilitation of offenders. This rehabilitation is multifaceted and requires the cooperation of varying stake holders namely:

i. Psychological services: These are offered by the Directorate of Psychological Services, and they strive to make available professional services to inmates, former inmates that have been granted probation and even those that are out on parole.[150] The primary aim of these services is to promote the mental health and the emotional wellbeing of those listed above. Crucially, these services ensure that offenders are rehabilitated for them to reintegrate successfully into society. Psychologists within the Directorate make sure that offenders are diagnosed as soon as they are admitted in order to enable their treatment that is based in

[147] See note above.

[148] See note above.

[149] See Snyman note 120 above at 16 who in expanding this point makes reference to how a person who is diagnosed and labelled as a kleptomaniac or psychopath should not be given a chance to commit the crime but rather the intervention/rehabilitation should be initiated before harm is actual caused. It is submitted that such preemptive action will result in the severance of a nexus between the commission of crime and treatment of sick person as his treatment would be akin to that of typically hospitalized person thus even if one was to regard such treatment as punishment, it is averred that such punishment would not have any blame attached to the person being punished.

[150] See Murhula and Singh note 141 above at 24.

accordance with their needs.[151] As the first point of departure, offenders are evaluated by means of interviewing, psychometric tests and observations within a group situation, feedback from functional personnel and consultation with any person who knows the offender.[152] Tailor made treatment programs are then crafted based on the data obtained from applying any of the aforementioned methods.

ii. Social work services: under the auspices of the Directorate of Social Work Services, offenders are provided with a wide range of services that include therapeutic, informative, supportive, crisis intervention, development, administrative, assessment and evaluation services.[153] Social work services, through its employment of professional social workers, empowers offenders with social functioning skills and aid them in resolving whatever personal problems they may be facing.[154] Consequently, offenders are equipped with the necessary social skills that are essential for their successful reintegration into society. Casework, group work and community work are the methods used to implement social work services.[155] Like psychologists, social workers also have the responsibility to determine the needs of offenders and to ensure that they are placed under programs which are suitable for their needs.[156] Social workers must ascertain that offenders are given relevant programs tailored to ensure that they are able to deal with issues such as substance abuse, marriage and family, life skills and sexual offending.[157] These programs have a positive impact on the lives of the offenders as they are aimed at improving the future livelihoods of the inmates by ensuring that they move away from old habits and develop a new rehabilitated life.

iii. Skills development and Spiritual care: this program is also an integral part of the rehabilitation services that are offered by the Department of Correctional Services. The Directorate of Skills Development in correctional centres offers programs that are in line with the South African Constitution in that they

[151] See note above.

[152] See note above.

[153] See note above at 25.

[154] See note above.

[155] See note above.

[156] See note above.

[157] See note above.

endeavour to educationally equip the incarcerated inmates.[158] These skills development programs, offer offenders the requisite skills that will make them relevant to the labour market upon their release and thus affording them the potential to be gainfully employed.[159] To foster this development, inmates are subjected to activities that improve their knowledge, skills and attributes and these consequently augment their social integration.[160] Religious figures equally play a pivotal role in shaping the spiritual and moral development of the offenders, through the provision of ongoing guidance and support.[161]

### 4.3 Conclusion

In conclusion, while it is noted that there are varying theories that may be used to justify the incarceration of offenders, it is clear that the democratic dispensation of South Africa is much inclined to a rehabilitative approach as it is more in line with the human rights ethos advocated for by the constitution. Having discussed the requisites that form part of the rehabilitation process, It therefore stands to reason that a violation of prisoners right to security would negatively impact the reformation of the offender as it subjects him to the very same factors that likely moulded him into be criminal. Having arrived at this deduction, the next and final chapter of this research summarises the findings and thereby concludes the research.

[158] Cilliers, C., & Smit, J. (2007). Offender Rehabilitation in the South African Correctional System: myth or realty. *Acta Criminologica: Southern African Journal of Criminology*, 83-101

[159] See note above.

[160] See Murhula and Singh note 141 above at 25.

[161] Dissel, A. (2008) Rehabilitation and Reintegration in African Prisons. *Human Rights in African Prison*, 89-103

# Chapter 5

## Conclusions and recommendations

### 5.1. Introduction

Throughout the introductory chapter of this research, it was made abundantly clear that it is undeniable that the incarceration of an offender has the adverse effect of depriving the prisoner's liberty of movement in that it curtails his choice with regards to with whom, where and how he is to live. However it has also been pointed out in the preceding chapter that, such deprivation may find rationality in the theories discussed; mainly the retributive theory, the preventative theory, the individual deterrence theory, the general deterrence theory and finally the rehabilitative theory.

Despite this rationality, scholars who subscribe to a democratic ideology that is premised on the observance and perseveration of human rights concur on the notion that there should be a general observance of minimum conditions that the prisoners ought to be subjected to.[162] In the South African context, the need to ensure the protection of prisoners' rights is further compounded by the spirit of the constitution which emphasizes the need to redress past injustices. As highlighted in the introductory chapter, prisons were in the past used as tools of social and political control and they were generally places of great vulnerability for inmates who had to reside in perverted settings that were designed to instil fear and silence any person bold enough to speak against the racist and authoritarian ideologies of the apartheid regime; prisons effectively became a tool that perpetuated the atrocious acts and consequences of the apartheid government.

### 5.2. Conclusions

It is this study's conclusion that the issue of prisoners being bearers of rights especially the fact that prisoners should serve their sentences free from inhuman and degrading conditions is not a subject of contention as there exists an abundance of international and regional instruments wherein these rights maybe not only be inferred but in other instances there are specifically spelt out as discussed in the

[162] See generally: https://www.charleskochinstitute.org/blog/winston-churchill-prisoners-friend/ accessed on 5 May wherein Winston Churchill is captured unequivocally asserting his view that the state of a democratic society can be depicted through an observation of how it treats its citizens.

second chapter of this research.[163] While the definition of what constitutes "cruel, inhuman and degrading punishment or treatment" is still mirky and subject to judicial interpretation on an international scale it is submitted that South African legislation has made great strides in articulating this term.

The commitment and endeavours to make the South Africa prisons a safe harbour for offenders to serve their penance and undergo rehabilitation is evidenced by the multiplicity of provisions in the constitution that offer a blueprint of the minimum standards a prisoner is entitled and which no unjustifiable infringement is permitted. In accordance with its mandate, the legislature enhanced and articulated the protections afforded by the Constitution through the comprehensive Correctional Services Act that details how the offenders are to be treated while in the confines of the correctional services system; the third chapter of this research was dedicated to unravelling the strides made by the South African legislature in an effort to ensure that the rights of prisoners are not transgressed.[164] The study noted that Chapter III of the Correctional Services Act, titled: CUSTODY OF ALL OFFENDERS UNDER CONDITIONS OF HUMAN DIGNITY evidenced a deep introspection towards the conditions that a prisoner ought to be subjected to while in custody of the correctional services department. This chapter is divided into three parts namely:

[163] See generally: The American Declaration of the Rights and Duties of Man; The Universal Declaration of Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms; The International Covenant on Civil and Political Rights; The American Convention on Human Rights; The Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment; The African Charter on Human and People's Rights.

[164] The long title of the Correctional Services Act which states that the Act is meant to:

To provide for a correctional system; the establishment, functions and control of the Department of Correctional Services; the custody of all offenders under conditions of human dignity; the rights and obligations of sentenced offenders; the rights and obligations of unsentenced offenders; a system of community corrections; release from correctional centre and placement under correctional supervision, on day parole and parole; a National Council for Correctional Services; a Judicial Inspectorate; In dependant Correctional Centre Visitors; an internal service evaluation; officials of the Department; public-private partnership correctional centre; penalties for offences; the repeal and amendment of certain laws; and matters connected therewith

PART A which deals with general requirements;[165] PART B which deals with disciplinary issues[166] and Part C which addresses security concerns of the inmate.[167]

The act has with great detail provided for conditions that the inmates should live in and even how and when the officers tasked with guarding them may use force. It is evident from the legislative provisions that the legislature intended on ensuring that inmates are not only safe from violence perpetrated by one inmate to another but also that they are protected from excessive force being emitted on them by the very correctional officers mandated to ensure their well-being while they are in custody.

## 5.3. Recommendations

### *5.3.1. Staff – Prisoner ratio*

Despite the legislative measures employed to safeguard the inmates in the correctional services system, their efficacy delves into the mediocrity realm if the prisoners within a correctional services institution exceed the number that the facility was built to accommodate. The staff - prisoner ratio is also vitally important in making sure that prisoners are safe from violence thus it is recommended that the Correctional Services Department should ensure that prisons are not overcrowded and that there is ample trained staff that are working within these facilities.

### *5.3.2. Social training of Correctional Services Staff*

The study has also noted the rehabilitation programs run by psychologists, social workers and religious figures are key to changing an inmate's deviant criminal behaviour, however these figures are not necessarily present at all times. It is the final recommendation that prison guards undergo training to impart on them skills that allow them to be able to handle inmates with an empathetic hand in order to create an environment which does not promote the breeding of gangs within the

[165] Encompassed under the subheading general requirements are issues such as: the approach to be taken with regards to safe custody; establishment of correctional centres; admission; accommodation; nutrition; hygiene; clothing and bedding; exercise and health care amongst others.

[166] The act discusses discipline in general, articulates what constitutes a disciplinary infringement and provides for disciplinary procedures and sanctions.

[167] In giving consideration to the safety concerns of a prisoner the legislature factored in how it could create an environment that is considered to be safe, the manner in which searches ought to be conducted, how to identify inmates, the manner in which security classifications ought to have been done including the segregation of inmates amongst other consideration that were discussed in detail in the third chapter of this research.

facility as much of the prisoner-on-prisoner violence is usually associated with gangs.

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