

**THE VIOLATION OF RIGHTS OF PRISONERS IN SOUTH AFRICA AFTER 1996:
MEDICO-LEGAL IMPLICATIONS**

A Dissertation Submitted in Fulfilment of the Requirements for the Degree of

MASTERS IN LAW

Of

UNIVERSITY OF KWAZULU NATAL

By

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December 2018

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ACKNOWLEDGEMENT

I would like to thank God for giving me excellent health that allowed me to complete this task.

I would like to thank Professor Nomthandazo Ntlama for all her guidance throughout this theses. I would also like to thank Prof Vawda for all his wise words and mentorship.

I am forever indebted to Dr John Uhomoibhi for making this all possible. He has played a fitting role of brotherhood and fatherhood and as such he remains an inspiration. I would also like to extend a great thank you to Mr Siphelo Mbeki who became more than a friend but became a brother at a time of need during my stay at UKZN. I would also like to thank Olivier Nsanzabaganwa for all the assistance during this research.

I would like to thank my family. I have great respect for my Mother Boniswa Phela who insisted I come to UKZN and read for this qualification. I further have profound respect for all the support I received from my Brother Xolisani Phela during the undertaking of this qualification. I would also like to thank my sister Babalwa Marala who insured that all my documents were submitted on time and for the words of motivation.

I would also like to thank Ms Mshengu and Mr Ramsewak of UKZN, for all the support administrative and otherwise.

Lastly, I take this opportunity to thank the person that took a challenging task of supervising me despite many hurdles and challenges. Mr M. Mpya who supervised this theses and facilitated a great challenge and managed it very well. I have great respect for him. I am hopeful that he will show the same level of enthusiasm he has shown with me on his other students.

ABSTRACT

Post-1994 and following the adoption of the Constitution of the Republic of South Africa on 8 May 1996, the Constitution has since become the supreme law of the country and any conduct or law that is in conflict with its provisions is invalid. The constitution is founded upon particular values, namely, human dignity, equality and the advancement of human rights and freedoms. Amongst others, the 1996 Constitution governs the establishment and administration of prisons with the inclusion of the rights of the prisoners. This dissertation discusses how the rights of prisoners are protected including the perceived violations. Due to the high number of violations of prisoner's rights, this dissertation will also discuss the various court decisions relating to the previously mentioned violations.

The purpose of this dissertation is, to do an in-depth analysis on the protection and violation of prisoner's 'right of access to healthcare' as provided in terms of section 27 of the Constitution of the Republic of South Africa. The dissertation will endeavour to expose the violations, provide an in-depth view of the extent of the violations through case studies. The implementation of the provisions of section 27 will be evaluated to determine if the prisons have been adequately protecting prisoners. In addition to the latter analysis, the prison's shortfalls will be highlighted with the inclusion of a brief legal position in other countries. The dissertation acknowledges the existence of the prisoners' rights, although the implementation thereof by prisons remains questionable and a source of controversy in the medico-legal sphere.

The dissertation ultimately concludes that the 'right of prisoners to access healthcare' should be monitored on a regular basis to ensure those prisoners' rights are not constantly violated. The dissertation further concludes that the continued oversight will reduce the number of court cases and ultimately the State's resources on cases that involve the violation of prisoner's rights and thus uphold the spirit and purpose of the Constitution of the Republic of South Africa.

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CHAPTER ONE

HISTORICAL BACKGROUND

1.1 OVERVIEW

1.1.1 *Prior to 1994*

In order to understand the current human rights issues in the SA correctional services system, it is crucial to consider the political role accorded the system of incarceration by the apartheid rulers and the manner in which prisons were run during this period.¹ This history of incarceration in apartheid South Africa reflects all the predictable attributes of racial prejudice and capitalist exploitation.²

During this period, the treatment of prisoners reflected the separatist ideology of the apartheid regime.³ Furthermore, prisoners were separated based on the colour of their skin and received different treatment.⁴

The correctional services department's general attitude towards prisoners was that they had been deprived of their freedom and that they therefore, had no rights, only privileges.⁵ This attitude was often endorsed by the South African courts when prisoners - especially prisoners incarcerated for political reasons - challenged their treatment at the hands of the Department.

In *Rossouw V Sachs*, for example, the Appellate Division questioned whether regulations made in terms of detention legislation conferred any legal rights upon prisoners and found that detainees had a right to the necessities of life but that they had no right to any 'comforts'.⁶ Later, in *Goldberg and Others v Minister of Prisons and Others*, the Appellate Division confirmed that long-term prisoners had no right to reading materials because these did not constitute 'necessities'.⁷ By 1993, however, the political atmosphere in

¹ A brief history of prisons in South Africa 'Monograph 29 – correcting corrections October 1998. Published by the Institute of Security Studies. Accessed at': <http://www.iss.co.za/pubs/Monographs/No29/History.html>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Pierre De Vos, '*Prisoner's rights litigation in South Africa since 1994: A critical evaluation*'. Pg 3 Accessed at: <http://www.saflii.org/za/journals/LDD/2005/6.pdf> last accessed 12 October 2018.

⁶ *Ibid.*

⁷ *Ibid.*

South Africa had changed and, in a remarkable turnaround, the full bench of Appeal Court in the case of *Minister of Justice v Hofmeyer* rejected this distinction as of little value because it was a blurred line dependent on the particular circumstances of the case.⁸

While the law as enforced by the South African courts now recognised the basic rights of prisoners, this was not reflected in the way the Department of Correctional Services dealt with prisoners from day to day.⁹

Prior to 1994, racial discrimination against all black people affected people's health in many ways.¹⁰ At that stage, black people, detained or free, did not have adequate access to healthcare facilities.¹¹ It was even worse for Prisoners. Various discriminatory conduct against all blacks included:¹² social conditions that caused ill health; the segregation of health services; unequal spending on health services; and the failure of professional medical bodies and civil society to challenge apartheid health. More than 10 years after our democratic elections in 1994, South Africa is still recovering from the many violations of the human right to health that took place systematically under apartheid laws and policies.¹³

1.1.2 Post-1994

In South Africa (“SA”), all prisoners have rights. In addition, prisoners who are awaiting trial and prisoners who have not yet been sentenced have certain rights.

In *Minister of Justice v Hofmeyr* (1993),¹⁴ the Supreme Court of Appeal held that “*the prisoner retains all his personal rights save those abridged or prescribed by law... the extent and content of prisoners’ rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights.*” Since this 1993 case, a new Constitution has been passed, and prisoners’ rights are protected by

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Section 27, ‘A background to health law and human rights in South Africa’. Pg 2 Accessed at: <http://www.section27.org.za/wp-content/uploads/2010/04/Chapter1.pdf> last accessed 20 November 2018.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Minister of Justice V Hofmeyr* (240/91) [1993] ZASCA 40; 1993 (3) SA 131 (AD); [1993] 2 All SA 232 (A) (26 March 1993).

the Constitution. Under the Bill of Rights in the Constitution, no person may be detained arbitrarily (for no reason) or “without just cause” (a good reason).

The current legal framework in South Africa is one that has transformed over the years from a system that was based on segregation of people according to race and background.¹⁵ To a system that attempts to achieve the most possible form of fairness and equality and to ensure dignity for all citizens.¹⁶ Indeed, with the proclaiming of a democratic period, the 1996 Constitution became a symbol of adequate protection from unequal treatment.¹⁷ The Constitution caters for every person from young, to females, to the indigenous, regardless of status or standing.¹⁸ The right to equality as enshrined in section 9 of the Constitution extends even to groups such as prisoners.¹⁹

The Constitution is founded on principles of constitutionalism and the rule of law.²⁰ These two principles ensure impartiality and equal standing before the law. In the past, persons who held positions of power enjoyed immunity and were usually not persecuted by the law. One example is how the police force abused the power that was bestowed upon them in the *Steve Biko* case, where a young man was detained and badly injured at the hands of prison employees.²¹ He died because of neglect and not being provided with immediate medical care.²² The significance of the case does not only relate to the negligence and failure to act of the prison officers but also extends to health care providers and how their profession requires them to act in cases of this nature.²³

The Steve Biko occurred before the final Constitution of South Africa was in effect. The ordeal has been revisited for guidance purposes by academics and politicians.²⁴ To be noted is how the legal system that was in place when the case occurred failed to address

¹⁵ Xolela Mangcu. *Biko, A Biography*, 2012, Ohio University Press page 34.

¹⁶ Founding Provisions of the Constitution of The Republic of South Africa, 1996, hereinafter referred to as ‘The Constitution’.

¹⁷ The Constitution of the Republic of South Africa, 1996.

¹⁸ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

¹⁹ *President of the Republic of South Africa v John Phillip Peter Hugo* Case CCT 11/96.

²⁰ The principle of the Rule of Law, information accessed at <http://koersjournal.org.za/index.php/koers/article/viewFile/848/959>. Accessed on 22 March 2018.

²¹ Steve Biko Biography - South African History Online, ‘*Since the Death of Biko – 40 years*’. Accessed at: <https://www.sahistory.org.za/people/stephen-bantu-biko> last accessed 12 November 2018.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

cases of this nature.²⁵ South African courts still to date receive cases related to mistreatment of prisoners, in particular, the violation of rights related to access to health care and the right to adequate health in general.²⁶

The Supreme Court of Appeal in the case of *Minister van Polisie v Ewels* [1975] ZASCA 2 (23 May 1975) upheld the doctrine of the rule of law and principle of constitutionalism.²⁷ The failure of the full implementation of these two principles in our domestic law created a vulnerable group of persons (prisoners), who face violation of their rights whilst in prison. The violations occur directly and indirectly through both omission and positive acts. In *Minister van Polisie v Ewels*, an off-duty police officer in a police station, supposedly in the presence of a more senior police officer who failed to intervene, assaulted a person.²⁸

Further to the above, the court broke away from the 'prior conduct' approach and held that delictual liability for a mere omission need not be connected to such prior conduct. On this basis, the Minister van Polisie was ordered to pay the delictual damages claimed.

Constitutionalism is a theory that underpins the current Constitution under the separation of powers.²⁹ The theory is based on the notion that state organs should have sufficient authority, however, such authority should be limited.³⁰ Section 2 of the South African Constitution declares the Constitution as the supreme law of the land. The result of that has been the abolition and repealing of earlier acts of parliament that undermine the spirit and purport of the Bill of Rights. The Constitution has influenced the enactment of the new legislation that governs the correctional services with the new Correctional Services Act 111 of 1998. This Act repeals the old Act³¹ that was in effect before the final promulgation of the 1996 South African Constitution.³²

²⁵ *Ibid.*

²⁶ *Lee v Minister of Correctional Services* 2011 (2) SACR 603 (WCC).

²⁷ *Minister van Polisie v Ewels* [1975] ZASCA 2 (23 May 1975).

²⁸ *Supra.*

²⁹ Judge Phineas M Mojapelo, 'The Doctrine of separation of powers (a South African perspective)'. Pg 5 Accessed at: <https://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf> last accessed 11 November 2018.

³⁰ *Ibid.*

³¹ Correctional Services Act 8 of 1959.

³² *Ibid.*

The 1996 Constitution is underpinned by the rule of law and this theory is seen not only in section 1, which contains founding provisions of the Constitution. Simply put, the rule of law only allows state organs to act in accordance with what the law provides, That is to say, to act in accordance with the law.³³ Examples would be persons in positions of power acting according to what the law provides and within the ambit of the authority provided by the enabling statute.³⁴

The second basis of the study is to discuss the implication of medicine in cases of detention. Furthermore, the role that Medical practitioners play concerning the violation of health-related rights that occur against inmates whilst in detention. The Hippocratic Oath binds medical professionals to a level of ethical standard they must possess during the carrying out of their duties.³⁵

1.2 THE AIMS AND OBJECTIVES OF THE STUDY

The aim of the study is to critically analyse the extent of violation of the rights of prisoners in SA with specific reference to the right of access to health care. The analysis will examine:

- whether the role of the Constitution in cases concerning prisoners violated rights;
- whether the prevalence of cases of such violations is as a result of inadequate policies or legislation, and key legislation after 1996 to address abuse and violations faced by prisoners;
- the role of the Human Rights Watch (HRW) in cases of violation of prisoners' rights, the study will also consider the role of the SAPOHR, in cases of violations; and
- the problems of violations of the rights of prisoners whilst in detention, by looking at the governing policies at an administrative level.

The above objectives bring about the following questions

- Whether this violation can be accounted for; and

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

- Whether administrative policies are consistent with the Constitution.

Seemingly, each policy must be tested against the Constitution on the basis that SA's legal framework may be failing to cater for human rights of prisoners. The courts are faced with a high influx of cases for delictual claims from prisoners who claim³⁶ one or more of their human rights being violated in prison. Among these cases are prisoners have sued the DCS for failing to put measures to protect them from contracting contagious diseases.³⁷ There have also been cases where prisoners claimed a violation of the right to access medical treatment.³⁸ The right as entrenched in the Constitution under section 35 (2) (e) which states that detainees have a right to adequate medical treatment. The inmates sued the department successfully.³⁹ It will also consider the current legal reform that addresses this right of access to health care by examining the National Health Act 61 of 2003, and the Correctional Services Act 111 of 1998.⁴⁰

The study will also consult international treaties that relate to the issue of the violation of prisoners' rights while in detention. The declaration on torture will be looked at as it provides useful information about how medical practitioners should conduct themselves in such cases.

The research has to look at the current legal framework that South Africa has concerning these violations, by looking at legislation that regulates the criminal justice system. The Correctional Services Act⁴¹ is one that was promulgated after the Constitution. The Act could appear to be well drafted but the issue would be with the implementation of the Act.

In addition to the above, the Act will offer insight into how far the country has come since 1994. The Act with amendments that shall be looked at closely to examine for their consistency with the Constitution of South Africa. The study will not be limited to the cited

³⁶ *Lee v Minister of Correctional services 2011 (2) SACR 603 (WCC).*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Van Biljon v Minister of Correctional Services 1997 (4) SA 441 (C).*

⁴⁰ The Police force is now regulated and a new organisation has been put in place to guard against cases of torture, the aims can be found at <http://www.apr.ch/>. Accessed on the 25 March 2018.

⁴¹ The Correctional Services Act 111 of 1998.

sources only. Other case law and statutes will be examined with international treaties and white/ policy papers to give the research meaning.

While some scholars have discussed the violation of prisoner's human rights,⁴² some have been able to analyse legislation and international treaties, yet, there is little literature with reference to the healthcare system in prison and access to it. There is also limited in-depth analysis of recent case law of this nature that has recently come before our courts, long-term effects of such violations in the end. There is also the scarcity of literature dealing with the role that health-care professionals play concerning the said violation.

The study will further examine problems of violations of the rights of prisoners whilst in detention, by looking at the governing policies at the administrative level. In addition, to be examined will be the validity of the justification that may be put forward by the state. The study will examine if the justification is legally valid. With the examination of the rights of prisoners, the right to access to health care and access to health care will be examined to analyse medico-legal implications of violation of the rights.

1.3 THE STATEMENT OF THE PROBLEM

The effects of past segregation on democratic South Africa has led to many concerns such as poor service delivery of basic services, such as water.⁴³ There is also a delay in the delivery of justice from the justice system and inadequate policies dealing with vulnerable groups such as women, children, the marginalised, and prisoners. The Correctional Services Act 111 of 1998 is intended to address this situation and the environment that detainees are kept under. This Act came into effect after the current Constitution of South Africa. The Correctional Services Act referred to above, was promulgated to complement the spirit and purport of the Constitution.

Nevertheless, in cases that have come before the courts in South Africa prisoners have alleged violation of their rights to access to adequate health-care. This indicates that there

⁴² Mason "Do prisoners in South Africa have a constitutional right to holistic approach to antiretroviral treatment?" (2013) Vol.6 No.2 *SAJBL* page 2. Accessed at: <http://www.sajbl.org.za/index.php/sajbl/article/view/290/311>. Last accessed – 18 July 2019.

⁴³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

have not been adequate changes since the past when prisoners had limited access to health care services due to the conditions of detention. The situation is still unchanged even in light of the Constitution. The courts have had to qualify the right to access to medicines as seen in the case of *B and Others v Minister of Correctional Services*.⁴⁴ The applicants wanted the Department of Correctional Services to provide them with ARV medication. The court held that s35 (2) (e) of the Constitution, which guarantees access to health care applies to inmates as well.

The role of health care practitioners is not adequately established in legislation.⁴⁵ The medical practitioners in most cases describe the situation in detention to be a unique one and suggest that the Department of Correctional Services is failing to provide adequate facilities to treat prisoners. In the *Lee, the case* during the giving of evidence the expert witness stated under oath how the department failed to implement recommendations the medical practitioners suggested. The legal framework and the medical profession ethical framework does not describe how they should conduct themselves in such cases.

Section 27 of the South African Constitution does not discriminate and seems to be drafted to cater for prisoners. Section 9 of the Constitution allows for the equal treatment of individuals before the law. That can be understood to include prisoners. Yet, this right was not extended to prisoners. This then leaves a question as to whether medical providers have established policy for dealing with prisoners and whether they can be found liable at law for failing to act in accordance with the rules prescribed.

Legislations enacted in place to give effect to section 27 include the National Health Act⁴⁶ the act refers to citizens in need of medical services that can be understood to include inmates, furthermore, the act regulates obligations that medical personnel including nurses have with regards to users/ patients of medical services. Another Act that seems to cater to inmates, perhaps even more specifically so is the Correctional Services Act⁴⁷. The contents of the act will be discussed in the following Chapters. Another act that

⁴⁴ *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C) 2.

⁴⁵ The Correctional Services Act 58 of 1998.

⁴⁶ See the preamble of the National Health Act 61 of 2003.

⁴⁷ Correctional Services Act 111 of 1998.

includes by implication inmates is the health professions Act⁴⁸ the contents of the Act focus on omissions and conduct that may lead to the inquest and subsequent disciplinary hearing of a Medical Professionals that fail to conform to the standards required by the Act.

Another legislation that seems to include accused persons even though they may not have been found guilty is the Criminal Law Sexual Offences and Related Matters Amendment Act.⁴⁹ This Act contains a provision, which seems to allow the state as requested by the alleged victim to insist on a blood test without the consent informed or otherwise from the alleged offender to establish if the alleged offender is HIV/AIDS positive. The issue of consent raises issues, which will be discussed later in chapters to follow.

1.4 RESEARCH METHODOLOGY AND LIMITATIONS OF THE STUDY

The current study was carried out as a desk study. The literature review was designed primarily as a descriptive study to provide baseline information on the existing court cases and journal articles under investigation.

Because the study is limited to desktop based, research the study will lack data that is recorded from real victims experiencing the violations. However, journals and other sources that reflect statistical figures will be consulted in the hopes of gaining insight into the nature and extent of the problem. Media sources will also be consulted to give an indication of how the public reacts to violations of the rights of prisoners that is noted as a limitation because media sources may not reflect the facts.

1.5 RATIONALE OF THE STUDY

Due to many cases that have come before the courts one may infer that the Correctional Services Department system is not fully functional, however, it can be proved beyond reasonable doubt that the Department is fully well funded by Government.⁵⁰ The significance of the study is to raise awareness on violations that still occur in South Africa.

⁴⁸ Health Professions Act 56 of 1974.

⁴⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁰ *Ibid.*

The Constitution provides a legal framework in which Acts and Policies should be based on.

As such, due to the gross violation of the rights of prisoners, the study then becomes vital to highlight where and how the Department of Correctional Services is failing. One would infer that not only is the Department of Correctional Services but there may well be a miscarriage of law when it comes to the implementation of the rights of prisoners. The study will also highlight at what stage would medical personnel be required to interact with the law, both voluntarily and when they would be required to report suspected violations as compelled by the law. The study will also seek to uncover the realities of practice through the studying of a case that first went to a lower court to, later on go to the Constitutional Court.

1.6 SEQUENCE OF CHAPTERS

Chapter 1 – This chapter will deal with the historical background of the problem, the statement of the problem, the rationale of the research, research design and methodology;

Chapter 2 – This chapter will comprise of a literature review;

Chapter 3 – analysis of the effectiveness of the constitution insofar as protection of prisoners' rights; and

Chapter 4 – This final chapter will suggest recommendations and provide a conclusion.

CHAPTER TWO

THE PRISONER'S CONSTITUTIONAL RIGHTS TO MEDICAL CARE

2.1 INTRODUCTION

In recent years, there has been a growing sensitivity to the medical needs of prisoners in SA.⁵¹ The Constitutional right to access healthcare has been entrenched in the 1996 Constitution.⁵² The Correctional Services Act 111 of 1998 designed to guard the prisoner's rights and medical well-being was enacted.⁵³ In addition, perhaps most importantly, the notion of constitutional right to in-prison medical care, arising out of the provisions of section 35 of the 1996 Constitution's prohibition of cruel and unusual punishment has shown renewed promise of providing significant protection to the prisoners.⁵⁴

The focus on this dissertation will be is placed on sections 9 (the equality clause), 27 (access to health care services) and section 35 (arrested, detained and accused persons).⁵⁵

2.2 THE SA CONSTITUTIONAL RIGHTS OF PRISONERS

Given the political history as discussed in chapter 1 of this dissertation, it does not come across as a surprise that the 1996 Constitution contains explicit provisions protecting anyone who finds himself in prison.⁵⁶ This does not only apply to prisoners awaiting trial but also sentenced prisoners are explicitly protected in terms of section 35 of the 1996 Constitution.

The courts have long recognized that correctional services authorities have a Constitutional obligation to provide access to in-prison medical care. This is based on the premise that due to the deprivation of his liberty, the prisoner cannot take care for himself.

⁵¹ Mubangizi 2003 Obiter 214. *For a discussion of private and state funding see Van Oosten 1999 De Jure 1-18. See also Davis and Cheadle et al Fundamental Rights at page 358.*

⁵² The Constitution of the Republic of South Africa, 1996.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ See also s 7(1) Constitution: "*This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom.*"

⁵⁶ *Minister of Correctional Services v Kwakwa and Another 2002 (4) SA 455 (SCA).*

A prisoner who has been injured by the negligence of a prison official or the medical malpractice of a prison physician can also claim damages.

2.2.1 Section 35

In particular, section 35(1) protects the rights of prisoners. However, for the purposes of this dissertation, the most important section of the Constitution is section 35(2) which states that everyone who is detained has a 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'. The Bill of Rights furthermore protects everyone's rights to human dignity.

2.2.2 Section 9 of the Constitution: Equal before the Law

Section 9 that deals with non-discrimination has a special place in the Bill of Rights, and sets its face, against laws and practices that reinforce the subordination of disadvantaged groups.⁵⁷

In *Harksen v Lane* the determination of whether or not the equality clause may in fact be invoked requires an inquiry into the fact of whether or not there is differentiation between people or categories of people.⁵⁸ If such is different, it must be determined if there is a rational connection to a legitimate government purpose.⁵⁹ The court went on to say that, even if there is such a rational connection it might, nevertheless still amount to discrimination.⁶⁰

2.2.3 Section 27 of the Constitution: Access to Healthcare Services

Health care is generally considered a basic need. Section 27(1)(a) of the Constitution provides specifically that everyone has the right to have access to health care, including reproductive health care.⁶¹ This right is limited internally by section 27(2), which provides

⁵⁷ *Brink v Kitshoff* NO 1996 4 SA 197 (CC). See also *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

⁵⁸ *Harksen v Lane* 1998 1 SA 300 (CC).

⁵⁹ *Harksen v Lane* 1998 1 SA 300 (CC).

⁶⁰ *Harksen v Lane* 1998 1 SA 300 (CC).

⁶¹ M Swanepoel, 'Human Rights that influence the mentally ill patient in South Africa Medical Law: A Discussion of Section 9, 27 and 35 of the Constitution.' Pg 1. Accessed at: <http://www.saflii.org/za/journals/PER/2011/41.pdf> last accessed 16 November 2018.

that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.⁶² The Constitution does not guarantee a right to health, but only the qualified right of access to health care services.⁶³ A further question that is of importance in understanding the right of access to health care services is that of the nature and level of care to which people are entitled.⁶⁴

In the case of *Soobramoney v Minister of Health Kwazulu-Natal* the Constitutional Court had to interpret the scope and content of the right of access to health care services guaranteed under sections 27(1)(b) and 27(3).⁶⁵ Mr Soobramoney, the appellant, was a 41-year old diabetic suffering from heart disease, vascular disease and irreversible chronic renal failure.⁶⁶ His life could be prolonged by means of regular renal dialysis. He sought dialysis treatment from the Addington State Hospital in Durban.⁶⁷ He was not admitted to the dialysis programme of the hospital.⁶⁸ Because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure, its policy was to admit to the renal dialysis programme those suffering from acute renal failure that could be treated and remedied by renal dialysis.⁶⁹

In July 1997 the appellant, relying on sections 27(3) and 11 of the Constitution, made an urgent application to a local division of the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital.⁷⁰ The application was dismissed. The appellant appealed to the Constitutional Court. The Constitutional Court held that Obligations imposed on the state under section 27 of the Constitution were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited because of the lack of resources.⁷¹

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC). Renal dialysis is a Procedure to preserve or extend someone's life when their kidneys have stopped functioning.

⁶⁶ *Supra*, see *Soobramoney* case referred to above.

⁶⁷ *Supra*, see *Soobramoney* case referred to above.

⁶⁸ *Supra*, see *Soobramoney* case referred to above.

⁶⁹ *Supra*, see *Soobramoney* case referred to above.

⁷⁰ *Supra*, see *Soobramoney* case referred to above.

⁷¹ *Supra*, see *Soobramoney* case referred to above.

2.2.4 Prisoner's Constitutional Right to Medical Care

As discussed in this dissertation, a prisoner has a Constitutional right to needed medical treatment. Imprisonment is the punishment for crime and as such, when deprivation of needed medical care is added to the imprisonment, the additional suffering it causes constitutes cruel and unusual punishment in excess of that imposed.⁷² On this basis, the denial of needed treatment will be in violation of section 9, 27 and 35 of the 1996 Constitution. It has to be noted that, while, this right is easily stated, the standard of medical care that it imposes is not.

Prisoners are a vulnerable group due to the deprivation of some of their rights, including the right to movement, association and freedom of trade. Prisoners always had these rights, even during incarceration.⁷³ The rights of prisoners that cannot be limited are contained in various instruments.⁷⁴ Such rights are inherent to all human beings – with no discrimination.⁷⁵

2.3 INTERNATIONAL PERSPECTIVE ON THE PROTECTION OF PRISONERS' RIGHTS

The independence of each state is what defines sovereignty? However, due to the sovereignty of all states, international organisations such as the United Nations, International Criminal Court of Justice, and World Health Organization are not inclined to undermine such sovereignty. Thus, the United Nations has used its authority to enact treaties that would serve as binding agreements when assented to and effectively states that agree to the treaty are bound to such a treaty. The United Nations enacted an instrument, the Universal Declaration on Human Rights (UDHR)⁷⁶ as guidelines that would give guidance to all states on in terms of upholding the prisoners' fundamental rights. The Declaration would influence more instruments to be enacted.

⁷² *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

⁷³ *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A).

⁷⁴ Universal Declaration of Human Rights adopted by resolution 217A (111) of the United Nations General Assembly on 10 December 1948. See article 5.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

2.4 THE UNIVERSAL DECLARATION ON HUMAN RIGHTS

The Declaration contains 30 articles, which contain core rights that serve as a guiding mechanism in terms of which laws may be built on.⁷⁷ This Declaration is not binding, but serves as a guideline for how states must build their law.⁷⁸ The rights contained in the articles relate to prisoners, largely.⁷⁹

Other instruments were later drafted and upon ratification, they would compel states to abide with such new provisions, although the UDHR is not binding.⁸⁰ More can still be done in an effort to ensure uniform obedience to and respect for all human rights.⁸¹

2.5 BASIC PRINCIPLES FOR THE TREATMENT OF PRISONERS

The United Nations General Assembly adopted the Basic Principles for The Treatment of Prisoners Proclamation on 14 December 1990.⁸² It contains provisions that address how prisoners should be treated.⁸³ Among the rights contained in the proclamation, the most relevant were:⁸⁴

- all prisoners shall be treated with the respect due to their inherent dignity and values they hold as human beings;
- there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- the responsibility of prisons for the custody of prisoners and protection of society against crime shall be discharged in keeping with a state's other social objectives

⁷⁷ WJ van Vollenhoven, *'the right to freedom of expression: The mother of our democracy'*. Accessed at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000600009 last accessed 10 November 2018.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ MA Glendon, *'The Rule of Law in the Universal Declaration of Human Rights'*. Accessed at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1008&context=njihr> last accessed 9 October 2018.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

and its fundamental responsibilities for promoting the wellbeing and development of all members of society;

- apart from the limitations that are demonstrably necessitated by incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights;
- where the state concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the optional protocol thereto, as well as such other rights set out in other United Nations covenants;
- the abolition of solitary confinement as a punishment or the restriction of its use should be undertaken and encouraged; and
- prisoners shall have access to the health services available in the country – without discrimination based on their legal situation.

2.5.1 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) is a multilateral treaty.⁸⁵ The ICCPR was adopted by the United Nations General Assembly through GA.⁸⁶ Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant. South Africa signed this treaty on 3 October 1994, ratified it on 10 December 1998 and it came into force on 10 March 1999.⁸⁷ That means an obligation exists and South Africa must incorporate the provisions of the treaty into its legal system. Among the 30 provisions, the most relevant articles are the following:

- Article 7 states that –

⁸⁵ South African Human Rights Commission, ‘*Civil and Political Rights Report 2016/17*’. Pg 3. Accessed at: <https://www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf>.

⁸⁶ F Viljoen, ‘*An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications*’. PER vol.17 n.6 Potchefstroom 2014. Accessed at: <http://dx.doi.org/10.4314/pelj.v17i6.09> last accessed 11 September 2018.

⁸⁷ International Covenant on Civil and Political Rights, 23 March 1976.

*“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”.*⁸⁸

- Article 10 states that –
“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.
- Article 10 further states that –
“Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons”.
- Finally, Article 26 states that –
*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.*⁸⁹

The abovementioned Articles were all enacted with the spirit and purport of curbing, if not preventing, the violation of prisoners fundamental rights.

2.5.2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which is dominantly referred to as the United Nations Convention against Torture (“UNCAT”)) is an international human rights treaty that endeavour to prevent

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

torture and other acts of cruel, inhuman, or degrading treatment or punishment worldwide.⁹⁰

In terms of this treaty, states are required to take effective measures to prevent torture in any territory under their jurisdiction, and forbids states to transport people to any country where there is reason to believe they will be tortured.⁹¹

The detention of such prisoners was related to various reasons – some political and some were held with the sole intention of obtaining information.⁹² This Convention is still relevant today, especially in the South African context.⁹³ The Convention does not include pain or suffering arising only from inherent or incidental lawful sanctions. The Convention defines ‘other cruel, inhuman or degrading treatment’ as: other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

2.5.3 Principles of Medical Ethics Relevant To the Role of Health

These principles were adopted in resolution 37/194 of December 18 in 1982 by the United Nations General Assembly to address the role medical personnel play relating to torture of detainees. The principles would address the issue of gross violation of the rights of prisoners mainly the right to healthcare. The principles also relate to the active or passive participation of medical personnel in issues relating to the torture of detainees.⁹⁴ The enforcement of these instruments, however, is still lacking largely.

⁹⁰ L Fernandez, ‘Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment as adopted in 2002 by the UN General Assembly 57/1999: Implications for South Africa’. Pg 7. Accessed at: <http://www.saflii.org/za/journals/LDD/2005/7.pdf>.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ J Sarkin, ‘Prisons in Africa: An evaluation from a human rights perspective’. Sur, Rev. int. direitos human. vol.5 no.9 São Paulo Dec. 2008 accessed at: <http://dx.doi.org/10.1590/S1806-64452008000200003> last accessed 11 October 2018.

2.6 REGIONAL INSTRUMENTS

2.6.1 INTRODUCTION

Africa has been associated with the gross violation of the human rights of various groups of people, including prisoners.⁹⁵ Due to poverty, in African countries the abuse of the rights of prisoners go unpunished because of the lack of infrastructure and of a well-established framework, and respective governments make attempts to curb the issues with legislation that evidently fail due to a lack of enforcement. The most notable legal instrument is the African Charter.⁹⁶

2.6.2 *African Charter on Human and Peoples' Rights*

The Charter is a legally binding treaty in South Africa and came into operation to address the many issues faced.⁹⁷ In relation to the regulation and protection of the rights of prisoners, the treaty makes no direct provision for them.⁹⁸ The Charter gives an indication in article 4 that caters for prisoners' rights in that it protects prisoners from unlawful violation of their rights.⁹⁹ The Charter has a series of articles that address a number of issues – some related to prisoners and some not.¹⁰⁰ The Charter also cater for the rights of prisoners. It states that every individual shall be equal before the law and every individual shall be entitled to the equal protection of the law.¹⁰¹ The Charter has further articles that directly and indirectly cater for prisoners:¹⁰²

- Article 4 states that every human beings are inviolable, that very human being shall be entitled to respect for his life and the integrity of his person, and that no one may be arbitrarily deprived of this right;

⁹⁵ *Ibid.*

⁹⁶ African Charter on Human and Peoples' Rights, 21 October 1986.

⁹⁷ Daniel Abebe, "Does International Human Rights Law in African Courts Make a Difference?," 56 Virginia Journal of International Law 527 (2017). Accessed at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12639&context=journal_articles last accessed 18 October 2018.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

- Article 5 states that every individual shall have the right to the respect for the dignity inherent in a human being and to the recognition of this legal status. It also states that all forms of exploitation and degradation of man – particularly slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment – shall be prohibited;
- Article 6 holds that every individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained;
- the Charter also makes reference to prisoners in article 16, by stating that every individual shall have the right to enjoy the best attainable state of physical and mental health; and
- Article 19 goes further and states that all people shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

The objective is to draw for South Africa an ideal situation where the rights of prisoners are respected and contained in proactive legislation. The current legal framework does not meet the ideals that the international community requires as a universal phenomenon. The legislation¹⁰³ that South Africa has enacted has largely failed to protect the rights of prisoners.¹⁰⁴ The rights of prisoners in various pieces of legislation¹⁰⁵ still fail to be implemented in their favour. The Constitution¹⁰⁶ allows the courts to consider international law when interpreting the law.¹⁰⁷ That puts South Africa in a favourable position – as there is a well-established legal framework regulating the rights of prisoners.¹⁰⁸ This situation appears paradoxical in that all other treaties are failing to meet the demands of the Constitution in so far as implementation is concerned.

¹⁰³ *Ibid.*

¹⁰⁴ S Liebenberg, 'Human Development and Human Rights South African Country Study'. Pg 8. Accessed at: http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf last accessed 11 September 2018.

¹⁰⁵ The Criminal Procedure Act 51 of 1977.

¹⁰⁶ The Constitution of the Republic of South Africa, 1996.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

2.6.3 South African Perspective on the Legal Framework of Prisoners

There has been comment and publication by academics, on issues relating to prisoners.¹⁰⁹ Some authors have argued that the government is failing and some have argued that prisoners have rights, while some have analysed international instruments.¹¹⁰ Mason argues that a specific aspect of antiretroviral (ARV) treatment should be made available as part of access to healthcare.¹¹¹ He refers to international instruments like the Universal Declaration of Human Rights (UDHR), ICCPR and ICESCR and others that South Africa has ratified. He refers – in making his point to the constitution that states that conditions of imprisonment must be consistent with dignity. Mason maintains that prisoners do not lose their rights when they are in detention. He therefore agrees with *Mubangizi* who argues that prisoners should not lose their rights.¹¹²

Mason makes reference to the classical case of *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A), in which it is discussed in detail how the rights of the prisoners are not ever lost during detention except for rights that have been limited by law. In the case, an example is made of the right of freedom of movement. In addition, prevalence is the aspect of police brutality that is still prevalent in the new democratic South Africa. Both Mason and Mubangizi illustrates that prisoners have rights even in detention. Another author¹¹³ goes further and puts the right to adequate health under the category of socio-economic rights.¹¹⁴

The author mentions that the Constitution of South Africa provides for the right to adequate healthcare, and that South Africa has ratified many international treaties but is still failing to realise socio-economic rights.¹¹⁵ The 2008/9 annual report issued by the Judicial Inspectorate gives clear indications that the rights as cited in the South African

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ N Motala and D McQuoid-Mason 'Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?' (2013) 6(2) *S Afr J BL* 40-44.

¹¹² J C Mubangizi 'Some reflections on the promotion of the rights of the rights of prisoners in South Africa' (2002) 15(2) *Acta Criminologica* 26-34.

¹¹³ E Harvey 'An intervention by rape crisis at Pollsmoor Prison' (2002) 11(2) *Track Two* 44-51.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid*

Constitution are being infringed upon, including the right to access healthcare while in detention.

The discourse deals with the issue of medical parole. Medical parole is a part of the right to access to healthcare, as the prisoners, when released, may be able to be well taken care of in a manner that a prison facility cannot. In that aspect, Mason states that palliative care is not available in prisons and highlights the option of releasing compassionately. Mason also seems to think that palliative care and compassionate release are part of the right to access to healthcare. The article also mentions how prisoners are not screened for fatal chronic illnesses like TB.

There is also a lack of attention to those in need of medical care – until it is too late. Marodi¹¹⁶ states that overcrowding is a direct contributing factor to violations of the rights of prisoners and that overcrowding and mortality rates have been rising because of neglect. The Author considers that overcrowding has increased at an alarming rate and explains how the rate of 15% is abnormally high.¹¹⁷ He points out that the high mortality rate is linked with violations of human rights.¹¹⁸ This has been noted by the International Human Rights Committee, whose report reflects South Africa as a country that has contributed to prisoners' deaths because of torture-related incidents.¹¹⁹

Harvey argues differently and focuses on incidents such as sexual violence in detention. Although that may be regarded as a deviation from the purpose of this research, the occurrence of this criminal activity among inmates suggests a failure to act by prison personnel. In essence, after such criminal activity, if there are injuries that require attention from a healthcare provider, then the Article is vital.

Harvey also contributes to the somewhat limited literature on the issue of male rape. At the time, South African law had not adequately given meaning to what male rape is, and the author states that male-to-male rape in prison is a crime.¹²⁰ She also states that the

¹¹⁶ L R Morodi 'Constitutional Rights of Prisoners within the criminal justice system in SA' (2001) 4(4) *Crime Research in South Africa* 1-14.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

prison facility is not well equipped to deal with the aftermath of this type of crime. Mason makes the same assertion and says the prison system is failing to rehabilitate prisoners, as the process is hindered due to the trauma inmates face while in detention. Mason also mentions how medical attention is delayed and in most cases denied – leading to the transmission of HIV/AIDS and other related infections, psychological trauma, and physical harm. Mason notes that after the prisoners experience such trauma, medical assistance is not administered – leading to more problems.

Bruyns *et al*¹²¹ agrees with Marodi about overcrowding, but goes further to discuss means to reduce the current prison population.¹²² They also suggests that when the population exceeds the normal range – then it creates idleness, and that then cultivates criminal activity. On the issue of prisoners being idle, he concurs with Harvey.¹²³ Both these authors note criminal activity among prisoners in detention. Mason¹²⁴ looks at the aftermath in the event that a prisoner has HIV and whether there will be access to ARV treatment.

Furthermore, Bruyns puts forward another argument based on the principle of deterrence with special reference to South Africa – and claiming that it is not working.¹²⁵ The Author also argues that the current system of transferring of prisoners to other crowded facilities defeats the purpose and that due to overcrowding; inmates commit crimes against one another. The Author suggests that a regulating policy may be the only way to combat the failing system in South African prisons. The right to adequate health care is contained in the Constitution.¹²⁶ The argument is based on whether the government has an obligation to realise this right. Bruyns further argues in terms of reasonableness with regard to realising the right to adequate health, and continues to discuss the shortcomings of the DCS in terms of supporting the right, as contained in the Constitution.¹²⁷ She draws a link

¹²¹ H J Bruyns & C H Cilliers 'A review of imprisonment and deterrence programs as a strategy to reduce prison populations' (2009) 1(22) *Acta Criminologica* 81-101.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ J Barnes 'Not too great expectations: Considering the rights to healthcare in prison and its constitutional implementation' (2009) 1 *SAJCJ* 39-68.

¹²⁷ *Ibid.*

between section 27 of the Constitution and section 35 (2) (e) in making the comparison, and argues they should be not read separately as they complement each another.¹²⁸

2.6.4 Limitation of the Rights of Prisoners

The rights in the South African Constitution¹²⁹ can be limited only by general application of the law, under section 36.¹³⁰ Section 36 states that ‘the rights in the bill of rights may be limited only by means of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’¹³¹ In this instance all relevant factors should be taken into account including, the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose’.¹³² Section 36(2)¹³³ states that ‘except as provided in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bills of Rights.

The limitation of the rights of prisoners should be determined by what the law provides for – considering the rationale for the limitation and having regard to the above elements that are taken into account when limiting a right.¹³⁴ The *S v Makwanyane*¹³⁵ case illustrates such an application. The case involved an inmate who was sentenced to death. The Act¹³⁶ allowed the death penalty. Although the *Makwanyane* case pre-dated the final Constitution, it is relevant, as the limitation clause did not change from the interim constitution. The case included many arguments – including the limitation of rights. Furthermore, the case becomes relevant as it involved the rights of prisoners and whether they can have a violation of a right justified under the limitation clause of section 36 of the

¹²⁸ *Ibid.*

¹²⁹ The Constitution of the Republic of South Africa, 1996.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ L Muntingh, ‘Prisons In A Democratic South Africa – A Guide To The Rights Of Prisoners As Described In The Correctional Services Act And Regulations’. Pg 4. Accessed at: <https://acjr.org.za/resource-centre/Prisons%20in%20a%20Democratic%20South%20Africa%20-%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf> last accessed 4 November 2018.

¹³⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) (102).

¹³⁶ The Criminal Procedure Act 51 of 1977.

Constitution. Section 36 is listed as an aspect that should be considered when dealing with the limitation of rights. The nature of the right that is to be limited is tested against the benefit that will arise from such a limitation. Once the balance is achieved, then law may limit certain rights. In *Makwanyane*, the main issues were the constitutionality of the court sanctioning the death penalty. It was also stated that such a sanction would go against the right to life.

The right to life was not the only right that would be violated by the death penalty but also the right not to be subjected to inhuman or degrading punishment.¹³⁷ Human dignity was also raised as a right that would be violated if the death penalty were sanctioned.¹³⁸ Having regard to the three rights that would be violated, the process of deciding whether the sanction is legal is then considered and weighed up against the violation. In the case, it was found that being subjected to inhuman, degrading and cruel punishment was a violation of the human right to dignity, and the right to human dignity carried too much weight to be justified in light of the limitation.

Furthermore, the right to life was also confirmed to be a fundamental right and that no limitation would warrant the violation of such a right, and only in exceptional circumstances would the limit be justified. The second factor listed in the Constitution is the importance of the purpose of the limitation. This aspect requires the limitation of the right to have the purpose it serves; the purpose must be of benefit to the general community. The decision in the case was against the death penalty as it violated basic important rights that the Constitution was founded on.

In addition to the above, the death penalty did have a purpose to serve in that it was an effective way of ensuring that the criminal would be unable to commit further crimes. However, the court still found that the limitation would undermine the values of the Constitution, such as *Ubuntu*. There are exceptions and instances where the purpose

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

relating to the limitation will however be preferred.¹³⁹ The third aspect to be considered is the nature and extent of the limitation.¹⁴⁰

This aspect relates to an enquiry of sorts – the aiding question being does the limitation cause a significant or insignificant violation of the right? Revisiting the court’s argument relating to limitation of rights, the court considered that the death penalty could fulfil the desired goal of deterrence and prevention of more crimes, but it still concluded that the limitation did not offer any significant change.

As such, the court found that the limitation would amount to a gross violation of the right to life, right to human dignity, and right to be free from torture and cruel, inhuman and degrading punishment. The court found the limitation to have no clear benefit and that the violation and limiting of the said rights would amount to violation of the rights the Constitution is based on. The limitation and its purpose are also taken into account when limiting rights listed in the Constitution under section 36.

This aspect relates to the result that could be achieved if the limitation was implemented. That means the benefit would need to be because of the limitation. Revisiting the *Makwanyane* case, the court was of the opinion that the death penalty could serve two purposes successfully – prevention, and deterrence so that the offender does not commit a crime. A third benefit was retribution, and the court was not confident about this benefit. The court was not as confident with deterrence of the commission of crime for other would-be criminals and advanced an argument that the state ought to have adduced evidence to the effect that the limitation would reduce criminal activity.

Effectively, the state failed in their argument¹⁴¹ that the limitation would yield such a benefit. Section 36¹⁴² introduces another aspect of less restrictive means to achieve the purpose of this aspect. This is aimed at ensuring that the benefit of the limitation is achieved by less restrictive means than the limitation must be – such that it could be achieved by less restrictive means. An example is the death penalty – which was the

¹³⁹ An example is when the witness is protected from intimidation by the incarceration of an accused who has not been found guilty by a court of law.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

main issue in *Makwanyane*. In the said case, the court decided that the death penalty was inhumane and unnecessary.

The limitation of the right to life in the hopes of reducing and preventing crime was argued extensively, and it was found that the prevention of crime could very well be achieved by long sentences or life imprisonment. Effectively, the benefit is what is regarded as important and the limitation must be such that it is less limiting as possible. In context, law of general application may limit the rights of prisoners. It does not, however, mean that they do not have rights. The right of access to healthcare is one of the rights that the state organs such as the Department of Health should uphold at all cost. It is also important to note that a limitation of a right in an unlawful manner is a violation of the right.

2.7 CONCLUSION

The international framework for the rights of prisoners is one that should ensure compliance with international standards. This would be achieved if states including South Africa put measures in place, such as legislative measures and institutions to help enforce the standards required by the international community. Furthermore, South Africa has ratified most of the instruments at international and regional level. South Africa also has a Constitution, which provides for equality and fairness and does not discriminate against any group of persons – including prisoners.¹⁴³

However, despite the existence and ratification of the above-mentioned instruments, enforcing such provisions may take some time, and due to the nature of the sovereign state compliance is not always ensured or guaranteed. That translates into human rights abuses, and further abuse of the rights of prisoners. In the South African context, violations of prisoners' rights is still rife – even though South Africa has ratified most of the above-discussed treaties/instruments.¹⁴⁴

¹⁴³ Section 9 of the Constitution of the RSA, 1996.

¹⁴⁴ *Ibid.*

CHAPTER THREE

THE FAR-REACHING IMPLICATIONS OF UPHOLDING THE RIGHTS OF PRISONERS AND THE ROLE OF THE MEDICAL PROFESSION

3.1 INTRODUCTION

The South African Law substantially guarantees the rights¹⁴⁵ and is enforced in courts through notable decisions¹⁴⁶ and the Constitution.¹⁴⁷ The focus of the discussion will be the relevant provisions of the Constitution of the Republic of South Africa, in particular, the provisions dealing with the rights of detainees and prisoners.¹⁴⁸ The chapter will also discuss the right of access to healthcare of prisoners as envisaged in the Constitution. The chapter will further discuss how the rights that relate to healthcare are implemented under the South African Constitution. The mechanisms giving meaningful implementation to prisoners' rights guaranteed in the Constitution the right to healthcare and access to health-care services will be discussed.

3.2 SECTION 2 OF THE CONSTITUTION

The Constitution is the supreme law of the land. Section 2 declares the Constitution supreme and *'that means any conduct which is found to be against the Constitution and its founding values will be declared invalid'*.¹⁴⁹

In addition, the principle of the rule of law was formulated and developed by Legal scholars, among them a lawyer called Dicey,¹⁵⁰ who explained that the rule meant limiting the authority of state organs and that no person is above the law – regardless of economic status or other issues.¹⁵¹ This rule of law principle, therefore, becomes important to this

¹⁴⁵ The Correctional Services Act 111 of 1998.

¹⁴⁶ *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C); *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A); *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

¹⁴⁷ *The Constitution of the Republic of South Africa*, 1996, hereinafter referred to as the Constitution, 1996.

¹⁴⁸ S 35 of the Constitution of the RSA, 1996.

¹⁴⁹ S 2 of the Constitution of the RSA, 1996.

¹⁵⁰ T Blackshield & G Williams *Australian Constitutional Law & Theory: Commentary and Materials* 5 ed (2010) 83-105 (ch 2, s 4 to end of 4(c)).

¹⁵¹ Kevin M. Stack, *'An Administrative Jurisprudence: The Rule Of Law In The Administrative State'*. (2016). Accessed at: <https://columbialawreview.org/content/an-administrative-jurisprudence-the-rule-of-law-in-the-administrative-state-2/> last accessed 2 November 2018.

study, as it curtails the abuse of human rights by the state.¹⁵² The rule of law, according to Dicey, also meant acting in accordance with the law. An example of the application of the rule of law would be a prisoner being afforded rights¹⁵³ and protection by the Constitution.¹⁵⁴ Through the application of the rule of law, such rights should not be violated.

In addition to the above, one may assume that if such rights are violated having due regard to the rule of law – then there is a clear violation of such rights.¹⁵⁵ For example, members of the Department of Correctional Services (DCS) have been alleged to cause undue harm to inmates despite the common knowledge that prisoners have fundamental rights¹⁵⁶ guaranteed in the Constitution.¹⁵⁷ The principle of constitutionalism is also one that can be found when consulting the Constitution. It implies a situation where the state may govern, but also requires that the state's power be limited. The limiting has been rationalised to mean avoiding the violation of the human rights of the right holders, by the state. This also means that the state may not use its power to violate any rights listed in the Constitution and gives authority to specific state organs to act according to the laws, and prescribes the procedure to be followed when doing such. The principle of constitutionalism also contains three principles that flow from constitutionalism.

The first principle is constitutional supremacy. Constitutional supremacy can be understood to mean a higher law a law that contains legal provisions, which are transgressed when other conduct goes against the founding values. An example of such supremacy is the South African Constitution itself. Section 2 of the Constitution, as discussed above, makes the Constitution the supreme law of the land. The striking down of incompatible laws and conduct has been visible over the few past years. The supremacy clause, therefore, makes the Constitution the guardian of new and existing

¹⁵² When a prisoner is assaulted while in the custody of a member of the state or state organ an example is the Steve Biko case discussed below.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ The International Bill of Rights awards rights without discrimination, including prisoners – see the Universal Declaration on Human Rights - adopted by the United Nations General Assembly at its 183rd session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.

¹⁵⁷ *Ibid.*

laws. The Constitution also contains other provisions that facilitate enforcement. Section 172 states that a court of law with jurisdiction may invalidate a law that is inconsistent with the rights guaranteed in the Constitution. Section 165 (5)¹⁵⁸ states that orders made by the court with jurisdiction must be followed by all state parties concerned. The structure of the 1996 Constitution is clear the guaranteed rights must be upheld. It is also clear on how these rights should be enforced. Having reviewed the 1996 Constitution it is clear that the rights contained and reflected in it, are rights that always existed but which now have been codified and recognised.

3.3 OVERVIEW OF THE CONSTITUTIONAL RIGHTS OF PRISONERS

The Constitution put in place a number of rights which, when applied together, create impenetrable protection by anyone whether a natural person or the State.¹⁵⁹ One of the rights is the right to Dignity.¹⁶⁰

The right to human dignity is found in section 10 of the Constitution and underpins the Constitution, which means that most rights are based on the principle of inherent dignity.¹⁶¹ The Constitution states that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.¹⁶² The concept of dignity is also found in section 1 of the Constitution as a founding value. The right to inherent dignity ranks high in the South African Constitution.

The courts have ruled in previous cases that dignity is inter-linked with many rights including the right of access to the healthcare of prisoners, the right not to be subjected to torture or inhumane and degrading punishment.¹⁶³ The right exists at birth when a person is born alive – hence the term ‘inherent’.¹⁶⁴ The spirit of the right to dignity is expanded in many other rights such as equality,¹⁶⁵ the right to adequate housing¹⁶⁶ and

¹⁵⁸ *Ibid.*

¹⁵⁹ JFDD Brand, ‘*Courts, socio-economic rights and transformative politics*’. (2009). Pg 2. Accessed at: file:///C:/Users/htseisi003/Downloads/brand_courts_2009.pdf last accessed 13 November 2018.

¹⁶⁰ *Ibid.*

¹⁶¹ GJ Pienaar, ‘*Constitutional provisions regarding juristic persons*’. (1998). Accessed at: <https://www.ajol.info/index.php/pej/article/view/43579> last accessed 17 November 2018.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid*, s 9 of the Constitution of the RSA, 1996.

¹⁶⁶ *Ibid*, s 26 of the Constitution of the RSA, 1996.

right not to be detained in conditions that are inconsistent with human dignity.¹⁶⁷ But how does the right to human dignity and equality apply to the prisoner's right to healthcare? To better understand the question, one must look to the concepts of these rights and how they relate to each another. The Interim Constitution¹⁶⁸ being the forerunner of the 1996 Constitution, emphasized on the right to dignity. It is contended that the right to dignity protects the prisoner just as it protects the free man.

3.4 APPLICATION OF THE PRISONERS' RIGHT TO DIGNITY

The Constitution contains several rights and the courts have emphasized on these rights in prior cases,¹⁶⁹ and prisoners are included in the scope and coverage of such rights. The most notable rights are discussed below.

The first right that prisoners are known to have been robbed of, is the right to equality. Section 9¹⁷⁰ of the Constitution states that:

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

¹⁶⁷ The Constitution of the RSA, s 35 (2) (e).

¹⁶⁸ Constitution of the RSA, 1993.

¹⁶⁹ Ss 9, 10, and 27 of the Constitution of the RSA, 1996.

¹⁷⁰ S 9 of the Constitution of the RSA, 1996.

The right to equality has been noted to be one of the founding rights that underpin the Constitution.¹⁷¹ The Constitution continues to refer to the right to equality both as a value and as a right. It entrenches the rights and states in its preamble that:

“The Republic of South Africa is a sovereign, democratic state founded on, among other values, ‘human dignity’, achievements of equality and the advancement of human rights and freedoms.”

It is therefore important to note that this right means in the context of prisoners.¹⁷² Prisoners are human beings who have their rights to liberty limited because of a court order or sentence.¹⁷³ They are detained for a period of time or indefinitely. That alone puts them at an unfair disadvantage. In this case, a court would have to protect the rights of prisoners.¹⁷⁴

In a case of Polls Moor prison in Cape Town where some prisoners are HIV positive, they approached a court on the claim that the respondent (DCS) violated their right to medical treatment.¹⁷⁵ They stated that the violation was because the DCS refused to give them ARV therapy.¹⁷⁶ The DCS raised the issue of financial constraints and in addition to this; they attempted to enforce their policy that, only permitted the supply of ARV medication to a limited number of people.¹⁷⁷ The court made an order and stated in an *obiter dictum* that prisoners do not lose their basic fundamental rights and that they should be equated with the treatment of persons who are not incarcerated.¹⁷⁸

The right to human dignity is entrenched in section 10 of the Constitution,¹⁷⁹ and is one of the values on which the Constitution rests. The founding provisions of the Constitution,

¹⁷² LM Muntingh, ‘*An Analytical Study of South African Prison Reform after 1994*’. (2012). Pg 4. Accessed at: http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/4627/Muntingh_LLD_2012.pdf;sequence=1 last accessed 11 December 2018.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ EN Keehn, ‘*Health, Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons*’. (2018). Accessed at: <https://www.hhrjournal.org/2018/05/health-human-rights-and-the-transformation-of-punishment-south-african-litigation-to-address-hiv-and-tuberculosis-in-prisons/> last accessed 2 November 2018.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Lee v. Minister of Correctional Services* 2013 (2) SA 144 (CC), para. 1.

¹⁷⁹ The Constitution of the RSA, s 10.

in the first chapter, state that “*everyone has a right to human dignity*”. Reference to it is also made in section 35(2) (e): “*all prisoners are entitled to conditions of detention that are consistent with human dignity*”. Section 1 (a) states that ‘human dignity is one of the values on which the Republic of South Africa is founded, and the right is further mentioned in section 7(1): “*human dignity is one of the democratic values affirmed by the Bill of Rights*”.¹⁸⁰ The right to human dignity was mentioned in relation to detention in the Makwanyane case.¹⁸¹

Furthermore, the court held that dignity was a right that detention had to conform to. In another case, dignity was linked to conditions of detention that were inconsistent with human dignity. In *S v Williams*¹⁸², corporal punishment was banned and deemed to lower or violate a person's dignity. The relevance of the decision is that the courts have interpreted the right to human dignity to also cater for prisoners. The right can, however, be limited under section 36 of the Constitution, which provides that “*any limitation to the rights in the Bill of Rights are to be based inter alia on human dignity*”.¹⁸³ The rights to dignity and equality are rights that tie in with any other right of prisoners.

It can be argued that the right to healthcare of prisoners under the South African Constitution is linked to the rights to dignity and equality.¹⁸⁴ The right to equality means that the same or similar healthcare services provided for a person who is not in detention should also be provided for prisoners¹⁸⁵.

3.5 MEANING OF PRISONERS’ RIGHT TO HEALTHCARE

The right of healthcare is provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR), being “*The right to the highest attainable standard of physical and mental health*”.¹⁸⁶ South Africa has ratified this international treaty. It is clear that section 27 of the Constitution seeks to encapsulate that right and give it meaning. It

¹⁸⁰ *Van Biljon v. Minister of Correctional Services* 1997 (4) SA 441 (C), para. 8.

¹⁸¹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC.

¹⁸² *S v Williams and Others* (CCT20/94) [1995] ZACC.

¹⁸³ *Supra*, see *Williams* case.

¹⁸⁴ *Du Plooy v Minister of Correctional Services* 2004 (3) All S.A. 613 (T)

¹⁸⁵ News article describing the denial of a bail application. Accessed at, <http://www.news24.com/SouthAfrica/News/Panayiotou-has-to-defecate-in-front-of-others-lawyer-says-20150720>, accessed on 30 July 2018.

¹⁸⁶ Article 12 of the International Covenant on Economic, Social and Cultural Rights.

provides the “*right to have access to health care, food, water, and social security*” – and further, than that, the right is contained in section 35(2) (e) which provides that:

“All detainees, including every sentenced prisoner, 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”.

The content of the right has been given through decisions in various cases that have come before the South African courts (the jurisprudence will be discussed in the next section).¹⁸⁷ Section 27(3) also provides for emergency medical treatment: “*no one may be refused emergency medical treatment*”. The content of the right is therefore different from that in the section that provides for ‘adequate healthcare’, and the wording suggests that the state only has an obligation to provide emergency medicine to everyone who is in need of such treatment. In light of the right to equality, it can be argued that prisoners are also included in the scope of the right to adequate healthcare and the right to be provided with emergency medical care.

3.6 IMPLEMENTATION OF THE RIGHT TO ADEQUATE HEALTHCARE

After having established that prisoners are catered for in the South African Constitution, the second question is to what extent the South African Constitution give full implementation to the rights. It is contended that having a right and being unable to enforce or benefit from it, is equivalent to not having such right. The focus is the right to health and whether the Constitution has been able to be given meaningful implementation. It is the prerogative of the Constitutional Court to be the watchdog of the Constitutional rights and to deal with cases of the violation of the rights.¹⁸⁸

¹⁸⁷ *Stanfield v Minister of Correctional Services* 2004 (4) S.A. 43 (C), paras. 125, 129, 132, 89–91, 119–122.

¹⁸⁸ *Supra*, see *Stanfield* case.

3.7 THE POWER OF THE CONSTITUTIONAL COURT IN PROTECTING PRISONERS' RIGHTS

In terms of section 167 of the Constitution, the Constitutional Court, as the final court of appeals for all matters (no longer limited to constitutional matters only - with its decisions binding on all other courts in South Africa, has key functions that enable a platform to litigate on issues of human rights violations. As an example, in *Lee v Minister of Correctional Services*,¹⁸⁹ the applicant was an inmate at Pollsmoor prison in Cape Town, who alleged that he had contracted TB whilst in the custody of the respondent. The significance of the case is that it was first heard in the lower courts before it was finally heard in the Constitutional Court.

The Constitution embodies rights that must be adhered to, however, the rights are implemented through the enactment of national legislation. Through this process, South Africa has seen many acts of parliament repealed due to non-conformity with the spirit and purport of the Constitution.¹⁹⁰ An example would be the sections dealing with 'administrative action'.¹⁹¹ A provision in the Constitution states that national legislation must be enacted to give effect to 'just administrative action' and equally applies to sections such as 'access to information'¹⁹² and Acts like this have been promulgated. The role of the Constitutional Court is very important. One author argues that constitutional courts are the 'institutional voice of vulnerable groups'.¹⁹³ By inference, one can argue that prisoners are also a vulnerable group in South Africa. The right of access to healthcare and the right to emergency medicine are contained in a number of provisions in the Constitution, most notably section 27. The Correctional Services Act that seeks to give meaningful implementation to the right to healthcare for prisoners.¹⁹⁴ Furthermore, the Act gives meaning to the right of healthcare for prisoners. The Correctional Services

¹⁸⁹ *Lee v Minister of Correctional services* 2011 (2) SACR 603 (WCC).

¹⁹⁰ The Correctional Services Act 111 of 1998. This Act was enacted to give prisoners the rights that are reflected in the Constitution, 1996. It repeals the old Correctional Services Act 8 of 1959.

¹⁹¹ S 33 (3) of the Constitution of the RSA.

¹⁹² S 32 (1), (2) of the Constitution of the RSA.

¹⁹³ N Ntlama 'Masiya: Gender Equality and the Role of the Common law' (2009) 3 (1) *Malawi L.J.* 117-132.

¹⁹⁴ The long title of the Correctional Services Act.

Act 111 of 1998 repeals the old Act¹⁹⁵ and contains a list of rights and regulations; some relate to the healthcare of prisoners and implementation.

3.8 THE RIGHT TO HEALTHCARE UNDER THE CORRECTIONAL SERVICES ACT (CSA)

The CSA states in the preamble, that ‘to provide for a correctional system; the establishment, functions and control of The Department of Correctional Services; the custody of all prisoners under conditions of human dignity.’ The Act reflects one of the key provisions of the Constitution, being ‘conditions of detention that are consistent with human dignity’, and as discussed above the right of dignity is a key feature in the right of healthcare. In this regard, there is the *Stanfield* case,¹⁹⁶ which involved an applicant who was a prisoner at the time of applying to be placed under correctional parole.

The application was made under the old Correctional Services Act the Interim Constitution,¹⁹⁷ the applicant was diagnosed with terminal lung cancer and the diagnosis confirmed that his life expectancy was shortened.¹⁹⁸ The application was refused and the applicant then applied for a review of the decision – based on the right to dignity and that he was entitled to die in a dignified manner.¹⁹⁹ Furthermore, the right to dignity ties in with the right to health in interpretation.²⁰⁰ One may infer from the decision that in trying to fulfil the right to dignity, the right to adequate healthcare was fulfilled, as the prison would have been unable to provide palliative care for a prisoner with terminal cancer.²⁰¹

Further to these rights in the Act, section 8 provides for adequate nutrition. It provides:

“8. (1) each prisoner must be provided with an adequate diet to promote good health, as prescribed in the regulations.

¹⁹⁵ Correctional Services Act 8 of 1959.

¹⁹⁶ *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C).

¹⁹⁷ *Ibid.*

¹⁹⁸ K. C. Goyer, “Prison health is public health: HIV/AIDS and the case for prison reform” Institute for Security Studies (November 1, 2002). Accessed at <https://issafrica.org/01-nov-2002-sacq-no-2/prison-health-is-public-health>. Last accessed 8 October 2018.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

(2) Such a diet must make provision for the nutritional requirements of children, pregnant women and any other category of prisoners whose physical condition requires a special diet.

(3) Where reasonably practicable, dietary regulations must take into account religious requirements and cultural preferences.

(4) The medical officer may order a variation in the prescribed diet for a prisoner and the intervals at which the food is served when such a variation is required for medical reasons.

(5) Food must be well prepared and served at intervals of not less than four and a half hours and not more than 14 hours between the evening meal and breakfast during each 24-hour period.

(6) Clean drinking water must be available to every prisoner.”

The Act also has a section, which prescribes the minimum obligations for the DCS in relation to the right of healthcare of prisoners.²⁰² Section 12 provides the following:

“12. (1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every Prisoner to lead a healthy life.

(2) (a) Every prisoner has the right to adequate medical treatment but no prisoner is entitled to cosmetic medical treatment at State expense.

(b) Medical treatment must be provided by a medical officer, medical practitioners or by a specialist or health care institution or person or institution identified by such medical officer except where the medical treatment is provided by a medical practitioner in terms of subsection

(3) Every prisoner may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of Prison, may be treated by such practitioner, in which event the prisoner is personally liable for the costs of any such consultation, examination, service or treatment.

²⁰² *Ibid.*

(4)(a) Every prisoner should be encouraged to undergo the medical treatment necessary for the maintenance or recovery of his or her health.

(b) No prisoner may be compelled to undergo a medical examination, intervention or treatment "without informed" consent unless a failure to submit to such medical examination, intervention or treatment will pose a threat to the health of other persons.

(c) Except as provided in paragraph (d), no surgery may be performed on a prisoner without his or her informed consent, or, in the case of a minor, with the written consent of his or her legal guardian.

(d) Consent to surgery is not required if, in the opinion of the medical practitioner who is treating the prisoner, the intervention is in the interests of the prisoner's health and the prisoner is unable to give such consent, or, in the case of a minor, if it is not possible or practical to delay it in order to obtain the consent of his or her legal guardian."

Further to the sections on the right to adequate healthcare, the Act mentions how the rights can be enforced.²⁰³ It establishes the mechanisms in which there can be a meaningful implementation of the right of access to healthcare.²⁰⁴ The mechanism is the 'judicial inspectorate' the functions are also outlined in the Act. Some of the key functions of the judicial inspectorate are discussed below.

3.9 THE JUDICIAL INSPECTORATE

The judicial inspectorate is a key feature of the CSA. It seeks to protect prisoners from harm. Among other functions, it also facilitates the inspection of the prison environment. The judge concerned may report any act of corruption or dishonest behaviour.²⁰⁵ The appointed judge is also responsible for appointing assistants.²⁰⁶ The assistants could be

²⁰³ I. Skosana, "*Prisoners' health rights routinely violated in SA's jails*",. Bhekisisa (April 23, 2018). Accessed at <http://bhekisisa.org/article/2015-04-23-prisoners-health-rights-routinely-violated-in-sas-jails>. Last accessed 11 November 2018.

²⁰⁴ *Ibid.*

²⁰⁵ The Correctional Services Act 111 of 1998, s 85.

²⁰⁶ The Correctional Services Act 111 of 1998, s 87.

offer expertise that may improve the quality of the prison environment i.e. they could have medical background.²⁰⁷

The Act also provides that the assistants appointed have the same powers as the inspecting judge.²⁰⁸ The CSA also provides for the inspecting judge to arrange for the inspection, and to report on abuse. The judge is empowered to deal with the complaints and is competent to deal with cases of urgency. The report, once compiled, is sent to the Minister, and an annual report is submitted to the president.²⁰⁹ The Act also provides for the judge to hold an enquiry and to conduct hearings.²¹⁰ The judge is also empowered to employ means consistent with the Act that can speed-up the functioning of the inspectorate.²¹¹

In the *Stanfield* case, the court interpreted the refusal to grant the prisoner medical parole as being inhuman and effectively violating the right of healthcare.²¹² It means that one could argue that parole boards at least attempt to give meaningful implementation to the right to healthcare.

3.10 PAROLE BOARDS

To assist in the meaningful implementation of the right of healthcare of prisoners, the CSA provides for the establishment of parole boards.²¹³ Parole has been seen in South Africa as a means to assist detainees that seek release from prison to die with their family or in palliative care.²¹⁴

The courts have cited the right to human dignity in interpreting the right of healthcare. In the case of *Goldberg*,²¹⁵ the courts established that even with common law, prisoners

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ The Correctional Services Act 111 of 1998, 1998, s 90 (2) (3).

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Du Plooy v Minister of Correctional Services* 2004 (3) All S.A. 613 (T); Medical parole was previously restricted to prisoners at the last stages of a terminal illness, but it is now permitted on grounds of suffering from a terminal disease or conditions, or if rendered physically incapacitated so as to severely limit daily activity or self-care. See, Correctional Services Act 111 of 1998 section 79, as amended by the Correctional Matters Amendment Act 5 of 2011.

²¹³ A. Meldrum, "South African government ends AIDS denial" *The Guardian* (October 28, 2006). Accessed at <https://www.theguardian.com/world/2006/oct/28/southafrica.aids>.

²¹⁴ *Ibid.*

²¹⁵ *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A).

maintain their basic human rights, including the right of healthcare. The case has been cited in other judgments – the most notable being the *Stanfield case*²¹⁶ already referred to, was on appeal the court held that the applicant had the right to die in dignity – promoting the section 10 the right to dignity.

Thus, the courts are of the opinion that prisoners maintain their basic human rights furthermore; it is evident that the right to dignity ties in with the right to healthcare of detainees.²¹⁷ Also of note is how the courts insist that the right to healthcare is paramount. The CSA has tried to give meaning to the right to healthcare, by including sections on parole and parole boards, as discussed below.

3.11 KINDS OF PAROLE UNDER THE CORRECTIONAL SERVICES ACT

The parole board operates under the Department of Correctional Services and is mentioned expressly in the governing Act. There are three kinds of parole in South Africa:

- Full parole – a period when an offender serves his sentence while in the custody of a correctional facility is conditionally released. He is then permitted to serve the remainder of his sentence outside of prison and back in the community under the supervision and control of the Department of Correctional Services;
- Day parole – entails the offender being released gradually into the community under controlled supervision; and
- Medical parole – this kind of parole requires that a medical practitioner adduce the extent of the illness of the detainee. Such a detainee must be in the final stages of his illness. The detainee is released into the community, but also under controlled supervision. Those that have terminal illnesses are released to die in the company of family.

²¹⁶ *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C).

²¹⁷ *Sonke v Government of Republic of South Africa* 24087/15 (unreported). Accessed at <http://www.genderjustice.org.za/publication/pollsmoor-court-order/>.

3.12 WHY PRISONERS' RIGHTS ARE INALIENABLE

The medico-legal implications of detention are discussed here. The focus will be on medico-ethical principles that are violated whilst in prison and the role medical practitioners' play and should play when treating prisoners.²¹⁸

3.13 ROLE OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA (HPCSA)

This is a regulatory body like the law society and was established by the Health Professions Act.²¹⁹ Its main function is to discipline and make accountable medical Doctors who fail to comply with the requirements laid down by the body.²²⁰ It also serves as a guideline providing a mechanism to medical professionals who may be unfamiliar with the requirements.²²¹

Furthermore, the HPCSA provides a framework that combines ethics and the law.²²² There are also more ethical theories that underpin the medical profession that have a direct reference to how they should conduct the relationship between themselves and the patient as illustrated below. As mentioned previously, the discussion relates to medical doctors and the theories – with particular reference to inmates and accused persons as indicated below:

- *The theory of autonomy* – this theory is based on the decision-making capacity of the patient;²²³ the notion of the patient being allowed to decide what procedures they can consent to. This is also known as the right to self-determination (deciding what happens to one's self).
- *The theory of beneficence* – the doing of a good of the practitioner towards the patient. This doing well can be interpreted to mean that the Doctor must act in the best interest of the patient. This theory is also contained in legal instruments. The

²¹⁸ See the South African Department of Correctional Services, Annual Report 2016-2017, (Pretoria: Department of Correctional Services, 2017), p.9.

²¹⁹ Health Professions Act 1974 Act No 56 of 1974.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Patient is meant to include inmates who require medical attention or are seen or treated by medical professionals; it, therefore, means the scope and definition of the theories include them.

Universal Declaration of Human Rights (UDHR) has a provision on ‘the standard of living adequate for a person’s health and wellbeing and that of his family’.²²⁴

- *Theory of non-maleficence* – do no harm to the patient or as little harm as possible. This theory is also found in international instruments. The UDHR provides that ‘nobody shall be subjected to cruel, inhuman or degrading treatment’,²²⁵ the South African Constitution also contains provisions that embody this theory. The South African Bill of Rights provides that nobody may be subjected to any form of a medical experiment without his or her informed consent.²²⁶
- *The principle of justice* has a legal-enforceability aspect and relates to resource allocation. Resource allocation is usually the reason provided by DCS when they fail to distribute services adequately. In *Van Biljon*, the DCS stated that the inmates were requesting medication that the DCS could not afford, and thus the failure to provide them with medicines. The court rejected that claim and focused on adequate medical treatment. The question then to be looked at is if in reality the theories and the law as it stands is being followed and practised. The patients have rights, prisoners requiring medical services are also patients, and thus doctors have moral, ethical, medical, and legal obligations towards them.

Illness and diseases plague the prison environment in South Africa. The South African Constitution, however, provides for medical treatment to be given to everyone one could infer that prisoners are included therein. In Section 27, the section reads

“Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.” The section also includes a provision, which states ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.’”

²²⁴ Universal Declaration of Human Rights (article 25.1).

²²⁵ Universal Declaration of Human Rights (article 5).

²²⁶ *Ibid.*

A clause makes it mandatory that emergency treatment is provided to those who require it:

“No one may be refused emergency medical treatment”.²²⁷ The ICCPR has the following provision: ‘nobody may be subjected to without their free consent medical or scientific experimentation’.²²⁸

The African Charter also contains a similar provision that states the following: ‘the prohibition of all forms of exploitation and degradation, including cruel inhuman or degrading treatment’.²²⁹

It is important to note that the section also relates to inmates.²³⁰ As seen previously, prisoners are also included in the scope of the right to equality.²³¹ That makes them beneficiaries of the right to adequate healthcare.²³² Furthermore, the Constitution contains a provision that further justifies the right of adequate healthcare for prisoners.²³³ Section 35 (2) (e) states that every detained person has the right to be detained under ‘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’.²³⁴

For many years, in South Africa, the principle of the separation of powers has meant that each power serves its own function.²³⁵ The judiciary is left with just enforcing rules and the law.²³⁶ It is argued that this principle is not functional; some may even argue it is functional concerning the promotion of the rights of prisoner one may need to revisit some important judgments, which have been handed down by the South African courts.²³⁷ The focus will be on discussion of the impact of the jurisprudence of case law and its effect on

²²⁷ S 27 (1)–(3) of the Constitution of the RSA, 1996.

²²⁸ *Ibid.*

²²⁹ See African Charter article 5.

²³⁰ C. Cooper, “*South Africa—Health rights litigation: cautious constitutionalism*” in A.E. Yamin (ed), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, 2011), p.217.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

the promotion of the rights of prisoners. To illustrate this discussion, media reports will be referred to – not as binding evidence, but to illustrate how the public perceives matters regarding the violation of the rights of prisoners.

3.14 WHAT IMPACT DOES THE JURISPRUDENCE HAVE ON THE PROMOTION OF THE RIGHTS OF PRISONERS?

When a person wants to discuss the impact the jurisprudence has had on the promotion of the rights in question, it is important to revisit the Steve Biko case.²³⁸ Although this study is based on the gross violations of the rights of prisoners since the inception of the 1996 Constitution, it is worth including some cases that occurred before this time. The rationale is that it highlights the degrading treatment prisoners endured and how the courts dealt with such cases. The discussion of recent cases post 1996 will highlight how the courts have dealt with violations after 1996 – which is when prisoners have had a set of rights in the Bill of Rights.

3.15 THE STEVE BIKO CASE

Steven Bantu Biko was an African man who was born in South Africa, and he was a political activist. He was also the leader of the Black Consciousness Movement. He was arrested on 21 August 1977²³⁹ under the Terrorism Act.²⁴⁰ During his detention, Steve Biko was tortured in the hopes of gaining information from him. It is later confirmed that he was assaulted by officers whilst in detention and was left on the floor with no clothes on. It is also reported that at this stage he was no longer responsive and was speaking in the slurred language.²⁴¹

On 7 September 1977, the police called a medical Doctor to examine Biko – a Dr Lang – who, after examining the prisoner, found nothing wrong. This is despite the visible signs of trauma that the prisoner was presenting with. Later on, the more senior Dr Benjamin was called in to re-examine Biko. Dr Benjamin advised that Biko is taken to a hospital, but the police refused and ignored the referral. At that stage, Biko was severely ill and

²³⁸ Xolela Mangcu. *Biko: A Biography*. 1965.

²³⁹ http://www.doh.gov.za/docs/legislation/patientsright/charter_e.html last accessed 19 November 2018.

²⁴⁰ The Terrorism Act 83 of 1967.

²⁴¹ X Mangcu *Biko: A Biography* (2012).

becoming unresponsive. Biko was then transported in the back of a van for over ten hours, on Dr Lang's advice, to a Pretoria hospital. During his trip, Biko was unresponsive and unconscious, naked, and handcuffed.²⁴²

3.16 SIGNIFICANCE OF THE JURISPRUDENCE

It can be argued that the Biko case violated human rights as laid out in the UDHR. It can also be argued that the doctors concerned also violated their moral, ethical, and legal duty to treat and take care of Biko. However, one needs to consider if the violations still occur regardless of the 1996 Constitution. The *Goldberg v Minister of Prisons*²⁴³ the case established that prisoners maintained their basic human rights. The case was also cited in *Stanfield v Minister of Correctional Services*.²⁴⁴

The prisoner applied to be released on medical parole because he had an incurable illness and his lifespan was reduced. The DCS declined his application arguing that he did not meet the requirements as stipulated by the CSA.²⁴⁵ That argument was dismissed by the court when it held that the applicant deserved to die in a dignified and humane manner.²⁴⁶ It is evident that violations can still occur regardless of constitutional provisions like the right to dignity that is clearly linked to the right of access to healthcare. The court also argued that the 'lumping together' of prisoners who suffer from a terminal illness was inhumane and degrading.

In *Lee v Minister of Correctional Services*,²⁴⁷ the prisoner, Mr Lee, sued the DCS, alleging that he had contracted TB while in prison. It was no secret that the prison environment is overcrowded, which raises medical and other concerns. Mr Lee initiated the case at the High Court, but it ended up going on appeal to the SCA, which dismissed it because of the failure to prove causal nexus. The Constitutional Court, however, welcomed the case and subsequently ruled in favour of Mr Lee. The Treatment Action Campaign joined his action as friends of the court. The issue of overcrowding was discussed at great length.

²⁴² <http://www.news24.com/SouthAfrica/News/How-Steve-Biko-died-20120919> accessed on 10th October 2018.

²⁴³ *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A).

²⁴⁴ *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C).

²⁴⁵ Correctional Services Act 8 of 1959.

²⁴⁶ *Ibid.*

²⁴⁷ *Lee v Minister of Correctional Services* 2011 (2) SACR 603 (WCC).

New evidence in the form of a report reflected that overcrowding was the main cause of TB-related deaths.²⁴⁸

More so, in awarding judgment, the Constitutional Court expressed that among the many duties that DCS had, they had to ensure that the purpose of the Act that gives a promise of safe and humane detention – should be met. The court also noted that healthcare services are guaranteed in the Act to allow prisoners a healthy lifestyle.²⁴⁹ The judgment from the Constitutional Court indicates that both the Act and the Constitution have express provisions on the right of access to healthcare and the dignity that is afforded to prisoners. Furthermore, the case occurred after 1996 that leads to the question of whether the Biko case changed any aspects of how prisoners are treated.

The Steve Biko case may differ from the case of Mr Lee who was able to have a ruling in his favour. In addition, the circumstances are not as graphic as those surrounding Steve Biko are. Furthermore, there are no acts of violence in the *Lee* case. The reason for that could be that the rights of prisoners are being fully applied; however, a recent case could give a different opinion.

South Africa has been tied to police brutality and custody-related deaths. In the following case, the accused was not yet charged with any offence – but was in police custody. The facts of the case resemble the Steve Biko case in several ways.

In February 2013 a Mozambican man, who is reported to have been working as a taxi driver, was arrested. The arrest was very unusual and degrading as he was captured on video being dragged behind a police van, with people from the community witnessing this act of the police. He was later put in holding cells where he died two hours later. It is reported that there was a pool of his own blood, where his body was found.²⁵⁰ The case reached the high court in Pretoria. The state pathologist adduced evidence and stated that had the deceased received medical intervention in time, he could have survived. He also observed the deceased in his cell and performed an autopsy that revealed the cause

²⁴⁸ Annual Report 2010/2011: Treatment of Inmates and Conditions in Correctional Centres.

²⁴⁹ *Lee v Minister of Correctional Services* Case CCT 20/12 [2012] ZACC para 70.

²⁵⁰ Accessed at <http://www.theguardian.com/world/2015/aug/25/eight-south-african-policemen-guilty-of-murdering-taxi-driver> (2015). Last accessed: 18 December 2018.

of death as blunt-force trauma and lack of oxygen in the brain caused by the severe assault. The perpetrators were eight police officers who were on duty.

They adduced evidence was that they were acting reasonably because the deceased resisted arrest. Judge Bert Bam rejected that and found them all guilty of murder.²⁵¹ The case is similar to the *Biko* case in that the man was tortured and denied medical services and died in circumstances which were inhumane and degrading, and inconsistent with human dignity. The case occurred long after the 1996 Constitution came into force and many other cases have come before our courts. In *Stanfield*,²⁵² a case, discussed above, the prisoner was denied medical parole and the judgment on appeal was questioned in light of the right to adequate healthcare and the right to die in dignity.

The application for medical parole was based on the old CSA.²⁵³ However, the court despite such binding decisions still handed down orders that ignored the constitutional provisions and the role of the parole board and further undermined the rights of prisoners as envisaged in the 1996 Constitution. The new CSA was promulgated to give effect to the constitutional provisions, as the old act was questioned in light of the right to human dignity and access to healthcare. Not granting medical parole was seen unconstitutional.

One would believe that the above cases would not occur under the new legal system and new Act, which allows terminally ill prisoners to apply to be released on medical parole. The new Act²⁵⁴ was highlighted when a prisoner applied to be released on medical parole citing section 49 of the CSA. The DCS did not object to the application when the lawyers accepted that the man was in the final stages of terminal cancer and had multiple growths that would cause him to die from asphyxiation. A medical practitioner made this clinical diagnosis, but the main question is whether the jurisprudence relating to the Steve Biko and *Stanfield* cases has had any effect on how the courts arrive at their judgments today. The judge in the case denied the application just mentioned,²⁵⁵ although his application

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ Correctional Services Act 8 of 1959.

²⁵⁴ *Ibid.*

²⁵⁵ Judge Brocher declined the application, stating that the granting would make it impossible for the state to prosecute the prisoner.

to be released on medical parole was strongly motivated by the attorney concerned, who said 'his death was an unmitigated assault on his dignity'.²⁵⁶

The *Louka* case shows that the Stanfield case has had no effect whatsoever on how the courts rule concerning cases of violation of the rights of prisoners. Moreover, it seems not to matter that the right of access to healthcare is tied in with the right to human dignity, which is a cornerstone of the Constitution. One may argue that had the jurisprudence been taken into account, the imbalances of the past would not be repeated. Furthermore, the conditions have been reported to be inhumane and degrading, like the conditions Mr Lee discussed as a possible cause of his TB infection when he was in Pollsmoor prison.

Judge Cameron visited the prison and noted many disturbing conditions that the inmates live under for example the linen was lice-infested because they had failed to wash it. The judge was also shocked when he saw that there was no system in place for HIV-positive patients, and they had little to no access to medicine. The judge further observed that the prisoners had boils and wounds and that they had no exercise. He further noted that what he was witnessing was what the court had ordered to be addressed in the Lee case.²⁵⁷

In previous years, the judicial inspectorate had raised the same issues. It is very important to note that all the issues raised in these reports are a clear indication that the jurisprudence of case law has not been positively transformed by the DCS. The judge inspectorate Justice Vuka Maswazi Tshabalala issued another report that highlights concerns. He reported on the conditions from 2012 to 2013.²⁵⁸ His report is graphic and described in detail issues of concern and that healthcare was of particular concern. Having cited the report issued in 2012, he noted that its recommendations were never taken into account. He further noted that 38% of inmates are not given any form of medical examination on admission.

²⁵⁶ News article. Accessed at <http://www.news24.com/SouthAfrica/News/Lawyer-Loukas-death-a-miscarriage-of-justice-20150512>, accessed on 11 July 2018.

²⁵⁷ Article about the visit by Judge Cameron. Accessed at <http://www.news24.com/SouthAfrica/Local/City-Vision/Prison-system-failing-inmates-20150909>, accessed on 30 July 2018.

²⁵⁸ The Judicial Inspectorate for Correctional Services, report 2012/2013. Pg.2. Accessed at <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf>, accessed on 10 September 2018.

Furthermore, 29% are not made aware of their right to access healthcare. On the issue of parole, as noted in the *Stanfield* and *Louka* cases, parole is important as it allows an offender to apply for early release due to terminal illness. However, as the right to adequate healthcare also entails being cared for in a humane manner, parole gives the inmate the opportunity to die outside of the prison environment where palliative care facilities are available.

The judge noted that the inmates were not made aware they could apply, and those that applied were made to wait for months. He also noted cases of assault which is still of serious concern. It is a gross violation of the prisoner's right to bodily integrity among other rights. The rate of death in prison was also noted in the report: it had gone up from 48 to 57.²⁵⁹ Furthermore, the rate of un-natural deaths was also high. One author argues that the Constitutional Court, High Court and SCA have an obligation to develop the common law,²⁶⁰ but the courts have failed, to some degree, to even attempt to develop the common law.

The jurisprudence suggests that the courts only rely on statutes and even then, the enforcement is tainted.²⁶¹ In the *Lee* case, the court did not visit the common law provisions or attempt to interpret them in light of the Bill of Rights.²⁶² Ntlama also argues that section 39 (2) of the Constitution binds the Constitutional Court to interpret the common law, and to analyse it in light of the spirit and purport of the Bill of Rights.²⁶³

3.17 CONCLUSION

Violations of the rights of prisoners are still prevalent. The study focused on violations after the 1996 Constitution had been implemented. The Constitution should have the rights it contains enforced at all levels but that does not seem to be the case. The pieces of legislation that has been enacted because of the Bill of Rights suggest that

²⁵⁹ *Ibid.*

²⁶⁰ N Ntlama 'Masiya: *Gender Equality and the Role of the Common law*' (2009) 3 (1) *Malawi L.J.* 117-132.

²⁶¹ AK Abebe, '*The Judiciary and its role in the realisation of a constitutional right*'. Pg.6. Accessed at: <https://repository.up.ac.za/bitstream/handle/2263/23887/05chapter5.pdf?sequence=6> last accessed 11 October 2018.

²⁶² *Ibid.*

²⁶³ *Ibid.*

transformation is still a long way off for prisoners. The meaningful implementation of at least the rights to access to healthcare has not taken place. Jurisprudence has arisen because of litigation at various courts including the SCA and the Constitutional Court. The judgments should be a point of reference for lower courts or subsequent cases, but as seen above, this is still not the case. This is despite all the cases and advocacy by human rights organisations for public interest litigation. There is still great concern each year that prisoners are violated and that the implementation of their rights fails at almost every level.

CHAPTER FOUR: FINAL ANALYSIS

4.1 CONCLUDING REMARKS AND RECOMMENDATIONS

The rights of prisoners have been transformed over the years. Indeed, the Proclamation of the South African Constitution²⁶⁴ has given effect to international legal instruments ratified by South Africa.²⁶⁵ The international treaties play an essential role in shaping and developing South African law. They ensure that the concept of human rights is always clearly stated in the law. The legal framework of the rights of prisoners is further encapsulated in domestic law – with the statute being the governing act.²⁶⁶

However, that said, South Africa is still behind with regard to promoting and implementing the rights of prisoners. Prisoners face gross violations of their rights. Custody is meant to be a safe place where a person can serve time and punishment in prison without fear of being violated. Prisoners get contagious diseases from being in prison, are assaulted, die, and live in an environment that is not suitable for human habitation. The confusion as to whether the right to equality places prisoners on the same level as other right bearers can advance these violations. With fear of stigma, prisoners lack a voice to speak. With unfair discrimination, nobody wants to listen to prisoners because it is thought that they deserve all that comes their way. South Africa still has a long way to go, in trying to achieve a constitutional state that includes an adequate legal framework that includes prisoners, and where enforcement, in practice, is made mandatory and reported.

4.2 RECOMMENDATIONS

4.2.1 PUBLIC INTEREST LITIGATION

This is a study on the violation of the rights of prisoners. It is, therefore, necessary to recommend options that the Constitution would provide for better protection, and for implementation of the rights of prisoners.

²⁶⁴ The Constitution of the Republic of South Africa, 1996.

²⁶⁵ The Universal Declaration on Human Rights (South Africa is a member state to this treaty); the International Covenant on Civil and Political Rights; the African Charter.

²⁶⁶ The Correctional Services Act 111 of 1998.

Section 38 of the Constitution gives standing to certain listed members.²⁶⁷ The standing means they have the capacity and authority to seek legal remedies at law for the gross violations of the rights of prisoners. The section further gives those that are unable to seek these legal remedies themselves, an opportunity to have their grievances heard by a court of law through other people raising such issues on their behalf.²⁶⁸ The section is further recommended for the promotion of the rights of prisoners, in that it allows Non-Governmental Organisations to raise these issues on behalf of prisoners.²⁶⁹ With well-established NGOs like the Treatment Action Campaign and Section 27, violations could reach court speedily.

4.2.2 THE ROLE OF THE MEDIA

The government is allowed to work in close connection with the media. The media and freedom of speech are instrumental in shaping democracy. One would argue that through the media those issues that were previously unknown are publicised and can be made public knowledge by the media. Media forms and shapes moral panic. The public is more prone to reason in favour of those that are reported as victims. Furthermore, freedom of expression,²⁷⁰ as entrenched in the South African Constitution, ensures that violations are made public. The media should always be in favour of promoting the rights of those that cannot have their voice heard.

4.2.3 THE ROLE OF EDUCATIONAL INSTITUTIONS

The Department of Education (DoE) has been mandated to introduce concepts that are deemed useful for upcoming students. In the past, they have made mathematics compulsory and introduced life orientation among other issues. They have also tried to include in their curriculum, aspects of all kinds of abuse against women, children and the aged. It is through the curriculum that the rights of prisoners could get attention. If DOE were to introduce this concept then the students would be well informed about the legal framework of prisoners and the facilities that are put in place for them. This will enhance exposure to and awareness of the violations of prisoners' basic human rights including

²⁶⁷ S 38 (a) to (e) of the Constitution of the RSA, 1996.

²⁶⁸ S 38 (b) of the Constitution of the RSA, 1996.

²⁶⁹ S 38 (e) of the Constitution of the RSA, 1996.

²⁷⁰ S 16 (1) of the Constitution of the RSA, 1996.

the right to education.²⁷¹ Furthermore, the DoE also has a legal obligation to ensure that basic education is supplied to prisoners, and the curriculum must be designed to accommodate their situation. The prisoners might lack resources to complete certain tasks. If education is shaped to accommodate learners and prisoners – both parties benefit. A prisoner who is well informed about the system is more likely to know when a violation occurs and how to go about dealing with it.

4.2.4 TRAINING OF MEDICAL STAFF

The medical staff play an integral role in the healthcare infrastructure of the prison system. The first point of contact is the healthcare provider in prison if the prisoner is in need of medical attention. Currently, as seen in the study, the focus is on how to deal with the symptomatic relief of ailments of the prisoners. The recommendation in this regard is to train the medical staff to be able to cater for persons who are in prison. They are faced with many cases of TB, and HIV/AIDS-related illnesses. If a preventative mechanism plan can be introduced, it would educate the prisoners on how to live a healthy lifestyle. This is even with the high-risk behaviour they engage in, including sharing instruments for making tattoos or injecting drugs, which could cause blood-borne illnesses including hepatitis and STIs and HIV/AIDS. Educational programmes on how to take medication, how to avoid contracting the above illnesses, on universal precautions, and about ventilation and basic hygiene could protect them from all the mentioned illnesses.

4.2.5 CONCLUSION

The study critically analysed what South Africa as a constitutional state is undergoing. It discussed many issues that relate to the extent of the violation of the rights of prisoners. The study discussed how the medical profession can interact with the legal system, and focused on the liability and obligations that medical practitioners have to prisoners. It was argued that the prisoners are essential, patients. The legal framework was also discussed in detail covering the international and regional instruments and the domestic legal framework that included the South African Constitution.

²⁷¹ S 29 (10 (b) of the Constitution of the RSA, 1996.

The study further looked at the inter-related rights in the Constitution. It highlighted that the right to healthcare can be best explained and accessed if core rights like equality and dignity are unpacked. The study showed that prisoners are right holders and as such are equal before the law entitling them to the right to human dignity, and, most importantly, the right to healthcare.

The study also focused on the jurisprudence that should promote the rights of prisoners and considered whether there was a meaningful implementation of the rights of prisoners. Having discussed that, the role of constitutional initiatives were discussed including the parole board and the judicial inspectorate.

Effectively the study is a contribution to the body of knowledge. The contribution was novel and original with an emphasis on the medico-legal implications of the violation of the rights of prisoners in South Africa.

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