CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 307/19

In the matter between:

SONKE GENDER JUSTICE NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Third Respondent
INSPECTING JUDGE FOR CORRECTIONAL SERVICES	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Sixth Respondent

Neutral citation:	*Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2020] ZACC 26
Coram:	Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Theron J (majority): [1] to [132]

Jafta J (dissenting): [134] to [232]
Victor AJ (dissenting in part): [233] to [259]

Heard on: 3 March 2020

Decided on: 4 December 2020

Summary: Correctional Services Act 111 of 1998 — constitutionality of sections 88A(1)(b), 88A(4) and 91 — sections 88A(1)(b) and 91 are unconstitutional

Independence of the Judicial Inspectorate for Correctional Services — section 7(2) — rights of inmates — international obligations

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Western Cape Division, Cape Town:

1. The declaration by the High Court, Western Cape Division, Cape Town that sections 88A(1)(b) and 91 of the Correctional Services Act 111 of 1998 are constitutionally invalid to the extent that they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services, is confirmed.
2. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
3. The second and third respondents are to pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

THERON J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ and Mhlantla J concurring):

> "No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."[1]

Introduction

[1] The treatment of incarcerated persons and the conditions in which they are held lie at the heart of this application. The Bill of Rights grants every detained person the rights to life, dignity, bodily security and conditions of detention that are consistent with human dignity.[2] Any person who has stepped into one of this country's correctional centres will know that, in many respects, the treatment of inmates and conditions of detention fall far short of this. The task of ensuring that these obligations are met lies primarily with the Executive and – in particular – the Department of Correctional Services (Department). But who guards the guards? Who ensures that the Department is doing its part in ensuring that incarcerated persons' constitutional rights are not violated? The State has entrusted this important task to the Judicial Inspectorate of Correctional Services (Judicial Inspectorate), a statutory body tasked with inspecting and monitoring correctional centres in South Africa. The Judicial Inspectorate is the body that exercises oversight over the Department.[3] The key question raised in this

[1] Mandela *Long Walk to Freedom* (Little, Brown and Company, London 1994) at 115.

[2] Section 35(2)(e) of the Constitution.

[3] Preamble to the Correctional Services Act 111 of 1998 (Act). The Department, established in terms of section 3 of the Act, is charged with fulfilling the objects of the Act, performing all work necessary for the effective management of the correctional system and exercising authority over inmates (see sections 3(1) and 4(1) of the Act). The objects of the Act, as stated in its preamble, include giving effect to the Bill of Rights, in particular its provisions relevant to inmates and ensuring the custody of inmates under conditions of human dignity. The Act contains specific provisions regarding the treatment of inmates, including standards of accommodation, nutrition, exercise, clothing, hygiene, religion and communication, which the Department is required to adhere to (see sections 7 to 14 of the Act).

matter is whether the Judicial Inspectorate has adequate independence to fulfil this oversight role effectively.

Litigation background

[2] The applicant, Sonke Gender Justice NPC (Sonke), a non-profit company, has played an active role in policy research, advocacy related to the care and safety of inmates and the strengthening of oversight mechanisms of correctional services since 2007.

[3] Sonke launched a constitutional challenge to the Act in the High Court, Western Cape Division, Cape Town (High Court). The first to sixth respondents in the High Court proceedings included the President of the Republic of South Africa, the Minister of Justice and Correctional Services (Minister of Justice), the National Commissioner of Correctional Services (National Commissioner), the Inspecting Judge for Correctional Services (Inspecting Judge), the Minister of Finance and the Minister of Public Service and Administration. The President, Minister of Justice and National Commissioner opposed the relief sought by Sonke in the High Court.

[4] Sonke initially launched a broad challenge to Chapters IX and X of the Act, but later abandoned this in favour of a narrower challenge to sections 85(2), 90(1), 88A(1)(b), 88A(4) and 91 of the Act. Sonke submitted that the impugned sections are inconsistent with the Constitution, because they fail to provide the Judicial Inspectorate with the independence it needs to perform its monitoring and reporting functions effectively. In the High Court, Sonke predicated its constitutional challenge to the impugned sections of the Act on section 7(2) of the Constitution. It contended that section 7(2), read with applicable international law, obliges the State to create an adequately independent correctional centre inspectorate. According to Sonke, the effect of the impugned provisions was that the Judicial Inspectorate lacked the necessary structural, operational and financial independence to discharge its functions effectively.

[5] Highlighting the crucial function fulfilled by the Judicial Inspectorate in protecting the rights of inmates, who are at the mercy of the State, the High Court found the international law instruments signed and ratified by South Africa to be determinative of the fact that South Africa was obliged to create a national institution with the necessary independence. Moreover, the High Court held that the Judicial Inspectorate's independence was vital to the delivery of its mandate. Relying on the principles established in *Glenister II*,[4] the High Court emphasised that section 7(2) of the Constitution, which must be read as embracing international law, requires the State to take reasonable and effective steps to respect, protect, promote and fulfil constitutional rights.[5] That Court held that a Judicial Inspectorate that is not sufficiently independent poses a threat to the constitutional rights of incarcerated persons, does not constitute a reasonable measure and would not satisfy the State's constitutional obligations.[6]

[6] The High Court identified section 88A(4) (which concerns the referral of matters involving misconduct by the Chief Executive Officer (CEO) of the Judicial Inspectorate to the Department) as posing a threat to the Judicial Inspectorate's independence: there was, the Court reasoned, no reason why an independent mechanism could not be put in place for this purpose. It held that the referral of such matters to the Department militated against a perception of independence and undermined public confidence.[7]

[7] In addition, the High Court held that the amount of control exercised by the Department over the Judicial Inspectorate's budget, in terms of sections 88A(1)(b) and 91 of the Act, threatens the Judicial Inspectorate's ability to function effectively and efficiently. The Judicial Inspectorate essentially has to compete with the Department, which it is meant to oversee, for funding.[8]

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[4] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

[5] *Sonke Gender Justice v President of the Republic of South Africa* 2019 (2) SACR 537 (WCC) (High Court judgment) at para 40.

[6] Id at para 42.

[7] Id at paras 52-3.

[8] Id at paras 66-7.

[8] The High Court accordingly declared sections 88A(1)(b), 88A(4) and 91 of the Act inconsistent with the Constitution and suspended the declaration of invalidity for a period of 24 months from the date of judgment, in order to afford Parliament an opportunity to remedy the defect.[9]

In this Court

[9] This application places the confirmation of the High Court order of constitutional invalidity before this Court. In terms of sections 167(5) and 172(2)(a) of the Constitution, this Court must confirm any order of constitutional invalidity made by the High Court in respect of legislation before that order has any force.[10] It is trite that, as is the case in appeals,[11] an application for confirmation is directed at confirmation of the order, not the reasoning.

[10] Sonke contends that the State is required by section 7(2) of the Constitution to create oversight entities such as the Judicial Inspectorate that are fundamentally fit for their purpose. It submits that independence is an inherent characteristic of effective investigative or watchdog entities. It follows that, if such an entity lacks institutional independence, it is not fit for its purpose. The creation of an entity of this nature would not, Sonke contends, constitute a reasonable step by the State to respect, protect,

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[9] Id at para 79.

[10] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[11] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 71 and *Western Johannesburg Rent Board v Ursula Mansion (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

promote and fulfil rights, as required under section 7(2) of the Constitution. It would also be irrational and infringe on the principle of legality.

[11] Relying on this Court's findings in *Glenister II*, Sonke argues that the duties imposed on the State by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights, interpreted in light of international law, may, where appropriate, require the creation of independent bodies.

[12] Sonke contends that sections 88A(1)(b) and 91 of the Act – which place the Judicial Inspectorate's budget under the control of the Department (the very entity it is mandated to oversee) – do not afford the Judicial Inspectorate an adequate level of financial and operational independence. This inhibits the Judicial Inspectorate's ability to perform its functions without the assistance or permission of the Department. In addition, Sonke contends that section 88A(4) grants the Department disciplinary power over the CEO of the Judicial Inspectorate and that this renders the CEO vulnerable to political interference, or will at least create the perception among the public and inmates that the Judicial Inspectorate is not independent. This, too, amounts to a failure by the State to ensure that the Judicial Inspectorate enjoys an adequate level of independence.

[13] Sonke contends that the threat posed to the independence of the Judicial Inspectorate by the impugned provisions renders them inconsistent with the Constitution and that the declaration of invalidity should therefore be confirmed.

[14] The Minister of Justice and the National Commissioner abide the decision of this Court. They were represented at the hearing of this matter by counsel, but made no submissions. The Inspecting Judge also filed a notice to abide. The Inspecting Judge was represented at the hearing by counsel, who made oral submissions on his behalf.

Issues

[15] Two issues will determine whether the High Court's declaration of constitutional invalidity should be confirmed:

(a) whether the Constitution imposes an obligation on the State to ensure that the Judicial Inspectorate, as the body tasked with monitoring and reporting on the treatment of inmates and conditions in correctional centres, has an adequate level of independence; and

(b) if so, whether the impugned provisions of the Act ensure an adequate level of independence to the Judicial Inspectorate.

Merits

Legislative structure of the Judicial Inspectorate

[16] The Act was the product of significant legislative reform in the correctional justice sector. Following the passing of the Constitution, all government departments were obliged to bring their *modus operandi* in line with the values espoused by the Constitution.[12] The Act represented a total departure from its predecessors and created a "modern, internationally acceptable correctional system, designed within the framework of the 1996 Constitution".[13] It aims to ensure that all inmates are detained in safe custody "under conditions of human dignity".[14]

[17] One of the innovations introduced by the Act was the establishment of the Judicial Inspectorate as an oversight body tasked with monitoring and reporting on the treatment of inmates and conditions in correctional centres.[15] The Judicial Inspectorate

[12] Department of Correctional Services *White Paper on Corrections in South Africa* (February 2005) at 30 (2005 White Paper). See also Jagwanth "A Review of the Judicial Inspectorate of Prisons of South Africa" (2005) 9 *Law, Democracy and Development* 45 at 46-7.

[13] 2005 White Paper id at 30.

[14] See the long title to the Act, which includes in its description of the objects of the Act "[t]o provide for a correctional system; the establishment, functions and control of the Department of Correctional Services; [and] the custody of all inmates under conditions of human dignity".

[15] See Jagwanth above n 12 at 46, who provides the following useful overview of the establishment of the Judicial Inspectorate:

> "The establishment of the Judicial Inspectorate must be seen against the backdrop of the South African constitutional order as well as the aims and objectives of the Act as a whole. The Act attempts to regulate the correctional system to give effect to the Bill of Rights – particularly as it affects prisoners – and international law principles on correctional matters. It must also be seen as giving effect to the principles of accountability, responsiveness and open governance that are embraced by the Constitution.

is not a departmental entity, established by the Executive, but rather a free-standing institution, created by Parliament. The notion of independent oversight is based on the premise that transparency and accountability are key features of a democracy, which requires, among other things, that the exercise of executive power be checked by a body that is independent of that power. The Judicial Inspectorate is one of a number of institutions that have been established since the advent of our constitutional dispensation to bolster and support democracy, human rights and the rule of law. Other examples include the South African Human Rights Commission (SAHRC),[16] the Electoral Commission,[17] the Public Protector[18] and the Independent Police Investigative Directorate (IPID).[19]

[18] The statutory framework for the Judicial Inspectorate is found in Chapter IX of the Act, in particular, sections 85 to 91. The Judicial Inspectorate is an independent office under the control of the Inspecting Judge.[20] Its object is to facilitate the inspection of correctional centres, to enable the Inspecting Judge to report on the treatment of inmates and on conditions in correctional centres.[21] The Inspecting Judge is a judge appointed by the President, from the ranks of either High Court judges who are in "active service" as defined in section 1(1) of the Judges' Remuneration and Conditions

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> Under the Act, the purpose of the correctional system is to ensure a just, peaceful and safe society by the detention of all prisoners in safe custody whilst ensuring their human dignity. The Act also has a general focus on promoting the 'social responsibility and human development of prisoners'. An important component in encouraging the success of this system is the existence and proper functioning of an independent oversight body to ensure that the purposes of the legislation are fulfilled and that conditions in prisons are in line with our constitutional framework and democratic practices. As one of the key 'independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services' the [Judicial] Inspectorate plays a crucial role in maintaining the objectives of the Act, and safeguarding the constitutional requirements of the correctional system."

[16] Established in terms of section 115 of the interim Constitution, read with sections 181(1)(b) and 184 and item 20 of Schedule 6 to the Constitution.

[17] Established in terms of section 181(1)(f) of the Constitution, read with section 3 of the Electoral Commission Act 51 of 1996.

[18] Established in terms of section 181(1)(a) of the Constitution, read with section 1A of the Public Protector Act 23 of 2014.

[19] Established in terms of section 3 of the Independent Police Investigative Directorate Act 1 of 2011.

[20] Section 85(1) of the Act.

[21] Id section 85(2).

of Employment Act,[22] or judges who have been discharged from active service in terms of section 3 of that Act.[23] The Inspecting Judge continues to receive the salary, allowances, benefits and privileges attached to the office of a judge.[24]

[19] Section 88A governs the appointment of the CEO of the Judicial Inspectorate.[25] The Inspecting Judge must identify a suitable CEO who, in turn, must be appointed by the National Commissioner.[26] The CEO is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate[27] and for the appointment of staff to enable the Judicial Inspectorate to perform its functions.[28] She is also responsible for the appointment of experts to assist the Inspecting Judge with any specialised aspects of inspections or investigations for a fixed-term period.[29] The CEO must account to the National Commissioner for all the monies received by the Judicial Inspectorate.[30] The

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[22] 47 of 2001. Section 1(1) defines "active service" as "any service performed as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act".

[23] Section 86(1) and 86(2) of the Act. In practice, the Minister of Justice and Correctional Service nominates the Inspecting Judge to the President. See Sonke Gender Justice *Evaluation of South Africa's Judicial Inspectorate for Correctional Services: Assessing its Independence, Effectiveness and Community Engagement* (2013) (Sonke Evaluation) at 13, fn 47.

[24] Section 86(3) of the Act.

[25] Id section 88A of the Act, which reads:

> "(1) The Inspecting Judge must identify a suitably qualified and experienced person as Chief Executive Officer, who–
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> (a) is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate;
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> (b) is accountable to the National Commissioner for all the monies received by the Judicial Inspectorate; and
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> (c) is under control and authority of the Inspecting Judge.
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> (2) The person contemplated in subsection (1) must be appointed by the National Commissioner.
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> (3) The appointment and other conditions of service, including salary and allowances of the Chief Executive Officer are regulated by the Public Service Act.
>
> (4) Any matters relating to misconduct and incapacity of the Chief Executive Officer must be referred to the National Commissioner by the Inspecting Judge."

[26] Id section 88A(1) and (2).

[27] Id section 88A(1)(a).

[28] Id section 89(1).

[29] Id section 89(4).

[30] Id section 88A(1)(b).

CEO's conditions of service and salary, as well as those of the other staff members, are regulated by the Public Service Act.[31] The Inspecting Judge is obliged to refer any matters relating to misconduct or incapacity on the part of the CEO to the National Commissioner.[32]

[20] The powers, functions and duties of the Inspecting Judge are set out in section 90 of the Act. The Inspecting Judge is required to inspect, or arrange for the inspection of, correctional centres and remand detention facilities[33] in order to report on the treatment of inmates in correctional centres and on conditions and any corrupt practices therein.[34] The Act mandates that, whenever an inmate dies in a correctional centre, whether from natural or unnatural causes, this must immediately be reported to the Inspecting Judge.[35] Similarly, all instances of the use of force against inmates,[36] solitary confinement or extended solitary confinement[37] and the use of mechanical restraints[38] must be reported to the Inspecting Judge. In terms of section 90(2) of the Act, the Inspecting Judge may only receive and address complaints submitted by the National Council for Correctional Services (National Council),[39] the Minister of Justice, the National Commissioner, a Visitors' Committee[40] or, in urgent cases, an Independent

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[31] 103 of 1994. See, in particular, section 3(5)(a).

[32] Section 88A(4) of the Act.

[33] Section 1 of the Act defines a "remand detention facility" as:

> "[A] place established under this Act as a place for the reception, detention or confinement of a person liable to detention in custody, and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of detention, protection, treatment or otherwise, and all quarters used by correctional officials in connection with any such remand detention facility, and, for the purpose of sections 115 and 117, includes every place used as a police cell or lock-up."

[34] Section 90(1) of the Act.

[35] Id section 15(2).

[36] Id section 32(6).

[37] Id section 30(6).

[38] Id section 31(3).

[39] The members of the National Council, established in terms of section 83 of the Act, are appointed by the Minister of Justice. In terms of section 84 of the Act, the primary function of the National Council is to advise in developing policy relating to the correctional system and the sentencing process.

[40] Visitors' Committees are established, where deemed appropriate by the Inspecting Judge, in terms of section 94 of the Act. Visitors' Committees are comprised of Independent Correctional Centre Visitors for a particular area.

Correctional Centre Visitor (Independent Visitor).[41] The Inspecting Judge may also "of his or her own volition deal with any complaint".[42] Thus, the Judicial Inspectorate does not only receive complaints from within the Departmental structure.

[21] The Inspecting Judge is obliged to submit a report on each correctional centre or remand detention facility inspection to both the Minister of Justice and the relevant Parliamentary Committees on Correctional Services.[43] Accordingly, the Judicial Inspectorate reports to both the Executive and Parliament. The involvement of Parliament is an important check on the Department and on the status of correctional centres and remand detention facilities. In addition, the Inspecting Judge submits an annual report, which must be tabled in Parliament by the Minister of Justice.[44] For the purpose of conducting an investigation, the Inspecting Judge is empowered to make any enquiry and to hold hearings.[45] The Inspecting Judge also has the power to make rules that are necessary for the efficient functioning of the Judicial Inspectorate, provided these are not inconsistent with the Act.[46]

[22] Independent Visitors are essential to the work of the Judicial Inspectorate. They are tasked with visiting correctional centres and receiving, recording and monitoring complaints received during private interviews with inmates. In the exercise and performance of their powers and functions, Independent Visitors must be given access to any part of the correctional centre and any document or record.[47] In addition, the

[41] An Independent Correctional Centre Visitor is appointed by the CEO, in consultation with the Inspecting Judge, for each correctional centre, in terms of section 92 of the Act, following a public call for nominations and a consultative process with community organisations, for a period determined by the CEO.

[42] Section 90(2) of the Act.

[43] Id section 90(3).

[44] Id section 90(4).

[45] Section 90(6) of the Act provides that, at any such hearing, the Inspecting Judge is regarded as the chairperson of a Commission of Enquiry for purposes of sections 3 to 5 of the Commissions Act 8 of 1947.

[46] Id section 90(9) of the Act.

[47] Id section 93(2).

Head of the relevant correctional centre must assist an Independent Visitor in the performance of their assigned powers, functions and duties.[48]

The historical context of correctional centres in South Africa

[23] Correctional centres in South Africa cannot be considered in isolation from their historical context. Under the racist authoritarian regime of apartheid, the legal system administered injustice, as the courts were required to implement increasingly oppressive laws. Far from being guardians of fundamental rights, the Judiciary came to represent the gateway to unjust imprisonment and punishment without purpose. The majority of the South African population came to regard the machinations of justice with suspicion and mistrust. As the late Mahomed DP observed, "[t]he legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation".[49]

[24] Under apartheid, imprisonment was wielded as a tool for social and political control. Apartheid introduced laws criminalising political opposition and the earlier Correctional Services Act[50] dramatically restricted oversight and media coverage of prisons.[51] To recall the atrocities that occurred within the walls of South African

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[48] Id section 93(3).

[49] *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 1. It is no accident that current legislative instruments governing the administration of justice recall historical injustices and echo the transformative mandate of the Constitution, which expresses the imperative of eliminating the remnants of that system. See, for example, the preamble to the Superior Courts Act 10 of 2013, which provides that "with the advent of the democratic constitutional dispensation in 1994, the Republic inherited a fragmented court structure and infrastructure which were largely derived from our colonial history and were subsequently further structured to serve the segregation objectives of the apartheid dispensation". See also the Child Justice Act 75 of 2008, which introduces a system of diversion from the criminal justice system for children, recognising in its preamble that "before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children".

[50] 8 of 1959 (Prisons Act). This legislation was the predecessor to the Act.

[51] Section 44(1)(f) of the Prisons Act provided that:

> "Any person who publishes or causes to be published in any manner whatsoever any false information concerning the behavior or experience in prison of any prisoner or ex-prisoner or concerning the administration of any prison, knowing the same to be false, or without reasonable steps to verify such information (the onus of proving that reasonable steps were taken to verify such information being upon the accused); shall be guilty of an offense and liable on conviction to a fine not exceeding R8 000 or, in default of payment, to imprisonment for a period not

correctional centres prior to the introduction of the Constitution is to be reminded of the jarring barbarity of those who were given unchecked authority over vulnerable incarcerated persons. Many incarcerated persons were political activists, who, as a result of their opposition to the apartheid system, were plucked from society, hidden from the national and international gaze and plunged into the horrifying darkness of human cruelty.

[25] Dr Alexander Boraine, the late Chairperson of the Truth and Reconciliation Commission's Special Hearing on Prisons[52] recounted how one of the hearing attendees said, recalling his incarceration, "when I was there they said to me, 'you can scream as loud as you like, there is no one to hear you'".[53] Statements made by formerly incarcerated persons before the Commission attempted "to eliminate, to throw light on if you like, an area that has in many ways been a place of darkness".[54] One witness recounted how, while incarcerated on Robben Island, he was forced to work until his hands bled, beaten and—

> "put into a trench, forcibly held there and then some prisoners were actually instructed to cover me up, I was therefore being buried alive up to a point where it was only the face that was remaining above the earth. My whole body was covered and I was in that

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> exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment."

In addition, sections 44(1)(e) and (g) of the Prisons Act banned the taking or publication of photographs or sketches, and the publication of prisoners' own writings without written permission from the Commissioner of Prisons.

[52] The Truth and Reconciliation Commission (TRC) was a juristic person established in terms of section 2 of the Promotion of National Unity and Reconciliation Act 34 of 1995, which had as its objectives the promotion of national unity and reconciliation through, inter alia, establishing as "complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960." Special hearings were held on significant focus areas that the Commission felt warranted particular attention.

[53] Truth and Reconciliation Commission "Opening statement by Dr Alexander Boraine at the Special Hearings – Prisons, held at The Fort, Johannesburg" (21 July 1997), available at https://www.justice.gov.za/trc/special/prison/masondo.htm (Dr Boraine's Opening Statement). In Bunting "The Prisons of Apartheid" *Africa South* 4 (1960) at 46, Mr Lot Motsoenyane, who was incarcerated at Leeukop Prison in 1954 for public violence, is quoted as saying, "[t]hroughout the period I was in, we were never given soap. It is impossible to complain to prison visitors." Mr Henry Kolisang, who was incarcerated in Leeukop for over two years, is similarly quoted as saying, "[p]risoners were warned that those who gave unfavourable reports [to visitors] would get another five years".

[54] Dr Boraine's Opening Statement id.

> situation for quite some time, I had to scramble out at the time when the prison warders wanted to urinate into my mouth."[55]

A female prisoner recalled how she was repeatedly assaulted by police to the point where she miscarried her child and that she could trust nobody to assist her.[56]

[26] More insidious than instances of blatant physical violence and unexplained disappearances was the psychological torture, cruelty and neglect suffered by prisoners. The lights at Pretoria Central Prison were "never, ever, ever switched off"[57] and prisoners were under constant surveillance, refused shoes and fed rotten food.[58] A former death row prisoner testified—

> "[w]hat was important was the letters. They kept our letters from us. The letters were the things that gave us strength. . . . Even when you have the letters, after a certain time, they would come and search the cells, they would seize the letters and tear them."[59]

[27] The dawn of our constitutional democracy necessitated the extensive systemic reform of correctional centres. As noted, the Act established the Judicial Inspectorate, articulated detailed standards regulating the conditions of detention and the treatment of incarcerated persons and represented a move towards an internationally acceptable correctional system.[60] Having initially struggled to respond to the need for reform, the Department of Correctional Services, in particular after 2004, "developed a deeper

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[55] Truth and Reconciliation Commission "Statement of Mr Johnson Mlambo" *Special Hearings Transcripts* (21 July 1997), available at https://www.justice.gov.za/trc/special/prison/mlambo.htm.

[56] Truth and Reconciliation Commission "Statement of Ms Deborah Marakala" *Special Hearings Transcripts* (21 July 1997), available at https://www.justice.gov.za/trc/special/prison/marakala.htm.

[57] Truth and Reconciliation Commission "Statement of Mrs Paula McBride" *Special Hearings Transcripts* (21 July 1997), available at https://www.justice.gov.za/trc/special/prison/mcbride.htm.

[58] Truth and Reconciliation Commission "Statement of Mr Henry Makgothi" *Special Hearings Transcripts* (21 July 1997) available at https://www.justice.gov.za/trc/special/prison/magkothi.htm.

[59] Truth and Reconciliation Commission "Statement of Mr Duma Khumalo" *Special Hearings Transcripts* (22 July 1997) available at https://www.justice.gov.za/trc/special/prison/khumalo.htm. Mr Khumalo, concluding his statement, recalled that "[t]here were strong men, but at night people would cry."

[60] See [16]. See also Muntingh *An Analytical Study of Prison Reform after 2004* (LLD thesis, University of the Western Cape, 2012) at 265.

understanding of its constitutional obligations".[61] Courts, too, began to adopt a progressive and expansive interpretation of inmates' rights.[62] Nevertheless, the rights of incarcerated persons have been beleaguered by setbacks and, as discussed in the section that follows, their vindication has been the subject of extensive litigation.[63]

[28] This Court stands alongside the Old Fort Prison and is built, in part, with 150 000 bricks from the notorious Awaiting Trial Block, the walls of which bore witness to flagrant abuses of the human rights of incarcerated persons. The Constitutional Hill precinct, which housed thousands of common law and political offenders,[64] is an icon of resistance and democracy, rising from the ashes of past oppression. It is an architectural embodiment of the importance of bringing light into what were the darkest and most shameful corners of our justice system.[65] And, while our country has stepped decisively away from the darkness of our past, this is indisputably a continuing project. Correctional centres remain fertile breeding grounds for autocracy and human rights abuses, cloistered as they are from the view of society. It is within this context that the Judicial Inspectorate carries out its mandate, with the constitutional rights of

[61] Muntingh (2012) id at 442 and 444. He observes that:

> "[R]apid reform of the prison system did not materialise, but rather the opposite occurred and a second crisis developed, namely the collapse of order and discipline in the Department. The period from1994 to 2004 was characterised by a series of governance failures in the prison system.
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> . . .
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> [T]he Department engaged in a number of policy initiatives that were either cosmetic or fundamentally so ill-conceived or poorly implemented, that they detracted from reform efforts."

[62] Id at 266.

[63] See, in this regard, id at 383-4 and 386. Examples of such setbacks include the passing of minimum sentences legislation in 1997, amendments increasing the stringency of bail legislation between 1995 and 1997 and the attempted exclusion of prisoners from the 1999 general elections.

[64] Individuals housed at the Old Fort Prison and Number Four Prison included, among others, Nelson Mandela, Albert Luthuli, Walter Sisulu, Joe Slovo, Ahmed Kathrada, Albertina Sisulu, Winnie Madikizela-Mandela, Alex La Guma, Robert Sobukwe, the treason trialists, protestors of the pass laws and students from the 1976 Soweto uprising.

[65] See the statement of regarded journalist and apartheid activist Benjamin Pogrund ("Statement of Mr Benjamin Pogrund" *Special Hearings Transcripts* (22 July 1997), available at https://www.justice.gov.za/trc/special/prison/pogrund.htm):

> "I hope that this Commission will recommend methods whereby the public can watch what goes on inside prisons. Possibly through the sort of prison visitors, community visitors used in Britain, where people have the right of access to prisons and to talk to prisoners at any time."

incarcerated persons hanging in the balance. I now examine the most pertinent of these rights.

The constitutional rights of inmates

[29] Central to the determination whether the Constitution imposes an obligation on the State to ensure the adequate independence of the Judicial Inspectorate is an examination of the implicated rights in the Bill of Rights. This is so because, as will be explained, the question whether the State has taken reasonable and effective measures to discharge its obligations under section 7(2), to respect, protect, promote and fulfil the rights in the Bill of Rights, is informed by the particular rights in the Bill of Rights that are implicated in the matter.[66] As held by this Court in *Mazibuko*, the nature and extent of the obligations imposed on the State by those rights, read alongside the State's obligations in section 7(2), is a matter of rights interpretation.[67]

[30] Inmates are a particularly vulnerable group. They are wholly dependent on the State for the provision of their basic needs, including shelter, food and medical care, and their physical and mental well-being. It was accepted in *Hofmeyr* that inmates are entitled to *all* their personal rights and that their personal dignity cannot be temporarily taken away by law.[68] They may not be subjected to any illegal treatment, or infringement of their liberty not warranted by, or necessary for, the purposes of correctional centre discipline and administration. Incarceration per se is not a justification for the limitation of inmates' rights, and they continue to enjoy all rights save those which it is absolutely necessary to curtail in order to implement the sentence or order of a court (the *residuum* principle).[69]

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[66] See Sucker "Approval of an International Treaty in Parliament: How does section 231(2) Bind the Republic?" (2013) *Constitutional Court Review* 417 at 430.

[67] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 46-50.

[68] *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993 (3) SA 131 (A) (*Hofmeyr*) at 139I.

[69] First expressed in *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 122-3, the *residuum* principle requires that a person's rights are not limited upon incarceration, except where necessary to properly implement the sentence.

[31] If constitutional values find clear expression in the functioning of correctional facilities, the protection of the rights of inmates will be optimised and better results will be achieved by correctional centres. In addition, adherence to the rule of law will be maintained and, ultimately, society as a whole will benefit as a result of reduced crime rates and recidivism. For correctional centres to function as hidden enclaves, beyond the reach of the Constitution, would be an intolerable position in our constitutional dispensation.[70]

[32] All the rights in the Bill of Rights apply to inmates, save where justifiably limited in terms of section 36 of the Constitution. There are, however, a number of non-derogable rights that become especially important when an individual is incarcerated and thus directly subjected to the State's coercive powers. These include the rights to dignity;[71] life;[72] freedom and security of the person;[73] and to be detained in conditions that are consistent with human dignity, which include opportunities for exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.[74]

[33] Dignity is a foundational value in our Constitution.[75] The right of inmates to dignity is expressed in the oft-quoted dictum of this Court in *August*. In considering the rights of inmates to vote, this Court said that:

> "The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."[76]

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[70] Muntingh "Prisons in South Africa's Constitutional Democracy" *Centre for the Study of Violence and Reconciliation: Criminal Justice Programme* (2007) at 5.

[71] Section 10 of the Constitution.

[72] Section 11 of the Constitution.

[73] Section 12 of the Constitution.

[74] Section 35(2)(e) of the Constitution.

[75] Sections 1(a) and 10 of the Constitution. Section 10 affirms that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

[76] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

Human dignity is in this case expressed as the right to participate in elections. Understood in these terms, the right to dignity guarantees that inmates still "count", notwithstanding their incarceration.

[34] Inmates remain members of our democratic society, equally entitled to rights except where these are justifiably limited in light of the *residuum* principle.[77] The right to dignity also has a bearing on how punishment can be administered. In the seminal judgment of *Makwanyane*, this Court held that "[r]espect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishment".[78] The importance of the vindication of the right to dignity in the context of punishment was also canvassed in *Williams*, a case concerning the practice of the corporal punishment of juvenile offenders, in which this Court held:

> "[T]he State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the [Interim] Constitution."[79]

[35] As Muntingh observes, the right to dignity "lies at the core of prisoners' rights in a constitutional democracy and should be understood in very tangible terms, emphasising the positive measures undertaken to give effect to personal worth and autonomy".[80] In this vein, the High Court in *Stanfield* held that it would amount to inhuman treatment not to discharge an incarcerated person diagnosed with terminal lung cancer from a correctional centre, in order that he might die with dignity.[81] The Court pointedly derided the position assumed by the Department in that matter, which it held

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[77] In *Ehrlich v Minister Correctional Services* 2009 (2) SA 373 (E) at para 7, the Court held that "[n]ow in the era of democratic constitutionalism . . . the *residuum* principle has stronger protection than before. There can be no doubt that it is in harmony with the Constitution's values."

[78] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 655 (CC) at para 59, citing the German Federal Constitutional Court.

[79] *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) (*Williams*) at para 38.

[80] Muntingh (2007) above n 70 at 11.

[81] *Stanfield v Minister of Correctional Services* 2004 (4) SA 43 (C) at para 126.

appeared to be that the applicant "must lose his dignity before it [was] recognised and respected".[82]

[36] In *Makwanyane*, this Court concluded that "[r]etribution cannot be accorded the same weight under our Constitution as the rights to life and dignity"[83] and affirmed that inmates retain all the rights to which every person is entitled under the Bill of Rights, subject only to justifiable limitations imposed by incarceration.[84] It is notable that the State also bears a positive obligation to protect the rights to life of all citizens, including all incarcerated persons.[85] The importance of the State discharging this obligation is underscored by the high incidence of assaults, by both guards and fellow incarcerated persons, in correctional facilities, with the incidence of the former stated as being almost double the latter and the number of assaults increasing each year.[86]

[37] The right to freedom and security of the person[87] requires, amongst other things, that inmates not be tortured in any way. As will be explained, "torture" includes both physical and psychological torture. Moreover, inmates have the right not to be treated in a cruel, inhuman or degrading way. Violations of the right to freedom and security of the person may necessarily infringe other rights: for example, the right to dignity, the rights to dignity, healthcare and privacy.

[38] Section 35(2) of the Constitution addresses the general rights of detained and incarcerated persons, including the right to living conditions consistent with human

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[82] Id at para 124.

[83] *Makwanyane* n 78 above at para 146.

[84] Id at para 143.

[85] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 58 and *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 43.

[86] See Judicial Inspectorate for Correctional Services *Annual Report 2018/19* (2019) at 43 and Judicial Inspectorate for Correctional Services *Annual Report 2017/18* (2018) at 46. The latter illustrates a 19% increase in assault complaints between 2017 and 2018.

[87] Section 12 of the Constitution. Section 12(1)(c) to (e) provides that the right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources; the right not to be tortured in any way; and the right not to be treated or punished in a cruel, inhuman or degrading way.

dignity. This entails, among other things, adequate medical treatment, and the right to communicate with their spouses, next of kin, religious counsellors and medical practitioners.[88] Section 35(2) is unqualified and has been relied on to challenge the State's treatment of detained persons on numerous occasions. In *Van Biljon*, the High Court held that, once it is established that "anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment".[89] In *Strydom*, the High Court considered the physical environment of correctional facilities and found that the supply of electricity, which allowed incarcerated persons to enjoy television in an environment otherwise lacking in stimulation, was important for the mental health and rehabilitation of incarcerated persons and that failure to provide this amenity would amount to cruel and degrading treatment.[90]

[39] The issue of living conditions was canvassed more recently by the High Court in relation to conditions at Pollsmoor Remand Detention Facility, where, in at least one reported instance, approximately 60 detainees were forced to share a cell built to accommodate approximately 30 people.[91] Ventilation was poor. Between 50 and 60 people shared a single toilet and shower.[92] Detainees were forced to sleep on the floor, or to share bare mattresses, and were vulnerable to emotional distress, disease and violence due to the crowded conditions.[93] Some detainees complained that they went for weeks without being released from their cells. The applicants in that matter (Sonke and Lawyers for Human Rights) approached the Court for a declaration that the State had acted unconstitutionally in failing to provide remanded persons with adequate exercise, nutrition, accommodation, facilities and health care services. The court issued

[88] Section 35(2)(f) of the Constitution.

[89] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) at 62B-D.

[90] *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) at para 15.

[91] Justice Cameron "Constitutional Court of South Africa Report: Pollsmoor Correctional Centre – Remand Centre and Women's Centre" (23 April 2015), available at https://www.concourt.org.za/images/phocadownload/prison_visits/cameron/Pollsmoor-Prison-Report-23-April-2015-Justice-Edwin-Cameron-FINAL-for-web.pdf.pdf at 14 and 19.

[92] Id.

[93] Id at 13-4, 19 and 28.

an order calling on the State to appear in court on a fixed date and show good cause why the court should not order it to reduce the number of persons detained at Pollsmoor Remand Detention Facility to 120% of its capacity. The court granted the declarator sought by the applicants and ultimately ordered the State to reduce overcrowding to 150% by 30 June 2017.[94] While this may be viewed as a successful outcome, it is pertinent to note, particularly in light of the concerns raised in the present application, that, following the litigation, the Department of Correctional Services withdrew its authorisation for Sonke Gender Justice to work in five Western Cape correctional facilities.[95] This may well be construed as an attempt by the Department to avoid a harsh light being cast on potential rights infringements in correctional centres and remand detention facilities.

Is the State obliged to ensure the adequate independence of the Judicial Inspectorate?

The State's obligations under section 7(2) of the Constitution, in relation to incarcerated persons

[40] Section 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This makes clear that section 7(2) imposes both positive and negative duties on the State.[96]

[41] The duty to "respect" is the negative duty on the State not to perform any act that infringes the rights in the Bill of Rights.[97] The duty to "protect" refers to the positive duty that the Constitution imposes on the State to "provide appropriate protection to

[94] *Sonke Gender Justice v Government of the Republic of South Africa*, unreported judgment of the Western Cape High Court, Cape Town, Case No. 24087/15 (5 December 2016). "Reasons for judgment" (23 February 2017), available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/03/Sonke-Gender-Justice-v-the-Government_SA_2017.pdf.

[95] Nevin and Keehn "Pollsmoor: Reducing Overcrowding in a South African Remand and Detention Facility" *Evidence for HIV Prevention in Southern Africa* (2018) at 16.

[96] See *Mazibuko* above n 67 at para 46, fn 34.

[97] *Carmichele* above n 85 at para 44.

everyone through laws and structures designed to afford such protection".[98] This is a duty to prevent interference with, or infringement of, rights by others.[99] The duty to "fulfil" is the positive duty that the Constitution imposes on the State, in certain circumstances, to "take positive measures that assist individuals and communities to gain access to and enjoy the full realisation of the relevant rights".[100] Finally, the State may also, where appropriate, have a duty to "promote" constitutional rights in the sense of undertaking "awareness-raising and educational measures concerning the rights".[101] As explained, the starting point in considering the obligations imposed on the State by section 7(2) must be the rights in the Bill of Rights. This is because the nature and extent of the State's section 7(2) obligations require a consideration of the implicated rights. It is clear that in this matter we are dealing with the positive obligation of the State to protect the rights to life, dignity, bodily security and conditions consistent with human dignity of inmates from invasion. The question concerns what steps the State is required to take to fulfil this obligation.

[42] This Court pronounced authoritatively on the requirements of section 7(2) in *Glenister II*. This Court said:

> "[T]he starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection.' Implicit in section 7(2) is the *requirement that the steps the*

[98] Id at paras 44-5. See also *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) (*Van Duivenboden*) at para 20.

[99] See, by way of examples regarding the State's duty to protect rights, *Carmichele* above n 85, which concerned the State's obligation to protect the dignity, freedom and security of women and *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC), which concerned the State's obligation to provide protections for child victims in criminal proceedings.

[100] Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co Ltd, Cape Town 2010) at 84. See, by way of an example regarding the duty to fulfil the rights in the Bill of Rights, *Minister of Health v Treatment Action Campaign (No. 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign (No.2)*), which concerned the State's obligation to make the antiretroviral drug Nevirapine available at hospitals and clinics.

[101] Liebenberg "The Interpretation of Socio-Economic Rights" in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 6.

> *State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective*."[102]

[43] This Court acknowledged that "there are many ways in which the State can fulfil its duty to take [measures] to respect, protect, promote and fulfil the rights in the Bill of Rights" and that courts should not be "prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt".[103] While acknowledging that there is a range of possible measures open to the State when it seeks to fulfil its section 7(2) obligations, this Court emphasised that the measures taken *must be reasonable*.[104] The measures taken by the State to fulfil its constitutional obligations are subject to judicial review for reasonableness.[105]

[44] An overarching issue for determination in *Glenister II* was whether the Constitution imposes an obligation on the State to establish and maintain an *independent* body to combat corruption and organised crime. The majority held that the Constitution did. It found that the State's section 7(2) obligation to respect, protect, promote and fulfil the rights in the Bill of Rights inevitably gives rise to "a duty to create efficient anti-corruption mechanisms".[106] This, it reasoned, is because corruption undermines rights in the Bill of Rights, including the rights to dignity and equality and various socio-economic rights.[107] The majority further held that the Constitution requires the State to establish an anti-corruption unit that has "*the necessary independence*",[108] because establishing an anti-corruption unit that lacked adequate independence "would not constitute a reasonable step".[109]

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[102] *Glenister II* above n 4 at para 189.

[103] Id at para 191.

[104] Id.

[105] Bishop and Raboshakga "National Legislative Authority" in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 17-40.

[106] *Glenister II* above n 4 at para 177.

[107] Id.

[108] Id at para 189.

[109] Id at para 194.

[45] In reaching this conclusion, this Court considered the fact that international law imposes an obligation on the State on the international plane to establish an anti-corruption unit with the necessary independence.[110] This is because section 39(1)(b) requires that courts consider international law when interpreting the Bill of Rights, including section 7(2).[111] The Court emphasised, however, that the duty to create an anti-corruption unit with adequate independence does not exist only in the international sphere. Rather, it arises from the Constitution itself, which draws the obligations assumed by the State on the international plane deeply into its heart, by requiring the State to fulfil them in the domestic sphere.[112] This Court said:

> "This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the State to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself."[113]

[46] This Court was at pains to explain that section 7(2) requires the State to establish an anti-corruption unit with adequate independence, even without any consideration of international law. It held:

> "[C]orruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. . . . even leaving to one side for a moment the Republic's international law obligations, we consider that the scheme of our Constitution points to the cardinal need for an independent entity to combat corruption. Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common-sense approach, our law demands a body outside executive control to deal effectively with corruption.

[110] Id at para 192.

[111] Id.

[112] Id at para 189.

[113] Id at para 195.

> The point we make is this. It is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should."[114]

[47] The decision of the majority in *Glenister II* provides salutary guidance in this case. The understanding of section 7(2) adopted by this Court in *Glenister II* formed part of the *ratio decidendi* (rationale or basis of deciding) of that decision. It is, therefore, binding on this Court in terms of the doctrine of precedent, which "is a manifestation of the rule of law itself".[115] This Court has recognised that departing from binding precedent undermines the rule of law and "invites legal chaos".[116] Courts may thus only depart from binding precedent where that precedent is "clearly wrong" and must, in such instances, give reasons for the departure.[117]

[48] Moreover, the understanding of section 7(2) adopted by this Court in *Glenister II* is entirely of a piece with this Court's jurisprudence on the obligations of the State arising from the Bill of Rights. As explained by this Court in *Rail Commuters*, the Constitution—

> "requires the bearer of constitutional obligations to perform them in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances."[118]

[49] The interpretation of section 7(2) adopted by this Court also serves the constitutional value of accountability by requiring the State to account for the steps that

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[114] Id at paras 200-1.

[115] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay Ratepayers'*) at para 28.

[116] Id at paras 28-30.

[117] Id at para 30.

[118] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters*) at para 87.

it takes to respect, protect, promote and fulfil the rights in the Bill of Rights.[119] The value of accountability is served by requiring the State to show that the measures that it adopts to fulfil its section 7(2) obligations are reasonable and effective. This is consistent with the role of the courts as expressed in *Treatment Action Campaign (No. 2)*:

> "The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation."[120]

[50] The vulnerability of inmates in correctional centres and the real possibility of the infringement of their rights to life, dignity, bodily security and conditions consonant with human dignity imposes a positive obligation on the State to provide appropriate protection to inmates "through laws and structures designed to afford such protection".[121] There are indeed many measures through which the State may seek to fulfil this obligation and it is unnecessary to decide whether the Constitution requires the State to establish a mechanism with oversight over the Department.[122] This is because the State itself *elected* to fulfil its constitutional obligations through the establishment of the Judicial Inspectorate with the mandate to oversee the Department and monitor and report on the treatment of inmates and the conditions in correctional centres.

[51] The question in this case is whether the State's *chosen measure* of fulfilling its obligation to protect the constitutional rights of inmates by establishing the Judicial Inspectorate passes constitutional scrutiny. More particularly, whether establishing the

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[119] *Van Duivenboden* above n 98 at para 20.

[120] *Treatment Action Campaign (No. 2)* above n 100 at para 38.

[121] *Glenister II* above n 4 at para 189.

[122] As correctional centres and remand detention facilities operate behind closed doors and high walls, there is a real possibility of the rights of inmates being infringed with impunity in the absence of effective oversight mechanisms. Without deciding the issue, it is worth noting that this real risk may require the State to put in place effective oversight mechanisms in order to protect the rights of inmates from invasion, as it is mandated to do by section 7(2) of the Constitution. As explained, it is unnecessary to decide this issue, because the State has elected to put an oversight mechanism in place – the Judicial Inspectorate.

Judicial Inspectorate *without* ensuring that it has adequate independence constitutes a reasonable step.

[52] Independence is an inherent characteristic of a successful oversight, or watchdog, entity and is crucial in ensuring the effective oversight of correctional facilities.[123] In the context of an oversight entity like the Judicial Inspectorate, independence requires that it must be able to perform its functions, free from the influence of the executive body it is mandated to scrutinise. Moreover, even if we accept that the Department as a whole is generally committed to assisting the Judicial Inspectorate, the facts and statistics presented in the papers and in the Judicial Inspectorate's annual reports over the past decade reveal that the rights of inmates remain threatened by, among other things, "bad apples" and rogue operators within the Department, whose conduct takes place in spaces that are well-hidden from public view.[124]

[53] To effectively scrutinise correctional centres and remand detention facilities, an oversight body should maintain an arms-length relationship with the Department. It should be sufficiently insulated from undue influence or "capture" by the very departmental officials whose conduct it is charged with monitoring. In addition, it must gain the confidence and trust of inmates. Inmates' confidence in the work done by a correctional centre oversight body will depend largely on the extent to which that body is perceived as being independent.[125]

[54] It follows that establishing the Judicial Inspectorate, without also ensuring that it has adequate independence to perform its oversight role effectively, does not constitute a reasonable step to protect the rights of incarcerated persons. Section 7(2), read with various rights in the Bill of Rights (including those contained in sections 10,

[123] Sonke Evaluation above n 23 at 20.

[124] Section 38 of the Constitution expressly recognises the right of anyone listed in that section to approach a competent court alleging that a right has been threatened or infringed.

[125] See Jagwanth above n 12 at 58.

11, 12 and 35), requires the State to ensure that the Judicial Inspectorate has *adequate independence*. This conclusion does not require that anything be "read into" the Constitution. The overarching standard of reasonableness imposed by section 7(2) requires, in relation to steps taken by the State to ensure oversight of the Department, that the oversight body is sufficiently independent. The requirement of independence thus flows directly from the State's constitutional obligation to act reasonably and effectively in fulfilling its constitutional obligations.

The interpretative value of international law

[55] In light of the conclusions that I have reached, consideration of international law may be seen as unnecessary. The requirement that a correctional facility oversight body enjoys adequate independence flows directly from the Constitution itself and exists independent of international law. However, in *Glenister II*, this Court stressed the importance of the obligation on courts to consider international law when interpreting the Bill of Rights, saying:

> "And it is here where the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that, when interpreting the Bill of Rights, a court 'must consider international law'. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the State to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law."[126]

[56] Section 39(1)(b) of the Constitution thus enjoins us to consider international law when interpreting provisions in the Bill of Rights.[127] And, in *Glenister II*, this Court

[126] *Glenister II* above n 4 at para 192.

[127] Section 39(1) of the Constitution provides that:

> "When interpreting the Bill of Rights, a court, tribunal, or forum–
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

established clear precedent on the role of international treaties that have been approved by Parliament in determining what "reasonable and effective" steps the State is obliged to take under section 7(2) in order to respect, protect, promote and fulfil those rights.

[57] Subject to limited exceptions, once an international instrument has been approved by Parliament, it binds South Africa on the international plane, in terms of section 231(2) of the Constitution.[128] The section 39(1)(b) injunction to consider international law when interpreting provisions of the Bill of Rights applies, regardless of the ratification status of any applicable international instruments.[129] However, this Court has made it clear that, once an international instrument has been ratified and approved in accordance with section 231(2) of the Constitution, it is deemed to be of "the foremost interpretative significance"[130] and "has significant impact in delineating the State's obligations in protecting and fulfilling the rights in the Bill of Rights".[131] As this Court affirmed in *Glenister II*, the operation of section 39(1)(b) does not "incorporate international agreements into our Constitution."[132] However – and particularly in the present case, where an "independent" oversight body already exists – section 39(1)(b) enjoins us to look to the standards of independence and the correctional facility oversight bodies envisioned in international conventions and protocols as points of reference when assessing whether the State has discharged its obligations under section 7(2).[133] The contents of applicable international instruments provide valuable

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[128] Section 231(2) of the Constitution provides:

> "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

[129] See, for example, *Women's Legal Centre Trust v President of the Republic of South Africa* 2018 (6) SA 598 (WCC) at paras 158-65 and 173-8, where it was held that even international instruments which had not been domesticated, and were not law in South Africa, held interpretative power.

[130] *Glenister II* above n 4 at para 194.

[131] Id at para 182, where this Court held that:

> "[T]he main force of section 231(2) is in the international sphere. An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved 'binds the Republic'. That important fact . . . has significant impact in delineating the State's obligations in protecting and fulfilling the rights in the Bill of Rights."

[132] Id at para 195.

[133] Id at para 192.

insights into the type and standard of the measures that the State is required to take. This approach acknowledges the clear policy expressions evinced by this country in acceding to international conventions and accords with this Court's jurisprudence in *Glenister II*.

[58] There are a number of relevant international law instruments that require parties thereto to establish independent oversight bodies for the prevention of torture and degrading treatment. Although not all of these expressly refer to the protection of the human rights of incarcerated persons, a review of the rights violations reported in South African correctional centres over the course of a single year demonstrates that the potential for infringement of the human rights that each of the instruments seek to vindicate only becomes more pronounced in the context of correctional centres.[134] It also bears noting that South African correctional centres, in many instances, do not solely house convicted offenders, but also serve as interim accommodation for remand detainees and for mentally ill state patients awaiting accommodation at bed-short state psychiatric hospitals.[135] These persons have special needs and are particularly susceptible to rights violations in the harsh correctional centre environment. This necessitates the provision of sufficient safeguards and services to ensure that the rights of these vulnerable persons are adequately protected.

[59] Perhaps the most relevant international instrument for present purposes is the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol),[136] which was ratified by South Africa and approved by Parliament in early 2019.[137] The effect of this ratification is threefold.

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[134] Annual Report 2018/19 above n 86 at 24-8 and 36-41.

[135] Annual Report 2018/19 above n 86 at 28. See also section 49D of the Act, which makes provision for the temporary incarceration of mentally ill inmates in correctional centres.

[136] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly Resolution 57/199, 18 December 2002.

[137] South African Human Rights Commission "Launch of the National Torture Preventive Mechanism" (17 July 2019), available at https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2009-media-statement-launch-of-the-national- torture-preventive-mechanism-npm.

[60] First, as noted, the effect of South Africa's ratification of any international instrument is to bind the Republic on the international plane and to lend particular interpretative significance to the provisions of that instrument when interpreting rights in the Bill of Rights.[138] This much is clear from this Court's binding *ratio decidendi* in *Glenister II*.

[61] Secondly, the effect of the coming into force of the Optional Protocol is that the mandate of the United Nations Subcommittee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment (Subcommittee) is triggered in relation to South Africa. This entitles the Subcommittee, amongst other things, to visit and inspect places of detention in South Africa and requires South Africa to grant unrestricted access to this body.[139]

[62] A further effect of South Africa's ratification of the Optional Protocol is that the State is obliged, within one year of the Optional Protocol's entry into force, to maintain, designate or establish a national preventive mechanism, which may comprise multiple decentralised bodies, to ensure that torture is prevented at the domestic level.[140] The State retains a wide discretion regarding the particular manner in terms of which this obligation is incorporated into national law and discharged on the domestic plane. The State has, in accordance with this obligation, designated the SAHRC as the coordinator and functionary of a multi-body national preventive mechanism.[141] While the project

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[138] See [57].

[139] Articles 4, 12 and 14 of the Optional Protocol.

[140] Article 17 of the Optional Protocol.

[141] Jeffery "Launch of South Africa's National Torture Preventive Mechanism of the Optional Protocol to the Convention against Torture" (Department of Justice keynote address delivered at the Castle of Good Hope, Cape Town, 19 July 2019). See also the foreword to the Annual Report 2018/19 above n 86 at 10, where the Inspecting Judge notes that he "represent[s] JICS on the National Preventive Mechanism (NPM), which South Africa is obliged to have under the Optional Protocol". See also "Concluding Observations of the Subcommittee on the Second Periodic Report of South Africa" (7 June 2019), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/ZAF/CO/2&Lang=En), which expresses the following sentiment at 6:

> "While welcoming the parliamentary approval of the ratification of the Optional Protocol to the Convention and the designation of the South African Human Rights Commission as the coordinating body for the national preventive mechanism, the Committee is concerned about

is still in its early phases and no report from South Africa's national preventive mechanism has yet been published by the Subcommittee,[142] it is envisioned that the SAHRC, driven by its constitutional mandate and policy decisions, will work with several statutory bodies, including the Judicial Inspectorate, to fulfil the mandate of the Optional Protocol.[143] It is common practice, when States effect their international obligations on the domestic plane, to make use of existing bodies and laws where these adequately serve the objects of the international convention in question. In the case of the Optional Protocol, the majority of countries in the region have designated their existing national human rights institutions as national preventive mechanisms or co-ordinators thereof.[144] It is apposite to highlight, at this juncture, that this case is not about the State's chosen designation and structure of the national preventive mechanism referred to in the Optional Protocol. Rather, it is about whether the legislation governing the Judicial Inspectorate, regardless of whether it is one of the bodies involved in the functioning of South Africa's national preventive mechanism or not, currently affords it adequate independence to enable it to fulfil its function effectively. The fact that the Judicial Inspectorate appears to have assumed a role in the operation of South Africa's national preventive mechanism simply lends further weight to this point.

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the limitations currently faced by oversight bodies in terms of mandates, budgets and institutional independence from the government departments that are supervised."

[142] See United Nations Human Rights Office of the High Commissioner "UN Treaty Body Database: Reporting Status for South Africa" (20 October 2020).

[143] South African Human Rights Commission "SAHRC Strategic Plan 2020-2025" (January 2020) at 12. See also "Report of the Portfolio Committee on Justice and Correctional Services on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) tabled in terms of section 231(2) of the Constitution, 1996, and the Explanatory Memorandum to the Optional Protocol" (13 March 2019) at 19. This document recounts discussions between the Department and the SAHRC as early as 2017 regarding the national preventive mechanism model as being one which includes existing institutions, including the Judicial Inspectorate, with the SAHRC assuming a co-ordinating role.

[144] See Association for the Prevention of Torture "Renewed Commitment to OPCAT Implementation by African Countries" (29 November 2019), available at https://www.apt.ch/en/news_on_prevention/renewed-commitment-to-opcat-implementation-by-african-countries. See also Association for the Prevention of Torture "South Africa – OPCAT Situation" (20 October 2020), available at https://www.apt.ch/en/knowledge-hub/opcat-database/south-africa, which indicates that the co-ordinating mechanism of the SAHRC will be joined "by other institutions following legislative reform".

[63] The ratification of the Optional Protocol followed the earlier ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (Torture Convention),[145] which is directly enforceable by courts at a domestic level by virtue of the fact that it has been incorporated into South African national law by way of the Prevention and Combating of Torture of Persons Act[146] (Torture Act). The objectives of the Torture Act include giving effect to South Africa's obligations in terms of the Torture Convention, the promotion of universal respect for human rights and the protection of human dignity, and the provision of measures aimed at the prevention and combating of torture.[147] It is notable, further, that the prohibition against torture has been recognised as a peremptory norm of customary international law, meaning that it has "a higher rank in the international hierarchy than treaty law . . . [and that] the principle at issue cannot be derogated from by States through international treaties, or local or special customs or even general customary rules not endowed with the same normative force".[148]

[64] The Optional Protocol recognises this and is dedicated to establishing a system of regular correctional facility oversight as a means to prevent torture and cruel, inhuman or degrading treatment in correctional centres. It recognises the fact that the powerlessness of the victim has been found to be "a defining prerequisite" for torture.[149] Correctional centres, where incarcerated persons are almost entirely reliant on those overseeing them, are one of the more extreme examples of human powerlessness. It is increasingly acknowledged that the definition of "torture" does not stop at physical

[145] 10 December 1984. The Torture Convention was ratified by South Africa on 10 December 1998. While the Torture Convention is not specific to incarcerated persons, its provisions seek to facilitate complaints and investigations into any acts of torture or ill-treatment committed in any state party's territory.

[146] 13 of 2013.

[147] Section 2(1) id.

[148] *Prosecutor v Anto Furundžija*, IT-95-17/1-T, § 153, ICTY 1998. See further *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, no 1033, § 457, ICJ 2012 and *Al-Adsani v UK*, no 35763/97, § 61, ECHR 2001.

[149] *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (presented at the forty-third session of the Human Rights Council 24 February to 20 March 2020) (Special Rapporteur Report) at 11.

suffering.[150] Psychological torture has been interpreted to include all methods, techniques and circumstances which are intended, foreseen or designed to inflict severe mental suffering, even absent physical pain. This includes, for example, isolation, the induction of anxiety through misinformation and violent threats against the incarcerated person or their family, the manipulation of cultural phobia, the withdrawal of access to privileges such as bedding or reading material, the imposition of contradictory or absurd rules, public humiliation and constant surveillance.[151] Correctional facilities, where incarcerated persons are necessarily under the control of others, create a fertile environment for inflicting torture.[152]

[65] The Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa[153] (Robben Island Guidelines) were developed in part to encourage support of the Optional Protocol, which was at that stage in draft form[154] and constitute the first regional instrument concerning the prevention of torture in Africa.[155] Although the Robben Island Guidelines are non-binding, like other soft law they offer a useful tool for interpreting the obligations found in related binding instruments.[156] For example, they lend additional detail to Article 5 of the African Charter on Human and Peoples' Rights, a binding instrument that prohibits torture and cruel, inhuman or degrading

[150] Article 1 of the Torture Convention defines "torture" as including the intentional and purposeful infliction of severe pain or suffering "whether physical or mental".

[151] Special Rapporteur Report above n 149 at 7 and 12.

[152] In Langa "Analysis of Existing Data on Torture in South Africa: With Specific Focus on Annual Reports published by IPID and JICS" (2011) *The Centre for the Study of Violence and Reconciliation* at 15, notes that many cases that meet the criteria for torture are not classified as "torture" in the annual reports of the Judicial Inspectorate, but rather as "assaults". The same analysis, at 25, notes that a high incidence of prisoners who take their own lives were those placed in isolation for extended periods.

[153] African Commission on Human and Peoples' Rights Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, 23 October 2002.

[154] Mujuzi "An Analysis of the Approach to the Right to Freedom from Torture adopted by the African Commission on Human and Peoples' Rights" (2006) 6 *African Human Rights Law Journal* 423 at 440. A number of the provisions of the Robben Island Guidelines restate or paraphrase obligations already contained in the Convention.

[155] Long and Murray "Ten Years of the Robben Island Guidelines and Prevention of Torture in Africa: For What Purpose?" (2012) 12 *African Human Rights Law Journal* 311 at 311.

[156] Id at 328.

treatment.[157] In addition, they are relied upon in conjunction with the Optional Protocol by complainants who appear before the African Commission, as evidence of States' obligations under international human rights law; and by the African Commission itself, as a reference for the types of safeguards to be afforded to detained persons.[158] The Robben Island Guidelines require all Member States of the African Union, including South Africa, to "[e]nsure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment",[159] to "[e]stablish and support . . . complaint mechanisms which are independent from detention and enforcement authorities",[160] and to "[e]stablish, support and strengthen independent national institutions . . . with the mandate to conduct visits to places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment".[161]

[66] As noted, the Optional Protocol obliges every state party to maintain a designated national preventive mechanism, to visit correctional centres and places of detention and ensure that torture and other cruel, inhuman or degrading treatment or punishment is prevented.[162] The importance of these mechanisms being independent is made clear by

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[157] South Africa is bound by the provisions of the African Charter on Human and Peoples' Rights, 27 June 1981, following its accession thereto on 9 July 1996.

[158] Long and Murray above n 155 at 339.

[159] Article 17 of the Robben Island Guidelines.

[160] Id at Article 40.

[161] Id at Article 41.

[162] The Optional Protocol above n 136 provides, in relevant part, as follows:

> "Article 1
>
> The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
>
> . . .
>
> Article 3
>
> Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).
>
> . . .
>
> Article 17

Article 18 of the Optional Protocol, which requires states parties to "guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel"[163] and to "give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights."[164] The principles it refers to are the United Nations Principles relating to the Status of National Institutions (Paris Principles),[165] which deal with the status and functioning of national institutions for the protection and promotion of human rights. Independence is a core requirement of the Paris Principles. Article 2 of the Paris Principles provides:

> "[T]he national [preventive mechanism] shall have . . . adequate funding. The purposes of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."

[67] Parliament has not promulgated national legislation expressly domesticating the Optional Protocol since its ratification by South Africa, but it is evident that the Judicial Inspectorate has features akin to those envisioned for a national preventive mechanism in the Optional Protocol and that the State has, for some time, contemplated the Judicial Inspectorate as one of several bodies that will function as part of a multi-body national preventive mechanism.[166] As the High Court held, the mandate of the Judicial Inspectorate indubitably contributes to the aims of the Optional Protocol.[167]

> Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralised units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in uniformity with its provisions."

[163] Id at Article 18(1).

[164] Id at Article 18(4).

[165] United Nations Principles relating to the Status of National Institutions (Paris Principles), adopted by UN General Assembly Resolution 48/134, 20 December 1993.

[166] See Jeffery above n 141. While the mandate of a national preventive mechanism in the Optional Protocol is wider than that of the Judicial Inspectorate, the Deputy Minister of Justice has acknowledged that the Judicial Inspectorate is one of a number of institutions that has an oversight mandate over places of detention and, as such, carries out many of the functions required of a national preventive mechanism in terms of its mandate.

[167] High Court judgment above n 5 at para 37.

Moreover, through its accession to the Optional Protocol, Parliament has made a clear policy decision that South Africa should be bound by its provisions. Regardless of the extent of the Optional Protocol's domestication, this Court has, as explained, held that an international instrument approved by Parliament binds South Africa in terms of section 231(2) of the Constitution.[168] It thus has constitutional import and must be referred to in determining the State's obligations to protect and fulfil the rights implicated by that instrument.[169]

[68] The Convention and the Optional Protocol, read with the Paris Principles, demonstrate the measures that must be in place and the level of protection that must be afforded in order for the State to discharge its obligations under section 7(2) of the Constitution in respect of the conglomerate of implicated rights of inmates.[170] An independent inspectorate must be financially and structurally independent and distinct from any authority charged with the administration of correctional facilities. Absent these features, the State cannot be said to have taken reasonable and effective steps, as

[168] As the High Court judgment id explained at para 28: "[T]he approval of an international agreement in terms of section 231(2), by Parliament, tells the world that South Africa undertakes to comply with international agreements as between it and other member states at an international level. The use of the word 'binds' in section 231(2) connotes a legal obligation that South Africa has in the international sphere."

[169] *Glenister II* above n 4 at para 182.

[170] There are several additional regional "soft law" instruments, which, while non-binding, offer similar interpretative value in that they can be referred to for guidance when considering the contents of international law. These include the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), adopted by UN General Assembly Resolution 70/175, 17 December 2015 and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations Principles), adopted by UN General Assembly Resolution 43/173, 9 December 1988.

The Mandela Rules provide, among other things, that all prisoners shall be protected from torture and cruel, inhuman or degrading treatment and that "no circumstances whatsoever may be invoked as a justification" (rule 1) and that "[a]llegations of torture or other cruel, inhuman or degrading treatment or punishment of prisoners shall be dealt with immediately and shall result in a prompt and impartial investigation conducted by an independent national authority" (rule 57(3)). Moreover, the Mandela Rules state clearly that, regardless of the initiation of any internal investigation, a correctional centre is obliged to report deaths, disappearances and serious injuries to a competent independent body (rule 71(1)). The United Nations Principles place a similar emphasis on independence providing, for example, at Article 29.1 that:

> "In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention and imprisonment."

required by section 7(2). The analogous reasoning of the High Court is apposite on this score.[171]

[69] When the State acceded to the Convention and the Optional Protocol, it assumed internationally binding duties, as well as the obligation to act in good faith with regard to its obligations under those instruments. The obligations imposed on the State in terms of the Convention, the Optional Protocol and the Paris Principles are clear. They impose on the State the duty in international law to create a correctional centre oversight mechanism that has the necessary independence.[172] As mentioned, this duty does not only exist in international law, but is sourced in the Constitution itself. As pertinently stated in *Glenister II*, "the Constitution appropriates the obligation for itself".[173]

[70] International law also offers useful interpretative guidance outside the sphere of Bill of Rights interpretation. The Act makes provision for the establishment of the Judicial Inspectorate as "an independent office" for the purpose of facilitating "the inspection of correctional centres".[174] Section 233 of the Constitution requires us, when interpreting any legislation, to prefer an interpretation that accords with international law.[175] Accordingly, when interpreting the meaning of "an independent office", or the scope of "investigations of correctional facilities", the emphasis on the independent nature of national preventive mechanisms in the Optional Protocol, read with the other mentioned international instruments, makes it perspicuous that "an independent office",

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[171] High Court judgment above n 5 at paras 41-2.

[172] See *Glenister II* above n 4 at paras 189-93:

> "[I]nternational law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence. That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention."

[173] *Glenister II* above n 4 at para 189.

[174] Section 85 of the Act.

[175] Section 233 of the Constitution reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

as envisioned in section 85(1) of the Act, is one which is financially and structurally independent and distinct from any authority implicated in the administration of detention or correctional facilities and services. Thus, the Act itself, interpreted in accordance with the provisions of applicable international law, envisions an "independent" Judicial Inspectorate as being one which is financially, operationally and visibly independent, and distinct from the Department.

Do the impugned provisions ensure the Judicial Inspectorate an adequate level of independence?

This Court's jurisprudence on institutional independence

[71] While "it is difficult to attempt to define the precise contours of a concept as elastic as [independence]", this Court's previous decisions grappling with independence have given the concept substance and offer "bright lights" for us as we traverse this territory once again.[176]

[72] The starting point must be the distinction drawn in our law between individual and institutional independence.[177] This distinction has been most clearly expressed in relation to the independence of individual judges and the independence of the courts as institutions. In *Van Rooyen*, this Court highlighted the distinction between individual and institutional independence. It stated:

> "This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference."[178]

[176] *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at para 31.

[177] Powell "Judicial Independence and the Office of the Chief Justice" (2019) 9 *Constitutional Court Review* 497 at 500-4.

[178] *Van Rooyen v S* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 19.

[73] The Court relied on the minority judgment of O'Regan J in *De Lange*, in which the following passage from the Canadian case of *R v Valente* was quoted with approval:

> "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal." [179]

[74] The same distinction applies here. We must distinguish between the independence of the Inspecting Judge[180] and the independence of the Judicial Inspectorate as an institution. This case concerns the institutional independence of the Judicial Inspectorate.

[75] What then are the markers of institutional independence? This Court has recognised that a wide variety of factors must be considered in assessing the independence of an institution.[181] However, certain key markers have emerged,

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[179] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 159, citing *R v Valente* (1985) 24 DLR (4th) 161 (SCC); [1985] 2 SCR 673 at 171.

[180] There are a number of provisions in the Act that ensure the independence of the Inspecting Judge. First, section 86(1) requires that the Inspecting Judge must be a judge in active service or a judge who has retired from active service. The fact that the Inspecting Judge must be a judge – a person who is presumed to be independent and impartial – is a significant guarantee of independence. Secondly, section 86(2) provides that where the Inspecting Judge is a judge in active service, she holds office during the period of active service or until she requests to be released to resume judicial duties. Section 88(1) provides that where the Inspecting Judge is a retired judge, her terms and conditions of service are governed by the Judges' Remuneration and Conditions of Employment Act 47 of 2001. This provides the Inspecting Judge with security of tenure. Thirdly, section 86(3) provides that the Inspecting Judge "continues to receive the salary, allowances, benefits and privileges attached to the office of a judge". Section 88(2) of the Act provides that, where the Inspecting Judge is retired from active service, the remuneration payable to the Inspecting Judge shall be determined by the Minister of Justice or agreed with the Inspecting Judge. This provides the Inspecting Judge with financial independence.

[181] *McBride* above n 176 at para 31.

namely: structural independence, operational independence, and perceived independence.

[76] Structural and operational independence are often discussed alongside each other as they are closely linked. In *Glenister II*, Ngcobo CJ stated that the question is not whether an institution has "absolute or complete independence", but whether it enjoys "sufficient structural and operational autonomy so as to shield it from undue political influence".[182] Testing the independence of a structure does not require actual evidence of violations or undue influence – the real possibility of it occurring is sufficient.

[77] Structural independence is concerned with the way in which the institution is structured. A key component of structural independence is financial independence – an institution's "ability to have access to funds reasonably required" to perform its core functions.[183] Operational independence relates to control over and freedom from interference in those matters connected with the performance of the institution's functions.[184] These include the appointment and accountability of staff, and operational decisions. In *Glenister II*, this Court held that what is required is "insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit".[185]

[78] Finally, the perception of independence is extremely important when evaluating whether independence in fact exists.[186] This Court has repeatedly emphasised the importance of the appearance or perception of independence in evaluating whether an entity enjoys an adequate level of independence.[187] Public confidence in an institution's

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[182] *Glenister II* above n 4 at paras 121 and 125. Quoted with approval in *McBride* id at paras 33-4.

[183] *New National Party of South Africa v Government of Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 98.

[184] Id at para 99.

[185] *Glenister II* above n 4 at para 216.

[186] Id at para 207.

[187] *McBride* above n 176 at para 41; *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at para 31; *Glenister II* id at para 207; and *Van Rooyen* above n 178 at para 32.

independence is an indispensable part of independence.[188] In *Glenister II,* this Court said:

> "[I]f Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective bench marks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[189]

[79] This Court also established the following test for determining whether an institution has perceived independence:

> "Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."[190]

[80] The standard to be applied is thus that of the "reasonably informed and reasonable member of the public". The emphasis is on confidence in the institution's "autonomy-protecting mechanisms" or the mechanisms designed to secure the independence of the institution.[191] Thus, as explained in *Helen Suzman Foundation*, the overriding consideration in determining whether an institution has the appearance or perception of independence is whether the relevant legislation has "in-built autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisals".[192]

Sections 88A(1)(b) and 91 of the Act

[81] Section 91 of the Act provides that "the Department is responsible for all expenses of the Judicial Inspectorate", and section 88A(1)(b) stipulates that the CEO of

[188] *Glenister II* id at para 207.

[189] Id.

[190] Id.

[191] *Helen Suzman Foundation* above n 187 at para 31.

[192] Id at para 32.

the Judicial Inspectorate "is accountable to the National Commissioner for all the monies received by the Judicial Inspectorate".

[82] The High Court held that sections 88A(1)(b) and 91, read together, undermine the financial, operational and perceived independence of the Judicial Inspectorate. It held that the effect of these sections is that the Department has total control over the budget of the Judicial Inspectorate. This would allow the Department to financially starve the Judicial Inspectorate, should it wish to. It also means that the Judicial Inspectorate is forced to compete with the Department for spending priorities. The High Court held that this lack of financial independence has an impact on the ability of the Judicial Inspectorate to fulfil its mandate and perform its functions effectively.

[83] The question before this Court is whether the declaration of constitutional invalidity in respect of sections 88A(1)(b) and 91 of the Act should be confirmed. This requires a determination of whether these sections ensure the Judicial Inspectorate sufficient structural and operational independence so as to shield the Judicial Inspectorate from undue political interference. This involves an enquiry as to whether the Judicial Inspectorate has sufficient control of its money and budget to take the steps it deems reasonably necessary to effectively oversee the actions of the Department and to perform its monitoring and reporting functions.

[84] Financial independence was discussed by this Court in *New National Party*, in adjudicating a challenge to the independence of the Electoral Commission, a Chapter 9 Institution. This Court said:

> "[Financial independence] implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding

> reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees."[193]

[85] Although the challenge to the independence of the Electoral Commission failed because the applicant failed to prove the case that it made out in its founding papers,[194] it emerges from this Court's reasoning that for the Executive to provide the funding that is to be made available to an independent institution would be irreconcilable with that institution's independence.

[86] This Court also criticised the Government's contention that the Electoral Commission had to account to the Department of Home Affairs for its expenditure.[195] The Government contended that Treasury Instruction K5 applied to the Electoral Commission and required it to submit financial statements, a director's report and an auditor's report to the accounting officer of the Department of Home Affairs.[196] This Court held that the application of Instruction K5 to the Electoral Commission had the potential to undermine its independence. It said:

> "While it is reasonable and necessary to require that the Commission should have an internal audit procedure and that it should be required to produce audited reports and financial statements at the end of the financial year, the essence of the problem is that Instruction K5 has been designed to cater for a situation in which a department makes funds available from its own budget to a public entity for the performance of certain functions. The arrangement is fundamentally inappropriate when applied to independent institutions such as the Commission."[197]

[87] This Court further found the application of Instruction K5 to be inappropriate in that it would empower and require the accounting officer of the Department of Home

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[193] *New National Party* above n 183 at para 98.

[194] Id at paras 70 and 101.

[195] Id at paras 88-9.

[196] Id at paras 86-7.

[197] Id at para 89.

Affairs to do certain things that would be invasive of the independence of the Electoral Commission. This Court explained:

> "Firstly, the accounting officer can stipulate further conditions considered desirable and which must be fulfilled before any further money is paid to the public entity. Secondly, he or she is obliged to perform an evaluative role in relation to the public entity. The accounting officer can pay money over to the entity only if satisfied that its objectives have been achieved and that any relevant conditions which have been placed on the financial assistance have been complied with. If Instruction K5 were validly to be applied to the Commission, the accounting officer of the Department could refuse to give the Commission money if, in his or her opinion, the work of the Commission did not contribute to a free and fair election or had failed to comply with a condition imposed upon it by the accounting officer. If this were so, the independence of the Commission would be clearly undermined."[198]

[88] In *Helen Suzman Foundation,* this Court was faced with a challenge to the South African Police Service Act[199] (SAPS Act) on the basis that the Executive and the National Commissioner of the SAPS had an impermissible degree of influence over the budget of the Directorate of Priority Crime Investigation (DPCI).[200] This Court recognised that adequate funding is of crucial importance for independence.[201] The Court further held that, although the Executive may play some role in the preparation of the budget, the Executive "should not have an unfettered discretion over the level of funding" of an independent institution.[202]

[89] This Court ultimately dismissed the challenge because the budget of the DPCI was "specifically and exclusively appropriated by Parliament".[203] It concluded that the DPCI has an adequate level of financial independence because "neither the Executive

[198] Id.

[199] 68 of 1995.

[200] *Helen Suzman Foundation* above n 187 at para 40.

[201] Id at para 41.

[202] Id.

[203] Id at para 42.

nor the National Commissioner [have] the final say on the level of the DPCI's funding. Parliament does".[204]

[90] The legal principles set out by this Court in *New National Party* in relation to Instruction K5 find application here, notwithstanding that the independence of the Electoral Commission is expressly mandated in the Constitution.[205] This Court's decision in *Helen Suzman Foundation* also demonstrates that the financial independence of the Judicial Inspectorate is inadequate. There is no provision in the Act equivalent to subsection 17H(1) of the SAPS Act, which provides that expenses incurred in connection with the functioning of the DCPI shall be defrayed from monies specifically appropriated by Parliament for this purpose. It was this sub-section, as well as sub-sections 17H(5) and 17H(6),[206] which were decisive in this Court's resolution to dismiss the application in *Helen Suzman Foundation*. There, this Court held that it is Parliament, and not the Executive or the National Commissioner that has the final say on the level of the DPCI's funding.[207] By contrast, in the present instance, the budget of the Judicial Inspectorate is not exclusively appropriated by Parliament. The effect of

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[204] Id.

[205] Once it is so that the Constitution imposes an obligation that the Judicial Inspectorate be independent, the principles set out in *New National Party* above n 183 are instructive.

[206] The relevant provisions of section 17H read—

> "(1) The expenses incurred in connection with—
>
> (a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the Directorate; and
>
> (b) the remuneration and other conditions of service of members of the Directorate,
>
> shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
>
> . . .
>
> (5) Monies appropriated by Parliament for the purpose envisaged in subsection (1)—
>
> (a) shall be regarded as specifically and exclusively appropriated for that purpose; and
>
> (b) may only be utilised for that purpose.
>
> (6) The National Head of the Directorate shall have control over the monies appropriated by Parliament envisaged in subsection (1) in respect of the expenses of the Directorate."

[207] *Helen Suzman Foundation* above n 187 at para 42.

sections 88A(1)(b) and 91 is that the Judicial Inspectorate's budget is both determined and controlled by the very Department over which it is meant to exercise oversight. It is the Department which has the final say on the Judicial Inspectorate's funding. The Department, in fact, has an "unfettered discretion" over the Judicial Inspectorate's level of funding.

[91] The Department is responsible for the expenses of the Judicial Inspectorate. While the Department may not utilise funds earmarked for the Judicial Inspectorate for its own purposes, it does determine how much money the Judicial Inspectorate receives. Moreover, although it cannot spend the Judicial Inspectorate's money on its own projects, it is in a position to control how the Judicial Inspectorate spends that money. The accounting officer of the Department – the National Commissioner – is the accounting officer for the Judicial Inspectorate[208] and the CEO must account to the National Commissioner for the monies received by the Judicial Inspectorate. The Department has the power to approve or disapprove the expenditure of the Judicial Inspectorate.

[92] A government department should not determine or control the funding of an independent institution like the Judicial Inspectorate. As held in *New National Party*, such an arrangement is inappropriate for independent institutions.[209] It follows from the reasoning in *New National Party* that the legislative position regarding the funding of the Judicial Inspectorate seriously undermines its independence.

[93] Closely intertwined with structural independence is operational independence. Operational independence relates to whether, on a day-to-day basis, the Judicial Inspectorate can practically carry out its functions without the assistance or permission of the Department. In *New National Party*, this Court was cognisant of the

[208] Section 36(2) of the Public Finance Management Act 1 of 1999, read with Schedule 1 to the Public Service Act above n 31 and section 3(3) of the Act.

[209] *New National Party* above n 183 at para 89.

close relationship between financial and operational independence. This Court said that operational independence—

> "implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The [E]xecutive must provide the assistance that the Commission requires 'to ensure [its] independence, impartiality, dignity and effectiveness'. The [D]epartment cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission *must be put in funds to enable it to do what is necessary*."[210]

[94] The Department's control over the funding of the Judicial Inspectorate has the potential to impact negatively on the ability of the Judicial Inspectorate to function effectively. This possibility alone makes the impugned provisions inimical to the Judicial Inspectorate's independence.

[95] We have also been given several illustrative examples of how the ability of the Judicial Inspectorate to carry out the functions connected with its monitoring and reporting role has been impeded by sections 88A(1)(b) and 91 of the Act in a manner that is antithetical to the independence of the Judicial Inspectorate.

[96] As long ago as 2011, complaints were raised in a report on the Judicial Inspectorate's operation and independence, alleging that its financial dependence on the Department had at times resulted in the Judicial Inspectorate facing serious operational challenges. In particular, it was noted that the Department had at times imposed, or attempted to impose, its internal financial and administrative policies and procedures on the Judicial Inspectorate. This had frequently led to delays in service delivery.

[97] In the Judicial Inspectorate's 2015/2016 Annual Report it is recorded:

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[210] *New National Party* above n 183 at para 99.

> "The [Judicial] Inspectorate had very little influence and opportunity to determine its own financial and human resourcing needs, as the budget of the [Judicial Inspectorate] is administered via [the Department]. Budget inputs provided by the Judicial Inspectorate to [the Department] are finalised and concluded with National Treasury with limited consultation from the [Judicial] Inspectorate. The implication on this model is that funding allocated by [the Department] may be reprioritised to other units within [the Department], thus disadvantaging the operations of the [Judicial] Inspectorate.
>
> The [Judicial] Inspectorate is in an incessant battle with the [Department] for resources such as staff, IT systems and infrastructure and it places an onerous burden on the legislative operations of our organisation."[211]

[98] One of the enduring challenges faced by the Judicial Inspectorate has been its under-capacity as a result of the difficulties it has faced in appointing staff. In 2011, the Judicial Inspectorate restructured itself and, in the process, established additional posts. At the time, the Inspecting Judge described this restructuring as being imperative to ensuring that the Judicial Inspectorate can meet its statutory obligations. Although the Minister of Justice approved the restructuring, by 31 March 2014 the Department had not allocated the necessary budget for the proposed new posts.

[99] By the 2014/2015 financial year, the restructured Judicial Inspectorate was intended to have 101 posts. But only 44 posts were approved, with an additional 38posts filled on a contract basis to meet the immediate needs of Judicial Inspectorate, leaving it short of 18 filled posts (almost 20% of its total staff). The consequences of this were described in 2014 by the Inspecting Judge in the following terms:

> "In the interim, valuable employees with institutional knowledge are lost due to the temporary nature of their employment and prospects of fixed employment elsewhere, notwithstanding the fact that the organisation has invested a lot of time in equipping them with the knowledge in the area of corrections and human

[211] Judicial Inspectorate for Correctional Services *Annual Report 2015/16* (2016) at 32 and 82.

> rights. The situational analysis continues to dampen the morale of all staff members who are executing the duties of other functionaries where those posts are not fulfilled by contract or permanent employees".[212]

[100] And, in 2015, the Inspecting Judge noted in his report:

> "The year under review has been one that is not short of hurdles. With contract posts being terminated, the Judicial Inspectorate has had to limp from month to month with a small number of staff wearing multiple hats in order to get the operations going."[213]

[101] The Inspecting Judge has identified the filling of staff vacancies in the Judicial Inspectorate as a specific challenge. He states on affidavit that in 2016, the Minister of Justice announced that 42 new positions had been granted to the Judicial Inspectorate. However, the Judicial Inspectorate was advised that because the Department had not received additional funds from Treasury, the money for the new posts within the Judicial Inspectorate would only be available when the Department abolished internal Department positions. This process would be determined exclusively by the Department. By July 2017, most of the proposed new positions within the Judicial Inspectorate had been advertised but were again subject to the Department's abolition of posts within the Department. Had the Department decided *not* to abolish any posts, the Judicial Inspectorate would not have been able to hire the vitally-needed 42 extra staff members. And there would be nothing that it could have done about it, save to complain to the Department.

[102] The Inspecting Judge has also complained about a lack of adequate office space, a situation which he describes as "completely untenable". It is virtually impossible, he says, for the Inspecting Judge and the Judicial Inspectorate to function properly out of the existing office space. Despite his and the Judicial Inspectorate's efforts to engage

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[212] Judicial Inspectorate for Correctional Services *Annual Report 2013/14* (2014) at 23.

[213] Annual Report 2015/16 above n 211 at 33.

with the Department about this, "no date for tender invitations to go out, or office space to become available, has been given". According to the Inspecting Judge, the situation "remains desperate".

[103] The most striking example of the impact of the Department's control over the Judicial Inspectorate's budgetary allocation on its finances is the Department's unilateral election to reduce the Judicial Inspectorate's approved 2018/2019 budget allocation by 22%, without providing any advance notice or cogent explanation for the reduction. The impact of this decision on the Judicial Inspectorate's ability to operate effectively is patently clear.

[104] The close financial and administrative ties between the Judicial Inspectorate and the Department undoubtably undermine the independence of the Judicial Inspectorate. The Department's control over the budget of the Judicial Inspectorate gives it the power to curtail the ability of the Judicial Inspectorate to perform its functions and carry out its mandate. The Department is, as the High Court held, effectively in a position to financially starve the Judicial Inspectorate. The question is not whether the Department has done this, but whether it is desirable that it is possible for it to do so.

[105] It seems incompatible with the independence of the Judicial Inspectorate to place the Department, which the Judicial Inspectorate is meant to oversee, in control of its budget. Giving the Department the final say on the Judicial Inspectorate's funding does not provide the Judicial Inspectorate with an adequate level of financial independence. In addition, the Judicial Inspectorate's lack of financial independence has impacted negatively on its ability to function effectively.

[106] It is worth noting that provisions like sections 88A(1)(b) and 91 do not feature in statutes governing other independent institutions. This Court, in *Glenister II*, opined that insights concerning institutional independence may be drawn from institutions which "adequately embody . . . the degree of independence appropriate to their

constitutional role and functioning", including the courts, the National Prosecuting Authority and Chapter 9 Institutions.[214]

[107] The expenditure incurred in connection with the work of many Chapter 9 Institutions must be defrayed out of money appropriated by Parliament for that purpose, in the same manner as for the expenditure of a department of the National Government.[215] Similarly, the Superior Courts Act provides that expenditure in connection with the administration and functioning of the Superior Courts must be defrayed from monies appropriated by Parliament for that purpose.[216] The same treatment applies in respect of expenses incurred in connection with the exercise of powers or the performance of functions of the prosecuting authority and the remuneration and other conditions of service of members of the prosecuting authority.[217] My conclusion that sections 88A(1)(b) and 91 undermine the independence of the Judicial Inspectorate is, therefore, bolstered by a consideration of the legislative provisions governing the financing of other independent institutions.

[108] There are clearly various options which may better safeguard the independence of the Judicial Inspectorate. Possible options would include the funds being appropriated by Parliament, or ring-fenced. It is not necessary for this Court to determine how the funding of the Judicial Inspectorate should be determined. It is sufficient to conclude that the mechanism currently provided for in the Act results in the Judicial Inspectorate not enjoying adequate independence and that there are other mechanisms available, which would, if included in the Act, ensure the independence of the Judicial Inspectorate.

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[214] *Glenister II* above n 4 at para 211.

[215] See, for example, section 9(1) of the Commission for Gender Equality Act 36 of 1996; section 13(1) of the Electoral Commission Act; and section 34(1) of Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

[216] Section 10 of the Superior Courts Act.

[217] Id at section 36(1)(a) to (b).

Section 88A(4) of the Act

[109] Section 88A(4) of the Act requires that "[a]ny matters relating to misconduct and incapacity of the [CEO] must be referred to the National Commissioner by the Inspecting Judge". The High Court held that section 88A(4) empowers the National Commissioner to decide on matters relating to the misconduct and incapacity of the CEO, upon referral from the Inspecting Judge.[218] It found that the National Commissioner had the power to decide what action should follow upon a referral. The High Court concluded that the "process of referral" from the Inspecting Judge to the National Commissioner undermines the "independent role that the CEO has to play" and that this, in turn, undermines the independence of the Judicial Inspectorate.[219] The High Court held that section 88A(4) not only had the potential to undermine the actual independence of the Judicial Inspectorate, but also that it posed a problem for the perceived independence thereof.[220] In making this finding, the High Court relied on this Court's decision in *McBride*, in which the powers of the Minister of Police to remove the Executive Director of IPID were found to be antithetical to the independence of IPID.[221] The High Court accordingly declared the section constitutionally invalid to the extent that it failed to ensure an adequate level of independence to the Judicial Inspectorate.

[110] It is worth noting that this Court has held that what is required is an adequate level of independence – not absolute independence.[222] The key question in this matter is therefore whether section 88A(4) is antithetical to the Judicial Inspectorate having an *adequate* level of independence.

[218] High Court judgment above n 5 at para 48.

[219] Id at paras 51 and 53.

[220] Id at para 51.

[221] *McBride* above n 176 at para 38.

[222] *Glenister II* above n 4 at para 121.

[111] There is, with respect, a missing link in the reasoning of the High Court. The judgment notes that section 88A(4) does not stipulate the powers of the National Commissioner once the matter has been referred by the Inspecting Judge:

> "It does not, for instance, say he may discipline or remove the CEO after a process has been followed. It seems to me his powers are open as to what process to follow after the referral of those matters to him or her. A decision is, however, taken by him or her as to what follows after the referral."[223]

[112] The High Court, while acknowledging that the role of the National Commissioner may be administrative, as contended by the respondents in that Court, simply concluded that the Act "shifts the role away from the office of the Inspecting Judge . . . to the very body on whose conduct the Inspectorate is intended to report".[224] This conclusion was reached without an attempt to determine the nature of the power, if any, conferred upon the National Commissioner by section 88A(4). In this regard, the High Court erred.

[113] What if, as contended by the respondents, the role of the National Commissioner, following a referral of a matter relating to misconduct and incapacity of the CEO from the Inspecting Judge, is merely administrative? In my view, and for the reasons that follow, the National Commissioner performs only an administrative role or function upon referral by the Inspecting Judge.

[114] First, on a proper interpretation of section 88A(4), it is the Inspecting Judge who is empowered to make decisions regarding the process to be followed in respect of misconduct or incapacity concerning the CEO. The Inspecting Judge would be obliged to initiate an appropriate process to determine these issues. It is implicit that the Inspecting Judge makes a decision on the process to be followed. It is only once the issue of misconduct or incapacity has been determined and a decision reached in respect

[223] High Court judgment above n 5 at para 49.

[224] Id at para 53.

thereof, that the Inspecting Judge refers the matter to the National Commissioner for the final administrative step. On this construction of section 88A(4), the National Commissioner exercises no disciplinary or other power over the CEO, but merely administratively gives effect to the decision of the Inspecting Judge, which is made after following due process.

[115] Secondly, this interpretation is consistent with the wording of the section. The section does not use the words "alleged misconduct or incapacity". Hence the preferred interpretation is that it is only once misconduct or incapacity has been established and a decision made in respect thereof, following due process, that the matter is referred to the National Commissioner by the Inspecting Judge. This construction does not strain the ordinary meaning of the section.

[116] Thirdly, this interpretation coheres with the context in which the section appears.[225] The Act provides that the Judicial Inspectorate is "an independent office under the control of the Inspecting Judge"[226] and, more specifically, that the CEO is "under the control and authority of the Inspecting Judge".[227] Section 88A(4) must be read together with the relevant sections which give substantive powers and control over the functions of the CEO to the Inspecting Judge. This supports the view that section 88A(4) gives the Inspecting Judge control over matters relating to the misconduct or incapacity of the CEO.

[117] Fourthly, this construction is consistent with the interpretation adopted by the High Court in respect of the legislative provision governing the appointment of the

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[225] In *Moyo v Minister of Police* [2019] ZACC 40; 2020 (1) SACR 373 (CC); 2020 (1) BCLR 91 (CC) at para 52, this Court explained:

> "In *Endumeni* our jurisprudence on statutory interpretation was made clear. A few points bear repeating. The process of interpretation is not undertaken in a stepwise fashion, but involves the attribution of meaning to a particular provision, drawing on the ordinary rules of grammar and syntax, in light of the context in which the phrase appears. The language and context must be considered together. Internal inconsistency should be avoided so as to render the statute coherent with its purpose. The interpretive process is objective and not subjective."

[226] Section 85(1).

[227] Id section 88A(1)(c).

CEO. The High Court held that, although the Act provides that the National Commissioner "appoints" the CEO, the National Commissioner is empowered to do no more than effect the appointment administratively.[228] It is the Inspecting Judge who identifies the person to be appointed as CEO. The High Court stated: "[t]he National Commissioner is obliged to appoint the person so identified. No discretion is afforded to the National Commissioner in this regard."[229]

[118] Finally, and most importantly, this interpretation promotes the spirit, purport and objects of the Bill of Rights as stipulated in section 39(2) of the Constitution,[230] which is a "*mandatory* constitutional canon of statutory interpretation".[231] This Court has repeatedly stated that "if a provision is open to multiple plausible interpretations, then the one that best conforms with the Constitution should be preferred".[232] The only limitation imposed on this mandatory injunction to interpret legislation so as to promote the spirit, purport and objects of the Bill of Rights is that the legislative provision must be "reasonably capable" of bearing the meaning ascribed to it by the court – the interpretation must not be "unduly strained".[233]

[119] This interpretation of section 88A(4) ensures that the section does not have the potential to adversely impact the independence, perceived or otherwise, of the Judicial Inspectorate. This is because it places matters connected to misconduct or incapacity

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[228] High Court judgment above n 5 at para 47.

[229] Id.

[230] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (*Wary Holdings*) at paras 87-8 and *Investigating Directorate; Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (1) BCLR 1079 (CC) (*Hyundai*) at para 21.

[231] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

[232] *Moyo* above n 225 at para 55 and *Wary Holdings* above n 237 at para 45.

[233] *Hyundai* above n 230 at para 24. In *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 20, this Court explained:

> "Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."

of the CEO squarely under the control of the Inspecting Judge. It is this interpretation that *best* promotes the spirit, purport and objects of the Bill of Rights.

[120] In *McBride*, the independence of IPID was successfully challenged in this Court, particularly insofar as the impugned legislative provisions allowed the Minister of Police to discipline, suspend, or remove the Executive Director of IPID.[234] This Court held that the Minister of Police's powers to discipline, suspend or remove the Executive Director of IPID did not pass constitutional muster.[235] It further held that this power undermined or subverted the independence of the Executive Director and was not congruent with the Constitution[236] in that it subjected him to the political control of the Minister of Police.[237]

[121] The High Court's reliance on *McBride* in this matter was misplaced. Section 88A(4) does not render the CEO vulnerable to political or executive control. This is because it is the Inspecting Judge, under whose control the Judicial Inspectorate operates and under whom the CEO works, who must refer any matter concerning incapacity or misconduct of the CEO to the National Commissioner. On a proper interpretation of section 88A(4), there is the crucial factor of the interposition of the requirement that the Department can reach the CEO only if there has been a referral by the Inspecting Judge. There is, therefore, no real possibility that the CEO could be threatened or feel threatened with removal by the Department for carrying out her duties vigorously. The fact that the National Commissioner must give effect to the decisions

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[234] IPID was established to ensure independent oversight of the South African Police Service (section 2(b) of the Independent Police Investigative Directorate Act 1 of 2011. IPID carries out independent and impartial investigations of criminal offences allegedly committed by members of SAPS and makes disciplinary recommendations resulting from such investigations. See section 2(d) and (e) of the IPID Act.

[235] *McBride* above n 176 at para 58.

[236] Id at para 30.

[237] Id at para 39, which reads:

> "To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure – is subversive of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister."

taken by the Inspecting Judge concerning misconduct or incapacity related to the CEO, does not render the CEO vulnerable to political or executive control.

[122] Unlike in *McBride*, here there is no question of any unilateral interference in the CEO's tenure by the Executive. The Inspecting Judge stands in the way. However much the Department might want to remove the CEO, it does not have "access" to her without a referral by the Inspecting Judge.

[123] The High Court further held that even if the independence of the Judicial Inspectorate was not actually undermined by section 88A(4), there may be a perception or appearance that its independence is compromised.[238] As explained, the perception of independence is an indispensable part of independence. Without public confidence in the independence of an institution, that institution fails to meet one of the "objective benchmarks for independence".[239] The question whether the Judicial Inspectorate is perceived as independent is essentially whether the public and, perhaps more importantly, inmates in South African correctional centres have confidence in the Judicial Inspectorate's autonomy-preserving mechanisms to enable its members to carry out their duties vigorously.

[124] In *McBride*, the impugned legislative provisions that gave the Minister of Police the power to discipline, suspend or remove the Executive Director of IPID from office were held to be constitutionally invalid because, in addition to being subversive of the independence of IPID, they destroyed public confidence in IPID.[240] This Court said:

> "[T]he cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID. As the amicus curiae emphasised in its submissions, both the independence and the appearance of an independent IPID are central to this matter.. . . This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate

[238] High Court judgment above n 5 at para 51.

[239] Id.

[240] *McBride* above n 176 at para 43.

> complaints against the police fearlessly and without favour or bias. IPID must therefore not only be independent, but must be seen to be so. Without enjoying the confidence of the public, IPID will not be able to function efficiently, as the public might be disinclined or reluctant to report their cases to it."[241]

[125] It is essential to the effectiveness of the Judicial Inspectorate that inmates have confidence in the independence of the Judicial Inspectorate and its ability to carry out its monitoring and reporting functions without interference from the Department. Without this confidence, inmates may be unwilling to report any complaints. This would completely undermine the effectiveness of the Judicial Inspectorate and even defeat its purpose.

[126] Additionally, poor conditions and the mistreatment of inmates in correctional centres are serious matters affecting the public. The public has an interest in the Judicial Inspectorate inspecting, investigating, monitoring and reporting on the conditions in correctional centres and on the treatment of inmates. The oversight role that the Judicial Inspectorate performs is essential to upholding the dignity of inmates and safeguarding their constitutional rights. This is especially because correctional centres are closed environments, which few can penetrate. It is critical that the Judicial Inspectorate be seen by the public as fulfilling this oversight role without any undue interference and that the Judicial Inspectorate enjoys public confidence. In addition, the nature of correctional centres in South Africa cannot be considered in isolation from their historical context. Under apartheid, imprisonment was wielded as a tool for social and political control. Apartheid prisons were sites of mental and physical degradation, torture and deaths in custody. This has left deeply embedded scars on our nation and contributes added weight to the need for public confidence in the mechanisms in place to prevent abuse and mistreatment in correctional centres under our new democratic dispensation.

[127] However, section 88A(4) cannot be seen as undermining public confidence in

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[241] Id.

the Judicial Inspectorate. This is because there are adequate independence-preserving mechanisms built into the Act. In particular, the role of the Inspecting Judge is critical to the actual and perceived independence of the Judicial Inspectorate. It is of manifest importance that the Judicial Inspectorate is *under the control* of the Inspecting Judge. This is one of the key independence-preserving mechanisms in respect of the Judicial Inspectorate. The role of the Inspecting Judge in relation to the appointment and removal of the CEO provides manifold safeguards against undue interference by the Department. In addition, it is patently clear, for the reasons set out, that the CEO is squarely under the control of the Inspecting Judge. In these circumstances, a reasonable and reasonably informed member of the public or inmate would have no cause for concern that the CEO could be vulnerable to political or executive interference.

[128] On a proper construction, section 88A(4) ensures an adequate level of independence to the Judicial Inspectorate. I am, thus, unable to confirm the High Court's declaration of invalidity in respect of section 88A(4).

Conclusion

[129] Section 7(2), read with sections 10, 11, 12 and 35 of the Constitution, imposes a positive obligation on the State to establish and maintain a correctional centre oversight mechanism that is independent. In establishing the Judicial Inspectorate, the State was fulfilling this constitutional obligation. This Court has made it clear that the steps that the State adopts in terms of section 7(2) must be reasonable and effective.[242] Establishing the Judicial Inspectorate without ensuring that it has an adequate level of independence from the Department over which it is to exercise oversight cannot be considered a reasonable step. This is because establishing an inadequately independent Judicial Inspectorate would leave the rights of inmates under sections 10, 11, 12 and 35 of the Constitution vulnerable to infringement.

[242] *Glenister II* above n 4 at para 189.

[130] The Judicial Inspectorate as it is currently formulated is neither financially, nor operationally independent. In enacting sections 88A(1)(b) and 91, Parliament has failed to meet the objective benchmarks for institutional independence. In light of my finding that sections 88A(1)(b) and 91 fail to ensure an adequate level of independence of the Judicial Inspectorate, it follows that the State has not acted reasonably and effectively as required by section 7(2) of the Constitution. These sections offend the constitutional obligation resting on the State to establish an independent correctional centre oversight mechanism. The declarations of constitutional invalidity in respect of sections 88A(1)(b) and 91 should accordingly be confirmed.

[131] The High Court's declaration of constitutional invalidity in respect of section 88A(4), however, cannot be confirmed. This is because this section is reasonably capable of a constitutionally compliant interpretation. It bears repeating that the injunction to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation is mandatory.

[132] Sonke sought a cost order in its favour in this Court. Although the Minister of Justice and the National Commissioner abided by the decision of this Court, Sonke litigated because it was obliged to, as the declaration of invalidity has no effect unless confirmed by this Court. Sonke has been partially successful in this Court and should accordingly be entitled to its costs.

Order

[133] The following order is made:

1. The declaration by the High Court, Western Cape Division, Cape Town that sections 88A(1)(b) and 91 of the Correctional Services Act 111 of 1998 are constitutionally invalid to the extent that they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services, is confirmed.

2. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
3. The second and third respondents are to pay the costs of the applicant in this Court, including the costs of two counsel.

JAFTA J (Tshiqi J concurring):

[134] I have had the benefit of reading the judgment of my colleague Theron J (first judgment). Regrettably I am unable to agree with the conclusion proposed and the reasons supporting it. I do not agree that the impugned provisions are inconsistent with section 7(2) of the Constitution and as a result they are invalid.

[135] I am indebted to my colleague for her crisp narration of the facts which I embrace. As a result there is no need for me to repeat here an account of those facts.

[136] Before I address the question of invalidity, I need to explain how obligations of the Republic under international law are enforced at national level. This is necessary because the High Court and the first judgment rely heavily on the instrument of international law as a ground for the conclusion that the impugned provisions are inconsistent with the Constitution. The High Court rightly concluded:

> "The Constitution does not expressly state that an independent inspectorate must be established; neither does it specify what characteristics such a body would encompass, if established. Indeed, it differs from Chapter 9 institutions, and even the Independent Police Investigative Directorate ('the IPID'), in this respect. As articulated by the Inspecting Judge in his affidavit, it is more akin to the IPID than the Chapter 9 institutions, though, the IPID is established in terms of section 206 (6) of the Constitution."[243]

[243] High Court judgment above n 5 at para 24.

[137] The High Court correctly observed, with reference to section 231 of the Constitution,[244] that for international obligations to bind the Republic, they should go through a particular process. Of importance is the requirement that international agreements bind the Republic only after they have been approved by Parliament, except those of a technical, administrative or executive nature which do not require ratification or accession by Parliament. These agreements become part of national legislation if enacted into law by Parliament. However, the self-executing ones become law upon approval by Parliament unless they are inconsistent with the Constitution or an Act of Parliament.

[138] Section 231(4) reminds us that our Constitution is the supreme law of the Republic. It goes further to tell us that an Act of Parliament also ranks higher than international laws, at national level. In fact, an Act of Parliament constitutes a benchmark for determining whether an international instrument becomes law in the Republic. If the instrument in question is inconsistent with an Act of Parliament, it does not automatically become law.

[139] Notably, international law applies in two forms at national level. First, it informs the interpretation of legislation. Where legislation under construction is reasonably

[244] Section 231 of the Constitution provides:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

capable of two meanings, section 233 of the Constitution obliges the interpreting court to prefer a meaning that is consistent with international law over the one that is not.[245]

[140] The other form by which international law is applied is by having it first enacted into law by Parliament. Once it is legislated, it becomes part of our national legislation and can be enforced within the Republic like any Act of Parliament.

[141] The Optional Protocol to the Convention against Torture (Optional Protocol), on which the High Court and the first judgment rely to found the duty to establish a Judicial Inspectorate completely independent of the Department of Correctional Services, was enacted into law by the National Assembly on 19 March 2019 and by the National Council of Provinces on 28 March 2019. And in terms of article 28, the Optional Protocol came into force in this country 30 days from the date of submitting the instrument of accession to the Secretary General of the United Nations. According to the High Court this occurred in June 2019 and the Protocol came into operation on 20 July 2019.

[142] Therefore, the Optional Protocol became enforceable as law in the Republic in July 2019. From that moment it was open to any litigant with standing to approach our courts to enforce the Protocol. The applicant here, Sonke, was aware of this course. But chose to persist with its attack of the impugned provisions, invoking the Protocol to buttress its challenge.

[143] Effectively what is sought by Sonke in these proceedings is to enforce the Optional Protocol. Sonke wants to convert the Office of the Judicial Inspectorate for Correctional Services into an institution envisaged in the Optional Protocol. Yet that office was established by chapter IX of the Correctional Services Act,[246] more than 10 years before the Optional Protocol was approved by Parliament.

[245] See above n 175.

[246] 111 of 1998.

[144] It appears from the record that Sonke and other civil society organisations have been lobbying Parliament to amend the Correctional Services Act and confer complete independence upon the Office of the Judicial Inspectorate. These bodies have produced a body of research papers which were presented to Parliament. One of the reports produced at the behest of Sonke reads:

> "If the Inspectorate – as a reporting body primarily – is to function effectively with maximum impact, then it is important that steps be taken to safeguard its long-term independence. Full independence is necessary not only to ensure that the Inspectorate can disseminate findings and lobby with civil society for change in the prison system freely and without fear, but it is also necessary for public confidence and trust in the Inspectorate."

[145] Relying on this statement, in the founding affidavit Sonke alleged that the independence it was advocating for was necessary for the effectiveness of the Judicial Inspectorate. Sonke stated:

> "As is noted in Sonke Evaluation (at part 5(b)(i) on page 20), independence is a vital element for the effectiveness of prison oversight. To penetrate correctional facilities, which are inherently 'closed worlds', a prison oversight body is required to formally establish and maintain an arms-length relationship with correctional services. It should be sufficiently insulated from undue influence and co-option or "capture" by the correctional officials whose conduct it is charged with monitoring. In addition, a prison oversight body needs to be perceived as independent since the legitimacy of and confidence in its work depends largely on the extent to which it is perceived as independent."

[146] This is the context in which the stance adopted by Sonke in not seeking to enforce the Optional Protocol directly must be seen. It is not that Sonke wants the state to establish the body contemplated in the protocol, but that it seeks the complete independence enjoyed by that body to be transferred to the Judicial Inspectorate.

[147] A perusal of the Optional Protocol reveals that the institution envisaged in the Protocol is completely different from the Judicial Inspectorate. For instance, Article 1 of the Optional Protocol obliges states to establish a system of regular visits by independent international and national bodies to places where people are detained, in order to prevent torture and other cruel, inhumane or degrading treatment or punishment. This is why the Protocol affords state parties a period of a year from the date of its coming into operation, within which to establish national bodies. Both the national and international bodies must operate within that specific system.

[148] Moreover, the purpose of these bodies is singular. It is to prevent "torture and other cruel, inhumane or degrading treatment or punishment". This, therefore, limits these bodies to only two of the rights guaranteed in the Bill of Rights. These are the rights not to be tortured and not to be treated or punished in a cruel, inhumane or degrading manner.[247] This differs markedly to the objective served by the Judicial Inspectorate whose purpose is to conduct inspections of the "correctional centres and remand detention facilities in order to report on the treatment of the inmates" and any corrupt and dishonest practices. The Inspecting Judge also has the powers to deal with complaints from certain specified bodies, including the Minister and the National Commissioner.[248] Therefore, the Inspecting Judge does not have the

[247] Section 12 of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[248] Section 90 of the Act provides:

> "(1) The Inspecting Judge inspects or arranges for the inspection of correctional centres and remand detention facilities in order to report on the treatment of inmates in correctional centres and remand detention facilities and on conditions and any corrupt or dishonest practices in correctional centres and remand detention facilities.
>
> (2) The Inspecting Judge may only receive and deal with the complaints submitted by the National Council, the Minister, the National Commissioner, a Visitors' Committee and, in cases of urgency, an Independent Correctional Centre Visitor and may of his or her own volition deal with any complaint."

power to prevent torture and other cruel, inhumane and degrading treatment or punishment. The best he can do is to report to the Minister and the relevant Parliamentary Committee as provided for in section 90(3) of the Correctional Services Act.[249]

[149] Of greater importance is the fact that the Optional Protocol itself provides for the designation of national bodies as "national preventative mechanisms for the purposes of the present Protocol if they are in conformity with its provisions".[250] This means that if the Protocol applies to the Judicial Inspectorate, Sonke can simply enforce it by seeking a mandamus directing the state to designate the Inspectorate in terms of the Protocol. If so directed, the Inspectorate would enjoy the independence that Sonke is promoting. Its independence would not only be guaranteed but the Inspectorate would have its own funding "to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence".[251]

[150] If on the contrary the Optional Protocol does not apply to the Judicial Inspectorate, then the Protocol cannot be used as a springboard for the kind of independence that Sonke says the Inspectorate is entitled to.

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[249] Section 90(3) provides:

> "The Inspecting Judge must submit a report on each inspection to the Minister and the relevant Parliamentary Committees on Correctional Services."

[250] Article 17 of the Optional Protocol reads:

> "Each State Party shall maintain, designate or establish, *at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level*. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions." (own emphasis)

[251] Article 2 of the United Nations Principles relating to the Status of National Institutions (Paris Principles) provides:

> "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."

[151] This case is not about the question whether inmates held in various correctional facilities countrywide continue to enjoy the rights entrenched in the Bill of Rights. That they retain those rights when they enter prisons is beyond doubt. The case is also not about whether the relevant Inspectorate is independent. Its independence is guaranteed by section 85 of the Correctional Services Act.[252] This independence allows the Inspecting Judge freedom to inspect correctional centres and report on the treatment of inmates and conditions under which they are held.

[152] The Inspecting Judge's function is supported by Independent Correctional Centre Visitors who are appointed by the Inspectorate's Chief Executive Officer, following consultation with the Inspecting Judge.[253] These officials are independent individuals who are not part of the Department of Correctional Services and they perform their functions under the direction of the Inspecting Judge. Their functions include regular visits to prisons, seeing prisoners in private, recording their complaints and discussing those with the Head of the prison concerned, and monitoring the manner in which those complaints are dealt with. Notably, these officials are entitled to have access to any part of the prison and to any document or record.[254] Importantly, if these

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[252] Section 85 provides:

> "(1) The Judicial Inspectorate for Correctional Services is an independent office under the control of the Inspecting Judge.
>
> (2) The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres."

[253] Section 92 of the Act provides:

> "(1) At the request of and in consultation with the Inspecting Judge, the Chief Executive Officer must as soon as practicable, after publicly calling for nominations and consulting with community organisations, appoint an Independent Correctional Centre Visitor for each correctional centre.
>
> (2) An Independent Correctional Centre Visitor holds office for such period as the Chief Executive Officer may determine at the time of such appointment in consultation with the Inspecting Judge.
>
> (3) The Chief Executive Officer may at any time, if valid grounds exist, suspend or terminate the service of an Independent Correctional Centre Visitor."

[254] Section 93 of the Act provides:

> "(1) An Independent Correctional Centre Visitor shall deal with the complaints of inmates by—
>
> (a) regular visits;

officials are refused access, they may report this to the Inspecting Judge whose decision on the matter is final.[255] All of this reinforces the independence of the Inspectorate.

[153] This case is about whether section 7(2) of the Constitution, read in isolation or with the other provisions of the Bill of Rights, expressly or impliedly places an obligation upon the state to create an inspectorate with the independence of the kind contemplated in the Optional Protocol.

High Court's approach

[154] It is now opportune to consider whether the High Court was right to declare the impugned provisions invalid on account of being inconsistent with the Constitution. The onus was on Sonke to show that those provisions were not consistent with the

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(b) interviewing prisoners in private;

(c) recording complaints in an official diary and monitoring the manner in which they have been dealt with; and

(d) discussing complaints with the Head of the Correctional Centre, or the relevant subordinate correctional official, with a view to resolving the issues internally.

(2) An Independent Correctional Centre Visitor, in the exercise and performance of such powers, functions and duties, must be given access to any part of the correctional centre and to any document or record."

[255] Section 93 further provides:

"(3) The Head of the Correctional Centre must assist an Independent Correctional Centre Visitor in the performance of the assigned powers, functions and duties.

(4) Should the Head of the Correctional Centre refuse any request from an Independent Correctional Centre Visitor relating to the functions and duties of such a Visitor, the dispute must be referred to the Inspecting Judge, whose decision will be final.

(5) An Independent Correctional Centre Visitor must report any unresolved complaint to the Visitors' Committee and may, in cases of urgency or in the absence of such a committee, refer such complaint to the Inspecting Judge.

(6) The Inspecting Judge may make rules concerning, or on the appointment of an Independent Correctional Centre Visitor, specify, the number of visits to be made to the correctional centre over a stated period of time and the minimum duration of a visit, or any other aspect of the work of an Independent Correctional Centre Visitor.

(7) Each Independent Correctional Centre Visitor must submit a quarterly report to the Inspecting Judge, which shall include the duration of visits, the number and nature of complaints dealt with, and the number and nature of the complaints referred to the relevant Visitors' Committee."

Constitution.[256] This Court may confirm that declaration of invalidity only if persuaded that it was correctly made.[257]

[155] This process requires us to consider the impugned provisions and the section of the Constitution against which they were tested. We must interpret them to determine what each means. Once their respective meanings are established, we must compare each impugned provision with the relevant section of the Constitution to ascertain the necessary inconsistency.

[156] At the outset I must mention the standard which the High Court deduced from section 7(2) of the Constitution and invoked to strike down the impugned provisions. That Court held that section 7(2) of the Constitution impliedly imposes a duty on the state to take reasonable and positive steps to create an appropriately independent Inspectorate.[258] Relying on the decision of this Court in *Glenister II*[259], the High Court reasoned:

> "Taking *Glenister*'s reasoning into account, creating an Inspectorate that is not sufficiently independent could not be seen as reasonable. If the Inspectorate lacks sufficient independence that would not be in keeping with South Africa's international obligations as provided in OPCAT, read with the Paris Principles and other relevant international instruments. The State would not have fulfilled its duty as implied in section 7(2), which is to take reasonable and positive steps in creating an appropriately independent Inspectorate. The structure chosen by the State in the creation of the inspectorate must withstand constitutional scrutiny. The applicant has listed a number of rights which pertain to inmates, which I have already listed. Any failure on the part of the State to create an adequately independent Inspectorate, may well be an infringement of those rights. It goes without saying that if JICS is not adequately independent, that would affect the fulfilment of its inspecting and reporting role on the

[256] *New National Party of South Africa* above n 183 at para 20. See also *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) at para 49.

[257] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC) 2006 (12) BCLR 1399 (CC) at para 23.

[258] High Court judgment above n 5 at para 42.

[259] *GlenisterII above n 4* .

> treatment of inmates in correctional centres and their conditions. This ultimately impacts on the protection, promotion or fulfilment of the Bill of Rights as it pertains to the inmates."

[157] The High Court proceeded to hold that for the duty to take reasonable and positive steps to be fulfilled, the state must "provide reasonable and effective mechanisms to promote human rights, as undertaken in the Optional Protocol, for instance". It will be recalled that the protocol targets two rights only from those which are guaranteed by the Bill of Rights. This statement therefore suggests that section 7(2) imposes a positive obligation to reasonably and effectively promote only the rights mentioned in the protocol.

[158] Having noted, rightly, that the Constitution does not expressly require the state to establish "an inspectorate with the necessary independence", the High Court held that the establishment flows from "the scheme of the Constitution, read with international obligations".[260] In its own words the High Court stated:

> "With these considerations as background, it seems to me that the basis of applicant's case, sourced from section 7(2), has merit and is well supported by the reasoning in *Glenister*. Therefore, although the Constitution does not specify the creation of an inspectorate with the necessary independence, it seems to me, given the scheme of the Constitution, read with the international obligations South Africa has committed itself to, and the objects of the Act, the most reasonable and effective interpretation of section 7(2) is that it does impose an obligation for the creation of an adequately independent institution, as part of its duties to provide reasonable and effective mechanisms to promote human rights, as undertaken in OPCAT, for instance."[261]

[159] It is clear from this statement that, in order to formulate the standard against which the impugned provisions were tested, the High Court read the Constitution

[260] High Court judgment above n 5 at para 43.

[261] Id.

together with international law and the Correctional Services Act, to determine the meaning of section 7(2) of the Constitution.

[160] It appears that the High Court was compelled to adopt the approach it followed by the fact that section 7(2) does not explicitly say the state is under a duty to create an inspectorate with the level of independence described in the Optional Protocol. It is indeed correct that the text of section 7(2) does not refer to the creation of a particular body, let alone prescribing independence as a feature of any entity. The question that arises is how do we come to the meaning ascribed by the High Court to section 7(2)? There is only one process employed by our courts to determine the meaning of the Constitution. It is interpretation.

Interpretation

[161] Sonke pleaded its claim for invalidity in these terms:

> "In summary, it is submitted that the State's obligation under section 7(2) of the Constitution in respect of the human rights of inmates casts a duty on it to establish and maintain a prison oversight mechanism with the necessary independence to enable it to function effectively. To the extent that it has failed to do so, it is submitted that such failure violates a number of fundamental rights, including those enshrined in sections 10, 11, 12 and 35(2) of the Bill of Rights, as it amounts to a failure to make adequate steps to respect, protect, promote and fulfil such rights."

[162] This requires us to interpret section 7(2) read with sections 10, 11, 12 and 35(2) to determine if indeed collectively they impose a duty on the state to establish an independent prison oversight entity, as claimed by Sonke. If such duty exists, we need to establish its content and scope. For we can only ascertain whether the Correctional Services Act complies with those provisions of the Constitution if we know the nature and extent of the duty they impose.

[163] As mentioned, section 7(2) in explicit terms imposes upon the state a duty to "respect, protect, promote and fulfil the rights in the Bill of Rights". This is a very

broad duty which extends not only to cover the rights in section 10, 11, 12 and 35. It applies to all rights guaranteed by the Bill of Rights, regardless of who the right-bearers are.

[164] Section 10 enshrines the right to dignity which is conferred on everyone. Section 11 guarantees everyone the right to life. Whilst section 12 entrenches a basket of rights under the rubric of the right to freedom and security of the person. These rights include the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; not to be tortured; not to be treated or punished in a cruel, inhumane or degrading manner and to be free from all forms of violence. And lastly, section 35(2) confers various rights on detained persons, irrespective of whether they are sentenced prisoners or not. These rights include the right to be detained under conditions that are consistent with human dignity and incorporates adequate accommodation, nutrition, reading material and medical treatment, provided at state expense.

[165] None of these rights expressly impose a positive obligation on the state, hence they should be read together with section 7(2). The core issue is the nature of the positive duty that emerges from the collective reading of these provisions. This Court has affirmed the general principle that rights in the Bill of Rights impose a negative duty which requires everyone, including the state, not to infringe them. But in some instances those rights may require positive steps to be taken by the state for their fulfilment.

[166] In *Rail Commuters Action Group* this Court pronounced:

> "The rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right. So, for example, the right to freedom of expression requires those bound by it not to act in a manner which would impair freedom of expression. The obligation is in a sense a negative one, as it requires that nothing be done to infringe the rights. However, in some circumstances, the correlative obligations imposed by

> the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights. In the case of most of the socio-economic rights in the Bill of Rights, the ambit of the positive obligation that flows from the right is explicitly determined in the Bill of Rights. The precise ambit of the positive obligation thus imposed has been discussed by the Court in several cases concerned with socio-economic rights."[262]

[167] Notably in that matter too, this Court was called upon to determine the nature and ambit of the duty imposed by section 7(2) read with sections 10, 11 and 12 of the Constitution but on that occasion the Court found it unnecessary to decide whether sections 10, 11 and 12 imposed a positive duty on Metrorail.[263] However, this does not detract from the important principle the Court had laid down.

[168] In *Carmichele* this Court was confronted with the same issue, arising from the interpretation of provisions similar to sections 10, 11 and 12 read with section 7(2). On that occasion, this Court observed:

> "It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."[264]

[169] In adopting this approach, the Court rejected the jurisprudence of the United States of America and embraced the jurisprudence of the European Court of Human Rights.[265] In *Osman* that Court held:

> "It is thus accepted by those appearing before the Court that Article 2 of the Convention [which entrenches the right to life] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational

[262] *Rail Commuters* above n 118 at para 69.

[263] Id at para 72.

[264] *Carmichele* above n 85at para 44.

[265] Id at para 45.

> measures to protect an individual whose life is at risk from the criminal acts of another individual."[266]

[170] What emerges from a reading of these authorities is that in certain circumstances the rights enshrined in sections 10, 11 and 12 of the Constitution may, in addition to the negative duty, impose a positive obligation on the state to take reasonable measures to ensure that those rights are protected. But *Carmichele* does not define those circumstances. Nor does it tell us how they should be determined. However, the decision of the European Court of Human Rights, on which this Court relied in *Carmichele*, shed some light on the issue.

[171] A careful reading of the judgment in *Osman* reveals that the Court accepted that ordinarily the right to life will be adequately protected if the state has put in place laws which prohibit the killing of individuals and if those laws are backed up by law-enforcement machinery for "the prevention, suppression and sanctioning of the breaches" of such laws. If all of this is put in place, the state would have discharged its duty to safeguard the right to life. But there may be circumstances where all those steps will fall short of securing the right to life such as when there is a heightened risk to the life of a particular individual, posed by a certain group of people. In these circumstances, the ordinary steps would be inadequate and the state would be under a positive obligation to provide special security to protect the individual whose life is at risk. This may be in the form of bodyguards.

[172] The higher risk posed to the life of that individual would constitute "the well-defined circumstances" referred to in *Osman*. It is the unusual or greater risk to any of the rights in the Bill of Rights which will give rise to a positive duty that falls on the state to take reasonable steps to protect the threatened right. And the reasonableness of the steps taken would depend on the nature of the risk posed to the right in question. Another example is that when the coronavirus pandemic reached this country, the state

[266] *Osman v United Kingdom*, no 23452/94, § 29, EHRR 1998 at para 115.

was under a positive duty to introduce extraordinary measures to protect the lives of South Africans.

[173] The special circumstances giving rise to the positive duty would determine the extent and nature of the duty. For the steps taken in the discharge of that duty to be reasonable and effective, they must match or surpass the risk of harm against the guaranteed rights. Sometimes those circumstances may warrant the establishment of a new entity to reinforce legislative measures put in place. On some occasions, the circumstances may be such that the new entity created should be vested with some degree of independence, for it to be effective.

[174] In *Glenister II* this Court affirmed the principle pronounced in *Carmichele* in these terms:

> "This Court has held that in some circumstances [section 7(2)] imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. Implicit in s 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective."[267]

[175] It bears emphasis that the independence given to the entity must be linked to its functions. For independence, it must be stressed, is not a badge of honour for the entity in question. But it is an essential element to protect the entity from external interference when it carries out its functions. This independence must enable the entity to resist and reject any external improper interference with the performance of its functions.

[176] In *Glenister II* this Court identified endemic corruption that continues to ravage this country as constituting special circumstances that warranted the establishment of an independent anti-corruption entity. The majority said:

[267] *Glenister II* above n 4 at para 189.

> "The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution."[268]

[177] The Court proceeded to hold that the anti-corruption entity the state was obliged to establish must have adequate independence[269]. This conclusion was reinforced by a number of international law instruments including the Organisation for Economic Co-operation and Development (OECD); Specialised Anti-Corruption Institutions: Review of Models OECD Report. That report defined independence in these words:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."[270]

[178] The OECD Report reveals that the purpose of the independence for anti-corruption entities is to protect them against undue political interference while it recognises that genuine political will is a necessary element in the fight against

[268] Id at para 175.

[269] Id at paras 194-8.

[270] Id at para 188.

corruption. The report emphasises that it is the structural and operational autonomy that is important.

[179] For the level of independence to be adequate, there must be safeguards built around it to secure the entity's autonomy. The OECD Report suggests that in addition to a clear mandate for the entity, there must be transparent procedures for the appointment and removal from office of its head. Where the entity is placed within a department, safeguards must be put in place to shield the entity from undue interference by senior officials in the chain of command. All these elements of independence commend themselves to the entity we are concerned with in the present matter.

[180] To conclude the interpretation, it is evident that in certain circumstances section 7(2) read with the rights in the Bill of Rights may impose a positive duty upon the state to take reasonable and effective steps to protect guaranteed rights. This special duty is additional to the general duty on the state and all its organs to respect, protect, promote and fulfil the rights in the Bill of Rights. But the special duty is triggered only by specific circumstances which threaten guaranteed rights.

[181] Therefore, in appropriate circumstances, section 7(2) read with sections 10, 11, 12 and 35(2) of the Constitution may impose a positive duty on the state to take reasonable steps to protect the rights of prisoners entrenched in those provisions. The questions that arise are whether the relevant special circumstances exist here and whether the duty has been triggered.

Necessary circumstances

[182] This matter is unusual in the sense that the challenge mounted against some of the provisions under which the Judicial Inspectorate operates is not brought by the Judicial Inspectorate itself. Instead, it is brought by Sonke, a non-profit organisation dedicated to the promotion of human rights. The record reveals that the Judicial Inspectorate did not support this litigation even though it filed affidavits to explain some of the issues raised. The Judicial Inspectorate chose to abide by the decision of the

Court. This is the background against which the relevant circumstances must be assessed.

[183] In its founding papers, Sonke raised two main complaints. It bemoaned the limitation on the mandate conferred on the Judicial Inspectorate. Sonke complained that before 2001 the Inspectorate had authority to investigate corruption and dishonest practices in correctional centres, but that power was taken away when section 85(2) was amended in 2001. Sonke also complained that the Inspectorate was "toothless" because it has no power to make binding decisions which can be enforced against the Department of Correctional Services. Sonke alleged:

> "In terms of sections 85(1) and 90(1) the mandate of JICS is limited to facilitating the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates and conditions in correctional centres."

[184] Sonke continued to formulate its claim in these terms:

> "129. In addition it is submitted, for the reasons articulated above, that the mandate of JICS is too limited to equip it to function effectively in monitoring and curbing human rights abuses and in correctional service centres. More particularly:
>
> 129.1. JICS is "toothless" because it does not have the power to make binding decisions or enforce compliance by DCS with its recommendations;
>
> 129.2. JICS lacks clear, strong investigative powers;
>
> 129.3 JICS is not statutorily obliged to report criminal conduct on the part of DCS officials to the NPA for prosecution or to recommend disciplinary proceedings against DCS officials on which DCS is obliged to report back."

[185] To illustrate its point on the issue of authority, Sonke contended that the Inspectorate's mandate must be compared to the authority of the Independent Police Investigative Directorate (IPID) established in terms of the Independent Police Investigative Directorate Act[271]. Sonke said IPID enjoys "a wide range of well-defined

[271] 1 of 2011.

powers" of investigation and lamented that the Inspectorate does not have such powers. Sonke concluded by submitting that the Inspectorate's mandate should not be limited to the power of inspecting, monitoring and reporting on the treatment of inmates in correctional centres which is contained in section 85(2).

[186] The previous Inspecting Judge in his affidavit filed in the High Court, refutes that the Inspectorate's powers are as narrow as Sonke claims. He says that section 85 must be read in the context of other provisions of the Correctional Services Act. If so read, for example he says, the Inspecting Judge has authority to instruct the National Commissioner to investigate any death in a correctional centre. He also points out that inmates whose constitutional rights are violated may refer their complaints to the Inspecting Judge. He points out that in the case of a death of an inmate, the Inspecting Judge may even conduct a hearing himself under the Commissions Act[272] incorporated by section 90 of the Correctional Services Act.

[187] The Inspecting Judge explicitly indicates that he has authority to investigate and make final decisions which are binding. He draws attention to section 93 of the Act "which allows [the Inspecting Judge] to decide as a matter of finality any dispute between an Independent Correctional Centre Visitor and a Head of Centre in relation to the functions and duties of the former".

[188] With regard to investigations into "fraud, corruption and maladministration by correctional officials and disciplinary proceedings" the Inspecting Judge points out that they are undertaken by the National Commissioner who is obliged to compile a report in relation to each investigation or disciplinary proceedings. He points out that the National Commissioner must submit such reports to the Inspecting Judge, if so requested.

[272] 8 of 1947.

[189] The crucial question is whether on these facts, Sonke has established special circumstances which warrant the state to take preventative operational measures to protect the rights of inmates, over and above the steps and measures already taken under the Correctional Services Act. Put differently, whether the steps and measures presently taken under the Act are inadequate to protect fundamental rights of prisoners. This is the test flowing from section 7(2) of the Constitution read with the rights in the Bill of Rights.

[190] Plainly, the answer to this question is in the negative. On the facts, Sonke has failed to meet the relevant test. This means that Sonke has not established the benchmark against which it required the impugned provisions of the Act be tested. In the absence of special circumstances, it cannot be argued that when Parliament passed the Correctional Services Act, it violated the duty arising from section 7(2). A reading of the Act shows that Parliament was alert to the section 7(2) obligation which ordinarily requires all the organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights. In the various provisions of the Act, various entities are required to take steps designed to protect the prisoners' basic rights. Sonke has failed to show that the steps and measures contained in the Act may not protect those rights and that other special measures should be enacted.

[191] There is simply no evidence on the record which establishes that fraud, corruption and maladministration are rife in the correctional centres where prisoners are kept. Nor is there evidence which suggests that the prisoner's rights to dignity, life and freedom and security of the person are affected by those offences. But more importantly, there is no evidence which indicates that the Directorate for Priority Crime Investigation (Hawks), which was specifically established to combat corruption and other serious crimes following *Glenister II,* fail to investigate serious crimes committed in correctional centres. To mandate the Inspectorate to investigate the same offences would constitute duplication. Lastly, there is no evidence which shows that under the presently formulated Correctional Services Act, there is interference with the Inspectorate's functions designed to protect prisoners' constitutional rights.

[192] It follows that the High Court has misconstrued the test that was reaffirmed in *Glenister II*. A reading of the majority judgment in that case reveals that the test was based on the interpretation of section 7(2) read with the rights in the Bill of Rights, in the earlier decisions of *Carmichele* and *Rail Commuters Action Group*[273]. In these two cases this Court determined the special positive obligation by reading section 7(2) and the other provisions of the Bill of Rights. This exercise did not include international law. The reason for this is simple. International law does not form an integral part of our Constitution. Instead, to the extent that it is consistent with the Constitution, it is incorporated into the body of South African law. For example, the Protocol we are concerned with here became part of South African legislation upon its domestication by Parliament. As legislation, it cannot be treated as part of the Constitution against which the validity of other legislation may be tested.

[193] With regard to the interpretation of the Bill of Rights, international law is considered, not as part of the Bill of Rights, but as a source that may clarify the language used in the Bill[274]. The law reports are replete with examples of how this Court and others have invoked international law when interpreting the Bill of Rights[275]. To illustrate the point a few examples suffice. In *Bader Bop*, consistent with section 39(1) of the Constitution, this Court considered international law on Freedom of Association and Protection of the Right to Organise Convention, the Right to Organise and Collective Bargaining Convention and decisions of the Freedom of Association Committee of the International Labour Organisation, to interpret the rights entrenched in sections 18 and 23 of the Bill of Rights. Similarly, in *Carmichele* this Court applied the European Convention on Human Rights and the decision in *Osman* to determine whether section 7(2) read with the right to life imposes a positive duty on the state in

[273] *Glenister II* above n 4 at paras 189-90.

[274] See above n 127.

[275] *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 at paras 27-36.

certain circumstances "to provide appropriate protection to everyone through laws and structures designed to afford such protection".

[194] In *Glenister II* as well, this Court invoked international law instruments to determine the nature of independence required for an anti-corruption entity. The Court first ascertained that when section 7(2) is read with sections 10, 11 and 12 of the Bill of Rights, they impose an obligation upon the state to establish an independent anti-corruption entity. Because these provisions of the Bill do not explicitly describe the nature of the entity's independence, this Court invoked the international law instruments like OECD to clarify the type of independence required.

[195] It bears emphasis that the duty to establish the independent entity was sourced from the provisions of the Bill of Rights alone. International law was employed to clarify what those provisions meant by an independent anti-corruption entity. It is therefore wrong to use international law to found a constitutional duty which may be used as a benchmark to test the validity of legislation.

Independence of the Inspectorate

[196] Assuming that an obligation of the kind envisaged in *Glenister II* was established here, the claim for invalidity by Sonke would still fail. This is because the Correctional Services Act establishes an Inspectorate with independence sufficient to protect it against external interference with performance of its functions. Section 85(1) of the Correctional Services Act explicitly decrees that the Judicial Inspectorate "is an independent office under the control of the Inspecting Judge". It does not end there.

[197] The Act also builds a strong fire-wall around the Inspectorate. The Inspecting Judge who is the head of the Inspectorate is appointed by the President from the ranks of sitting Judges and retired Judges. The terms and conditions of employment are identical to those applying to sitting Judges. This means that the Inspecting Judge enjoys the same security of tenure of office. He or she may be removed from office only if the process for the removal from office applicable to Judges is followed. As it

appears from *Glenister II*, this is a strong safeguard for independence. With regard to the security of tenure, the OECD limits this requirement to the head of the entity because he or she is the controlling and directing mind of the entity.

[198] The OECD further requires that the entity be insulated from improper political interference with the performance of its functions. Significantly, the OECD makes it plain that full independence is not required for the specialised entities. Instead, an entity must enjoy a degree of autonomy that enables it to carry out its functions without improper interference. Where the entity is part of an existing institution, structural autonomy requires that the entity be protected against undue interference by senior officials in the chain of command.

[199] As correctly pointed out by the previous Inspecting Judge, the Correctional Services Act immunises the Inspectorate from interference by senior officials in the Department. In section 92 the Act empowers the Chief Executive Officer of the Inspectorate to appoint Independent Correctional Centre Visitors, in consultation with the Inspecting Judge. Unlike the other staff of the Inspectorate, these officials are not public servants. They are accountable only to the Inspecting Judge.

[200] The Independent Correctional Centre Visitors are empowered to regularly visit prisons; interview prisoners in private; record complaints raised by prisoners and submit them to officials at the prison visited; monitor the manner in which those complaints are addressed; and discuss those complaints with the head of prison. Section 93(2) authorises these Visitors to have access to any part of the prison and any document or record. Section 93(3) obliges the head of the prison concerned to assist the Visitors in the performance of their duties. If the head of prison refuses to co-operate and assist, the matter may be referred to the Inspecting Judge for final determination. A decision of the Inspecting Judge binds the head of prison and her staff.

[201] Therefore, the Inspectorate is effectively protected from interference by departmental officials. The structural and operational autonomy meets the requirements mentioned in *Glenister II*.

Financial independence

[202] The source of this requirement is not clear to me. It will be recalled that for this requirement to be a benchmark against which legislation is to be tested, it must have the Constitution as its genesis. It cannot be located in international law. The proposition that placing the budget of the Inspectorate in the hands of the Department it is meant to oversee is antithetical to the Inspectorate's independence is seductively attractive but it is flawed. Its flaw lies in its foundation. The roots of this proposition are not the Constitution. And it is difficult to appreciate how allowing the Department to prepare the budget for the Inspectorate is antithetical to the latter's independence.

[203] In *Helen Suzman Foundation* this Court rejected a challenge against the validity of a provision of the South African Police Service Act[276] which required the head of the Hawks to be consulted when the National Commissioner of the South African Police Service (SAPS) prepares the budget estimate for the Hawks before incorporating it into SAPS's budget estimate. The Foundation had argued that the inclusion of the Hawks' budget in that of SAPS undermines the former's independence. This Court held that the impugned provision has in-built safeguards and that the Hawks budget is approved by Parliament, albeit as part of the budget for SAPS. And that where the estimate presented to Parliament was lower than that which the head of the Hawks had made, the Hawks may raise its concerns in relation to the inadequacy of the budget with Parliament.[277]

[204] It will be recalled that in *Helen Suzman Foundation* this Court was concerned with independence of entities envisaged in section 7(2) read with the rights in the

[276] 68 of 1995.

[277] *Helen Suzman Foundation v President of RSA* above n 187 at para 42.

Bill of Rights. But notably this Court observed that international law does not set parameters on the Hawks' control over its budget and that the prevailing international practice was that the Executive prepares the budget and Parliament approves it.[278]

[205] In this regard the international law coheres with our constitutional architecture. The scheme of our constitutional order is that revenue is collected by the Executive which also prepares budgets for approval by Parliament. This places the Executive, and not Parliament, in a position to know how much it has collected to fund the operations of government. What determines amounts to be allocated to various organs of state is the financial resources available to government and not what each organ of state desires to get. If an organ of state ends up obtaining an amount less than what it had estimated, this does not in any way have an impact on its independence. Less money may mean that the entity is not able to perform certain functions. For example the current coronavirus pandemic has seriously undermined the government's ability to collect revenue and the result is that many organs of state would have funding less than what they had requested and possibly also less than what Parliament had approved.

[206] The decision of this Court in *New National Party* does not change this reality.[279] That case is distinguishable from the present matter. The *New National Party* was dealing with the funding of the Electoral Commission, which is a chapter 9 institution. Its independence is guaranteed by section 181 of the Constitution[280]. The independence

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[278] Id at para 41

[279] *New National Party of South Africa* above n 183.

[280] Section 181 of the Constitution provides:

> "(1) The following state institutions strengthen constitutional democracy in the Republic:
>
> (a) The Public Protector.
>
> (b) The South African Human Rights Commission.
>
> (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
>
> (d) The Commission for Gender Equality.
>
> (e) The Auditor-General.
>
> (f) The Electoral Commission.

of chapter 9 institutions is comparable to that of the Judiciary. Section 181 is framed in terms almost identical to section 165 of the Constitution[281]. Yet we know from *Glenister II* that the level of independence contemplated in section 7(2) read with other provisions of the Bill of Rights is less than that enjoyed by the Judiciary[282].

[207] A further significant feature of distinction is that in *New National Party* financial independence was not at issue. The Commission's financial autonomy was safeguarded by the Electoral Commission Act.[283] The dispute in that matter was about pre-Constitution departmental regulations which the Department of Home Affairs and Treasury continued to apply to the Commission contrary to the Electoral Commission Act, as if the Commission was an entity of the Department of Home Affairs. They insisted that the Commission should account to the Department Home Affairs for its budget despite the fact that under the Electoral Commission Act, its CEO was its accounting officer and that the Commission had the power to prepare

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(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

[281] Section 165 of the Constitution provides:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

[282] *Glenister II* above n 4 at para 207 and 211.

[283] 51 of 1996 at section 13.

and present its budget to Parliament. And that in terms of section 181(5) of the Constitution, the Commission is accountable only to the National Assembly.

[208] It is in this context that the statement made by the Court in *New National Party* must be read and understood. That decision is not authority for extending financial autonomy contemplated in the Electoral Commission Act to entities established as a result of the obligation located in section 7(2) read with the provisions of the Bill of Rights.

[209] *Glenister II* which dealt with the independence of an entity contemplated in section 7(2) does not consider financial accountability as the antithesis of independence. There, this Court held that the statutory power given to a Ministerial Committee extended beyond the scope of oversight and included in it the core function of the entity in question. The Court observed:

> "We accept that financial and political accountability of executive and administrative functions requires ultimate oversight by the executive. But the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI, goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence."[284]

[210] Section 7(2) read with the Bill of Rights has been assigned a meaning which does not include financial independence. I am not aware of any justification for reading those provisions differently in this matter. Properly construed, what they require is that an independent entity established as a result of a positive obligation emanating from those provisions must be afforded adequate funding to enable it to carry out its functions. As mentioned, what is sufficient in a given case is context-specific and contingent upon what the government can afford.

[284] *Glenister II* above n 4 at para 236

Reasonableness

[211] Where, as here, Parliament has taken legislative steps to establish an independent entity, the action taken may be impugned only on the ground of reasonableness. This is because the obligation under which Parliament acted, assuming that it was established, would have required it to take reasonable and effective legislative measures. This much is clear from *Glenister II*[285].

[212] To underscore this principle *Glenister II* declares:

> "Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable."[286]

[213] The same principle was embraced in *Mazibuko* in relation to socio-economic rights. There this Court said:

> "Moreover, what the right requires will vary over time and context. Fixing a quantified content might in a rigid and counter-productive manner prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable."[287]

[214] And yet in *Rail Commuters Action Group* this Court reminds us of the proper approach to assessing whether reasonable measures were taken:

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[285] Id at para 189.

[286] Id at para 191.

[287] *Mazibuko* above n 67 at para 60.

> "The duty thus identified requires Metrorail and the Commuter Corporation to ensure that reasonable measures are in place to provide for the safety of rail commuters. The standard of reasonableness requires the conduct of Metrorail and the Commuter Corporation to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance. Furthermore, a court must be careful not to usurp the proper role of the decision maker. In particular,
>
> > '[a] decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.'
>
> This Court considered the manner in which the standard of reasonableness should be applied to positive constitutional obligations in *Government of the Republic of South Africa and Others v Grootboom and Others*. The Court held that the standard would need to be assessed in the light of the 'social, historical and economic context' of housing and in the light of institutional capacity."[288]

[215] The reasonableness test seeks to strike a balance between the need to require organs of state to fulfil constitutional obligations and acceptance of the principle that those organs of state should be accorded "appropriate leeway to determine the best way to meet the obligations in all the circumstances".[289] In putting the reasonableness of these measures under scrutiny, courts should "pay due respect" to the measure chosen by the responsible organ of state.

[288] *Rail Commuters* above n 118 at para 86.

[289] Id at para 87.

Impugned provisions

[216] Since Parliament here has enacted provisions which establish an independent Inspectorate, the impugned provisions must be tested against the standard of reasonableness. This is on the assumption that the obligation to establish an independent Inspectorate exists. The first provision which Sonke attacks is section 88A(4) of the Correctional Services Act. This section provides that matters relating to misconduct and incapacity of the Inspectorate's CEO must be referred to the National Commissioner by the Inspecting Judge.

[217] Keeping in mind that Parliament was at liberty to choose whatever measures it deemed necessary to meet the obligations, even if the Court were to think of other and better measures, it cannot replace those chosen by Parliament with its own[290]. The issue remains whether section 88A(4) is a reasonable measure. The reasonableness of this provision must be evaluated with reference to the purpose of protecting the prisoners' rights entrenched by the Bill of Rights. What constitutes reasonable measures is context specific and depends on the circumstances of a particular case.

[218] Consequently the factors which must be considered in evaluating the reasonableness of the measure may differ from case to case. However, some may be common to all cases. These would include the nature of the obligation, the context in which it arises, the extent of any threat to basic rights if the obligation is not met and the degree of harm that may ensue[291]. Importantly, the reasonableness standard that must eventually be invoked is similar to the test that applies to administrative decisions[292].

[219] Here the nature of the obligation is to establish an independent Inspectorate for the purpose of protecting prisoners' basic rights. Because Sonke misconceived the test

[290] *Mazibuko* above n 67 at paras 63-65.

[291] *Rail Commuters* above n 118 at para 88.

[292] Id.

applicable, it has failed to canvass factors relevant to the assessment of the reasonableness of the impugned provisions. The matter was approached on the footing that the independence granted by the Act to the Inspectorate was not sufficient and as a result Parliament had failed to meet the relevant obligation. The source of this error was the failure to identify the nature of the obligation, flowing from section 7(2) read with the rights in the Bill of Rights.

[220] I have already illustrated that in relevant provisions, Parliament has established the Inspectorate adequately independent to repulse any interference with the performance of its functions. The question that needs to be addressed on this aspect of the case is whether section 88A(4) derogates from that independence. The section merely requires that disciplinary issues against the CEO be referred to the National Commissioner by the Inspecting Judge. Under this scheme, the National Commissioner cannot initiate disciplinary proceedings against the CEO. Nor can she determine the matters which form the subject matter of those proceedings because this is the sole preserve of the Inspecting Judge. Notably this process has little impact, if any, on the Inspectorate's autonomy to perform its functions. Therefore no unreasonableness has been proved in respect of this section.

[221] The second provision impugned by Sonke is section 88A(1)(b) of the Act. This section requires the CEO to account to the National Commissioner for public monies received by the Inspectorate. It cannot be gainsaid that our Constitution places a premium on the values of accountability and transparency. Here, unlike in *New National Party,* the Inspectorate does not have an accounting officer who accounts to Parliament for the use of public money. The National Commissioner is the Inspectorate's accounting officer and therefore the CEO has to account to him or her. It may well be that it is desirable to make the CEO its accounting officer but that is not the test. The standard is whether by requiring the CEO to account to the National Commissioner, Parliament has enacted an unreasonable provision.

[222] This arrangement does not detract from the Inspectorate's autonomy with regard to the performance of its core function. The ability of the Inspectorate to have regular visits at prisons, take complaints from prisoners privately, and have access to records and monitor the manner in which these complaints were addressed by the prison officials, are all not affected by the requirement that the CEO should account to the Commissioner on how funds were used. Therefore, it cannot be said that section 88A(1) is unreasonable.

[223] The last provision under attack is section 91, which charges the Department of Correctional Services with the responsibility to provide the Inspectorate with funding for all its expenses. The circumstances pertaining to the complaint that the Inspectorate's budget should not be controlled by the Department are set out in the affidavits filed in the High Court by Sonke and the Inspectorate.

[224] Although Sonke detailed the amounts allocated to the Inspectorate in relation to specific financial years, it complained that those amounts were not sufficient to cover the needs of the Inspectorate. However, in respect of the most recent year, Sonke alleged that the Inspectorate failed to spend the entire budget. It could not fill vacant posts because of the red tape in the Department and consequently an amount of about R7 million was not spent.

[225] It is important to note that the previous Inspecting Judge and the CEO adopted a position that differed from Sonke on this issue. They emphasised matters other than the insufficient budget. The previous Inspecting Judge applauded the Department for creating 42 new posts in the Inspectorate during the 2016 budget speech. But there was a delay in filling them up. When the Inspectorate raised a query, departmental officials informed it that the funding for the posts had not been received from the Treasury. It will be recalled that in terms of section 216 of the Constitution, the Treasury has control over the fiscus[293]. According to this provision the Treasury is empowered to stop

[293] Section 216 of the Constitution provides:

transfer of funds even if they were approved by Parliament, if an organ of state has not met the expenditure control measures put in place by the Treasury. The enforcement of these measures has the effect of overriding what Parliament had approved. This underscores the significance attached to financial accountability by the Constitution.

[226] Upon noting that funds were not forthcoming from the Treasury, the Inspecting Judge said the Department decided to abolish some of its posts in order to fund the posts established in the Inspectorate. Some of these posts were filled. The Judge also mentioned office space as one of the challenges faced by the Inspectorate but pointed out the willingness of the Department to help, even though the process was slow. He also mentioned the delay in booking a flight for him to an international conference and the challenges he had with the uploading of software on his official laptop. Having noted with appreciation the willingness of the Minister and the Commissioner to support the Inspectorate, he observed that those challenges were caused by a power play between officials in the Department and those in the Inspectorate.

[227] For his part, the CEO of the Inspectorate explained that some of these administrative challenges were attributable to a failure to define in clear terms, the roles of officials in the two organisations. He lamented the reduction of the Inspectorate's budget by the Department's Chief Financial Officer (CFO) during the approval of the budget for the 2018/2019 financial year. When the matter was raised with the Minister and the Commissioner, it turned out that the CFO had acted without authority and the CFO was instructed to reverse his decision.

"(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—

(a) generally recognised accounting practice;

(b) uniform expenditure classifications; and

(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures."

[228] The affidavits of the previous Inspecting Judge and the Inspectorate's CEO paint a picture of a healthy co-operation between the Minister and the Commissioner, on the one hand and the Inspectorate, on the other. The challenges caused by junior officials in the Department are usually resolved even though this takes time. As a result, they did not support the call for financial independence pursued by Sonke. In fact, whilst this litigation was proceeding in the High Court, the parties established a committee that was mandated to come up with a solution to the challenges faced by the Inspectorate. That process is at an advanced stage and a proposal referred to as a Business Case has been drawn, with the Inspectorate's input. The Inspectorate would have preferred that a judicial decision on the matter be delayed in view of that internal process.

[229] None of the challenges mentioned was said to have affected prison visits by Independent Correctional Centre Visitors whose primary function is to take complaints from prisoners, submit them to officials and monitor how those complaints are addressed. The issue is whether by placing the Inspectorate's budget in the hands of the Department, section 91 is an unreasonable measure. The bogey that control of the budget must not be in the Department over which the Inspectorate has an oversight role must be put to rest. In the first place, the nature of the obligation we are concerned with here does not require independence in relation to budget preparation. As this Court observed in *Helen Suzman Foundation*, what is required is not control over budget but adequate funding that enables the entity to perform its functions[294]. Second, section 91 does not empower the Department to frustrate the Inspectorate's mandate by defunding it. On the contrary, that provision obliges the Department to fund all expenses incurred by the Inspectorate.

[230] Of course that funding must depend on what the Department can reasonably afford. If, like now during the coronavirus pandemic, less revenue is collected, it will not be unreasonable for the Department to fund less expenses. But this is compensated

[294] *Helen Suzman Foundation* above n 187 at para 41.

by the fact that once the budget of the Inspectorate is fixed in a sum of money, that money is ring-fenced and may be used only for the needs of the Inspectorate. This means that if it has to be reduced, approval of Parliament is needed. On the facts, the Inspectorate has had opportunities to address its budget requirements directly with Parliament.

[231] All of this negates any suggestion that section 91 constitutes an unreasonable measure. It cannot be described as a statutory provision that no reasonable Parliament may enact. This is the reasonableness standard applicable to the review of administrative action which *Rail Commuters Action Group* extends to matters like the present one.

[232] For all these reasons, I would reverse the declaration of invalidity made by the High Court. However, this does not mean that the obligation to establish an entity envisaged in the Protocol is not enforceable. It may be enforced in our domestic courts as part of our legislation, following its domestication by Parliament. But what may not be done is to invoke it as an integral part of the Constitution against which the validity of legislation is tested.

VICTOR AJ

> "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[295]

Introduction

[233] I have had the benefit of reading the well-crafted main judgment of my sister Theron J and the learned dissent of my brother Jafta J. The first judgment sets out in detail the background, the contentions of the parties and the issues in this matter. I agree

[295] Quote by Lord Chief Justice Hewart in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

with the confirmation of invalidity of sections 88A(1)(b) and 91 of the Act for the reasons advanced in the main judgment. I cannot agree with the failure to declare the third impugned section, section 88A(4) of the Act, inconsistent with the Constitution. I do not agree that it is "reasonably capable of a constitutionally compliant interpretation".[296] Section 88A(4) provides:

> "Any matters relating to misconduct and incapacity of the Chief Executive Officer must be referred to the National Commissioner by the Inspecting Judge."

[234] I find this section constitutionally problematic and would recommend a declaration of constitutional invalidity, giving Parliament the opportunity to remedy the constitutional defect within 24 months, for the reasons that follow.

[235] The essential issue in this case is the independence of the constitutionally established Judicial Inspectorate. Sonke seeks to ensure that the independence of the Judicial Inspectorate is guaranteed in order to perform its functions. Before this Court there are three impugned sections of the Act. Two of the three sections have been declared constitutionally invalid by the main judgment. This scrutiny and declaration of invalidity of the two sections in itself demonstrates that there has been inadequate independence of the Judicial Inspectorate. It is therefore necessary to scrutinise the role of the National Commissioner to assess whether they remain completely outside the operations of the Judicial Inspectorate thereby ensuring complete independence.

Statutory framework of the Judicial Inspectorate

[236] Section 85(1) of the Act provides for the establishment of an independent office, called the Inspectorate for Correctional Services, under the control of an Inspecting Judge. The object of the Judicial Inspectorate is to "facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres".[297] Embedded

[296] Main judgment at [131].

[297] Section 85(2) of the Act.

in the Judicial Inspectorate's mission is to ensure that an inmate's constitutional rights to human dignity and due process are protected. It is a central and sensitive task which must be reported on without fear or favour.

[237] The Judicial Inspectorate's stated vision is to "embody independent oversight of human rights for all inmates in correctional centres".[298] According to its annual report: "The focus of the [Judicial] Inspectorate is to inspect, monitor and report on the treatment of inmates, the conditions in correctional centres and to further report any corrupt or dishonest practices within the correctional centres".[299] This stated vision and focus brings the functioning of the Judicial Inspectorate into the context of constitutional values.

[238] Prior to the introduction of the Judicial Inspectorate, the legislation regulating prison policy was closed, draconian and primarily a retributive penal justice system, heavily regulated and controlled and shielded from public scrutiny and community involvement.[300] The promulgation of the Act was aimed at changing the law governing the correctional system and giving effect to the Bill of Rights in the Constitution.[301] Its express legal mandate among other matters is to establish an independent Judicial Inspectorate. Parliament has imposed an obligation to establish and maintain an independent body and it is necessary that this be attained in every sense of the word. It is this principle of independence in a substantive sense that leads me to this dissent in respect of section 88A(4) of the Act.

[239] Section 2 of the Act, in part, provides that the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by: detaining all inmates in safe custody whilst ensuring their human dignity; and

[298] Annual Report 2015/16 above n 211at 22.

[299] Id at 20.

[300] Jagwanth "A Review of the Judicial Inspectorate of Prisons of South Africa" (2004) CSPRI Research Paper Series 4 at 4.

[301] Id.

promoting the social responsibility and human development of all inmates and persons subject to community corrections.

[240] The need and rationale for maintaining the independence of the Judicial Inspectorate is critical if we are to make sure our democratic ethos, the institutions upholding our democracy, the rule of law and the foundational values of our nascent constitutional project are not undermined.[302]

[241] The question then arises as to the independence of the Judicial Inspectorate. The main judgment calls for independence in all aspects save for the disciplining of the CEO. It is this narrow issue of the proper interpretation of section 88A(4) and true independence that requires analysis. It is to this I turn.

[242] The Legislature saw it fit to establish an independent unit headed by a judge in order to promote autonomy and independence. Once the Legislature creates an independent office, in this case a Judicial Inspectorate under the control of a judge, then such an office must enjoy all the aspects of independence that accompany such office. It must carry with it the current observance of what constitutes judicial independence. The Judicial Inspectorate must have the operational and structural attributes of independence and measure of autonomy. It must be independent of other branches of government in what is essential to its functioning. Section 85(1) provides that the Judicial Inspectorate must be "independent." If this is not so in every facet of its functioning, then it cannot be said to be an independent Judicial Inspectorate.[303] It must be free of actual or apparent influence of any person or institution. Moreover, in this case, a National Commissioner over which the Inspecting Judge has no control. The

[302] *Glenister II* above n 4 at para 166.

[303] See *Valente* above n 179 at 687, where the Supreme Court of Canada stressed the following regarding judicial independence:

> "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."

independence of a judge is so entrenched in our constitutional democracy that it serves no purpose to adopt a piecemeal approach to their powers.

[243] If the section is not declared invalid then it means that the CEO is to be disciplined by the National Commissioner. This leads to the perception that the Judicial Inspectorate is insufficiently insulated from policies and the influence of the National Commissioner in its structure and functioning. It makes the Judicial Inspectorate vulnerable to the National Commissioner's view and decision. This signals a perception that the Inspecting Judge is subordinate to the National Commissioner and this, in turn, undermines the independence of the Inspecting Judge.

The CEO's Role

[244] The role of the CEO is a central one in the Judicial Inspectorate. In terms of the Act, the CEO is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate,[304] which include the appointment of staff,[305] the appointment of experts to assist the Inspecting Judge,[306] and accounting to the National Commissioner for all the monies received by the Judicial Inspectorate.[307] Having established an independent Judicial Inspectorate, the profile projected must be one of substantive independence and consistency. There must be a public perception of independence. A reasonable and informed member of the public, which includes the inmate and the family of the inmate, may have reservations about the Judicial Inspectorate's independence if the role of the CEO's discipline is left to the National Commissioner.

[304] Section 88A(1)(a) of the Act.

[305] Id at section 89(1).

[306] Id at section 89(4)(a).

[307] Id at section 88A(1)(b).

Analysis of independence

[245] The Judicial Inspectorate plays an exemplary and pivotal role to ensure the protection of inmates. The Judicial Inspectorate has an ambitious vision to uphold the human dignity of inmates through independent, proactive, and responsive oversight and ensure impartiality, dignity, accessibility and effectiveness to the Inspecting Judge. The constitutional architecture of the Judicial Inspectorate was designed to be a beacon of independence and on a proper analysis this cannot be fully achieved in practical terms if section 88A(4), as it currently stands, remains in place.

[246] It is anomalous to have portions of the Judicial Inspectorate independent but the disciplining of the CEO not. This is because, as I now show, independence is assessed on the basis of factors and mechanisms for accountability and oversight. These factors must be analysed to determine whether, on the whole, the body satisfies the threshold of adequate independence. The independence cannot be piecemeal. The Supreme Court of Canada in *Valente* defined independence thus:

> "The word 'independent' . . . reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial function, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees."[308]

[247] The independence must not only be underpinned by public perception. It also rests on objective facts that include financial independence as well as full operational independence when it comes to the functioning of the CEO. The benchmark of independence should include the perception by the public that the structure of the Judicial Inspectorate is transparent to the maximum extent possible.[309] It is the ideal that is expected to be achieved and perceived from an external perspective in order to

[308] *Valente* above n 179 at 685. This statement was made in the context of judicial independence in respect of a judge serving on a tribunal. However, the statement is persuasive on the meaning of independence, and applies in these circumstances as well.

[309] *Glenister II* above n 4 at para 207.

instil public confidence in the body. The level of perceived independence must be that of sufficient or adequate independence based on objective facts. As highlighted in *Glenister II*, this means that a "reasonable and informed member of the public" must be of the opinion that the body has sufficient autonomy and autonomy-protecting features. This Court stated that—

> "the appearance or perception of independence plays an important role in evaluating whether independence in fact exists. . . . Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy- protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or constitutive of its independence."[310]

[248] In *Helen Suzman Foundation* this Court further emphasised that it is "public confidence in mechanisms that are designed to secure independence" that is important.[311] In *McBride*, perception of independence was described as essential to the independence of IPID:

> "It is therefore necessary to its credibility and the public confidence that it be not only independent but that it must also be seen to be independent, to undertake this daunting task, without any interference, actual or perceived, by the Minister."[312]

[249] This is apposite in the current context. Inmates ought to have confidence that the body to which they report mistreatment in correctional centres is not beholden to those responsible for their incarceration or their mistreatment. If they do not feel that the body is independent, they will lose confidence in the body and its ability to resolve their grievances, which would defeat the purpose of the Judicial Inspectorate. In my

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[310] Id.

[311] *Helen Suzman Foundation* above n 187 at para 31.

[312] *McBride* above n 176 at para 41.

view, the retention of section 88A(4) means that the Judicial Inspectorate structure falls short of adequate independence.[313] This Court in *McBride* also explained that independence—

> "requires a careful examination of a wide range of facts to determine this question. Amongst these are the method of appointment, the method of reporting, *disciplinary proceedings* and method of removal . . . from office, and security of tenure."[314]

[250] Disciplinary oversight and decision making on this by the National Commissioner is incompatible with adequate independence. The Judicial Inspectorate's primary role is embedded in what is one of the most problematic and vulnerable areas of our penal policies, being correctional centres. It is well-accepted that one of the problems faced by correctional centres in South Africa is overcrowding.[315] It is a serious concern, as it automatically generates substandard and often inhumane conditions of detention and inmates are forced to live for extended periods in congested accommodation, with insufficient space to move, sit or sleep.[316] This requires the Judicial Inspectorate to analyse sentenced and awaiting trial inmates' basic needs in terms of living conditions, medical care, legal aid and family visits.[317] This difficult context is tailor-made for tension between the Judicial Inspectorate and the National Commissioner. Section 85(1) of the Act guarantees the independence of the Judicial Inspectorate. It must therefore be wholly independent of the Department.

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[313] *Glenister II* above n 4 at para 211.

[314] *McBride* above n 176 at para 31.

[315] Giffard and Muntingh *The Effect Of Sentencing On The Size Of The South African Prison Population* (Open Society Foundation of South Africa 2006) at 13-4.

[316] United Nations Office on Drugs and Crime *Handbook On Strategies To Reduce Overcrowding In Prisons* (United Nations, New York 2013) at iii.

[317] Id. According to the same United Nations report:

> "[Prisoners] being squeezed into cramped living quarters, often in appalling hygiene conditions and with no privacy, makes the experience of being deprived of freedom – already stressful in normal circumstances – exponentially worse. It erodes human dignity and undermines detainees' physical and mental health, as well as their reintegration prospects. In addition to putting excessive strain on infrastructures, it heightens the potential for tensions and conflicts among detainees and with staff. It quickly leads to difficulties in maintaining good order within the prison, resulting in potentially severe consequences in terms of safety for the detainees, as well as in terms of supervision and security."

The main judgment has highlighted the concern about the operational and financial links between the Judicial Inspectorate and the National Commissioner. However, the main judgment does not see the fact that the CEO is subject to the disciplinary jurisdiction of the National Commissioner as a problem. I believe this relationship too compromises its independence.

Analysis of section 88A(4)

[251] Section 88A(4) of the Act provides that "[a]ny matters relating to misconduct and incapacity of the CEO must be referred to the National Commissioner by the Inspecting Judge". On my reading of the section, all it requires is that in the event of any misconduct or incapacity on the part of the CEO, the Inspecting Judge must refer such matter to the National Commissioner. The section is silent on whether the referral should take place before or after a disciplinary process or finding by the Inspecting Judge. It merely states that the CEO's incapacity or misconduct must be referred by the Inspecting Judge to the National Commissioner. To me, that means the CEO must be referred to the National Commissioner for disciplinary action. Therefore, the section grants the National Commissioner disciplinary power over the CEO. In my view, this illustrates the very problem that there is no outright independence. Having the power to discipline a CEO is an important aspect of control.

[252] The main judgment states that, on a proper interpretation of section 88A(4), the Inspecting Judge is empowered to make decisions regarding the process to be followed in respect of misconduct or incapacity concerning the CEO. It states that the Inspecting Judge would be obliged to initiate an appropriate process to determine these issues. It finds that it is thus implicit that the Inspecting Judge makes a decision on the process to be followed.[318] In my view, this is not clear from the wording of the section. The section is silent on whether the Inspecting Judge may make a decision on the process to be followed, and I do not think that this can be inferred from the wording. At most, all the section says is that, should an issue regarding misconduct or incapacity

[318] Main judgment at [114].

arise, the Inspecting Judge must refer such issue to the National Commissioner. The section does not specify at which stage or following what process the "matters relating to misconduct and incapacity" must be referred, all it says is that they must be referred. Simply put, the process to be followed is thus that the CEO's conduct must be referred to the National Commissioner.

[253] I agree with the main judgment that the context within which section 88A(4) appears is important in ascertaining the extent of the powers which the Inspecting Judge has over the CEO. In terms of section 88A(1)(c), the CEO is under the authority and control of the Inspecting Judge. The Inspecting Judge thus has substantive powers and control over the functions of the CEO. However, the question is whether the section is "reasonably capable" of bearing the meaning ascribed to it by the main judgment without "unduly straining" the language of the section.[319] In *Abahlali Basemjondolo* this Court warned that "whilst it is important to prefer an interpretation that avoids any constitutional inconsistency, we must be careful not to choose an interpretation which cannot be readily inferred from the text of the provision".[320]

[254] A constitutionally compliant reading can thus only be ascribed to section 88A(4) if that reading "can be reasonably ascribed to the section".[321] I am of the view that the inference of a "decision" having been taken by the Inspecting Judge before referring the misconduct to the National Commissioner unduly strains the wording of the section. It does not appear anywhere in the section that the National Commissioner must give effect to the "decisions" taken by the Inspecting Judge concerning misconduct or incapacity. The section only refers to the referral of matters relating to misconduct or incapacity. It seems to me that, at most, the Inspecting Judge merely has the power to identify any issue relating to misconduct or incapacity on the part of the CEO and is

[319] Id at [118] relying on *Hyundai* above n 230 at paras 24 and 26.

[320] *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) (*Abahlali Basemjondolo*) at para 120.

[321] *Hyundai* above n 230 at para 23.

then obliged to refer such matters to the National Commissioner, who will then decide on the appropriate disciplinary action.

[255] Of course, we must look at what a reasonably informed member of the public reading section 88A(4) would think of the arrangement created by the section. In my view, a reasonably informed member of the public will perceive this disciplinary process to be carried out by the National Commissioner as a constraint on its independence. The National Commissioner holds the metaphorical key to the inmate's cell door and simultaneously also controls the disciplinary process of the CEO. The juxtaposition of these two processes does not portray a profile of the kind of independence which would reach the required benchmark.

[256] The independence of the Judicial Inspectorate must also mean operational independence without the control of the disciplinary process of the CEO by the National Commissioner. This independence would include the publication of reports of adverse conditions in correctional centres, which the Judicial Inspectorate wishes to make public in the media. True independence requires the Judicial Inspectorate to act freely and without constraint in this regard. This may lead to the perception that the CEO whose task it would be to publish such a report, may be constrained in some way as the National Commissioner is charged with the disciplining of the CEO. It is an important mission of the Judicial Inspectorate that the public and inmates be assured that adverse conditions should not be concealed. The fact that correctional centre conditions are subject to oversight may of itself introduce tension between the National Commissioner and the Judicial Inspectorate. It cannot be gainsaid that allowing the National Commissioner disciplinary control over the CEO creates a scenario that is tailor-made for some potential dissonance between the Judicial Inspectorate and the National Commissioner. This impedes and does not safeguard its long-term independence.

Conclusion

[257] The Optional Protocol is an instructive international instrument in this matter. It bears emphasising that Article 18(1) of the Optional Protocol requires states parties to "guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel". The Judicial Inspectorate has the features of such a national preventive mechanism.[322] It is entrusted to promote and protect the rights of inmates. For it to be able to fulfil this purpose, it must have an adequate level of independence to ensure that it can function accordingly. It is undesirable when assessing the nature of the independence that there should remain a limitation being the disciplinary aspect of a personnel member, the CEO. The need for a sufficiently independent Judicial Inspectorate is clear and it is incontestable that the independence must be consistent throughout in its operational and structural attributes.

[258] I am not assuming that the power of the National Commissioner will be abused. My disquiet arises from the symbolic and substantive perception that the CEO is ultimately responsible to the National Commissioner for their conduct. Juxtaposed to this is the objective fact of the CEO being subject to the National Commissioner's disciplinary control. This offends the Constitution if the true purpose of the Act is to be achieved in relation to the Judicial Inspectorate. It is vitally important in a democracy that the Judicial Inspectorate be independent of all external pressures from the very institution the Judicial Inspectorate must hold to account. As well as in fact being independent in this way, it is of critical importance that the Inspecting Judge must be seen to be both independent and in control of all aspects of the Judicial Inspectorate.

[259] In the result, I would have confirmed the High Court's declaration of invalidity for the reason that section 88A(4) falls short of the standard of independence required and thus does not pass constitutional muster.

[322] See main judgment at [67].

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