

# **Inmates' right to a traditional food in the correctional centres: a critical analysis**

## **1. Introduction**

In the past South Africa was one of the countries that was characterised with the culture of abuse of the rights of inmates. This culture emanated from the societal belief that inmates had to suffer or had to be punished for the crimes they had committed. What made the situation worse for them was the fact that the courts were not willing to interfere in their treatment as they believed that the correctional centres' officials were capable of treating them. However, as times went on, the courts gradually began to change their minds on the treatment of inmates. They began to argue that there were some rights that inmates did not lose upon entering the correctional centres. This embracement of inmates' rights by the court was referred to as the common law principle of residuum.<sup>1</sup> In the last twenty years this common law principle became entrenched in the Interim and the final Constitution which currently guarantee the rights of inmates.<sup>2</sup> One of those rights is their right to traditional food. This right is informed by the fact that people find their cultural identity in different places which could also include the correctional centres which house

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<sup>1</sup> Some of the cases that enforced the principle of residuum are *Thukwane v Minister of Correctional Services*, 2003 (1) SA 51 (T) paras 21-23 and *N and others v Government of Republic of South Africa and others (No 1)* 2006 (6) SA 543 (D) para 20.

<sup>2</sup> 1993 Interim Constitution and 1996 Final Constitution.

inmates;<sup>3</sup> the Constitution accepts the diversity of the nation,<sup>4</sup> the right to be different,<sup>5</sup> cultural pluralism<sup>6</sup> and that cultural practices forms part of human identity, dignity and equality.<sup>7</sup>

It is in this context that this paper seeks to critically analyze the protection and enforcement of inmates' right to traditional food in the last twenty years. In doing so, the first part of the paper analyses the protection of inmates' right to traditional food in the correctional centre and the second part analyses the case of *Huang & Others v The Head of Grootvlei prison & Another*.

## **2. Inmates' right to traditional food in the correctional centre**

### **2.1 inmates' right to traditional food implicitly recognized in the right to adequate nutrition**

Just like inmates' right to adequate medical treatment and accommodation, inmates' right to traditional food is protected by section 35(2)(e) of the Constitution. While this section does not specifically protect this right, it is implicitly incorporated in inmates'

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<sup>3</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) para 54, emphasis added.

<sup>4</sup> *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) para 65.

<sup>5</sup> *Idem*.

<sup>6</sup> *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 23.

<sup>7</sup> *Ibid* at para 62.

right to adequate nutrition protected by this section. This was indirectly affirmed by the court in the case of *Huang & Others v The Head of Grootvlei prison & Another*<sup>8</sup> when it found that the correctional centre's decision to take away a concession that had entitled the Chinese inmates to receive and prepare their own Eastern traditional food was unlawful and in violation of their right to adequate nutrition in terms of section 35(2) (e) of the Constitution. The critical analysis of this case will follow later. Suffice at this stage to say that the court's recognition of this right within the right to adequate nutrition means that inmates' right to tradition food imposes a positive obligation on the state to fulfil it. In other words, inmates are entitled to demand that the state provides them with their traditional food at its expense because all inmates' right guaranteed by section 35(2) (e) impose a positive obligation on the state to fulfil them.

## **2.2 The role of the right to participate and enjoy culture on traditional food in the correctional centre.**

Apart from section 35(2) (e), inmates' right to traditional food is protected by section 30 and 31 of the Constitution. Section 30 entrenches the right of everyone to participate in the cultural life of their choice which respects traditions that may include traditional food.<sup>9</sup> Unlike section 30, section 31 protects the right of people

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<sup>8</sup> *Huang & Others v The Head of Grootvlei prison & Another*, 2008 JOL 21089 (O) Case No 992/2003 (ZAFSHC) (Unreported judgement of 15 May 2003).

<sup>9</sup> Rautenbach C, Van Rensburg FJ, "Pienaar G, Culture (and religion) in constitutional adjudication", PER/PELJ 2003 (6) 1, 6/112, CITING Currie "Minority Rights: Education, Culture, and Language" in Chaskalson et al (eds), *Constitutional Law of South Africa* (Juta Kenwyn 1999) 35.19, emphasis added.

who belong to a cultural community to enjoy their culture. So both these sections empower inmates as individuals or as a group to demand access to traditional food in the correctional centre.<sup>10</sup> In *Christian Education South Africa v Minister of Education* the Constitutional Court indirectly affirmed this argument as follows:

The rights protected by section 31 are significant both for individuals and for the communities they constitute.<sup>11</sup>

However, it is crucial to note that unlike section 35(2)(e) which imposes a positive obligation to fulfil inmates' right to traditional food, sections 30 and 31 impose a negative obligation on the state to respect or not to interfere with this right. In other words, inmates' right to traditional food under these sections does not entitle them to demand that the state provides them with traditional food at its expense. These sections merely entitle them to demand that the state respects or not to interfere with their right to their traditional food. Again in *Christian Education South Africa v Minister of Education* the Constitutional Court indirectly stresses this negative obligation as follows:

...negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language).<sup>12</sup>

Other constitutional rights relevant to inmate's right to traditional food in the correctional centre include the right to self-determination of a cultural community

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<sup>10</sup> Ibid at 18/112, emphasis added.

<sup>11</sup> *Christian Education South Africa v Minister of Education* (note 6 above) at para 23.

<sup>12</sup> Ibid at para 23.

sharing a cultural heritage protected by section 235 of the Constitution<sup>13</sup> and the right to freedom of association protected by section 18 of the Constitution.<sup>14</sup>

### **2.3 Legislation protecting inmates' right to traditional food**

Apart from the Constitution, the Correctional Services Act,<sup>15</sup> its Regulations<sup>16</sup> and the Children's Act<sup>17</sup> play a critical role in the protection of inmates' right to traditional food. Section 8 (3) of the Correctional Services Act obliges the state to enact Regulations, where reasonably practicable, which cater for inmates' diet that takes into account their cultural preferences. In compliance with section 8(3) the Department of Correctional Services enacted Regulations which currently limit access to traditional food to pregnant or lactating remand detainee.<sup>18</sup> While this is a commendable move by the Department of Correctional Services towards the enforcement of inmates' right to traditional food, it is a concern that the Regulation does not cater for a situation where a pregnant or lactating remand detainee who had access to a cultural food becomes an inmate. In other words, it is not clear whether a pregnant or lactating remand detainee who had access to a cultural food as a remand detainee would cease to have access to such traditional food as soon

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<sup>13</sup> Rautenbach C, Van Rensburg FJ, Pienaar G, (note 9 above) at 17/112.

<sup>14</sup> Ibid at 18/112, Citing Devenish *A Commentary on the South African Constitution* 61; Woolman *Freedom of Association* 22.1-22.12; De Waal, Currie and Erasmus *The Bill of Rights Handbook* 312-318.

<sup>15</sup> Correctional Services Act 111 of 1998.

<sup>16</sup> Correctional Services Regulations No. 35032, 27 February 2012.

<sup>17</sup> Children's Act 38 of 2005.

<sup>18</sup> Correctional Services Regulations, (note 16 above).

as she is sentenced and become an inmate. The absence of the Regulations catering for these inmates means that these inmates cannot compel the state to continue to provide them with traditional food because the Regulation only caters for pregnant or lactating remand detainees and not inmates. While one may assume that the state would continue providing those inmates with their traditional food, but if it is not regulated, it is possible that those inmates may end up being denied access to traditional food by some correctional centres. So the absence of the Regulations catering for these inmates, by far, amount to the violation of their constitutional right to traditional food and their right not to be unfairly discriminated against by the state.

Other than the Correctional Services Act and Regulations, the Children' Act indirectly protects inmates' right to traditional food by obliging the state to consider the child's best interests and maintain a connection with their culture or tradition.<sup>19</sup>

#### **2.4 The limitation of inmates' right to traditional food**

Just like other rights in the Constitution, inmates' right to traditional food is not absolute. Inmates' right to traditional food, in terms of sections 30 and 31 of the Constitution, can be limited if the cooking or the distribution of traditional food violates the rights of other inmates. In such cases, the state is constitutionally empowered to interfere with inmates' right to traditional food in order to protect the rights of other inmates. However, if the cooking or the distribution of traditional food does not violate other inmates' rights, the state has no option but to allow inmates to cook and eat their traditional food in the correctional centre. In this instance, the

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<sup>19</sup> Section 7 (1) (e) (ii) of Children Act, (note 17 above).

state can interfere with this right if its interference amounts to a reasonable and justifiable limitation of this right in terms of section 36. In other words it has to pass the proportionality enquiry which will take into account the nature of this right and the extent of its limitation, the importance of the purpose of the limitation, the relationship between the limitation and purpose and the existence of less restrictive means to achieve that purpose.<sup>20</sup>

The proportionality enquiry will also apply when limiting inmates' right to traditional food in terms of section 35 (2) e). In other words, should the state fail to provide inmates with their traditional food as required by this right, it will have to justify such failure under section 36. The reason being, section 35 (2) (e), unlike other socio-economic rights, does not have an internal limitation clause.

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<sup>20</sup> These are factors taken into account when determining whether a right has been constitutionally limited. Some of the cases which have applied these factors include the Constitutional Court cases of *Khosa and Others v Minister of Social Development and Others*, *Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) para 113; and *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 40.

### **3. The critical analysis of the case of *Huang & Others v The Head of Grootvlei prison & Another***

In the last twenty years, this right has only been enforced by the court in the case of *Huang & Others v The Head of Grootvlei prison & Another*.<sup>21</sup> This case concerned applicants who were of Taiwanese (Chinese) origin and who sought an order that they be allowed to receive raw food and to prepare it in the kitchen of Grootvlei correctional centre in accordance with their Eastern tradition. They argued that the correctional centre's decision of taking away a concession that had entitled them to receive and prepare their own Eastern traditional food was unlawful and in violation of their right to adequate nutrition in terms of section 35(2) (e) of the Constitution. The court agreed with the applicants and found that the correctional centre's decision violated section 35(2) (e) which entrenches inmates' right to adequate nutrition and section 8(3) of the Correctional Services Act which obliged the state to enact regulations that give effect to inmates' rights to cultural or religious food. It then ordered the state to allow them to receive raw food and prepare it in accordance with their Eastern tradition in the Grootvlei correctional centre.

This court's finding demonstrates the commitment on the part of the court to protect and enforce inmates' right to traditional food. Hence, it has been commended for emphasizing that socio-economic rights protect cultural and religious aspects of human identity.<sup>22</sup> This commitment can also be derived from the court's advice that

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<sup>21</sup> Liebenberg S, *Socio-economic rights, Adjudication Under a Transformative Constitution*, 2010, 265.

<sup>22</sup> Liebenberg S, *Socio-economic rights, Adjudication Under a Transformative Constitution*, 2010, 265.



the applicants may amend their papers (which they never did) and demand that the state provide them with their traditional food at the expense of the state.

However, while I agree with the court's finding, I do not agree with the manner it arrived at its finding on two grounds. The first one is that the court found that the correctional centre's decision to take away a concession which had allowed the Chinese inmates to cook their traditional food in the correctional centre violated section 35 (2) (e) instead of finding that it violated section 30 or 31 of the Constitution. The reason why the finding that section 35 (2) (e) was violated was not appropriate is because this section imposes a positive obligation on the state to provide inmates with adequate nutrition which includes traditional food. The right that is violated by the state's action is the right to cultural life or to enjoy culture which includes traditional food guaranteed by sections 30 and 31. The reason is, as already argued, these sections impose a negative obligation on the state not to interfere with inmates' rights to traditional food and that the legal question in this case was whether the state's decision to take away a concession which allowed them to cook their traditional food in the correctional centre violated their constitutional rights. It was not whether the state had failed to provide the applicants with their traditional food as required by section 35 (2) (e). So the court should not have been misled by the applicants' argument that the decision of the state to take away the concession amounted to the violation of section 35(2) (e).

This interpretative approach would have compelled the court to first ascertain whether inmates' access to traditional food was in no way violating the Bill of Rights. If access to traditional food led to no violation of the Bill of Right then the court would

have had to find that inmates' right to traditional food as protected by sections 30 and 31 were violated by the state's actions. This finding would then present the state with an opportunity to argue that it violated these rights in a constitutional manner in terms of section 36.

The second reason why I do not agree with the manner the court arrived at its finding is that the court did not engage in the process of determining whether the applicants' claim to be allowed to cook their traditional food was based on their sincere belief which could be objectively supported.<sup>23</sup> In stressing the importance of this process when determining whether a cultural right has been violated, the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay*, argued as follows:

the centrality of the practice should be judged with reference to the importance of the belief or practice to the claimant's religious or cultural identity.<sup>24</sup>

The court proceeded to put into practice this argument in the following paragraphs:

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<sup>23</sup> This approach has already been followed when interpreting religious rights in South Africa and abroad. In South Africa it has clearly been stressed in the case of *Christian Education South Africa v Minister of Education* (note 6 above) para 37 when the Constitutional Court argued that "...No one in this matter contested that the appellant's members sincerely believe that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children". Some of the international cases in which the consideration of sincere belief was stressed during the interpretation of the right to religion are the USA Supreme Court case of *Mondrea Vinning-EL, Plaintiff—Appellant v John Evans and Rick Sutton, Defendant—Appellants No 10—1681, 2011 United States Court of Appeal and the European Court case of Jakobski v Poland* application no. 18429/06, judgment 7 December 2010.

<sup>24</sup> *Ibid* at paras 52 and 58.

...Even on the most restrictive understanding of culture, Sunali is part of the South Indian, Tamil and Hindu groups ...whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part.<sup>25</sup>

Further, the court stressed the relevance of a sincere belief as follows:

Sunali also endured a large measure of insensitive treatment from her peers, including the prefects of the School, and media exposure, yet continued to stand by her belief. All this points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture.<sup>26</sup>

So these paragraphs surely oblige the court to either ask whether the claimants had a sincere belief to their traditional food or whether their belief to traditional food could be objectively supported because both these questions lead to the same conclusion.<sup>27</sup> In other words, the evidence of a subjective belief cannot be ruled out in cases dealing with cultural rights because for one to belong to a cultural group, he or she has to have a sincere belief in the practice of his or her cultural group that serves his or her interests. So this interpretation accommodates both subjective and objective questions because it is possible for a member of a certain cultural group not to follow its practices simply because those practices do not serve his or her interests. This interpretative approach is also crucial because South Africa is a developing country and would prohibit the potential abuse of this right by inmates who could demand a baseless cultural food that may have the effect of stretching the

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<sup>25</sup> Ibid at para 50.

<sup>26</sup> Ibid at para 58.

<sup>27</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay*, (note 3 above) para 52.

limited resources of the correctional centres. It would also limit the floodgates of unnecessary cases.

#### **4 Conclusion**

South Africa, over the last twenty years through its Constitution and legislation, by far, played an important role in protecting inmates' rights including their right to traditional food. The courts have also been equal to the task as they have also robustly enforced the rights of inmates including their right to traditional food. However, while the country is headed in the right direction in the protection and enforcement of inmates' rights there is still some work that has to be done, especially on the enforcement of this right. The Correctional Services Act Regulations have to be amended to cater for the right to traditional food of pregnant or lactating inmates. The constitutional interpretative approach also encapsulates engaging in the process of determining whether an inmate's claim to traditional food is subjectively or objectively supported.