

Incarceration and the Restriction in the Enjoyment of the Rights of Prisoners (Pemenjaraan dan Sekatan dalam Kenikmatan Hak Banduan)

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ABSTRACT

Human rights are universal standards that protect and safeguard all persons from severe mistreatments and abuses. The notion of human rights is grounded on the recognition that “all human beings are born free and equal in dignity and rights” and everyone is therefore “entitled to all rights and freedoms” contained in the human rights law. All the rights and freedoms guaranteed by the law can however, be subjected to a restriction according to other laws of the land. The respect and protection for the human rights of a person depend upon his status, whether he is an adult or a child; a prisoner or freeman; male or female. It was argued that prisoners are entitled to all their personal rights as well as personal dignity that are not temporarily taken away by the law or necessarily inconsistent with the circumstances in which they have been placed. The question to ask is do the laws expressly stated the rights that are not forfeited as a result of incarceration? If the answer is in the negative, what is the litmus test to employ in order to determine the rights that are not lost as a result of incarceration? This study examines relevant laws, published and unpublished reports in order to answer the above posed questions.

Keywords: Human rights; prisoners’ rights; test; restriction of rights; incarceration

ABSTRAK

Hak asasi manusia ialah taraf sejagat yang melindungi semua orang daripada salah laku dan pencabulan yang teruk. Pengertian hak asasi manusia adalah berdasarkan pengiktirafan bahawa “semua manusia dilahirkan bebas dan sama rata dari segi maruah dan hak-hak” dan oleh sebab itu, semua orang “berhak atas semua hak dan kebebasan” yang terkandung dalam undang-undang hak asasi manusia. Sebaliknya, semua hak dan kebebasan yang dijamin oleh undang-undang boleh, tertakluk pada sekatan mengikut undang-undang lain negara itu. Kehormatan dan perlindungan hak asasi manusia seseorang adalah bergantung pada statusnya, sama ada dia dewasa atau kanak-kanak; seorang banduan atau orang bebas; lelaki atau perempuan. Adalah dihujahkan bahawa banduan berhak kepada semua hak peribadi serta maruah peribadi mereka yang tidak diambil secara sementara oleh undang-undang atau tidak selaras dengan keadaan di mana mereka telah diletakkan. Soalan yang perlu ditanya ialah adakah undang-undang menyatakan secara nyata hak-hak yang tidak dilucutkan akibat pemenjaraan? Jika jawapannya adalah negatif, apakah ujian mudah yang digunakan untuk menentukan hak-hak yang tidak hilang akibat pemenjaraan? Kajian ini memeriksa undang-undang yang berkaitan, laporan yang diterbitkan dan tidak diterbitkan untuk menjawab soalan-soalan di atas.

Kata kunci: Hak asasi manusia; hak-hak banduan; ujian; sekatan terhadap hak; pemenjaraan

INTRODUCTION

Human rights are universal standards or customs that help to protect and safeguard all persons from severe maltreatment and abuses.¹ The idea of human rights is based on the recognition that “all human beings are born free and equal in dignity and rights” and everyone is therefore “entitled to all rights and freedoms”² contained in the human rights law. Furthermore, it is based on the notion that certain freedoms and rights are fundamental to human existence that is, they are inherent entitlements guaranteed to a person as a result of being human which are founded on respect for the dignity of a person.³ Human rights are perceived as an entitlement of all people regardless of their status, location, the legal system or any other context.⁴ Clapham added that human rights come into play to stop governments and other actors from pursuing expedient policies at the expense of the well-being of certain individuals and the proper functioning of a democratic society under the rule of law.⁵ Akther in her PhD thesis argues that every individual has the right to be treated with dignity in all situations and must be protected from certain villain against his/her person.⁶

Conversely, certain rights and freedoms guaranteed by the law can be subjected to restriction according to the other laws of the land such as the Criminal Code, the Penal Code and other laws that are enacted to ensure peaceful coexistence and protection of the rights of citizens.⁷ Therefore, the notion that human rights are

universal in nature does not mean everyone has the same rights.⁸ Everyone has human rights and can claim them but the precise composition of such claims depend on where the person is, who he is and what rights would he possess? In other words, the respect and protection for the human rights of a person depend upon his status, whether he is an adult or a child; a prisoner or freeman; male or female. Danjuma, Nordin and Muhamad in another article entitled “Rights of Prisoners under International Law: Rights against Forced labor; Ill Treatments or Punishments; and Right to Work and Wages” opine that some rights are not absolute in which their enjoyment may be restricted by the State,⁹ in order to protect a legitimate objective.¹⁰ For instance, the right to vote is universal in nature but applicable only to adult citizens which age limit varies according to the law of a particular country. Also, human rights are inalienable only if it cannot be restricted by the law due to the commission of a crime or voluntarily giving it up, thus, not all human rights are inalienable or absolute.¹¹ For example, freedom of movement is guaranteed under the law but such right may be restricted upon the imposition of imprisonment by the court.¹²

It was argued that prisoners are entitled to all their personal rights as well as personal dignity that are not temporarily taken away by the law or necessarily inconsistent with the circumstances in which they have been placed.¹³ The question to ask is do the laws expressly state the rights that are not forfeited as a result of incarceration?

If the answer is in the negative, what is the litmus test to employ in order to determine the rights that are not lost as a result of incarceration? The study examines relevant laws, published and unpublished reports in order to answer the above posed questions.

To achieve the objectives of this study, the paper is divided into different parts. After the introduction, the paper provides an overview of prisoners' rights; examines the classification of prisoners' rights; ascertains the tests to apply in determining whether a right is lost due to incarceration and lastly, concludes the analysis.

PRISONERS' RIGHTS

Prison is an institution of the State that accommodates alleged offenders who are awaiting trials and convicts serving their sentences by way of imprisonment or waiting for the execution of sentence. Prisoners usually violate the law of the State and in some cases encroached the right of other fellow citizens.¹⁴ In other words, prisoners are those who are legitimately accused of committing crimes and those who are the final product of criminal justice.¹⁵

Human rights are the basic and fundamental rights guaranteed to individuals and groups; and protected by the law.¹⁶ The idea of human rights is based on the recognition that "all human beings are born free and equal in dignity and rights"¹⁷ and everyone is therefore "entitled to all rights and freedoms"¹⁸ contained in the human rights law. Further, it is based on the notions

that certain freedom and rights are fundamental to human existence that is they are inherent entitlements guaranteed to a person as a result of being human which are founded on respect of the dignity of a person.¹⁹

The United Nations Declaration of Human Rights incorporates a wide range of rights. Among the basic rights include the right to life; right against torture or arbitrary detention; right to fair trial as well right to defense.²⁰ On the other categories of rights, Kalin and Kunzli state that there are civil liberties such as freedom of opinion, assembly, religion and right to marry which are included alongside with the other series of economic, social and cultural rights.²¹ The question to ask is whether prisoners are entitled to any rights guaranteed by the law or they forfeit their rights and pay for their crime due to their status as prisoners?

In order to answer the question above, it is important to note that right to liberty is guaranteed to everyone but such right can be infringed by a lawful arrest and detention in accordance with the established law.²² Taking into the custody of alleged and convicted offenders, they are specifically subjected to movement restraint and their right to liberty is no longer available.²³ But does that take away all other rights? The authors observe that prior to 20th century, during the hands-off period, courts refused to entertain matters relating to the prisoners in prisons because prisoners forfeited all their rights at the gate of the prison.²⁴ Prisoners ought to pay for their crimes and were regarded as "slaves of the States".²⁵

During the hands-off period,²⁶ it was accepted that upon conviction, a person forfeited all the rights that are not expressly guaranteed by the statutory law or correctional policy.²⁷ Such position continued due to the reluctance of the courts to intervene in the internal administration of prisons.²⁸ According to Regoli and Hewitt, many individuals believed that persons who have been convicted of a felony and sent to prison should lose all their basic rights and privileges.²⁹

With the shift of the philosophy of punishment from retributive justice to reformation as echoed in Article 10(3) of the International Covenant on Civil and Political Rights 1966 (ICCPR) which states that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be for their reformation and social rehabilitation”.³⁰ The advocates for the prisoners’ rights argued that prisoners are human beings and should not be subjected to inhuman and degrading treatment, and above all, they are eventually going back to the society.³¹ Against this background, Article 10 of the ICCPR advocates that “all persons deprived of their liberty should be treated humanely and with respect for the inherent dignity”.

Sequel to the shift of philosophy of punishment from retribution to reformation, quite a number of resolutions and declarations were passed by the United Nations’ General Assembly. Among them are Mandela Rules; the Basic Principles for the Treatment of Prisoners,³² the Body of Principles for the Protection of all Persons

under any Form of Detention or Imprisonment;³³ Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴ On regional declarations and rules on prisons, the European countries have European Prisons Rules.³⁵ While African Region has Kampala Declaration on Prison Conditions in Africa and Plan of Action (Kampala Declaration),³⁶ Arusha Declaration on Good Prison Practice,³⁷ and the Ouagadougou Conference on Penal and Prison Reform in Africa, 2002.

During the middle of the 20th century, courts began to recognize the rights of prisoners in a number of cases. The Supreme Court of the United States in the case of *Cooper v. Plate*³⁸ held that prisoners who were denied their right to practice their religion were entitled to a legal remedy and their rights were not extinguished at the prison gate. The fact that prisoners are confined in prisons does not make them lose all their rights.³⁹ Prisoners are entitled to seek redress when a person acting under the color of the State law deprives them of their rights guaranteed by the Constitution.⁴⁰ Thus, from a legal point of view, prisoners shall enjoy all their human rights except those restrictions which unavoidably follow from the denial of the right to personal liberty, such as the right to freedom of movement and participation in public gatherings.⁴¹ This view of Nowak is consistent with Principle 5 of the Basic

Principles for the Treatment of Prisoners.⁴²

Principle 5 of the Basic Principles for the Treatment of Prisoners 1990 provides:

Except those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations Covenants.

However, the authors submit that Principle 5 above should be read together with Article 29(2) of the Universal Declaration of Human Rights (UDHR) on limitation. Article 29(2) of the UDHR echoes that the enjoyment of rights and freedoms should be subject to the limitations specified in the law for the purpose of protecting the rights and freedoms of others as well as meeting the demands of morality, public order and the welfare of the general public.

It was also held by the Supreme Court of Zimbabwe that it remains the constitutional duty of the court to enforce the constitutional rights of all persons including prisoners.⁴³ Similarly, a court in Nigeria held in the case of *Peter Nemi v. Attorney General of Lagos State and Ors*,⁴⁴ that prisoners still have their rights intact, except those deprived by the law. Therefore, the rights and freedoms are not gifts or privileges at the whim of a government or leader, they can neither all be denied nor

forfeited on the basis that an individual has committed an offence⁴⁵ or is alleged to have committed an offence.

Despite the above recognition that prisoners retain all rights and freedom except those that are expressly withdrawn by the law or lost as a result of incarceration, still one will be in limbo considering there was no clear demarcation as to the rights that are lost as a result of incarceration. Consequent to that, this study examines the classification of prisoners' rights in the subsequent heading in order to ascertain the classes of rights that are lost due to incarceration.

CLASSIFICATION OF PRISONERS' RIGHTS

For the purpose of this study, prisoners' rights are classified into express; linked; and implied rights as discussed below.

EXPRESS RIGHTS OF PRISONERS

Express rights are rights that are contained in the binding Treaties and Conventions where their scope of application is expressly extended to prisoners in custody of the States. Such rights include right to life; right against torture, cruel, inhuman and degrading treatment or punishment (CIDT); right against forced labor; right against slavery; and right to freedom of religion.⁴⁶ Article 4(2) of the ICCPR made it expressly clear that there should be no derogation of these rights even during a public emergency which threatens the life of the nation. Thus, such rights should not be infringed upon in

any circumstance.

LINKED RIGHTS OF PRISONERS UNDER PLP

These are rights where the coverage of their protection is not expressly extended to prisoners but their violation may amount to an infringement of the express rights.⁴⁷ These rights include the right to health; right to rest and leisure; and right to food just to mention few. With respect to right to health, it is an undeniable fact that the State has a duty to ensure that the right to health and medical care of every prisoner in its custody is respected. On the reason why the right to health is categorized as linked right, it is because a violation of the right to health may often impair the enjoyment of other human rights, such as the rights to education or work, and vice versa.⁴⁸ It was held that failure to provide adequate medical care constitute cruel, inhuman or degrading treatment.⁴⁹ Thus, violating rights to health amount to an encroachment of the right to life and CIDT.⁵⁰ The court in the case of *Spicer v. Williamson*,⁵¹ recognizes the right to health of a prisoner. In *Odafe & Ors. v. Attorney-General of the Federation and Others*,⁵² the court instructed the Federal Government to transfer prisoners from prison to a specialist hospital where they could have adequate medical attention since they were confirmed to be HIV positive. The court declares that failure on the part of the government to provide such medical care and treatment to prisoners amounts to torture.⁵³

On rights to rest and leisure, both

Articles 24 of the UDHR and Article 7 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) guarantee that workers should be given adequate time for rest and leisure, and periodic holidays with pay. However, the above laws are silent as to the scope of application of the right to rest and leisure in respect of a prisoner who is in custody of the State. Yet, if one read the wordings of UDHR, ICESCR and Article 5 of the Basic Principles for the Treatment of Prisoners,⁵⁴ he/she will come to a conclusion that the prisoners are entitled to rest and leisure for the work that they are engaged into under prison labor programs.

Additionally, the fact that prisoners are confined in a prison and have forfeited their right to liberty does not make them similitude to machines, they are still human beings worthy to be given all human considerations. And even machines are required by their mechanical default, to rest in order to function well much less of a person with blood in his body who uses his strength to work. The nature of the work to be carried out by the prisoners under prison labor programs should be that which can be carried out by a freeman, meaning that the nature of the work should not be seen to be beyond human capacity or strength. Thus, preventing prisoners from rest and day(s) off will pose a potential threat to their rights to human dignity and right against CIDT due to the fact it is a non-derogable right.⁵⁵

IMPLIED RIGHTS OF PRISONERS

These are rights even though recognized by

the binding treaties such as ICCPR, ICESCR, and African Charter on Human and Peoples' Rights (Banjul Charter) 1986 among others but they are not expressly extended to prisoners in custody of the States. These rights are expressly extended to prisoners via Resolutions, Declarations; Acts; Rules; Prisons Regulations and Standing Orders on prisons. Such rights include the right to work; right against exploitation; and right to wages among others. These categories of rights require a yard stick in order to ascertain whether they are lost due to incarceration or not. Thus, the subsequent heading focuses on the tests or yardstick needed to ascertain whether any of the said rights is lost due to incarceration.

TEST TO APPLY IN DETERMINING WHETHER A RIGHT IS NOT LOST DUE TO INCARCERATION

From the discussion above particularly under prisoners' rights, prisoners are entitled to all rights equally guaranteed to freemen except those rights that deemed to have been lost as a result of incarceration or those that are restricted by law. However, the Basic Principles for the Treatment of Prisoners and the scholars who supported the above notion have not clearly mentioned those rights that are lost due to incarceration. Thus, the authors opine that the tests to apply in determining whether a right is lost or restricted due to the incarceration of a prisoner are:

1. Whether there is a law that restricts the scope of the right by excluding prisoners?⁵⁶

2. Whether extending the scope of protection of the right to accommodate prisoners would pose a threat to peace, security and be contrary to correctional policy?

The definition of "threat to peace or contrary to correctional policy" should be based on cultural values of a State. This is because human rights standards must relate to the cultural values of the people.⁵⁷ Further, there is a belief that though several cultural traditions across the globe share some basic rights and values, there are still some differences in the understanding of the nature, scope and enforcement of certain rights.⁵⁸ Thus, no moral values are universal, customs and traditions limit the scope of human rights, and human rights vary from place to place and time to time. In determining the scope or construing the meaning of application of any human rights, one must consider cultural, social, and even religious background of individuals prior to recognizing the actuality of a human right or else, there would be a violation of the tenets of the religion.⁵⁹

Based on the tests above, one may apply them in order to determine whether a right is extended to prisoners or are lost due to incarceration.

CONCLUSION

From the foregoing, it is demonstrated that the international human rights treaties and declaration use general phrases "everyone" and "every individual" which shows that

they do not exclude some categories of people from being protected under the laws. This makes them vague and uncertain as to whether the protection is extended to prisoners. The analysis reveals that prisoners retain all the rights and freedoms except those that are taken away by the law. The study classifies prisoners' rights into express; linked; and implied rights. Express rights are rights that are contained in the binding Treaties and Conventions where their scope of application is expressly extended to prisoners in custody of the State.

Whereas the scope of protection of linked rights is not expressly extended to prisoners but their violation may amount to an infringement of express rights particularly right against CIDT. While

implied rights consist of rights that are expressly extended to prisoners via Resolutions, Declarations; Acts; Rules; Prisons Regulations and Standing Orders on prisons. Implied rights are not absolute rights, they can be infringed upon satisfying two tests formulated in this study. Firstly, when there is a law that restricts the scope of the right by excluding prisoners and secondly, where extending the scope of protection of the right to accommodate prisoners would pose a threat to security and contrary to correctional policy? These tests could be a guide to human rights activists, lawyers, civil society organizations, and individuals in drawing a line as to when a prisoner's right can be said to have been lost due to incarceration.

NOTES

¹ John Vorhaus, 'Prisoners' right to education: a philosophical survey' (2014) 12 (2) *London Review of Education*, p 168.

² Articles 1 and 2 of the Universal Declaration of Human Rights (UDHR). See Micheal Freeman, Universalism of Human Rights and Cultural Relativism in Scott Sheeran & Sir Nigel Rodley (eds.), *Political and legal Theory in Routledge Handbook on International Human Rights Law*, Routledge, New York, 2013, pp 49-51; David Beetham, Universality, Historical Specificity and Cultural Difference in Human Rights in Geoff Gilbert, Françoise Hampson & Clara Sandoval (eds.), *Strategic Visions for Human Rights Essays in Honour of Professor Kevin Boyle*, Routledge, U. K., 2011, pp 34-51.

³ United Nations High Commissioner for Human Rights, *Manual on Human Rights Training For Prison Officials*, New York, 2005, p 3. See Andrew Clapham, *Human Rights A Very Short Introduction*, Oxford University Press, New York, 2007, p 2; Andrew Fagan, *Human Rights Confronting Myths and Misunderstanding*, Edward Elgar Publishing, U. K., 2009, p 8; Ibrahim Ojo Tajudeen, 'Behind the prison walls: rights or no rights?' (2013) 2 (4) *International Journal of Innovative Research & Development*, p 779.

⁴ Sue Farran, *Human Rights in the South Pacific Challenges and Changes*, Routledge-Cavendish, New York, 2009, p 52. See also Tim Dunne & Nicholas F. Wheeler, Introduction: Human Rights and the Fifty Year's Crisis in *Human Rights in Global Politics*, Cambridge University Press, U. K., 1999, p 4.

- ⁵ Andrew Clapham, *Human Rights A Very Short Introduction*, p 2.
- ⁶ Shajeda Akther, *Ensuring Justice in Bangladesh Through the Right to A Fair Trial*, Ph.D thesis, Universiti Kebangsaan Malaysia, 2015, p 1.
- ⁷ See Abayomi Oyebola, 'Fundamental rights of prisoners: A perspective' (n.d), <http://www.nigerianlawguru.com/articles/human%20rights%20law/FUNDAMENTAL%20RIGHTS%20OF%20PRISONERS.%20A%20PERSPECTIVE.pdf> >accessed (18 January 2016); Ayade E. Ayade, 'Problems of prison overcrowding in Nigeria: some lessons from South Africa and America' Masters dissertation, Central European University Hungary, 2010, p 12.
- ⁸ John Vorhaus, *Prisoners' Right to Education: A Philosophical Survey*, (2014), 169.
- ⁹ Ibrahim Danjuma, Rohaida Nordin & Mohd M. Muhamad, 'Rights of prisoners under international law: rights against forced labor; ill treatments or punishments; and right to work and wages' (2017) *The Law Review (Sweet & Maxwell)*, p 273.
- ¹⁰ Andrew Clapham, *Human Rights A Very Short Introduction*, p 96.
- ¹¹ Ibrahim Danjuma, Rohaida Nordin & Mohd M. Muhamad, 'Rights of prisoners under international law: rights against forced labor; ill treatments or punishments; and right to work and wages' p 273; Andrew Clapham, *Human Rights A Very Short Introduction*, pp 96-97.
- ¹² Ibrahim Danjuma, Rohaida Nordin & Mohd M. Muhamad, 'Rights of prisoners under international law: rights against forced labor; ill treatments or punishments; and right to work and wages' p 273.
- ¹³ Graham Zellick, 'Prisoners' rights in England' (1974) 24 (4) *The University of Toronto Law Journal*, p 335; M. Nowak, 'Fact-finding on torture and ill-treatment and conditions of detention' (2009) 1 (1) *Journal of Human Rights Practice*, p 110; *Hudson v. Palmer*, 468, U.S. 524 (1984) it was held that prisoners retain those rights that are compatible with the objectives of incarceration. Similarly, Zick share similar view. See Timothy Zick, 'Prisoners' rights' (1991) 79 (1253) *The Georgetown Law Journal*, pp 1253-1295. See also Principle 5 of the Basic Principles for the Treatment of Prisoners 1990.
- ¹⁴ For instance, offences relating to encroachment of the right of a fellow citizens are offences against person and they include; assault, murder, rape just to mention few.
- ¹⁵ E. Aboki, *History of Nigeria Prisons Service, An Inside Account*, Bizmak Publishers, Kaduna, (2007).
- ¹⁶ S. Foster, *Human Rights & Civil Liberties*, 3rd Edn., Pearson Publisher, England, 2011, pp 4-5.
- ¹⁷ See Article 1 of the Universal Declaration of Human Rights (UDHR); Abdul Haseeb Ansari & Umar A. Oseni, *Human Rights: Genesis and Perspectives in Abdul Ghafur @Khin Maung Sein (ed.), Human Rights Law: International, Malaysian and Islamic Perspectives*, p 13; Micheal Freeman, *Universalism of Human Rights and Cultural Relativism in Scott Sheeran & Sir Nigel Rodley, Political and legal Theory in Routledge Handbook on International Human Rights Law*, pp 49-51; David Beetham, *Universality, Historical Specificity and Cultural Difference in Human Rights in Geoff Gilbert, Françoise Hampson & Clara Sandoval (Eds.), Strategic Visions for Human Rights Essays in Honor of Professor Kevin Boyle*, pp 34-51.
- ¹⁸ See Article 2 of the UDHR; John Vorhaus, *Prisoners' Right to Education: A Philosophical*

- Survey, *London Review of Education*, p 168; Steve Foster, *Human Rights & Civil Liberties*, p 10.
- ¹⁹ See United Nations High Commissioner for Human Rights, *Manual on Human Rights Training For Prison Officials*, New York, 2005, p 3; Andrew Clapham, *Human Rights A Very Short Introduction*, p 2; Andrew Fagan, *Human Rights Confronting Myths and Misunderstanding*, p 8; Ibrahim Ojo Tajudeen, ‘Behind the prison walls: rights or no rights’ p 779; Sue Farran, *Human Rights in the South Pacific Challenges and Changes*, p 52; Tim Dunne & Nicholas F. Wheeler, Introduction: Human Rights and the Fifty Year’s Crisis in *Human Rights in Global Politics*, p 4.
- ²⁰ Walter Kalin & Jorg Kunzli, *The Law of International Human Rights Protection*, Oxford University Press, New York, 2009, p 3.
- ²¹ Walter Kalin & Jorg Kunzli, *The Law of International Human Rights Protection*, p 3. For the classification of these rights see Theodor Meron, *Human Rights in International Law: Legal and Policy Issues*; Abdul Haseeb Ansari & Umar A. Oseni, Human Rights: Genesis and Perspectives in Abdul Ghafur @Khin Maung Sein (ed.), *Human Rights Law: International, Malaysian and Islamic Perspectives*, p 13.
- ²² See Article 3 of UDHR and Article 10 of the ICCPR; Shajeda Akther, Ensuring Justice in Bangladesh Through the Right to A Fair Trial, p 2.
- ²³ M. A. Araromi, ‘Prisoners’ rights under the Nigerian law: legal pathways to progressive realization and protection’ (2015) 6(1) *Afe Babalola University Journal of Sustainable Developmental Law & Policy*, p 171.
- ²⁴ As it was held in the case of *Siegal v. Ragen* 88 F. Supp. 996 (N.D.III. 1949).
- ²⁵ R. M. Harding, ‘The enforcement of prisoners’ rights in the United States: an access to the courts issue’ (1998) 3(1) *Cov. Law Journal*, p 10.
- ²⁶ J. Hatchard, ‘Judicial recognition and protection of the constitutional rights of prisoners’ (1995) 39(1) *Journal of African Law*, p 93, observed that courts in Africa have traditionally adopted the hands-off doctrine towards prisoners’ rights.
- ²⁷ J. J. Senna & L. J. Siegel, *Introduction to Criminal Justice*, p 442.
- ²⁸ J. J. Senna & L. J. Siegel, *Introduction to Criminal Justice*, p 442.
- ²⁹ R. M. Regoli & J. D. Hewitt, *Exploring Criminal Justice*, p 404.
- ³⁰ See Eze Mark & Okafor E. Emeka, ‘The prison as an instrument of social reformation and rehabilitation: a study of Nigerian prisons (medium) Kiri-Kiri Lagos’ p 25.
- ³¹ Araromi A. Marcus, ‘Prisoners’ rights under the Nigerian law: legal pathways to progressive realization and protection, p 171; Amnesty International, Nigerian Prisoners’ Rights Systematically Flouted, p 6; Jason Yanofski, Prisoners v. prisons: a history of correctional mental health rights, p 42; Graham Zellick, ‘Prisoners’ rights in England’ p 335; M. Nowak, Fact-finding on torture and ill-treatment and conditions of detention, p 110; Timothy Zick, ‘Prisoners’ rights’ p 1259; Steve Foster, *Human Rights & Civil Liberties*, p 288; Sufian Hemed Bukurura, ‘Emerging trends in protection of prisoners’ rights in Southern Africa, p 92; Anastasia Karamalidou, *A Critical Assessment of Human Rights in English and Dutch Prisons*, p 263; Martin Damon, ‘State prisoners’ rights to medical treatment: merely elusive or wholly illusory, p 42; J. Hatchard, ‘Judicial recognition

- and protection of the constitutional rights of prisoners’ p 93. Also, see the following cases *Carlson v. Green*, 446, U.S. 14, 18-19 (1980); *Bounds v. Smith*, 430, U.S. 817, 824-28 (1977); *Wolff v. McDonnell*, 418, U.S. 539 (1974); *Hudson v. Palmer*, 468, U.S. 524 (1984).
- ³² Adopted and proclaimed by General Assembly Resolution 45/111 of 14th December, 1990.
- ³³ Adopted and Proclaimed by the General Assembly Resolution 43/173 (9 December 1988).
- ³⁴ Adopted by General Assembly Resolution 37/194 of 18 December 1982.
- ³⁵ Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.
- ³⁶ Adopted at the Kampala Seminar on prison conditions in Africa, September 1996.
- ³⁷ Adopted on 27 February 1999, Arusha, Tanzania) regulating the prisons in Central, Eastern and Southern African (CESCA) countries which Nigeria is not part of it, due to the fact that it is located in West Africa.
- ³⁸ 378 U.S. 546 (1964).
- ³⁹ *Cooper v. Plate* 378 U.S. 546 (1964).
- ⁴⁰ *Carlson v. Green*, 446, U.S. 14, 18-19 (1980); *Bounds v. Smith*, 430, U.S. 817, 824-28 (1977) it was held that prisoners have constitutional rights to adequate, effective and meaningful access to courts to challenge violations of constitutional rights; *Wolff v. McDonnell*, 418, U.S. 539 (1974) it was held that “there is not curtain drawn between the Constitution and the prisons of this country.”
- ⁴¹ M. Nowak, ‘Fact-finding on torture and ill-treatment and conditions of detention’ (2009) 1 (1) *Journal of Human Rights Practice*, p 110; *Hudson v. Palmer*, 468, U.S. 524 (1984) it was held that prisoners retain those rights that are compatible with the objectives of incarceration.
- ⁴² Principle 5 of the Basic Principles for the Treatment of Prisoners 1990 provides that “Except those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations Covenants”.
- ⁴³ *Conjwayo v. Minister of Justice and Anor*. 1991(1) ZLR 105.
- ⁴⁴ (1999) 6 NWLR (Part 452), 42.
- ⁴⁵ United Nations High Commissioner for Human Rights, *Manual on Human Rights Training For Prison Officials*, p 4.
- ⁴⁶ See Article 4(2) of the ICCPR.
- ⁴⁷ In some cases, the violation of linked rights may lead to violation of express rights like right to life and right against CIDP.
- ⁴⁸ Office of the United Nations High Commissioner for Human Rights and World Health Organization (WHO), Right to Health, Fact Sheet No. 31, 2008.
<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>>accessed (2 December 2016).
- ⁴⁹ See the cases of *Coleman v. Schwarzenegger*; Dist. Court, ED California 2006 and *Plata v. Schwarzenegger*, 603 F.3d 1088 (2010).
- ⁵⁰ In the case of *Suzana bt Md Aris v DSP Ishak bin Hussain* (2011) 2 LRC 241, the court held that “...to deprive a person of prompt medical treatment when he was in police custody, especially when that person was in pain and had

just vomited blood, was to subject that person to torture, cruel, inhuman or degrading treatment by default, though not deliberately, contrary to art 5 of the UDHR...”

⁵¹ 191 N.C. 487 (N.C. 1926). The fact of the case was that the board of county commissioners argued that it did not empower the Sheriff to take the prisoner to the plaintiff’s hospital for treatment, and not aware of the need to give such services to the prisoner till after the services were accomplished and the expenses were incurred. It had been the practice of the board of county commissioners to only settle bills for medical services rendered to prisoners in the custody of the sheriff after they approved it. The board argued that it was not liable to pay for the bill since it was not informed prior to the services. The court held that it is wrong to say that the Sheriff is personally liable for the medical bills since he failed to inform the board. It held further, that the State has a legal duty to provide medical attention to a person in the custody of the Sheriff and settle all the medical expenses incurred while in his custody since he is performing his official duty.

⁵² (2004) AHRLR 205.

⁵³ *Odafe & Ors. v. Attorney-General of the Federation and Others* (2004) AHRLR 205, para 35.

⁵⁴ Article 5 of the Basic Principles for the Treatment of Prisoners provides: “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International

Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations Covenants”

⁵⁵ Non-derogable rights are rights which a State must guarantee, without exception, at all times, including in time of war or other public emergency. All the non-derogable rights are absolute in the sense that there are never any circumstances that may warrant State to justify curtailing or restricting those rights. Right against torture, inhuman or degrading treatment or punishment is among these non-derogable rights. See Article 4(2) of the ICCPR, Article 7 of the ICCPR, General Comment 20 of ICCPR. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

⁵⁶ This is in accordance with Article 29(2) of the UDHR which provides that rights and freedoms guaranteed in the Declaration are subject to restriction as prescribe by law.

⁵⁷ Abdul Haseeb Ansari & Umar A. Oseni, Human Rights: Genesis and Perspectives in Abdul Ghafur @Khin Maung Sein (ed.), *Human Rights Law: International, Malaysian and Islamic Perspectives*, p 14.

⁵⁸ Abdul Haseeb Ansari & Umar A. Oseni, Human Rights: Genesis and Perspectives in Abdul Ghafur @Khin Maung Sein (ed.), *Human Rights Law: International, Malaysian and Islamic Perspectives*, p 15. See also Rhona K. M. Smith, *Texts and Materials on International Human Rights*, p 40.

⁵⁹ Shahrul Mizan Ismail, Breaking new ground in

human rights protection: proposing an inverted triangular approach through group-based enforcement in South East Asia, p 6.

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