

Prisoner's right to health in South Africa

by

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Annexure G

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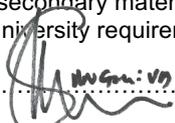
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Summary

People are not incarcerated voluntarily; they are placed in correctional centers by the state either as un-sentenced suspects in a crime awaiting their cases to be finalized or as sentenced offenders, sentenced by a court to incarceration. Because the prisoners are placed in these centers involuntarily, the state has a total and inescapable responsibility and duty to care for them in a manner that does not violate or compromise their constitutional rights. The right to health care or right to access to health care is one such right.

The International Bill of Rights, together with a number of charters and treaties have set minimum standards that, when read together, articulate the right to health for prisoners and lay down a platform on which comprehensive international legal framework can be developed guaranteeing the right to health of all persons who are incarcerated and deprived of their liberty. This framework has also laid a perfect foundation from which the Constitution, particularly the Bill of Rights, of the Republic of South Africa was based. The Bill of Rights, Chapter 2 in the Constitution of the Republic of South Africa, contains several guarantees aimed at safeguarding the rights of those individuals detained by the State, whether they are sentenced prisoners or awaiting trial. The Correctional Services Act was promulgated in 2004 in creating a rights based framework for South African's prison system. The Department of Correctional Services must provide, within its available resources, adequate healthcare services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life. Although the Department of Correctional Services is governed by a discrete piece of legislation in the form of Correctional Services Act, it does not have its own separate laws that govern health care, but have to be in line with what the National Health Act and the Constitution dictates. In terms of the Right to Healthcare and Medical Treatment, the Department of Correctional Services complies with all Department of Health policies and practices.

The Constitution, together with legislation (DCS, NHA and regulations) have provisions that clearly entrench the protection of health related rights of prisoners.

From the legal perspective, the Constitution and legislation have sufficient safeguards that promote the right to health care for prisoners. The court has also been equal to the task in enforcing these rights. It has to be noted, however, that whilst litigation has brought victory to individual complainants, these victories have often not translated into fundamental changes in reality situations on the ground. The disjuncture between what is in the law and what actually happens on the ground stems from challenges that can be solved internally by the Department of Correctional Services and others that outside the purview of the department.

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Chapter 1

Introduction

1.1 Introduction and background

When a court sentences a person to incarceration he or she retains all his or her rights, except those that are necessary to limit so that the sentence can be implemented¹. The incarcerated individual is still entitled to all other basic human rights including the right to have access to the health services available in the country without discrimination on the grounds of their legal situation². These human and legal rights as set out and entrenched in the Constitution and the legislation on prisons and prison policy. The right to health care or right to access to health care is one such right.

The Bill of Rights, Chapter 2 of the Constitution, describes the rights of all persons in South Africa³. The state must respect, protect, promulgate and fulfill the rights in the Bill of Rights. All arrested and detained individuals have a right to adequate health care services as obligated by the Constitution. In terms of the Correctional Services Act, (Act 111 of 1998), the Department of Correctional Services has a duty to provide primary health care services and refer patients to external health care facilities for secondary and tertiary levels of health care.

The South African prisons are, however, desperately overcrowded and the most basic constitutional rights, health care included, of prisoners are often not adequately protected⁴. This gap between the guarantees set out in the Constitution together with the Correctional Services Act and the actual conditions in prisons is a situation that poses a threat to the fulfillment of these legislative obligations⁵.

1.2 Study statement and study question

The study intends to address an understanding of whether the Constitution and available legislative framework safeguards the rights of access to health care for those individuals detained by the State, whether they are sentenced prisoners or awaiting trial. In essence, the study aims to inquire whether there are sufficient

legislative safeguards to the right to health care for people who are incarcerated; and whether the courts offer relief when the state falls short of meeting its obligation in fulfilling those rights. Furthermore, the study seeks to address whether it is a needed and effective strategy to turn to the courts in an effort to promote the health rights of prisoners when the State is failing to provide prisoners with these rights.

1.3. Study objective

This research will attempt to answer the following questions:

- a) Does the provisions of the Constitution sufficiently safeguard and promote the right to health care for prisoners?
- b) Does the provisions of the Correctional Services Act sufficiently safeguard and promote the right to health care for prisoners?
- c) Have the courts offered substantive relief to prisoners in an effort to promote their health rights?

1.4 Literature review

People are not incarcerated voluntarily; they are placed in correctional centers by the state either as un-sentenced suspects in a crime awaiting their cases to be finalized or as sentenced offenders, sentenced by a court to incarceration⁶. Because the prisoners are placed in these centers involuntarily, the state has a total and inescapable responsibility and duty to care for them in a manner that does not violate or compromise their constitutional rights⁷. The residuum principle is central to the rights of all inmates⁸. This principle states that incarcerated individual is still entitled to all other basic human rights including the right to have access to the health services available in the country without discrimination on the grounds of their legal situation⁹, the only rights taken are those that are necessary to limit so that the sentence can be implemented¹⁰.

The Constitution, particularly the Bill of Rights, will be central in this discussion as a guiding document from which other legislation takes heed. The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled¹¹. The prison system must therefore have an underlying philosophical framework derived from the Constitution. The

Constitution makes it clear that the primary responsibility of respecting, protecting, promoting and fulfilling all of the rights in the Bill of Rights, under section 7(2) of the Constitution, rests on the legislature and the executive¹². Section 27 (2) of the Constitution enjoins the state to ‘take legislative and other measures, within its available resources, to achieve progressive realization’ of the right to have access to healthcare services¹³.

It is against this background that the Correctional Services Act (111 of 1998) was promulgated in 2004 in creating a rights based framework for South African’s prison system¹⁴. The Department of Correctional Services must provide, within its available resources, adequate healthcare services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life¹⁵. Section 79 of the Correctional Services Act, as amended states that “any offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and the Parole Board or the Minister”¹⁶.

The National Health Act (61 of 2003) is the health related piece of legislation and the arguably the prime portal of entry for access to healthcare services by the majority of South Africans¹⁷. The pivotal role of the Act in promoting, protecting and fulfilling rights based access to a variety of health services in the public health sector and correctional services institutions will also be discussed. Prison health is part of public health and prisons are part of our society¹⁸. In this context, the essence of medical ethics in prison will also be discussed. The primary task of the prison doctor and the other health care workers is the health and well-being of the inmates. Issues of informed consent, confidentiality and privacy, with respect to incarcerated individuals with also be discussed.

Case law relevant and applicable to health care rights in prisons will also be canvassed. South African prisons are desperately overcrowded and often the most basic constitutional rights of prisoners are often not protected adequately. Overcrowding, for instance, result in a number of other violations: lack of sufficient ventilation, poor physical and mental health, ineffective rehabilitative services and the threat to the safe custody of prisoners¹⁹; this is vindicated in cases like *Lee v Minister for Correctional Services and others 2012 ZACC 30*²⁰. Case law will further

clarify what role the courts have played in promoting and protecting the rights of prisoners in South Africa.

Also canvassed will be sources from different authors regarding the rights to healthcare, with particular reference to prisoner's access to the health services, will be discussed and analyzed, including views expressed in books, publications and legal journals.

1.5 Methodology

The study questions raised are discussed on an integrated multilayered approach: this approach has as its source the applicable supreme provisions of the Constitution; the applicable principles of common law; relevant legislation (often articulated in terms of the Constitution); interpretative case law (as a source of the positive law), international law and considerations of medical ethics.

Primary sources of the research are the Constitution, together with relevant legislation and regulations. These pieces of legislative framework will be interpreted, analyzed and applied through case law. Secondary sources of the study will be from views expressed by authors both locally and internationally. The national and international codes that govern prisons, healthcare and ethics will also form part of the sources.

1.6. Limitations of the study

The study does not address all the basic rights of the prisoners conferred by the Bill of Rights but rather confines itself to a suite of rights which, when viewed collectively, could be said to constitute a right to health. Similarly, apropos to the Correctional Services Act, not all rights are addressed save for those that pertain to health care services and medical treatment.

1.7 Structure

1.7.1 Chapter 1: Introduction

The introduction sets out the framework used upon conducting the study. This chapter also covers the background to the study, the problem statement, objectives, methodology and overview of the study structure.

1.7.2 Chapter 2: International human rights law with respect to the right to health of prisoners

This chapter deals with the international legal instruments that address human rights for people who are incarcerated with specific reference to the right to healthcare. A global perspective in the form of international law and policy promulgated in the the International Bill of Rights that consists of the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) is explained. The United Nations (UN) rules and principles regarding prisoners are also discussed.

1.7.3 Chapter 3: The Constitution and the right to health of prisoners

This chapter deals with the rights of prisoners in the South African constitutional dispensation. The Constitution contains a number of different references to health care services and medical treatment. In contrast to international law, there is no express mention of a broad right to health. There are certain rights that are of particular importance where it concerns arrested and detained persons. The basic rights of all arrested and detained persons in South Africa are primarily based on Sections 9,10, 11, 12, 27 and 35. Section 35 (2) specifically talks to the right of prisoners to medical treatment. Viewed collectively, this suite of rights could be said to constitute a right to health.

1.7.4 Chapter 4: The Correctional Services Act No. 111 of 1998 and health care rights of prisoners

In this chapter the Correctional Services Act (111 of 1998), on healthcare and medical parole, and the Correctional Matters Amendment Act (5 of 2011) will be discussed. Section 12 of the Correctional Services Act relates specifically 7 to

issues of healthcare services and medical treatment; whilst sections 7 (Accommodation), 8 (Nutrition), 9 (Hygiene), 10 (Clothing and bedding), and 11 (Exercise) relate to factors that are determinants of health. The old section 79 Correctional Services Act had been amended by section 14 of the Correctional Matters Amendment Act 5 of 2011. This section is intended to create a medical parole system which protects the dignity of inmates and gives due consideration to public safety.

1.7.5 Chapter 5: National Health Act No. 61 of 2003 and relevance to prison health

The pivotal role of the National Health Act (61 of 2001) in promoting, protecting and fulfilling rights based access to a variety of health services in the public health sector will also be discussed, however, with specific reference to prisoner's rights to healthcare services, confidentiality, privacy and informed consent consistent with medical ethics. The interface of public health and prison health is highlighted as demonstrated by the fact that – although, the Department of Correctional Services is governed by a discrete piece of legislation in the form of Correctional Services Act- it does not have its own separate laws that govern health care, but have to be in line with what the National Health Act and the Constitution dictates.

1.7.6 Chapter 6: The prisoner's health care rights litigation in South Africa

Case law dealing with the topics in chapters 2, 3, 4 and 5 will be discussed in this chapter as well as practical implications of relevant legislation. Issues on how the courts have pronounced on prisoner's rights to health care access; the violations of the provisions of the Constitution through - overcrowding, lack of adequate medical treatment, access to medical parole and overall lack of consideration for prisoner's dignity and respect- are discussed

1.7.7 Chapter 7: Discussion and conclusion

The issues raised in respect of each of the questions posed in the foregoing chapters are discussed and conclusions reached.

Foot notes

- 1 *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C) (SAHC 1997 C), para 42
- 2 Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990. Principle 9
- 3 Muntingh, LM (2006) [Revised 2010], A Guide to the rights of inmates as described in the Correctional Services Act and Regulations, p12
- 4 De Vos, P(2005), 'Prisoners' rights litigation in South Africa since 1994: A critical evaluation' in Law, Democracy and Development, p89
- 5 Ibid
- 6 Muntingh, supra p8
- 7 Ibid, p8
- 8 Ibid, p7
- 9 Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990. Principle 9
- 10 Muntingh, supra p7
- 11 The Constitution of the Republic of South Africa Act, No. 108 of 1996. Section 2
- 12 Pieterse, M (2014): 'Can Rights Cure? The impact of human rights litigation on South Africa's health system, p36
- 13 The Constitution, s 27 (2)
- 14 Muntingh, supra p7
- 15 Correctional Services Act 111 of 1998, s12 (1)
- 16 Ibid, s 79
- 17 Hassim A, (2008), The National Health Act 61 of 2003: A Guide, p xi
- 18 WHO/Europe (2014): Prisons and Health, foreword
- 19 Ballard and Dereymaeker (2011): Conditions of detention and prison overcrowding: a few lessons from abroad. The Social Reintegration of Ex-Prisoners in Council of Europe Member States Conditions of detention and prison overcrowding: a few lessons from abroad,
- 20 *Lee v Minister for Correctional Services and others* 2012 ZACC 30

CHAPTER 2

International human rights law with respect to the right to health of prisoners

2.1 Introduction and background

According to the Preamble of the WHO Constitution, “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”¹. Human rights are universal, inalienable, indivisible and interdependent.² Implicit in the foregoing statement is that, every person has human rights and that those rights cannot be taken away from the person, including a prisoner. Prisoner’s rights are, therefore, human rights and have to be respected and upheld in the highest esteem as one would for those who are in the community.

The International Covenant on Economic, Social and Cultural Rights, has stated, “Health is a fundamental human right indispensable from the exercise of other human rights”³. The right to health or the right to access to health care, is therefore, a human right that is firmly guaranteed by both international and individual states legal frameworks.

The genesis of international law on health rights of prisoners, according to Rick Lines⁴, has its roots from *Act for Preserving the Health of Prisoners in Gaol, and preventing the Gaol Distemper* enacted in 1774 as legislation in Britain to specifically address health in prisons. This legislation provided a foundation from which the health rights of prisoners as defined in international law, and the mechanisms that have been used to ensure the rights of prisoners to realize the highest attainable standard of health⁵ is built. The principles outlined in the Act continue to form the framework of state’s obligations in international law to safeguard the health of prisoners⁶.

The prisoner’s rights to: Access to medical care for the prisoner, to adequate and acceptable medical infrastructure that meets the hygienic standards required were enshrined in the Act⁷. The Act further enshrined legal obligations to the British

government to provide both primary medical care for sick prisoners, as well as taking proactive preventative health measures⁸. It mandated that prison medical staff meet proper qualifications and standards, and it also expressly pronounced that the state had a legal obligation to provide health care to prisoners at its own cost⁹. In essence, the state has a special duty of care for those in places of detention which should cover safety, basic needs and recognition of human rights, including the right to health¹⁰. In the light of the foregoing account, one can thus deduce that, the provisions of this Act provided a foundation from which the health rights of prisoners could be defined in contemporary international law.

2.2 International legal instruments

The United Nations in embracing the provisions of the aforementioned Act; has set up instruments that promote the culture of human rights, in the form of Universal Declaration on Human Rights (UDHR) adopted in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR). These instruments, that set out to promote human rights through standard-setting and to protect or initiating measures of implementation of the human rights, are collectively known as International Bill of Rights¹¹. These instruments, that constitute the body of human rights law, makes human rights dignity operable and channels sentiment and conviction into institutionalized forms and procedures, allowing for remedial redress and the apportionment of responsibility¹². Other key human rights treaties and bodies that have examined questions of health in prisons pertinent to this topic include the following:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention on the Elimination of All Forms of Racial Discrimination
- United Nations Human Rights Council
- European Convention on Human Rights
- African Charter on Human and Peoples Rights
- United Nations Standard Minimum Rules for the Treatment of Prisoners

- The Revised Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)

Central to all these treaties and charters is that, the right to health of prisoners is enshrined under both economic, social and cultural rights as well as civil and political rights.

They set minimum standards that, when read together, articulate the right to health for prisoners and lay down a platform on which comprehensive international legal framework can be developed guaranteeing the right to health of all persons who are incarcerated and deprived of their liberty¹³. The treaties and charters are established by the 192 UN member states that make up the UN General Assembly that is the chief policy-setting body in the UN and it plays a key role in standard setting and the codification of international law¹⁴. It is in this forum where human rights treaties and declarations are adopted at the General Assembly¹⁵. Consensus is reached between member states in the form of a treaty and/or in a charter where the countries pledge to respect, protect and fulfil the rights the treaty enshrines, and participate in the system(s) of independent monitoring and adjudication the treaty sets out¹⁶. Each treaty defines the specific human rights protections and also establishes a committee of independent experts (known as a “treaty body”) to monitor the progress of states towards meeting the obligations enshrined in the treaty; for example, the UN Human Rights Committee monitors the national implementation of the ICCPR¹⁷.

The standards established in international human rights treaties and conventions are essentially contracts between states¹⁸. States are bound to observe ‘legally-binding’ provisions, and consequences follow if they do not¹⁹. These provisions, in a true state of the word, essentially constitute what can be termed as ‘soft law’ and as such none are binding and there is no direct enforcement mechanism; it is the political weight of the treaties themselves that is their strongest asset, as all states have agreed the same terms²⁰. Accordingly, under international human rights law, when a state violates an individual’s rights as defined within an international treaty, it is in effect breaching its contract with the other states parties to protect that person’s rights²¹.

Although none of these instruments has a binding effect within international law, they at least exert an ethical obligation on the states to observe such prison health resolutions and often they have found legal expression within international and domestic case law²². A number of them have been cited by international human rights bodies in finding countries in violation of prisoners' rights to health care²³. A major thread running through these instruments is the primacy of human rights to all person's irrespective of whether they are free or incarcerated. The right to health is a universal right and accordingly includes that of prisoners. Key essentials of these rights with respect to health in prisons include the following: Right to access to medical care, a right to timely medical attention, right to a professional standard of care, a right to preventative health and a right to environmental health (a right to adequate living space and a right to hygienic living conditions)²⁴.

2.2.1 Universal Declaration on Human Rights

Although the Universal Declaration on Human Rights (UDHR) does not expressly address the right to health for prisoners, it is submitted however that, because health is a fundamental human right indispensable from the exercise of other human rights²⁵, it covered within the envelope of the right to life. Article 3 of UDHR which says that "Everyone has the right to life, liberty and security of person"²⁶ invariably guarantees the right to medical care in prisons under the right to life²⁷.

Prisoner medical care under the right to life has come to the attention of the Human Rights Committee where, in a case of *Lantsova v. The Russian Federation*²⁸, the Committee found that the failure of the authorities to provide a "properly functioning medical service" to diagnose and treat the prisoner's medical condition violated his right to life²⁹. The Human Rights Committee concludes that, in this case, there has been a violation of paragraph 1 of article 6 of the Covenant³⁰. This flows from the inherent obligation by the state to look after the health of the people it deprives of their freedom by putting them in penal institutions.

2.2.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) prohibit torture and cruel, inhuman, or degrading treatment or punishment, without exception or derogation. The ICCPR expressly states that "Every human being has the inherent

right to life and that this right shall be protected by law and thus no one shall be arbitrarily deprived of his life”³¹. Article 10 of ICCPR states that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The right to have medical attention provided to prisoners in a timely fashion is one broadly supported as a legal requirement. Failure to provide medical attention when needed had found way into the UN Human Rights Committee in *Leehong v. Jamaica*³². The Committee found that the state of Jamaica violated Articles 7 and 10(1) of the ICCPR because the applicant had “only been allowed to see a doctor once, despite having sustained beatings by warders and having requested medical attention”³³. The Committee stated that “the ill-treatment and conditions described are such as to violate the author’s right to be treated with humanity and with respect for the inherent dignity of the human person and the right not to be subjected to cruel, inhuman or degrading treatment, and are therefore contrary to articles 7, and 10, paragraph 1”³⁴.

2.2.3 International Covenant on Social, Economic and Cultural Rights

The provision in Article 12 of the ICSECR establishes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and this applies to prisoners just as it does to every other human being³⁵. Accordingly, respect for the fundamental rights of prisoners entails the provision to prisoners of preventive treatment and health care, both equivalent to those provided to the community³⁶. Prison authorities, therefore, have a responsibility not simply to provide health care but also to establish conditions that promote the wellbeing of prisoners and should ensure that prisoners do not leave prison in a worse condition than when they entered³⁷.

2.2.4 Basic Principles for the Treatment of Prisoners

Like Article 10 of the ICCPR, the Basic Principles for the Treatment of Prisoners echoes the same sentiments that bestows the prisoner’s right to be treated with the respect due to their inherent dignity and value as human beings³⁸. Furthermore, principle 9 particularly deals with the aspect of health. It states that “Prisoners shall have access to the health services available in the country without discrimination on

the grounds of their legal situation”³⁹. A lack of adequate living space for prisoners is considered by the UN Human Rights Committee as not only contribution to a violation of the right to dignity and humane treatment, but also to conditions that breach the rights to life and health⁴⁰. Communicable diseases, like TB and scabies, thrive in overcrowded and poorly ventilated spaces. Overcrowding in prison worsens the health conditions for prisoners and thus violate their fundamental human rights to life and human dignity. Overcrowding also result in inadequate access to ablution and sanitation facilities thus posing as a serious health hazard for the inmates. In *Melnick v. Ukraine*, the European Court specifically found “that the applicant’s conditions of hygiene and sanitation were unsatisfactory and would have contributed to the deterioration of his poor health”⁴¹. The court also found that - taken together with their duration, the overcrowding, inadequate medical care and unsatisfactory conditions of hygiene and sanitation - the applicant's detention in such conditions amounted to degrading treatment⁴².

2.2.5 The Revised Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)

The Revised Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) set out the essential elements that are suitable and adequate in penal institutions housing inmates. The Mandela Rules set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management⁴³. The rules cover a wide spectrum including on healthcare services, medical treatment and determinants of health. Basic human rights that are inviolable and universal to everyone, including prisoners, like ‘the right to life and the right to be treated with respect due to their inherent dignity and value’ form a foundation from which these rules are derived (Rule 1).

Medical services and treatment are covered in Rules 24 -35 whilst the determinants of health (accommodation, nutrition, hygiene, exercise, clothing and bedding) are covered in Rules 12-23. Collectively these rules set out to fulfill the right to health for prisoners ensuring their lawful right: to access to medical care; to timely medical attention; to a professional standard of care; to preventative health and to environmental health (a right to adequate living space and a right to hygienic living conditions).

Without aiming to exhaust the entire rule book, here are few examples of the rules and how they apply in safeguarding the rights of prisoners to health. The right to a professional standard of care is proclaimed in Rule 24 (1) where it states that “Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status. Furthermore, Rule 25 (2) stipulates that the health-care service shall consist of an interdisciplinary team with sufficient qualified personnel. Lack of qualified professional and medical staff is a violation of human rights obligations.

With respect to a right to timely medical attention, Rule 31 states that “The physician or, where applicable, other qualified health-care professionals shall have daily access to all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed “. Rule 27 further emphasizes the timeliness of medical attention in that “All prisons shall ensure prompt access to medical attention in urgent cases and that inmates who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Failure to provide medical attention when needed had found way into the UN Human Rights Committee in *Leehong v. Jamaica*⁴⁴. The Committee found that the state of Jamaica violated Articles 7 and 10(1) of the ICCPR because the applicant had “only been allowed to see a doctor once, despite having sustained beatings by warders and having requested medical attention⁴⁵.

2.2.6 African Charter on Human and Peoples Rights

The member states of the African Union pledges, in the African Charter on Human and Peoples Rights⁴⁶, to recognize the rights, duties and freedoms enshrined in the Charter and also to undertake to adopt legislative or other measures to give effect to them (Article 1). The treaty body created by the Charter to ensure its provisions are promoted is the African Commission on Human and People’s Rights⁴⁷. Article 16 (1) states that “Every individual shall have the right to enjoy the best attainable state of physical and mental health⁴⁸ and Article 16 (2) pledges that “States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick⁴⁹. The African Commission, in the case of *Malawi African Association and Others v.*

Mauritania, found a violation of the right to health and right to life in the African Charter (Article 4) by failing to provide medical care following the death of four detainees who succumbed following a lack of medical attention⁵⁰ and failure to provide adequate food, also a violation of Article 16 was found, in part, due to inadequate hygiene in the prison⁵¹.

2.3 Conclusion

Despite international declarations, treaties and standards, prisoners all over the world are largely confined in conditions that are overcrowded, without adequate nutrition, poor access to health care and thus depriving them of their basic human rights. That notwithstanding, the international legal instruments as set by the United Nations has made a solid foundation for building consensus on standards that apply across diverse jurisdictions, are accepted by practitioners as authoritative and set challenging expectations⁵². They have also laid a perfect foundation from which the Constitution, particularly the Bill of Rights, of the Republic of South Africa was based. Because South Africa is a signatory to most of these international agreements, it is duty bound to apply their provisions as for section 231(4) and (5) of the Constitution⁵³. The following chapter explores rights of prisoners in the South African constitutional dispensation.

Footnotes

1. Constitution of World Health Organisation
2. Dhai, A & McQuoid-Mason, D (2011) 'Bioethics, Human Rights and Health Law: Principles and Practice' Juta. p37.
3. International Covenant on Civil and Political Rights adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966.
4. Lines R (2008): The right to health of prisoners in international human rights law. International Journal of Prisoner Health, March 2008; 4(1): 3-53, p5
5. Ibid, p5
6. Ibid, p5
7. Ibid, p5
8. Ibid, p5
9. Ibid, p5

10. WHO: Prisons and Health (2014). Gatherer A, Enggist S, and Moller L: The essentials about prisons and health.
11. Rodley, N and Pollard, M (2009): The Treatment of Prisoners under International Law: Edition 3
12. Viljoen F: Beyond the law: Multi-disciplinary perspectives on human rights, 2012. Introduction; Disciplinary beyondness: A background to the conference and collection of papers, xiv
13. Lines R (supra), p9
14. Ibid, p9
15. Ibid, p9
16. Ibid, p9
17. Ibid, p9
18. Ibid, p10
19. Viljoen, F (supra), xiv
20. Lines, R (supra), p9 and 14
21. Ibid, p10
22. Ibid, p14
23. Ibid, p14
24. Ibid, p15-36
25. Universal Declaration of Human Rights adopted by General Assembly resolution 217 A (III) of 10 December 1948. Preamble.
26. Ibid, Article 3
27. Lines, R (supra), p17
28. Lantsova v. Russian Federation. Communication No. 763/1997 26 March 2002 CCPR/C/74/D/763/1997
29. Ibid (supra), para 9.2, and Lines R (supra), p17
30. Ibid, para 9.2 and Lines R, p17
31. ICCPR Article 6.1, supra
32. Lines, R (supra), p23
33. Ibid, p23
34. Leehong v. Jamaica. Communication N° 613/1995 13 July 1999 CCPR/C/66/D/613/1995*, para 9.2
35. International Covenant on Social, Economic and Cultural Rights (1966)
36. Lehtmetts, A and Pont, J: Prison health care and medical ethics: A manual for health-care workers and other prison staff with responsibility for prisoners' well-being.
37. WHO: Prisons and Health (2014). Coyle A: Standards in prison health: the prisoner as a patient
38. Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990
39. Ibid, Principle 9
40. Lines R. (supra), p32

41. Ibid, p34
42. Melnik v. Ukraine Application No. 72286/01, 28 March 2006, para 111
43. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)
44. Lines, R (supra) p21 and Leehong v. Jamaica (supra) 9.2
45. Ibid, p21
46. African Charter on Human and Peoples Rights. Adopted in Nairobi June 27, 1981; Entered into Force October 21, 1986
47. Lines, R (supra)
48. African Charter (supra), Article 16 (1)
49. Ibid, Article 16 (2)
50. Lines, R (supra), p35
51. Ibid, p36
52. Ibid, p36
53. The Constitution of the Republic of South Africa Act, No. 108 of 1996. Section 231: (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.

CHAPTER 3

The Constitution and the to the right to health of prisoners

3.1 Introduction

With the demise of Apartheid and the advent of a democratic dispensation, South Africa has acceded to some of the international treaties, as discussed and explained in the foregoing chapter, on which the right to health particularly that of prisoners was based¹. It is to be noted though that the 1996 Constitution of the Republic of South Africa, unlike in international law, does not contain a broad all-encompassing provision to the 'right to health'². There is a suite of rights which, when viewed collectively, could be said to constitute a right to health³ and accordingly enjoy constitutional protection. The Bill of Rights (Chapter 2 of the Constitution), in other words, describes a number of different provisions aimed at promoting the realization of different aspects of the right to health, which ought to be read together when ascertaining the extent of health-related protection conferred by the Constitution⁴. These rights are: the right to life; the right to dignity; the right to bodily and psychological integrity; the right to an environment that is not harmful to health or well-being; the right to emergency medical treatment, the right of access to health care services; and the rights to sufficient food and water and social security, including appropriate social assistance⁵. Because human rights are universal, inalienable, indivisible and interdependent⁶, they also apply to people who are incarcerated in prisons.

There are certain rights that are of particular importance where it concerns arrested and detained persons. The basic rights of all arrested and detained persons in South Africa are primarily based on Sections 9,10, 11, 12, 24, 27 and 35. Section 35 (2) specifically talks to the right of prisoners to medical treatment. Viewed collectively, this suite of rights could be said to constitute a right to health. The following section discusses the aforesaid rights as promulgated in the Constitution that comprise a right to health particularly relevant to prisoners.

3.2 Rights to health with respect to prisoners

3.2.1 Section 9: Equality

Principle 9 of the United Nations (1990) Basic Principles for the Treatment of Prisoners states that “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation”⁷. This finds resonance under section 9 of the Constitution which guarantees that “Everyone is equal before the law and has the right to equal protection and benefit of the law in section 9 (1); section 9 (2) that “Equality includes the full and equal enjoyment of all rights and freedoms”; and section 9 (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth^{8,9}. Section 9 thus confers that prisoners have the same right to health care as everyone else.

3.2.2 Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected¹⁰. Human dignity is another right that has been identified as central both in the founding provisions of the Constitution and by the Constitutional Court¹¹. Because health is an essential for life and for human dignity¹², poor health significantly diminishes the capacity for enjoyment of the rights to life and human dignity¹³. The authors Carstens & Pearmain further avers that “In the language of health care, dignity usually equates to quality of life. In a situation in which a person no longer has quality of life, his or her dignity is usually significantly impaired. Dignity is thus a prerequisite of health in the sense contemplated by the constitution of the WHO”¹⁴.

A lack of adequate living space for prisoners was considered by the UN Human Rights Committee as not only contribution to a violation of the right to dignity and humane treatment, but also to conditions that breach the rights to life and health¹⁵. Apropos human dignity in the context of prison conditions and the quality of life thereby, the Constitutional Court judgement by Nkabinde J, in *Lee v Minister of Correctional Services and Others*, said “*that there is a duty on Correctional Services authorities to provide adequate health care services, as part of the constitutional*

right of all prisoners to “conditions of detention that are consistent with human dignity”, is beyond dispute. It is not in dispute that in relation to Pollsmoor the responsible authorities were aware that there was an appreciable risk of infection and contagion of TB in crowded living circumstances. Being aware of that risk they had a duty to take reasonable measures to reduce the risk of contagion”¹⁶. Nkabinde J went further to affirm sentiments expressed in the Supreme Court of Appeal judgement, on the same matter, that “prisoners are amongst the most vulnerable in our society to the failure of the state to meet its obligations and statutory obligations”, and that “a civilized and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation . . . inherent in the right . . . to ‘conditions of detention that are consistent with human dignity’¹⁷. Human dignity is, therefore, both a constitutional value and a right¹⁸; and it is inextricably intertwined with the right to life.

3.2.3 Section 11: Life

Everyone has the right to life¹⁹. The other aspects of the right to health are meaningless without life itself²⁰, it is the most fundamental of all human rights²¹. The Constitutional Court judgement by O’Regan J in *S v Makwanyane 1995* averred that “The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. The concept of human life is at the center of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society”.

Apropos life and dignity the judge further averred that “right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity”²³. The poor conditions of prison are not only deleterious to the

right to health, but also to the right to life and human dignity. The state by taking away the autonomy of an individual through imprisonment has a legal duty to, at state expense, provide with adequate accommodation, nutrition, and medical treatment. The state has an obligation to safeguard the inmate's rights to life, human dignity and, by extension, their right of access to health care.

3.2.4 Section 12: Freedom and security of the person

Section 12 (2) states that “Everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”²⁴ In the context of health care, the right to bodily and psychological integrity implies a right to informed consent²⁵. It entails a right of a person to be left alone in the sense of being left unmolested by others²⁶ and that anything that happen to that person will do so with his/hers un-coerced permission. In prison settings the right to security in the person over his/her body found expression in *Minister of Safety and Security v Xaba*²⁷ where the court found that the Criminal Procedure Act did not authorize police official to use violence to obtain the surgical removal of a bullet from the leg of a criminal suspect for purposes of evidence²⁸. Section 12 (2) (c) protects the persons, especially prisoners as a vulnerable group, from being subjected to medical or scientific experiments without their informed consent.

3.2.5 Section 24: Environment

The right of a person to an environment that is not harmful to their health or well-being²⁹ is enshrined in section 24 (a). South African prisons are desperately overcrowded and that the most basic constitutional rights of prisoners are often not protected adequately³⁰. This section of the Constitution was promulgated, in the context of prison environment, to safeguard that the conditions are not harmful to the health and well-being of the inmates. As already stated in 3.2.3 above, the poor conditions of prison are not only deleterious to the right to health, but also to the right to life and human dignity. The state by taking away the autonomy of an individual through imprisonment has a legal duty to, at state expense, provide with adequate accommodation, nutrition, and medical treatment.

3.2.6 Section 27: Health care, food, water and social security.

Section 27 of the Constitution says: (1) “Everyone has the right to have access to -
(a) health care services, including reproductive health care;
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
(3) No one may be refused emergency medical treatment”³¹.

It is to be noted that s27(1) (a) and s27(3) specifically relate to the right have access to health care services and not to be refused emergency medical treatment respectively. A right not to be refused emergency medical treatment is a fundamental element of a right to health because it relates to the protection of life itself without which a right to health cannot be appreciated or enjoyed³². Because the right to health or to have access to health is a universal one, this also applies to the prisoners.

3.2.7 Section 35: Arrested, detained and accused persons

This section specifically deals with the rights of those arrested individuals. In the context of health, section 35 (2) (e) avers that everyone detained has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment³³, and section 35 (2) (f) (iv) states that a detained person has a right to communicate with, and be visited by, that person's chosen medical practitioner³⁴. The differences in the terminology used between sections 27 (1) and 35 (2), with the former speaking of “health care services” whilst the latter refers to “medical treatment”, has been pointed out by Carstens & Pearmain³⁵. Further discussion on this will be ventilated in Chapter 6 when dealing with the case of *Van Biljon v Minister of Correctional Services*.

3.3 Conclusion

In an effort to try to answer the first research question: Does the Constitution sufficiently safeguard and promote the right to health care for prisoners?

It is respectfully submitted that, in view of the foregoing section and the views articulated therein, the Constitution does attempt to safeguard and promote the right to health care for prisoners. Viewed in concert, “the right to life; the right to dignity;

the right to bodily and psychological integrity; the right to an environment that is not harmful to health or well-being; the right to emergency medical treatment, the right of access to health care services; and the rights to sufficient food and water and social security”, these rights can be understood to constitute the right to have access to health care or health care services for individuals who are incarcerated in South African prisons. They serve as guarantees, with respect to health care, aimed at safeguarding the rights of those individuals detained by the State³⁶.

The South African prisons are, however, desperately overcrowded and the most basic constitutional rights, health care included, of prisoners are often not adequately protected³⁷. This gap between the guarantees set out in the Constitution together with the Correctional Services Act and the actual conditions in prisons is a situation that poses a threat to the fulfillment of these legislative obligations³⁸. The following Chapter deals with the Correctional Services Act (111 of 1998) that was promulgated in 2004 in creating a rights based legislative framework for South African’s prison system³⁹ and thus specifically deal with the prisoner’s right to health care.

Footnotes

1. Pieterse, M (2014): ‘Can Rights Cure? The impact of human rights litigation on South Africa’s health system; p16.
2. Ibid, p17
3. Carstens, P & Pearmain, D (2007) ‘Foundational principles of South African medical law’. LexisNexis. p 24-25.
4. Pieterse, M (2014) supra, p17
5. Carstens, P & Pearmain, D (2007) supra, p25.
6. Dhali, A & McQuoid-Mason, D (2011) ‘Bioethics, Human Rights and Health Law: Principles and Practice’ Juta. p37.
7. Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990
8. The Constitution of the Republic of South Africa Act, No. 108 of 1996. Section 9
9. See also Pieterse, M (2014) supra, p18
10. Section 10 of the Constitution of the Republic of South Africa.
11. Carstens, P & Pearmain, D (2007) supra, p29.
12. Ibid, p29

13. Ibid, p29
14. Ibid, p29
15. Lines R: The right to health of prisoners in international human rights law. *International Journal of Prisoner Health*, March 2008; 4(1): 3-53, p
16. *Lee v Minister for Correctional Services and others 2012 ZACC 30*, para 59.
17. Ibid, para 65
18. Carstens, P & Pearmain, D (2007) *supra*, p29.
19. Section 11 of the Constitution of the Republic of South Africa.
20. Carstens, P & Pearmain, D (2007) *supra*, p25.
21. Ibid, p25
22. *S v Makwanyane 1995 (3) SA 391 (CC)*, para 326
23. Ibid, p327
24. Section 12 (2) of the Constitution of the Republic of South Africa.
25. Carstens, P & Pearmain, D (2007) *supra*, p29
26. Currie, I & De Waal, J (5ed, 2005) 'The Bill of Rights handbook' Juta, p 287
27. *Minister of Safety and Security v Xaba 2004 (1) SACR 149 (D)*. See also *Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C)*. Further in-depth discussion will follow in Chapter 6 that deals with case law.
28. Currie, I & De Waal, J (5ed, 2005), *supra*, p 287
29. Section 24 (a) of the Constitution of the Republic of South Africa.
30. De Vos, P: 'Prisoners' rights litigation in South Africa since 1994: A critical evaluation' in *Law, Democracy and Development*, Vol 9 Issue 1 (2005), p89
31. Section 27 of the Constitution of the Republic of South Africa.
32. Carstens, P & Pearmain, D (2007) *supra*, p34
33. Section 35 (2) of the Constitution of the Republic of South Africa.
34. Ibid.
35. Carstens, P & Pearmain, D (2007) *supra*, p109
36. De Vos, P (*supra*), p89
37. Ibid
38. Ibid
39. Muntingh, LM (2006) [Revised 2010], *A Guide to the rights of inmates as described in the Correctional Services Act and Regulations*, p12

Chapter 4

The Correctional Services Act No. 111 of 1998 and health care rights of prisoners

4.1 Introduction and background

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled¹. The prison system must therefore have an underlying philosophical framework derived from the Constitution. The Constitution makes it clear that the primary responsibility of respecting, protecting, promoting and fulfilling all of the rights in the Bill of Rights, under section 7(2) of the Constitution, rests on the legislature and the executive². Section 27 (2) of the Constitution enjoins the state to ‘take legislative and other measures, within its available resources, to achieve progressive realization’ of the right to have access to healthcare services³. It is against this background that the Correctional Services Act (111 of 1998) was promulgated in 2004 in creating a rights based framework for South African’s prison system. The Department of Correctional Services must provide, within its available resources, adequate healthcare services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life⁴.

Section 35 (2) (e) provides that everyone detained has a right to conditions of detention that are consistent with human dignity⁴. Section 2 (b) of the Correctional Services Act (111 of 1998) states, “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”⁵, thus buttressing the right as per the Constitution. The Correctional Services Act makes provision for access to health care and the delivery of health care services to inmates and these are encompassed in several sections of the Act. To be found below is a discussion on these sections. I have grouped them, for convenience, into

three categories namely (i) Access to health care services (Sections 6 and 12 including regulations), (ii) Medical parole (Section 79 and regulations 29 (A)), and (iii) Social determinants of health (Sections 7, 8, 9, 11 and the relevant regulations).

4.2 Access to health care services

4.2.1 Section 6: Admission

Section 6 (5) of the Act together with Regulation 2 (promulgated in Government Gazette no. 35032 dated 27 February 2012 under Section 134 of the Correctional Services Act⁶) stipulates the conditions under which inmates can be admitted on arrival in prison. The inmate must bath and shower as soon as he or she is admitted⁷; the inmate must undergo a health status examination, which must include testing for contagious and communicable diseases⁸. It has to be determined and appropriately recorded if the admitted inmate has sustained any injuries, whether he or she is on any medication (acute, chronic, or both); and whether she is pregnant if female⁹. The purpose is to ensure that, if the inmate is sick or on any medication, it is duly ordered and made available to the prison authorities. On the other hand, it ensures that those inmates already incarcerated are protected from acquiring any contagious disease that can be brought by the incoming new inmate because he or she will be isolated. Screening of these diseases on admission is not fool proof, however, especially in diseases like TB. This was alluded to in the case in *Lee v Minister for Correctional Services and Others*, where the court found that the TB screening measures employed at Pollsmoor Prison were superficial thus not effective¹⁰.

4.2.2 Section 12: Health care

4.2.2.1 Health care right of all inmates in general

Rule 24 (1) in the Mandela Rules states that “Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status”¹¹; and Section 27 of the Constitution says: (1) (a) “Everyone has the right to have access to health care services”. This right is supported by section 12 of the Correctional Services Act¹² where it avers that: (1) The Department must provide, within its available resources, adequate health

care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life.

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

(b) Medical treatment must be provided by a correctional medical practitioner, medical practitioners or by a specialist or health care institution or person or institution identified by such correctional medical practitioner except where the medical treatment is provided by a medical practitioner in terms of subsection 3. Subsection 3 endorses freedom of choice where the inmate may be visited and treated by a medical practitioner of his or her choice at the inmate's expense.

The right to bodily and psychological integrity, which includes the right to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent¹³ finds expression in the subsection 4 (b) and (c) that reads: (b) No inmate may be compelled to undergo medical intervention or treatment without informed consent unless failure to submit to such medical intervention or treatment will pose a threat to the health of other persons;¹⁴ and no surgery may be performed on an inmate without his or her informed consent, or, in the case of a minor, without the written consent of his or her legal guardian¹⁵. Further protection, because inmates are regarded as vulnerable group together with the disabled and the elderly, is provided in Regulation 7 (7) where it stipulates that 'an inmate may not, even with his or her consent, be subjected to any medical, scientific experimentation or research¹⁶; and that an inmate may not participate in clinical trials, except with the National Commissioner's approval given on application made by the inmate¹⁷. Any request from the inmate to donate or receive an organ or tissue by donation¹⁸; and any request from the inmate to receive any form of artificial fertilization¹⁹ in accordance with the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983) must be approved by the National Commissioner. An inmate, however, may not receive any form of artificial fertilization²⁰, in this case invoking section 36 of the Constitution²¹.

The regulations go further to ensure access to health by covering inmates even when they have been released on parole provided that they sustained injuries while in prison. Regulation 7(12) (a) and (b) states that: After release or placement under community corrections an injured inmate is entitled to medical treatment at

departmental expense for an injury sustained in Correctional Centre until the injury is healed²²; and that such a person may be required to report to a Correctional Centre for further treatment after release or placement under community corrections²³.

4.2.2.2 Special categories of inmates

4.2.2.2. (a) Pregnant inmates

Special categories of inmates are catered for in the Correctional Services Act under sections 49 A-D. It is my respectful view that they either belong in section 12 of the Act or should be harmonized with regulation 7. According to s49A read together with Regulation 26D, that deals with pregnant inmates, every remand detainee who on admission claims to be pregnant, must immediately be referred to a registered medical practitioner for a full medical examination in order to confirm such pregnancy²⁴ and be afforded access to pre-, intra and postnatal services²⁵. It is incumbent on the National Commissioner to, within the Department's available resources, ensure that a unit is available for the accommodation of pregnant remand detainees²⁶. It must also be ensured that every pregnant remand detainee must be provided with an adequate diet with accordance to their nutritional needs as prescribed in the Department of Health's Maternal Health Guidelines as well as the Departmental ration scales and Therapeutic Diet Manual, taking into consideration religious or cultural beliefs²⁷. It is also required that if the medical practitioner or registered midwife prescribes any form of medication or treatment additional to what is normally recommended, the Head of the Remand Detention Facility or Correctional Centre or an official authorized by him or her, as the case may be, must arrange to provide such²⁸. The aforesaid official must inform the investigating officer and prosecutor of the pregnancy of a remand detainee²⁹; and must also inform the next of kin of the pregnancy of the detainee, if so requested by the pregnant remand inmate³⁰. Furthermore, the pregnant remanded inmate may request additional visits with the alleged biological father, next of kin or other supportive persons over and above the normal visits allowed³¹.

4.2.2.2 (b) Disabled inmates

Section 49B deals with disabled remand inmates and makes provision for the following: (1) If the National Commissioner considers it necessary, having regard to

remand detainees' disability, the National Commissioner may detain disabled remand detainees separately in single or communal cells, depending on the availability of accommodation specifically designed for persons with disabilities. (2) The Department must provide, within its available resources, additional health care services, based on the principles of primary health care, in order to allow the remand detainee to lead a healthy life. (3) The Department must provide, within its available resources, additional psychological services, if recommended by a medical practitioner.

4.2.2.2 (c) Aged inmates

Section 49C, apropos remand aged detainees says that — (1) The National Commissioner may detain remand detainees over the age of 65 years in single or communal cells, depending on the availability of accommodation. (2) A registered medical practitioner may order a variation in the prescribed diet for an aged remand inmate and the intervals at which the food is served, when such a variation is required for medical reasons and is within the available resources of the Department.

4.2.2.2 (d) Mentally ill inmates

The National Commissioner may detain a person suspected to be mentally ill, in terms of section 77 (1) of the Criminal Procedure Act or a person showing signs of mental health care problems, in a single cell or correctional health facility for purposes of observation by a medical practitioner³²; the Department must provide, within its available resources, adequate health care services for the prescribed care and treatment of the mentally ill remand detainee³³; and furthermore, the Department must, within its available resources, provide social and psychological services in order to support mentally ill remand detainees and promote their mental health³⁴.

4.3 Medical Parole

4.3.1 Section 79 and Regulation 29A

The Correctional Services Act makes express provision for medical parole to be afforded to sentenced prisoners who reach the eligibility threshold. Section 79 of the Act, read together with Regulation 29A, extensively covers medical parole with respect to the procedure needed to be followed and the conditions under which the

inmates may find relief in this process. The National Commissioner, the Correctional Supervision and Parole Board or the Minister may consider any sentenced inmate for placement on medical parole if - (1)(a) such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care; (b) the risk of re-offending is low; and (c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released³⁵.

4.3.2 Medical conditions that require medical parole

The medical conditions suffered by offenders that are considered worthy of consideration, by the Medical Parole Advisory Board, are listed in Regulation 29A (5) (a) and (b)³⁶ includes both infectious and non-infectious diseases. Some of the conditions included in the list are Stage IV of Acquired immune deficiency syndrome despite good compliance and optimal treatment with antiretroviral therapy (see *Mazibuko v Minister of Correctional Services* together with *Du Plooy v Minister of Services* discussed in Chapter 6 below); MDR or XDR tuberculosis despite optimal treatment; malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure (see *Derby-Lewis v Minister of Correctional Services* in Chapter 6 below, Diabetes mellitus with end-organ failure, and cardiac disease with multi organ failure as examples. The conditions that may be considered are not limited to the list but, the Medical Parole Advisory Board (the Board) may consider any other condition not listed in sub-regulation (5)(a) and (b) if it complies with the principles contained in Section 79 of the Act³⁷.

With respect to 'low risk of re-offending' criterion, it is not certain whether it is possible to establish, with reasonable certainty, whether an offender poses a low risk or not³⁸. The propensity to re-offend by a person released on medical parole was expressed in *Stanfield v Minister of Correctional Services*, where the court said "There is no indication of what a "short", as opposed to a "not so short", life expectancy may be. Nor can it be determined when a prisoner is so ill that it would be physically impossible for him to commit a crime. I should imagine that the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly when he knows that he has only

a few months to live”³⁹. The Board is able to rely on section 79 (5)⁴⁰ which contains factors that need to be considered when determining whether an inmate has a higher or lower risk of re-offending⁴¹.

4.3.3 Who can apply or initiate the medical parole process and what is the procedure?

4.3.3.1 Who initiates the application process?

Whereas before only the Department of Correctional Services (DCS) medical personnel could initiate the process of applying for medical parole, s79 (2) (a) of the Act has expanded the scope of people who can lodge an application to include, not only medical personnel, but also the sentenced offender or a person acting on his or her behalf⁴². The purpose of this expansion is to make medical parole more accessible to those who may genuinely benefit from it because prior to the introduction of the new section 79, the proportion of inmates who had been released on medical grounds over the years had been extremely low compared to the number of inmates who had died of natural causes in prison⁴³.

4.3.3.2 What is the procedure followed?

The procedure entails the following: The application is initiated by filling in an appropriate application form and direct it to the Head of a Correctional Centre. Upon receipt of the application, the Head of the center then refer the application to the correctional medical practitioner who must make an evaluation of the application in accordance with the provisions of Section 79 of the Act and make a recommendation in this regard⁴⁴. Section 79 (2) (c) stipulates that: ‘The written medical report, accompanying the application, must include, amongst others, the provision of—

- (i) a complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced offender suffers;
- (ii) a statement by the medical practitioner indicating whether the offender is so physically incapacitated as to limit daily activity or inmate self-care; and
- (iii) reasons as to why the placement on medical parole should be considered⁴⁵.

The recommendation must be submitted to the Medical Parole Advisory Board who must make a recommendation to the National Commissioner, Supervision and Parole Board or Minister, as the case may be⁴⁶. Finally, the Medical Parole Advisory Board must make a recommendation to the National Commissioner, the Correctional

Supervision and Parole Board or the Minister, as the case may be, on the appropriateness to grant medical parole in accordance with Section 79(1)(a) of the Act; and if the recommendation of the Medical Advisory Board is positive, then the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, must consider whether the conditions stipulated in Section 79(1)(b) and (c) are present⁴⁷.

4.3.4 Awaiting trial inmates who are severely ill and incapacitated

The Regulations, particularly Regulation 26G, also cover awaiting trial (remand) offenders who are terminally ill or severely incapacitated. The medical practitioner must establish whether the remand detainee is suffering from any condition contemplated in Regulation 29A (5)⁴⁸ and compile a written report directed to the court. The report, by the medical practitioner, must amongst other things, include the following factors: '(a) a complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced offender suffers; (b) a statement by the medical practitioner indicating whether the remand detainee is so physically incapacitated as to severely limit daily activity or self-care; (c) the care and treatment required by the remand detainee; (d) whether the particular Remand Detention Facility is able to provide adequate care for the detainee; and (e) if the facility is unable to provide adequate care, reasons as to why the release of the remand detainee should be considered'⁴⁹. Before referring the awaiting trial offender to court, the Head of the facility must first determine if there is no other detention facility that can be able to accommodate and provide adequate care for the offender⁵⁰, and serve the court where the remand detainee is due to appear⁵¹. A sworn letter or statement of affirmation by the Head of the Remand Detention Facility must accompany the written medical report issued by the medical practitioner and any report of the Medical Parole Advisory Board⁵². It is to be noted that the Head of the Remand Detention Facility is at liberty to refer to the Medical Parole Advisory Board established in terms of Section 79(3)(a) of the Correctional Services Act, to provide an independent medical report in order to assist the Head to form an opinion⁵³.

In the light of the foregoing account, it is to be borne in mind that, the provisions of the Act and its accompanying regulations apropos medical parole, is to afford the

terminally ill and severely incapacitated inmates an avenue in which they can be released from prison in line with their inherent right to human dignity. In *Stanfield v Minister of Correctional Services*, the court held that “To insist that an inmate remain incarcerated until he/she has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity”⁵⁴. It would be inhumane to continue holding an inmate in a penal institution when he or she is severely ill, and incapacitated such that he/she cannot independently perform activities of daily living; this would undermine his right to human dignity as enshrined in the Constitution and furthermore negate the purpose of the very Correctional Services Act as articulated in section 2. Section 2 (b) of the Correctional Services Act (111 of 1998) states, “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”.

4.4 Social determinants of health

Human health is determined not only by contact with the microbes and toxins that directly cause illness or by organ system failures, but also by other biological and social factors⁵⁵. The underlying determinants of health include environment and infrastructure, also dietary and sanitary practices⁵⁶. The conditions under which the offenders - are accommodated (in terms of space and hygiene), the nutrition provided to them, and whether they are afforded time and space to exercise – are essential in their general health and well-being. The Correctional Services Act makes provision for conditions of accommodation (s7), hygiene (s9), nutrition (s8) and exercise (s11) and they are briefly discussed below.

4.4.1 Section 7: Accommodation (read together with Regulation 3)

Overcrowding in prison worsens the health conditions for prisoners and thus violate their fundamental human rights to life and human dignity. Furthermore, a lack of adequate living space for prisoners is considered as not only contributing to a violation of the right to dignity and humane treatment, but also to conditions that breach the rights to life and health. Section 7(1) of the Act states “Inmates must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health

conditions. These requirements must be adequate for detention under conditions of human dignity⁵⁷. Regulation 3 stipulates that “In every Correctional Centre provision must be made for general sleeping and in-patient hospital accommodation, consisting of single or communal cells or both⁵⁸. Furthermore, all cell accommodation must have sufficient floor and cubic capacity space to enable the inmate to move freely and sleep comfortably within the confines of the cell⁵⁹; and must be ventilated in accordance with the National Building Regulations SABS 0400 of 1990 issued in terms of Section 16 of the Standards Act, 1993 (Act No. 29 of 1993)⁶⁰. Adequate space and ventilation are imperative in preventing the spread of TB. TB is an airborne communicable disease which spreads easily especially in confined, poorly ventilated and overcrowded environments⁶¹ like prisons. Overcrowding and poor ventilation contribute to vast numbers of prisoners contracting TB as such has become a major problem in prisons⁶².

4.4.2 Section 9: Hygiene (read together with Regulation 3)

The DCS must provide the means for inmates to be able to keep his or her person, clothing, bedding and cell clean and tidy⁶³. Every inmate must be provided with a separate bed and with bedding which provides adequate warmth for the climatic conditions and which complies with hygienic requirements as prescribed by the Order⁶⁴. With respect to facilities in the hospital section of the prison, provision must be made for a standard range of hospital beds, bedding and clothing that specifically suit the needs for effective patient care⁶⁵.

Sanitation is also a major key factor in preventing diseases like dysentery that may be spread via the oral-fecal root. As such provision is made to have facilities that are consistent with human dignity in penal settings. Regulation 3 (2) (d) (i-iii) behooves the DCS to have, in all its centers, accessible ablution facilities that must be available to all inmates at all times; access to hot and cold water for washing Purposes; and in sections where there is communal sleeping, accommodation ablution facilities must be partitioned off.

4.4.3 Section 8: Nutrition (read together with Regulation 4)

Good nutrition is essential for health and that imperative has been catered for in section 9 of the Act read together with Regulation 4. Each inmate must be provided

with an adequate diet to promote good health, as prescribed in the regulations⁶⁶. The regulations prescribe a diet consisting of a minimum protein and energy amounts⁶⁷ deemed adequate for male, female and children categories; and the diet must provide for a balanced distribution of food items that include grain; fruits and vegetables; dairy; meat and protein; and fats, oils and sugar⁶⁸.

4.4.4 Section 11: Exercise (read together with Regulation 6)

According to section 11 of the Act, “Every inmate must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily. If the weather permits, this exercise must take place in the open air”⁶⁹. Prisoners who desire to enter into an exercise program - but are either injured, pregnant, on acute or chronic medication – must first be certified by a doctor as to their eligibility to enter into such a program⁷⁰. In respect of each inmate other than an inmate mentioned in sub-regulation (1), a Correctional Medical Practitioner or registered nurse must issue a certificate stating whether or not the inmate is fit for exercise⁷¹; and if a registered nurse in considering whether an inmate is fit for exercise, is of the opinion that the inmate is subject to any condition which should be evaluated by a Correctional Medical Practitioner, the registered nurse must refer the inmate to the Correctional Medical Practitioner for a decision as to whether the inmate concerned is fit for exercise⁷². Recreational activities, as prescribed by the Order must be provided in all Correctional Centers for the benefit of the mental and physical health of inmates⁷³.

4.5 Conclusion

It is submitted that, on paper, the Correctional Services Act 111 of 1998 has - through its provisions accompanied by its regulations - promulgated legislation that seeks to respect, protect, promote and fulfill all of the rights in the Bill of Rights with respect to the right of access to health and health care services for those individuals who find themselves under incarceration in South African prisons. Through its admission policy, the health care services made available, the provisions that allow the possibility of medical parole, and the improvement of conditions that curtail the adverse impact of the social determinants of health; the DCS does attempt to

contribute to maintaining and protecting a just, peaceful and safe society by detaining all inmates in safe custody whilst ensuring their human dignity as averred in Section 2 (b) of the Act. There exists a gulf, however, between the guarantees set out in the Constitution, available legislation and the actual conditions in prisons necessitating the intervention by the courts in the quest to have these guarantees fulfilled. Before we explore the court's role in this regard, it will be prudent to also briefly discuss the National Health Act, as arguably the prime portal health related piece of legislation with respect to access to health care services in South Africa. Principles of privacy, confidentiality, informed consent and medical ethics with respect to prisoners within the ambit of the National Health Act are discussed in the next chapter.

Footnotes

1. The Constitution of the Republic of South Africa Act, No. 108 of 1996, Section 2.
2. Pieterse, M (2014): 'Can Rights Cure? The impact of human rights litigation on South Africa's health system, p36
3. Ibid, p36
4. Correctional Services Act 111 of 1998, s12 (1)
5. The Constitution of the Republic of South Africa Act, No. 108 of 1996, s35.
6. Correctional Services Act, s 2
7. Correctional Services Act, 1998 as amended; Promulgation of Correctional Services Regulations with Amendments Incorporated 1 March 2012 as promulgated in Government Gazette no. 35032 dated 27 February 2012 (henceforth referred to as Regulations)
8. Correctional Services Act s6(5), Regulations 2 (2) and (3)(a)
9. Ibid
10. Ibid, Regulation 2 (3) (b)
11. *Lee v Minister for Correctional Services and others 2012 ZACC*, para 62.
12. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Rule 24 (1)
13. Correctional Services Act, s 12 (1) and (2).
14. The Constitution of the Republic of South Africa, s12 (2) (b) and (c)
15. Correctional Services Act, s 12 (4) (b)
16. Ibid, s12 (4) (c)

17. Regulation 7(7) (a)
18. Ibid, 7(7) (b)
19. Ibid, 7(8)(a)
20. Ibid, 7(8)(b)
21. Ibid, 7(8)(b)
22. The Constitution of the Republic of South Africa, s36 Limitation of rights. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
23. Regulation 7(12) (a)
24. Ibid, 7(12) (b)
25. Correctional Services Act, s49A (1)
26. Regulation 26D (1)
27. Correctional Services Act, s49A (2)
28. Regulation 26D (6)
29. Ibid, 26D (2)
30. Ibid, 26D (3)
31. Ibid, 26D (4)
32. Ibid, 26D (5)
33. Correctional Services Act, s49D (1)
34. Ibid, s49D (2)
35. Ibid, s49D (3)
36. Ibid, s79 (1)
37. Regulation 29A (5)
38. Ibid, 29A (6).
39. Albertus C (2012): Does the new medical parole system give effect to inmates' right to dignity and the public's right to safety. CSPRI newsletter, Issue No. 41, June 2012, p
40. Stanfield v Minister of Correctional Services 2003 (4) ALL SA 282 (C) at para 110.
41. Correctional Services Act, s79 (5) that says: When making a determination as contemplated in subsection (1) (b), the following factors, amongst others, may be considered:
 - (a) Whether, at the time of sentencing, the presiding officer was aware of the medical condition for which medical parole is sought in terms of this section;

- (b) any sentencing remarks of the trial judge or magistrate;
 - (c) the type of offence and the length of the sentence outstanding;
 - (d) the previous criminal record of such offender; or
 - (e) any of the factors listed in section 42 (2) (d).
42. Albertus, supra
 43. Correctional Services Act, s79 (2) (a)
 44. Albertus, supra
 45. Regulation 29A (3)
 46. Ibid, 29A (4)
 47. Correctional Services Act, s79 (2) (c)
 48. Regulation 29A (7)
 49. Ibid, 26G (1)
 50. Ibid, 26G (2)
 51. Ibid, 26G (4) (a)
 52. Ibid, 26G (4) (b)
 53. Ibid, 26G (5)
 54. Ibid, 26G (3)
 55. Stanfield supra at para 124; see also Albertus, supra
 56. WHO Western Pacific Region – WHO (2007): Chapter 2: Social Determinants of Health, p7
 57. Ibid, p7
 58. Correctional Services Act, s7(1)
 59. Regulation 3 (1)
 60. Ibid, 3 (2) (a)
 61. Ibid, 3 (2) (b)
 62. Lee v Minister for Correctional Services, supra para 8
 63. Guidelines for prevention and treatment of HIV in arrested, detained and sentenced persons. The Southern African Journal of HIV medicine, Issue No. 30, Autumn 2008, p21-33
 64. Correctional Services Act, s9
 65. Regulation 3 (2) (e) (i)
 66. Ibid, 3 (2) (e) (ii)
 67. Correctional Services Act, s8
 68. Regulation 4 (1)

69. Ibid, 4 (2)

70. Correctional Services Act, s11

71. Regulation 6 (1)

72. Ibid, 6 (2)

73. Ibid, 6 (3)

74. Ibid, 11

Chapter 5

National Health Act No. 61 of 2003 and relevance to prison health

5.1 Introduction and background

The National Health Act 61 of 2003 (NHA) is arguably the most important Act passed by Parliament to give effect to the right of everyone to have access to health care services¹. The NHA aligns the manner in which healthcare policy is to be formulated and treatment provided with the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution")². The NHA sets the foundation of the health care system and works in combination with other pieces of legislation which relate to other areas of the health care system like, The Choice of Termination of Pregnancy Act 92 of 1996; The Health Professions Act 56 of 1974, The Medicines and Related Substances Act 101 of 1965; The Medical Schemes Act 131 of 1998 and The Nursing Act 33 of 2005³. It is to be noted that the Correctional Services Act (CSA) is stand-alone legislative piece falling under a separate ministry (Justice and Correctional Services). However, the provisions that relate to health care and the determinants of health, as discussed in the previous chapter, are aligned with the provisions of NHA. In other words, inmates who are in prison are to be treated in line with the provisions of the NHA when requiring health care services. The Department of Correctional Services (DCS) does not have its own separate laws that govern health care, but have to be in line with what the NHA and the Constitution dictates. In terms of the Right to Healthcare and Medical Treatment, the DCS complies with all Department of Health (DOH) policies and practices⁴. As such, the right to adequate medical treatment generally means that a detainee or inmate with HIV or TB must have access to the same kind of care and treatment available in the community⁵. The guidelines in the management of HIV, TB, non-communicable diseases are the same as those in the general public.

In this chapter, the author will not repeat what has been already mentioned in the previous chapter with respect to access to health care services for those who are

held in penal institutions, but discuss other sections of the NHA that have not yet been traversed but are also relevant, not only to the general public but, to prisoners as well. The sections discussed also involve the subject of medical ethics that practitioners are governed by. These sections (of NHA) include; section 6 (User to have full knowledge), section 7 (Consent of the user), section 8 (Participation in decisions), section 11 (Health services for experimental or research purposes) and section 14 (Confidentiality).

5.2 The National Health Act

5.2.1 Section 6: User to have full knowledge

Section 6 provides for the user, inmate in the case of prison, to be fully informed by the health provider about his or her health status; about the range of diagnostic procedures and treatment options generally available to him or she; about the benefits, risks, costs and consequences generally associated with each option; and about his or her right to refuse health services and explain the implications, risks, obligations of such refusal⁶. The health care provider is also enjoined to inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.

The discretion is left to the health provider to fully disclose the health status to the user in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user⁷. Factors to be considered in deciding what to disclose include emotional stability, intelligence and the age of the inmate.

HIV/AIDS is very prevalent in prison and disclosure is central to its successful management. HIV testing requires pre-testing and post-testing counselling, this is a requirement outlined in the South African HIV counselling and testing (HCT) Policy guidelines⁸. The DCS has also fallen in line with the guidelines and accordingly conduct pre- and post-test counselling by a health care counsellor and obtaining the prisoner's informed consent prior to the administering of the HIV test. In the headnote section of the judgment in *C v Minister of Correctional Services*, the process of pre and post counselling are explained in this manner; 'Pretest counselling entailed informing the prisoner of the meaning of HIV infection; the

manner of transmission of the disease; the nature of the test and that consent was required; the social, psychological and legal implications of the test; what was expected if the result of the test proved positive; and the prisoner had to be granted time to consider the information before consenting to the test being administered. In the event of a positive blood test post-test counselling required that psychologists, social workers and nursing staff be at hand to support the prisoner and to provide advice so that the result could be accepted⁹. This in line with section 6 of NHA, the prisoner is entitled to full disclosure prior to testing and post-testing for HIV. The disclosure must be give the patient (inmate) a general idea in broad terms and in a layperson's language; of the nature, scope, consequences, risks, dangers, complications, benefits and disadvantages and prognosis of, the alternatives to the proposed intervention, as well as the patient's right to refuse treatment¹⁰.

5.2. 2 Section 7: Consent of the user

Section 7 of the Act states that:

- (1) Subject to section 8, a health service may not be provided to a user (inmate) without the user's informed consent unless-
- (a) the user is unable to give informed consent and such consent is given by a person-
 - (i) mandated by the user in writing to grant consent on his or her behalf; or
 - (ii) authorized to give such consent in terms of any law or court order;
 - (b) the user is unable to give informed consent and no person is mandated or authorized to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;
 - (c) the provision of a health service without informed consent is authorized in terms of any law or a court order;
 - (d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or
 - (e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service.

Section 7 (1) (c) and (d) are particularly germane in prison settings where an inmate presents with Multiple Drug Resistant TB (MDX-TB) and may have to be isolated and be treated. In this case, he or she will have to be compelled to submit to these measures even if he or she does not wish to take treatment because it will be in the best interest of the public.

The Act further behooves the health provider to take all reasonable steps to obtain the user's informed consent¹¹. With respect to NHA, 'informed consent' means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section 6¹². For the consent to be informed, the health service provider must have fully disclosed and the patient must have fully understood the specified service proposed, the benefits and material risks involved, the alternative and how they would fare without treatment. In *Stoffberg v Elliot*, the court said that "any operation performed without his consent is an unlawful infringement of his right to personal security entitling him to compensation for such damage as he has suffered"¹³.

5.2.3 Section 8: Participation in decisions

Section 8 (1) states that "A user has the right to participate in any decision affecting his or her personal health and treatment", thus invoking the principle of patient autonomy. The concept of patient autonomy in South African medical law has been judicially recognized as long ago as 1923 in the case of *Stoffberg v Elliott*¹⁴. The judge, in this instance, put the right to autonomy and security of the person in the centre¹⁵.

Section 8 further states that: (2) (a) If the informed consent required by section 7 is given by a person other than the user, such person must, if possible, consult the user before giving the required consent. (b) A user who is capable of understanding must be informed as contemplated in section 6 even if he or she lacks the legal capacity to give the informed consent required by section 7. (3) If a user is unable to participate in a decision affecting his or her personal health and treatment, he or she must be informed as contemplated in section 6 after the provision of the health service in question unless the disclosure of such information would be contrary to the user's best interest. This is echoed in the Correctional Services Act s 12 (4) (b) and (c)¹⁶.

5.2. 4 Section 11: Health services for experimental or research purposes

With respect to prisoners, section 11 is supplanted by provisions in the regulations of the NHA. Regulation 4.3 stipulates that:

Research with prisoners is appropriate when -

- (a) the risk of harm posed by the research is commensurate with risks that would be accepted by non-prisoner volunteers;
- (b) the rights of prisoners, including but not limited to the rights to dignity, privacy, bodily integrity and equality, will be protected; and
- (c) the procedures and guidelines issued by the Department of Correctional Services will be followed.

The DCS procedures and guidelines are found in the Regulation 7 (7) of the Correctional Services Act¹⁷.

5.2.5 Section 14: Confidentiality

Section 14 (1) states that “All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential”. This is in line with prison policy on HIV that states that - Prisoners have the right to confidentiality about their HIV status and that they may not be forced to disclose their HIV status¹⁸. Inmates have the right to expect that their medical information will be protected against unnecessary disclosure and against gossip, however, real confidentiality is not possible in a correctional setting¹⁹. As a general principle, standards of care in prisons, including patient confidentiality, should strive to be the same as those in the open community²⁰.

When dealing with prisoners, balancing security and treatment needs poses a daunting ethical problem for the health care providers. Due to security concerns, it is not uncommon that an inmate patient enters the consultation room to see a doctor accompanied by the prison warder who then inadvertently overhears the entire interaction between the the patient and the doctor. It also to be noted that, in almost every health institution that provides for HIV/AIDS management, there is a designated clinic for that and this makes it difficult for HIV patients to keep their illness confidential. Attending the HIV/AIDS clinic in plain view of the general

population precludes denial of HIV/AIDS, because everyone sees everyone goes all the time²¹. Notwithstanding these challenges, the primary task of the prison doctor and the other health care workers is the health and well-being of the inmates²². This is fundamental to any health care professional working in prison. It is the essence of medical ethics.

5.3 Medical ethics governing health care professionals in prison settings

5.3.1 Core ethical values and standards required of health care practitioners

Booklet 1 of the Health Professions Council of South Africa (HPCSA)²³, in section 2.3, stipulates the core ethical values and standards required of health care practitioners and these include the following:

2.3.1 Respect for persons: Health care practitioners should respect patients as persons, and acknowledge their intrinsic worth, dignity, and sense of value.

2.3.2 Best interests or well-being: Non-maleficence: Health care practitioners should not harm or act against the best interests of patients, even when the interests of the latter conflict with their own self-interest.

2.3.3 Best interest or well-being: Beneficence: Health care practitioners should act in the best interests of patients even when the interests of the latter conflict with their own personal self-interest.

2.3.4 Human rights: Health care practitioners should recognize the human rights of all individuals.

2.3.5 Autonomy: Health care practitioners should honor the right of patients to self-determination or to make their own informed choices, and to live their lives by their own beliefs, values and preferences.

2.3.6 Integrity: Health care practitioners should incorporate these core ethical values and standards as the foundation for their character and practice as responsible health care professionals.

2.3.7 Truthfulness: Health care practitioners should regard the truth and truthfulness as the basis of trust in their professional relationships with patients.

5.3.2 Medical ethics in prison

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)²⁴ has set out 7 essential principles for the practice of prison health care namely: Free access to a doctor for every prisoner; Equivalence of care; Patient consent and confidentiality; Preventive health care; Humanitarian assistance; Professional independence; and Professional competence²⁵. These principles are not a departure from the general core ethical values and standards required of all health care practitioners, they consolidate and highlight aspects that specifically relate to the prison situation. Below, I have only distilled those that stand out without repeating values and standards apply to all health care practitioners irrespective of whether they are working in prison or in the community at large.

5.3.2.1 Free access to a doctor for every prisoner

The CPT recommends that: “While in custody, prisoners should be able to have access to a doctor at any time, irrespective of their detention regime (e.g. solitary confinement); the health care service should be so organized as to enable requests to consult a doctor to be met without undue delay; and that prisoners should be able to approach the health care service on a confidential basis, for example, by means of a message in a sealed envelope and that prison officers should not seek to screen requests to consult a doctor”²⁶.

It is further recommended by the CPT that, in a situation where the inmate has been admitted in the outside public hospital, he or she should not be physically attached to their hospital beds or other items of furniture for custodial reasons and that other means of meeting security needs satisfactorily can and should be found; the creation of a custodial unit in such hospitals is one possible solution²⁷.

5.3.2.2 Equivalence of care

Apropos general medicine the CPT avers that “A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly”²⁸.

Concerning psychiatry patients, it is to be noted that there is a high incidence of psychiatric symptoms among prisoners compared to the general population²⁹ and furthermore that prison in itself is a stressful environment that may trigger psychiatric symptoms (e.g. depression). Consequently, the CPT recommends that a doctor qualified in psychiatry should be attached to the health care service of each prison, and some of the nurses employed there should have had training in this field³⁰. “A mentally disturbed and violent patient should be treated through close supervision and nursing support, combined, if considered appropriate, with sedatives. Resort to instruments of physical restraint shall only very rarely be justified and must always be either expressly ordered by a medical doctor or immediately brought to the attention of such a doctor with a view to seeking his approval. Instruments of physical restraint should be removed at the earliest possible opportunity. They should never be applied, or their application prolonged, as a punishment”³¹.

5.3.2.3 Preventive health care

Suicide is one of the problems that is frequently encountered in prison. The CPT recommends that medical screening on arrival, and the reception process as a whole, should be performed properly to identify those at risk and relieve some of the anxiety experienced by all newly-arrived prisoners³². Prison staff as a whole, medical and officers, should have a high index of suspicion to be able to any indication that may suggest propensity to suicide. Keen attention should be placed on periods immediately before and after trial and, in some cases, the pre-release period, involve an increased risk of suicide³³. A person identified as a suicide risk should, for as long as necessary, be kept under a special observation scheme³⁴.

5.3.2.4 Humanitarian assistance

Special attention should be to certain specific categories of vulnerable inmates³⁵ and these include the following:

- (i) Mother and child: If the mother and child are together in prison, they should be placed in conditions providing them with the equivalent of a creche and the support of staff specialized in post-natal care and nursery nursing³⁶.

- (ii) Adolescents: Because the adolescent stage is a period marked by a certain re-organization of the personality, requiring a special effort to reduce the risks of long-term social maladjustment, the adolescent inmates should be allowed to stay in a fixed place, surrounded by personal objects and in socially favorable groups; furthermore, the regime applied to them should be based on intensive activity, including socio-educational meetings, sport, education, vocational training, escorted outings and the availability of appropriate optional activities³⁷.
- (iii) Inmates with personality disorders: This pertains to those inmates who may be violent, suicidal or characterized by unacceptable sexual behavior, and are for most of the time incapable of controlling or caring for themselves because of a history of family traumas, long-standing drug addiction, conflicts with authority or other social misfortunes³⁸. They need services of psychologists who can put them into socio-therapeutic programs³⁹.
- (iv) Prisoners unsuited for continued detention: Specific reference is made to those inmates that are eligible for medical parole. These inmates can be catered for under section 79 and regulation 29A of the Correctional Services Act as discussed supra in the previous chapter.

5.3.2.5 Professional independence

In order to guarantee their independence in health-care matters, the CPT considers it important that the health care staff should be aligned as closely as possible with the mainstream of health-care provision in the community at large and the clinical decisions should be governed only by medical criteria⁴⁰. In South Africa, all the health care professionals are registered under the HPCSA and are bound by the provisions of the NHA and fall under the DOH but not the DCS. This is to avoid potential ethical dilemmas when their duty to care for their patients (sick prisoners) enter into conflict with considerations of prison management and security⁴¹.

The death of Steve Biko while in custody put the question of professional independence in the center and exposed a gross violation of medical ethics by district surgeons who examined him while in custody. Instead of treating the inmate with the level of skill and care commensurate with their obligations as prescribed by

the code of medical ethics, including to execute their professional duty independently, they instead “breached their duty by not staying independent of any non-medical interference and succumbing to the pressures of the security police”⁴².

According to Pont (supra), “compliance to these afore-discussed essential principles will result in ethical medical conduct that promotes the confidence of the inmates to the medical care in prison; leaves no doubt as to the doctor’s medical professionalism and ethics; prevents misunderstandings; provides guidance in situations of conflicts; supports quality assurance of the medical work; protects against legal appeals; and gives international support”⁴³.

5.4 Conclusion

Although the DCS is governed by a discrete piece of legislation in the form of CSA, it does not have its own separate laws that govern health care, but have to be in line with what the NHA and the Constitution dictates. In terms of the Right to Healthcare and Medical Treatment, the DCS complies with all DOH policies and practices. In South Africa, all the health care professionals are registered under the HPCSA and are bound by the provisions of the NHA and fall under the DOH but not the DCS. As such, health care practitioners are governed by a core ethical values and standards as outlined in the HPCSA guidelines. The CPT has outlined essential principles that, if health care practitioners working in prison were to comply with, will result in ethical medical conduct that promotes the confidence of the inmates to the medical care in prison; leaves no doubt as to the doctor’s medical professionalism and ethics; prevents misunderstandings; provides guidance in situations of conflicts; supports quality assurance of the medical work; protects against legal appeals; and gives international support.

The following chapter will deal with the role of the courts to promote the health care rights of the prisoners in the effort to fulfill the constitutional promise of a life lived with dignity and respect irrespective of their legal situation.

Footnotes

1. Hassim A, (2008), The National Health Act 61 of 2003: A Guide, p xi
2. Kirby N (2005), South Africa: The National Health Act: A Guide for Beginners

3. Hassim A, supra p xi-xii
4. Guidelines for the management of Tuberculosis, Human Immunodeficiency Virus and Sexually Transmitted Infections in Correctional facilities 2013, p47
5. Ibid, p47
6. The National Health Act 61 of 2003, s 6 (1)
7. Ibid, s6 (1) (a)
8. National HIV Counselling and Testing Guidelines -2015, p6
9. *C v Minister of Correctional Services 1996 (4) SA 292 (T)*, head note
10. Carstens, P & Pearmain, D (2007) 'Foundational principles of South African medical law', p 883
11. NHA, s 7 (2)
12. Ibid, s 7 (3)
13. *Stoffberg v Elliott 1923 CPD 148*, head note
14. Carstens, P & Pearmain, supra p87
15. *In Stoffberg v Elliott*, the court averred that - "In the eyes of the law, every person has certain absolute rights which the law protects. They are not dependent upon a statute or upon a contract, but they are rights to be respected, and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another. Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference".
16. Correctional Services Act, s 12 (4) (b) and (c) that reads: (b) No inmate may be compelled to undergo medical intervention or treatment without informed consent unless failure to submit to such medical intervention or treatment will pose a threat to the health of other persons, and no surgery may be performed on an inmate without his or her informed consent, or, in the case of a minor, without the written consent of his or her legal guardian
17. Ibid, The Regulation 7 (7) where stipulates that 'an inmate may not, even with his or her consent, be subjected to any medical, scientific experimentation or research; and that an inmate may not participate in clinical trials, except with the National Commissioner's approval given on application made by the inmate.
18. Section 27 (2010) The rights of prisoners 2010/04/15Manual, p352
19. Dubler N (2014): Ethical Dilemmas in *Prison and Jail Health Care* (2014).
20. Pinta ER (2009): Decisions to Breach Confidentiality When Prisoners Report Violations of Institutional Rules
21. Dubler, supra
22. Pont J (25 March): Medical Ethics in Prison - United Nations Office on Drugs and Crime, p16
23. Health Professions Council of South Africa (HPCSA) (2008). Booklet 1: Guidelines for good practice in the health care professions – General ethical guidelines for the health care professions, section 2.3

24. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was set up under the 1987 Council of Europe Convention of the same name (hereinafter “the Convention”). According to Article of the Convention: “The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment”
25. Pont, supra p16
26. CPT: Health care services in prisons; Extract from the 3rd General Report [CPT/Inf (93) 12], published in 1993, para 34, p39
27. Ibid, para 37, p40
28. Ibid, para 38, p40
29. Ibid, para 41, p41
30. Ibid, para 41, p41
31. Ibid, para 44, p41
32. Ibid, para 58, p44
33. Ibid, para 58, p44
34. Ibid, para 59 p44
35. Ibid, para 64, p44
36. Ibid, para 64, p44
37. Ibid, para66, p45
38. Ibid, para67, p45
39. Ibid, para 69, p46
40. Ibid, para 71-72, p46
41. Ibid, para 71, p46
42. Rossouw, SH & Buitendag, N (2012): Chapter 13: Steve Biko’s death: The role of the medicine, law and their organised professions; Beyond the law: Multi-disciplinary perspectives on human rights, p290
43. Pont, supra p27

Chapter 6

The prisoner's health care rights litigation in South Africa

6.1 Introduction and background

The advent of constitutionalism in the Republic of South Africa in 1994 dispensed with “the general attitude of the Department of Correctional Services (DCS) towards prisoners, that because they (prisoners) had been deprived of their freedom, they therefore had no rights, but only privileges”¹. The courts were also complicit by endorsing the DCS’s attitude when the prisoners- particularly political prisoners- challenged their treatment at the hands of the DCS². Constitutionalism ushered a new dispensation where rights of prisoners were enshrined in the Bill of Rights thus guaranteeing a humane treatment of prisoners by the prison system.

The Bill of Rights, Chapter 2 in the Constitution of the Republic of South Africa, contains several guarantees aimed at safeguarding the rights of those individuals detained by the State, whether they are sentenced prisoners or awaiting trial³. Section 27 (1) (a), (2) and (3) states that “Everyone has the right to have access to - (a) health care services, including reproductive health care; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights and that (3) No one may be refused emergency medical treatment”⁴. Section 35 (2) (e) of the Constitution provides that everyone detained has a right to conditions of detention that are consistent with human dignity⁵. Consistent with this provision is section 2(b) of the Correctional Services Act (CSA) that spells out the purpose of the Act⁶. The rights of prisoners to health care are spelled out in some detail in the CSA and Regulations⁷. Notwithstanding these provisions, it has been found that the DCS has, in many respects, failed to ‘comply with its principal legislation, the Correctional Services Act (111 of 1998), and the requirements in the Bill of Rights’⁸. Fortunately, these health related rights are justiciable under the South African jurisprudence, as such,

prisoners can approach courts for relief in instances where they feel that there are violations of their constitutional rights. Section 38 (a)-(e) of the Constitution provides that “everyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- anyone acting in their own interest; anyone acting on behalf of another person who cannot acting their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members”⁹.

In this chapter, I attempt to explore the role that has been played by the courts in an effort to promote the health care rights of prisoners where the State was failing to fulfill its obligations in this regard. Courts have offered relief and pronounced on several areas of prison conditions that impact heavily on the health status and care of the inmates.

6.2 Case law

6.2.1 The centrality of the ‘residuum principle’ to the rights of prisoners

As early as 1912 had the court averred that, at common law level, prisoners retain all basic rights and personal dignity¹⁰. When a court sentences a person to incarceration he or she retains all his or her rights, except those that are necessary to limit so that the sentence can be implemented¹¹. The incarcerated individual is still entitled to all other basic human rights including the right to have access to the health services available in the country without discrimination on the grounds of their legal situation¹², the only right taken is that of freedom. The foregoing statements represents a dictum that has become known as the residuum principle which was restated and found expression in a minority judgement of Corbett JA in *Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 14 (A)*. The judge said, “It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed... He must submit to the discipline of prison life and the rules and regulations,

which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights, which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress”¹³.

The dictum was further endorsed and saluted, by Hoexter J A in *Minister of Justice v Hofmeyr 141 C – 142 A*¹⁴, as a “reminder that in truth the prisoner retains all his personal rights save those abridged or proscribed by law”¹⁵ and that “the root meaning of the dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common law rights”¹⁶. The approach by the courts apropos to the basic rights of prisoners has been to abide by this dictum. See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others 1992 (2) SA 56 (ZS) at 60 G - 61 A*; *Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others 1982 (2) SA 547 (C)*; *Tshikane v Minister of Correctional Services and Others (2014: 23316) [2014] ZAGPJHC 261; 2015 (2) SARC99 (GJ) (17 October 2014)*; and *Minister of Correctional Services and Others v Kwakwa and Another*.

6.2.2 Human dignity and life

In *S v Makwanyane and Another 1995 (3) SA 391 (CC)*, Chaskalson J stated that “Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary’”¹⁷. When someone is imprisoned, it is to be noted that, there is some degree of infringement on the person's dignity. This was alluded to by the court in *S v Makwanyane* when it averred that “Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity”¹⁸. The court however qualified the point by stating that, notwithstanding the encroachment upon the inmate's dignity, “a prisoner does not lose all his or her rights on entering prison”¹⁹. Whilst it may necessary to encroach upon on someone else's dignity through imprisonment; it has to be noted that “imprisonment is a severe form of punishment”²⁰, as such it has to be done judiciously mindful of the difference between “encroaching upon rights for the

purpose of retributive justice”²¹ and for the purpose of corrective justice. The latter is what is aimed at and the former is unconstitutional. Accordingly, “retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity”²².

Section 2, of the Correctional Services Act, states 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’²³ and thus fulfilling the requirements as per section 35 (2) (e) of the Constitution that provides for ‘everyone that has been detained having a right to conditions of detention that are consistent with human dignity’²⁴. It cannot be gainsaid that detaining inmates in conditions that are deleterious to their health impinges on their inviolable right to be treated with human dignity. For instance, a lack of adequate living space for prisoners was considered by the UN Human Rights Committee as a contribution to a violation of the right to dignity and humane treatment²⁵. In the case of *Lee v Minister for Correctional Services and others 2012 ZACC 30*, Nkabinde J alluded to the fact that “there is a duty on Correctional Services authorities to provide adequate health care services, as part of the constitutional right of all prisoners to “conditions of detention that are consistent with human dignity”²⁶. It was found that incarceration of prisoners in overcrowded cells predisposed them to contracting tuberculosis at Pollsmoor Prison and hence the conditions were not consistent with human dignity. The court said that “in circumstances where a legal duty exists to protect Mr. Lee (plaintiff) and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment”²⁷.

With respect to the right to life, Langa J in *S v Makwanyane* said that “the right to life is a supreme right and fundamental of all rights”²⁸. Unlike other rights, the right to life is unqualified in the Constitution. The government has an obligation to protect the life of everyone in South Africa²⁹, more so when it is the life of an inmate whose autonomy has been taken away by the state through imprisonment. The Constitutional Court judgement by O’Regan J in *S v Makwanyane* averred that -”the

right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them”³⁰. Accordingly, the Constitutional Court declared the death sentence unconstitutional.

The courts have also found and pronounced on the inextricable linkage between the right to human dignity and the right to life. O’Regan J continued to say “But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. The concept of human life is at the center of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society”³¹. The Justice went on to say that “The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity”³².

The right to life is precious as without which all other rights are absent³³. Without the right to life, there will be no right to health. In essence, the right to health care or the right to access to health care, will not exist without life. Accordingly, without life, the other aspects of the right to health are meaningless³⁴. On the other hand, quality of life depends on a person’s good health. The capacity for enjoyment of the rights to life and human dignity is obviously significantly diminished by poor health³⁵. Health is, therefore, an essential for life and for human dignity³⁶. In *Lantsova v. The Russian Federation*, the Human Rights Committee found that failure by the prison authorities to provide a properly functioning medical service to diagnose and treat the prisoner’s medical condition was found to have violated the prisoner’s right to life”³⁷. Mr. Lantsova died in custody in a Russian jail and fell ill whilst incarcerated. The conditions in which the inmate (Mr. Lantsova) was held were overcrowded, poorly ventilated, unhygienic and there was inadequate food; and furthermore, after his health deteriorated he received medical care only during the last few minutes of his life, that the prison authorities had refused such care during the preceding days and that this situation caused his death³⁸.

6.2.3 Access to healthcare services and medical treatment

The South African courts have made judgements on several cases pertaining to the right to medical treatment for prisoners. HIV and AIDS has been in the center of litigation involving prisoners. In *EN and Others v Government of the Republic of South Africa 2007*, the court ordered that the Westville Correctional Center, with immediate effect, to provide with anti-retroviral treatment (ARVs) to prisoners in accordance to National Department of Health's Operational Plan and to remove the restrictions that prevent the prisoners and all other similarly situated inmates at Westville Correctional Centre (WCC), who meet the criteria as set out in the aforesaid Plan, from accessing Anti-Retroviral Treatment at an accredited public health facility³⁹. The judgement followed an action brought before the court by Aids Law Project (ALP) on behalf of the prisoners at WCC who met the criteria, to receive ARVs, set by the National Department of Health's Operational Plan in the comprehensive management and treatment of HIV and AIDS. The applicants went to court on the basis that their fundamental constitutional rights, as enshrined under sections 27⁴⁰ and 35⁴¹, are being infringed. Furthermore, they pleaded for the DCS to fulfill its obligations as for provisions of CSA. Section 12 of the CSA states that, "(1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life. (2) (a) Every inmate has the right to adequate medical treatment but no inmate is entitled to cosmetic medical treatment at State expense. (4) (a) Every inmate should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health"⁴². The Minister of Health and the MEC for Health (KwaZulu-Natal), as respondents, were joined in the application because they too shared a responsibility for health care of convicted and awaiting-trial prisoners⁴³, in terms of the National Health Act. Section 21(2)(b)(iv) of the National Health Act 61 of 2003 provides: 'The Director-General [of Health] must, in accordance with the national health policy . . . issue and promote . . . health services for convicted persons awaiting trial'⁴⁴.

In *Van Biljon v Minister of Correctional Services*⁴⁵ the case involved four inmates who were already on ARVs but no provided by the prison authorities and wanted to continue with their treatment at the state's expense. The DCS argued that it was not in the position to provide with the treatment because prisoners are entitled to the

same standard of medical treatment as is provided for persons attending state institutions and that since ordinary persons attending provincial hospitals were not entitled to antiretroviral drugs for the treatment of HIV/AIDS due to budgetary constraints, neither were the prisoners⁴⁶. The prisoner's application based their challenge against DCS on section 35 (2) (e) of the Constitution⁴⁷, arguing that failure to provide them with ARVs infringed on their right to receive adequate medical treatment at the state expense. The court found that there was a far stronger obligation on the part of the state to provide medical care particularly to vulnerable prisoners who are living with HIV and AIDS⁴⁸. The court pointed out the inherent vulnerability of HIV positive individuals to opportunistic infections particularly TB and pneumonia, and the fact that the overcrowded conditions in which prisoners are accommodated exacerbates their vulnerability to these opportunistic infections⁴⁹. Accordingly, the court held that – “Even if it is, therefore, accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve the immune systems than that which the State provides for HIV patients outside”⁵⁰.

In *State v Magida* the prisoner appealed that, because of her HIV status and the unavailability of ARVs in prison, she was entitled to a lesser sentence as prison conditions would negatively affect her health precipitating early death than they would a healthy HIV negative inmate⁵¹. The court upheld the appeal and set aside the sentence imposed by the trial court and ordered that time already served in prison sufficed as appropriate sentence⁵².

6.2.4 Prison living conditions

Prison conditions deteriorate largely because of overcrowding. Poor prison conditions impact negatively on the health of inmates. Overcrowding in prison worsens the health conditions for prisoners and thus violate their fundamental human rights to life and human dignity. Furthermore, a lack of adequate living space for prisoners is considered as not only contributing to a violation of the right to dignity and humane treatment, but also to conditions that breach the rights to life and health.

Section 35 (2) (e) of the Constitution provides for every person who is detained, including every sentenced prisoner, the right- to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation and nutrition⁵³.

In *Lee v Minister for Correctional Services and Others*, the court averred “that it was not in dispute that incarceration of prisoners in overcrowded cells predisposed them to contracting tuberculosis at Pollsmoor Prison”⁵⁴, as such the prison authorities – being aware of the risk – had a duty to take reasonable measures to reduce the risk of contagion⁵⁵. The reasonable measures were set out in the Standing Correctional Orders (SCO). The SCOs were geared up to minimize the risk in the spread of communicable diseases like TB. This entailed effective screening of incoming prisoners and the isolation of infectious patients by the health care workers within 24 hours of admission to prison⁵⁶. It was found by the court that -an effective program did not exist, instead the initial screening was superficial and there was no isolation of those inmates found to be contagious⁵⁷. Accordingly, the DCS was found liable for the delictual damages suffered by Mr. Lee (applicant) as a consequence of contracting TB while in detention at Pollsmoor Prison. It is to be noted that, in the Van Biljon case, overcrowded conditions in which prisoners are accommodated were highlighted as a predisposing factor that exacerbates prisoner’s vulnerability to opportunistic infections including TB and pneumonia⁵⁸. In *Melnick v. Ukraine*, the European Court held that - the prisoner’s detention in conditions that were overcrowded, with unsatisfactory conditions of hygiene and sanitation - amounted to degrading treatment⁵⁹.

6.2.8 Invoking the right to privacy

In *C v Minister of Correctional Services*⁶⁰, the court held that - a prisoner’s privacy was invaded when his blood was tested for HIV without his consent which was in contravention of the principle of patient autonomy. This was after a member of the prison health staff failure to adhere to the informed-consent policy set out by the DCS when testing prisoners for HIV. In terms of the norms, prisoners had to receive pre- and post-test counselling by a competent member and the prisoner's informed consent had to be obtained prior to the HIV test being administered⁶¹. It was thus found that the conduct of the prison officer amounted to an invasion of privacy and

consequently the deviation from the accepted norm of informed consent, including the fact that there was no pre-counselling, was of such a degree that the deviation was material and wrongful⁶². In *Stoffberg v Elliott*, the right to autonomy and security of the person in the center when the court said “In the eyes of the law, every person has certain absolute rights which the law protects. They are not dependent upon a statute or upon a contract, but they are rights to be respected, and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another. Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference”⁶³. This is in line with the provisions of the National Health Act, sections 6 (User to have full knowledge), section 7 (Consent of the user), and section 8 (Participation in decisions)⁶⁴ and further aligns with section 12 (2) (c) of the Constitution⁶⁵.

6.2.9 Invoking the right to bodily integrity

The right to bodily and psychological integrity, which includes the right to security in and control over one's body⁶⁶, has also found its way into South African courts. Although, the following cases were criminal matters, they also needed the assistance of medical fraternity, and hence briefly ventilated in this section. Two cases with similar sort of facts, in *Minister of Safety and Security and Another v Xaba 2003 (2) SA 703 (D)*⁶⁷ and in *Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C)*⁶⁸, had the court reaching the opposite conclusion in their judgements. In both cases the suspects had a bullet lodged in the leg and the police needed the bullets as evidence to the crimes that the suspects were purported to have committed. In the Gaqa matter, the Cape High Court held that – while “the proposed surgical intervention to remove the bullet would undoubtedly be a serious affront to the respondent's human dignity and an act of state sanctioned violence against his bodily – and perhaps also psychological – integrity, the community interests must prevail over the individual interest”⁶⁹. The order was for the bullet to be surgically removed because “it is apparent that a refusal to assist the applicant in this case will result in serious crimes remaining unsolved, law enforcement stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the

resolution of such crime”⁷⁰. With respect to Xaba, ‘the court refused to grant an order allowing a bullet to be forcibly surgically removed from a prisoner’s leg against his will. It said that his section 12 rights would be infringed if the proposed surgery were to take place without his consent in the absence of a law limiting these rights as contemplated in section 36 of the Constitution”⁷¹. “The court further held that the word "search," when used in the context of the powers of search and seizure, does not include an operation under general anesthetic. Even if it did, police could not delegate this power (or the right to use reasonable force in terms of section 27) to a doctor. Furthermore, the court held that section 37(1)(c) does not intend to allow a police official to empower a medical practitioner to perform an operation; only limited surgery associated with the taking of a blood sample is allowed thereby”⁷². Carstens & Pearmain submit that “the decision in Xaba is more consistent with the concept of both the right to bodily integrity and a right to health since health in its broader sense is based as much on psychological integrity as it is on bodily integrity and the power of a person to refuse a surgical invasion of his or her person is essential for both”⁷³.

6.2.10 Medical parole

The fact that a prisoner is sick does not mean that he can then “escape punishment or seek an adjustment of his term of imprisonment”⁷⁴. However, the primary duty of the state is towards the protection and promotion of inmates’ dignity and well-being⁷⁵, as such releasing prisoners who are - suffering from a terminal disease or condition or if [he] is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care⁷⁶ - is another avenue to ensure that obligation. The medical parole system is geared up to offer relief to those inmates who, because of their ill health, are so incapacitated that they have to suffer the indignity and humiliation of being totally dependent on others to perform even the most basic activities of daily living.

Whereas before only the Department of Correctional Services (DCS) medical personnel could initiate the process of applying for medical parole, s79 (2) (a) of the Act has expanded the scope of people who can lodge an application to include, not only medical personnel, but also the sentenced offender or a person acting on his or her behalf⁷⁷. Secondly, the old section 79 (replaced by a new one on 01 March

2012), only permitted the release of inmates who were in the “final phase of a terminal illness”⁷⁸. However, in the new section 79 - the inmates suffering from life threatening illness, but who were not bedridden or noticeably terminally ill⁷⁹ - are now able to be considered for medical parole. The medical conditions suffered by offenders that are considered worthy of consideration, by the Medical Parole Advisory Board, are listed in Regulation 29A (5) (a) and (b)⁸⁰ includes both infectious and non-infectious diseases.

The number of inmates who have been released on medical parole has been desperately low. In 2009/2010 there were some 900 prisoners who died due to natural causes and 765 (85%) were under medical treatment and potentially eligible for medical parole⁸¹. Reasons for such a low number have been attributed to the narrowness of the scope of diseases and the people who could initiate the process; but that has since changed courtesy of the new section 79 (2) (i) and (ii). Arbitrary application of the medical system by the authorities -where rules are not applied fairly and prisoners treated differently depending on extraneous issues, like political propinquity, as was the case of Shabir Shaik – also contributed to the problem. In is against this backdrop that courts have played a critical role in intervening to grant prisoners parole where the DCS and the Ministry have failed. In terms of section 33 (1) of the Constitution, “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”⁸². Accordingly, prisoners can challenge any administrative decision by the DCS that is deemed unfair and prejudicial. What follows below are cases where the courts have intervened in upholding the human dignity of prisoners as enshrined in the Constitution.

In *Stanfield v Minister of Correctional Services and Others*⁸³, the prisoner lodged an application to be placed on parole on medical grounds in terms of section 69 of the Act⁸⁴ and the medical experts, who were treating the inmate, provided a supporting affidavit, opining that the prisoner should to be placed on medical parole because he was diagnosed as suffering from incurable and inoperable lung cancer known as a “small cell carcinoma” that has affected both lungs and advanced coronary disease⁸⁵. The authorities recommended that the application be rejected on the grounds that the inmate was not yet bedridden; he physically looked well and was able to dress and feed himself; and although his life expectancy was estimated to be 6-12 months, successful treatment can have an influence on this period⁸⁶. The other reason was

that, because the inmate looked physically well and eminently dying, he may re-offend should he be released on medical parole.

In repudiating that assertion, the court held that the inmate's "inherent right to human dignity has not been observed in the consideration of his application for release on parole on medical grounds"⁸⁷. The court cited four reasons in this respect namely: Firstly, the authorities failed to appreciate the gravity of the prisoner's illness and the prognosis that it carried because of his physical appearance at the time without considering that – "the condition will undoubtedly undergo a radical change in the near future, but instead, chose to ignore, or downplay, the fact that he is suffering from an inoperable and incurable disease that will inevitably cause his death within a few months"⁸⁸. The court further said that, for the authorities "to insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity"⁸⁹.

Secondly, with respect to the inmate being housed in another facility that was purported to be adequately equipped to cater for terminally ill inmates yet in reality it was not; the court held that – "To insist that he remain incarcerated while being housed in the said facilities constitutes a blatant denial of his most basic right to be treated with dignity and respect, regardless of the crime he has committed and the period of his sentence that he has actually served"⁹⁰.

Thirdly, with respect to the suggestion that the inmate could commit crimes after being released on medical parole, the court averred that it was "extremely unlikely that the applicant's thoughts, urges and desires are directed at anything but being reunited with his family during the last few months of his life"⁹¹, as such, "to insist that he remains imprisoned until it is physically impossible for him to commit any crime is, in my view, inhuman, degrading and thoroughly undignified"⁹². See also *S v Mazibuko 1996*. Fourthly, the court averred that, the suggestion that the release of the applicant on parole for medical reasons will impact negatively on the penal system and on the expectations of other prisoners suffering from terminal disease, constituted another failure on the part of the authorities to respect the applicant's inherent right to dignity⁹³. The court also held that, the nature of the prisoner's

conviction, length of sentence and the period of time served in prison is irrelevant for a prisoner to be placed on medical parole if the requirements are met and the recommendation is made by the medical practitioner as per provision⁹⁴.

In *Mazibuko v Minister of Correctional Services and Another*⁹⁵, a case that involved an inmate who was serving a life sentence who applied to be placed on medical parole, because he was dying of AIDS and increasingly getting worse, and the DCS refused to accede to his request. The court held that “the medical condition of the applicant was satisfactorily proved. He was dying of Aids and his condition was deteriorating daily. The court found no reason for his further incarceration, and set aside the decision not to release him on parole”⁹⁶. The court held that “refusal to release applicant on medical parole, is unjust, unlawful, unreasonable, and procedurally unfair”⁹⁷. See also *Du Plooy v Minister of Correctional Services and Others*⁹⁸.

In *Derby-Lewis v Minister of Justice and Correctional Services and Others*⁹⁹ is a recent case decided on in 2015 involved an inmate who was initially sentenced to death and the sentence later commuted to life imprisonment. The inmate had already served 21 years and 6 months of his sentence and applied to be considered for medical parole, in terms of section 79 of the CSA, as he was suffering from an inoperable lung cancer. He also had co-morbid diseases in the form of congestive heart failure, skin cancer and prostate cancer. Despite the recommendation by the Medical Parole Advisory Board (MPAB) to have him released the Minister refused to grant the parole on the grounds that the cancer was classified as Stage IIIB whereas the the Act required that it be Stage IV for one to be eligible¹⁰⁰. In his judgement, Baqwa J, invoked section 12 (1) (e) that states that “Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way”¹⁰¹. Because the applicant was terminally ill and two attendant specialists had given him 6 months to live¹⁰², it was held that it refusing to release him on parole will be in violation of section 12(1)(e). Accordingly, when interpreting provisions of any statute, it has to be done as far as possible in a manner that upholds the basic tenets of the South African law entrenched in the Constitution which is the supreme law of the country¹⁰³. The court went on to say that, “one of the principles entrenched in the Constitution is the principle of Ubuntu which recognizes the inherent dignity in every human being and enjoins people of South Africa to treat one another in a humane manner”¹⁰⁴. In the

light of the aforesaid, the court ordered the release of the prisoner on medical grounds.

6.3 Conclusion

In the light of the foregoing discussion, it is evident the court has shown an extremely keen interest in safeguarding the rule of law and has come down strongly against the failure of state organs to adhere to existing legal rules¹⁰⁵. Indeed, the courts have proved to be valuable in upholding the health rights of prisoners when called by upon to intervene. The right to be treated with human dignity and respect permeates through almost every matter brought to court with respect to prisoner's rights in general and health care rights in particular.

Although the courts have been able to offer substantive relief to prisoners in an effort to promote their health rights, few of them have been reported. Many cases had been settled out of court and many others who found their way to court, where judgments were often handed down against the Department of Correctional Services, are not considered reportable because they did not establish any important precedent or dealt with a matter considered politically interesting or controversial¹⁰⁶.

Footnotes

- 1 De Vos, P (2005), 'Prisoners' rights litigation in South Africa since 1994: A critical evaluation' in Law, Democracy and Development, p91
- 2 Ibid, p91
- 3 Ibid, p89
- 4 The Constitution of the Republic of South Africa Act, No. 108 of 1996, s27.
- 5 Ibid, s35
- 6 Correctional Services Act (CSA) 111 of 1998, s 2 (b) states "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"
- 7 Benatar, S (2014), 'The state of our prisons and what this reveals about our society', p613
- 8 Muntingh, LM (2012), 'An analytical study of South African prison reform after 1994, p3
- 9 The Constitution, s38
- 10 Muntingh, LM (2006) [Revised 2010], A Guide to the rights of inmates as described in the Correctional Services Act and Regulations, p7
- 11 *Van Biljon and Others v Minister of Correctional Services and Others 1997 (4) SA 441 (C) (SAHC 1997 C), para 42*
- 12 Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990. Principle 9

- 13 *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A)
- 14 Commission of inquiry (Jali Commission) - South African Government, p330
- 15 *Minister of Justice v Hofmeyr* (240:91) [1993] ZASCA 40, 1993(3) SA 131 (AD); [1993] 2 All SA 232 (A) (26 March 1993), p20
- 16 Ibid, p20
- 17 *S v Makwanyane and Another* 1995 (3) SA 391 (CC), para 58
- 18 Ibid, para 142
- 19 Ibid
- 20 Ibid, para 143
- 21 Ibid
- 22 Ibid, para 146
- 23 CSA, s 2
- 24 The Constitution.
- 25 Lines R: The right to health of prisoners in international human rights law. *International Journal of Prisoner Health*, March 2008; 4(1): 3-53, p 32
- 26 *Lee v Minister for Correctional Services and others* 2012 ZACC 30, para 59.
- 27 Ibid, para 65
- 28 *S v Makwanyane*, para 217.
- 29 Carstens, P & Pearmain, D (2007) 'Foundational principles of South African medical law'. LexisNexis, p27.
- 30 *S v Makwanyane*, para 326
- 31 Ibid
- 32 Ibid, para 327
- 33 Ibid, Kriegler J para 210.
- 34 Carstens & Pearmain, supra p25.
- 35 Ibid, p29
- 36 Ibid.
- 37 *Lantsova v. Russian Federation, Communication No. 763/1997* (26 March 2002), CCPR/C/74/D/763/1997, para 9.2
- 38 Ibid, para 9.2
- 39 *EN and Others v Government of RSA and Others* (2006) AHRLR 326 (SAHC 2006), para 35
40. Section 27 of the Constitution states: (1) "Everyone has the right to have access to - (a) health care services, including reproductive health care; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights and that (3) No one may be refused emergency medical treatment"
41. Ibid, s35 (2) Everyone who is detained, including every sentenced prisoner, has the right- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and (f) to communicate with, and be visited by, that person's- (iv) chosen medical practitioner.

42. CSA s12 (1) (2) (a) and 4(a)
43. *EN and Others v Government of RSA and Others*, para 21
44. The National Health Act 61 of 2003
45. *Van Biljon and Others v Minister of Correctional Services and Others 1997*
46. Carstens & Pearmain, supra p 109
47. See 41, supra
48. Motala N and McQuoid-Mason D (2013), 'Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?'. *The South African Journal of Bioethics & Law*; Vol 6, No2, p3
49. *Van Biljon and Others v Minister of Correctional Services and Others*, para 54
50. Ibid
51. *S v Magida 2005 (1) All SA 1 (SCA) (S. Afr.)*, para 9
52. Ibid, para 22-23
53. The Constitution, s35 (2) (e)
54. *Lee v Minister for Correctional Services and others*, supra para 59
55. Ibid
56. Ibid, para 61
57. Ibid, para 62
58. *Van Biljon and Others v Minister of Correctional Services and Others*, supra para 54
59. *Melnik v. Ukraine Application No. 72286/01, 28 March 2006*, para 111
60. *C v Minister of Correctional Services 1996 (4) SA 292 (T) 300*
61. Ibid
62. Ibid.
63. *Stoffberg v Elliott 1923 CPD 148*
64. National Health Act No. 61 of 2003
65. The Constitution, s12 (2) (c) – Everyone has a right not to be subjected to medical or scientific experiments without their informed consent.
66. Ibid, s12 (2) (b)
67. *Minister of Safety and Security and Another v Xaba 2003 (2) SA 703 (D)*
68. *Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C)*
69. Ibid
70. Ibid
71. Carstens & Pearmain, supra p30-31
72. *Minister of Safety and Security and Another v Xaba*
73. Carstens & Pearmain, supra p31
74. *Du Plooy v. Minister of Correctional Services and others [2004] JOL 12850 (T), para. 4.*
75. Albertus C (2012): Does the new medical parole system give effect to inmates' right to dignity and the public's right to safety. CSPRI newsletter, Issue No. 41, June 2012
76. Correctional Services Act 111 of 1998, s79 (1) (a)
77. Ibid

78. Albertus, supra
79. Ibid
80. Regulation 29A (5) In the assessment by the Medical Parole Advisory Board, the Board must consider whether the offender is suffering from: (a) Infectious conditions- (i) World Health Organisation Stage IV of Acquired immune deficiency syndrome despite good compliance and optimal treatment with .antiretroviral therapy; (ii) Severe cerebral malaria; (iii) Methicilin resistance staph aurias despite optimal treatment; (iv) MDR or XDR tuberculosis despite optimal treatment; or (b) Non-infectious conditions- (i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure; (ii) Ischaemic heart disease with more than two ischaemic events in a period of one year with proven cardiac enzyme abnormalities; (iii) Chronic obstructive airway disease grade III to IV dyspnoea; (iv) Cor-pulmonale; (v) Cardiac disease with multiple organ failure; (vi) Diabetes mellitus with end organ failure; (vii) Pancytopenia; (viii) End stage renal failure; (ix) Liver cirrhosis with evidence of liver failure; (x) Space occupying lesion in the brain; (xi) Severe head injury with altered level of consciousness; (xii) Multisystem organ failure; (xiii) Chronic inflammatory demyelinating Poliradiculoneuropathy; (xiv) Neurological sequelae of infectious diseases with a Kamofky score of 30 percent and less; (xv) Tetanus; (xvi) Dementia; and (xvii) Severe disabling rheumatoid arthritis, and whether such condition constitutes a terminal disease or condition or the offender is rendered physically incapacitated as result of injury, disease or illness so as to severely limit daily activity or inmate self-care.
81. Albertus, supra
82. The Constitution, s33(1)
83. Stanfield v. Minister of Correctional Services and others [2003] 4 All SA 282(C)
84. Section 69 of the Correctional Services Act. This Act was repealed by Correctional Services Act of 1998.
85. Stanfield v. Minister of Correctional Services and others, para 5-6
86. Ibid, para 13
87. Ibid, para 123
88. Ibid, para 124
89. Ibid, para 124
90. Ibid, para 126
91. Ibid, para 126
92. Ibid, para 126
93. Ibid, 127
94. Ibid, para 82
95. *Mazibuko v Minister of Correctional Services and another* [2007] JOL 18957 (T)
96. Ibid, Summary page 1
97. Ibid, page 11
98. *Du Plooy v Minister of Correctional Services and others* [2004] JOL 12850 (T),
99. *Derby-Lewis v Minister of Justice and Correctional Services (17889/15)* [2015] ZAGPPHC 661;

2015 (2) SACR 412 (GP) (29 May 2015)

100. Ibid, summary
101. The Constitution, s12 (1) (e)
102. *Derby-Lewis and the Minister of Justice and Correctional Services and Others*, para 54
103. Ibid, para 55
104. Ibid, para 55
105. De Vos, supra page 93
106. Ibid, page 97

CHAPTER 7

Discussion and conclusion

7.1 International legal instruments

Human rights are universal, inalienable, indivisible and interdependent¹. Every person has human rights and that those rights cannot be taken away from the person, including those of a prisoner. Amongst a cluster of these fundamental rights is the right to health. It is a right that is indispensable from the exercise of other human rights². The International Bill of Rights, together with a number of charters and treaties have set minimum standards that, when read together, articulate the right to health for prisoners and lay down a platform on which comprehensive international legal framework can be developed guaranteeing the right to health of all persons who are incarcerated and deprived of their liberty³. Although none of these instruments has a binding effect within international law, they at least exert an ethical obligation on the states to observe such prison health resolutions and often they have found legal expression within international and domestic case law⁴. They have also laid a perfect foundation from which the Constitution, particularly the Bill of Rights, of the Republic of South Africa was based. Because South Africa is a signatory to most of these international agreements, it is duty bound to apply their provisions as for section 231(4) and (5) of the Constitution⁵.

7.2 Constitutional provisions on rights to health with respect to prisoners

The basic rights of all arrested and detained persons in South Africa are primarily based on Sections 9, 10, 11, 12, 24, 27 and 35 of the Constitution. Viewed collectively, this suite of rights could be said to constitute a right to health. Section 35 (2)(e) specifically awards a right for prisoners to be detained in “conditions that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment⁶, and section 35 (2) (f) (iv) states that a detained person has

a right to communicate with, and be visited by, that person's chosen medical practitioner⁷. This cluster of the aforementioned rights, serve as guarantees aimed at safeguarding the healthcare rights of those individuals detained by the State⁸. There is, however, a disjuncture between what is promised and guaranteed by the provisions of the Constitution and the actual conditions experienced by prisoners thus undermining the fulfillment of these legislative obligations. Accordingly, this has led to prisoners embarking in the process of taking legal action.

The courts have on several instances made judgements against the failure by the state to fulfill its Constitutional obligations and in the main have pronounced favorably towards safeguarding the prisoner's human rights. Prisoners are a vulnerable group who, because of their incarceration, are deprived of the latitude to access medical services they prefer and can afford; and are thus wholly dependent on the state for their well-being. Consequently, their health interests have likely been singled out for protection by the court⁹, who, in its decisions, has made it clear that it will be quite sympathetic to constitutional claims based on section 35 of the Constitution because noncompliance with these provisions will have a serious effect on the human dignity of prisoners¹⁰. To that end, the Constitution, with its provisions relating to health, has sufficiently safeguarded and promoted the right to health care for prisoners.

7.3 The Correctional Services Act No. 111 of 1998 and health care rights of prisoners

The Correctional Services Act (111 of 1998) that was promulgated in 2004 in creating a rights based legislative framework for South African's prison system¹¹ and thus specifically deal with the prisoner's right to health care. The Department of Correctional Services must provide, within its available resources, adequate healthcare services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life¹². The Correctional Services Act, together with its regulations, makes provision for access to health care and the delivery of health care services to inmates and these are encompassed in several sections of the Act. The Act is a powerful tool to hold the Department of Correctional Services to account whenever violations of the rights of prisoners occur and are exposed.

7.4 National Health Act No. 61 of 2003 and relevance to prison health

The Department of Correctional Services (DCS) does not have its own separate laws that govern health care, but have to be in line with what the NHA and the Constitution dictates. In terms of the Right to Healthcare and Medical Treatment, the DCS complies with all Department of Health (DOH) policies and practices¹³. As such, the right to adequate medical treatment generally means that a detainee or inmate with HIV or TB must have access to the same kind of care and treatment available in the community¹⁴. For instance, the guidelines in the management of HIV, TB, non-communicable diseases are the same as those in the general public.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has outlined essential principles that, if health care practitioners working in prison were to comply with, will result in ethical medical conduct that promotes the confidence of the inmates to the medical care in prison; leaves no doubt as to the doctor's medical professionalism and ethics; prevents misunderstandings; provides guidance in situations of conflicts; supports quality assurance of the medical work; protects against legal appeals; and gives international support.

7.5 The prisoner's health care rights litigation in South Africa

We have seen, in Chapter 6, how courts adjudicated in several cases where prisoner's rights were under threat and subjected to violations. The centrality of the residuum principle to the rights of all inmates has been illuminated and concretized through numerous prominent judgements. See *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A), *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at 60 G - 61 A; *Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others* 1982 (2) SA 547 (C); *Tshikane v Minister of Correctional Services and Others* (2014: 23316) [2014] ZAGPJHC 261; 2015 (2) SARC99 (GJ) (17 October 2014); and *Minister of*

Correctional Services and Others v Kwakwa and Another.

Furthermore, it is submitted that, the right of prisoners to be treated with human dignity and respect, runs through as a common persistent thread in these judgements. The South African's jurisprudence has dispensed with death penalty as a form of punishment because the 'right to life' is sacrosanct in the Constitution. The 'right to life' together with the 'right to be treated with human dignity' has been eloquently articulated by all judges in *S v Makwanyane and Another 1995 (3) SA 391 (CC)*. In *Lee v Minister for Correctional Services and others 2012 ZACC 30*, the court held that that incarceration of prisoners in overcrowded cells predisposed them to contracting tuberculosis at Pollsmoor Prison and hence the conditions were not consistent with human dignity¹⁵.

In *Van Biljon v Minister of Correctional Services*, In *EN and Others v Government of the Republic of South Africa* and *State v Magida*, the right of access to medical treatment in the form of ARVs (anti-retroviral drugs) was endorsed and entrenched by the court. The courts have also intervened and ordered the release of terminally ill inmates whose initial applications to be released on medical parole had failed. In *Stanfield v Minister of Correctional Services and Other* held that 'for a prisoner to be placed on medical parole, it is irrelevant what the nature of his conviction and the length of his sentence of imprisonment might be and it was equally irrelevant what period of imprisonment he has actually served'¹⁶. In *Mazibuko v Minister of Correctional Services and Another*, court held that "refusal to release applicant on medical parole, is unjust, unlawful, unreasonable, and procedurally unfair"¹⁷. In *Derby-Lewis v Minister of Justice and Correctional Services and Others*, it was said, "one of the principles entrenched in the Constitution is the principle of Ubuntu which recognizes the inherent dignity in every human being and enjoins people of South Africa to treat one another in a humane manner"¹⁸.

7.6 Conclusion

The Constitution, together with legislation (DCS, NHA and regulations) have provisions that are perspicuous with respect to the protection of health related rights of prisoners. From the legal perspective, the Constitution and legislation have

sufficient safeguards that promote the right to health care for prisoners. It has also been demonstrated that, when called upon, the court has also been equal to the task in enforcing these rights. It has to be noted, however, that -whilst litigation has brought victory to individual complainants, these victories have often not translated into fundamental changes¹⁹ - in reality situations on the ground. Indeed, the guaranteed rights set out in the Constitution are not commensurate to what actually transpires in prison. The disjuncture between what is in the law and what actually happens on the ground stems from challenges that can be solved internally by DCS and others that outside the purview of the department

Amongst those that can be solved within is the pervasive culture of disrespect for the law and the rule of law by the prisons authorities at leadership level and by individuals²⁰. These manifest as -lack of respect for the law, and for court orders and judgments²¹; not adhering to the department's own rules and regulations regarding the conditions under which prisoners are kept²²; and failure to adhere to agreements reached in good faith by lawyers through reverting back to practices that they have undertaken to stop²³.

The problem of overcrowding is a constitutional violation. This problem further cascades and trigger other problems resulting in a number of other violations like - lack of sufficient ventilation, adequate sanitation facilities, and hygienic conditions. These violations invariably impact negatively on the right of prisoners to health. Solving the overcrowding problem is a mammoth task as it involves factors that are outside the scope and competence of the DCS. Overcrowding impacts on the ability of DCS to accommodate prisoners in conditions that are consistent with human dignity, yet -this can be largely blamed on problems inherent in the criminal justice system and the way the Department of Justice (and not Correctional Services) deal, with the issue²⁴. Furthermore, the high rate of crime in South Africa, resulting in more and more people arrested, is a societal problem. Urban violence and crime largely occur in poor communities and without changing the socio-economic conditions of the poor, the levels of crime may not abate and thus leading to overcrowding in prisons.

Foot notes

1. Dhai, A & McQuoid-Mason, D (2011) 'Bioethics, Human Rights and Health Law: Principles and Practice' Juta. p37.
2. International Covenant on Civil and Political Rights adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966.
3. Lines R (2008): The right to health of prisoners in international human rights law. *International Journal of Prisoner Health*, March 2008; 4(1): 3-53, p9
4. *Ibid*, p14
5. The Constitution of the Republic of South Africa Act, No. 108 of 1996. Section 231: (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.
6. *Ibid*, s35 (2) (e)
7. *Ibid*, s35 (2) (f) (iv)
8. De Vos, P: 'Prisoners' rights litigation in South Africa since 1994: A critical evaluation' in *Law, Democracy and Development*, Vol 9 Issue 1 (2005), p89
9. Pieterse, M (2014): 'Can Rights Cure? The impact of human rights litigation on South Africa's health system, p23
10. De Vos, *supra* p93
11. Muntingh, LM (2006) [Revised 2010], *A Guide to the rights of inmates as described in the Correctional Services Act and Regulations*, p12
12. *Correctional Services Act* 111 of 1998, s12 (1)
13. *Guidelines for the management of Tuberculosis, Human Immunodeficiency Virus and Sexually Transmitted Infections in Correctional facilities* 2013, p47
14. *Ibid*, p47
15. *Lee v Minister for Correctional Services and others*, *supra* para 59
16. *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), para 82
17. *Mazibuko v Minister of Correctional Services and another* [2007] JOL 18957 (T) page 11.
18. *Derby-Lewis and the Minister of Justice and Correctional Services and Others*, para 55
19. De Vos, p106.
20. *Ibid*, p99
21. *Ibid*, p99
22. *Ibid*, p102
23. *Ibid*, p102
24. *Ibid*, 108

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1. African Charter on Human and Peoples Rights. Adopted in Nairobi June 27, 1981; Entered into Force October 21, 1986. <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>
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