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# The protection of prisoners' rights to health care services in South African law: Is it adequate?

## Summary

A recent newspaper article<sup>1</sup> depicted a dismal picture of the situation behind the walls of the largest prison in the Southern hemisphere. It was revealed that at least four prisoners die of HIV/AIDS at Westville Prison every month because the Department of Correctional Services does not have the resources to provide treatment. In terms of Section 35(2)(e) of the South African Constitution prisoners are entitled to medical treatment at state expense, dependant of course on the availability of resources. The issue of the availability of resources has seen a barrage of case law being brought to the fore challenging section 35(2) (e). This article examines some of these cases and also attempts to shed light on the plight of prisoners in accessing their rights to health care services.

## Opsomming

### Is die beskerming van gevangenes se regte op gesondheidsdienste in Suid-Afrika voldoende?

'n Onlangse koerantartikel beeld 'n somber prentjie uit van die situasie agter die mure van die grootste gevangenis in die Suidelike halfrond. Dit is aan die lig gebring dat ten minste vier gevangenes elke maand by die Westville gevangenis aan MIV/VIGS doodgaan, omdat die Departement van Korrektiewe Dienste nie die bronne het om mediese behandeling te verskaf nie. In terme van Artikel 35(2)(e) van die Suid-Afrikaanse Grondwet is gevangenes geregtig op mediese behandeling op staatsonkoste, afhangeende natuurlik van die staat se bronne. Die kwessie van die beskikbaarheid van bronne het 'n spervuur van sake reg na vore gebring wat 'n uitdaging rig teen Artikel 35(2)(e). Hierdie artikel ondersoek sommige van hierdie sake en probeer ook lig werp op die nood van gevangenes om toegang te verkry tot hulle reg tot gesondheidsorgdienste.

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1 See *Sunday Tribune (Herald)* 17 July 2005.

## 1. Introduction

Prisoners in South Africa whether sentenced or not are supposed to enjoy rights ordinarily enjoyed by all persons that are provided for in terms of the Constitution.<sup>2</sup> Some of these rights are, of course, limited by virtue of these individuals being imprisoned. This principle is better known as the residuum principle. The point here is that, in terms of the Constitution, the rights of prisoners are equally protected and enforceable in much the same way as those of other people. Prisoners do not enjoy only those rights that are specifically provided to them by the Constitution. They also enjoy rights that are enjoyed by ordinary people.

In *S v Makwanyane*,<sup>3</sup> the Constitutional case which declared the death penalty unconstitutional, the court affirmed that although dignity may be impaired by imprisonment, a prisoner does not lose all his rights on entering prison. Chaskalson P said that even though imprisonment is a severe punishment imposed on prisoners, prisoners nevertheless retain all the rights to which every person is entitled to under the Constitution subject only to limitations imposed by the prison regime.<sup>4</sup>

## 2. Historical background

A prisoner like any other person is entitled to good health. The World Health Organization (hereinafter referred to as WHO) which recognizes the right to health of every human being is explicit in its constitution that:

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.

The stance by WHO to uphold and protect prisoners' rights to health care services is not only reflected in the preamble of its constitution but also in terms of the Guidelines drafted for the treatment of prisoners. Prisoners have a right to receive health care equivalent to that available in the community without discrimination of their legal status.<sup>5</sup> The constitutional provision of the right of access to health care services raises particular problems in the prison context, as is the case with any other large institution.<sup>6</sup> These problems, it is argued, are exacerbated by factors such as confinement, lack of exercise, violence, and the use of drugs in prisons.<sup>7</sup> In South Africa, prior to the promulgation of the *Correctional Services Act*,<sup>8</sup> the *Prisons Act*<sup>9</sup> apparently afforded prisoners with a means to access health care services. It has been argued that some provisions of the *Prisons Act* might be considered as being directly relevant to prisoners'

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2 *Constitution of the Republic of South Africa Act* 108 of 1996.

3 1995 (3) SA 391 (CC).

4 1995 (3) SA 391 (CC) 451A-B.

5 WHO guidelines on HIV infection and AIDS in prison, Geneva March 1993.

6 Livingstone *et al* 2003: 221.

7 Livingstone *et al* 2003: 221.

8 111 of 1998 (hereinafter referred to as the *Correctional Services Act*).

9 8 of 1959 (hereinafter referred to as the *Prisons Act*).

health as they were amplified by regulations under the Act.<sup>10</sup> The regulations under the *Prisons Act* incorporated detailed provisions governing medical treatment of prisoners by imposing a duty upon medical officers to visit sick prisoners as often as necessary and to treat them.

However, despite the *Prisons Act*, prisoners' rights, including their right to health care services, did not seem to exist in reality. The situation that prevailed was that the treatment of a person in detention whether sentenced or awaiting trial was an area in which abuses by the old regime were particularly pronounced and in which the courts by and large were reluctant to intervene.<sup>12</sup> Over and above that, prison officials were authorized to decide how prisoners were to be treated.<sup>13</sup>

Amongst the main challenges today, overcrowding has been identified as one of the main contributory factors to health problems experienced in prisons. The Judicial Inspectorate of Prisons,<sup>14</sup> a statutory body established to monitor the conditions and state of prisons, also strives to provide quality and accurate information about the treatment of prisoners and the conditions in prisons. As a body that has been mandated to visit prisoners and try to resolve complaints received by them, it is not surprising that health care has featured among the most common complaint received from prisoners during 2004.<sup>15</sup> In a recent report on the state of South African prisons, it was also revealed that the conditions in prisons are still quite deplorable due to overcrowding.<sup>16</sup> In terms of the Inspectorate's report the ten most overcrowded prisons in South Africa in 2005 were those that are indicated in the table in the next section.

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10 Strauss 1991: 391.

11 Strauss 1991: 392.

12 Corder and Van Zyl Smit 1998: 476.

13 Corder and Van Zyl Smit 1998: 476.

14 The Judicial Inspectorate of Prisons was established as an independent statutory body in terms of section 85 of the *Correctional Services Act 111 of 1998* (It will hereinafter be referred to as the Inspectorate).

15 See Report of the Judicial Inspectorate of Prisons, <http://judicialinsp.pwv.gov.za/Projects/projects1.Asp>.

16 See note 15 above.

## 2.1 The ten most overcrowded prisons

Prison	Built to accommodate	Actual number of prisoners
King Williams Town	301	808
Johannesburg Medium A	2630	7077
Louis Trichardt	324	892
Pietermaritzburg	1330	3880
Ladysmith (WC)	54	160
Most Free	42	143
Thohoyandou (female)	134	464
Middledrift	411	1486
Umtata Med	580	2101
Johannesburg Med.B	1300	4984

What is evident from an examination of the above table is that problems experienced in the prison milieu are exacerbated by the fact that most prisons clearly exceed the capacity they are designed to accommodate. The situation prevailing in South African prisons is that in some cases as reflected above, these prisons are a staggering 200-300% overcrowded. Malnutrition, unhygienic conditions and the lack of medical care remain some of the most common causes of death in prison.<sup>18</sup> Food shortages in some prisons, combined with extreme overcrowding create ideal conditions for the spread of communicable diseases.<sup>19</sup> The South African Prisoners Organization for Human Rights has argued that overcrowding contributes greatly to the rapid spread of HIV/AIDS virus within the prison system.<sup>20</sup> The report further suggests that this pandemic is spreading at an alarming rate among prisoners. Mdluli, the National President

17 Report of the Judicial Inspectorate of Prisons, see note 15 above. The above statistics indicate the position as at 31 January 2005.

18 According to the Report of the Judicial Inspectorate of Prisons, deaths in prisons are classified in two categories namely Natural and Unnatural deaths. Natural deaths are those where a prisoner died because of illness including diseases such as AIDS. Unnatural deaths are cases where prisoners died because of suicides, assaults, accidents or similar events. During the period 1995 until 2004 the death rate in prisons has escalated from 1.65 deaths per 1000 prisoners per annum, see note 15 above.

19 Human Rights Watch: Prisons (Human rights abuses against prisoners) <http://www.hrw.org/prisons/abuses.htm>.

20 See Nisc Discover Report (All government department affected by AIDS), <http://www.sapa.org.za>. Pete 1998: 181. Pete in his work examined the issues affecting the rights of prisoners during the post election period and draws attention to the violation of the rights of prisoners with AIDS in Diepkloof Prison in Johannesburg.

of the South African Prisoners Organization for Human Rights, has made the point that AIDS in prisons is more widespread than it is outside.<sup>21</sup> He has also asserted that the root of the problem lies in the fact that most inmates are young black men who are considered as a high risk category and that sexual activities are primarily homosexual and usually unprotected.<sup>22</sup>

This raises the question of access of condoms to prisoners. According to government policy, condoms are to be distributed to prisoners on the same basis as condoms are provided in the community.<sup>23</sup> A criticism leveled against the policy on condom distribution in prisons has been that whilst very clear on paper, in terms of application of the policy this has been observed to be made on an *ad hoc* basis, with only some prisons equipped with condom dispensers.<sup>24</sup> What this in effect means is that where such condoms dispensers are not easily accessible, prisoners are reluctant to approach health care workers for condoms out of fear that their privacy or confidentiality might be violated. Further the AIDS policy document also provides that:

A prisoner may not receive condoms before having undergone education counselling regarding AIDS, the use of condoms and the dangers of high risk behaviour.

But it is the next proviso that where a prisoner has received counselling that this has to be recorded on his medical file, that makes the issue of confidentiality a contentious one. Surely, the contents of a 'private discussion' of this nature with a medical officer do not have to be documented. It is not surprising that despite a proliferation of educational campaigns encouraging voluntary HIV testing that most prisoners are opposed to having to submit to such testing.

Nevertheless should a person opt voluntarily to being counselled and tested for HIV/AIDS, the HIV/AIDS policy requires that he or she is to be given pre-test and post test counselling and stipulates that test results are to be kept confidential 'but have to be reported to the head of the prison'. Goyer has expressed dissatisfaction with the above approach and is of the opinion that there is no such thing as partial confidentiality in terms of one's HIV status. The only person who has the right to know is the person who has been tested.<sup>25</sup> The writers are inclined to support this thinking and are of the view that mandatory testing of prisoners can neither be considered as a means to combat the HIV/AIDS crisis nor prevent the spread of AIDS in prisons.

The International Guidelines on HIV/AIDS and Human Rights which has integrated the principles and standards of international human rights law in presenting an HIV/AIDS response for the international community has identified 'prisoners and other detained persons as a vulnerable group of individuals'.<sup>26</sup>

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21 *True Love Magazine* August 2002.

22 See note 21 above.

23 Goyer HIV/AIDS Policy in South African Prisons, <http://www.iss.co.za/Pubs/Monographs/No79/Chapter3.html>.

24 South Africa: Feeling the impact of HIV/AIDS in prisons, <http://www.plusnews.org/webspecials/HIV-in-prisons.SouthAfrica.asp>.

25 See note 24 above.

26 See note 24 above.

As far as HIV prevention, treatment, care and support (including antiretroviral and other safe and effective medicines) is concerned, the Revised Guideline 6 is explicit that states should pay attention to vulnerable groups and populations with regard to such treatment.<sup>27</sup> Based on human rights principles, access requires that goods, services and information is not only to be made available and of a good quality, but also within physical reach and affordable to all.<sup>28</sup>

Currently in South Africa only 63 000 people are on antiretrovirals (ARVs) nationally, none of which include prisoners. The Treatment Action Campaign (hereinafter referred to as the TAC) has reported that while prisoners have access to medication for infections such as tuberculosis and influenza, they are definitely not getting ARVs.<sup>29</sup> In response to this Ndlovu, the spokesperson for the department of Correctional Services has made the submission that prisoners do receive ARVs but only if doctors recommend that ARVs are to be given to inmates.<sup>30</sup> Nevertheless the problem appears to be compounded by the fact that in keeping with national policy, ARVs are not available and therefore cannot be made readily available and accessible to prisoners. In the words of Mkhize, the spokesperson of TAC, the position is aptly summed up as follows: 'If the health department can't reach their ARV targets on the outside, how can they manage to roll it out in prisons?'<sup>31</sup> Whilst the South African Policy on AIDS and HIV in South African Prisons appears to reflect the key elements of the HIV and Human Rights International Guidelines, there nevertheless appears to be very little co-ordination and implementation of the policy to effectively access treatment care and support. The resultant effect of this being that in South African prisons many more people could die of AIDS-linked diseases.<sup>32</sup>

It is against this backdrop that this paper explores the current position of the extent to which prisoners' rights, in particular the rights to health care services are protected in terms of South African law. This will be done by examining the relevant provisions of the Constitution and drawing on the recently promulgated *Correctional Services Act*. It will be seen that the Constitution does not only provide prisoners with rights but also provides them with mechanisms to review their complaints from a constitutional perspective.<sup>33</sup> Such mechanisms will be assessed from an examination of recent case-law to determine whether they do at all promote and protect prisoners' rights to health care services. In addition, the *Correctional Services Act* (which has subsequently repealed the *Prisons Act*),

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27 See note 23 above.

28 HIV/AIDS and human rights international guidelines, revised guideline 6 access to prevention, treatment, care and support, <http://www.ohchr.org/English/about/publications/docs/g6.pdf>.

29 See note 28 above.

30 See note 28 above.

31 Aids drugs to be more accessible in KZN prisons, <http://www.aegis.com/news/sapa/2005/SA050709.html>.

32 AIDS related deaths up by 584%. AIDS has increased non violent deaths in South Africa by 584% since 1995 and is expected to kill 7000 prisoners a year by 2006, [http://www.news24.com/News24/South\\_Africa/Aids\\_Focus/0,,2-7-659-1006689,00.h](http://www.news24.com/News24/South_Africa/Aids_Focus/0,,2-7-659-1006689,00.h).

33 Kalinich and Clack 1998: 65.

prescribes a new approach to imprisonment.<sup>34</sup> This approach, reflected in the preamble of the Act as well as other relevant provisions, will also be analysed for purposes of clarity.

However, before examining prisoners' rights to health care services in the South African context and the influence of international law on South African law in the protection of prisoners' rights to health care services, it becomes necessary to gain an international perspective on the subject. Under international law, prisoners' rights to health care services are protected through international human rights instruments, as well as regional treaties, a discussion of which follows hereunder.

### 3. International human rights law and the protection of prisoners' rights to health care services

The United Nations Universal Declaration of Human Rights is regarded as the mainspring of all human rights existing today.<sup>35</sup> Article 25 of the Declaration provides everyone, including prisoners, with a right to a standard of living adequate for personal health and well-being, including food, clothing, housing, medical care, and other necessary social services. This Declaration also protects prisoners in terms of Article 5, from being tortured. The Declaration also led to the formation of other international instruments (International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights and several other regional human rights conventions) protecting human rights, including prisoners' rights to health care services.<sup>36</sup> However this Declaration fails to address the issue of transgression, since it is merely a recommendatory resolution of the General Assembly. Nevertheless Van Zyl Smit has expounded the view that South African courts may refer to this Declaration as authority when interpreting the Bill of Rights.<sup>37</sup>

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1987), in terms of article 2 (1) protects prisoners' rights to health care services by imposing an obligation on states to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdictions. The International Covenant on Economic, Social and Cultural Rights (1976) recognizes, in terms of article 12, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Reyes has argued that the highest attainable standard of health should also apply to prison health conditions and health care.<sup>38</sup> Article 7 of the International Covenant on Civil and Political Rights (1966) provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment

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34 Dissel and Ellis Reform and stasis: transformation in South African prison <http://www.csvr.org.za/papaers/papad and se.htm>.

35 Chapman 1993: 7.

36 Dugard 2003: 240.

37 Van Zyl Smit 1992: 75.

38 See Reyes, [www.icrc.org/Web/eng/siteengOngf/iwpList302/AAC9DBC9B9954AEAC1256BAA001FC31D-65K](http://www.icrc.org/Web/eng/siteengOngf/iwpList302/AAC9DBC9B9954AEAC1256BAA001FC31D-65K).

or punishment, and no one shall be subjected without his free consent to medical or scientific experimentation. This Covenant, in terms of Article 10, imposes a positive duty on the parties to ensure that prisoners are treated with respect and human dignity.<sup>39</sup> Humanity, it ought to be stressed, also embraces the provision of good health care services in prisons.

International human rights instruments providing for prisoners' rights to health care services include, The Standard Minimum Rules for the Treatment of Prisoners (1955), The Basic Principles for the Treatment of Prisoners (1990), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) and The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990). These international instruments in essence provide that prisoners should be respected and treated with human dignity. At a regional level, protection of prisoners' rights to health care services include the European Convention for the Protection of Human Rights and Fundamental freedoms, the American Convention on Human Rights, and the African Charter on Human and People Rights. In terms of article 3 of the European Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. With regard to this right there is no distinction between the status of a prisoner and that of a free person.<sup>40</sup> In terms of Article 5 (2) of the American Convention on Human Rights, no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. The same argument that was made in respect of article 3 of the European Convention can also be made in the analysis of article 5 of the American Convention, namely that the right in terms of article 5 does not distinguish between a prisoner and a free person. Therefore all persons including prisoners are entitled to this right. The same analysis can also be submitted in respect of article 5 of the African Charter on Human and People's Rights. Article 5 prohibits all forms of exploitation, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment.

#### 4. The influence of international law on South African law in establishing a framework for prisoners' rights to health care

South Africa has ratified a number of international treaties and conventions that protect prisoners' rights to health care services. These treaties and conventions have influenced South African law in establishing a framework for prisoners' rights to health care. The constitution has been instrumental in ensuring that international law is taken into consideration in the protection of prisoners' rights.

Section 39(1)(b) provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. This provision must be read with section 233 which requires of a court when interpreting legislation to give preference to any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

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39 Hall 1985-1986: 81.

40 Hall 1985-1986: 81.



international law.<sup>41</sup> It is therefore submitted that when interpreting legislation pertaining to prisoners' health care rights, a court is under an obligation to consider international law that protects such rights.

It is important to note, however, that the court is not only confined to international human rights treaties that South Africa has ratified, when it acts under section 39(1)(b).<sup>42</sup> In *S v Makwanyane*, it was held that the term 'public international law' in a similar provision in the Interim Constitution was not limited to norms of international law binding on South Africa.<sup>43</sup> This extends the scope of protection of prisoners' rights to health care services since South African courts can now authoritatively refer to the *Makwanyane* case in order to make use of non-binding international norms in South Africa when protecting prisoners' rights.

## 5. Prisoners' rights to health care services in terms of South African law

### 5.1 *The Constitution of the Republic of South Africa Act 108 of 1996*

It is established that the interim constitution was the forerunner to the final constitution. Under the interim constitution prisoners' rights to health care services were provided for under sections 10, 11 and 25. Sections 10 and 11 provided for the respect and the protection of dignity and the prohibition against cruel, inhuman or degrading treatment or punishment respectively. As these sections made no distinction in respect of status, they implicitly afforded protection to prisoners as well.

Section 25 specifically protected prisoners' rights to health care services by providing that detained persons (including sentenced prisoners) had the right to be detained under conditions consonant with human dignity. While the interim constitution imposed a positive duty on the state to fulfill prisoners' rights to health care services, this, however was only the genesis of the recognition of the rights of prisoners. The final constitution with its plethora of provisions to improve the quality of life of *all* citizens further affirmed and endorsed the commitment of upholding prisoners' rights.

The 1996 constitution provides specific protection for prisoners' rights to health care services in terms of section 35(2)(e). Under this section everyone, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including exercise and provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment.

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41 Dugard 2003: 264.

42 Dugard 2003: 267.

43 1995 (3) SA 391 (CC) 413G.

Socio-economic rights are not inherently competitive with each other or with other rights. According to Judge Sachs there should not be an inevitable tension between the state and the individual in the enjoyment of these rights.<sup>44</sup> He uses the example of a group of people all claiming access to health care services to illustrate this point. The question that needs to be answered according to him is 'what is the best way in which all of us can exercise our rights together?'<sup>45</sup> The concept of rationing and of queues is therefore built into the very nature of access to social and economic rights. The rationing of socio-economic rights does not therefore constitute a limitation of the right that has to be justified. In the course of rationing everyone's right to be considered as an individual may not be disregarded.<sup>46</sup> With respect to prisoners even though their rights to health care are not subject to the progressive realization clause like other socio-economic rights in the constitution, the State can protect this right only if it is in a position to do so.

In *Van Biljon v Minister of Correctional Services*,<sup>47</sup> the Cape Provincial Division ordered state prison authorities to provide expensive antiretroviral combination therapy to two HIV-infected prisoners on the ground that the state had failed to provide satisfactory evidence of the lack of financial resources. The prisoners based their argument on section 35(2)(e) of the constitution. They alleged that in terms of the section, the state was under an obligation to provide adequate medical treatment. The court in the case emphasized the point that in determining what is 'adequate' regard had to be made to what the state could provide.<sup>48</sup> By including socio-economic rights in the constitution, the state has made a choice to prioritise these rights.<sup>49</sup> In so doing, it must also assume responsibility for fulfilling these rights.<sup>50</sup> The challenge, as postulated by Judge Yacoob, is to be able to deliver effective equality and social justice.<sup>51</sup> He is clear that in enforcing socio-economic rights that courts should encourage those that allocate budgetary resources to prioritise the meeting of constitutional obligations in relation to these rights.<sup>52</sup> What this in effect means is that in terms of section 35(2)(e) the state may be compelled to provide expensive medical treatment to prisoners if it fails to satisfactorily prove the non-availability of resources. Therefore this could be interpreted to mean that resource constraints are an internal limitation in respect of section 35(2)(e) similar to the internal limitations in sections 26(2) and 27(2).

However it is argued that section 35(2)(e) rights are not qualified by a progressive realization clause, as is the case for sections 26(2) and 27(2).<sup>53</sup> The only qualification to section 35 (2)(e) is section 36, the general limitation clause that applies to all provisions in the Bill of Rights.<sup>54</sup>

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44 Sachs, [http://www.chr.up.ac.za/centre\\_projects/socio/esrvol1no4htm1#6](http://www.chr.up.ac.za/centre_projects/socio/esrvol1no4htm1#6).

45 See note 44 above.

46 See note 44 above.

47 1997(4) SA 411 (C).

48 Mubangizi 2002: 48.

49 Kollapen, [http://www.chr.up.ac.za/centre\\_projects/socio/esrvol1no4htm1#6](http://www.chr.up.ac.za/centre_projects/socio/esrvol1no4htm1#6).

50 See note 49 above.

51 Yacoob, [http://www.chr.up.ac.za/centre\\_projects/socio/esrvol1no4htm1#6](http://www.chr.up.ac.za/centre_projects/socio/esrvol1no4htm1#6).

52 See note 51 above.

53 Ngwena 2000: 34.

54 Ngwena 2000: 34.

It is also submitted that the standard of adequacy in section 35(2)(e), in terms of international law, should not be informed by resource availability at the first stage of analysis but what are accepted basic standards of medical treatment for prisoners in international and comparative law. The Human Rights Committee emphasized that all persons deprived of their liberty should be treated with humanity and respect for their dignity, since it is a fundamental and universally applicable rule.<sup>55</sup> It further provides that since the application of this rule is a minimum, it cannot be dependent on the material resources available in the state party.<sup>56</sup> In the case of *Mukong v Cameroon*,<sup>57</sup> the African Commission stressed the point that the fulfillment of prisoners' rights to health care, as a minimum requirement in terms of the Standard Minimum Rules for the Treatment of Prisoners, does not depend on the availability of resources. In this case the Commission held that minimum floor space, adequate sanitary facilities, provision of food of nutritional value adequate for health and strength must be observed regardless of a state party's level of development. It further held that these minimum requirements must be observed even if economic or budgetary considerations may make compliance with these obligations difficult. Therefore the court in *Van Biljori's* case (discussed above) should have also considered international minimum standards on prisoners' health care rights as was applied in *Mukong's* case.

While the position is somewhat hazy in so far as the rights to adequate accommodation, nutrition and reading material are concerned, one might be guided by the decision of *Huang and Others v The Head of Grootvlei Prison*<sup>58</sup> in this regard. In this case, the applicants sought an order that they be allowed to receive raw food and prepare such food in accordance with Eastern tradition in the kitchen of Grootvlei Prison. The applicants contended that at the beginning of 1999 they had received a concession that entitled them to receive and prepare their own Eastern food. They argued that this concession was unlawfully taken away on 14 January 2003. This they regarded as a violation of their right to special food in terms of section 35(2)(e) of the constitution. While section 35(2)(e) does not expressly provide for 'special food' it is suggested that the courts decision could very well have been based on the reasoning that adequate nutrition as contemplated in terms of section 35(2)(e) may also be deemed to include special food.

What can be gleaned from an examination of the above-mentioned decisions is that the medical treatment was provided for by the state (*Van Biljori's* case), and the state was also forced to allow prisoners to prepare their special food in the prison kitchen (*Huang's* case). In *Huang's* case the applicant did not expressly allege that their special food should be provided at state expense. However the court did say that they may be allowed to do so in amplified papers. In determining whether to provide that which was sought in terms of section 35(2)(e), regard had to be made to what was 'adequate'. What can be

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55 U.N. Human Rights Committee, General Comment 21, para 4.

56 U.N. Human Rights Committee, General Comment 21, para 4.

57 No. 458/1991 (August 10, 1994), U.N. Doc. CCPR/C/51/D/458/1991.

58 2003 JDR 0658 (O) Case Number 992/2003.

deduced from the above is that what is perceived as adequate would indeed 'vary from situation to situation'.<sup>59</sup>

Apart from the rights of prisoners in terms of section 35(2)(e), there are other constitutional rights that have a bearing on prisoners' rights to health care services. An examination of these rights includes the following:

### 5.1.1 Health care, food, water and social security

In terms of section 27(1) of the constitution everyone has a right to have access to:

- a) health care services, including reproductive health care;
- b) sufficient food and water; and
- c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

It is submitted that the phrase 'everyone' in section 27 above includes prisoners. Prisoners are entitled to enjoy this right in much the same way as people who are not in prison. It is notable that the fulfillment of rights in terms of section 27(2) is subject to the availability of resources. Therefore the section has a built in limitation. In other words, if resources are not available, the state will not be obliged to fulfill this right. However, as has already been alluded to above, states are expected by international law to meet at least the minimal or basic needs as proclaimed for example in the Alma-Ata Declaration.<sup>60</sup> In fulfilling this right (section 27), the obligations imposed by the International Covenant on Economic, Social and Cultural Rights have been interpreted to mean that it rests on the courts to develop principles to ensure that the state promotes and protects prisoners' rights to health care services.<sup>61</sup>

### 5.1.2 Equality

In terms of section 9(1), everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) prohibits unfair discrimination by the state on the basis of race, gender, sex, social origin, pregnancy, marital status, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(4) prohibits unfair discrimination by individuals on the basis of the same grounds listed in section 9(3) above.

It is argued that all prisoners, irrespective of race, gender and sex should be accorded the same treatment as far as the provision of health care services in prisons is concerned. However, a distinction must be made between fair and unfair discrimination. In terms of the law, unfair discrimination is not allowed, but fair discrimination is permitted.<sup>62</sup> In *Van Biljon*,<sup>63</sup> the facts of which have already been discussed above, the court clearly distinguished between a prisoner

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59 Mubangizi 2002: 49.

60 Ngwena 2000: 31.

61 Ngwena 2000: 31.

62 Mubangizi 2002: 60.

63 1997(4) SA 411 457C-F.

and an ordinary citizen with regard to the provision of health care. What emerges from such a differentiation is the fact that the state has more of a responsibility of providing health care to HIV positive prisoners than it has to ordinary persons, outside of prison, suffering from the same infection.

The question that begs a response is whether this amounts to fair discrimination. In *Van Biljon*, the court expressed the view that prisoners were kept in conditions that were more susceptible to opportunistic infections. As a result thereof, the state was under an obligation to provide better treatment for HIV positive persons inside prison than those outside. Further as prisoners, due to the curtailment on their freedom, had limited access to medical treatment when compared to ordinary citizens, such discrimination was regarded as being fair.

### 5.1.3 The right to life

Section 11 of the Constitution provides that everyone has a right to life. In *S v Makwanyane*<sup>64</sup> the court ruled the death penalty to be unconstitutional, contrary to human dignity and inconsistent with the right to life. It has been submitted that the interpretation of section 11 requires the Department of Correctional Services to protect prisoners and ensure that their lives are not endangered either by themselves or other prisoners.<sup>65</sup> It is imperative that prisons provide and maintain quality health care services to prevent the spread of diseases, such as tuberculosis and HIV/AIDS, which might pose a threat to prisoners' lives.

Where a prisoner dies as a result of poor quality health care in prison, it can be argued that on the basis of section 11 one can challenge the states' role in protecting the lives of prisoners as it has an obligation to ensure the protection of all its citizens. It has been provided that in such circumstances the state should be held accountable and even be taken to task for the number of deaths in South African prisons.<sup>66</sup>

The positive obligation imposed by section 11 of the constitution is comparable with article 21 of the Indian Constitution. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Such jurisprudence around the right to life so as to impose positive obligations on the state of basic needs of the people was developed by the Indian Supreme court. In the case of *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and another*<sup>67</sup> the applicant fell off a train and suffered serious head injuries and brain haemorrhage. He was denied treatment at the various government hospitals which were approached even though his condition was very serious at the time. He was in need of immediate medical attention. The court held that the Indian constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state the primary duty of the government is to secure the welfare of the people. Providing adequate medical

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64 1995 (3) SA 391 (CC).

65 Mubangizi 2002: 60.

66 Mubangizi 2002: 61.

67 1996 AIR SC 2426.

facilities for the people is an essential part of the obligations undertaken by the government in a welfare state. It was further held that failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment would result in violation of the person's right to life guaranteed under article 21. While South Africa may not be regarded as a welfare state, the inclusion of section 11 in the Bill of Rights also imposes an obligation on the state to uphold and protect the lives of all persons.

#### 5.1.4 The right to privacy

In terms of section 14 of the Constitution everyone has a right to privacy. This includes the right not to have their homes searched, their possessions seized, or the privacy of their communication infringed. All individuals cherish privacy, and would resist intrusion into their private lives by the state or other individuals.<sup>68</sup> Devenish has provided that the right to privacy is a basic human need, essential for the development and maintenance of a free society and for ensuring a mature and stable personality.<sup>69</sup> It is therefore submitted that violating prisoners' rights to privacy can be deleterious to their mental health and must be challenged under the Constitution.

In the case of *C v Minister of Correctional Services*,<sup>70</sup> the plaintiff was a prisoner in the custody of the defendant. A blood sample was taken from the plaintiff and was later subjected to a test for HIV. The plaintiff was subsequently advised that he had tested positive for HIV. The plaintiff then instituted an action for damages on the grounds of alleged wrongful invasion of his right to privacy. The court held that pre-test counselling was required in that it protected prisoners from experiencing anxiety should the result come back positive. The court awarded damages because of the failure of the prison authorities in providing the prisoner with pre- and post- test counseling. It was provided that failure to provide the necessary counselling resulted directly in the deterioration of the prisoners' health. Pre- and post-test counselling is without a doubt a highly essential element in the promotion and protection of health care in prisons.

#### 5.1.5 The right to human dignity

In terms of section 10, everyone has inherent dignity and the right to have their dignity respected and protected. With regard to prisoners' rights, including their rights to health care services, this provision must be read together with section 35(2)(e) which entitles prisoners to conditions of detention that are consistent with human dignity.<sup>71</sup> The case of *Duplooy v Minister of Correctional Services*<sup>72</sup> serves to illustrate this point. The facts of the case were that the applicant, a terminally ill inmate, suffering from chronic myeloid leukemia was refused release on medical parole by the parole board. The court held that the decision not to

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68 Devenish 1998: 55.

69 Devenish 1998: 55.

70 1996 (4) SA 292.

71 Mubangizi 2001: 131.

72 2004 3 All SA 613.

place the applicant on medical parole was irrational and unreasonable and in total conflict of sections 10, 12(1) (c) and section 35(2) (e) of the constitution. Due to his rapidly deteriorating state of health and the fact that he was dying, compelling him to remain in incarceration and treating him in the prison hospital, was regarded as being too onerous for him. When the values of empathy and compassion are weighed against the applicant's continued imprisonment, this continued incarceration violates his human dignity and security and punishment becomes cruel, inhuman and degrading. The court, basing its judgment on the above reasons, set aside the decision of the parole board, and ordered that the applicant be placed on medical parole. This entitled him to be treated at the Pretoria Academic Hospital, outside of prison, and in the event of being discharged from hospital was to be placed under the care of his wife, at their common home.

The above case is indeed a far cry from the approach adopted to the treatment of terminally ill prisoners in the past. It is also in line with the thinking of Mubangizi that the provision of health care services in prisons must embrace respect and protect prisoners' rights to have their dignity respected and protected.<sup>73</sup>

### 5.1.6 Freedom and security of the person

Section 12(1) provides that everyone has the right to freedom and security of the person, which includes, among others, the right:

- a) not to be deprived of freedom arbitrarily or without just cause;
- b) not to be tortured in any way
- c) not to be treated or punished in a cruel, inhuman or degrading way
- d) to be free from all forms of violence from either public or private sources.

This section is relevant and significant to prisoners' rights to health care services, as it includes among others, the right not to be tortured and not to be treated or punished in a cruel, inhuman or degrading way. The right not to be treated or punished in a cruel, inhuman or degrading manner should be read in conjunction with section 10 which provides protection of human dignity and section 35(2) (e) which provides for the right to conditions of detention which are consistent with human dignity.<sup>74</sup> In *S v Makwanyane*<sup>75</sup> the court drawing on its analysis, held that the death penalty was not constitutional as it was not only in contravention of prisoners' rights to human dignity but that the punishment itself was construed as being cruel, inhuman or degrading and in total violation of prisoners' rights and their well being.

Treatment or punishment is said to be torturous, cruel, inhuman or degrading, if it is disproportionate to the act committed or to the objective of ensuring discipline and ordered community life, or is unreasonable, or unnecessary, or arbitrary, or if it produces undue pain or suffering.<sup>76</sup> In a prison situation, in

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73 Mubangizi 2002: 62.

74 Mubangizi 2002: 62.

75 1995 (3) SA 391 (CC).

76 Dissel, <http://www.csvr.org.za/papers/papad&se.htm>.

terms of this right, prison officials are prohibited from using force on prisoners, except when they are protecting inmates from fellow inmates.<sup>77</sup>

### 5.1.7 Slavery, servitude and forced labour

In terms of section 13 of the Constitution, no one may be subjected to slavery, servitude and to forced labour. This section basically provides that prisoners should be treated with dignity and with respect for their inherent dignity. Any treatment which amounts to slavery or servitude is a complete violation of section 13 of the Constitution. In so far as prisoners' health is concerned, this aspect of 'forced labour' should be read in conjunction with section 40(1) of the *Correctional Services Act*. Section 40(1) of the above Act protects prisoners' health in that it provides that work is only intended to keep prisoners active for a normal working day and is not to be used in an exploitative manner. It is submitted, therefore, that section 40(1) is intended to prohibit intensive labour which has the effect of affecting prisoners' good health.

### 5.1.8 The limitation clause

Prisoners' rights to health care, like other rights in the Bill of Rights, are also subject to the limitation clause. This is based on the position confirmed in *Hofmeyer v Minister of Justice*<sup>78</sup> that prisoners, irrespective of the reason for their detention, retain all their personal rights save those abridged or proscribed by law. In terms of section 36 (1) of the constitution, 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.

It is submitted that prisoners' rights to health care can be limited only after taking into account all of the above factors. In determining to what extent prisoners' rights to health care should be limited, from what is outlined above, it is clear that prisoners' rights to health care services can only be limited if the limitation is reasonable and justifiable in an open and democratic society.

## 5.2 The *Correctional Services Act* (111 of 1998)

The preamble of the *Correctional Services Act* provides that the Act was enacted to give effect to the Bill of Rights, and in particular to the provisions of the Bill

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<sup>77</sup> Mubangizi 2002: 62.

<sup>78</sup> 1993 (3) SA 131 (A) 140-141.



of Rights that are pertinent to prisoners. The provisions of the Act appear to be in keeping with prisoners' rights to health care services, which are guaranteed not only by the constitution but also by international norms on correctional matters.<sup>79</sup> The international principles relevant to correctional matters have been discussed earlier in the article.<sup>80</sup> The *Correctional Services Act* establishes certain mandatory minimum norms applicable to all prisoners that cannot be withheld for any disciplinary or other purpose. It protects prisoners' rights to health care services to the extent that it requires that all people should be detained in safe conditions whilst ensuring their safe custody and promoting the social responsibility and human development of all prisoners.<sup>81</sup>

Chapter three of the Act deals with the custody of all prisoners under conditions of human dignity. Section 4(2) (a) specifically spells out that the Department of Correctional Services must take necessary steps to ensure the safe custody of every prisoner. This chapter appears to mirror the opening section of the constitution, which lists 'human dignity' as one of the pre-eminent values on which the Republic of South Africa is founded.<sup>82</sup> It is also consistent with section 10 of the constitution, which guarantees that everyone is to have their dignity respected and protected.<sup>83</sup> With respect to prisoners, this chapter is consonant with section 35(2) (e) which guarantees prisoners' right to conditions of detention that are consistent with human dignity.<sup>84</sup>

There are several provisions of the Act that protect prisoners' rights to health care services. Section 7(1) which deals with the issue of accommodation articulates that the requirements for detention of prisoners have to meet the conditions of human dignity. It provides that such requirements must include adequate space, cubic capacity, lighting, ventilation, sanitary installations and general conditions which are not harmful to health. To ensure the security and well-being of prisoners, the section further provides that male prisoners are to be kept separately from female prisoners and that children are to be kept separately from other prisoners and that their accommodation must be appropriate to their age.<sup>85</sup>

As far as nutrition is concerned section 8(1) provides that every prisoner must be provided with an adequate diet to promote good health. Section 8(2) provides that such diet must make provision for the nutritional requirements of children, pregnant women and any other category of prisoners whose conditions require a special diet. Section 8(3) is slightly more contentious in light of the recently decided case of *Huang v Head of Grootvlei Prison*. In terms of section 8(3) it is clear that where reasonably practicable, dietary regulations must take into account religious requirements and cultural preferences.

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79 See note 76 above.

80 See subheading 3 above for discussion on international human rights protection of prisoners' rights to health care services.

81 See note 76 above.

82 Mubangizi 2001: 97.

83 Mubangizi 2001: 97.

84 Mubangizi 2001: 97.

85 *Correctional Services Act* 111 of 1998 sections 7(1)(a) and (c).

From the *Huang's* case, the facts of which have already been discussed at length,<sup>86</sup> the applicants' request to be allowed to prepare their own cultural food in accordance with Eastern tradition was upheld as a fundamental right under the constitution. Further, the provision of special food was also found to be 'reasonably practicable' as contemplated in terms of section 8(3) of the Correctional Services Act. It therefore stands to reason, that if the request by the applicant was not 'reasonably practicable,' then the applicants might not have been granted the order that was sought. Section 11 makes provision for exercise whilst in incarceration. The section allows for prisoners to be given the opportunity to exercise sufficiently to remain healthy. In order to determine what is construed as 'sufficiently', it is explicit within the section, that prisoners are entitled to at least one hour of exercise on a daily basis.

In terms of section 12, the Department of Correctional Services must provide, 'within its available resources', adequate health care services, based on the principles of primary health care, in order to allow all prisoners to live healthy lives. This imposes an obligation on the state to provide prisoners with health care services. Recent case law has affirmed the responsibility of the state to HIV infected prisoners.<sup>87</sup> However, not all medical costs have to be borne by the state. In terms of section 12(3), where a prisoner is visited or examined by a medical practitioner of his choice, the prisoner would have to personally bear the costs of such consultation, examination, services or treatment received.

Section 41(3) protects prisoners' psychological and social well-being by providing that the state has a duty to provide social and psychological services in order to develop and support sentenced prisoners by promoting their social functioning and mental health. The Act also imposes a duty on the state to protect the right to health care services of those prisoners who are subject to community corrections.

Section 56(1) provides that if a correctional official has reason to believe that a medical examination is required to determine whether conditions set for the person in question are appropriate in light of his or her health, then such an examination may be conducted. What is obvious from the above section is that the test to decide whether to conduct such an examination is a subjective one.

## 6. Conclusion

The primary objective of incarceration is the rehabilitation and development of prisoners. It has to be conceded that for rehabilitation to be effective, the provision of health care services in prisons requires careful monitoring. Prisoners in South Africa appear to be given the protection required by South African law with regard to health care services. It is noteworthy that not only the constitution has been instrumental in providing prisoners with the mechanism to challenge their predicament, but legislative intervention, by way of the *Correctional Services Act* has also endeavoured to achieve that goal. In addition, the upholding of prisoners' rights to health care services by South African courts, as reflected

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86 See subheading 5.1 above for discussion of the case.

87 Subheading 5.1.2 above for discussion of *Van Biljon v Minister of Correctional Services*.

in the analysis of case law above, has played a significant role in ensuring that prisoners are accorded the necessary protection for quality health care. To determine whether such protection is in fact adequate, seems to vary from situation to situation. What has emerged from an interrogation of the subject is that while the constitution does protect prisoners' rights to health care services, the lack of resources on the part of the state presents the main obstacle to prisoners attempting to access their rights. What this in effect translates to is that while prisoners can avail themselves to the protection afforded in terms of legislation, such protection is clearly not adequate.

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