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Reflecting on Medical Parole in South Africa

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1. Introduction

The release of prisoners on parole is an issue of interest to both scholars and the public. Those who fall in the former category are aware that there are laws, regulations and policies in place that must be adhered to before prisoners may be released on parole. The public's knowledge and awareness of parole is generally restricted to when high profile prisoners are released or when a particular offender is released and the victim or family of the victim are approached by the media for comment on the release. Those of us who are aware that at a particular stage during a sentence of imprisonment a prisoner has an expectation to be considered for parole, start doubting the effectiveness of the criminal justice system when such time comes and a prisoner is not considered for parole. Parole is, however, not only considered when a certain minimum period of a prison sentence has been served, but also when a prisoner's health deteriorates to such an extent that his or her death is imminent. For such situations the Correctional Services Act provides for the humane option of parole on medical grounds. Medical parole has in the past decade become an increasingly contentious issue within the context of the AIDS pandemic and prisoners' access to antiretroviral therapy. This issue of CSPRI Newsletter looks at medical parole and in particular how courts in South Africa have interpreted it. It also provides statistics on prisoners who have been released on medical parole between 1996 and 2006.

2. Medical parole

The '?general rule [is that] an offender cannot expect to escape punishment or seek an adjustment of his term of imprisonment because of ill health.'[1] However, some prisoners have been released on medical parole before they have spent the minimum period required under the relevant laws under which they were sentenced. Under section 79 of the Correctional Services Act,

> any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.'[2]

While commenting on the rationale behind this provision, the Chairperson of the National Council on Correctional Supervision, Judge Siraj Desai, reportedly said that medical parole 'is only available in circumstances where the offender is in the final stages of a terminal illness-the idea being that the offender should be permitted to die a dignified death outside of prison.'[3] This means that prisoners living with chronic ailments who are on medication will ordinarily not qualify for release on medical parole unless it is abundantly clear that such prisoners have no chance of recovering from their ailments and

that their state of health has deteriorated to such an extent that their demise is imminent. In other words, they should be in such a health condition that there is no chance that they would not meet their death.[4]

Section 69 of the 1959 Correctional Services Act[5] which was repealed by the 1998 Correctional Services Act, although the wording in some respects remained the same in respect of medical parole, was interpreted by Judge Van Zyl of the High Court of the Cape of Good Hope Provincial Division in a manner that clearly demarcates the contours of medical parole. In *Stanfield v Minister of Correctional Services and others*[6] Judge Van Zyl ordered the Department of Correctional Services to place on medical parole a prisoner who was suffering from an incurable lung cancer and in respect of whom doctors had certified that he had very few months to live. The judge observed 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. It is equally irrelevant what period of imprisonment he has actually served.'[7]

Thus the only requirement for a person to be considered for release on medical parole is that there is written evidence from the medical practitioner treating that person, who has diagnosed that person as being in the final phase of any terminal disease or condition, so that such a release on parole or correctional supervision will enable such a person to die a consolatory and dignified death. When a court or the National Council on Correctional Services or the Correctional Supervision and Parole Board (CSPB) is petitioned by a prisoner to be considered for placement on parole on any ground including medical parole, such a body should ensure that its decision reflects the 'well established values of justice, fairness, and reasonableness.' Such a decision should also 'accord with the requirements of good faith and public interest.'[8]

One of the arguments that could be put forward by those opposing the placement on parole of prisoners who are patently in the final phase of their terminal illness would be that such a person, if he or she does not die in the shortest time possible after their being placed on parole, might re-offend.[9] However, the courts seem to have cast doubt on that argument by holding 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.'[10] While the Act requires that a prisoner may be considered for medical parole when they are in the final stages of a terminal disease so as to enable such a prisoner to have a consolatory and dignified death, this requirement has to be weighed in the light of the right to human dignity. In other words, the prison authorities should not wait for such a prisoner to be bedridden because, according to the court, '[t]o 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.'[11]

3. Other cases where prisoners have been released on medical parole

In *Mazibuko v Minister of Correctional Services and another*,[12] the applicant, who was serving a life sentence for the offences of murder, assault with intent to do grievous bodily harm, theft and unlawful possession of a firearm and ammunition, applied to be placed on medical parole and the respondent refused to do so. He sought the review of the respondents' decision not to grant him medical parole. The High Court of the Transvaal Provincial Division found that the refusal to release the applicant on medical parole, who was dying of AIDS and whose medical condition was deteriorating daily, as submitted in evidence by his doctor, was 'unjust, unlawful, unreasonable, and procedurally unfair.'[13] The Court ordered his release.

In *Du Plooy v Minister of Correctional Services and others*[14] in which the respondents also refused to release the applicant who was dying of AIDS on medical parole, the High Court of Transvaal held that such a decision was in violation of applicant's rights not to be treated in a cruel and inhumane or degrading manner, his right to access medical care, human dignity, and that it was also irrational and unreasonable.[15]

4. Use of medical parole

Table 1 shows the number of prisoners released on medical parole between 1995 and 2006, indicating that this parole option is in fact used very seldom when compared to the rapid increase in the number of prisoners dying of natural causes in prison. Natural causes include diseases such as Aids. It is apparent that the number of prisoners released on medical parole is not related to the number of deaths due to natural causes and this is evidently a function of how the purposes of medical parole are interpreted and applied by Correctional Supervision and Parole Boards.

Table 1 Number of prisoners who have been released on medical parole since 1996 compared to the number of prisoners who died of natural causes.[16]

Year	Number of prisoners released on the medical parole	Number of natural deaths
1996	49	211
1997	47	327
1998	47	534
1999	59	737
2000	60	1087
2001	51	1169
2002	88	1389
2003	117	1683
2004	76	1689
2005	64	1507
2006	70	Not available

5. Conclusion

The above has shown that under the law it is not a requirement for a person to be released on medical parole that they should not be in a position to re-offend. What is required is that that the person has been diagnosed to be in the final stages of a terminal illness and that they should be released on parole to have a consolatory and dignified death. They do not have to be bedridden or be visibly ill. It has been shown that courts of law are increasingly intervening to grant medical parole to prisoners where the Department of Correctional Services and the CSPBs have been reluctant to do so in manner that is irrational, unreasonable and against the rights of prisoners. Parole is an administrative decision, it must be exercised in a lawful, reasonable, and in a procedurally fair manner, which is in line with section 33 of the Constitution and the relevant provisions of the Promotion of Administrative Justice Act.[17] The statistics of prisoners who have been released on medical parole have also been shown, indicating that the number of releases on medical parole are not correlated with the number of prisoners dying of natural causes.

The Department of Correctional Services, through the Correctional Services Amendment Bill,[18] attempted to add another condition to be fulfilled before a person could be granted medical parole. It proposed that section 79 should be amended to require that in addition to being certified by a medical practitioner to be in the final phase of a terminal disease or condition, the person could not be released on medical parole unless the CSPB, or in case of a person serving a life sentence, the Minister, was satisfied that such a prisoner was not capable of committing crime in the future. As the above discussion has demonstrated, such a requirement would have run contrary to the finding in the Stanfield case and was withdrawn after civil society, including CSPRI, submitted to the Portfolio Committee on Correctional Services that it was bound to be in contravention of prisoners' rights .[19]

6. SA Prisons at a glance

Category	Feb '07	July '07	Incr/Decr %
Functioning prisons	237	239	-0.8
Total prisoners	161674	159961	-1.0
Sentenced prisoners	113213	112440	-0.68
Unsentenced prisoners	48461	47521	-1.9
Male prisoners	158115	156612	-0.9
Female prisoners	3559	3349	-5.9
Children in prison	2077	2144	3.3
Sentenced children	912	875	-4.0
Unsentenced children	1165	1269	8.9
Total capacity of prisons	115327	114644	-0.6
Overcrowding	140.2%	139.53%	-0.67
Most overcrowded			
Umtata Medium	353%	437%	
Least overcrowded			
Flagstaff	15.50%		
Ebongweni Max (Kokstad)		16.4%	
Awaiting trial longer than 3 months	21203	22413	5.7
Infants in prison with mothers	168	149	11.3

Endnotes

**I would like to thank Prof. Julia Sloth-Nielsen and Mr. Lukas Muntingh of Civil Society Prison Reform Initiative for the comments on the earlier drafts of this newsletter*.

[1]Du Plooy v Minister of Correctional Services and others [2004] JOL 12850 (T) paragraph 4.
[2] Emphasis added.
[3] See 'Parole only for terminally ill patients: Desai' sabcnews, 17 April 2007 at <http://www.sabcnews.co.za/south_africa/general/0,2172,147337,00.html > accessed on 20 April 2007. It has been observed that '?the purpose of medical parole is singular, namely to allow the prisoner concerned to die a 'consolatory and dignified death'. The purpose of medical parole is **not** to enable the prisoner to receive treatment, recover and lead a normal life.' See Lukas Muntingh 'Medical Parole: Prisoners' Means to Access Anti-Retroviral Treatment?' (2006) March *AIDS Law Quarterly* 8-10, 10 (Emphasis in the original).
[4] While interpreting section 69 of the 1959 Correctional Services Amendment Act in the light of the proposed section 79 of the present Correctional Services Act, Judge Van Zyl of the High Court of the Cape of Good Hope Provincial observed that '[a]lthough the requirement that the prisoners should be in the "final phase of any terminal disease or condition" features strongly in the proposed amendment, it is not and has never been, a requirement in terms of section 69 of the current Act. This may account for the reference to terminal illness in the standing correctional order "B" and the circular of 21 December 2001?It should be noted further that there are no requirements in section 69 relating to life expectancy, a state of being bedridden or the imminence of death. There is likewise no suggestion that the prisoner should be (physically or otherwise) unable to commit any crime should he be released on parole for medical reasons.' See Stanfield v Minister of Correctional Services and others [2003] 4 All SA 282(C), page 303, paras 85-86.
[5] Section 69 provided that 'A prisoner serving any sentence in a prison: (a) who suffers from a dangerous, infectious or contagious disease; or (b) whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.'
[6] *Stanfield v Minister of Correctional Services and others* [2003] 4 All SA 282(C).
[7] See *Stanfield v Minister of Correctional Services and others* [2003] 4 All SA 282(C), page 302, para. 82.
[8] See *Stanfield v Minister of Correctional Services and others* [2003] 4 All SA 282(C), page 308, para 102.
[9] This is the same stance that was taken by the prosecution, the defence and the court in the case of *S v Mazibuko* [1996] 4 All SA 720 (W). In this case the accused, a youthful and first offender, was found guilty of attempted murder, robbery with aggravating circumstances, and unlawful possession of a firearm and ammunition and sentenced to 10 years imprisonment. However, the accused had been severely injured by gunshots from the police when he fired back at them at the time when he committed the offences and had as a result become a quadriplegic. In recommending that the Department of Correctional

Services should consider putting the accused on medical parole, the court observed that '[b]oth the state and the defence have asked me to recommend to the Commissioner of Correctional Services that an investigation be instituted as soon as possible to ascertain whether the accused is eligible for parole on medical grounds as provided for in section 69 of the Act. I believe that I should accede to such request. This is not the sort of case where the accused, if placed on parole, would be free to roam the streets and commit further crimes. The accused's condition speaks for itself. The accused should create no greater danger to the public than he would if he were kept in a prison. I was informed by Mr van Staden [the then head of Johannesburg Medium B Prison] that appropriate conditions will be placed on the granting of the parole which will serve both the interests of the accused and safeguard the interests of the community.' (At page 726).

[10] *Stanfield v Minister of Correctional Services and others* [2003] 4 All SA 282(C), page 310, para. 110.

[11] *Stanfield v Minister of Correctional Services and others* [2003] 4 All SA 282(C), page 314, para 124.

[12] [2007] JOL 18957 (T).

[13] *Mazibuko v Minister of Correctional Services and another* [2007] JOL 18957 (T) page 11.

[14] [2004] JOL 12850 (T)

[15] *Du Plooy v Minister of Correctional Services and others* [2004] JOL 12850 (T) , para 26.

[16] Office of the Judicial Inspectorate of Prisons, Cape Town, 18 September 2007.

[17] Act No. 3 of 2000.

[18] Correctional Services Amendment Bill (B32-2007).

[19] See Lukas Muntingh, 'Submission by the Civil Society Prison Reform Initiative to the Portfolio Committee on Correctional Services on the Correctional Services Amendment Bill [B32 of 2007]' 27 August 2007, pages 17-18.

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