

HUMAN RIGHTS

Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?

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The prevalence of AIDS in prisons is believed to be higher than in the broader community. While the courts have used their powers to enforce prisoners' rights in terms of the Constitution, specifically their right to medical treatment, the state needs to adopt a holistic approach when providing antiretroviral therapy (ART) for prisoners. Failing to provide support for ART, beyond its mere provision, would offend the values of the Constitution. This support includes comprehensive HIV and AIDS care and prevention, treatment of opportunistic infections, access to nutritional supplements, access to palliative care and compassionate release. Counteracting challenges to the implementation of effective treatment, care and support strategies will require committed endeavours by the Department of Correctional Services.

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The prevalence of AIDS in prisons is believed to be higher than in the broader community.^[1] This is not surprising, as prison is a setting where public health problems in the community are intensified and exist on a greater scale.^[2] South Africa has one of the 'highest incarceration rates in the world' and the highest in Africa,^[3] and its prisoners represent one of the segments of the population most 'severely affected' by the disease.^[4] However, no reliable data exists on the rate of infection in South African prisons, though it is reported to be around 40%.^[5] The same population that is most vulnerable to HIV and AIDS is at a higher risk of being incarcerated, and many of the factors associated with a vulnerability to AIDS, also increase the likelihood of being imprisoned.^[6] In South Africa, the profile of such a vulnerable person is a young, unemployed, uneducated black male from a poor socio-economic background.^[2]

Antiretroviral therapy (ART) has made AIDS a more manageable chronic condition and improves recipients' quality of life.^[7] Access to healthcare not only protects the rights of HIV-positive prisoners, it reduces the cumulative impact of HIV and AIDS on this population and prevents secondary infections from developing.^[8] Research shows that in developed countries that have implemented combinations of antiretroviral (ARV) drugs, mortality rates have decreased amongst incarcerated individuals.^[7] However, there has been a dearth of corresponding studies in developing countries.

In South Africa, HIV and AIDS in prisons have not been adequately addressed as a political and financial imperative.^[9] Prisoners are not excluded from the population of South Africans requiring ART. However, their right to access to treatment, as guaranteed in the South African Constitution^[10] and the Correctional Services Act,^[11] has not been appropriately addressed. Individual cases dealing with prisoners' rights to medical treatment in the context of HIV and AIDS have come before the courts.^[12,13]

International law and policy

It is internationally accepted that prisoners retain all the basic human rights that are not lost as a consequence of incarceration (which are most commonly the rights to freedom of movement and privacy). Prisoners are entitled to the majority of the other rights in the Constitution, including the right to healthcare. Healthcare in prisons is a guaranteed and protected right in international law, and numerous international legal instruments address this specifically.^[14]

The International Bill of Rights

The International Bill of Rights consists of the Universal Declaration on Human Rights (UDHR),^[15] the International Covenant on Civil and Political Rights (ICCPR)^[16] and the International Covenant on Social, Economic and Cultural Rights (ICESCR).^[18]

The UDHR provides that 'Everyone has the right to a standard of living adequate for the health and wellbeing of himself', and this includes 'medical care'.^[15] The ICCPR states that every person has the inherent right to life.^[16] The Human Rights Committee has explained that this right should be interpreted broadly and that governments must adopt positive, proactive measures to protect human life, including measures that can reduce the spread of epidemics.^[17]

The ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.^[18] 'Everyone' includes prisoners. Even though South Africa has not yet ratified the ICESCR, by signing the treaty it indicated its intention to ratify it and incurred an international obligation not to act contrary to the ICESCR's object and spirit.^[19]

Article 16 of the African Charter on Human and Peoples' Rights (Banjul Charter) affirms the right of every individual to the best attainable state of health.^[20] As a signatory to this protocol, South Africa is obliged to take measures to enforce this right.

United Nations rules and principles regarding prisoners

The United Nations (UN) Standard Minimum Rules (Standard Rules)^[21] emphasise that the attainment of the highest possible standard of health is a human right, and should not be restricted because of imprisonment. The UN Principles for the Treatment of Prisoners (Basic Principles)^[22] provide that prisoners must have access to medical and health services equivalent to those available to the general population in their country of incarceration, without discrimination based on their legal standing. This includes preventative measures.^[2]

The World Health Organization (WHO) guidelines affirm that prisoners have the right to receive healthcare which is equivalent to that available in the community.^[23] To provide this, states therefore have an obligation to implement legislation, policies and programmes consistent with international human rights norms.

The right of prisoners to healthcare in South Africa

Before 1994, under apartheid, the law applicable to HIV and AIDS was derived from the common law,^[24] which recognised that prisoners were entitled to a remedy if the circumstances of their detention unnecessarily violated their natural rights.^[25,26]

The effect of the Constitution

The Constitution,^[10] although it does not have explicit provisions regarding HIV and AIDS, guarantees prisoners the right 'to conditions of detention that are consistent with human dignity including ... adequate ... medical treatment'. However, this right is limited in scope, as the state is required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this right. However, the Constitution's right to healthcare clause regarding prisoners does not have this limitation, and appears to be limited in scope only if it is justifiable under the general limitation clause of the Constitution.

The effect of the Correctional Services Act

The Correctional Services Act^[11] enshrines the values in the Bill of Rights, recognises international principles on correctional matters and establishes certain minimum rights applicable to all prisoners and which cannot be withheld for any disciplinary or other purpose. The Act provides that the Department of Correctional Services (DCS) is obliged to provide adequate healthcare services within its available resources.

Why prisoners have stronger constitutional protection

It is often controversial whether or not prisoners should be entitled to the same basic human rights as ordinary law-abiding citizens. Prisoners are not able to access the health services they may need through regular channels because they are incarcerated. Also, the conditions of their incarceration further compromise their health status. This is perhaps why prisoners enjoy stronger constitutional protection than ordinary citizens: their vulnerability puts them at an added disadvantage in terms of access to healthcare and medical treatment, which justifies immediate access to medical treatment provided at state expense.^[25] Furthermore, according to the

Constitution, medical treatment must be provided where indicated 'diligently and without delay'.^[10]

Government response to HIV and AIDS in prisons

The Operational Plan^[27] outlined by the Department of Health in 2003 devoted only one paragraph to correctional services, and did not give prisoners any significant consideration as a vulnerable group. The protracted ARV rollout only gained momentum in 2005.^[28] Government's commitment to the rollout was finally formalised in the HIV and AIDS and STI National Strategic Plan for South Africa 2007 - 2011 (NSP).^[29] The courts have ordered the government to appropriately respond to the issues and challenges expressly referred to in its own policy documents.^[13]

The DCS is a key role player in facilitating prisoners' access to ART and its role cannot be ignored. However, the DCS has been characterised by internal instability and changes in leadership and staffing structures. This, together with government's apparent non-response, has put prisoners at further risk of rights violations.^[30]

The courts' responses

The right to medical treatment for prisoners in South Africa has been the focal point of several judgments handed down by South African courts. The courts have compelled the DCS to prioritise comprehensive treatment and care for prisoners, which is consistent with their right to receive healthcare and medical treatment, in such cases as *Van Biljon v. Minister of Correctional Services*^[12] and *N and Others v. Government of Republic of South Africa and Others*.^[13]

Van Biljon v. Minister of Correctional Services

In *Van Biljon v. Minister of Correctional Services*, four HIV-positive prisoners, who had previously received ART outside of prison, challenged the state to provide them with medication at its own expense, as part of the state's obligation to fulfill the prisoners' right to adequate medical treatment. The court had to decide (i) whether the applicants' medical condition or the advanced nature of their disease entitled them to medical treatment and (ii) whether this treatment should be provided at the state's expense. In emphasising the term 'adequate' in the Constitution, the court observed that medical treatment does not have to be the 'best available' or even 'optimal', but must be equivalent and comparable to the treatment afforded to those outside the prison setting. However, the court went further and found that there was a stronger obligation on the state to provide medical care for particularly vulnerable prisoners, such as those living with HIV and AIDS, than there was to provide healthcare for comparable patients outside of prisons.^[12]

The court's decision was to consider resource limitations under the Constitutional clause relating to prisoners.^[10] This gave rise to criticism because the section does not have a specific limitation clause.^[31] If the right to medical treatment was being limited due to financial constraints, then this could only be done under the general limitation clause of the Constitution.^[10]

N v. Government of Republic of South Africa

N v. Government of Republic of South Africa dealt with the challenges of access to, and provision of, ARVs for prisoners. In this case 15

applicants, incarcerated at Westville Correctional Centre (WCC), and all infected with HIV and AIDS, needed ARVs and brought an urgent application to court. Prisoners had attempted to access ARVs via regular channels but this failed, forcing the prisoners to litigate as a last resort.^[13]

The court accepted that the applicants and respondents had divergent views on the facts of the case, but did not dispute the applicants' claims that their constitutional rights to medical treatment were being violated. The respondents did not recognise that the applicants' actions aimed to speed up the provision of ARV treatment in accordance with South Africa's Operational Plan, and believed that they were seeking to override the NSP and expected the court to prescribe treatment for them. However, the court regarded the applicants' complaints in a very serious light, stating that the case involved questions of life and death. The court referred to numerous precedents dealing with the medical care of prisoners, dating back to the turn of the century, and held that the DCS was obliged to provide, within its resources, adequate healthcare.^[13] However, the WCC failed to implement the court's order issued, and two further applications to court had to be brought before it finally complied.^[12,32]

Academic views on the case law

It has been suggested that, at the bare minimum, prisoners must be afforded a certain level of primary healthcare, while access to secondary or tertiary healthcare should only be provided if the failure to do so would infringe on a prisoner's right to dignity.^[31] It is irrelevant whether the medical treatment is provided within the confines of the prison. However, it is vital that the right to healthcare and medical treatment is not unnecessarily violated. The courts have already decided that an eight-year prison sentence of an HIV-positive prisoner could be converted into a sentence of correctional supervision, to enable the prisoner to access appropriate medical and psychological treatment.^[33]

The above decisions indicate that litigation may be used positively, allowing the courts to affect the way in which prisons operate and to compensate prisoners for the infringements of their rights.^[31] However, while the courts' approach in these isolated cases has been progressive, it does not address the systemic factors impacting on the burden of the disease within prisons.

Challenges for treatment and care of prisoners living with HIV and AIDS

The right to medical care in prisons includes the provision of ART for HIV and AIDS care and prevention, treatment of opportunistic infections, access to nutritional supplements, access to palliative care and compassionate release.^[6] In the South African context, there are many more barriers to effective implementation of treatment, care and support initiatives in prisons, such as a lack of (i) nutritional support, (ii) adherence, (iii) continuity of care, and (iv) confidentiality, leading to stigmatisation. Unless there is a holistic approach to these matters, beyond the mere provision of ARVs, the programme is unlikely to be as effective as it should be.

Nutritional support

A nutritious diet is necessary for ARVs to be effective, but prisoners are not provided with a healthy, balanced diet.^[34] Inflexible mealtimes may be a major barrier to adherence, especially for those ARVs that

require administration with meals and fluids.^[4] The routine of prison meals poses a barrier to adherence as meals are standardised and not tailored to the needs of individual prisoners. At best, prisoners are given nutritional support in the form of extra fruit.^[30] It has been recommended that a healthy diet consists of three regular meals and additional nutritional support through 'fresh fruit and vegetables' and vitamin supplements.^[34] Ideally, prisoners should have their diets customised to cater for their nutritional needs,^[34] but this is impractical in the present prison setting in the short-term.

Adherence

Adherence is one of the key factors in obtaining the full benefit of ARVs and many of the barriers to it are institutional.^[35] While the routine-dominated setting of the prison system makes the administration of ARVs easier, this is a specialised procedure outside the scope of what typical South African prisons are capable of providing.^[2] The failure to take medication timeously is one of the major challenges to proper adherence. It has been reported that it is impossible to serve all of the large numbers of prisoners needing to access the clinic to receive ARVs at the allocated time, which hampers their adherence.^[36] Logistical issues included transporting prisoners to the access points for the medication, as well as security concerns. In addition, the prison setting may make it difficult to monitor adherence patterns. A possible solution is to facilitate the development of onsite ARV clinics at prisons, as was done in Leeuwkop Prison in Sunninghill, Johannesburg during 2011.^[37] These types of wellness clinics serve multiple purposes, serving as a venue for education, counselling and testing and thus extending the therapeutic value of treatment, care and support. Some strategies for improving adherence are outlined in the Operational Plan and can be employed in a prison setting.^[27] These strategies, *inter alia*, empower patients to monitor the side effects of ARVs, and include adherence discussions in support groups and adherence tools such as pillboxes, calendars or timetables for medication uptake.^[27]

Continuity of care

The revolving door system of prisoners entering and leaving prisons can provide a barrier to continuity of care. Treatment may be discontinued for various lengths of time due to prisoners' movement between facilities, court appearances or return to the community.^[27] The high risk of repeat offenders being incarcerated again may further disrupt care.^[27] The Department of Correctional Services Framework for the Implementation of a Comprehensive HIV and AIDS Programme has only one objective that refers to access to ART for ex-prisoners after release.^[38] Prisons need to ensure that links are formed with community-based health programmes and facilities or healthcare systems in other prison facilities, to ensure that prisoners are able to adhere to their treatment and receive adequate care when they are transferred or released.^[27] This, however, requires high levels of coordination and resources and may overburden prison staff, resulting in inefficient referrals or follow-ups that hamper treatment quality. Clear and formal referral systems should be in place to provide a continuum of care when prisoners are discharged.^[27] Contact should be made with community health service providers in advance of prisoners' release.^[39] Similar contact should be made when affected prisoners enter prison, to ensure continuity for those who are already receiving some form of treatment and care in the community.^[6]

Confidentiality and stigmatisation

Prisoners who know their status and have access to ARVs may be discouraged from taking medication for fear of social isolation or abuse. Concealing their medication from fellow prisoners or prison officials is difficult when prisons are overcrowded. The lack of privacy in prisons means that prisoners receiving ARV find it difficult to conceal their status from prison officials or other prisoners.^[39] Officials sometimes ridicule those with HIV and AIDS, which aggravates their stigmatisation.^[39] Prisoners miss their medication because they do not want to stand in line to receive it, and often conceal their HIV status from other prisoners.^[39] One strategy for improving adherence is disclosure of the prisoner's HIV status to family and friends – which is encouraged,^[34] provided that it is done with the prisoner's consent and does not constitute an unlawful invasion of privacy. Other strategies that may help overcome this challenge include access to support groups, exposure to regular education programmes focusing on stigma, and peer counselling, which have been shown to be key ingredients of any effective prison HIV and AIDS policy.^[39]

Conclusion

South African prisoners represent a microcosm of a society with one of the highest HIV and AIDS prevalence rates in the world. Prisoners enjoy strong international and constitutional protection, and those who meet the criteria for admission to an ART programme are entitled to receive the treatment they need, notwithstanding the crimes they have committed. Although ART cannot be considered a panacea for the problem of HIV and AIDS in prisons, its provision is consistent with international trends towards combating the progression of the disease.

While the courts have used their powers to enforce the rights of prisoners in terms of the Constitution, specifically their right to medical treatment, the state needs to adopt a holistic approach when providing ART for prisoners. Prisons should not offend the values of the Constitution by failing to provide support for the treatment for HIV and AIDS in South African prisons – beyond the mere provision of ART. This failure can be overcome by providing comprehensive HIV and AIDS care and prevention, treatment of opportunistic infections, access to nutritional supplements, access to palliative care and compassionate release. This will require committed endeavours by the DCS to counteract existing challenges to the implementation of effective treatment, care and support strategies in South African prisons.

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