

UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW

A critical assessment of the constitutionality of section 79(7) of the Correctional Services Act 111 of 1998, with specific reference to the *proviso*

A mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of Law (LLM)

George Aloysius Permall Pillay
8521239

Supervisor: Professor AJ Hamman

Co-supervisor: Dr C Albertus

November 2019



UNIVERSITY *of the*
WESTERN CAPE

DECLARATION

I declare that '*A critical assessment of the constitutionality of section 79(7) of the Correctional Services Act 111 of 1998, with specific reference to the proviso*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

George Aloysius Permall Pillay

November 2019



UNIVERSITY *of the*
WESTERN CAPE

ACKNOWLEDGEMENTS

I am greatly indebted to my supervisors, Professor AJ Hamman and Dr C Albertus for their guidance, patience and encouragement. Thank you so much. It is, and always will be, greatly appreciated.

Thank you to my parents, to whom I owe so much in life. Words cannot even start to express my deep gratitude.

To my family, and colleagues in the Law Clinic, who were supportive – a huge thank you.



DEDICATION

Dedicated in loving memory of my late mother



UNIVERSITY *of the*
WESTERN CAPE

Key words

community corrections

correctional centre

dignity

equality

improved health

incarceration

inmate

medical condition

medical parole

medical parolee

parole

parole board

physical incapacity

sentence

serious illness

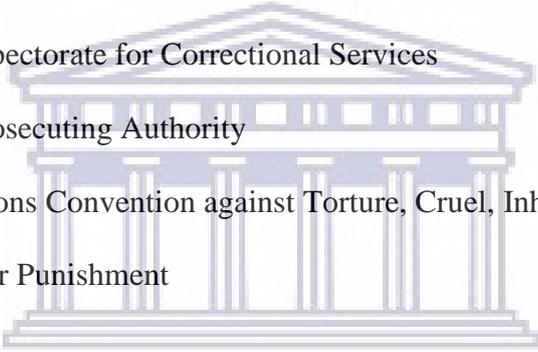
terminal illness



UNIVERSITY *of the*
WESTERN CAPE

Abbreviations and Acronyms

CAS	Crime Administration System
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DCS	Department of Correctional Services
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRPD	International Convention on the Rights of Persons with Disabilities
JICS	Judicial Inspectorate for Correctional Services
NPA	National Prosecuting Authority
UNCAT	United Nations Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment



UNIVERSITY *of the*
WESTERN CAPE

CHAPTER 1

INTRODUCTION AND OVERVIEW OF MEDICAL PAROLE

IN SOUTH AFRICA	1
1.1 Introduction	1
1.2 Definitions of terms	2
1.3 Background to the study	3
1.4 Problem statement	9
1.5 Research objective	11
1.6 Literature review	11
1.7 Research methodology	13
1.8 Chapter outline	13

CHAPTER 2

THE HISTORY AND DEVELOPMENT OF MEDICAL PAROLE

IN SOUTH AFRICA	15
2.1 Introduction	15
2.2 The Legislative History	15
2.2.1 The Prisons and Reformatories Act 13 of 1911	15
2.2.2 The Prisons Act 8 of 1959	16
2.2.3 The Correctional Services Act 8 of 1959	18
2.2.3.1 Decided cases under the 1959 Act	18
2.2.4 The decisions relative to the <i>proviso</i> to section 79(7) of the CSA of 1998	21
2.2.5 Section 79 of the CSA of 1998 prior to 2012 amendment	22
2.3 Recommendations made by the Judicial Inspectorate for Correctional Services (JICS)	24
2.3.1. Reports of the Judicial Inspectorate (1999 – 2005/2006)	25
2.3.2 The 2006/2007 JICS Annual Report	27
2.3.3 The 2007/2008/2009 JICS Annual Reports	29
2.3.4 The 2009/2010/2011/2012 JICS Annual Reports	31
2.3.5 The JICS Annual Reports after the section 79 amendment	33
2.4 The release of Shabir Shaik	35
2.5 The Parliamentary debate	37

2.6 The National Council on Correctional Services' Review	38
2.7 The amended section 79 of the CSA 111 of 1998: the substantive and procedural requirements for medical parole	40
2.8 Chapter conclusion	44

CHAPTER 3

MEDICAL PAROLE: THE INTERNATIONAL AND REGIONAL FRAMEWORK

3.1 Introduction	45
3.2 The International Covenant on Economic, Social and Cultural Rights	45
3.3 The United Nations Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment	46
3.4 The International Covenant on Civil and Political Rights	49
3.5 The International Convention on the Rights of Persons with Disabilities	50
3.6 The International Convention on the Elimination of all Forms of Racial Discrimination	51
3.7 The Convention on the Elimination of all Forms of Discrimination Against Women	52
3.8 The Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)	53
3.9 The African Charter on Human and People's Rights (Banjul Charter)	54
3.10 Chapter conclusion	54

CHAPTER 4

THE PURPOSE OF SENTENCING AND THE OBJECTIVES OF MEDICAL PAROLE

4.1 Introduction	56
4.2 Sentencing and the theories of punishment	57
4.2.1 The Retributive Theory	57
4.2.2 The Preventive Theory	58
4.2.3 The Deterrent Theory	58
4.2.4 The Reformatory Theory	59
4.3 The theories of punishment and medical parole	60

4.4 The factors the court will consider in the determination of a sentence	61
4.5 Parole in general	62
4.6 Parole: right, privilege and administrative action	63
4.7 Parole as a continuation of a sentence	63
4.8 The factors to be considered whether medical parole should be granted	65
4.9 The non-parole period	66
4.10 The role of the Medical Parole Advisory Board and section 79(4)(b) of the Correctional Services Act 111 of 1998	67
4.11 The inmate's right to dignity under the amended legislation	69
4.12 Medical parole and the constitution	71
4.13 The cancellation of medical parole	72
4.14 The constitutionality of the <i>proviso</i> to section 79(7) of the CSA 111 of 1998	74
4.15 Chapter conclusion	78
CHAPTER 5	
MEDICAL PAROLE: A COMPARATIVE VIEW	80
5.1 Introduction	80
5.2 The position in South Africa	80
5.3 The position in Canada	81
5.4 The position in the United States of America	84
5.5 An overview of the jurisdictions	89
5.6 Chapter conclusion	93
CHAPTER 6	
CONCLUSION AND RECOMMENDATIONS	95



CHAPTER 1

INTRODUCTION AND OVERVIEW OF MEDICAL PAROLE IN SOUTH AFRICA

1.1 INTRODUCTION

In recent years the issue of medical parole has become a controversial issue in South Africa. Prior to 2012, at which juncture the law governing the release of inmates on grounds of terminal illness was amended, there were cases where the public deemed the law inadequate and susceptible to political interference.¹ There can therefore be little doubt that an amendment to the law was opportune to ensure that the release of inmates was based on legitimate medical reasons.

Generally if an inmate suffers from an illness or is incapacitated to the extent that his quality of life is significantly limited and his position is in such a stage of deterioration, surely he should be released on medical parole. The problem however occurs when such a person's health improves after his release because the law does not require his return to detention. In other words, when the medical grounds for his release cease to exist, the law does not ask for the revocation of medical parole.

This thesis deals with the succinct issue of whether a legislative provision which prohibits the return of a medical parolee to a correctional centre because of an improvement in his medical condition is constitutionally sound or not. This prohibition may possibly be perceived as a violation of the equality clause in the Bill of Rights in that it affords a privilege or benefit to one class of inmates, and not to another.

1 Weiner M available at <https://ewn.co.za/2015/02/24/OPINION-Mandy-Wiener-Schabir-Shaik-must-go-back-to-jail> (accessed 26 May 2019).

For the purposes of this study certain terms in this field will be defined. Thereafter the background will be provided.

1.2 DEFINITIONS OF TERMS

Certain terms that are used throughout this thesis are herein defined. The term, ‘medical parole’, is not specifically defined in Chapter 1 (Definitions) of the Correctional Services Act (CSA)². The term, ‘parole’, however is defined in the Act: it means a form of community corrections as contemplated in Chapter VI (Community Corrections).³ Community corrections are defined in the Act as ‘all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department’.⁴ The Department means the Department of Correctional Services (DCS).⁵

The term ‘correctional centre’ has replaced the term ‘prison’.⁶

An ‘inmate’ is defined as any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody or is *en route* from one correctional centre or remand detention facility to another correctional centre or remand detention facility.⁷ The term ‘inmate’ has replaced the term ‘prisoner’.⁸

A ‘sentenced offender’ is defined as a convicted person sentenced to incarceration or correctional supervision.⁹

2 Correctional Services Act 111 of 1998 (CSA).

3 Chapter 1 of the CSA.

4 Chapter 1 of the CSA.

5 Chapter 1 of the CSA.

6 General note of the CSA.

7 Chapter 1 of the CSA.

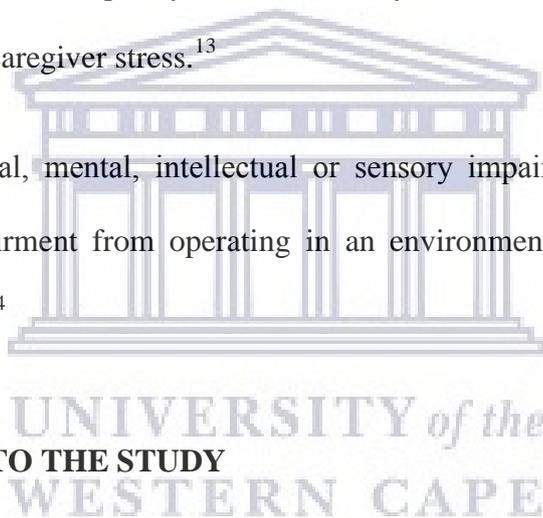
8 General note of the CSA.

9 Chapter 1 of the CSA.

The term ‘parolee’ is not specifically defined in the CSA; it may therefore be accepted that the ordinary dictionary meaning of the word finds application, being a person released on parole. In a similar vein, the person released on medical parole is a ‘medical parolee’.

A ‘terminal illness’ is defined as an illness or injury that will inevitably result in the death of the patient.¹⁰ It is also defined as a disease or condition which cannot be cured and is likely to lead to someone’s death.¹¹ A further definition is that it is an irreversible life threatening or life limiting illness for which there is no cure and will result in an inevitable decline in function until death.¹² A ‘serious illness’ is defined as a condition that carries a high risk of mortality, negatively impacts the quality of life and daily function, and/or is burdensome in symptoms, treatments, or caregiver stress.¹³

A ‘disability’ is a physical, mental, intellectual or sensory impairment which prevents a person having such impairment from operating in an environment developed for persons without such impairment.¹⁴



1.3 BACKGROUND TO THE STUDY

Medical parole in South Africa is currently governed by section 79 of the CSA.¹⁵ This section was amended in 2012 by section 14 of the Correctional Matters Amendment Act 5 of 2011.¹⁶ Prior to the amendment in 2012, section 79 of the CSA provided that 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

10 Mc Quoid-Mason D & Dada M A – *Z of Medical Law* (2011) 414.

11 ‘What does terminal illness mean?’ available at <https://www.mariecurie.org.uk/who/terminal-illness-definition> (accessed 04 June 2019).

12 <https://www.up.ac.za/media/shared/62/Palliative%20Care%20Resources/final-npfspc-august-2017> (accessed 04 June 2019).

13 ‘Serious illness’ available at <https://pallipedia.org/serious-illness> (accessed 04 June 2019).

14 Chapter 1 of the CSA.

15 Act 111 of 1998 assented to 19 November 1998; date of commencement 31 July 2004.

The history of the section on medical parole will be discussed in detail in chapter two.

16 The amended provision came into operation on 01 March 2012.

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.¹⁷

An inmate could thus only be considered eligible for medical parole where he was diagnosed with being in the final phase of a terminal disease or condition, and the purpose of the release on medical parole was to afford the inmate the opportunity to die a ‘consolatory and dignified death’.¹⁸

The legislation was amended to address critical weaknesses in the previous legislation.¹⁹ Previously section 79 of the CSA failed to make provision for inmates who were seriously ill or physically incapacitated to be considered for medical parole.²⁰ Thus, seriously ill or physically incapacitated inmates would remain incarcerated in a correctional centre, notwithstanding the fact that the DCS had neither the financial nor the human resources to care for such inmates.²¹ It will be argued that the recommendations made by the Judicial Inspectorate for Correctional Services to the parliamentary committee on justice and correctional services were instrumental in persuading the Legislature to amend section 79 of the CSA.

Secondly, since an inmate could be considered eligible for medical parole upon the written submission of a medical doctor’s diagnosis, medical doctors were hesitant to make a recommendation that the inmate be released because the recommendation could be subject to

17 Section 79 of the CSA, prior to the amendment.

18 Section 79 of the CSA, prior to the amendment.

19 Albertus C ‘Protecting inmates’ dignity and the public’s safety: A critical analysis of the new law on medical parole in South Africa’ (2012) 16 *Law, Democracy & Development* 186.

20 Albertus (2012) 186.

21 Minister on Correctional Matters Amendment Bill [B41-2010], Enhanced Parole System & Remand Detention%20%20PMG.htm2. (accessed 02 November 2018).

scrutiny, especially considering that 60% of inmates did not die soon after their release on medical parole.²²

Moreover, the DCS was previously taken to court in instances where inmates who were in fact seriously ill, were not released on medical parole.²³ A few of these cases, most notably *Stanfield v Minister of Correctional Services and others*²⁴, preceded section 79 of the Correctional Services Act 111 of 1998, and successfully challenged its predecessor, section 69 of the Correctional Services Act 8 of 1959. The courts were critical of the legislation and ordered the DCS to release such inmates.²⁵ It should be noted that these inmates were considered seriously ill, and not necessarily terminally ill. Furthermore, inmates who were physically incapacitated to the extent that they were incapable of taking care of themselves, were also excluded from consideration for placement on medical parole.

It was, however, the release of Shabir Shaik in March 2009, after having served only twenty eight months of a fifteen year sentence, on medical parole that catapulted the issue of medical parole into the arena of public discourse and opinion.²⁶ Shaik was diagnosed as terminally ill, and was released by the DCS on medical parole. He had, it would appear, miraculously recovered from his terminal illness; alternatively he was from the outset, never terminally ill.²⁷

22 Minister on Correctional Matters Amendment Bill [B41-2010], Enhanced Parole System & Remand Detention%20%20 PMG.htm2. (accessed 02 November 2018).

23 *Stanfield v Minister of Correctional Services and others* [2003] JOL 11651 (C). *Du Plooy v Minister of Correctional Services and others* [2004] 3 All SA 613 (T) and *Mazibuko v Minister of Correctional Services and others* [2007] JOL 18957 (T).

24 [2003] JOL 11651 (C).

25 *Stanfield v Minister of Correctional Services and others* [2003] JOL 11651 (C). *Du Plooy v Minister of Correctional Services and others* [2004] 3 All SA 613 (T). *Mazibuko v Minister of Correctional Services and others* [2007] JOL 18957 (T).

26 Mujuzi J 'Releasing terminally ill prisoners on medical parole in South Africa' (2009) 2 *South African Journal on Bioethics and Law* 60.

27 Mujuzi (2009) 61.

There were media reports that Shaik was seen in public with no indication in his conduct that he was suffering from a debilitating condition and that his demise was imminent.²⁸ The reports even became the subject of debate in the National Assembly in August 2009.²⁹ It had thus become very apparent that the release of Shaik on medical parole caused damage to the public perception in the credibility of the medical parole system.³⁰

On the other hand, the Parole Board's refusal to release Clive Derby-Lewis, a right wing politician, on medical parole was questioned in the media.³¹ The perceived inconsistency in the Parole Board's decisions to release or refusal to release certain high profiled inmates with political affiliations was a profoundly politicized issue that elicited attention at the highest level of government.

The argument has been advanced that in view of these weaknesses, the DCS considered it necessary to amend the medical parole system to, *inter alia*, introduce detailed criteria to determine eligibility and to ensure consistency in the application of the criteria. The amendment was also intended to instill respect for the dignity of seriously ill inmates, and further to ensure that the financial and human resources expended on the care of seriously ill inmates are curtailed.³²

It will however be argued that it was not the DCS that sought an amendment to the medical parole system, but the Judicial Inspectorate for Correctional Services (JICS). It will be strongly contended that the Judicial Inspectorate was instrumental in drawing attention to the

28 Hansard%20%20 Questions to the Deputy President of RS%20 Kgalema Motlante%20%20 PMG.htm9,10. (accessed 5 April 2019).

29 Hansard%20%20 Questions to the Deputy President of RS%20 Kgalema Motlante%20%20 PMG.htm9,10. (accessed 5 April 2019).

30 National Council for Correctional Services briefing, Judicial Inspectorate Annual Report 2008_09%20%20 PMG.htm.2. (accessed 5 April 2019).

31 Rabkin F 'Medical parole system in spotlight.' available at <http://www.bdlive.co.za/national/law/2015/02/02/medical-parole-system-in-spotlight> (accessed 1 July 2016).

32 Media Briefings%20%20 PMG.htm5.(accessed 5 April 2019).

plight of seriously ill and physically incapacitated inmates who, notwithstanding their perilous conditions and dire circumstances, were denied medical parole. It is submitted that the DCS did not of its own accord seek to effect amendments to the medical parole system, but was rather placed under compulsion to do so by the Legislature.

With regard to the DCS's imperative to ensure that the dignity of seriously ill inmates is respected, it is instructive to note that the purpose of the correctional system, as contained in section 2 of the CSA, must ensure, *inter alia*, that the human dignity of inmates is maintained and that the safety of society is not compromised.³³

The salient provisions in the amended section 79 of the CSA 111 of 1998 read as follows

79. Medical parole – (1) Any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if- such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care; the risk of re-offending is low; and there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.

(7) A decision to cancel medical parole must be dealt with in terms of section 75(2) and (3): Provided that no placement on medical parole may be cancelled merely on account of the improved medical condition of an offender.

In terms of the amendment to section 79 of the CSA, the application for release on medical parole may be brought by a medical practitioner, or the inmate himself, or a person acting on behalf of the inmate.³⁴ This specific provision has now afforded persons who would otherwise not have been in a position to bring the application to do so.³⁵ The application must be supported by way of a written medical report recommending placement on medical

33 Section 2 of the CSA.

34 Section 79(2)(a) of the CSA.

35 Albertus (2012) 86.

parole.³⁶ Should the application not be supported by a written medical report, the application shall not be considered.³⁷

The written medical report must include, *inter alia*, a diagnosis and a prognosis of the terminal illness or physical incapacity of the inmate; an indication as to whether the physical incapacity is of such a nature and extent that it limits the inmate's daily activity and ability to take care of himself; and must advance reasons as to why medical parole should be considered.³⁸

A Medical Parole Advisory Board shall provide an independent medical report in addition to the one referred to earlier.³⁹ In order to determine whether there is a likelihood that the inmate, once released on parole, will re-offend, the National Commissioner, Correctional Supervision and Parole Board or the Minister may take into account a series of factors, including, *inter alia*, whether the presiding officer had knowledge of the inmate's medical condition at the time of sentencing, remarks made in sentencing by the presiding officer, the type of offence, the duration of the sentence yet to be served, and the inmate's criminal record.⁴⁰

The amended section 79 of the CSA establishes three criteria that must be met in order for an inmate to be considered eligible for parole.⁴¹ The criteria are the following: (1) he must be suffering from a terminal disease or condition, or he is physically incapacitated as a result of an injury, disease or illness that severely limits his daily activity or ability to care for himself; (2) the risk of committing a new offence is low; and (3) there are arrangements for his care

36 Section 79(2)(b) of the CSA.
37 Section 79(2)(b) of the CSA.
38 Section 79(2)(c) of the CSA.
39 Section 79(3)(a) of the CSA.
40 Section 79(5) of the CSA.
41 Section 79(1) of the CSA.

and treatment in the community to which he is released.⁴² Should these three criteria be met, the inmate may be considered eligible for placement on medical parole.⁴³

The decision to cancel medical parole is governed by section 79(7) of the Act.⁴⁴ Section 79(7) states that the decision to cancel medical parole must be dealt with in terms of section 75(2) and (3) of the Act.⁴⁵ Section 75(2) and (3) details the procedure that must be followed by the DCS where cancellation of parole is sought by the National Commissioner.⁴⁶ Medical parole can however not be cancelled where the condition of the inmate improves in that the *proviso* to section 79(7) of the Act specifically excludes the cancellation of medical parole where the condition of the parolee has improved.⁴⁷ Medical parole can however be cancelled should the remaining two conditions be breached. In other words, should the parolee re-offend whilst on medical parole, or should the arrangements for his care and treatment outside the correctional centre be removed or deteriorate, his medical parole can be cancelled. The salient issue for consideration is therefore whether the amendment to section 79, more specifically the *proviso* to section 79(7), is constitutionally sound.

1.4 PROBLEM STATEMENT

Medical parole may be cancelled where the parolee has reoffended or where the conditions of his care have been removed or have deteriorated, but not if his medical condition has improved.⁴⁸ The Legislature does not define what constitutes an improvement. This specific clause which precludes the cancellation of medical parole where the condition of the parolee has improved subsequent to his release is of particular interest. It means that should the

42 Section 79(1) of the CSA.

43 Section 79(1) of the CSA.

44 Section 79(7) of the CSA.

45 Section 79(7), read with section 75(2) and (3) of the CSA.

46 Section 75(2)(a) of the CSA.

47 Section 79(7) of the CSA.

48 Albertus (2012) 195.

medical condition of a parolee improve after his release (and provided he complies with the remaining two conditions of his parole), he cannot be returned to a correctional centre. The expectation quite naturally, pursuant to the release of a terminally ill inmate, is that the offender's terminal illness will persist, or alternatively that he will die soon after his release.⁴⁹

The amended section 79 has been extended to include seriously ill and physically incapacitated inmates, and therefore the expectation of an imminent death in the case of these inmates is removed. It has been argued that under the old section 79 that should the offender recover from his illness, he should be returned to the correctional centre in order to serve the remainder of his sentence.⁵⁰ This argument is motivated by the controversy surrounding the release of Shabir Shaik on medical parole.⁵¹ The weakness in the old section 79 was that it did not provide for a parolee who made a miraculous recovery to be returned to a correctional centre.

Shaik was convicted in June 2005 on one count of fraud and two counts of corruption, and sentenced to 15 years imprisonment.⁵² He was released on medical parole ostensibly because he was suffering from a terminal illness, having served only 28 months of his sentence.⁵³ It has been argued that his release was 'a matter of political convenience' in view of his influence and links to the then state president and the ruling party.⁵⁴ Whether the release of Shaik a mere few weeks prior to the enactment of the amendment to section 79(7) of the CSA was fortuitous or coincidental is open to speculation.⁵⁵ The Shaik case undoubtedly however had the effect of raising public awareness of the implications of the amendment to section

49 Mujuzi (2009) 60.

50 Mujuzi (2009) 60.

51 Mujuzi (2009) 60.

52 Wolf L 'Pre-and post-trial equality in criminal justice in the context of the separation of powers (2011) 14 *Potchefstroom Electronic Law Journal* 99.

53 Wolf (2011) 102.

54 Wolf (2011) 102.

55 Wolf (2011) 110.

79(7).⁵⁶ This thesis will investigate whether medical parole must be cancelled should the medical condition or health of the parolee improve significantly after his release. It will require an interrogation of the meaning of ‘improved health’.

1.5 RESEARCH OBJECTIVE

The objective of the research is to determine whether section 79(7) of the CSA, and more specifically its *proviso* will pass constitutional muster. In other words, if the inmate’s condition improves by virtue of his ability to afford superior health care outside a correctional centre, he is arguably placed at a distinct advantage relative to other inmates who may not have access to resources. The variance in the respective means of inmates may conflict with the constitutional right to equality.

1.6 LITERATURE REVIEW

A cursory examination of the writings of the principal authors on the subject of medical parole is herein undertaken. The works of van Wyk, Albertus, Mujuzi and Wolf shall be considered. In view of the *proviso* to section 79(7) of the CSA Van Wyk poses the question whether the release of an inmate whose medical condition has improved is ‘reasonable’ relative to other inmates who remain imprisoned.⁵⁷ She further asks whether the release is in the best interest of the public.⁵⁸ Van Wyk makes the assertion that the section is a ‘very

56 Hlongwane S ‘New medical parole board, new rules â?? Correctional Services moves to avoid another Shaik “brouhaha”.’ available at <http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/#.V3z6oNR95kh> (accessed 27 June 2016).

Bateman C ‘Tighter medical parole – no more Shaik, rattle and roll’ (2012) 102 *South African Medical Journal* 210.

57 Van Wyk K The Legal Framework Regulating Medical Parole: A Comparative Study (LLM thesis), University of Pretoria (2014) 2.

58 Van Wyk (2014) 2.

unusual clause' in that Shaik was released on medical parole and made a miraculous recovery, whilst a lesser known convict who had a terminal illness was denied medical parole and died in a correctional centre.⁵⁹ The submission is made that medical parole was used to the benefit of inmates who had political links.⁶⁰ A critical consideration of van Wyk's argument and submissions is undertaken in the comparative study made later.

Albertus argues that the clause may '*appear to be peculiar*' because medical parole is justified notwithstanding the fact that the condition upon which it was initially granted, namely the terminal illness or physical incapacity, had dissipated.⁶¹ Albertus affords further consideration to the issue of medical parole within the broader context of an inmate's inherent and constitutional right to dignity and the right to health.⁶²

Mujuzi discusses the case law that had a bearing on the jurisprudence related to medical parole, as well as the contentious issues surrounding medical parole.⁶³ Wolf's article is comprehensive and intensely critical in its discussion on the notions of equality, particularly in the Shaik matter.⁶⁴ It is an expansive study that speaks of the separation of powers and its impact on decisions in respect of medical parole.⁶⁵

Although there are writings on parole in general⁶⁶, there still exists a discernable dearth of academic literature on specifically medical parole. This dearth is in all probability attributed to a lack of interest in a topic that impacts upon a miniscule number of persons. Moreover, these persons to whom reference is made are persons who have committed serious crimes and

59 Van Wyk (2014) 16.

60 Van Wyk (2014) 17.

61 Albertus (2012) 195.

62 Albertus C The right to health care of terminally ill inmates in South Africa (LLD thesis) University of the Western Cape (2018) 191 – 209.

63 Mujuzi J (2009) 59.

64 Wolf (2011) 99 - 104.

65 Wolf (2011) 112 - 134.

66 Louw F The parole process from a South African perspective (MA thesis) University of South Africa (2008). Moses J *Parole in South Africa* (2012). Mujuzi J 'Unpacking the law and practice relating to parole in South Africa' (2011) 14 *Potchefstroom Electronic Law Journal*.

hence were removed from society. In other words, the topic speaks only to an acutely small sector of society that is already marginalized. Notwithstanding the paucity in the literature, the significance of this study is borne out in the sentiments expressed by Fyodor Dostoyevsky and finely encapsulated with these words: “A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals”. This study is therefore not solely confined to a consideration of a solitary aspect of the criminal justice system, being medical parole, but reflects on a much broader and holistic view of society’s relations with its own members which it had - through its judiciary - relegated to correctional centres.

1.7 RESEARCH METHODOLOGY

The principal method deployed is a desktop study. The primary source material is legislation, court judgments, policy documents, reports, circulars, and government notices. The secondary source material will be books, chapters in books, journal articles and dissertations.

1.8 CHAPTER OUTLINE

Chapter 1 introduces the area of research, and the significance of the research. It further outlines the legislative framework of medical parole prior to the amendment to section 79 of the CSA, and the current position in our law.

Chapter 2 gives consideration to the history and development of medical parole in South Africa. It will also provide a deeper discussion of the content of section 79 of the CSA prior to its amendment; the circumstances that prompted the amendment; and the present content of section 79, post amendment. The chapter will further consider the procedural and substantive requirements to be placed on medical parole.

Chapter 3 considers whether the international and regional conventions, covenants and instruments can offer any guidance to the central issue of whether a medical parolee should be returned to a correctional centre when his medical condition has improved.

Chapter 4 discusses medical parole within the context of the theories of punishment. The chapter further considers *inter alia*, parole in general; the factors that must be considered whether medical parole must be granted; the role of the Medical Parole Advisory Board, as well as the constitutionality of the *proviso* to section 79(7) of the CSA.

Chapter 5 is a comparative study and considers the position in South Africa, Canada and the United States of America. In South African law a medical parolee cannot be returned to a correctional centre should his medical condition improve, whereas by way of example, in the state of Louisiana in the United States of America an inmate is denied medical parole for certain offences and in respect of others his medical parole may be revoked should his medical condition improve.⁶⁷

Chapter 6 concludes the research, and offers recommendations.

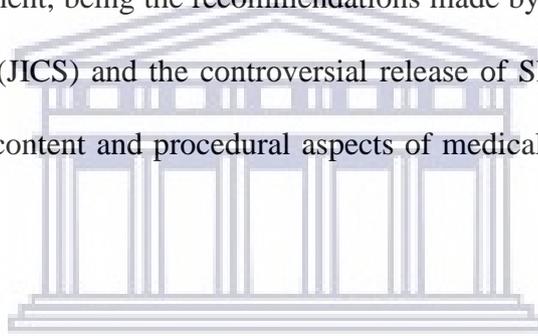
67 2014 Louisiana Laws Revised Statutes TITLE 15 – Criminal Procedure RS 15:574.20 – Medical parole program; eligibility; revocation available at <http://law.justia.com/codes/louisiana/2014/code-revisedstatutes/title-15/rs-15-574.20> (accessed 16 July 2016).

CHAPTER 2

THE HISTORY AND DEVELOPMENT OF MEDICAL PAROLE IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter discusses the history and development of medical parole in South Africa. It will consider the relevant provisions in the Prisons Act 8 of 1959, the Correctional Services Act 8 of 1959 and the cases decided under this Act, the Correctional Services Act 111 of 1998 prior to its amendment, and post its amendment. Most importantly, it considers the circumstances that motivated the amendment, being the recommendations made by the Judicial Inspectorate for Correctional Services (JICS) and the controversial release of Shabir Shaik. The chapter considers the substantive content and procedural aspects of medical parole embedded in the amendment.



2.2 THE LEGISLATIVE HISTORY

2.2.1 THE PRISONS AND REFORMATORIES ACT 13 OF 1911

With the establishment of the Union of South Africa on 31 May 1910, there was a need for uniform prison legislation.¹ This led to the introduction of the Prisons and Reformatories Act 13 of 1911.² This Act did not specifically provide for medical parole; it was amended from time to time and was ultimately replaced by the Prisons Act 8 of 1959. The omission of any provision to accommodate the plight of those who were terminally or seriously ill may be regarded as an indication of the lack of consideration for the well-being of inmates. Inmates were detained in appalling circumstances since time immemorial. It ought therefore to have been foreseeable that the health of inmates may at times be compromised and that serious

1 Singh S 'The historical development of prisons in South Africa: A penological perspective' (2005)55 *New Contree*.
2 Singh (2005) 21.

illness may ensure yet it may be argued that law-makers were not concerned with the plight and dignity of inmates.

2.2.2 THE PRISONS ACT 8 OF 1959

Section 71 of this Act bore the heading, 'release on medical grounds'.³

The contents of this provision read as follows

'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.'⁴

In terms of this provision, an inmate had to meet one of two criteria in order to be released on medical parole. He had to suffer from a dangerous, infectious or contagious disease, or alternatively, in view of his physical condition it was expedient to place him on medical parole. The criterion of expediency is not defined. It was therefore open to interpretation whether the criterion was intended to benefit the DCS or the inmate. If the benefit fell to the DCS it was relieved of the burden - in terms of both financial and human resources - of taking care of a physically incapacitated inmate.

Conversely, if the benefit fell to the inmate then there would be the expectation that the community into which the inmate would be released is capable of taking care of him. A third possibility is that the benefit favours both the DCS as well as the inmate, possibly but not necessarily in equal proportions. In any event, the criterion that the physical condition of the inmate is a factor to be considered in the determination of an inmate's eligibility for medical

3 Section 71 of the Prisons Act 8 of 1959.

4 Section 71 of the Prisons Act 8 of 1959.

parole is later replicated in greater detail in the amended section 79 of the Correctional Services Act 111 of 1998.⁵ There is however no *proviso* to the effect that should there be an improvement in the condition of the inmate, he would then be compelled to return to the correctional centre.

The inclusion in the legislation of a woman in a state of advanced pregnancy is of particular interest. It is not an unreasonable or misplaced assumption that the number of such instances would be exceptionally low, but notwithstanding its rarity the Legislature saw fit to include the pregnant woman in the Act. The inclusion raises two important considerations. In the first place it presupposes that a correctional centre may not have the capacity to care for a woman preceding and pursuant to childbirth, and that she would be better cared for at a facility outside the correctional centre. Secondly, it follows that she would at some stage after delivery be returned to the centre. A search for empirical data in this regard yielded no results, but barring the absence, the construction of this provision clearly demonstrates that after childbirth, there is no ostensible reason why the parolee cannot be returned to the correctional centre. It is important to note that it is however only an assumption that the return would naturally follow childbirth. The Prisons Act was later renamed the Correctional Services Act 8 of 1959.

5 The amended section 79 of the CSA 111 of 1998 provides ‘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.’

2.2.3 THE CORRECTIONAL SERVICES ACT 8 OF 1959

Section 69 of the Correctional Services Act 8 of 1959 bore the heading ‘placement on parole on medical grounds’. The contents of this section were identical to the contents of section 71 of the Prisons Act 8 of 1959.

2.2.3.1 DECIDED CASES UNDER THE 1959 ACT

The cases of *Stanfield v Minister of Correctional Services and others*⁶; *Du Plooy v Minister of Correctional Services and others*⁷; and *Mazibuko v Minister of Correctional Services and others*⁸ were decided under the Correctional Services Act 8 of 1959. In these cases the Court ordered the release of each of the applicants on medical parole where their applications to the Commissioner or the Parole Board had failed precisely because their condition was not deemed to be terminal by the Commissioner or the Parole Board. Each case shall briefly be discussed in turn, and the significance of the judgments shall be considered relative to the *proviso* to section 79(7) of the Correctional Services Act 111 of 1998.

In *Stanfield v Minister of Correctional Services and others*⁹ the applicant, a 48 year old man convicted of fraud, was sentenced to six years’ direct imprisonment.¹⁰ He was diagnosed with lung cancer that was both inoperable and incurable,¹¹ and suffered from an advanced coronary disease.¹² In his prognosis, the doctor treating the applicant stated that the average survival rate, with treatment, was six to eight months.¹³ The applicant brought an application

6 [2003] JOL 116519 (C).
7 [2004] JOL 12850 [T].
8 [2007] JOL 18957 [T].
9 [2003] JOL 11651 (C).
10 *Stanfield* p.2 para.4.
11 *Stanfield* p.2 para.5.
12 *Stanfield* p.4 para.7.
13 *Stanfield* p.4,5 para.6.

in the Cape High Court seeking a review of the Parole Board's refusal to place him on medical parole.¹⁴

The Court criticized the Parole Board on four grounds. First, the Court held that by limiting its understanding of the applicant's condition to only his outward appearance, the Parole Board had elected to either ignore or downplay the diagnosis that the applicant was suffering from an inoperable and incurable disease that would cause his death within a very short space of time.¹⁵ Secondly, the Court held that the Parole Board refused to acknowledge the inadequacy of the medical facilities at the correctional centre in which the applicant was incarcerated, and that this inadequacy extended to all correctional centres under the jurisdiction of the DCS.¹⁶

Thirdly, the Court disputed the Parole Board's averment that the applicant would still be in a position to commit a crime or crimes.¹⁷ The Court opined that 'it is extremely unlikely that the applicant's thoughts, urges and desires are directed at anything but being reunited with his family during the last few months of his life.'¹⁸ Finally, the Court faulted the Parole Board's suggestion that the release of the applicant on medical parole will impact adversely on the penal system and on the expectations of other inmates suffering from terminal diseases.¹⁹ The Court held that the facts and circumstances of each applicant must be assessed individually.²⁰

14 *Stanfield* p.2 para.2.

15 *Stanfield* p.54 para.124.

16 *Stanfield* p.54 para.125.

17 *Stanfield* p.55 para.126 .

18 *Stanfield* p.55 para.126.

19 *Stanfield* p.55 para.127.

20 *Stanfield* p.55 para.127.

In *du Plooy v Minister of Correctional Services and others*²¹ the applicant sought the review of the respondents' refusal to release him on medical parole. The applicant was serving a fifteen years sentence.²² The applicant was suffering from incurable leukemia, and the medical specialists had advised the Parole Board that his life expectancy would not exceed three months. They recommended that he be placed on medical parole.²³ The specialists further contended that the applicant was afforded neither pain control nor care in the correctional centre.²⁴

The applicant was refused placement on medical parole because the Parole Board stated that he did not meet the requisite criteria, but failed to state what the criteria were.²⁵ The Court held that the Parole Board's refusal to place the applicant on medical parole was 'irrational and unreasonable',²⁶ and further in violation of his constitutional right to be treated under conditions of detention consistent with human dignity.²⁷

In *Mazibuko v Minister of Correctional Services and others*,²⁸ the applicant sought the review of the respondents' refusal to release him on medical parole. The applicant was serving a life sentence.²⁹ He was diagnosed as being HIV positive; he further averred that he was infected with tuberculosis and suffered from diarrhea.³⁰ At the time that the application was launched, the applicant suffered severe pain and disabilities, was confined to a wheel-chair, and was unable to attend to his own ablutions.³¹ He alleged that he did not receive proper medical

21 *Du Plooy v Minister of Correctional Services and others* [2004] 3 All SA 613 (T).

22 *Du Plooy* p.615 para.6.

23 *Du Plooy* p.616 para.9.

24 *Du Plooy* p.616 para.10.

25 *Du Plooy* p.618 para.19.

26 *Du Plooy* p.621 para.26.

27 *Du Plooy* p.621 para.26.

28 *Mazibuko v Minister of Correctional Services and others* [2007] JOL 18957 (T).

29 *Mazibuko* p.1.

30 *Mazibuko* p.2.

31 *Mazibuko* p.2.

care.³² The Court held that his continued incarceration was a denial of his right to dignity and ordered his release.³³

2.2.4 THE DECISIONS RELATIVE TO THE *PROVISO* TO SECTION 79(7) OF THE CSA OF 1998

In view of the *Stanfield*, *du Plooy* and *Mazibuko* judgments it is evident that the courts, in arriving at the decision to order the release of terminally ill inmates, were primarily guided by precedent and constitutional principles, in particular the right to dignity.³⁴ It is submitted that the cases are a clear demonstration of the court's recognition that the right to dignity must be afforded to all inmates who are terminally ill. The cases however are silent on the issue of whether an inmate who has shown improvement in his medical condition be returned to the correctional centre. This may be due to the fact that the issue of return after release was not formally raised. However, the potential recovery of an inmate was arguably always an unspoken consideration which prevented release in the first place.

The further significance of these cases is that each illustrates that the Courts directed an unconditional release. The release was therefore not linked to the fulfillment of a condition, or the occurrence of a contingency or an event. The implicit expectation, however, was that the parolee would succumb to his illness. It is arguable that the unconditional release established by the courts in these judgments foreshadowed the *proviso* to section 79(7) of the Correctional Services Act 111 of 1998 in that the *proviso* specifically states that should the condition of the parolee improve, he shall not be compelled to return to the correctional centre.

32 *Mazibuko* p.2.

33 *Mazibuko* p.2.

34 Albertus (2012) 186.

Moreover, the cases may also be interpreted as a reflection of a softer or more lenient approach on the part of the judiciary in its consideration of medical parole. Under the repealed section 79 it was difficult for inmates to be released on medical parole, and with the introduction of the amended section 79 it would appear that it is easier to be released on medical parole, and more importantly to remain on the outside even if there is an improvement in the parolee's health.

In proposing a review of medical parole, the then Minister of Correctional Services, Nosiviwe Mapisa-Nqakula, stated that on at least three occasions the DCS had been taken to court because it had failed to place terminally ill inmates on medical parole.³⁵ It is therefore not improbable that the Minister's reference to three occasions is an oblique reference to the *Stanfield*, *du Plooy* and *Mazibuko* cases.

2.2.5 SECTION 79 OF THE CSA OF 1998 PRIOR TO 2012 AMENDMENT

Medical parole in South Africa is currently regulated by section 79 of the Correctional Services Act 111 of 1998. Section 79 was amended by section 14 of the Correctional Matters Amendment Act 5 of 2011. The amendment came into operation on 01 March 2012. It has extended the circumstances under which placement on medical parole may be considered and made, and has further expanded the provisions relating to the procedures that must be followed in order for an inmate to be placed on medical parole.³⁶ Prior to its amendment, Section 79 of the Correctional Services Act 111 of 1998 bore the heading 'Correctional supervision or parole on medical grounds' and read as follows

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

35 Reviewing medical parole: brief notes on the proposed amendment of section 79 of the CSA.

36 Rabkin F 'Medical parole system in spotlight.' available at <http://www.bdlive.co.za/national/law/2015/02/02/medical-parole-system-in-spotlight> (accessed 1 July 2016).

considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board³⁷ or the court, as the case may be, to die a consolatory and dignified death.³⁸

In other words, prior to the amendment of section 79, the following criteria had to be met in order for an inmate to be released on medical parole: (1) the inmate had to be diagnosed with being in the final phase of a terminal illness or condition; (2) the diagnosis and medical report had to be made by the medical practitioner who had treated the inmate; and (3) the Commissioner, the Correctional Supervision and Parole Board or the court had to make the decision to release.

The purpose of the release on medical parole was to afford an inmate the opportunity ‘to die a consolatory and dignified death’.³⁹ It was understood that the reasoning underlying the release would make it possible for a terminally ill person to die a dignified death outside a correctional centre.⁴⁰ This has been interpreted to mean that the medical condition of the inmate has deteriorated to such an extent that there is no possibility of a recovery and that death is imminent.⁴¹ The amendment to section 79 was primarily motivated by the recommendations made by the JICS and the controversy highlighted in the media surrounding the release of former president Jacob Zuma’s financial advisor, Shabir Shaik, on medical parole.⁴² Each of these circumstances shall be considered in turn.

37 The appointment and composition of the Correctional Supervision and Parole Board is contained in section 74 of the CSA. The powers, functions and duties of the Correctional Supervision and Parole Board is contained in section 75 of the CSA.

38 Section 79 of the CSA, prior to its amendment.

39 Section 79 of the CSA, prior to the amendment.

40 Mujuzi (2009) 59.

41 Mujuzi (2009) 59.

42 Albertus (2012) 186.

2.3 RECOMMENDATIONS MADE BY THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES (JICS)

The amendment to section 79 of the Correctional Services Act 111 of 1998 was primarily motivated by the concern expressed by the JICS that the number of inmates released on medical parole was very low, relative to the number of deaths in the correctional centres.⁴³

It is not improbable that one of the fundamental difficulties that the DSC had experienced in considering whether or not to release an inmate on medical parole, was the inherent risk that the release may occasion because if there was an improvement in the parolee's medical condition there was no legislative provision that would sanction the return to the correctional centre. Albertus notes 'that attempts to find information to indicate whether some inmates who had died due to natural causes actually qualified for medical parole failed as such information does not exist in the public domain.'⁴⁴ Even after the amendment to section 79, the number of inmates released on medical parole remained very low.⁴⁵

In order to fully appreciate the context and import of the recommendations made by the JICS, consideration shall be afforded to the establishment of the Inspectorate, its role and its statutory reports. The reports reflect the origin and incremental development of the Inspectorate's interest in medical parole. The JICS was established in terms of section 85 of the CSA⁴⁶ and became operational on 01 June 1998.⁴⁷ It is an independent office under the control of the Inspecting Judge.⁴⁸ The Inspecting Judge is either a judge in active service seconded from the Supreme Court of Appeal or the High Court⁴⁹, or a judge who has been

43 Albertus (2012) 186.

44 Albertus (2012) 186.

45 JICS Annual Report 2013 - 2014, 41.

46 Section 85 of the CSA.

47 JICS Annual Report 1999.

48 Section 85(1) of the CSA.

49 Section 86(1)(a) read with section 86(2) of the CSA.

discharged from active service.⁵⁰ The role of the JICS is to facilitate the inspection of correctional centres in order for the Inspecting Judge to report on the conditions in correctional centres, and to report on the treatment of inmates in correctional centres.⁵¹ The report is an annual one, and it is submitted to the President and the Minister of Correctional Services.⁵² The report must further be tabled in Parliament by the Minister of Correctional Services.⁵³ The first annual report was submitted in the year 1999.⁵⁴

2.3.1 REPORTS OF THE JUDICIAL INSPECTORATE (1999 – 2005 / 2006)

The first annual report⁵⁵ of the Judicial Inspectorate spoke largely of a nascent Inspectorate, the ambit of its legislative mandate, its budget, and its potential logistical challenges for the period 01 June 1998 to 01 February 2000. Subsequent reports became progressively more comprehensive: they were structured and detailed containing insightful commentary, statistical data, graphic representations, constructive criticisms and recommendations. The format across the reports was not always consistent which made the tracking over time of certain parameters and variables, more specifically with reference to medical parole, difficult. This difficulty provided a particular challenge to this study and it is in this context that an assessment of the Judicial Inspectorate's findings ought to be viewed.

As noted previously, the number of inmates released on medical parole was very low compared to the number of deaths in correctional centres.⁵⁶ The Head of a Correctional Centre is under a statutory obligation to report all deaths in his correctional centre to the

50 Section 86(1)(b) of the CSA.
51 Section 86(2) of the CSA.
52 Section 90(4)(a) of the CSA.
53 Section 90(4)(b) of the CSA.
54 JICS Annual Report 1999.
55 JICS Annual Report 1999.
56 Albertus (2012) 186.

Inspecting Judge.⁵⁷ The judge may conduct an enquiry into the death; alternatively, he may instruct the National Commissioner to conduct such an enquiry.⁵⁸ The DCS draws a distinction between ‘natural deaths’ and ‘unnatural deaths’.⁵⁹

The CSA however, fails to define the distinction. According to the DCS, a natural death occurs when an inmate dies of an illness, including diseases such as AIDS (acquired immunodeficiency syndrome), while an unnatural death occurs when an inmate dies as a result of suicide, assault, accident or a similar event.⁶⁰ Should an inmate die of natural causes, an inquest will follow in order to ascertain the cause of death⁶¹; however, should an inmate die of unnatural causes no inquest will follow.⁶² The number of natural deaths over a period of one decade (1996 – 2005), relative to the number of inmates released on medical parole, the medical parolees, is illustrated in the table that follows.⁶³

Year	Natural deaths	Medical parolees
1996	211	49
1997	327	47
1998	534	47
1999	737	59
2000	1087	60
2001	1169	51
2002	1389	88
2003	1683	117
2004	1689	76
2005	1507	64

57 Section 15(2) of the CSA.

58 Section 15(2) of the CSA.

59 JICS Annual Report 2008 - 2009, 24.

60 JICS Annual Report 2005 - 2006, 34.

61 JICS Annual Report 2008 - 2009, 24.

62 Section 15(1) of the CSA.

63 JICS Annual Report 2005 - 2006, 35.

This data may be represented differently: the number of inmates who were placed on medical parole is expressed as a percentage of the number of natural deaths added to the number of medical parolees. The total number of natural deaths and medical parolees is classed as ‘the qualifiers’. This representation is made in the table below.

Year	Natural deaths and medical parolees (qualifiers)	Medical parolees	Percentage medical parolees of qualifiers
1996	260	49	19%
1997	374	47	13%
1998	581	47	8%
1999	796	59	7%
2000	1147	60	5%
2001	1220	51	4%
2002	1477	88	6%
2003	1800	117	7%
2004	1765	76	4%
2005	1571	64	4%

In other words, the number of inmates who were placed on medical parole is only a fraction of the total number of inmates who would have qualified for placement on medical parole. A point of interest is that the percentage of medical parolees had steadily declined over the years, from 19 per cent in the year 1996 to four per cent in the year 2005. In 2004, the JICS urged the DCS to make greater use of section 79 of the Correctional Services Act 111 of 1998 to allow for the release of terminally ill inmates.⁶⁴ It went so far as to state that ‘court applications should not be necessary’.⁶⁵

It is submitted that notwithstanding the directive of the JICS, the DCS was confronted with the difficulty of releasing inmates on medical parole and who would subsequently recover,

64 JICS Annual Report 2003 - 2004, 17.

65 JICS Annual Report 2003 - 2004, 17.

but could not be returned to a correctional centre because there existed no legislative provision to compel their return.

2.3.2 THE 2006 / 2007 JICS ANNUAL REPORT

In its 2006 / 2007 (01 April 2006 – 31 March 2007) Annual Report, the Judicial Inspectorate re-iterated its concern that the number of deaths in the correctional centres was high, and in an attempt to determine the reasons, it made an analysis of the variable, ‘time spent in prison before the death occurred’.⁶⁶ This variable is integral to making a determination whether inmates are dying from diseases contracted inside a correctional centre, or whether inmates are dying from diseases they had contracted before they were admitted to the correctional centre.⁶⁷ Should it be that the DCS contributed to the poor health, terminal illness and death of inmates, it could be even more unconscionable not to have a provision which deals holistically with medical parole and all its consequences.

The findings of the study revealed that 37 per cent of deaths occurred within the first 12 months following admission, 52 per cent within the first 24 months, and 62 per cent within the first 36 months.⁶⁸ In other words, the majority of deaths occurred within the space of a few months following admission.⁶⁹ The Judicial Inspectorate interpreted these findings to mean that the majority of inmates who died in correctional centres were already ill at the time of their admission.⁷⁰ Should this interpretation be accepted, it raises legitimate concerns regarding the quality of the medical examinations preceding admissions, as well as the quality of the medical care and treatment following admissions.⁷¹

66 JICS Annual Report 2006 - 2007, 44.
67 JICS Annual Report 2006 - 2007, 44.
68 JICS Annual Report 2006 - 2007, 44.
69 JICS Annual Report 2006 - 2007, 44.
70 JICS Annual Report 2006 - 2007, 44.
71 JICS Annual Report 2006 - 2007, 44.

The Judicial Inspectorate noted that the number of inmates released on medical parole in the year 2005 was only 64, and in the year 2006 only 70.⁷² The report notes, by way of example, that in the year 2006 the Judicial Inspectorate received 1 253 reports of deaths, whilst on the management information system operated by the DCS a total of 1 315 deaths were reported. This implies that the reporting of the DCS is not always accurate, but there is no sanction that the Judicial Inspectorate can impose upon the DCS.

2.3.3 THE 2007 / 2008 / 2009 JICS ANNUAL REPORTS

In its 2007 / 2008 (01 April 2007 – 31 March 2008) Annual Report, the Judicial Inspectorate made the recommendation that section 79 of the Correctional Services Act 111 of 1998 be subject to review.⁷³ The proposed review sought to determine whether, *inter alia*, the legislative threshold ‘final phases of any terminal disease or illness’ is appropriate for the release of an inmate on medical parole; whether the administrative rules were unwieldy and the cause for delays in the release of inmates on medical parole; and whether the manner in which the Correctional Supervision and Parole Board applied section 79 impacted upon the number of inmates released on medical parole.⁷⁴ The Inspectorate made no mention of the number of inmates released on medical parole for the year 2007, nor did it furnish a reason for the absence.

In its 2008 / 2009 (01 April 2008 – 31 March 2009) Annual Report, the Judicial Inspectorate afforded the issue of medical parole considerable attention.⁷⁵ The Report refers to a case study drawn from a sample of 269 inmate deaths reported in early 2009.⁷⁶ It further states that

72 JICS Annual Report 2006 - 2007, 43.

73 JICS Annual Report 2007 - 2008, 27.

74 JICS Annual Report 2007 - 2008, 27, 28.

75 JICS Annual Report 2008 - 2009, 24, 25.

76 JICS Annual Report 2008 - 2009, 24.

it would appear that 230 of the 269 inmates (representing 86% of the total number of inmate deaths) received medical treatment prior to their death.⁷⁷

Based upon the above mentioned finding, the Judicial Inspectorate made the assumption that the DCS had knowledge of the seriousness of their medical condition and the deterioration in their health.⁷⁸ Moreover, in 2008 only 54 inmates were released on medical parole – this represents only 5.5 per cent of the 987 reported deaths.⁷⁹ The Judicial Inspectorate emphasised the point that the DCS is the custodian of all inmates, and therefore has a duty of care toward the inmates.⁸⁰ This duty of care is constitutionally entrenched in the Bill of Rights.⁸¹

Moreover, the Correctional Services Act 111 of 1998 places a statutory obligation upon the DCS to fulfill the imperatives of the correctional system.⁸² Section 2(b) of the Correctional Services Act 111 of 1998 expressly states that ‘the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by detaining all inmates in safe custody whilst ensuring their human dignity’.⁸³

The Judicial Inspectorate noted that it had previously,

[R]aised the question whether the stringent prerequisites contained in such grounds, namely ‘the final phase of any terminal disease or condition’ should not be reconsidered. Apart from the difficulty of determining when a person is in the final phase of a terminal disease or condition, the continued detention of a seriously ill or debilitated inmate may constitute a clear breach of his or her constitutionally protected right to human dignity.⁸⁴

77 JICS Annual Report 2008 - 2009, 24, 25.

78 JICS Annual Report 2008 - 2009, 24,25.

79 JICS Annual Report 2008 - 2009, 25.

80 JICS Annual Report 2008 - 2009, 24.

81 Section 35(2)(e) of the Constitution.

82 Section 3(2)(a) of the CSA.

83 Section 2(b) of the CSA.

84 JICS Annual Report 2008 - 2009, 25.

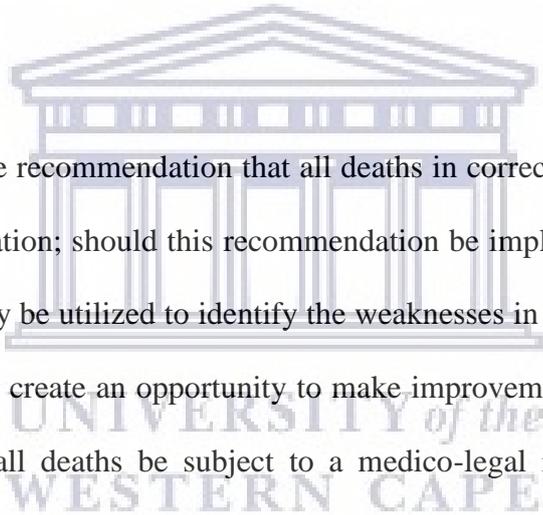
In its analysis of death reports, the Judicial Inspectorate had concluded that the heads of the correctional centres had classified deaths caused by heart attacks, cancer, tuberculosis and strokes as natural deaths.⁸⁵ As such, a natural death is not subject to an independent inquest. However, it is possible that the death may be a direct consequence of either the action or inaction of a correctional officer.⁸⁶ The example is made of an inmate who suffers from a chronic heart disease, but because he is not given his medication by the correctional officer, dies.⁸⁷ In this instance, the death is classified as natural, whereas it should be classified as unnatural and therefore subject to an independent inquest.⁸⁸ The Inspectorate noted that the number of inmates released on medical parole in the year 2008 was only 54.⁸⁹

2.3.4 THE 2009 / 2010 / 2011 / 2012 JICS ANNUAL REPORTS

In its 2009 / 2010 (01 April 2009 – 31 March 2010) Annual Report, the Judicial Inspectorate re-iterated its concern that the distinction drawn by the DCS between natural deaths and unnatural deaths is a misleading construct.⁹⁰ In respect of certain deaths that are classified as unnatural, some ought to be classified as natural. In other words, if the classification is modified, it means that the number of natural deaths would be substantively higher, and therefore, as a natural corollary, it would increase the number of inmates who were potentially eligible for medical parole. It further means that the percentage of inmates eligible for medical parole will be markedly high when compared to the total number of deaths in correctional centres, the occurrence of which could possibly have been avoided.

85 JICS Annual Report 2008 - 2009, 24.
86 JICS Annual Report 2008 - 2009, 24.
87 JICS Annual Report 2008 - 2009, 24.
88 JICS Annual Report 2008 - 2009, 24.
89 JICS Annual Report 2008 - 2009, 25.
90 JICS Annual Report 2009 - 2010, 26.

The point is made by the Judicial Inspectorate that upon admission to a correctional centre, an inmate is subject to a medical examination.⁹¹ However, the findings of the Judicial Inspectorate are that many awaiting trial detainees are not examined upon their admission to the correctional centre, ostensibly because there is a shortage of personnel.⁹² It is submitted by the Judicial Inspectorate that this failure on the part of the DCS creates a risk of the spread of contagious diseases, most notably AIDS and tuberculosis, especially because the correctional centres are overcrowded and their conditions are not always hygienic.⁹³ The Judicial Inspectorate has noted that the medical officers who complete the forms required to certify a death do not always include details regarding the pre-existing medical condition of an inmate.⁹⁴



The Inspectorate makes the recommendation that all deaths in correctional centres be subject to a medico-legal investigation; should this recommendation be implemented, it will provide the DCS with data that may be utilized to identify the weaknesses in the health care provided to inmates and will further create an opportunity to make improvements in the health care.⁹⁵ As noted earlier, should all deaths be subject to a medico-legal investigation, there is a stronger likelihood that a more accurate determination of trends relating to the causation of custodial deaths can be made; and the criteria of assessing the eligibility of inmates to be placed on medical parole can be more clearly defined by way of reference to an inmate's medical history. The Judicial Inspectorate's Annual Report 2010 / 2011 (01 April 2010 – 31 March 2011) did not canvass the issue of medical parole; it merely noted that the main cause of death in a few correctional centres was tuberculosis.⁹⁶

91 Section 6(5)(b) of the CSA.

92 JICS Annual Report 2009 - 2010, 27.

93 JICS Annual Report 2009 - 2010, 27.

94 JICS Annual Report 2009 - 2010, 26.

95 JICS Annual Report 2009 - 2010, 26.

96 JICS Annual Report 2010 - 2011, 25.

The Judicial Inspectorate's Annual Report 2011 / 2012 (01 April 2011 – 31 March 2012), in sharp contrast to its preceding report, specifically addressed the issue of medical parole.⁹⁷ The entry reads as follows: 'Some 19% of Heads of correctional centres said there were requests for medical parole in the last twelve months. Of those inmates who were the subject of requests, for 26 per cent parole had already been refused, and five per cent died before a decision was made'.⁹⁸ The entry is not particularly helpful for the following reasons: (1) the percentage of correctional centres that had responded is very low at 19 per cent; data from the overwhelming majority of correctional centres, being the balance at 81 per cent, is therefore lacking; and (2) and there is no indication what the real numbers are, the requests are only expressed in the form of a percentage.

2.3.5 THE JICS REPORTS ANNUAL AFTER THE SECTION 79 AMENDMENT

On 01 March 2012, the amendment to section 79 of the Correctional Services Act 111 of 1998 came into operation. Whilst the Judicial Inspectorate has no binding powers to effect change, it is submitted that it was instrumental in bringing attention to the weaknesses in the legislation and the policies of the DCS in respect of medical parole.

Subsequent reports of the Judicial Inspectorate are briefly considered below, but these reports did not influence the amendment to the legislation. They are of interest because they demonstrate that the issue of medical parole enjoyed currency for a limited period of time only; the interest was not consistently sustained by the Judicial Inspectorate.

97 JICS Annual Report 2011 - 2012, 47.

98 JICS Annual Report 2011 - 2012, 47.

The Judicial Inspectorate's Annual Report 2012 / 2013 (01 April 2012 – 31 March 2013) is silent on the issue of medical parole.⁹⁹ In its Annual Report 2013 / 2014 (01 April 2013 – 31 March 2014) the Judicial Inspectorate noted that the DCS had in May 2014 recorded that nationally only 20 inmates were released on medical parole.¹⁰⁰ The Inspectorate further noted that the medical personnel were in many cases not even aware of the amendments to section 79¹⁰¹, and further commented that because the number of inmates released on medical parole is low, a more concerted effort was required by both the Inspectorate and the DCS to 'ensure that the administrative processes are fluid and efficient'.¹⁰² The Inspectorate undertook to give priority to the issue of medical parole in the 2014 / 2015 (01 April 2014 – 31 March 2015) period.¹⁰³ Notwithstanding its undertaking, it is evident from the succeeding reports recorded below, that the Judicial Inspectorate failed to prioritize the issue of medical parole.

In its Annual Report 2014 / 2015 (01 April 2014 – 31 March 2015) the Judicial Inspectorate recorded that 32 applications for medical parole were made; there is however no indication how many applications were granted.¹⁰⁴ The following year, in its Annual Report 2015 / 2016 (01 April 2015 – 31 March 2016) the Judicial Inspectorate recorded that 14 applications for medical parole were made; and yet again there is no indication how many applications were granted.¹⁰⁵ It is submitted that after the amendments to the legislation and in view of its reports, the Judicial Inspectorate did not afford the issue of medical parole further attention.

99 JICS Annual Report 2012 - 2013.
100 JICS Annual Report 2013 - 2014, 41.
101 JICS Annual Report 2013 - 2014, 41.
102 JICS Annual Report 2013 - 2014, 41.
103 JICS Annual Report 2013 - 2014, 41.
104 JICS Annual Report 2014 - 2015, 92.
105 JICS Annual Report 2015 - 2016, 74.

2.4 THE RELEASE OF SHABIR SHAIK

The second circumstance that motivated an amendment to section 79 of the Correctional Services Act 111 of 1998 was the controversy surrounding the release of Shabir Shaik on medical parole. The release of Shaik attracted widespread criticism and condemnation.¹⁰⁶ It was widely speculated that political influence was exerted in the decision to release Shaik on medical parole by virtue of his close links to the ruling party, the African National Congress (ANC), and in particular to the former president of the ANC, Jacob Zuma.¹⁰⁷ Moreover, the release of Shaik stood in sharp contrast to the refusal of the DCS to release Clive Derby-Lewis, a right wing politician convicted of and serving a life sentence for the murder of Chris Hani, leader of the Communist Party.¹⁰⁸

Shaik was convicted in June 2005 on one count of fraud and on two counts of corruption.¹⁰⁹ He was sentenced to 15 years imprisonment, but only served 28 months of his sentence before he was released on medical parole on 03 March 2009.¹¹⁰ It is submitted that the high profile nature of his trial, sentence, and subsequent incarceration attracted widespread attention and that such attention had remained sustained for a considerable period of time.¹¹¹

The medical practitioners who treated Shaik diagnosed him to be suffering from a terminal illness.¹¹² Initially there were allegations of professional misconduct leveled against the medical practitioners to the effect that they had deliberately constructed a report that misrepresented Shaik's condition, more specifically that the report stated that he was

106 Mujuzi (2009) 59.

107 Bateman (2012) 210.

108 Rabkin (2015) 3.

109 Bateman (2012) 212.

110 Bateman (2015) 3.

111 Rabkin (2015) 3.

112 Wolf (2011) 102.

terminally ill. The medical practitioners were however subsequently found not guilty of professional misconduct by the Health Professional Council.¹¹³

Wolf, however, has made a few interesting observations with respect to the role that the Health Professional Council had played in the Shaik saga.¹¹⁴ These observations call into question the reasons why the Health Professional Council even saw fit to pronounce on Shaik's application and release on medical parole.¹¹⁵ Wolf notes that the Health Professional Council's inquiry into the professional misconduct of the medical specialists is not a statutory requirement in the process of ascertaining whether an inmate qualifies for medical parole or not, but nonetheless the Council considered it proper to declare that Shaik had qualified for medical parole.¹¹⁶

It is submitted that this observation is the clearest indication that, although the Health Professional Council found no misconduct on the part of its medical practitioners, it nonetheless sought to exonerate itself from any perception of impropriety or complicity in sanctioning the release of Shaik on medical parole. It is of interest to note that the Council did not, in view of the *proviso* to the amended section 79(7), pronounce on whether the improvement in Shaik's condition ought to warrant the establishment of grounds to compel his return to a correctional centre.

113 Mkhize, B 'Full statement after probe into Shaik doctors' available at <https://www.iol.co.za/news/south-africa/full-statement-after-probe-into-shaik-doctors-440474> (accessed 05 June 2019).

114 Wolf (2011) 103.

115 Wolf (2012) 103.

116 Wolf (2011) 103.

2.5 THE PARLIAMENTARY DEBATE

The significance of the controversy surrounding the release was of such magnitude that it was the subject of debate in the National Assembly. An extract of the proceedings in the National Assembly on 18 August 2009 is of particular interest. It is a recordal of a question posed by Patricia de Lille of the opposition party, the Democratic Alliance, to the Minister of Correctional Services, Nosiviwe Mapisa-Nqakula.

It reads as follows

Ms P De Lille: Deputy Speaker, Hon Minister, if some miracle happened and Mr Shaik recovered, and he is not dying and he is fit again ... [Laughter.] You know, a miracle could be drinking French wine, eating curry and a miracle happens and he recovers. If he recovers, will he be sent back to jail, because he certainly didn't die? I think the Minister must explain this. I don't know what the law says. I don't know if the law says that if you recover and there is a miracle that you must be sent back to jail. What is the legal position? Thank you. [Applause.]

The Minister of Correctional Services: I also don't know, but what I would propose is that the portfolio committee needs to amend the Correctional Services Act in order to make sure that if a person does not die at time when we all anticipated that the person would die, that then there should be action taken by sending the person back to prison. It is not I who can take that kind of decision; it is the portfolio committee, if it so wishes, which can propose an amendment to the Correctional Services Act.¹¹⁷

Further in the debate, the Minister states that she had already referred the matter to Judge Siraj Desai and the Parole Review Board in order to 'develop a policy around medical parole'. She further states that it is the responsibility of the portfolio committee to monitor and make recommendations to Judge Siraj Desai 'to make sure the whole area of medical parole is properly defined'.¹¹⁸

117 Hansard%20%20 Questions to the Deputy President of RS%20 Kgalema Motlante%20%20 PMG.htm.

118 Hansard%20%20 Questions to the Deputy President of RS%20 Kgalema Motlante%20%20 PMG.htm.

This particular extract of proceedings in the National Assembly clearly crystallizes the contentious nature of the issue regarding the release of an inmate on medical parole and whose condition had improved subsequent to his release. The law at that point in time was silent on this issue. It fell to the Legislature to bring certainty by way of an amendment to section 79 of the Correctional Services Act 111 of 1998. The review to which the Minister had made reference shall now be discussed.

2.6 THE NATIONAL COUNCIL ON CORRECTIONAL SERVICES' REVIEW

As noted previously, the then Minister of Correctional Services, Nosiviwe Mapisa-Nqakula, directed the National Council on Correctional Services to review the policy on medical parole.¹¹⁹ The functions and duties of the National Council are prescribed in section 84 of the Correctional Services Act.¹²⁰ The primary function of the National Council is to advise the Minister in the development of policy regarding the correctional system.¹²¹ The Minister must, in turn, refer draft legislation and major proposed policy developments to the National Council for comment and advice.¹²² In 2009 the review was undertaken by the National Council on Correctional Services under the chairmanship of Judge Siraj Desai. The review was finalised in January 2010. The review was specifically directed at addressing the following weaknesses:

1. The criterion that an inmate had to be in the 'final phase of a terminal disease or condition' in order to be considered for placement on medical parole was regarded as limiting in that it excluded inmates who were seriously ill or physically incapacitated

119 Department of Correctional Services Annual Report 2009/2010, 14.

120 Section 84 of the CSA.

121 Section 84(1) of the CSA.

122 Section 84(2) of the CSA.

from consideration for placement even under circumstances where the DCS had neither the human nor the financial resources to care for such inmates.¹²³

2. The reluctance of medical practitioners to recommend the release of inmates on medical parole because they experienced difficulty in certifying an inmate to be in the final phase of a terminal illness, and because their recommendations were subjected to criticism in the media, especially in instances where inmates who were placed on medical parole did not die soon after their release. This failure to release inmates on medical parole has contributed to an increase in the number of natural deaths in the correctional centres.¹²⁴
3. The DCS was previously taken to court because it had refused to place certain seriously ill inmates on medical parole. In light of the courts' findings directing the release of such inmates, the DCS sought to develop a system in terms whereof the dignity of seriously ill inmates would be respected; their release would be premised on humanitarian grounds; and the financial burden that such inmates placed on the DCS would be alleviated.¹²⁵
4. The application for medical parole had to ensure that seriously ill inmates were treated with dignity, and further had to ensure that the release of such inmates did not place society at risk.¹²⁶

It is of particular significance that the review, in its terms of reference, did not specifically seek to address the issue of the medical parolee whose condition had improved pursuant to

123 Reviewing medical parole: brief notes on the proposed amendment of section 79 of the CSA.

124 Reviewing medical parole: brief notes on the proposed amendment of section 79 of the CSA.

125 Reviewing medical parole: brief notes on the proposed amendment to section 79 of the CSA.

126 Reviewing medical parole: brief notes on the proposed amendment to section 79 of the CSA.

his release. The avoidance of the issue results in continued controversy. The amended current section 79 shall now briefly be discussed: both its substantive requirements as well as its procedural requirement.

2.7 THE AMENDED SECTION 79 OF THE CSA 111 OF 1998: THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR MEDICAL PAROLE

The amended section 79(1) of the CSA provides that any sentenced offender may be considered for placement on medical parole by the National Commissioner, the Correctional Supervision and Parole Board, or the Minister provided three criteria are met: (1) the offender is suffering from a terminal disease or condition, or if the offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care; (2) the risk of re-offending is low; and (3) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is released.¹²⁷

The application may be lodged by a medical practitioner, the inmate, or a person acting on behalf of the inmate.¹²⁸ The application must be supported by a written medical report which includes a complete medical diagnosis and prognosis of the terminal illness, or physical incapacity from which the inmate suffers; a statement by the medical practitioner indicating why the inmate is so physically incapacitated as to limit his daily activity or self-care; and finally reasons why medical parole should be considered.¹²⁹

127 Section 79(1) of the CSA.

128 Section 79(2)(a) of the CSA.

129 Section 79(2)(c) of the CSA.

The head of the correctional centre will receive the application¹³⁰ and refer it to the DSC medical practitioner.¹³¹ The practitioner must make a recommendation¹³² and submit it to the Medical Parole Advisory Board¹³³, which in turn will make a recommendation to the National Commissioner, Correctional Supervision and Parole Board, or the Minister.¹³⁴

The Medical Parole Advisory Board must, in terms of the applicable regulation,¹³⁵ consider whether the inmate is suffering from an infectious condition,¹³⁶ or a non-infectious condition.¹³⁷ The Medical Parole Advisory Board may consider any other condition that is not listed in this regulation, provided it complies with the principles enunciated in section 79

-
- 130 Regulation 29A.(3).
 131 Regulation 29A.(3).
 132 Regulation 29A.(3).
 133 The Medical Parole Advisory Board is established in terms of section 79(3)(a) of the CSA.
 134 Regulation 29A.(4).
 135 Regulation 29A.(5).
 136 Regulation 29A.(5)(a) Infectious conditions -
 (i) World Health Organization Stage IV of Acquired immune deficiency syndrome despite good compliance and optimal treatment with antiretroviral therapy;
 (ii) Severe cerebral malaria;
 (iii) Methicilin resistance staph aureus despite optimal treatment;
 (iv) MDR or XDR tuberculosis despite optimal treatment;
 137 Regulation 29A.(5)(b) Non-infectious conditions -
 (i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure
 (ii) Ischaemic heart disease with more than two ischaemic events in a period of one year with proven cardiac enzyme abnormalities;
 (iii) Chronic obstructive airway disease grade III to IV dyspnoea;
 (iv) Cor-pulmonale;
 (v) Cardiac disease with multiple organ failure;
 (vi) Diabetes mellitus with end organ failure;
 (vii) Pancytopenia;
 (viii) End stage renal failure;
 (ix) Liver cirrhosis with evidence of liver failure;
 (x) Space occupying lesion in the brain;
 (xi) Severe head injury with altered level of consciousness;
 (xii) Multisystem organ failure;
 (xiii) Chronic inflammatory demyelinating Poliradiculoneuropathy;
 (xiv) Neurological sequelae of infectious diseases with a Karnofsky score of 30 percent or less;
 (xv) Tetanus;
 (xvi) Dementia;
 (xvii) Severe disabling rheumatoid arthritis, and whether such condition constitutes a terminal disease or Condition or the offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care.

of the CSA.¹³⁸ The Medical Parole Advisory Board will make a recommendation to the National Commissioner, the Correctional Supervision and Parole Board, or the Minister.¹³⁹

If the recommendation of the Medical Parole Advisory Board is positive, then the National Commissioner, the Correctional Supervision and Parole Board, or the Minister must consider whether the conditions in section 79(1)(b) and (c) of the Act are present.¹⁴⁰ In other words, the National Commissioner, the Correctional Supervision and Parole Board, or the Minister must determine whether the risk of the inmate re-offending is low, and secondly, whether there are appropriate arrangements in place for the inmate's supervision, care and treatment within the community to which the inmate will be released.¹⁴¹

The National Commissioner, the Correctional and Supervision Board, and the Minister are the final decision-makers in parole applications.¹⁴² The National Commissioner is empowered to make decisions in respect of inmates serving a sentence of 24 months imprisonment or less; the Correctional and Supervision Board in respect of inmates serving a sentence in excess of 24 months; and the Minister in respect of inmates sentenced to life imprisonment.

The Medical Parole Advisory Board, which comprises thirteen independent medical practitioners,¹⁴³ meet monthly in order to review the applications received from the 243 correctional centres nationally.¹⁴⁴ A decision made by the majority of the members of the Board present shall be a decision of the Board.¹⁴⁵ The DCS has proposed the development and implementation of a discharge plan for each approved applicant, as well as a plan for the

138 Regulation 29A.(6).

139 Regulation 29A.(7).

140 Regulation 29A.(7).

141 Section 79(b) and (c) of the CSA, read with Regulation 29A.(7)

142 Albertus (2012) 193.

143 Correctional Services, 39.

144 Correctional Services, 39.

145 Regulation 29B(6).

transportation, accompaniment and handing over of the parolee to the next successive responsible party.¹⁴⁶

As noted previously, if the recommendation of the Medical Parole Advisory Board favours the release of the inmate on medical parole, the National Commissioner, Correctional Supervision and Parole Board or the Minister must make a determination regarding whether the inmate is likely to re-offend, and whether there are appropriate measures in place for the inmate's supervision, care and treatment within the community to which the inmate is released.¹⁴⁷

With regard to the inquiry into whether the inmate is likely to re-offend, the National Commissioner, Correctional Supervision and Parole Board or the Minister may take into account a series of factors, including, *inter alia*, whether the presiding officer had knowledge of the inmate's medical condition at the time of sentencing, remarks made in sentencing by the presiding officer, the type of offence, the duration of the sentence yet to be served, and the previous criminal record.¹⁴⁸

With regard to the inquiry whether there are appropriate measures in place for the inmate's supervision, care and treatment within the community to which the inmate is released, there is a concern that inmates who have the financial resources are better placed to source specialized care and treatment.¹⁴⁹ On the other hand, inmates who have little or no financial resources are at a distinct disadvantage because they cannot source specialized care.¹⁵⁰ In such cases and from a practical point of view it is arguable that the health needs of these

146 Correctional Services, 44.

147 Section 79(1)(b) and (c) of the CSA, read with Regulation 29A.

148 Section 79(5) of the CSA

149 Albertus (2012) 192.

150 Albertus (2012) 192.

inmates would be better served should they remain in a correctional centre, and not be released.¹⁵¹

2.8 CHAPTER CONCLUSION

It is submitted that the issue of medical parole did not feature in South African legislation prior to the Prisons Act 8 of 1959. Subsequent to 1959, the legislation became increasingly more descriptive of the types of medical conditions that would entitle an inmate to make application for release on medical parole. Moreover, the procedures were likewise also afforded greater detail and form. The inquiry as to whether a medical parolee should be compelled to return to a correctional centre should his health improve was never addressed in South African law prior to the amendment in 2012 to section 79 of the CSA. It was further argued that the JICS reports and the controversial release of Shabir Shaik caused the Minister of Correctional Services to instruct the National Council on Correctional Services to review the correctional services legislation and the DCS policies. The introduction of the amendment to section 79, more specifically the *proviso* to section 79(7) removed the uncertainty in respect of the status of an inmate whose medical condition has improved – he will now not be returned to a correctional centre.

151 Albertus (2012) 192.

CHAPTER 3

MEDICAL PAROLE: THE INTERNATIONAL AND REGIONAL FRAMEWORK

3.1 INTRODUCTION

This chapter considers the international and regional covenants, conventions and instruments. They are analysed to determine whether they have a bearing on medical parole. The relevant provisions in each covenant, convention and instrument shall be cited, and a broad liberal interpretation of each shall be proffered.

The covenants, conventions and instruments are specifically examined in order to determine whether can they offer any guidance in directing an answer to the inquiry whether a medical parolee in South Africa should be returned to a correctional centre when his health improves.

3.2 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force on 03 January 1976, and was ratified by South Africa on 18 January 2015.¹

Article 12 of the Covenant provides as follows

1. The States Parties to the present Covenant recognizes the right to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ..
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.²

Although this provision does not expressly make reference to inmates, it does speak of ‘conditions which would assure to all’. It may be accepted that the term ‘all’ extends to and

1 ‘The government of South Africa ratifies the ICESCR’ available at <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (accessed 03 December 2019).

2 ‘Human Rights for All. International Covenant on Economic, Social and Cultural Rights. A Handbook’ available at http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf (accessed 03 December 2019).

includes inmates serving a sentence in a correctional centre. Under the circumstances, a broad interpretation of this provision, within the context of medical parole, may lend itself to the view that ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness’ especially for terminally and seriously ill inmates would be best served if they are released on medical parole.

This particular interpretation, however, presupposes that the medical service and medical attention available outside the correctional centre is better placed to address the medical condition of the inmate. The interpretation of the provision, however, does not extend to prescribe nor does it suggest that the inmate be returned to the correctional centre should there be an improvement in his medical condition.

3.3 THE UNITED NATIONS CONVENTION AGAINST TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (UNCAT)

The United Nations Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) came into force on 26 June 1987, and was ratified by South Africa on 10 December 1998.³

Article 1.1 of the Convention provides as follows

For the purposes of this Convention the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴

3 ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: briefing with Deputy Minister’ available at <https://pmg.org.za/committee-meeting/28159/> (accessed 03 December 2019).

4 ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment available at

In view of the importance of this convention, it is useful to consider the role of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Special Rapporteur on Torture). The mandate of the Special Rapporteur on Torture is three-fold: 1) to transmit urgent appeals to States regarding individuals reported to be at risk of torture; 2) to undertake fact-finding visits to countries; and 3) to report on activities to the Human Rights Council and the General Assembly.⁵

The Special Rapporteur has declared that the ‘denial of medical treatment and/or absence of access to medical care in custodial situations may constitute cruel, inhuman or degrading treatment or punishment and is therefore prohibited under international human rights law.’⁶

In view of the Special Rapporteur’s declaration, it is submitted that in instances where medical care in a correctional centre is absent, the interests of an inmate may be better served if he were released on medical parole upon condition there is a guarantee that he will be afforded medical care outside the correctional centre. However, nothing further can be read into the Article, and neither are there any pronouncements nor findings from the Special Rapporteur to give direction on the question of whether the inmate who was released on medical parole should be returned to the correctional centre should his condition improve.

Article 4.1 of the Convention provides as follows

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any other person which constitutes complicity or participation in torture.

https://cti2024.org/content/docs/UNCAT%20OPCAT%20treaties_ENG.pdf (accessed 03 December 2019).

5 Report of Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Manfred Nowak available at <https://www.refworld.org/docid/498c211e2.html> (accessed on 05 July 2019).

6 Report of Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Manfred Nowak.

To give effect to South Africa's obligations under Article 4.1 of the Convention it enacted the Prevention of Combating and Torture of Persons Act 13 of 2013 on 24 July 2013. Section 3 of the Act is identical to Article 1 of the convention.⁷

It has been argued that the refusal to place an inmate on medical parole, notwithstanding the severity of his medical condition, can be construed as inhuman or degrading treatment, and therefore in conflict with UNCAT.⁸ In a similar vein, it has been argued that the refusal to place an inmate on medical parole, and thereby compelling him to remain in a correctional centre with inadequate medical facilities to care for him, may on a liberal interpretation of the Act, constitute torture because the conduct of the DCS constitutes the infliction of mental pain and suffering on an inmate under the acquiescence of a public official.

The latter argument may possibly be perceived as strained because it is predicated upon the premise that an aggrieved inmate, who notwithstanding the severity of his terminal illness or physical incapacity, will be in a position to lay a criminal charge against either the Minister of Correctional Services in his representative capacity, or alternatively specific identifiable members of the DCS wherein he alleges that the DCS or its functionaries had by the denial of medical parole acted in violation of the Act. Should this route be a viable option for an aggrieved inmate, it may reasonably be expected that it will raise a plethora of logistical concerns and issues.

First and foremost, it will require a mechanism in terms of which an inmate will be allowed to lodge a criminal charge, presumably with a police officer who will attend the correctional centre specifically for the purpose of taking the inmate's statement. It follows that there ought to be the assurance that the inmate can make his statement in a conducive environment and

7 Prevention of Combating and Torture of Persons Act 13 of 2013.

8 Report of Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Manfred Nowak

without fear of victimization. A police docket must be opened, registered under the crime administration system (CAS), and assigned to an investigating officer for purposes of conducting further investigation. A prosecutor must ultimately make a determination whether there is a strong likelihood or prospect of success.

And finally, a court must convene at the correctional centre to hear the testimonies of the witnesses. Under the circumstances, it is not inconceivable that the time and resources that must be expended by both the National Prosecuting Authority (NPA) and the judiciary to actuate and bring to fruition such proceedings will be substantial, and ultimately the process may be no more than an exercise in futility.

3.4 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) came into force on 23 March 1976, and was ratified by South Africa on 10 December 1998.⁹

Article 7 of the Covenant provides as follows

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no shall be subjected without his free consent to medical or scientific experimentation.¹⁰

This specific article finds resonance with the provisions in Article 1.1 of UNCAT. In view of the reference to a prohibition on ‘torture’ in this covenant as well as in UNCAT, it is submitted that a high premium is placed on the importance of fostering an international culture of respect for human rights. It is in this context that the decision as to whether a person released on medical parole should be returned to the correctional centre should his

9 ‘South Africa’s obligations under international and domestic law’ available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 04 December 2019).

10 ‘International Covenant on Civil and Political Rights’ available at <http://ccprcentre.org/ccpr-legal-framework/?iccpr-and-hr-committee/international-covenant-on-civil-and-political-rights-iccpr/> (accessed 04 December 2019).

condition improve, be assessed. If the return to the correctional centre is a portent to torture, then it submitted that within the framework and parameters of the international covenants, the return should be disallowed.

3.5 INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (ICRPD)

The International Convention on the Rights of Persons with Disabilities came into force on 30 March 2007, and was ratified by South Africa on 30 November 2007.¹¹

Article 25 of the Covenant provides as follows

State Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. State Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, State Parties shall: (a)-(f) prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.¹²

Within the context of corrections and correctional services, a liberal interpretation of this Article can encompass physically incapacitated inmates in correctional centres. With a view to illustrating this point, an inmate with a disability may not necessarily have access to health care in a correctional centre because of its limited resources and capacity.

Under such circumstances, where the inmate with the disability meets the criteria to be placed on medical parole, then this placement should naturally be afforded to him. He should not be denied placement on medical parole because of his disability. In other words, the State is enjoined not to prevent the denial of health care and health services to an inmate based upon his disability or physical incapacity. It is submitted that should the disability persist because it

11 'South Africa's compliance with UN Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society' available at <https://pmg.org.za/committee-meeting/12656/> (accessed 11 December 2019).

12 'South Africa's compliance with UN Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society'.

is permanent and irreversible, such an inmate, once released on medical parole, cannot be returned to the correctional centre.

3.6 THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) came into force on 04 January 1969, and was ratified by South Africa on 10 December 1998.¹³

Article 5 of the Convention provides as follows

In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably the enjoyment of the following rights: (e)(iv) the right to public health, medical care, social security and social services.¹⁴

The relevance of this Article within the context of South Africa's socio-political history is herein traversed. More specifically, the significance of the Article within the framework or environment of corrections and correctional services in South Africa is explored.

During the 1980's there was a progressive and systematic repeal of all racially discriminatory legislation in South Africa and by the year 1994, with the advent of a constitutional democracy, the statute books were purged of all race laws. Although the laws were removed, the issue of race and racism continued to occupy a position of centrality in South African society. It is submitted that the behavioral patterns that defined racism and racist conduct persisted in all spheres of society, and in this regard the environment of corrections and

13 'International Convention on the Elimination of All Forms of Racial Discrimination' available at <https://www.humanrights.ch/en/standards/un-treaties/racism/> (accessed 04 December 2019).

14 'United Nations Treaty Collection' available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (accessed 04 December 2019).

correctional services was not exempted.¹⁵ Reports of preferential treatment based upon race abounded.¹⁶

Prior to 1994 the correctional centres (prisons) were segregated along racial lines. It is common cause that the correctional centres for white inmates were superior to the centres for black inmates. Concomitant to the superior facilities was the preferential treatment afforded to white inmates.¹⁷ However, with the new political dispensation and social order ushered in by the first democratic elections in 1994, preferential treatment based upon race or ethnicity was prohibited. It therefore follows that in the consideration of all applications for medical parole, discrimination based upon race is disallowed. In a similar vein, the decision to compel an inmate to return to a correctional centre under circumstances where his condition has improved, should not be determined by race.

3.7 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) came into force on 03 September 1981 and was ratified by South Africa on 15 December 1995.¹⁸

Article 12 of the Convention provides as follows

1. State Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.¹⁹

Although the convention does not expressly make reference to women inmates seeking medical parole, it does not preclude such women from claiming protection under this specific

15 Singh S 'The historical development of prisons in South Africa: A penological perspective' New Contree 50 (November 2005) 28.

16 Singh (2005) 28.

17 Singh (2005) 29.

18 'United Nations Human Rights. Office of the High Commissioner' available at <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> (accessed 04 December 2019).

19 'United Nations Human Rights. Office of the High Commissioner.'

Article. It affords women inmates seeking medical parole a right of recourse should they feel aggrieved in instances where medical parole was denied. No inference can however be drawn from this convention regarding the return of a medical parolee to a correctional centre where his condition has improved.

3.8 THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS (NELSON MANDELA RULES)

The Standard Minimum Rules for the Treatment of Prisoners was adopted on 30 August 1955 and revised on 17 December 2015.²⁰ There are three significant rules that have a bearing on medical parole.

Rule 24.1 provides as follows

The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.²¹

Rule 25.1 provides as follows

Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners with special health-care needs or with health issues that hamper their rehabilitation.²²

Rule 27.1 provides as follows

All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.²³

-
- 20 'Nelson Mandela International Day 18 July' available at https://www.un.org/en/events/mandeladay/mandela_rules.shtml (accessed 04 December 2019).
- 21 'The United Nations Standard Minimum Rules for the Treatment of Prisoners' available at https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf (accessed 04 December 2019)
- 22 'The United Nations Standard Minimum Rules for the Treatment of Prisoners'
- 23 'The United Nations Standard Minimum Rules for the Treatment of Prisoners'

The Nelson Mandela Rules expressly address the issue of health care in correctional centres, and although the Rules do not specifically refer to the issue of medical parole, a few inferences and observations can nonetheless be made. Since health care for inmates is the responsibility of the State,²⁴ medical parole should be afforded to deserving applicants. The State carries the burden regardless of whether the inmate is serving his sentence within the confines of the correctional centre, or whether the inmate is serving his sentence on medical parole. The Rules are however silent on whether a parolee whose medical condition has improved, should be returned to the correctional centre or not.

3.9 THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (BANJUL CHARTER)

The African Charter on Human and People's Rights (Banjul Charter) came into force on 21 October 1986, and was ratified by South Africa on 09 July 1996.²⁵

Article 16 of the Charter provides as follows

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.²⁶

The Banjul Charter speaks of 'every individual' and 'people' of State parties, which would naturally include inmates serving a sentence in a correctional centre. Medical parole is a variant of a measure that the State may deploy in order to fulfill its obligation to ensure that inmates are afforded medical care that a correctional centre, by virtue of its limited resources, cannot offer. The Banjul Charter is reminiscent of the Nelson Mandela

24 Muntingh L 'Prisons in South Africa's constitutional democracy' (2007) 5.

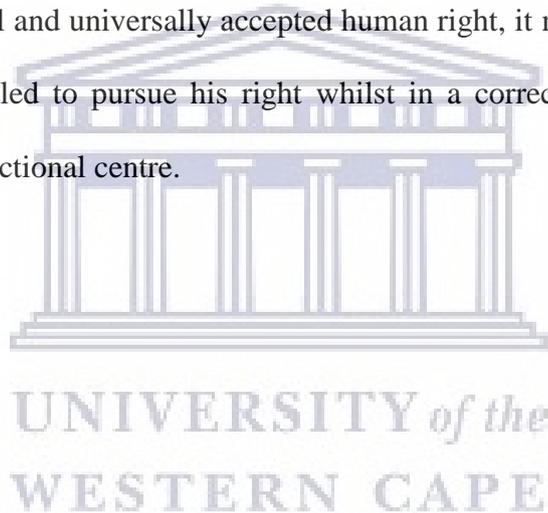
25 'African Union' available at https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 04 December 2019).

26 'African Commission on Human and People's Rights' available at <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 04 December 2019).

Rules in that it is equally silent on the issue of whether a medical parolee whose condition has improved, should be returned to the correctional centre or not.

3.10 CHAPTER CONCLUSION

Although the international and regional covenants, conventions and instruments do not offer any direct guidance on the issue of whether a medical parolee should be returned to a correctional centre should his health improve, they reflect a dominant and recurring theme that firmly entrenches the right to health as a human right. It is against this backdrop that the status of the medical parolee should be viewed: because the right to health is a fundamental and universally accepted human right, it naturally follows that the inmate would be entitled to pursue his right whilst in a correctional centre, and upon release, outside a correctional centre.



CHAPTER 4

THE PURPOSE OF SENTENCING AND THE OBJECTIVES OF MEDICAL PAROLE

4.1 INTRODUCTION

This chapter discusses medical parole within the context of the purpose of sentencing and the theories of punishment. The theories inform the sentence, and parole is a continuation of that sentence outside a correctional centre.¹ In this regard, medical parole is no different from parole. It too is a continuation of a sentence outside a correctional centre. The inquiry is thus directed at making a determination as to whether medical parole is compatible with the principles that underpin and define a sentence.

This chapter further discusses the factors the court will consider in its determination of a sentence. It shall also very briefly consider parole in general; parole as a right, privilege and administrative action; and the non-parole period. Under the circumstances, it is important to consider whether medical parole achieves the purposes of a sentence, or whether it is merely a measure motivated by a humanitarian concern for the welfare of a terminally ill or a physically incapacitated person.

Finally, the chapter shall canvass the factors that must be considered whether medical parole must be granted; the role of the Medical Parole Advisory Board; the inmate's right to dignity under the amended legislation; and most importantly, the constitutionality of the *proviso* to section 79(7) of the CSA.

1 Muzuji J 'Unpacking the law and practice relating to parole in South Africa (2011) 14. *Potchefstroom Electronic Law Journal* 205.

4.2 SENTENCING AND THE THEORIES OF PUNISHMENT

An accused person who is convicted of an offence must be punished and the punishment is the sentence handed down by the Court.² There exist a number of factors which a court must consider when deciding on an appropriate sentence. It usually refers to the triad of Zinn (discussed in more detail in paragraph 4.4). The theories of punishment inform the sentence.³ There are four principal theories of punishment: the retributive, the preventive, the deterrent and the reformative.⁴ Each theory shall briefly be discussed.

4.2.1 THE RETRIBUTIVE THEORY

According to the retributive theory, the punishment of the accused is justified because he deserves to be punished.⁵ Retribution restores the legal balance that was disturbed by the accused's commission of an offence.⁶ It is the debt that the accused pays back to society for his wrong-doing.⁷ Most importantly, the retributive theory does not seek to justify punishment by way of reference to a future benefit that may be achieved through punishment in the way that the other theories may seek to achieve.⁸ Retribution must however not be equated with vengeance, because vengeance implies that the harm inflicted by the wrongdoer must, in turn, be inflicted upon him.⁹ This theory lends expression to society's condemnation of the crime; it expresses society's moral outrage or indignation and abhorrence of crime.¹⁰ The proportionality of balance between harm and punishment speaks to the principle of equality, and this principle is enshrined as a constitutional right.¹¹

2 Terblanche SS *A Guide to Sentencing in South Africa* 3ed (2016)151.

3 Snyman (2014) 10.

4 Snyman (2014) 11.

5 Snyman (2014) 11.

6 Snyman (2014) 11.

7 Snyman (2014) 11.

8 Snyman (2014) 12

9 Snyman (2014) 12.

10 Terblanche (2016) 181.

11 Snyman (2014) 12.

The retributive theory constructs society as an indeterministic entity.¹² The theory is founded upon the supposition that a person has a free will, and therefore his conduct will be met with either society's approval or disapproval.¹³ On the other hand, the other theories construct society as a deterministic entity in which a person does not have a free will, and is a product of his circumstances.¹⁴

4.2.2 THE PREVENTIVE THEORY

The preventive theory postulates that the purpose of punishment is to prevent the occurrence of crime.¹⁵ The imposition of life imprisonment is such an example in that the accused is removed from society and is therefore prevented from committing further crimes.¹⁶ In *R v Karg*¹⁷ the Court held that 'if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may take the law into their own hands.' *S v Holder*¹⁸ supports the approach that imprisonment should not be imposed lightly, especially if another form of punishment will satisfy the purposes of punishment.

4.2.3 THE DETERRENT THEORY

The deterrent theory comprises two parts: deterring the offender from re-offending (individual deterrence), and deterring others who may intend or contemplate offending (general deterrence).¹⁹ This theory is founded upon the premise that the punishment meted to the individual accused will deter or discourage him from committing further crimes.²⁰ The

12 Snyman (2014) 13.

13 Snyman (2014) 14.

14 Snyman (2014) 14.

15 Snyman (2014) 15.

16 Terblanche (2016) 158,159.

17 1961 (1) SA 231 (A) 236.

18 1979 (2) SA 70 (A).

19 Snyman (2014) 15; Terblanche (2016) 172.

20 Snyman (2014) 15.

proverbial 'he must be taught a lesson' finds resonance in the theory of individual deterrence.²¹

On the other hand, general deterrence is directed at society at large.²² It is ensconced in the belief that the imposition of punishment will send a message to society that crime will be punished and this will instill a fear in members of society that should they commit a crime, they will suffer the same fate as the convicted accused.²³ It has been argued that the high levels of recidivism in South Africa undermine the theory.²⁴ The success of the theory is thus dependent upon the efficacy of the criminal justice system: if a prospective offender is mindful that there is a strong likelihood of apprehension, conviction and punishment, he is less likely to engage in criminal activity.²⁵

4.2.4 THE REFORMATIVE THEORY

The reformatory theory is based upon the premise that the purpose of punishment is to reform or rehabilitate an offender.²⁶ The focus is directed not at the crime, nor at the injury suffered, and nor does it give consideration to the effect that punishment may have on the offender. On the contrary, the focus is directed at the person and personality of the offender.²⁷

Rehabilitation only finds application where there exists a prospect or likelihood that the sentence may cause a reform in the conduct of the inmate and that upon his release he shall

21 Terblanche (2016) 177.
22 Snyman (2016) 16.
23 Snyman (2014) 16.
24 Snyman (2014) 15.
25 Snyman (2014) 16.
26 Snyman (2014) 16.
27 Snyman (2014) 16.

be integrated into society as a law-abiding and socially responsible citizen.²⁸ In the case of long term imprisonment, rehabilitation is not an important consideration.²⁹

4.3 THE THEORIES OF PUNISHMENT AND MEDICAL PAROLE

In sentencing an accused, the courts do not apply any one theory to the exclusion of all the other theories. The weight attached to the application of each theory however has a bearing on the court's sentencing regime.³⁰ It is submitted that at the time of sentencing, the Court will give little if any thought or consideration to the likelihood that at some time in the future a specific inmate will make application for medical parole. It therefore follows that the Court will not apply a specific theory or combination of theories to an inmate beyond incarceration. In principle, the medical parolee is still serving his sentence, albeit outside the confines of the correctional centre and therefore the theories of punishment will still find application.

4.4 THE FACTORS THE COURT WILL CONSIDER IN THE DETERMINATION OF A SENTENCE

The Court must exercise its discretion in order to impose an appropriate sentence.³¹ In the exercise of its discretion, the Court will consider the factors of the Zinn³² triad. These factors are the personal circumstances of the accused person, the severity of the offence, and the interests of society.³³

In *S v Zinn*³⁴ the appellant pleaded guilty to, and was found guilty of, 14 counts of fraud, 221 counts of theft and one count of contravention of the Insolvency Act 24 of 1936. He was

28 Snyman (2014) 18.

29 Terblanche (2016) 180.

30 Snyman (2014) 19.

31 Terblanche (2016) 151.

32 *S v Zinn* 1969 (2) SA 537 (A).

33 1969 (2) SA 537 (A).

34 1969 (2) SA 537 (A).

sentenced to 15 years' imprisonment and appealed to the Appellate Division of the High Court.³⁵ The Appellate Division held that the court *a quo* had overemphasized the effects of the appellant's crimes, and had not afforded the appellant's personal circumstances sufficient consideration.³⁶

With respect to the severity of the offence and the interests of society the following bears mention. The interests of society refer to the protection it needs, or the order or peace it needs.³⁷ It does not mean that public opinion must be satisfied.³⁸ By way of illustration, where an accused person is convicted of premeditated murder, the court must impose a life sentence.³⁹ The CSA is the statute that governs imprisonment.⁴⁰ Whilst imprisonment is not the most commonly imposed form of sentence, it is however imposed for the most serious crimes and imposed in respect of criminals who offend regularly and are not deterred by other forms of punishment.⁴¹

In the case of *S v Matyityi*⁴², it was held that the court must, in imposing a sentence, also take the interests of the victim into account. Under the circumstances, it is submitted that it is probably more correct to speak of four factors the court must consider, and not only the three.⁴³

35 1969 (2) SA 537 (A).

36 1969 (2) SA 537 (A).

37 Terblanche (2016) 167.

38 Terblanche (2016) 167.

39 Section 51 of the Criminal Law Amendment Act 105 of 1998.

40 The Correctional Services Act 8 of 1959 was replaced with the Correctional Services Act 111 of 1998. Section 14 of the Correctional Matters Amendment Act 5 of 2011 amended section 79 of the Correctional Services Act. The CSA came into operation on 01 March 2012.

41 Terblanche (2016) 245.

42 2011 (1) SACR 40 (SCA) par 16-17.

43 Snyman (2014) 19.

4.5 PAROLE IN GENERAL

Chapter VII (Release from correctional centre and placement under correctional supervision and on day parole and parole) of the CSA provides for the release of an inmate on parole.

The most salient provisions that find application for the release of an inmate on parole or on medical parole are contained in section 73 of the CSA.

The provisions of section 73 are as follows

Section 73. Length and form of sentences

(1) Subject to the provisions of this Act –

(a) a sentenced offender remains in a correctional centre for the full period of his sentence; and

(b) an offender sentenced to life incarceration remains in a correctional centre for the rest of his or her life.

(2) A sentenced offender must be released from a correctional centre and from any form of community corrections imposed in lieu of part of a sentence of incarceration when the term of incarceration imposed has expired.

(3) ..

(4) In accordance with the provisions of this Chapter a sentenced offender may be placed under correctional supervision, day parole, parole or medical parole before the expiration of his or her term of incarceration.

(4)(a) A sentenced offender may be placed under correctional supervision, on day parole, parole or medical parole –

(i) on a date determined by the Correctional Supervision and Parole Board; or

(ii) in the case of an offender sentenced to life incarceration, on a date to be determined by the Minister.

(b) Such placement is subject to the provisions of Chapter VI and such offender accepting the conditions for placement.

(6) (a) Subject to the provisions of paragraph (b), a sentenced offender serving a determinate sentence or cumulative sentences of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole was stipulated, half of the sentence, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences.

(aA) Subject to the provisions of paragraph (b), an offender serving a determinate sentence or cumulative sentences of not more than 24 months may not be placed on parole or day parole until such offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, a quarter of the sentence.

(b) A person who has been sentenced to -

(i)...

(ii)...

(iii)...

(iv) life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence.

4.6 PAROLE: RIGHT, PRIVILEGE AND ADMINISTRATIVE ACTION

The consensual thinking in South Africa is that parole is a privilege, and not a right.⁴⁴ It is argued that the assessment and consideration of an inmate for placement on parole constitutes administrative action.⁴⁵ As such, the decision to place an inmate on parole must meet the requirements of just administrative action.⁴⁶ These requirements are contained in section 33 of the Constitution.

Section 33 reads as follows

33. Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair; (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.⁴⁷

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted in compliance with section 33(3) of the Constitution. PAJA thus provides the legislative framework within which the administrative action of placing an inmate on parole is constructed.

4.7 PAROLE AS A CONTINUATION OF A CUSTODIAL SENTENCE

The release of an inmate from a correctional centre on parole does not conclude his sentence. On the contrary, it is merely a continuation of the sentence outside the correctional centre subject to certain conditions.⁴⁸ In this regard, medical parole is no different from parole – it

44 Moses (2012) 127.

45 Moses (2012) 128, 131.

46 Moses (2012) 128.

47 The Constitution of South Africa, 1996.

48 Mujuzi (2011) 14.

too is a continuation of a sentence outside a correctional centre, naturally subject to certain conditions.⁴⁹

Section 276(1) of the Criminal Procedure Act 51 of 1977 is the provision that empowers a court to impose a sentence where no other provision governing the imposition of a sentence exists.

Section 276(1) of the Criminal Procedure Act 111 of 1998 reads as follows:

276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

(a) . . .

[Para (a) deleted by s 34 of Act 105 of 1997.]

(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1);

[Para (b) substituted by s 3 of Act 107 of 1990 and amended by s 20 of Act 116 of 1993.]

(c) periodical imprisonment;

(d) declaration as an habitual criminal;

(e) committal to any institution established by law;

(f) a fine;

(g) . . .

[Para (g) deleted by s 2 of Act 33 of 1997.]

(h) correctional supervision;

[Para (h) added by s 41(a) of Act 122 of 1991.]

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

[Para (i) added by s 41(a) of Act 122 of 1991 and substituted by s 20 of Act 87 of 1997.]

In respect of certain offences, the legislation prescribes the sentence. A case in point is section 51 of the Criminal Law Amendment Act 105 of 1997 which prescribes the court to impose a minimum sentence in respect of certain offences.⁵⁰ The nature of the sentence contemplated in the Criminal Law Amendment Act is direct imprisonment.⁵¹ The Act

49 Mujuzi (2011) 14.

50 The Criminal Law Amendment Act 105 of 1997 came into operation on 01 May 1998.

51 The preamble to Act 105 of 1997 reads: ‘And Whereas the Constitutional Court has ruled that the sentence of death is unconstitutional and therefore invalid; And Whereas it is necessary to make

introduced a series of categories of offences, and in respect of each category prescribed the sentence. For example, the court is obligated to impose life imprisonment to an accused convicted of a planned or premeditated murder.⁵² The court may however deviate from the prescribed minimum sentence and impose a lesser sentence, should it be satisfied that there are compelling and substantial circumstances that merit the deviation.⁵³

Parole, including medical parole, is a process that is only considered and applied after the imposition of a custodial sentence. The National Commissioner, the Correctional Supervision and Parole Board or the Minister may consider factors, including the remarks made by the presiding officer in sentencing.⁵⁴ These factors are brought within the purview of consideration below.

4.8 THE FACTORS TO BE CONSIDERED WHETHER MEDICAL PAROLE SHOULD BE GRANTED

In making a determination whether to place an inmate on medical parole or not, the National Commissioner, the Correctional Supervision and Parole Board or the Minister, may consider the following factors: (a) whether the presiding officer, at the time of sentencing, was aware of the medical condition of the accused person for which placement on medical parole is sought⁵⁵; (b) any remarks made by the presiding officer in passing sentence⁵⁶; (c) the type of offence and the duration of the sentence⁵⁷; (d) the previous criminal record of the accused person⁵⁸; (e) factors listed in section 42(2)(d) of the Act.⁵⁹

provision for the setting aside of all such sentences in accordance with law and their substitution by lawful punishments.

52 Section 51(1) of Act 105 of 1997.

53 Section 51(3)(a) of Act 105 of 1997.

54 Section 79(5) of the CSA.

55 Section 79(5)(a) of the CSA.

56 Section 79(5)(b) of the CSA.

57 Section 79(5)(c) of the CSA.

58 Section 79(5)(d) of the CSA.

59 Section 79(5)(e) of the CSA.

A few of the factors listed in section 42(2)(d) of the Act are already contained in section 79(5)(a) – (d) of the Act. The listed factors contained in section 79(5)(a) – (d) will not be repeated hereunder, only the remaining factors will be brought under consideration. These include the conduct, disciplinary record, adaptation, training, aptitude, industry and physical and mental state of the inmate⁶⁰; the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced⁶¹; the assessment results and progress in terms of the correctional sentence plan.⁶² The correctional sentence plan is compiled by the Case Management Committee after an assessment is made⁶³, and it finds application to offenders who are sentenced to a term of incarceration exceeding 24 months.⁶⁴ The assessment is made to determine an offender's security classification for purposes of safe custody, health needs, educational needs, social and psychological needs, religious needs, specific development programme needs, work allocation, allocation to a specific correctional centre, needs regarding reintegration into society, restorative justice requirements, and vulnerability to sexual violence and exploitation.⁶⁵



4.9 THE NON-PAROLE PERIOD

Parole may only be considered where an inmate has served a non-parole period of his sentence.⁶⁶

Section 276B of the Criminal Procedure Act 51 of 1977 reads as follows

276B Fixing of non-parole-period

(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period

60 Section 42(2)(d)(iii) of the CSA.
61 Section 42(2)(d)(iv) of the CSA.
62 Section 42(2)(d)(v) of the CSA.
63 Section 38(1A)(a) of the CSA.
64 Section 38(1A)(a) of the CSA.
65 Section 38(1) of the CSA.
66 Section 276B of the CPA.

during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run

concurrently, the court shall, subject to subsection (1)(b), fix the non-parole-period

in respect of the effective period of imprisonment.

[S 276B inserted by s 22 of Act 87 of 1997.]

This means that where a court has sentenced a convicted person to a term of imprisonment for a period of two years or more the court may, as part of the sentence, set a period of time during which the person may not be placed on parole.

In the case of medical parole, this provision does not find application. The release of an inmate on medical parole may be made at any stage during the period of incarceration, regardless of the duration of time the inmate has already served in a correctional centre.

4.10 THE MEDICAL PAROLE ADVISORY BOARD AND SECTION 79(4)(b) OF THE CSA 111 OF 1998

The Medical Parole Advisory Board must, in addition to the medical report referred to earlier, provide an independent medical report to the National Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be.⁶⁷ There is no prohibition upon the medical practitioner or the Medical Parole Advisory Board from acquiring a written medical report from a specialist medical practitioner.⁶⁸

The placement of an offender on medical parole is subject to the provision that the offender shall, by way of informed consent, permit the disclosure of his medical information insofar as

67 Section 79(3)(a) of the CSA.

68 Section 79(3)(b) of the CSA.

it is necessary to process the application for medical parole.⁶⁹ The placement is further subject to an agreement in terms whereof the offender shall subject himself to monitoring conditions set by the Correctional Supervision and Parole Board.⁷⁰ The monitoring conditions⁷¹ may be amended or supplemented by the Correctional Supervision and Parole Board depending upon the improved medical condition of the offender.⁷²

Section 79(4)(b) of the Correctional Services Act 111 of 1998 provides that a parolee may be requested to undergo periodical medical examinations by a medical practitioner in the employ of the DCS.⁷³ However, there is no discernible reason for the inclusion of this particular provision, other than the reason cited in section 56 of the Correctional Services Act 111 of 1998, namely to determine whether the conditions set for the parolee are appropriate in view of his medical condition.⁷⁴

It is probable that the inclusion of section 79(4)(b) in the Act may serve a further, albeit obscure, purpose. In the event the parolee violates the conditions of his medical parole, for example by re-offending, his parole may be cancelled and he is compelled to return to the correctional centre. If, hypothetically, he had contracted a contagious disease whilst outside the correctional centre, his return to the correctional centre may potentially pose a risk to other inmates, as well as to correctional services personnel. Section 79(7) of the Correctional Services Act 111 of 1998 expressly prohibits the cancellation of medical parole merely because the condition of the parolee has improved. Thus, section 79(4)(b) is more likely

69 Section 79(4)(a)(i) of the CSA.

70 Section 79(4)(a)(ii) of the CSA.

71 Section 52 of the CSA.

72 Section 79(4)(a)(ii) of the CSA.

73 Section 79(4)(b) of the CSA.

74 Section 56 Medical examination (1) If at any time whilst a person is subject to community corrections a correctional official has reason to believe that a medical examination is required in order to determine whether the conditions set for the person are appropriate in the light of his or her health, the correctional official may request a correctional medical practitioner to conduct such an examination.

(2) A person subject to community corrections must submit to such an examination.

directed at safeguarding the interests of inmates and correctional services personnel where the condition of the parolee has deteriorated and not where the condition has improved.

Whilst it may be accepted that previously an executive body, such as the Parole Board, was empowered to alter ‘a binding judicial sentence’ it is submitted that with the establishment of the Medical Parole Advisory Board, the findings of the Board is limited to a medical diagnosis and prognosis. The Medical Parole Advisory Board is not the ultimate decision-maker in making a determination as to whether the inmate be released on medical parole or not; this decision is ultimately vested in the National Commissioner, the Correctional Supervision and Parole Board, or the Minister.⁷⁵

Albertus raises the concern that the Medical Parole Advisory Board’s recommendation to the final decision-makers will largely be based upon an assessment of the recommendation made by the medical practitioner in the employ of the DCS, and secondly, not all inmates will be examined by the Medical Parole Advisory Board.⁷⁶ Moreover, the efficacy of the Board may be constrained by limitations in terms of both time and resources.⁷⁷ It is therefore justifiably open to speculation whether the Medical Parole Advisory Board will be suitably placed to afford due and proper consideration to each and every individual application.⁷⁸

4.11 THE INMATE’S RIGHT TO DIGNITY

Barnes argues that for the period of time that an inmate is incarcerated in a correctional centre, he is ‘at the mercy of the state for the provision of even the most basic of necessities for a dignified existence: food, bedding, clothing and health care amongst others.’⁷⁹ In a

75 Section 79(4) of the CSA.
76 Albertus (2012) 190.
77 Albertus (2012) 191.
78 Albertus (2012) 191.
79 Barnes (2009) 39.

similar vein, Muntingh argues that Chapter 3 of the CSA describes in great detail the minimum standard for the detention of inmates under conditions that are consonant with the principle that their human dignity be respected.⁸⁰ He avers that ‘the state is in the first instance responsible for the failure to meet such standards as it is the state that places people in conditions that adversely affect their rights to dignity and safety.’⁸¹

Wolf argues that ‘the constitutionality of the Correctional Services Act is also questionable insofar as it confers powers upon executive bodies to alter binding judicial sentences’.⁸² The conversion of sentences by lay persons serving on executive-controlled boards is further not mandated by the Bill of Rights.⁸³ It is submitted that it cannot be the constitutionality of the Act in its entirety that is questionable simply because certain provisions in the Act speak of obligatory conditions that the correctional centres must meet. By way of illustration, a sample of such clauses in the Act includes sections 7, 10 and 11. Section 7 (Accommodation) provides that inmates must be held in cells which meet regulatory and prescribed requirements in respect of, *inter alia*, floor space, ventilation, and sanitary installations; and that these must be adequate for detention under conditions of dignity.⁸⁴ Section 10 (Clothing and bedding) states that the DCS must provide every inmate with clothing and bedding sufficient to meet the requirement of hygiene and climatic conditions.⁸⁵ Section 11 (Exercise) states that the DCS must afford every inmate the opportunity to exercise sufficiently to remain healthy, and is entitled to at least one hour of exercise daily.⁸⁶ In other words, there are certain provisions in the CSA that expressly embody constitutional principles.

80 Muntingh (2007) 7.

81 Muntingh (2007) 7.

82 Wolf (2011) 155.

83 Wolf (2011) 155.

84 Section 7 of the CSA.

85 Section 10 of the CSA.

86 Section 11 of the CSA.

4.12 MEDICAL PAROLE AND THE CONSTITUTION

The constitutional provisions that have a bearing on medical parole are sections 27(1)(a) and 35(2)(e).

Section 27(1)(a) of the Constitution provides as follows

Everyone has the right to have access to health care services, including reproductive health care.

‘Everyone’ is herein interpreted to include inmates serving a sentence in a correctional centre. Thus, an inmate has a constitutional right to access health care services in a correctional centre. It is submitted that should an inmate qualify for placement on medical parole, and further that the health care that he will be afforded outside the correctional centre is better placed to address his needs, that under such circumstances he should be released.

Section 35(2)(e) of the Constitution provides as follows

Everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

It has been documented that because the protocols that are adopted by correctional centres across the country may not be consistent, it follows that the provision of health care in the correctional centres will vary considerably.⁸⁷ It is therefore arguable that where the conditions of incarceration, specifically relating to accessing a qualitative medical treatment, do not augur well for an inmate who is eligible for medical parole, such an inmate’s application for placement should succeed.

In the case of *van Biljon v Minister of Correctional Services 1997 (6) BCLR 789 (C)* the Constitutional Court held that it was incumbent upon the State to provide ‘adequate’ medical

87 Barnes J ‘Not too Great Expectations: Considering the right to health care in prisons and its constitutional implementation’ *SACJ* (2009) 52.

treatment, and not ‘optimal’ medical treatment.⁸⁸ Whilst it is accepted that the medical treatment afforded to an inmate may only be adequate, and not optimal, it should not preclude an inmate from seeking medical parole where there is a strong likelihood that he can secure optimal treatment outside the correctional centre.

Where an inmate is released on medical parole and having secured optimal medical treatment makes a recovery, the present legislation, does not permit his return to the correctional centre.⁸⁹ Section 79(7) of the CSA specifically provides that ‘no placement on medical parole may be cancelled merely on account of the improved medical condition of the offender’.⁹⁰ To date, the Constitutional Court has not been called upon to make a finding on the constitutionality of this provision, and therefore an inmate whose medical condition improves will not be compelled to return to the correctional centre. One can therefore only surmise that under the circumstances the Constitutional Court will only make such a finding where civil society has a substantive interest, financial resources and a moral compass to pursue an answer.

4.14 THE CANCELLATION OF MEDICAL PAROLE

Section 79(7) of the CSA provides that ‘A decision to cancel medical parole must be dealt with in terms of section 75(2) and (3): Provided that no placement on medical parole may be cancelled merely on account of the improved condition of an offender’.⁹¹ Section 75(2) and (3) details the procedural steps that must be followed in order to cancel correctional supervision, day parole or parole. Notwithstanding the fact that these provisions do not make specific reference to medical parole, it is submitted that should a decision be made to cancel medical parole, then the process of cancellation is no different from the process applicable to

88 Barnes (2009) 44.

89 Section 79(7) of the CSA.

90 Section 79(7) of the CSA.

91 Section 79(7) of the CSA.

the cancellation of correctional supervision, day parole, or parole. Put differently, regardless of the grounds for cancellation, the process or procedural steps required to cancel medical parole are precisely the same procedural steps required to cancel correctional supervision, day parole, or parole.

A brief summation of the process follows hereunder. The supervision committee, which is a committee comprising of correctional officials⁹², must determine the level of supervision of a person subject to community corrections⁹³ and must review at regular intervals the extent to which the objectives of the community corrections are being achieved.⁹⁴ The supervision committee may advise the National Commissioner to request that the Correctional Supervision and Parole Board to cancel the correctional supervision, day parole or parole.⁹⁵

The Correctional Supervision and Parole Board must consider the matter within 14 days of the National Commissioner requesting that it do so.⁹⁶ The Correctional Supervision and Parole Board may elect to cancel the correctional supervision, day parole or parole, or amend the conditions.⁹⁷ Should the person concerned refuse to accept the amended conditions, the correctional supervision, day parole or parole must be cancelled.⁹⁸ The person concerned is entitled to submit representations or appear in person before the Board.⁹⁹

The *proviso* to section 79(7) of the Act specifically states that no placement on medical parole may be cancelled merely because the medical condition of the offender has improved. In other words, should the condition of the parolee improve after his release, he will not be

92 Section 58(1) of the CSA.

93 Section 58(2) of the CSA.

94 Section 58(3) of the CSA.

95 Section 75(2)(a) of the CSA.

96 Section 75(2)(a) of the CSA.

97 Section 75(2)(b) of the CSA.

98 Section 75(2)(b) of the CSA.

99 Section 75(3) of the CSA.

returned to the correctional centre, naturally subject to compliance with the conditions upon which his release was founded. In other words, if he has not reoffended and has further secured and maintained arrangements for his care and treatment within his community, he will not be returned to the correctional centre. The question that remains unanswered is whether this *proviso* is constitutionally sound.

4.15 THE CONSTITUTIONALITY OF THE *PROVISO* TO SECTION 79(7) OF THE CSA 111 OF 1998

Section 79(7) of the Correctional Services Act 111 of 1998 provides as follows

A decision to cancel medical parole must be dealt with in terms of section 75(2) and (3): Provided no placement on medical parole may be cancelled merely on account of the improved medical condition of an offender.

Section 75(2) and (3) details the procedural aspects of cancellation. The *proviso* to the subsection is of particular significance. It excludes the cancellation of medical parole should the condition of an inmate improve. In other words, where an inmate is released on medical parole and his condition improves, he will not be returned to a correctional facility to serve the balance of his sentence.

The salient question that now arises is the following: is the parole condition not contravened when the health or medical condition of the parolee improves? The condition is not stated explicitly, but it can be argued that the release of an inmate on medical parole presupposes that his medical condition is terminal, and further that his death is imminent. Where a parolee dies soon after his release on medical parole, there is no contravention of the implicit condition. The legislation allows for the release of an inmate whose condition may be such that he is physically incapacitated, in which case there will not be an improvement in his condition.¹⁰⁰ The inquiry now shifts to a determination of the constitutional considerations

100 Albertus (2012) 191.

that underpin the status of a parolee whose medical condition has improved and who now will not be returned to a correctional facility, relative to other inmates and relative to society.

It may be argued, on the one hand, that the improvement in a parolee's condition be deemed fortuitous, and that he be afforded an entitlement to remain on the outside. The improvement in his medical condition may also be ascribed to his better living conditions, better health treatment and naturally an environment that is substantially more conducive to physical and mental well-being.

On the other hand, the fact that the parolee will not be returned to a correctional centre is arguably in conflict with section 9 of the Bill of Rights in the Constitution.¹⁰¹ Section 9(1) provides that 'Everyone is equal before the law and has the right to equal protection and benefit of the law'. Section 9(2) provides that 'Equality includes the full and equal enjoyment of all rights and freedoms'.

Section 79(7) of the CSA makes provision for the placement of an inmate on medical parole if there are 'appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released'.¹⁰² This particular subsection, however, creates a difficulty specific to the context of South African society in that the marked difference in the socio-economic status of inmates creates an inequality when their applications for medical parole are considered.¹⁰³ Inmates who have affluent families will be placed at an advantage in that they have the financial means and access to resources to satisfy the criterion contained in section 79(1)(c).¹⁰⁴ In other words, the family can suitably provide for the supervision, care and treatment of the inmate. On the other hand, inmates with less

101 The Constitution of the Republic of South Africa 1996.

102 Section 79(1)(c) of the Correctional Services Act 111 of 1998.

103 Van Wyk, K *The legal framework regulating medical parole: a comparative study* (LLM thesis, University of Pretoria (2014) 39.

104 Van Wyk (2014) 38.

affluent families who have neither the financial means nor the access to resources to satisfy the criterion contained in section 79(1)(c) will be placed at a distinct disadvantage.¹⁰⁵ It is thus evident that the socio-economic status of an inmate will be a principal determinant in the consideration of whether medical parole shall be granted or not. This particular circumstance or condition is arguably in conflict with section 9 of the Constitution.

The nature of the inequality is illustrated by way of reference to the highly publicized cases of Xolile Mngeni¹⁰⁶ and Jackie Selebi¹⁰⁷. Mngeni was convicted in the High Court (Cape Provincial Division) of the murder of Anni Dewani and sentenced to life imprisonment.¹⁰⁸ He had brain surgery in 2011 to remove a tumour, and made application for medical parole in 2014.¹⁰⁹ Although the Medical Parole Advisory Board had recommended Mngeni's release on medical parole, his application was denied by the then Minister of Correctional Services, Michael Masutha.¹¹⁰ Mngeni died in a correctional centre. The Minister stated that the application was denied because there were no appropriate arrangements for Mngeni's supervision, treatment and care in his community.¹¹¹ On the other hand, Jackie Selebi who was convicted in the High Court (South Gauteng Division) of corruption and sentenced in August 2010 to serve a sentence of fifteen years' imprisonment was granted medical parole in July 2012; he was diagnosed with diabetes, kidney failure and hypertension.¹¹² The then

105 Van Wyk (2014) 38.

106 *S v Mngeni* (CC25/2011)[2012] ZAWCHC 202; 2013(1)SACR 583 (WCC)(19 November 2012).

107 *Selebi v S* (240/2011)[2011] ZASCA 249; 2012(1)SA 487 (SCA);2012(1)SACR 209(SCA) [2012] 1 All SA 332 (SCA) (2 December 2011).

108 *S v Mngeni* (CC25/2011)[2012] ZAWCHC 202; 2013(1)SACR 583 (WCC)(19 November 2012).

109 'Mngeni applies for medical parole – reports' available at <https://ewn.co.za/2014/07/06/Anni-Dewani-Mngeni-applied-for-medical-parole-Reports> (accessed 05 December 2019).

110 'Dewani killer denied medical parole' available at <https://www.sowetanlive.co.za/news/2014-07-23-dewani-killer-denied-medical-parole/> (accessed 05 December 2019).

111 'No medical parole for Anni's killer' available at <https://www.iol.co.za/news/no-medical-parole-for-annis-killer-1723870> (accessed 05 December 2019).

112 'Jackie Selebi granted medical parole' available at <https://www.news24.com/SouthAfrica/News/Jackie-Selebi-granted-medical-parole-20120720> (accessed 05 December 2019).

Minister of Correctional Services, Sibusiso Ndebele, advised his release on medical parole was facilitated because Selebi's family had the financial means to provide for his supervision, treatment and care.¹¹³ Selebi died a few months after his release on medical parole.¹¹⁴

The decisions in the Selebi and Mngeni cases illustrate a very important point, namely that an inmate with affluence will almost certainly be released on medical parole and by virtue of the section 79(7) *proviso* is implicitly given the assurance that he will not be returned to a correctional centre. On the other hand, an inmate with limited resources will not be released on medical parole and therefore the section 79(7) *proviso* will not find application under his circumstances.¹¹⁵

The medical parolee who recovers from an illness or who overcomes his incapacity is in relation to other inmates and in relation to society at large, fortunate. The recovery may be ascribed to circumstances and conditions that are purely fortuitous, and therefore his release does not cause violence to the constitutionally established right to equality. In other words, the improvement in his medical condition does not cause prejudice to others.

After an accused person is convicted, the Court must impose an appropriate sentence. The element of mercy is integral to the formulation of a balanced and humane approach in the consideration of an appropriate sentence.¹¹⁶ Since it is accepted that parole is a continuation of a sentence outside a correctional facility¹¹⁷, it is not untoward to construct the element of mercy as a constant that permeates the full duration of the sentence. In other words, there is

113 'Selebi paroled on medical grounds' available at <https://mg.co.za/article/2012-07-20-00-selebi-paroled-on-medical-grounds> (accessed 05 December 2019).

114 'Jackie Selebi dies' available at <https://www.enca.com/south-africa/jackie-selebi-dies> (accessed 05 December 2019).

115 Van Wyk (2014) 39.

116 *S v Rabie* 1975 (4) SA 855 at 862A.

117 *Mujuzi* (2011) 14.

no prejudice to others if due consideration is afforded to the centrality of mercy in sentencing and in parole.

4.15 CHAPTER CONCLUSION

The theories of punishment inform a sentence. In other words, the theories substantiate or lend justification to a sentence. They are the rationale that underlies the sentencing regime. Since parole and medical parole are considered a continuation of a sentence outside a correctional centre, it naturally follows that the theories find equal application to both an inmate and a parolee.

Whilst the theories of punishment underpin the concept of a sentence, the Court will be guided by factors such as the personal circumstances of the accused, the severity of the offence, the interests of society,¹¹⁸ and the interests of the victim¹¹⁹ in determining an appropriate sentence.

Whilst an inmate may only be considered eligible for parole after the service of a non-parole period, in the case of medical parole an inmate may be released without any consideration to the period of time that he had already served. There however are a series of factors the National Commissioner, the Correctional Supervision and Parole Board or the Minister must consider in making a determination whether medical parole must be granted. Arguably one of the most important factors to be considered is the recommendations of the Medical Parole Advisory Board. In view of the workload of the Medical Parole Advisory Board, it is very probable that its efficacy may be severely compromised.¹²⁰

Finally, it is submitted that the *proviso* to section 79(7) of the CSA may *prima facie* create an uneven treatment of parolees, in that those who recover will not be compelled to return to a

118 *S v Zinn* 1969(2) SA 537(A).

119 *S v Matyityi* 2011(1) SACR 40(SCA).

120 *Albertus* (2012) 191.

correctional centre. The legislation also omits to consider that an improved health may enhance the risk of re-offending. There are thus no measures in place to exert stricter control over the parolee to ensure and / or limit the risk of re-offending which in turn may result in his return to a correctional centre.



CHAPTER 5

MEDICAL PAROLE: A COMPARATIVE VIEW

5.1 INTRODUCTION

This chapter shall consider medical parole within the context of Canadian law and the law in the United States of America (USA). It shall more specifically consider the legal position in these jurisdictions regarding the issue of whether the medical parolee should be returned to the correctional centre should his condition improve, or not. These jurisdictions are selected in order to demonstrate the diversity in approach by way of both legislation and policy across the jurisdictions. It is moreover useful to consider how other jurisdictions with more advanced medical parole regimes deal with the issue of a medical parolee whose condition has improved. It is for this reason that Canada and the USA are used as comparators. Both these countries, like South Africa, have constitutional democracies with a common law tradition. The principal objective of the comparison is to ascertain whether the medical parole regimes of these countries can offer any solutions to the shortcomings in the South African regime.

5.2 THE POSITION IN SOUTH AFRICA

As previously stated, in South Africa medical parole is afforded to inmates who are suffering from a terminal illness or disease; it is also afforded to inmates who are physically incapacitated to the extent that their daily activities or their ability to care for themselves are severely limited.¹ Put differently, in South Africa the release of an inmate from a correctional centre by reason of his medical condition constitutes medical parole. However, the release on medical parole cannot be cancelled should the medical condition of the inmate improve.² The medical parole of an inmate can however be cancelled should the inmate re-offend, or if the

1 Section 79 of the CSA.

2 Section 79(7) of the CSA.

arrangements for his supervision, care and treatment in the community into which he has been released, are removed or vitiated.³

An application for medical parole must be supported by a written medical report.⁴ The head of the correctional centre will receive the application and forward same to the medical practitioner in the employment of the DSC.⁵ The practitioner must make a recommendation for submission to the Medical Parole Advisory Board.⁶ The Board, in turn, must make a recommendation to the National Commissioner, Correctional Supervision and Parole Board, or the Minister.⁷ If the recommendation of the Medical Parole Advisory Board favours the release of the inmate on medical parole, the National Commissioner, Correctional Supervision and Parole Board, or the Minister must ascertain whether the risk of the inmate re-offending is low, and also whether there are appropriate arrangements in place for the inmate's care outside the correctional centre.⁸ The decision to either grant or refuse the release of an inmate is ultimately vested solely with the National Commissioner, Correctional Supervision and Parole Board, or the Minister.⁹

5.3 THE POSITION IN CANADA

In Canada, there is no medical parole, but the release of an inmate for medical purposes is afforded by way of a temporary absence.¹⁰ The Canadian legislation allows an inmate to

3 Section 75(2) and (3) of the CSA.

4 Section 79(2)(c) of the CSA.

5 Regulation 29A.(3).

6 Regulation 29A.(4).

7 Regulation 29A.(4).

8 Section 79(b) and (c) of the CSA read with Regulation 29A.(7).

9 Albertus (2012) 193.

10 Corrections and Conditional Release Act (S.C.1992,c.20) Temporary absences may be authorized Section 17(1) The institutional head may, subject to section 746.1 of the Criminal Code, subsection 140.3(2) of the National Defence Act and subsection 15(2) of the Crimes Against Humanity and War Crimes Act, authorize the temporary absence of an inmate, other than an inmate described in subsection 17.1(1), if the inmate is escorted by a staff member or other person authorized by the institutional head and, in the opinion of the institutional head,

leave a correctional centre, either escorted or unescorted, to attend a hospital for medical treatment and thereafter to return to the correctional centre.¹¹

The Canadian concept of temporary absence is, in any event, in material respects, analogous to temporary leave in South African law. Temporary leave is provided for in section 44 of the CSA. Section 44 provides for the temporary release of an inmate from a correctional centre for *inter alia* compassionate leave; and treatment, development or support programmes.¹² It can be read into this provision that treatment includes medical treatment. Where an inmate is released on temporary leave he may be placed under escort or supervision.¹³ The temporary leave afforded to an inmate is also subject to cancellation.¹⁴

More recently, the dire circumstances of terminally ill inmates in Canadian correctional centres have highlighted the inadequacy of the legislation relating to medical parole.¹⁵

(a) the inmate will not, present an undue risk to society during an absence authorized under this section;

(b) it is desirable for the inmate to be absent from the penitentiary for medical or administrative reasons, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;

(c) the inmate's behaviour while under sentence does not preclude authorizing the absence; and

(d) a structured plan for the absence has been prepared.

The temporary absence may be for an unlimited period if it is authorized for medical reasons or for a period of not more than five days or, with the Commissioner's approval, for a period of more than five days but not more than 15 days if it is authorized for reasons other than medical reasons.

Conditions

(2) The institutional head may impose, in relation to a temporary absence, any conditions that the institutional head considers reasonable and necessary to protect society.

11 Corrections and Conditional Release Act (S.C.1992,c.20).

12 Section 44(1)(a) of the CSA.

(1)The National Commissioner may grant permission in writing on such conditions and for such periods as he or she may specify, for a sentenced offender to leave the correctional centre temporarily for the purpose of

(a) compassionate leave;

(b) treatment, development or support programmes;

(c) preparation for release;

(d) any other reason related to the successful reintegration of the sentenced offender into the community.

13 Section 44(2)(a) A sentenced offender who is granted permission to leave correctional centre remains a sentenced offender even while temporarily outside correctional centre and may be placed under escort or under supervision.

14 Section 44(3)(a) Any permission in terms of subsection (1) may be withdrawn at any time by the National Commissioner.

15 Harris K 'Watchdog calls for compassionate parole as prison system adopts new assisted death policy available at <https://www.cbc.ca/news/politics/terminally-ill-inmates-csc-zinger-maid-1.4546773>

Section 121(1) of the Corrections and Conditional Release Act (S.C.1992,C20) allows for parole under ‘exceptional cases’.¹⁶ This section specifically provides *inter alia* for the release of an inmate on parole who is terminally ill; whose physical or mental health is likely to suffer serious damage if he were to remain incarcerated; or for whom continued incarceration would constitute an excessive hardship that was reasonably foreseeable at the time the inmate was sentenced.¹⁷ Inmates who are serving a life sentence or an indeterminate sentence are excluded from consideration for placement on medical parole.¹⁸

Whilst section 121(1) provides for the release of inmates for compassionate reasons, it is submitted that this ‘provision is poorly regulated, it does not provide for a coherent and expeditious process, and it is unduly restrictive.’¹⁹ With a view to illustrating this point, reference is made to the 2010-2011 Annual Report of the Correctional Investigator wherein it is recorded that in the period between 2005 and 2010, there were 22 requests for parole, and only 12 were granted.²⁰ In light of the ostensibly limited value of section 121, argument has been advanced to repeal the current provision and to replace it with a provision that is grounded in a humanitarian concern for the welfare of suffering inmates.²¹ The existing provision, as well as the proposals directed at replacement are however silent on the issue of whether the return of an inmate whose medical condition has improved subsequent to release, be legislated or not.

(accessed 26 June 2019) 2.

16 Corrections and Conditional Release Act (S.C.1992,C20).

17 Corrections and Conditional Release Act (S.C.1992,C20).

18 Section 121(2) of the Corrections and Conditional Release Act (S.C.1992,C20).

19 Iftene, A ‘The case for a new compassionate release statutory provision’ (2017) 54:4 *Alberta Law Review* 936.

20 Iftene A (2017) 936.

21 Iftene A (2017) 950.

5.4 THE POSITION IN THE UNITED STATES OF AMERICA

‘The United States has only 5 percent of the world’s population, yet it has 25 percent of the world’s known prison population.’²² In view of the disproportionately high levels of incarceration in the USA relative to other nations, it makes pragmatic sense to consider its legislation and policies relating to medical parole.

In the USA medical parole is generally referred to as compassionate release.²³ ‘Compassionate release allows an inmate to die at home or in a non-correctional facility and is a non-judgmental and caring way of managing the care of terminally ill inmates.’²⁴ In the state of California however a distinction is drawn between compassionate release and medical parole.²⁵ In order for an inmate to be afforded compassionate release, he must satisfy the following criteria: he must be terminally ill with six months or less to live; he must be deemed no longer a threat to society; and he must have a place to go upon his release.²⁶ On the other hand, medical parole is afforded to inmates who are incapacitated or in a vegetative state and require 24-hour nursing care.²⁷ Most importantly, if an inmate’s condition improves whilst on medical parole, his parole can be revoked and he can be returned to the correctional centre to serve the balance of his sentence.²⁸ Inmates who are however serving life sentences without parole, or serving a sentence for conviction of murder of a police officer, or are sentenced to death, are excluded from consideration for medical parole.²⁹

-
- 22 Rich B ‘Justice, Mercy and the Terminally Ill Prisoner’(2013) 22 *Cambridge Quarterly of Healthcare Ethics* 382.
- 23 Boothby J, Overduin L (2007) 87:4 ‘Attitudes Regarding the Compassionate Release of Terminally Ill Offenders’ *The Prison Journal* 408.
- 24 Granse B (2003) ‘Why should we even care? Hospice social work practice in a prison setting’ *Smith College Studies in Social Work* 362.
- 25 Robinson S, Dobrzyn E ‘Compassionate release false hope for terminally ill inmates. Monterey Bay Justice Project’(2017) available at <https://csumb.edu/justiceproject/compassionate-release-false-hope-terminally-ill-inmates> (accessed 03 May 2019) 1.
- 26 Robinson S, Dobrzyn E (2017) 1.
- 27 Robinson S, Dobrzyn E (2017) 1.
- 28 Robinson S, Dobrzyn E (2017) 3.
- 29 Robinson S, Dobrzyn E (2017) 3.

Medical parole is intended to benefit inmates with chronic health conditions, and the release is contingent upon the following factors: the severity of the illness, the capacity of the clinic linked to the correctional centre to treat the illness, and the cost of incarceration.³⁰ Medical parole differs from compassionate release in that it is not premised upon the prognosis that the inmate's condition is terminal.³¹ It has been noted that the reliance on prognostication can ironically create the proverbial 'catch 22' situation: if the terminally ill inmate's request for compassionate release is made too late, the inmate may die before his application for release is approved; and if the request is made too early, he may live longer than expected.³² It follows that if the inmate's release is perceived to be too early or premature because he is still relatively healthy, it is likely to attract public criticism.

California has the largest state prison system in the USA.³³ In 2005 it was recorded that California with its prison population of 150 000 had, on average, granted 28 compassionate releases of 78 applications received annually.³⁴ It is therefore patent that the number of releases is very small. There is however no indication of how the balance of the applicants in comprised: whether they were inmates who were unsuccessful because they had not met the criteria for release, or whether they had died before their release was authorized.

In the state of Maryland, an inmate must be 'so chronically debilitated or incapacitated by a medical or mental health condition, disease, syndrome that he or she is physically incapable of presenting a danger to society' in order to qualify for medical parole.³⁵ In its determination

30 George Pro M 'Medical Parole and Aging Prisoners: A Qualitative Study'(2017) 23 *Journal of Correctional Health Care* 163.

31 George Pro M (2017) 163.

32 Williams B 'Balancing Punishment and Compassion for Seriously Ill Inmates'(2011) 155 *Annals of Internal Medicine* 123.

33 Vitiello M 'Alternatives to Incarceration: Why is California Lagging Behind?' (2012) 28:4 *Georgia State University Law Review* 1276.

34 Maull F 'The Prison Hospice Movement' (2005) 1:6 *Explore* 478.

35 2016 Maryland Code Correctional Services Title 7 – Parole, Release on Mandatory Supervision, and Executive Clemency Subtitle 3 – Eligibility for Parole; Parole Hearings 7-309. Medical Parole.

as to whether to release an inmate on medical parole, the Parole Commission must consider the availability of treatment within the community, family support, and available housing including hospice or hospital care.³⁶ Medical parole can however be revoked should the condition of the parolee improve.³⁷ The revocation of medical parole upon the improvement in the medical condition of a parolee is a practice that occurs in other states as well.³⁸

In the state of New York medical parole laws were enacted in 1992³⁹ and have since been amended over the years.⁴⁰ Presently the laws provide for the release of an inmate ‘suffering from a terminal condition, disease or syndrome and to be so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society’.⁴¹ The legislation was later amended to include inmates suffering from ‘a significant and permanent nonterminal condition, disease or syndrome.’⁴² A nonterminal illness does not prognosticate a life expectancy.⁴³ An inmate serving a sentence for murder in the first degree or an attempt or conspiracy to commit murder in the first degree

(Amendment effective October 1, 2017.) available at <https://law.justia.com/codes/maryland/2016/correctional-services/title-7/subtitle-3/section-7-309-d-1> (accessed 03 May 2019).

36 2016 Maryland Code Correctional Services Title 7 – Parole, Release on Mandatory Supervision, and Executive Clemency.

37 2016 Maryland Code Correctional Services Title 7 – Parole, Release on Mandatory Supervision, and Executive Clemency.

38 Rikard R ‘Aging Inmates: A Convergence of Trends in the American Criminal Justice System’ (2007) 13 *Journal of Correctional Health Care* 153.

Russel M ‘Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners – Is the Cure Worse than the Disease’ (1994) 3 *Widenar Journal of Public Law* 831. The states are Florida, Georgia, Louisiana, New York, Ohio, Oregon and Wyoming.

39 The New York State Senate available at www.nysenate.gov/legislation/laws/EXC/259-R (accessed 24 June 2019).

40 Silber R, Digard L, Maschi T, Williams B, La Chance J ‘A Question of Compassion: Medical Parole in New York State (2018) Vera Institute of Justice available at https://www.researchgate.net/publication/326065630_A_Question_of_Compassion_Medical_Parole_in_New_York_State_A_Question_of_Compassion_Medical_Parole_in_New_York_State_3_From_the_Director (accessed 24 June 2019).

41 The New York State Senate available at www.nysenate.gov/legislation/laws/EXC/259-R (accessed 24 June 2019).

42 Silber R et al. (2018) 6.

43 Silber R et al. (2018) 6.

is excluded from consideration for medical parole.⁴⁴ An inmate serving a sentence for murder in the second degree; or manslaughter in the first degree; or a sexual offence (defined in Article 130 of New York's penal law); or any attempt to commit any of these offences must serve one half of the sentence before he will be eligible for medical parole.⁴⁵

The request for placement on medical parole may be made by the inmate himself or alternatively by a person acting on his behalf; and it is addressed to the Commissioner of the New York State Department of Corrections and Community Supervision, or to the Department's Division of Health Services.⁴⁶ The Commissioner may in his discretion order a medical evaluation and discharge plan; the evaluation is made by a physician who is in the employment of the Department, or who renders services to the Department.⁴⁷ The medical evaluation shall, *inter alia*, contain a description of the inmate's condition, disease or syndrome; a prognosis concerning the likelihood of recovery; a description of the inmate's physical or cognitive incapacity and the likely duration of such incapacity; and a recommendation of the type and level of service and treatment the inmate will require should he be released on medical parole.⁴⁸

The medical evaluation report must be forwarded to the Deputy Commissioner (who is also the Chief Medical Officer), and within seven days after receipt of the medical evaluation, must advise the Commissioner as to whether the inmate's medical condition meets the criteria for medical parole.⁴⁹ The Commissioner will either certify that the inmate is eligible for medical parole and will refer the case to the Board of Parole for consideration; or

44 The New York State Senate available at www.nysenate.gov/legislation/laws/EXC/259-R (accessed 24 June 2019).

45 Silber R et al. (2018) 10.

46 Silber R et al. (2018) 13.

47 Silber R et al. (2018) 13.

48 Silber R et al. (2018) 13.

49 Silber R et al. (2018) 14.

alternatively, will not certify that the inmate is eligible and the case will not be referred to the Board of Parole.⁵⁰ The decision of the Commissioner in this regard is not reviewable.

The Board of Parole shall authorize the release of an inmate on medical parole after it has considered whether ‘in light of the inmate’s medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law.’⁵¹ The office of Health Services will prepare a discharge plan that provides for the release, transportation and placement of an inmate with a care-provider; the latter may be a hospital, hospice or any other appropriate care setting.⁵²

Medical parole is granted for a period of six months only.⁵³ Prior to the expiration of the six months, the physician treating the parolee must submit an updated report to the Board of Parole and ‘such report shall specifically state whether or not the parolee continues to suffer from a terminal condition, disease or syndrome, and to be so debilitated or incapacitated as to be severely restricted in his or her ability to self-ambulate or to perform significant normal activities of daily living.’⁵⁴

Should the parolee fail to submit an updated report, or an updated report is submitted but therein is stated that the inmate ‘is no longer so debilitated or incapacitated as to create a reasonable probability that he or she is physically and cognitively incapable of presenting any

50 Silber R et al. (2018) 14.

51 ‘The New York State Senate’ available at www.nysenate.gov/legislation/laws/EXC/259-R (accessed 24 June 2019).

52 ‘The New York State Senate.’

53 ‘The New York State Senate.’

54 ‘The New York State Senate.’

danger to society’, the Board of Parole is directed to hold a hearing; the purpose of the hearing is to determine the parolee’s state of debilitation or incapacitation, and it is held in the six month period of medical parole.⁵⁵ Should the Board of Parole finds that the parolee still meets eligibility criteria, the Board may extend the medical parole for a further period of six months; conversely, should the Board not renew the medical parole, the parolee is returned to the correctional centre.⁵⁶

5.5 AN OVERVIEW OF THE JURISDICTIONS

In South African law a terminally ill inmate may be released on medical parole, but should his condition improve, he shall not be returned to a correctional centre.⁵⁷ Both South Africa and Canada have legislative provisions that afford an inmate a temporary absence or leave from a correctional centre in order to obtain medical treatment.⁵⁸ Once the treatment is administered and complete, the inmate is returned to the correctional centre.⁵⁹

Van Wyk proposes that South Africa adopt the Canadian concept of a temporary absence.⁶⁰ In support of her argument, she contends that the reason underlying the release of an inmate under the previous section 79 of the CSA, namely ‘to die a consolatory and dignified death’, has been deleted from the current section 79.⁶¹ The deletion of the underlying reason removes the very *raison d’ etre* for medical parole in that it is no longer required in terms of the current section 79 that an inmate be released in order ‘to die a consolatory and dignified death’.⁶² The suggestion is made that an inmate be released on a temporary absence for the

55 ‘The New York State Senate.’

56 ‘The New York State Senate.’

57 Section 79(7) of the CSA.

58 Section 17(1) of the Corrections and Conditional Release Act (S.C.1992,C20) and section 44 of the CSA.

59 Section 17(1) of the Corrections and Conditional Release Act (S.C.1992,C20).

60 Van Wyk (2014) 38.

61 Van Wyk (2014) 38.

62 Van Wyk (2014) 39.

duration of time that he requires treatment, and once the treatment is completed and the health of the inmate has improved, he then be returned to the correctional centre.⁶³ It is further contended that because the purpose of the release on medical parole, i.e. to die a consolatory and dignified death, has been removed from the current section 79, the release of an inmate should be only to receive medical treatment.⁶⁴ The application of a temporary absence will thus suffice.⁶⁵

Whilst there is some merit in this proposal, it only speaks to instances where the medical condition of the inmate is of a presumably moderate severity and is therefore capable of treatment. The proposal does not canvass instances where the medical condition of the inmate is terminal and there exists a very real prospect that the demise of the inmate is imminent. Put differently, the treatment, if any, will not facilitate an improvement in the inmate's medical condition. Under such circumstances an inmate released on a temporary absence will not be returned to the correctional centre.

Moreover, the argument fails to take into account that the present section 79 of the CSA of not only envisages the release of an inmate who is inflicted with a terminal disease or condition, but it also provides for the release of an inmate on medical parole where his physical incapacity and ability to care for himself is severely limited. In such an instance, a temporary absence will not serve its intended purpose simply because the inmate's physical incapacity is not treatable. Whilst it is conceded that physiotherapy may ease the inmate's medical condition, it will not improve his condition to the extent that if he were released on a temporary absence, he will ultimately be returned to the correctional centre because of an

63 Van Wyk (2014) 39.

64 Van Wyk (2014) 40.

65 Van Wyk (2014) 40.

improvement in his condition. It is not untoward to accept that, in certain instances, the condition of being physically incapacitated is irreversible, and hence a temporary absence in these instances will be futile and serve no purpose.

It has been suggested that the South African legislature adopt the Canadian concept of the temporary absence.⁶⁶ The proposal that ‘terminally ill sentenced offenders should only be granted temporary absences to receive medical treatment’⁶⁷ is misplaced because it rests upon the supposition that a terminally ill inmate will, with treatment, make a recovery and be returned to the correctional centre.

As noted previously, the Canadian concept of the temporary absence⁶⁸ is in all material respects comparable to the South African concept of temporary leave.⁶⁹ The concept of the temporary absence or temporary leave only finds value in instances where the condition of the inmate is not terminal, and death is not imminent. Although Canada has a legislative provision, being section 121(1) of the Corrections and Conditional Release Act (S.C.1992,C20), that allows for the release of a terminally ill inmate, it does not make provision for the return of the inmate should his medical condition improve.

In the USA medical parole is usually referred to as compassionate release.⁷⁰ The state of California however draws a distinction between medical parole and compassionate release; and in the case of the former the release can be revoked should the inmate’s medical condition improve.⁷¹ In a few other states, notably Maryland, Louisiana, Georgia, Ohio and

66 Van Wyk (2014) 39.

67 Van Wyk (2014) 39.

68 Section 17(1) of the Corrections and Conditional Release Act (S.C.1992,C20).

69 Section 44 of the CSA.

70 Boothby J, Overduin L (2007) 408.

71 Robinson S, Dobrzyn E (2017) 1.

Wyoming, medical parole can be revoked where the medical condition of the inmate has improved.⁷²

The criteria for release, and the process required to facilitate release, are in South Africa and in the state of New York in many respects almost identical. There are however five fundamental differences: first, in New York medical parole is limited to a period of six months⁷³; whilst in South Africa medical parole is not limited to a fixed period of time.⁷⁴ Secondly, in New York medical parole can be revoked where the medical condition of the parolee improves⁷⁵; whilst in South Africa there is no revocation where the medical condition improves.⁷⁶ Thirdly, the release of an inmate in New York on medical parole prescribes that the inmate be placed in a hospital, hospice or any other placement that can provide appropriate medical care⁷⁷; whilst in South Africa the release of an inmate on medical parole only requires that there be 'appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released'.⁷⁸ Fourthly, New York excludes inmates serving sentences for serious offences, in particular murder in the first degree or the attempt or the conspiracy to murder from consideration for medical parole⁷⁹; whilst South Africa does not exclude inmates from consideration for medical parole regardless of the offence for which the inmate was convicted.⁸⁰ Finally, New York excludes an inmate who has not served at least one-half of his sentence in respect of certain offences, notably murder in the second degree and manslaughter⁸¹; whilst South Africa does not

72 Rikard R (2007) 153. Russel M (1994) 831.

73 'The New York State Senate.'

74 Section 79 of the CSA.

75 'The New York State Senate.'

76 Section 79(7) of the CSA.

77 'The New York State Senate.'

78 Section 79(1)(c) of the CSA.

79 'The New York State Senate.'

80 Section 79 of the CSA.

81 'The New York State Senate.'

consider the duration of the sentence already served by an inmate as a ground to exclude an inmate from consideration for medical parole.⁸²

5.6 CHAPTER CONCLUSION

It is submitted that the South African legislation governing medical parole is substantively more progressive than the medical parole laws of New York in that it is afforded to all terminally ill inmates regardless of the offence that they had committed, and regardless of the time that they had already served under the sentence. It is arguable that the requirement in New York that the terminally ill inmate be placed in a hospital, hospice or care-setting pursuant to his release on medical parole bears testimony to the American State's sustained concern for the welfare of an inmate. On the other hand, the omission in the South African legislation to define a health facility or a treatment centre to which a terminally ill inmate must be admitted after release may be interpreted as the State's divestment in its interest in the welfare of the inmate.

It is submitted that the position in the state of California is particularly instructive as an exemplar for South Africa because of the distinction it draws between medical parole and compassionate release. It is argued that it may be advisable to incorporate in our legal system the two models or forms of release. Compassionate release may be reserved for inmates who are terminally ill and whose life expectancy is limited to a very short and clearly defined period of time. Such an inmate will be released into the care of his family. Moreover, it ought to be a criterion for release that the likelihood that such an inmate will make a recovery is non-existent.

82 Section 79 of the CSA.

Medical parole on the other hand may be afforded to seriously ill inmates where the likelihood of recovery, albeit remote, exists and therefor if there is a recovery, the inmate will be returned to a correctional centre. In terms of this model, the inmate is released into the care of a hospice or health facility.



CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Medical parole in South Africa was previously a highly contentious issue. It was also in certain respects a hugely politicised issue. Medical parole is governed by section 79 of the CSA, and in 2012 it was amended.

It was argued in this thesis that the Legislature was persuaded to amend the legislation by the findings of the JICS, and more importantly by the controversial release of Shabir Shaik on medical parole. Shaik was released under section 79 prior to its 2012 amendment ostensibly because he was suffering from a terminal illness. It has however transpired that more than a decade later, his illness has ultimately proven to be not fatal at all. On the contrary, it appears that Shaik still continues to enjoy good health and an uncompromising life style.

In terms of the amended section 79, an inmate seeking release on medical parole must meet three criteria: first, he must be suffering from a terminal illness or condition, or he is physically incapacitated as a result of an injury, disease or illness that severely limits his daily activity or ability to care for himself; secondly, the risk of committing a new offence is low; and finally, there are arrangements for his care and treatment in the community to which he is released. Although section 79 allows for the cancellation of medical parole, the *proviso* to section 79(7) states that medical parole cannot be cancelled merely because the condition of the offender has improved. In other words, by virtue of this *proviso*, a parolee like Shaik cannot and will not be returned to a correctional centre to serve the balance of his sentence, however little of it that now remains. In any event, hypothetically (and it is conceded that the

point is moot), even if he were returned to a correctional centre, he is now eligible for ordinary parole.

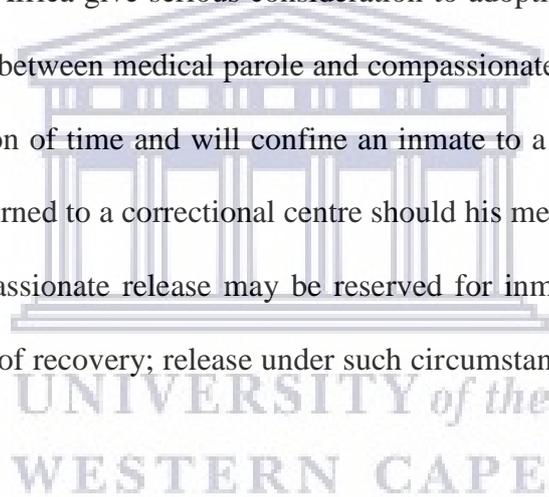
The *proviso* is therefore of particular significance and interest. It specifically and unequivocally prohibits the return of an offender back to a correctional centre in instances where his health has improved. It is submitted that it is an anomaly in that it may be interpreted as a provision that lends favour to an inmate with privilege because such an inmate has the resources to access medical care and treatment that will advance an improvement in his medical condition, whereas an inmate with limited or no means will not be released. This disparity is arguably in conflict with the equality clause in the Constitution that specifically states that everyone is equal before the law, and has the right to equal protection and benefit of the law. A terminally ill or physically incapacitated inmate with no financial support is placed at a distinct disadvantage in that he will not derive an equal benefit, relative to a privileged inmate, from this law. Viewed from this perspective section 79 of the CSA, and more specifically its *proviso*, may not be constitutionally sound.

It has been argued that since medical parole is a continuation of a sentence outside a correctional centre, the theories of sentencing still find application. There are however arguments to the contrary. A leading proponent of the counter argument in the USA is Jalila Jefferson-Bullock who has asserted that the ‘incarceration of terminally ill prisoners is legally, ethically, and financially unsound. It is not supported by any theory of punishment, does not comply with the Eighth Amendment ban on cruel and unusual punishment, and is financially unsustainable’.¹ She has strongly advocated for a more concerted implementation of compassionate release in the USA. The international and regional covenants, conventions

1 Jefferson-Bullock J ‘Are You (Still) My Great and Worthy Opponent: Compassionate Release of Terminally Ill Offenders’ (2015) 83:3 UMKC Law Review 523.

and instruments were brought within the ambit of consideration, and although they do not present any directives on point, the right to health resonates throughout their provisions. It is thus submitted that where medical parole is pursued, it is done so in the interests of affording terminally ill inmates the right to seek the best possible health care outside a correctional centre. The right to health is in any event a constitutional right, subject to the State's resources.

It is submitted that should there be a constitutional challenge to the amended section 79, more specifically its *proviso* upon the grounds that it implicitly favours inmates with privilege, it is recommended that South Africa give serious consideration to adopting the New York model which draws a distinction between medical parole and compassionate release. Medical parole may be for a fixed duration of time and will confine an inmate to a hospice or care facility; such an inmate can be returned to a correctional centre should his medical condition improve. On the other hand, compassionate release may be reserved for inmates whose condition is terminal with no prospect of recovery; release under such circumstances may be into the care of the immediate family.



BIBLIOGRAPHY

Books and chapters in books

Moses J *Parole in South Africa* (2012)

Snyman CR *Criminal Law* 6ed (2014)

Terblanche SS *A Guide to Sentencing in South Africa* 3ed (2016)

Van Wyk D, Dugard J, De Villiers B, Davis D (eds) *Rights and Constitutionalism: The new South African Legal Order* (1994)

Journal articles

Albertus C 'Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa' (2012) 16 *Law, Democracy & Development* 185

Barnes J 'Not too Great Expectations: Considering the right to health care in prisons and its constitutional implementation' *SACJ* (2009) 39

Bateman C 'Tighter medical parole - no more Shaik, rattle and roll' (2012) 102 *South African Medical Journal* 210

Boothby J, Overduin L (2007) 87:4 'Attitudes Regarding the Compassionate Release of Terminally Ill Offenders' *The Prison Journal* 408

George Pro M, Marzell M 'Medical Parole and Aging Prisoners: A Qualitative Study' (2017) 23 *Journal of Correctional Health Care* 162

Granse B (2003) 73:3 'Why should we even care? Hospice social work practice in a prison setting' *Smith College Studies in Social Work* 359

Iftene A (2017) 54:4 'The case for a new compassionate release statutory provision' *Alberta Law Review* 929

Jefferson-Bullock J (2015) 83:3 'Are You (Still) My Great and Worthy Opponent: Compassionate Release of Terminally Ill Offenders' *UMKC Law Review* 521

Mauil F 'The Prison Hospice Movement' (2005) 1:6 *Explore* 477

Moses J 'Parole: Is it a right or a privilege?' (2003) 19 *South African Journal of Human Rights* 263

Mujuzi J 'Releasing terminally ill prisoners on medical parole in South Africa' (2009) 2 *South African Journal on Bioethics and Law* 59

Mujuzi J 'Unpacking the law and practice relating to parole in South Africa'(2011) 14 *Potchefstroom Electronic Law Journal* 205

Rich B 'Justice, Mercy and the Terminally Ill Prisoner'(2013) 22 *Cambridge Quarterly of Healthcare Ethics* 382

Rikard R 'Aging Inmates: A Convergence of Trends in the American Criminal Justice System' (2007) 13 *Journal of Correctional Health Care* 150

Russel M 'Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners – Is the Cure Worse than the Disease' (1994) 3 *Widenar Journal of Public Law* 799

Singh S 'The historical development of prisons in South Africa: A penological perspective' (2005) 50 *New Contree* 15

Terblanche S 'Sentencing guidelines for South Africa: lessons from elsewhere' (2003) 120 *South African Law Journal* 858

Van Wyk C 'The impact of HIV/AIDS on bail, sentencing and medical parole in South Africa' (2008) 23 *South African Journal of Public Health* 50

Vitiello M 'Alternatives to Incarceration: Why is California Lagging Behind?' (2012) 28:4 *Georgia State University Law Review* 1273

Williams B et al. 'Balancing Punishment and Compassion for Seriously Ill Inmates'(2011) 155 *Annals of Internal Medicine* 122

Wolf L 'Pre- and post-trial equality in criminal justice in the context of the separation of powers' (2011) 14 *Potchefstroom Electronic Law Journal* 58

Theses

Albertus C *The Right to Health Care of Terminally Ill Inmates in South Africa* (LLD thesis, University of the Western Cape, 2018)

Lalla M *Unlocking the Impact of South Africa's Correctional Centre Conditions on Inmates' Rights* (LLM thesis, University of the Witwatersrand, 2017)

Louw F *The parole process from a South African perspective* (MA thesis, University of South Africa, 2008)

Van Wyk K *The Legal Framework Regulating Medical Parole: A Comparative Study* (LLM thesis, University of Pretoria, 2014)

Policy documents

Department of Correctional Services: White Paper on Corrections in South Africa 2005

Reports

Judicial Inspectorate Annual Report (2003 / 2004)

Judicial Inspectorate Annual Report (2005 / 2006)

Judicial Inspectorate Annual Report (2006 / 2007)

Judicial Inspectorate Annual Report (2007 / 2008)

Judicial Inspectorate Annual Report (2008 / 2009)

Judicial Inspectorate Annual Report (2009 / 2010)

Judicial Inspectorate Annual Report (2010 / 2011)

Judicial Inspectorate Annual Report (2011 / 2012)

Judicial Inspectorate Annual Report (2012 / 2013)

Judicial Inspectorate Annual Report (2013 / 2014)

Judicial Inspectorate Annual Report (2014 / 2015)

Judicial Inspectorate Annual Report (2015 / 2016)

Judicial Inspectorate Annual Report (2016 / 2017)

Department of Correctional Services Annual Report 2009/2010

Mutingh L (2007) *'Prisons in South Africa's Constitutional Democracy'* Centre for the Study of Violence and Reconciliation.

Hansard%20%20 Questions to the Deputy President of RS%20 Kgalema Motlante%20%20 PMG.htm.

Register of international instruments

The Convention on the Elimination of all Forms of Discrimination Against Women

The International Convention on the Elimination of all Forms of Racial Discrimination

The International Convention on the Rights of Persons with Disabilities

The International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights

The United Nations Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment

Register of regional instruments

The African Charter on Human and People's Rights (Banjul Charter)

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

Legislation

Constitution of the Republic of South Africa 1996

Correctional Services Act 8 of 1959

Correctional Matters Amendment Act 5 of 2011

Correctional Services Act 111 of 1998

Criminal Procedure Act 51 of 1977

Criminal Law Amendment Act 105 of 1997

Prisons and Reformatories Act 13 of 1911

Prisons Act 8 of 1959

Promotion of Administrative Justice Act 3 of 2000

Cases

Derby-Lewis v Minister of Correctional Services 2009 (6) SA 205 (GNP)

Du Plooy v Minister of Correctional Services and Others 2004 (3) All SA 613 (T)

Mazibuko v Minister of Correctional Services and others [2007] JOL 18957 (T)

R v Karg 1961 (1) SA 231 (A)

S v Holder 1979 (2) SA 70 (A)

S v Matyityi 2011 (1) SACR 40 (SCA)

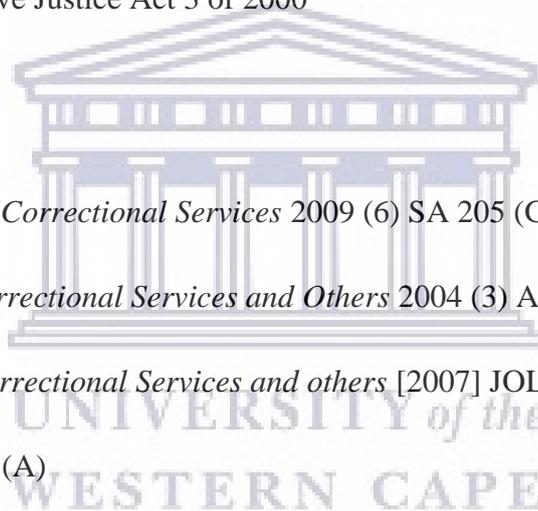
S v Mngeni (CC25/2011)[2012] ZAWCHC 202; 2013(1)SACR 583 (WCC)

S v Shaik 2007 (1) SA 240 (SCA)

S v Zinn 1969 (2) SA 537 (A)

Selebi v S (240/2011)[2011] ZASCA 249; 2012(1)SA 487 (SCA); 2012(1)SACR 209(SCA)
[2012] 1 All SA 332 (SCA)

Shaik v S 2008 (2) SA 208 (CC)



Shaik v S 2008 (5) SA 354 (CC)

Stanfield v Minister of Correctional Services and Others 2003 (4) All SA 282 (C)

Van Biljon v Minister of Correctional Services 1997(6) BCLR 789 (C)

International legislation

Corrections and Conditional Release Act (S.C.1992,c.20) Temporary absences may be authorized Section 17(1) The institutional head may, subject to section 746.1 of the Criminal Code, subsection 140.3(2) of the National Defence Act and subsection 15(2) of the Crimes Against Humanity and War Crimes Act, authorize the temporary absence of an inmate, other than an inmate described in subsection 17.1(1).

Internet sources

‘African Commission on Human and People’s Rights’

available at

<https://www.achpr.org/legalinstruments/detail?id=49>

(accessed 04 December 2019)

‘African Union’

available at

[https://au.int/sites/default/files/treaties/36390-sl-African charter on human and peoples rights 2.pdf](https://au.int/sites/default/files/treaties/36390-sl-African%20charter%20on%20human%20and%20peoples%20rights%202.pdf)

(accessed 04 December 2019)

Bauer N ‘Correctional services widens criteria for medical parole.’

available at

<http://mg.co.za/article/2012-02-23-correctional-services-widens-criteria-for-medical-parole>

(accessed 22 June 2016)

‘Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: briefing with Deputy Minister.’

available at

<https://pmg.org.za/committee-meeting/28159/>

(accessed 03 December 2019)



‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *and* Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’

available at

https://cti2024.org/content/docs/UNCAT%20OPCAT%20treaties_ENG.pdf

(accessed 03 December 2019)

‘Dewani killer denied medical parole’

available at

<https://www.sowetanlive.co.za/news/2014-07-23-dewani-killer-denied-medical-parole/>

(accessed 05 December 2019)

‘HIV Prevalence Survey, terminally ill inmates & medical parole issues: Departmental briefing’.

available at

<https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=HIV+Prevalence+Survey%2C+terminally+ill+inmates+%26+medical+parole+issues%3A+departmental+briefing>

(accessed 4 June 2016)

Harris K ‘Watchdog calls for compassionate parole as prison system adopts new assisted death policy’

available at

<https://www.cbc.ca/news/politics/terminally-ill-inmates-csc-zinger-maid-1.4546773>

(accessed 26 June 2019)

Hlongwane S ‘New medical parole board, new rules â?? Correctional Services moves to avoid another Shaik “brouhaha”.’

available at

<http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/#.V3z6oNR95kh>

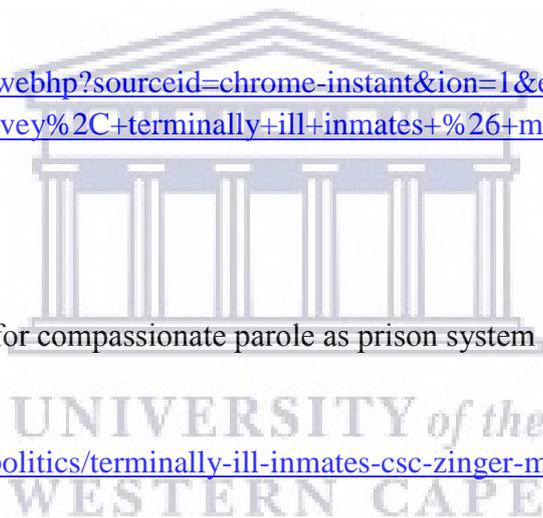
(accessed 27 June 2016)

‘Human Rights for All. International Covenant on Economic, Social and Cultural Rights.’ A handbook.

available at

http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf

(accessed 03 December 2019)



‘International Covenant on Civil and Political Rights’

available at

<http://ccprcentre.org/ccpr-legal-framework/?iccpr-and-hr-committee/international-covenant-on-civil-and-political-rights-iccpr/>

(accessed 04 December 2019).

‘International Convention on the Elimination of All Forms of Racial Discrimination’

available at

<https://www.humanrights.ch/en/standards/un-treaties/racism/>

(accessed 04 December 2019)

‘Jackie Selebi granted medical parole’

available at

<https://www.news24.com/SouthAfrica/News/Jackie-Selebi-granted-medical-parole-20120720>

(accessed 05 December 2019).

‘Jackie Selebi dies’

available at

<https://www.enca.com/south-africa/jackie-selebi-dies>

(accessed 05 December 2019)

Kelley A ‘Pallipedia’

available at

<https://pallipedia.org/serious-illness>

(accessed 04 June 2019)

Lindeque M ‘Clive Derby Lewis granted medical parole.’

available at

<http://ewn.co.za/2015/05/29/Clive-Derby-Lewis-granted-medical-parole>

(accessed 07 July 2016)

Mawson N ‘Dying for right to medical parole’ *Sunday Independent*

available at

<http://www.iol.co.za/sundayindependent/dying-for-right-to-medical-parole-1907688>

(accessed 07 July 2016)



‘Medical Parole: a Political Loophole?’ *SA Breaking News*

available at

<http://www.sabreakingnews.co.za/2013/10/07/medical-parole-a-political-loophole/>

(accessed 07 July 2016)

Mkhize B ‘Full statement after probe into Shaik doctors’

available at

<https://www.iol.co.za/news/south-africa/full-statement-after-probe-into-shaik-doctors-440474>

(accessed 05 June 2019)

‘Mngeni applies for medical parole - reports’

available at

<https://ewn.co.za/2014/07/06/Anni-Dewani-Mngeni-applied-for-medical-parole-Reports>

(accessed 05 December 2019)

‘Nelson Mandela International Day 18 July’

available at

https://www.un.org/en/events/mandeladay/mandela_rules.shtml

(accessed 04 December 2019)

‘No medical parole for Anni’s killer’

<https://www.iol.co.za/news/no-medical-parole-for-annis-killer-1723870>

(accessed 05 December 2019)

‘Placement on parole and correctional supervision: how the process affects the offender.’

available at

<http://www.dcs.gov.za/docs/landing/Parole%20public%20pamphlet%202012%20Eng.pdf>

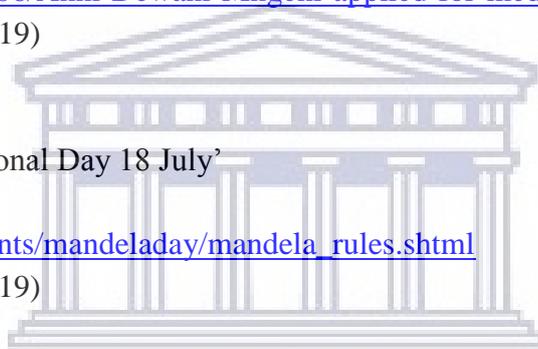
(accessed 17 May 2016)

Qukula Q ‘How medical parole works in South Africa’

available at

<http://www.702.co.za/index.php/articles/1594/how-medical-parole-works-in-south-africa>

(accessed 09 July 2016)



UNIVERSITY of the
WESTERN CAPE

Rabkin F ‘Medical parole system in spotlight.’
available at
<http://www.bdlive.co.za/national/law/2015/02/02/medical-parole-system-in-spotlight>
(accessed 1 July 2016)

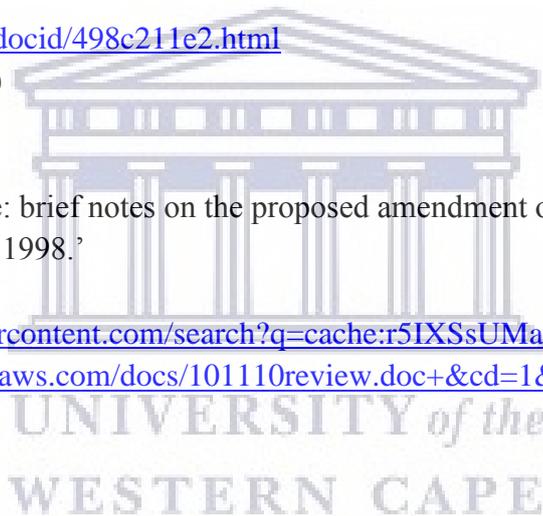
Robinson S, Dobrzyn E ‘Compassionate release false hope for terminally ill inmates.
Monterey Bay Justice Project’ (2017)
available at
<https://csumb.edu/justiceproject/compassionate-release-false-hope-terminally-ill-inmates>
(accessed 03 May 2019)

Report of Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment
or Punishment Manfred Nowak
available at
<https://www.refworld.org/docid/498c211e2.html>
(accessed on 05 July 2019)

‘Reviewing medical parole: brief notes on the proposed amendment of section 79 of the
Correctional Services Act, 1998.’
available at
[http://webcache.googleusercontent.com/search?q=cache:r51XSSUMarEJ:pmg-assets.s3-
website-eu-west-1.amazonaws.com/docs/101110review.doc+&cd=1&hl=en&ct=clnk&gl=za](http://webcache.googleusercontent.com/search?q=cache:r51XSSUMarEJ:pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/101110review.doc+&cd=1&hl=en&ct=clnk&gl=za)
(accessed 4 July 2016)

‘SACP disappointed in Hani Killer’s parole.’
available at
[http://www.news24.com/SouthAfrica/News/SACP-disappointed-in-Hani-killers-parole-
20150529](http://www.news24.com/SouthAfrica/News/SACP-disappointed-in-Hani-killers-parole-20150529)
(accessed 07 July 2016)

Selfe J ‘Selebi: New Legislative Review of Medical Parole needed.’
available at
<https://www.da.org.za/2013/10/selebi-new-legislative-review-of-medical-parole-needed/>
(accessed 07 July 2016)



‘South Africa’s compliance with UN Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society’
available at
<https://pmg.org.za/committee-meeting/12656/>
(accessed 11 December 2019).

Speech by Hon NN Mapisa-Nqakula at the Parole Board Working Session held at Pretoria Management area on 26 March 2012.
available at
<http://www.dcs.gov.za/UploadedFiles/Parole%20Board%20Work%20Session%20Speech.pdf>
(accessed 4 July 2016)

‘The government of South Africa ratifies the ICESCR’
available at
<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>
(accessed 03 December 2019)

‘The New York State Senate’
available at
www.nysenate.gov/legislation/laws/EXC/259-R
(accessed 24 June 2019)

‘The United Nations Standard Minimum Rules for the Treatment of Prisoners’
available at
https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf
(accessed 04 December 2019)

‘Selebi paroled on medical grounds’
available at
<https://mg.co.za/article/2012-07-20-00-selebi-paroled-on-medical-grounds>
(accessed 05 December 2019)



UNIVERSITY of the
WESTERN CAPE

Silber R, Digard L, Maschi T, Williams B, La Chance J ‘A Question of Compassion: Medical Parole in New York State’ (2018) Vera Institute of Justice available at

https://www.researchgate.net/publication/326065630_A_Question_of_Compassion_Medical_Parole_inNew_York_State_A_Question_of_Compassion_Medical_Parole_in_New_York_State_3_From_the_Director

(accessed 24 June 2019)

‘South Africa’s obligations under international and domestic law’ available at

<https://www.hrw.org/legacy/reports98/sareport/App1a.htm>

(accessed 04 December 2019)

Weiner M ‘Opinion: Schabir Shaik must go back to jail’

available at

<https://ewn.co.za/2015/02/24/OPINION-Mandy-Wiener-Schabir-Shaik-must-go-back-to-jail>

(accessed 26 May 2019)

‘United Nations Human Rights Office of the High Commissioner’

available at

<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

(accessed 04 December 2019)

‘United Nations Treaty Collection’

available at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en

(accessed 04 December 2019)

‘What does terminal illness mean?’

available at

<https://www.mariecurie.org.uk/who/terminal-illness-definition>

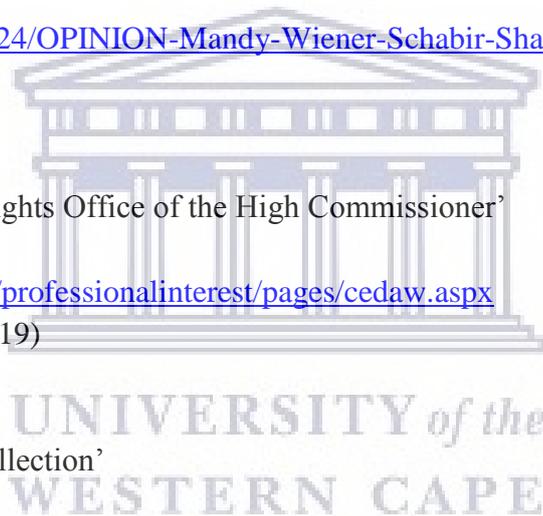
(accessed 04 June 2019)

2014 Louisiana Laws Revised Statutes TITLE 15 – Criminal Procedure RS 15:574.20 – Medical parole program; eligibility; revocation

available at

<http://law.justia.com/codes/louisiana/2014/code-revisedstatutes/title-15/rs-15-574.20>

(accessed 16 July 2016)



2016 Maryland Code Correctional Services Title 7 – Parole, Release on Mandatory Supervision, and Executive Clemency Subtitle 3 – Eligibility for Parole; Parole Hearings 7-309. Medical Parole. (Amendment effective October 1, 2017)

available at

<https://law.justia.com/codes/maryland/2016/correctional-services/title-7/subtitle-3/section-7-309-d-1>

(accessed 03 May 2019)



UNIVERSITY *of the*
WESTERN CAPE