

The HIV/AIDS Pandemic in Prisons

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ABSTRACT When a person is sentenced to jail, the society is less likely to care about what is going on behind bars. In the mind of the public, the imprisoned seem to lose identity and life. Too often people forget that there is a life behind bars which is a life in another community with different rules and spatial limits. According to individual human rights standards, a prisoner does not cease to be a human being who is entitled to be treated humanely, with dignity and respect as he or she deserves. Although this problem is rife in almost all countries, this paper will focus generally on HIV/AIDS pandemic in prisons generally and will also embrace the United Kingdom (UK) imprisonment scenario and how it relate to the South African situation. The Constitution of South Africa and the Human Rights Act 1998 in the UK and some of the limitations of the European Convention on Human Rights (ECHR) will be explored. Both prison systems have a high number of prisoners who have drug problems and related issues with communicable diseases. A great deal of research has focused on HIV/AIDS in normal settings however there have been little research directed on this issue in prison settings hence this paper will make a useful additive contribution to knowledge.

1. INTRODUCTION

When one considers prisoners as human beings and not as persons convicted for crime, then one becomes cognizant that prisoners behind bars are not deprived of fundamental human rights alongside with their liberty. Due to the stigma and discrimination associated with HIV/AIDS, being known to be HIV positive in prison means being relegated into the least worthwhile and undeserving status.

This paper finds its backbone on extensive literature review on the HIV/AIDS issues in prisons located in the UK and in South Africa taking into cognizance that both prison systems are characterised with large numbers of prisoners who has drug problems and other related contagious diseases. Notable contribution to knowledge through this exploration is expected as HIV/AIDS in prisons is not a well-researched area in both countries UK and South Africa. This study also relied heavily on human rights materials and other related news clips enabling the researchers to make a proper investigation on this issue. The main objective of this study is to bring awareness and add value to knowledge on the state of the HIV/AIDS pandemic in the UK and in South Africa. For the purpose of this paper Human Immunodeficiency Virus (HIV) is a retro-

virus that attacks the T- Cells in the immune system and can be transmitted through the exchange of bodily fluids such as blood and semen. Acquired Immune Deficiency Syndrome (AIDS) is caused by HIV in its advanced stages; it is possible for well managed HIV not to reach to the state of AIDS.

2. PRISONERS' RIGHTS AS HUMAN RIGHTS

Imprisonment involves the loss of the right to liberty; individuals are sentenced to prison as punishment and not for punishment, and therefore should retain as many civil rights as possible. Today, prisoners' rights are protected under the main international human rights standards, namely, the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the Bill of Rights as contained in The Constitution of the Republic of South Africa. These human rights standards contain provisions that prohibit torture and cruel, inhuman, or degrading treatment or punishment. However, some of the comprehensive guidelines remain in the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) (Starmer 1999) and other documents dealing with conditions of de-

tention include the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as adopted by the United Nations General Assembly on 9 December 1988, United Nations Document, A/ 43/ 49 (1988) whose principle 1 mention that 'all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person'.

In addition, recommendations with regards to HIV/AIDS in prison have been issued by the United Nations Programme on HIV/AIDS (UNAIDS 1996). The World Health Organization (WHO 1993) has published guidelines on HIV/AIDS infection in prisons that should be considered as supplementing and clarifying human rights standards as regards prisoner's rights.

2.1 Testing for HIV in Prison

Prisoners retain all their rights except for those that are inherently limited or withdrawn due to their imprisonment and it is arguable that under international human rights law, HIV-testing of prisoners on a mandatory basis may amount to a violation of prisoner's right to bodily and physical integrity (Article 8, ECHR) and freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 3, ECHR). According to WHO (1993) and UNAIDS (1996), compulsory testing of prisoners for HIV have been condemned in favour of the development of voluntary HIV/AIDS testing programmes that has to be carried out with the informed consent of the person and with adequate pre- and post-counseling.

In the UK there are national standards stipulated for the testing and treatment of HIV, for example, the British HIV Association guidelines and the Medical Foundation for AIDS and Sexual Health which is believed to be followed by the UK prison systems. However, it cannot be ascertained that this testing is readily available for the prisoners according to a survey conducted by National Aids Trust and the Prison Reform Trust among prison healthcare managers across the UK in 2005. Whereas Pollsmour prison in South Africa's HIV/AIDS testing is not compulsory and this goes for other prisons in South Africa. HIV tests are conducted prior to prisoner's request with a written consent or where testing is upon recommendation by the District Sur-

geon (Goyer 2001). In addition numerous community based groups in various countries have also condemned compulsory or mandatory HIV testing such as the Treatment Action Campaign (TAC) in South Africa and National Aids Trust (NAT) in the UK. However, despite its condemnation and prohibition in some countries, mandatory or compulsory HIV testing of inmates is still occurring in Canada and in South Carolina where prisoners are tested on admission for example. Even though HIV testing would determine exactly how many prisoners, and specifically which ones are infected with HIV to enable correctional services to improve care, provide special supervision and gather information on transmission (Goyer 2001) testing should remain an informed choice to each prisoner.

2.2 Challenging HIV- Testing under Article 8 ECHR

The prohibition of mandatory medical examination is clearly stated by the Convention case law under Article 8 (right to privacy) which has been interpreted as covering interference with bodily integrity as contained in 8 EHRR 235. Under the ECHR, the right of privacy is not absolute and can be subjected under Article 8 (2), to restrictions on grounds of public security, public health and the protection of rights of others. In the context of mandatory HIV/AIDS testing, governments could argue that such policy is justified on ground of public health. It can also be justified that prisons should screen for HIV/AIDS in order to identify infected prisoners to enable the provision of adequate care and protect staff, fellow inmates and third parties with whom HIV positive prisoners are likely to have contact after being released. Thus in reference to the ECHR, a government would have to indicate that the interference with prisoners' rights to privacy was:

- ♦ In accordance to the law;
- ♦ Necessary in a democratic society, and;
- ♦ For the protection of a 'legitimate claim' in this case, public health;
- ♦ There was a pressing need and the restriction was proportionate to that need;
- ♦ Weighted both against its adverse effects on the prisoners and against the protection of others.

Furthermore, the UN International Guidelines on HIV/AIDS state that there is no public health

or security justification for mandatory HIV/AIDS testing of prisoners (UNAIDS 1996) and several arguments will be put forward to support this view point:

- ♦ Testing of prisoners for HIV cannot exclusively detect all prisoners that are HIV positive due to delayed sero- conversion;
- ♦ In order to identify all prisoners infected with HIV in the perspective of protection of public health, testing would need to be continually repeated on those who test negative;
- ♦ There is also the problem of false positive results and whether should the prison segregate HIV positive prisoners;
- ♦ A prisoner who has been wrongly tested positive may be exposed to stigmatization and segregation;
- ♦ It has also been noted that HIV/AIDS transmission occurs in prisons, especially because of needle sharing among drug users and consensual or forced sex without protection (Dolan 1998).

Consequently, without an effective campaign on education and prevention, HIV testing is unlikely to have any benefits for the protection of the public health. Furthermore, the argument that favors protection of the staff, fellow inmates and third parties may mean divulging the status of the prisoner to all the persons concerned. This may result in discrimination, stigmatization and segregation of HIV positive prisoners. Since the informed consent and counseling of patients is recommended in the general community, the same standards of practice should be applicable to prisoners.

In the absence of case law dealing with this specific issue, it is difficult to predict whether the European Court of Human Rights (ECHR) would apply the same standards as it would in the case of mandatory HIV testing in the general community. In addition, in the case law of ECHR on drug testing in prison, one can argue that the court might decide to consider HIV testing in the general community and in prison as two distinct issues. However, compulsory medical intervention must be considered as interference with an individual right to privacy (Bill of Rights 1998).

2.3 Challenging HIV Testing under Article 3 ECHR

Under the human rights law, an individual's physical or bodily and mental integrity is also

protected by the prohibition of inhuman and degrading treatment under Article 3 ECHR and the following can be cited:

- ♦ Therefore, testing prisoners for HIV without their informed consent is tantamount to be considered as a prima facie violation of their rights under Article 3 ECHR.
- ♦ The vulnerability of a prisoner because of his detention and the presumed absence of pre- and post counseling are likely to increase extreme psychological and emotional consequences of a positive test.
- ♦ Positive test may also contribute to severe mental suffering that may create a state of anguish and stress and may contribute physical ill health.
- ♦ The fear of discrimination and stigmatization and the lack of moral support may cause detrimental mental and emotional problems that may lead to suicidal tendencies.

Starmer (1999) has also noted that the European Court of Human Rights has generally interpreted Article 3 ECHR in a very narrow sense as most applications brought by prisoners under the Article, have failed mainly because the Court found the conditions complained of were justified by reference to the aim pursued by their imposition. Whether the Court would interpret Article 3 ECHR as prohibiting mandatory HIV testing of prisoners is doubtful. The fact that it has been stated by the Commission that a failure to comply with the Minimum Rules for the Treatment of Prisoners does not automatically lead to a finding that Article 3 ECHR has been violated makes it clear that the interpretation of this article in relation to the conditions of prisoners to be extremely narrow.

3. VIOLATION OF CONFIDENTIALITY

The issue of confidentiality in this sphere is linked to the prisoner's status and the problem of HIV testing and also deals with an individual's right of privacy. According to the international guidelines information regarding the HIV status of a prisoner should only be disclosed under special circumstances like due to medical ethics that state such a disclosure must be to ensure the safety and well being of staff and fellow prisoners (WHO 1993). The violation of secrecy of a prisoner's HIV status is also likely to result in harassment and discrimination and discrimination from both staff and fellow inmates

and may lead to a risk of segregation, in solitary confinement, murder and exclusion from sport activities and others in prison (Jurgens 1999). Violation of prisoners' right of confidentiality by prison officers and even medical personnel is common and has been well publicized in various reports or case law. However, access by prison and medical staff to information pertaining to a prisoner's HIV status constitutes an interference with his right to respect for his private life. Further, the European Court of Human Rights recognizes that the respect for medical confidentiality as a vital principle that is imperative to privacy, in particular to a person's HIV status.

Whilst prison systems do not necessarily apply a policy of disclosure, the promise of confidentiality is often broken as this information is also often passed on amongst the prison staff. However, the ethical responsibility of medical officers to adhere to the principle of confidentiality is imperative for promotion of public health as disclosure for public consumption may deter prisoners to come forward to divulge and seek care due to fear of the repercussions that he may have to face if their HIV status is disclosed.

4. DENIAL OF ADEQUATE HIV MEDICAL TREATMENT

With evidence of HIV sero-conversion within the prison setting statistics indicate higher HIV sero-prevalence in prison than in general population tied up with high risk of HIV transmission in prison (Goyer 2001). There is argument that the denial and lack of preventative measures against HIV transmission in prison may be violation of prisoner's right to life and security coupled by the rights to protection against inhuman and degrading treatment or punishment under national and international human rights laws. As evidenced by a hunger strike by 242 inmates at Westville Medium B prison (WMB) in South Africa, treatment flow to the prisoners is slow and sometimes denied for menial reason for instance in this incident prison managers cited that treatment could not be provided to these prisoner as they lacked proper documentation such as IDs this reason on its own cannot not outweigh the life of a person that would be at stake. According to a survey by the Prisons Reform Trust and National Aids Trust in the UK in 2004 most Scottish prisons provided adequate treatment and care for prisoners however the

survey was from the prison managers' view and not from the prisoners.

4.1 Consequences of Sexual HIV Transmission and Human Rights

Male homosexual activity also occurs inside the prison as it would outside due to homosexual orientation but also as a result of the denial of female company inside prison settings. However, heterosexual sex also occurs either between male and female inmates or between female inmates and prison staff. Rapes are also common and are at times considered as a sort of institutionalized initiation where it can take a form of gang rapes (Human Rights Watch 2001). The risks of sexual assault are also enhanced by overcrowding and by violent unstable nature of some inmates in prison cells. However, it has also been noted that too often abuses of prisoners by prison staff are mostly disregarded and punitive actions should be taken against those who abuse their power and authority. Prostitution also occurs whereby inmates provide sex in exchange for money and other commodities and this is similar to sexual activities that happen outside incarceration. Consequently, sex in prison raises two important issues for instance; the provision of condoms and lubricants and the introduction of measures to combat aggressive sexual behavior that may include rape (Canadian HIV/AIDS Legal Network 2001).

Despite these sexual activities in prison, sex behind bars is by definition illegal and the provision of condoms to avoid transmission raises dilemma of this strategy be perceivable as being condoning these acts. It is also at times argued that consensual homosexual between inmates is illegal because prisons are public places not private. Consequently, whilst prisoner's access to condoms is policy in South African prisons (PlusNews 2013), the provision of condoms is still denied or limited as the argument remains not to encourage such homosexual activities. The rights of prisoners to receive health care including prevention measures have been strongly emphasized by the international community for instance the guidelines on HIV/AIDS in prisons state that prevention measure for HIV/AIDS in prison should complement and be compatible with those in the communities. Prison administrations have a responsibility to define and put in place policies and practice that will

create a safer environment and diminish the risk of HIV to prisoners and staff. Since sex occurs in prison even when prohibited, condoms should be made available to prisoners throughout their period of detention (WHO 1993).

There is also a strong argument for interpreting the failure to provide prisoners with condoms as a violation of the right to be protected against inhuman and degrading treatment under Article 3 of the ECHR (Canadian HIV/AIDS Legal Network 2001). Article 3 of the Convention imposes a duty on state authorities to take appropriate measures in situations where an individual may be exposed to torture, inhuman or degrading treatment or punishment. For instance, failure to provide prisoners with condoms not only violate the right of prisoners to health care that include protection against the transmission of infectious disease but it also puts their lives and dignity at stake by exposing them to a fatal disease. This is a violation of positive obligation under Article 3 ECHR. Article 8 ECHR also state that respect for private life requires authorities to take necessary steps to protect prisoners from contracting sexually transmitted diseases, arguably through the provision of condoms (Watt 2000).

The right of prisoners to be free from cruel, inhuman and degrading treatment in the context of sexual HIV transmission is also jeopardized in the context of coerced sex and rape. It has also been noted that violent sexual behaviors, prisoner-on prisoner rapes reported to prison authorities are at times ignored (Human Rights Watch 2001). However, failure to take measures to curb exposure of prisoners to inhumane and degrading treatment inflicts physical and emotional pain that result from HIV infection. “Most of the sex among the male prisoners - only 2.1% of the South African prison inmates are women, and 1.1% are children — was highly coercive, and described as ‘blatant rape’”, (Gear 2010) as cited by PlusNews (2013).

5. HIV TRANSMISSION BY INJECTION

The problem of HIV transmission in prison and drug use is prevalent and it also becomes a means for some prisoners to cope with incarceration and for others it is habitual. The sharing of non-sterile injecting equipment makes the injecting in prison an ideal breeding ground for HIV

transmission in Glenochill prison in central Scotland (Gough and Edwards 2009). Canadian medium security prison for women in Montreal have indicated that the introduction of specific measures such as the provision of bleach, needle exchange programmes or implementation of prison methadone maintenance programmes have had a beneficial impact (Gatali and Archibald 2004). For instance, various experiments were carried where prisoners were allowed to keep one piece of injecting in a specifically designated cabinet. At the end of the first year, no new cases of HIV or hepatitis had been shown and the prisoners’ health had improved. Furthermore, a decrease in needle sharing was observed and there was no evident increase in drug consumption and needles were not used as weapons (Stover 2000). The debate around the prevention measured to HIV transmission via drug injection is in line with the transgression of the right to be free from cruel, inhuman and degrading treatment and punishment which includes the duty of care for prisoners and the respect for prisoner’s dignity and life at stake in the absence of appropriate measure to prevent HIV transmission. During 2003 South African prison authorities admitted that rates of HIV infection could also be linked to the sharing of injection and tattoo equipment (Luyt 2003) although this have not yet been scientifically proven.

6. SEGREGATION

Whilst the segregation of people with HIV/AIDS is rare in the general community, it has been occurring in many prisons such as South Carolina and Alabama until recently in July 2013 when the policy was changed although it is not clear as to when this policy will be integrated after a number of inmates filed a lawsuit against the systems and the judge ruled in their favour (Jurist 2013). Segregation in this aspect means denying prisoners access to in-prison jobs, sport competitions, educational programmes, and religious services on the ground that uninfected inmates would be placed at a significant risk of contracting HIV. However, the segregation of HIV positive prisoners has been judged unlawful in some courts under the Equal Opportunity Act and Disability Discrimination Act. No evidence in literature has been found though on segregation of HIV positive prisoners in South Africa. Cases of segregation based on the crime

committed or in the interest of security to preserve discipline within the prison can be acceptable, however, the segregation of HIV positive prisoners is different in the sense that it's discriminatory and may have psychological, physical consequences and mental suffering on the prisoners.

7. CONCLUSION

Under international human rights law, states have duties to promote and protect prisoners' rights on a double rationale and that is human rights and public health, to that effect prisoner's rights to privacy should be guaranteed in particular through the introduction of voluntary testing and non-disclosure of the HIV status of prisoners. HIV transmission while in jail is likely to have detrimental effects on the prisoners tested positive, more especially in the absence of pre and post counseling, risk of stigmatization and discrimination. Simultaneously, the breach of confidentiality on HIV test results deters prisoners to test for HIV and is against human rights, human dignity and health ethics. Measures to curb the spread of HIV in prisons should actively be put in place and monitored. International human rights Organisations also need to periodically review the state of prisons in the view of HIV/AIDS monitoring as to whether international regulations are being followed. Much research need to be done on HIV/AIDS in prisons based on data collected in the prisons from prisoners themselves as this is not a well-researched area to make useful additive contribution.

REFERENCES

- Canadian HIV/AIDS Legal Networks. 2001. Info Sheet 4, From HIV/AIDS in Prison, Prevention: Condoms. From <www.aidslaw.ca> (Retrieved on 15 June 2013).
- Dolan K 1998. Evidence about HIV transmission in prison. *The Medical Journal of Australia*, 160: 734.
- Gaskin Emily Hilyer 2009. *A Prison within a Prison: Segregation of HIV Positive Inmates and Double Stigma*. Anthropology PhD Thesis, Unpublished. Atlanta: Georgia State University.
- Gatali M, Archibald C 2004. Women and HIV. *BMC Women's Health*. From <http://www.biomedcentral.com/1472-6874/4/S27> (Retrieved on September 13, 2013).
- Gough E, Edwards P 2009 HIV seroprevalence and associated risk factors among male inmates at the Belize Central Prison. *Rev Panam Salud Pública*, 25(4): 292-299.
- Goyer KC 2001. Confronting HIV/AIDS in South African Prisons. *Politikon South African Journal of Political Studies*, 28(2): 195-206.
- Human Rights Watch. 2001. *No Escape: Male Rape in US Prison*. New York: HRW Report.
- Jurgens, R. 1999. 'HIV/AIDS in Prisons: New Development'. *Canadian HIV/AIDS Policy and Law Newsletter*.
- Large SA 1999. *HIV and Hepatitis Prevention in Prisons*. PhD Thesis, Unpublished. Department of Psychology, University of Southampton, Southampton.
- Luyt WFM 2003. Harm and risk reduction in prisons. *Acta Criminologica*, 16(2): 88-107.
- Normil Sydney, 2013. South Carolina Prisons End HIV Segregation. *Jurist Paper Chase NewsBurst, Daily*, July11, 2013 P. 1.
- PlusNews 2013. In Depth: HIV in Prisons. From <http://www.plusnews.org/In-Depth/71089/48/HIV-in-prisons> (Retrieved on September 16, 2013).
- PlusNews 2013. South Africa: HIV-positive inmates hungry for ARVs From <http://www.irinnews.org/report/39456/south-africa-hiv-positive-inmates-hungry-for-arvs> (Retrieved on September 16, 2013).
- Starmer K 1999. *European Human Rights Law*. London: Legal Action Group.
- Stover H 2000. Evaluation of needle exchange pilot projects shown positive results. *Canadian HIV/AIDS Policy and Law Newsletter*, 5(2/3): 60-69.
- Republic of South Africa 1996. *Constitution of the Republic of South Africa*. Pretoria: Government Printer.
- UNAIDS 1996. *International Guidelines on HIV/AIDS and Human Rights*. Geneva: UNAIDS.
- UNODC/WHO/UNAIDS HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings. Vienna: United Nations Office on Drugs and Crime 2006 From <https://www.unodc.org/pdf/criminal_justice/HIV/AIDS_Prevention_Care_Treatment_and_Support_in_Prison_Settings.pdf> (Retrieved on September 18, 2013).
- Watt B 2000. HIV/AIDS and European Human Rights Law. *European Human Rights Law Review*, 1: 54-65.
- Winter M 2013, National Prison Project HIV Ghettos in U.S. Prisons are Finally in the Past From <https://www.aclu.org/blog/prisoners-rights-hiv-aids/hiv-ghettos-us-prisons-are-finally-past> (Retrieved on September 11, 2013).
- WHO/UNAIDS Guidelines on HIV Infection and Aids 1993. From <http://www.unodc.org/documents/hiv-aids/WHO%20guidelines%20prisons.pdf> (Retrieved on September 17, 2013).