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“...imprisonment does not deprive prisoner of all or every basic right which the ordinary citizen enjoys...”

Do prisoners have human rights?

Many people, including high ranking political leaders, sometimes argue that prisoners don't have or should not be allowed to enjoy their human rights. Such arguments are wrong and have no basis in law. Prisoners are human being and as such they retain their rights even when in prison. This is so because human rights are **universal**. This means that every person, including a prisoner, has human rights, no matter who he is, where s/he lives or his/her class, race, sex, age, social status, etc. Also, human rights are said to be **inalienable**. This means that they cannot be taken away from a person, including a prisoner.

Does that mean that a prisoner can enjoy all the rights like anyone else?

No. No right is absolute. This means that the enjoyment of human rights may be restricted or limited in certain circumstances. For example, all people have the right to liberty, the right to practice any profession, occupation, trade or business, the right to freedom of movement, etc. But these rights are restricted when you go to prison. Such restrictions or limitations are lawful and in line with the Namibian Constitution and the application of international human rights law.

So what rights does prisoners have?

Trial awaiting prisoners or people who have been sentenced lose some of their rights, such as freedom of movement, but they keep other rights such as the right to dignity. Even though the Namibian Constitution provides for the suspension or non – enjoyment of certain human rights in specific

circumstances, these circumstances do not include time spent in prison. The enjoyment of certain human rights may only be suspended when Namibia is in a state of **national defense** or when a **state of emergency** has been declared in the country. However, certain rights cannot be suspended under any circumstances. These rights include:

- ⚔ the right to human dignity
- ⚔ the right life
- ⚔ the right to equality and freedom from discrimination.
- ⚔ the right not be tortured or treated cruelly or inhumanely

This means that a prisoner retains his human dignity in all circumstances. His right to human dignity is inviolable in all circumstances irrespective of the type of crime he committed. He may also not be tortured or treated cruelly or inhumanely under any circumstances. This is so, because he remains a human being after all!

In addition to the above, Namibian and international law relating to the prisoners, provides that a prisoner (i.e. a trial-awaiting prisoners, sentence-awaiting prisoners and convicted prisoners) have the following rights:



- ⚪ To receive meals (from the State and his family);
- ⚪ To receive clothing, bedding, soap and medicine;
- ⚪ To receive visitors;
- ⚪ To receive and write letters (subject to censorship);
- ⚪ To exercise;
- ⚪ To medical treatment;



- ⚪ If a prisoner is female, to be kept separate from male prisoner;
- ⚪ If a female prisoner is to be admitted into prison custody, in certain instances, with her infant; such an infant must be supplied with clothing and other necessities by the State until she attains the age of two years;
- ⚪ If an unconvicted juvenile, not to be detained in a prison unless special circumstances so demands;

- ⌘ Not to be assaulted by prison guards unless he has attempted to escape, been riotous or violent, or has disobeyed a lawful order;
- ⌘ To be given an opportunity to state his case whenever a privilege and or benefit is withdrawn or amended;
- ⌘ To make complaints to the Officer in Charge



- ⌘ Be afforded adequate facilities for the preparation and presentation of his defense; his legal representative must be given adequate facilities to privately interview him; where the prisoner is unable to communicate with his legal representative in English, a suitable interpreter must be provided;

- ⌘ No to have his documents or letters addressed to the Ombudsman or his lawyer censored.
- ⌘ When charged for a prison offence, to be informed in writing of the nature and particulars of the charge against him or her, and be given a fair hearing
- ⌘ To be informed of the provisions of the Prisoners Act (No 17 of 1998), the applicable rules, orders and directives relating to the treatment and conduct of prisoners; this information must be made available to every prisoner immediately on admission to a prison; where the prisoner is illiterate the contents of those provisions must be orally explained to him;
- ⌘ To be free from unreasonable searches at night.

HIV/AIDS and Prisoners

In 1996 the United Nations Commission on Human Rights (UNCHR) stated that...





“...by entering prisons, prisoners are condemned to imprisonment for their crimes; they should not be condemned to HIV and AIDS. There is no doubt that governments have a moral and legal responsibility to prevent the spread of HIV among prisoners and prison staff and to care for those infected. They also have a responsibility to prevent the spread of HIV among communities. Prisoners come from the community, and they will eventually return to it. Protection of prisoners is thus protection of our communities!”

So, does a HIV positive prisoner have any special rights?

A prisoner that is HIV positive has the same rights as everyone else. Although the Prisoners Act is not HIV- and AIDS- specific. It deals with related issues such as discrimination, accommodation, food, health, treatment of prisoners, and the prohibition of inhuman or degrading treatment.

Which rights are at issue in the context of HIV and AIDS and prisoners?

The main rights at issue in the context of HIV and AIDS in prison are:

-  **The right to privacy:** Prisoners have a right to confidentiality regarding their health. Prison officials may only disclose health information, including the results of an HIV test, with the informed consent of the prisoner. If prison officials know about the HIV status of a prisoner, they may only tell someone else if the prisoner has given them permission to do so. The World Health Organization (WHO) recommends that any kind of marking or coding of a prisoner's file or cell to indicate HIV status should be prohibited.
-  **The right to consent to treatment and HIV testing:** Testing a prisoner for HIV without his consent and knowledge is unlawful. The policy of the Ministry of Health and Social Services (MoHSS) is to require informed consent and to provide pre-and post-test counseling before an HIV test may be done. The Ministry of Prisons and Correctional Services follow these guidelines. In the South African case of *C v Minister of Correctional Services*, a prisoner successfully sued the Department of Correctional Services because he was tested for HIV without his informed consent. The Court found that there was a violation of his rights because there was no pre-and post-test counseling, it could therefore not be said that he gave his informed consent. It is therefore against the law for a prisoner to be tested for HIV against his or her wishes or knowledge. A prisoner does not have to have an HIV test even if the prison authorities demand this. Informed consent must always be given for an HIV test.
-  It is against the law to force a person to make a confession or admission, for example about his or her HIV status, so that it can be used against him.
-  **The right to be free from discrimination:** Prisoners with HIV or AIDS have the right to equality and non-discrimination. Segregation of prisoners with HIV or AIDS indicates the HIV status of these prisoners to other inmates and to wardens. Such segregation violates the prisoner's right to privacy, confidentiality and may lead to acts of discrimination against the HIV positive prisoner. Prisoners may only be separated from other prisoners on medical or other recognized grounds as provided for under the Prisons Act. The right to dignity of the prisoner should also be respected at all times.

The right to health: The Prisons Act requires that a doctor be appointed as medical officer for each prison. It is the medical officer's job to help the prisoner stay healthy and provide medical care in the event of illness. Prisoners thus have a right to medical treatment. A prison is supposed to keep medical supplies on site and this should include medication for HIV/AIDS. The 1993 WHO Guidelines provide that *"all prisoners have the right to receive health care, including preventive measures, equivalent to that available in the general community without discrimination"*. People in prison thus have a right to health guaranteed in international law, rules, guidelines and covenants.



The right to education: Prisoners face the same risk of HIV infection as other people outside prison. In fact, conditions in prison usually mean that there is a higher risk of HIV infection in prison. Sexual intercourse and injecting drug use occur in prison, and are widespread in many prisons. Inmates also get tattoos and some other practices take place that carry a risk of HIV infection. These are indisputable facts and realities. Prisoners have the same right to protect themselves from infection as other people outside prison. This protection comes in





the form of HIV education and the provision of condoms. The current criminalization of sodomy and the concomitant position and reluctance of prison authorities to provide condoms to prisoners is unwise, outdated and counter-productive and instead serve to indirectly spread the virus. Harm reduction, rather than zero-tolerance, must be the pragmatic policy basis for fighting HIV and AIDS in prisons and providing HIV and AIDS care. It therefore make sense that HIV education and condoms should be available to all prisoners, as they are available to people in the community.

The rights of accused people

Accused people are people who have been charged with crimes but who have not yet been sentenced or convicted.

Can an accused person be forced to have an HIV test?

Based on the right to privacy and freedom and security of the body an accused person cannot be forced to have an HIV test. However, in South Africa the South African Law Commission has recommended that the victim of a sexual crime should be able to apply to a magistrate to have the accused tested for HIV and the result should be told to the victim if -

-  there is a possibility that blood or semen was transferred during the sexual crime.
-  not more than 50 days have passed from the date when the crime took place
-  the accused person has been arrested or charged.
-  Bail and sentencing of a rape accused with HIV and AIDS

No similar suggestion has been made in Namibia as yet. However, the merit and demerits of such a legal provision warrants open and frank discussions given the high incidence of sexual crimes committed in the country.

Bail and sentencing for rape accused with HIV and AIDS

All accused people have a right to apply for bail. This is so because the Constitution says that all persons are innocent until proven guilty. However, where the crime is very serious, the law makes it more difficult to get bail.

For example the Combating of Rape Act (No. 8 of 2000) allows for bail in rape cases, but it changes the bail procedures to pay more attention to the rape victim's concerns.

The Combating of Rape Act sets down minimum sentences for first offenders and repeat offenders in rape cases. A rapist who knowingly exposes a rape complainant to HIV through rape will receive the highest minimum sentence. Knowingly exposing someone to the risk of HIV infection is also a ground for a charge of attempted murder, in addition to the charge of rape. A conviction of this charge would be likely to carry a heavy prison sentence, which could be served in addition to the sentence of rape.

Do prisoners have responsibilities?

Yes. Prison, as mentioned earlier, can be a place where HIV/AIDS transmission occurs more easily. Inmates therefore have a duty to protect themselves and others from becoming infected with the disease. This means, that a prisoner should:

- ⌘ Get an HIV test if he think that he might be infected;
- ⌘ Use a condom during sex;



- ⌘ Use clean or sterilized needles only; and
- ⌘ If he suspects that he is HIV positive and think he put someone at risk of being infected, tell the person.
- ⌘ Every prisoner also has a duty to keep clean and healthy. This means that if he think he is getting sick, he must talk to the doctor assigned to the prison.

What can prisoners do to have their concerns addressed and their rights respected?

- ✚ Prisoners can make a complaint to the Officer in Charge of the prison or the Commissioner of Prisons.
- ✚ A prisoner can also complain to a visiting justice or anyone else authorised to inspect the prison. Prisons are inspected regularly by visiting justices. Magistrates, judges, members of Parliament and Regional Governors, Regional councilors are all visiting justices. They may inspect any part of the prison, test the quality and quantity of the food given to prisoners, investigate prisoners' complains and inspect prison records. They are suppose to write their observations and comments in the visiting justices' book, which is send to the Commissioner of Prisons.
- ✚ Prisoners can also complain to the Ombudsman about abuse and human rights violations in prison.
- ✚ Prisoners also have the right to take legal action against the prison authorities as provided for under the Namibian Constitution (Article 25). Many prisoners have been successful in taking the prison authorities to court. An example is where prison officials at the Windhoek Prison kept prisoners in leg-chains for months. This practice was declared unconstitutional by the High Court¹.

¹ Namundjebo v. Commanding Officer, Windhoek Prison