

# **A CRITICAL ANALYSIS OF MEDICAL PAROLE IN SOUTH AFRICA: A COMPARATIVE STUDY**

by

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## TABLE OF CONTENTS

Acknowledgements .....	ii
Chapter 1 - Introduction.....	1
1.1 Introduction	1
1.2 Problem statement	2
1.2.1 Main research question	2
1.2.2 Secondary questions	2
1.3 Purpose of the study	3
1.4 Research method	4
1.5 Chapter outline	4
Chapter 2- Historical development of medical parole legislation in South Africa.....	5
2.1 Introduction	5
2.2 <i>Prison Act</i>	5
2.3 <i>Correctional Services Act 8 of 1959</i>	6
2.3.1 <i>Stanfield v Minister of Correctional Services</i>	7
2.3.2 <i>Mazibuko v Minister of Correctional Services and others</i>	9
2.4 <i>Correctional Services Act 111 of 1998</i>	11
2.5 Reports on cases dealt with under section 79 of the <i>Correctional Services Act 111 of 1998</i> before the amendment	13
2.6 Conclusion	15
Chapter 3 - The current criteria for placement on medical parole in South Africa.....	17
3.1 Introduction	17
3.2 The current criteria for placement on medical parole in South Africa	17
3.3 Criticism against the current criteria for medical parole in South Africa	20
3.4 Recovery of offenders placed on medical parole	21
3.5 Case law related to eligibility for medical parole under the current criteria	23
3.5.1 <i>Derby-Lewis v Minister of Justice and Correctional Service</i>	23
3.5.2 <i>Democratic Alliance v National Commissioner of Correctional Services and Others</i>	25
3.6 Conclusion	27
Chapter 4 - Comparative study .....	29
4.1 Introduction	29
4.2 The legal position in Canada	29
4.2.1 Types of release	29
4.2.2 Temporary absence release	29
4.2.3 Criteria for eligibility for temporary absence	31
4.2.4 Cancellation of temporary absence release	33

4.2.5	Parole by exception	33
4.2.6	Case law dealing with compassion release in Canada	35
4.2.6.1	<i>Leblanc, Re, 2001 CarswellOnt</i>	35
4.3	Legal position in the United States of America	37
4.3.1	Mississippi	37
4.3.1.1	Type of release	37
4.3.1.2	Criteria for eligibility for conditional medical release	38
4.3.1.3	Termination of conditional medical release	38
4.3.1.4	Case dealing with compassionate release in Mississippi	39
4.3.1.4.1	<i>United states v Shundrake McKeel</i>	39
4.3.2	New York	40
4.3.2.1	Type of release	40
4.3.2.2	Criteria for medical release	41
4.3.2.3	Cases dealing with compassionate release in New York	43
4.3.2.3.1	<i>Richard Sunday Ifill v Lester N Wright</i>	43
4.3.2.3.2.	<i>Theresa McDonnell v Anthony J. Annucci</i>	44
4.4	Conclusion	45
Chapter 5 - Conclusion and Recommendations .....		46
5.1	Introduction	46
5.2	Summary: South Africa, Canada and the United States of America (Mississippi and New York) compared	46
5.2.1	Legislation	46
5.2.2	Eligibility	46
5.2.2.1	Types of Illnesses	47
5.2.2.2	Period served in prison	48
5.2.2.3	Type of conviction	49
5.2.2.4	Cancellation	49
5.3	Recommendations and Conclusion	50
BIBLIOGRAPHY .....		53

# CHAPTER 1 - INTRODUCTION

## 1.1 INTRODUCTION

In the early ages, the word "parole", originating from French, which means "word of honour", related to a promise by a captured soldier upon release not to take arms against his captor.<sup>1</sup> The word parole then later referred to a prisoner's promise not to attempt to escape from prison.<sup>2</sup> Since 1995, parole has been defined as a system of discretionary release of inmates from prison before finishing the maximum limit of their sentence.<sup>3</sup> It is also a system of supervision and reintegration into the community until the end of the sentence.<sup>4</sup> The philosophy of parole emanates from the view that an offender can serve part of his sentence in the community, which becomes one phase of the treatment process.<sup>5</sup>

Medical parole, sometimes called "compassionate release", is a specific form of parole and allows prisoners to seek early release from prison if they have terminal, other or chronic and age-related health issues.<sup>6</sup> Medical parole is a correctional policy intended to benefit prisoners with specified health conditions by releasing them to parole before their expected release date.<sup>7</sup> Different countries have different criteria in place which assist in determining eligibility for medical parole.<sup>8</sup> In general, the eligibility for medical parole depends on the inmates' inability to perform activities of daily living or needing 24-hour nursing care.<sup>9</sup>

South Africa, like most other countries, has medical parole. The *Correctional Services Act 111 of 1998* regulates the release of prisoners on medical parole in South Africa.<sup>10</sup> The amended and current section 79(1) of the Act stipulates:

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1 O' Connor 1985:337.  
2 O' Connor 1985:337.  
3 Alvarez 1995-1996.  
4 Alvarez 1995-1996.  
5 Louw & Luyt 2009:5.  
6 Cooper & Bernard 2021:173.  
7 Pro & Marzell 2017:2.  
8 Pro & Marzell 2017:2.  
9 Pro & Marzell 2017:2.  
10 *Correctional Services Act 111 of 1998.*

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—

(a) 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.

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.<sup>11</sup>

Despite amendments made, the medical parole system in South Africa still faces criticism. The release of Shabir Shaik, the financial advisor of former President Jacob Zuma, on medical parole after serving only three years of his fifteen years triggered public debate and put the issue of medical parole in the spotlight.<sup>12</sup> The early release of Mr Jacob Zuma has also brought the spotlight on the system and more criticism.<sup>13</sup> Another issue which raised eyebrows was the fact that according to a study by Albertus,<sup>14</sup> 60 per cent of prisoners released on medical parole did not die after being placed on parole.

## **1.2 PROBLEM STATEMENT**

### **1.2.1 Main research question**

The main research question for this study is whether the current policy/ policies and legislation on medical parole in South Africa are effective.

### **1.2.2 Secondary questions**

The secondary questions that flow from the main research question are as follows:

1. How was medical parole introduced and developed in South Africa?

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<sup>11</sup> *Correctional Services Act:sec 79(1).*

<sup>12</sup> Albertus 2012:186.

<sup>13</sup> *The Democratic Alliance v National Commissioner of Correctional Services and Others* 2021/45997 (G).

<sup>14</sup> Albertus 2012:187.

This will include the legislative development of medical parole in South Africa from 1910.

2. How is eligibility for placement for medical parole in South Africa determined today?

This will include the current criteria for placement on medical parole and recent case law.

3. What happens in instances where the parolee recovers from the condition or illness?

4. What is the legal position governing medical parole in Canada?

This section discusses eligibility for medical parole and the cancellation of temporary absences in Canada.

5. What legal position governs medical parole in Mississippi and New York State?

In this section, eligibility for medical parole and cancellation of medical conditional release for Mississippi and New York states will be discussed.

6. Are there any recommendations (based on the comparative study) which can be made for South Africa on the current legislation governing medical parole?

### **1.3 PURPOSE OF THE STUDY**

This study aims to determine the effectiveness of the legislation governing medical parole in South Africa. This will be done by analysing relevant sections of the current law regulating medical parole. To further determine the effectiveness of South Africa's legal position, a comparison will be made between South Africa, Canada and the United States of America, focusing on Mississippi and New York.<sup>15</sup> The reason for comparing South Africa and Canada is that the law has similarities in that the Canadian Charter of Human Rights and Freedom was used as the template for the *Constitution of the Republic of South Africa of 1996*. Unlike Canada, the American states of Mississippi and New York were chosen because of their recent developments in the

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<sup>15</sup> Cornell Law School "State". Legal Information Institute, <https://www.law.cornell.edu/wex/state> (accessed on 1 September 2022), defines state law as law, constitutions, statutes, regulations and common law that are only applicable in that particular territory or jurisdiction. The United States of America is divided into fifty sovereign states, with its own laws and regulations.

field of medical parole and the possible solutions they offer to South Africa. The whole purpose is to establish what South Africa can learn from it.

#### **1.4 RESEARCH METHOD**

This is a desk-top study. For this mini-dissertation, in-depth research will be conducted to evaluate the development of legislation governing medical parole in South Africa and current policies. Research will be conducted through theoretical analysis of available legal literature.

Case law will also be analysed and compared to another to determine the practicality of the policy.

Added to the above, a comparative study will investigate the present legal position, legislation, and medical parole policies in Canada, Mississippi, and New York. As explained in paragraph 1.3, the reason for comparison between South Africa and Canada is that the law has similarities in that the Canadian Charter of Human Rights and Freedom was used as the template for the *Constitution of the Republic of South Africa* of 1996. Unlike Canada, the American states of Mississippi and New York were chosen because of their recent developments in the field of medical parole and the possible solutions they offer to South Africa.

#### **1.5 CHAPTER OUTLINE**

This dissertation contains five chapters. Chapter 1 serves as the introduction to the dissertation. In this chapter, medical parole is clearly defined, and the study's problem statement and aim are explained. Chapter 2 focuses on the historical background of the laws regulating medical parole in South Africa. Chapter 3 discusses the criteria for the current eligibility for medical parole in South Africa and cases in which this criterion was tested. Chapter 4 compares medical parole in Canada, Mississippi, and New York states with South Africa. Chapter 5 contains a conclusion and recommendations based on the comparative study conducted in chapter 4.

## CHAPTER 2- HISTORICAL DEVELOPMENT OF MEDICAL PAROLE LEGISLATION IN SOUTH AFRICA

### 2.1 INTRODUCTION

The general rule is that an offender cannot be released or escape punishment or an adjustment on his/her prison term be made because of ill health.<sup>16</sup> However, some prisoners have been released on medical parole before the end of the minimum period required under the relevant laws in terms of which they were sentenced.<sup>17</sup> With the establishment of the Union of South Africa in 1910, there was a need for more consistency and to create a penal and prison policy for South Africa as a whole.<sup>18</sup> Consequently, legislation was put into place to ensure the possibility of releasing sentenced offenders before their sentence ends.<sup>19</sup> One of the reasons inmates could be released from prison was on medical grounds to allow them to die in dignity and be surrounded by those who matter most to them.<sup>20</sup>

This chapter will discuss the historical development of laws regulating medical parole in South Africa.

### 2.2 *PRISON ACT*

The first attempt to meet this goal of creating a penal and prison policy for South Africa was the enactment of the *Prisons and Reformatories Act* 13 of 1911.<sup>21</sup> This Act was repealed by the *Prison Act* 8 of 1959, which repealed and replaced all laws in place at the time regarding prisons.<sup>22</sup> The *Prison Act*, specifically relating to medical parole, stipulated in section 71 that:

Any prisoner who is detained in any prison under sentence of court and- (a) who is suffering from a dangerous infectious or contagious disease; or (b) whose life is endangered by his detention in a prison; or (c) whose release is expedient on grounds of advanced pregnancy,

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<sup>16</sup> Mujuzi 2009:59.

<sup>17</sup> Mujuzi 2009:59.

<sup>18</sup> Singh 2005:21.

<sup>19</sup> Dintwe 2011:1406.

<sup>20</sup> Dintwe 2011:1406.

<sup>21</sup> Singh 2005:21.

<sup>22</sup> Singh 2005:21.

may, on the recommendation of the medical officer, be released by the Minister either unconditionally or on probation or on parole as the Minister may direct.<sup>23</sup>

According to this section, medical parole could be granted to any prisoner who was suffering from a dangerous infectious disease, a contagious disease, or one whose life was endangered by being in prison and on the grounds of pregnancy. This raised many questions, including whether the correctional facilities were indirectly avoiding the responsibility of providing care to prisoners who were pregnant.<sup>24</sup> Another question which was raised in the instance is whether this meant only diseases which could be transmissible qualified for one to be released, and if so, what if it is not a disease which led to the death of the prisoner?<sup>25</sup> Additionally, the question was raised whether the correctional facility at the time evaded the responsibility of caring for sick inmates.<sup>26</sup>

### **2.3 CORRECTIONAL SERVICES ACT 8 OF 1959**

The *Prisons Act* was later replaced by the *Correctional Services Act* of 1959.<sup>27</sup> Provisions for medical parole in the *Correctional Services Act* 8 of 1959 were provided for in section 69, similar to section 71 of the *Prison Act* of 1959. Section 69 of the *Correctional Services Act* 8 of 1959 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.<sup>28</sup>

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<sup>23</sup> *Prison Act* 8/1959:sec. 71.

<sup>24</sup> Pillay 2019:17.

<sup>25</sup> Pillay 2019:17.

<sup>26</sup> Pillay 2019:17.

<sup>27</sup> In the same year, 1959, it was named the *Correctional Services Act* 8 of 1959. Pillay 2019:17.

<sup>28</sup> *Correctional Services Act* 8/1959:sec. 69.

It is clear from the above that the Minister and the Commissioner were given the powers to decide on releasing inmates on medical parole.<sup>29</sup> Several cases were dealt with under the *Correctional Services Act* 8 of 1959. They are discussed below.

### **2.3.1 *Stanfield v Minister of Correctional Services***

In *Standfield v Minister of Correctional Services*,<sup>30</sup> the court stated that the case was decided in terms of the *Correctional Services Act* 1959 because the *Correctional Services Act* of 1998 had not yet been into operation.<sup>31</sup> In the case of *Stanfield v Minister of Correctional Services*,<sup>32</sup> the court set aside the respondents' decision to not grant medical parole in terms of section 69 of the *Correctional Services Act* 8 of 1959.<sup>33</sup>

Mr Standfield, the applicant, was forty-eight years old and convicted of fraud for tax evasion exceeding an amount of two million rand. On the 6<sup>th</sup> of March 2001, he was sentenced to six years imprisonment.<sup>34</sup> In May 2003, he was diagnosed “as suffering from an incurable and inoperable lung cancer known as a “small cell carcinoma”. It was described by Dr Peter Chapman, a respiratory physician or pulmonologist who did the diagnosis, as the worst type of cancer that “grows most rapidly and is not suitable for surgical removal”.<sup>35</sup> The medical tests done on the 26 May 2003 indicated that the cancer was prevalent in the left lung but had already spread to the right lung. Dr Chapman stated that chemotherapy was the only treatment that could be applied.<sup>36</sup> The applicant was referred to Dr Eedes, a radiation oncologist practising at the said hospital.<sup>37</sup> In his supporting affidavit, he stated that “it would be appropriate for the applicant to be placed on parole on medical grounds”.<sup>38</sup> The report further indicated

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<sup>29</sup> *Mazibuko v Minister of Correctional Services and others* [2007] JOL 18957.

<sup>30</sup> *Stanfield v Minister of Correctional Services* 2003 4 ALL SA 282 (C).

<sup>31</sup> *Stanfield v Minister of Correctional Services*:par. 80.

<sup>32</sup> *Stanfield v Minister of Correctional Services*:par. 1.

<sup>33</sup> *Stanfield v Minister of Correctional Services*:par. 1. The Respondents were the Minister of Correctional Services, the Commissioner of Correctional Services, P MANS N O (delegated official of the second respondent), The Parole Board, Helderstroom Prison.

<sup>34</sup> *Stanfield v Minister of Correctional Services*:par. 4.

<sup>35</sup> *Stanfield v Minister of Correctional Services*:par. 5.

<sup>36</sup> *Stanfield v Minister of Correctional Services*:par. 5.

<sup>37</sup> *Stanfield v Minister of Correctional Services*:par. 6.

<sup>38</sup> *Stanfield v Minister of Correctional Services*:par. 6.

that his chances of surviving for one year were less than 20%, while it was less than 10% for two years.<sup>39</sup>

In the interim, Dr Frank, as appointed in terms of section 6, requested Prof Du Toit, a second opinion on the applicant's medical condition.<sup>40</sup> The report by Prof Du Toit stated that the applicant is reported to have severe ischaemic heart disease and that the illness is inoperable.<sup>41</sup> The professor recommended that the applicant be released on medical parole immediately.<sup>42</sup>

However, the delegated official of the Commissioner of Correctional Services (third respondent) decided otherwise, regardless of recommendations made by medical practitioners.<sup>43</sup> He gave the reason that successful treatment can influence the applicant's period of life. He provided that the applicant on the outer looked very normal and not at the stage of being bedridden. He further opined that the prison could provide the applicant with the needed treatment. The applicant took this decision on review.<sup>44</sup>

The court of appeal set aside the decision not to grant medical parole in terms of section 69 of the *Correctional Services Act* 8 of 1959. The court reasoned that the third respondent "misunderstood and misconstrued the medical opinions of Dr Eedes, Dr Chapman and Prof du Toit".<sup>45</sup> The court stated further that there was misinterpretation of the provisions of section 69 of the Act<sup>46</sup> by the third respondent. According to the court, he did that by creating non-existent requirement which were at the time not in the Act or operative.

The court further provided that it was clear that the third respondent did not consider that the prison did not have adequate facilities to care for the applicant.<sup>47</sup> According to the court, he also failed to consider that the applicant's position required specialists in

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<sup>39</sup> *Stanfield v Minister of Correctional Services*:par. 6.  
<sup>40</sup> *Stanfield v Minister of Correctional Services*:par. 10.  
<sup>41</sup> *Stanfield v Minister of Correctional Services*:par. 10.  
<sup>42</sup> *Stanfield v Minister of Correctional Services*:par. 10.  
<sup>43</sup> *Stanfield v Minister of Correctional Services*:par. 13.  
<sup>44</sup> *Stanfield v Minister of Correctional Services*:par. 14.  
<sup>45</sup> *Stanfield v Minister of Correctional Services*:par. 115.  
<sup>46</sup> *Correctional Services Act* 8/1959.  
<sup>47</sup> *Stanfield v Minister of Correctional Services*:par. 122.

hospitals distant from the prison and closer to where the applicant would stay if released on medical parole.<sup>48</sup>

Lastly, the court further stated that the third respondent failed to respect the human dignity of the applicant in his assessment of the applicant's physical condition for purposes of section 69 of the Act.<sup>49</sup> He chose to “ignore or downplay” the fact that the applicant was suffering from an “inoperable and incurable disease” that would inevitably cause his death in a few months.<sup>50</sup>

The court was satisfied that the applicant had met the requirements of section 69 of the *Correctional Services Act* and ordered he be released on medical parole.<sup>51</sup>

### **2.3.2 Mazibuko v Minister of Correctional Services and others**

The case of *Mazibuko v Minister of Correctional Services and others*<sup>52</sup> is another case in which medical parole was dealt with in terms of section 69 of the *Correctional Services Act* 8 of 1959. The court reasoned that it used section 69 of the *Correctional Services Act* of 1959<sup>53</sup> because it was to the same effect as section 79(1) of the *Correctional Services Act* 111 of 1998.<sup>54</sup>

In this case, the applicant was a 32-year-old male. He was convicted in the Transvaal Provisional Division of the High Court for murder, assault, robbery, theft and possession of an unlicensed firearm. For the murder alone, the applicant was sentenced to life imprisonment.<sup>55</sup>

The applicant was sentenced on 20 March 2002. On 22 September 2003, he was diagnosed as HIV positive. He was admitted at Baviaanspoort Maximum Correctional Centre on 17 December 2004 after he had been transferred from the Kutama Sinthumule Correctional Centre.<sup>56</sup> On 19 May 2005, his CD4<sup>57</sup> count was 189; on 9

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<sup>48</sup> *Stanfield v Minister of Correctional Services*:par. 122.

<sup>49</sup> *Stanfield v Minister of Correctional Services*:par. 124.

<sup>50</sup> *Stanfield v Minister of Correctional Services*:par. 124.

<sup>51</sup> *Stanfield v Minister of Correctional Services*:par. 134.

<sup>52</sup> *Mazibuko v Minister of Correctional Services and others*.

<sup>53</sup> *Correctional Services Act* 8/1959.

<sup>54</sup> *Correctional Services Act* 111/1998.

<sup>55</sup> *Mazibuko v Minister of Correctional Services and others*:1.

<sup>56</sup> *Mazibuko v Minister of Correctional Services and others*:2.

<sup>57</sup> CD4 count is a blood test to check the amount of CD4 cells in the body. CD4 cells are type of white blood cells. They play a key role in the immune system. They alter other immune cells to

September, the CD4 count was 143, indicating a decline. On 10 November, his CD4 count was 96. He was also infected with tuberculosis and suffered from diarrhoea and vomiting.<sup>58</sup>

In September 2005, his condition deteriorated, and as a result, he was admitted to the medium hospital at Baviaanspoort. He complained of dizziness and lack of energy. The CT chest x-ray scans were conducted, and a lesion was identified in his lungs. When the applicant was launching this application, he suffered severe pains and disabilities. He was unable to bathe himself and get himself by the toilet.<sup>59</sup> He used a wheelchair.

He also stated that he was not provided with anti-retroviral treatment.<sup>60</sup>

On 5 October 2005, a Medical Parole Board meeting was constituted, which recommended that the applicant be placed on medical parole. The life expectancy was not determined. Recommendation by the medical officer treating the applicant if he was retro positive, with a lesion suggestive of cancer.<sup>61</sup> An application was made by the attorney of the applicant for a release on medical grounds and was declined. The reason provided by the Minister of Correctional Services was that he was waiting for a second opinion. He wanted a second opinion to prove that the applicant was indeed sick and had to be released on medical parole.<sup>62</sup>

The court was, however, of the view that refusing to release the applicant, who had complied with the requirements of the Act, amounts to an infringement of section 33(1) of the Constitution.<sup>63</sup> The court further stated that the applicant needed to be treated with mercy and that refusing to release the applicant on medical parole was “unjust, unlawful, unreasonable and procedurally unfair”.<sup>64</sup> As a result, the court granted the applicant's notice of motion.

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the presence of infections such as bacteria or virus in the body. Moncivaz "CD4 vs Viral Load: What's in the number?", <https://www.healthline.com/health/hiv-aids/cd4-viral-count> (accessed on 08 October 2023).

<sup>58</sup> *Mazibuko v Minister of Correctional Services and others*:2

<sup>59</sup> *Mazibuko v Minister of Correctional Services and others*:2

<sup>60</sup> *Mazibuko v Minister of Correctional Services and others*:3.

<sup>61</sup> *Mazibuko v Minister of Correctional Services and others*:3.

<sup>62</sup> *Mazibuko v Minister of Correctional Services and others*:10.

<sup>63</sup> *Mazibuko v Minister of Correctional Services and others*:10.

<sup>64</sup> *Mazibuko v Minister of Correctional Services and others*:11.

## 2.4 CORRECTIONAL SERVICES ACT 111 OF 1998

After several cases had been dealt with under the *Correctional Services Act* 8 of 1959, it was decided that there was a need for better guidance regarding medical parole. This led to the introduction of the *Correctional Services Act* 111 of 1998.

Medical parole in South Africa is still regulated by section 79(1) of the *Correctional Services Act* 111 of 1998. Section 79(1) was amended in 2011 by section 14 of the *Correctional Matters Amendment Act* 5 of 2011.<sup>65</sup> The amendment came into operation on 1 March 2012. This amendment extended the circumstances allowing medical parole and further expanded the provisions relating to the procedures that must be followed for an inmate to be placed on medical parole. Before this amendment, Section 79(1) of *the Correctional Services Act* 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 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.

From the above section, the criteria which had to be met to qualify for medical parole were as follows: (1) the inmate had to be diagnosed with a terminal illness or condition and be in its final phase, (2) the diagnosis and medical report had to have been made by a medical practitioner who had treated the inmate and (3) the Commissioner, the Correctional Supervision and Parole Board or the court had to decide on the release.

The above section 79(1) of the *Correctional Services Act* was levelled with criticism.<sup>66</sup> The first critique made against the section was that it did not specify who may make the application for medical parole, which led to many applications not being considered.<sup>67</sup> The second critique made was against the requirement that the prisoner can only make an application for medical parole when they have reached the "final phase" of their terminal illness.<sup>68</sup> The requirement related to the "final phase of a terminal illness" led to medical doctors being reluctant to recommend that an inmate

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<sup>65</sup> *Correctional Matters Amendment Act* 5/2011:sec. 14.

<sup>66</sup> Albertus 2012:185.

<sup>67</sup> Albertus 2012:185.

<sup>68</sup> Albertus 2012:185.

be released on medical grounds because of the difficulty surrounding proving that an inmate is in his/her final phase of a terminal illness.<sup>69</sup> It is believed by writers like Albertus<sup>70</sup> that this reluctance to recommend inmates for medical parole due to the difficulties surrounding the requirement of the "final phase" of their terminal illness contributed to the high number of deaths due to natural causes in the correctional centres.

Dintwe<sup>71</sup> also emphasises the challenges posed by the phrase "final phase" of any terminal disease or condition. According to the writer, the provision poses the question: how final is final?<sup>72</sup> Dintwe<sup>73</sup> believes the medical practitioner's assessment has two requirements according to section 79(1). First, the diagnosis must show that there is no chance of recovery and that it is inevitable that the patient will die from the diagnosis.<sup>74</sup> The second requirement is that the medical practitioner's prognosis has to find the patient's condition of such a nature that his or her demise is imminent.<sup>75</sup> Therefore, the debate is that the term "final phase" is immeasurable and will differ from one doctor to another.<sup>76</sup> It is argued that this then led to inconsistencies as far as medical parole was concerned.<sup>77</sup>

The third critique was that this section infringed on the right to dignity of inmates. In the case of *Stanfield v Minister of Correctional Services*,<sup>78</sup> it was held that to insist that terminally ill inmates remain incarcerated until they become visibly debilitated and bedridden cannot be regarded as humane treatment following their inherent dignity.<sup>79</sup> The court further held that the continuation of incarceration of a terminally ill inmate in circumstances where necessary medical facilities to palliate his condition are lacking is an infringement of their human dignity.<sup>80</sup>

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<sup>69</sup> Albertus 2012:187.

<sup>70</sup> Albertus 2012:187.

<sup>71</sup> Dintwe 2011:1406.

<sup>72</sup> Dintwe 2011:1406.

<sup>73</sup> Dintwe 2011:1406.

<sup>74</sup> Dintwe 2011:1406.

<sup>75</sup> Dintwe 2011:1406.

<sup>76</sup> Dintwe 2011:1406.

<sup>77</sup> Dintwe 2022:1406.

<sup>78</sup> *Stanfield v Minister of Correctional Services*:paras. 123-125.

<sup>79</sup> *Stanfield v Minister of Correctional Services*:paras. 123-125.

<sup>80</sup> *Stanfield v Minister of Correctional Services*:paras. 123-125.

The above criticism led to the amendment of section 79(1) of the *Correctional Services Act*. The amendment made by section 14 of the *Correctional Matters Amendment Act* on section 79(1) of the *Correctional Services Act* reads as follows:

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—

(a) 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;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.<sup>81</sup>

The amendment omitted the phrase "final phase of a terminal illness", which has broadened the scope of who qualified for medical parole in South Africa. Criticism faced by this amendment, however, is that it has created an assumption that now everyone with a terminal illness can apply for medical parole. However, this provision will be elaborated further in Chapter 3.

## **2.5 REPORTS ON CASES DEALT WITH UNDER SECTION 79 OF THE CORRECTIONAL SERVICES ACT 111 OF 1998 BEFORE THE AMENDMENT**

Two of the most popular reports of medical parole granted under section 79 of the *Correctional Services Act* of 1998 before the amendment are that of Shabir Shaik and Jackie Selebi. There are no reported court cases as medical parole for both parties was granted.

The case of Shabir Shaik is the most interesting case which was dealt with under South African medical parole law because of two reasons: one, he was a businessman and into politics, and two, shortly after his release on medical parole, he miraculously recovered from the illness he had stated to have and was life-threatening. On 2 June

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<sup>81</sup> *Correctional Services Act*:sec 79(1).

2005, Shaik was convicted of two counts of corruption and one of fraud.<sup>82</sup> An effective sentence of 15 years imprisonment was imposed, being the minimum sentence in terms of section 51(2)(a)(i) of the *Criminal Law Amendment Act*.<sup>83</sup>

Shabir Shaik was released on medical parole on 3 March 2009 after serving only two years and four months of his sentence. It was said that this was a result of a life-threatening hypertension he was suffering from. Soon after his release from prison, Shabir Shaik was spotted playing golf and appeared healthy.<sup>84</sup> This has led to many people questioning the effectiveness of South African medical parole regulations.

Another reported case of medical parole that has left many questioning the effectiveness of the law, whether it applies equally and whether the same effort and time is given to all cases of medical parole is that of Jackie Selebi. Selebi served as head of Interpol.<sup>85</sup> He was convicted of corruption in 2010 and was sentenced to 15 years imprisonment.<sup>86</sup> He was convicted of corruption for taking bribes from drug smugglers. He was released on medical parole less than a year after beginning his sentence.<sup>87</sup> Jackie Selebi had suffered a stroke and had kidney problems and diabetes. He was induced into a coma for two and a half weeks and died.<sup>88</sup>

His medical parole sparked rumours of preferential treatment. This was also addressed in the Minister of Correctional Services Briefing on general issues and Jackie Selebi parole issues meeting in 2012.<sup>89</sup> Mr Tom Moyane, the National Commissioner at the time, mentioned in the meeting that he had been informed of the ill health of Selebi in December 2011. In an attempt to squash the allegations of preferential treatment, he stated that the same process was followed for Selebi as for

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<sup>82</sup> *S v Shaik and others* 2008 (5) SA 354 (CC).

<sup>83</sup> *S v Shaik and others*:par. 1.

<sup>84</sup> Mujuzi 2009:59.

<sup>85</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness", <https://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/> (accessed on 02 June 2022).

<sup>86</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness", <https://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/> (accessed on 02 June 2022).

<sup>87</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness", <https://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/> (accessed on 02 June 2022).

<sup>88</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness", <https://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/> (accessed on 02 June 2022).

<sup>89</sup> Parliamentary Monitoring Group "Minister of Correctional Services Briefing on General Issues and Jackie Selebi parole issues", <https://pmg.org.za/committee-meeting/14650/> (accessed on 1 June 2023).

other inmates. He stated that Selebi was taken to the hospital within seven days.<sup>90</sup> He further mentioned that an independent investigation of Selebi's health at the Steve Biko Centre confirmed that he was ill.<sup>91</sup> The Commissioner stated that an application for medical parole was launched similar to that of other inmates and that 11 professionals on the Medical Parole Advisory Board and their careers were on the line if their decision was incorrect.<sup>92</sup>

The Commissioner further stated that medical parole was based on the principle of humane incarceration.

## 2.6 CONCLUSION

This chapter focused on the historical development of laws regulating medical parole in South Africa. The establishment of the Union of South Africa required that there be laws in place regulating prisons, and the first step towards that goal was the enactment of the *Prisons and Reformatories Act* 13 of 1911. The *Prison Act* 8 of 1959 repealed and replaced all laws in place at the time regarding prisons.<sup>93</sup> Section 71 of the *Prison Act* dealt with medical parole. The *Prisons Act* was replaced by the *Correctional Services Act* of 1959.<sup>94</sup> Provisions for medical parole in the *Correctional Services Act* 8 of 1959 were provided for in section 69:

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

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<sup>90</sup> Parliamentary Monitoring Group "Minister of Correctional Services Briefing on General Issues and Jackie Selebi parole issues", <https://pmg.org.za/committee-meeting/14650/> (accessed on 1 June 2023).

<sup>91</sup> Parliamentary Monitoring Group "Minister of Correctional Services Briefing on General Issues and Jackie Selebi parole issues", <https://pmg.org.za/committee-meeting/14650/> (accessed on 1 June 2023).

<sup>92</sup> Parliamentary Monitoring Group "Minister of Correctional Services Briefing on General Issues and Jackie Selebi parole issues", <https://pmg.org.za/committee-meeting/14650/> (accessed on 1 June 2023).

<sup>93</sup> Singh 2005:21.

<sup>94</sup> In the same year, 1959, it was named the *Correctional Services Act* 8 of 1959. Pillay 2019:17.

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.<sup>95</sup>

The *Correctional Services Act* of 1959 was finally replaced with the *Correctional Services Act* of 1998, providing better medical parole guidelines.

The original section 79 faced criticism, leading to an amendment. The amendment made by section 14 of the *Correctional Matters Amendment Act* on section 79(1) of the *Correctional Services Act* omitted the phrase "final stage of terminal illness". It broadened the pool of people who could apply for medical parole.

The current criterion for placement on medical parole in South Africa will be discussed in chapter 3.

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<sup>95</sup> *Correctional Services Act* 8/1959:sec. 69.

## CHAPTER 3 - THE CURRENT CRITERIA FOR PLACEMENT ON MEDICAL PAROLE IN SOUTH AFRICA

### 3.1 INTRODUCTION

As evident from the case law discussion in Chapter 2, the inconsistency in granting medical parole in the past emphasised the need for change.

With the amendments made to section 79(1) of the *Correctional Services Act*,<sup>96</sup> it is important to investigate the current criteria followed for placement on medical parole in South Africa and whether it is effective.

In this chapter, the current criteria for placement on medical parole will thus be investigated. This chapter will further investigate what happens upon recovery of inmates on medical parole.

### 3.2 THE CURRENT CRITERIA FOR PLACEMENT ON MEDICAL PAROLE IN SOUTH AFRICA

As stated above in paragraph 2.4, the amended section 79(1) of the *Correctional Services Act* provides as follows:

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—

(a) 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.

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.<sup>97</sup>

An application for medical parole must be lodged to the National Commissioner, Correctional Supervision and Parole Board or the Minister in the prescribed manner by the medical practitioner, a sentenced offender, or a person acting on the offender's

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<sup>96</sup> *Correctional Services Act*.

<sup>97</sup> *Correctional Services Act*:sec 79(1).

behalf.<sup>98</sup> This application will not be considered if it is not supported by a written medical report recommending that the offender be placed on medical parole. This medical report made by the inmate's medical practitioner must include the following: (1) a complete medical diagnosis and prognosis of the terminal illness or limit caused by the physical incapacity of the said offender, (2) a statement which indicates the type of physical incapacity the offender suffers, and (3) the reasons for consideration of placement on medical parole.<sup>99</sup>

Section 29A(1) of the Promulgation of Correctional Services Regulations with Amendments Incorporated<sup>100</sup> provides that if it is established by health status examination that “a sentenced offender is suffering a condition of which the prognosis indicates a condition listed in sub-regulation (5), such facts must be recorded in the prescribed register”. Section 29A(5) provides a list of medical conditions to be taken into consideration by the Medical Parole Advisory Board and states as follows:

(5) In the assessment by the Medical Parole Advisory Board, the Board must consider whether the offender is suffering from:

(a) Infectious conditions-

(i) World Health Organisation Stage IV of Acquired immune deficiency syndrome despite good compliance and optimal treatment with antiretroviral therapy;

(ii) Severe cerebral malaria;

(iii) Methicilin resistance staph aurias despite optimal treatment;

(iv) MDR or XDR tuberculosis despite optimal treatment; or

(b) Non-infectious conditions-

(i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure;

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<sup>98</sup> *Correctional Services Act*.sec. 79(3).

<sup>99</sup> *Correctional Services Act*.sec. 79(3).

<sup>100</sup> GN 323 Government Gazette 2012:54(35277).

- (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 Kamofky score of 30 percent and less;
- (xv) Tetanus;
- (xvi) Dementia; and
- (xvii) Severe disabling rheumatoid arthritis, and whether such condition constitutes a terminal disease or condition or the offender is rendered physically incapacitated as result of injury, disease or illness so as to severely limit daily activity or inmate self-care.<sup>101</sup>

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<sup>101</sup> GN 323 Government Gazette 2012:54(35277).

Section 29A(6) of the Regulations provides that the Medical Parole Advisory Board may consider any of the conditions not listed in sub-regulation (5) if it complies with the principles contained in section 79(1) of the *Correctional Services Act*.<sup>102</sup> The Board may obtain additional reports from other medical specialists regarding reg 29A(3).

The Medical Parole Advisory Board must recommend to the National Commissioner, the Correctional Supervision and the Parole Board or the Minister the appropriateness of granting medical parole per section 79(1) of the Act. If the recommendations are positive, then the National Commissioner, the Correctional Supervision and Parole Board or the Minister must consider whether the conditions stipulated in section 79(1)(b) and (c) are present.

### **3.3 CRITICISM AGAINST THE CURRENT CRITERIA FOR MEDICAL PAROLE IN SOUTH AFRICA**

After having amended section 79 of the *Correctional Services Act*, one would have imagined that the amended section would be without criticism. However, several criticisms have been made against the amended section.

The first criticism comes from section 79(1)(a), which states the following as requirements for medical parole: "(1) the offender or prisoner is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of the injury, disease or illness so as to severely limit daily activities or inmate self-care". Albertus<sup>103</sup> is of the view that as much as this has made it easier for more prisoners to apply for medical parole, it will also open a floodgate of unnecessary applications.<sup>104</sup> Inmates with any terminal condition will take this as an opportunity to apply for medical parole with no regard for whether it affects their daily activities or self-care.<sup>105</sup>

Another criticism levelled against the amendment related to section 79(2)(c) of the Act is that section 79(2)(c) stipulates that the medical report "must include":

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<sup>102</sup> GN 323 Government Gazette 2012:54(35277).

<sup>103</sup> Albertus 2012:192.

<sup>104</sup> Albertus 2012:192.

<sup>105</sup> Albertus 2012:192.

- (i) a complete diagnosis and prognosis of the terminal illness or physical incapacity from which the prisoner suffers;
- (ii) a statement **by** the medical practitioner indicating whether the offender is so physically incapacitated as to limit daily activity or inmate self-care; and
- (iii) reasons why the placement on medical parole should be considered.

According to Albertus,<sup>106</sup> this means that only prisoners with statements by medical practitioners showing that they are physically incapacitated will be considered for their placement. According to the writer, the issue with this is that it infringes on the right to dignity of the prisoner making this application. The writer explains that the right to dignity of the applicant for medical parole will be infringed by the fact that it is only when they are unable to care for themselves or incapacitated that they are allowed to make an application for medical parole. According to Albertus,<sup>107</sup> this also limits applications to only prisoners who are rendered incapable, which means that other inmates who are terminally ill but capable of self-care will be prejudiced.

### **3.4 RECOVERY OF OFFENDERS PLACED ON MEDICAL PAROLE**

Another question that may arise once medical parole is granted is whether recovery from injury, disease or illness will influence the medical parole.<sup>108</sup>

Jackie Selebi was sentenced to 15 years imprisonment in 2012 after being found guilty of fraud and corruption.<sup>109</sup> He was released on medical parole in 2012 after only serving 229 days of prison time.<sup>110</sup> It was stated that his medical condition was terminal, chronic, progressive and has deteriorated.<sup>111</sup> Shortly after his release, he passed away.

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<sup>106</sup> Albertus 2012:193.

<sup>107</sup> Albertus 2012:193.

<sup>108</sup> Mujuzi 2009:60.

<sup>109</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness' <http://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/?amp> (accessed on 02 June 2022).

<sup>110</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness' <http://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/?amp> (accessed on 02 June 2022).

<sup>111</sup> De Wet & Sosibo "Jackie Selebi dies aged 64 after long illness' <http://mg.co.za/article/2015-01-23-jackie-selebi-dies-aged-64-after-long-illness/?amp> (accessed on 02 June 2022).

Unlike in the case of Jackie Selebi, Shabir Shaik miraculously recovered. Shaik was convicted in June 2005 on account of fraud and two counts of corruption.<sup>112</sup> The medical practitioner who was treating Shabir Shaik diagnosed that he was suffering from a terminal illness. He was sentenced to 15 years imprisonment but only served 28 months of it before being released on medical parole.<sup>113</sup>

There were allegations of professional misconduct levelled against the medical practitioner to the effect that they had deliberately constructed a report that misrepresented Shaik's condition, especially the report that stated that he was terminally ill. What was more of an issue was how Shaik was seen out in a restaurant in good shape and health in a few months.<sup>114</sup>

The above two cases reflect one of the issues regarding medical parole, which raises the question of what happens in instances where an inmate out on medical parole recovers. The fact that 60 per cent of inmates released on medical parole in South Africa did not die after placement on medical parole is one of the ongoing contentious issues with medical parole.<sup>115</sup>

Section 79(7) of the *Correctional Services Act* provides that a decision to cancel medical parole should not be merely on account of improved medical conditions of the offender. This means that should an inmate's medical condition improve; he will not be returned to prison to serve the remainder of the years of his sentence.<sup>116</sup>

This now brings the question of whether the criteria for medical parole, which requires that an offender must be sick, is not then contravened if an offender then recovers and does not go back to prison.

Mujuzi<sup>117</sup> states that media reports have provided over the years that offenders released on medical parole have re-offended. He believes that in this instance, the Department of Correctional Services must put measures in place to ensure that offenders released on medical parole are closely monitored should they miraculously

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<sup>112</sup> Bateman 2012:212.

<sup>113</sup> Bateman 2012:212.

<sup>114</sup> Bateman 2012:212.

<sup>115</sup> Albertus 2012:187.

<sup>116</sup> *Correctional Services Act*.sec. 79(7).

<sup>117</sup> Mujuzi 2009:60.

recover. They should be returned to prison to serve the remainder of their sentence.

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### **3.5 CASE LAW RELATED TO ELIGIBILITY FOR MEDICAL PAROLE UNDER THE CURRENT CRITERIA**

#### **3.5.1 *Derby-Lewis v Minister of Justice and Correctional Service***

With the above provided, the courts have continued to have matters come before them with prisoners who believe they meet the requirements yet were denied medical parole. In the 2015 case of *Derby-Lewis v Minister of Justice and Correctional Services*,<sup>119</sup> the applicant was a male serving life for murder since 1993. At the time of the application, he had served 21 years and six months of his sentence. The applicant applied for medical parole to the Department of Correctional Services on 2 May 2014.<sup>120</sup> The report by Dr Fourie supported this application.

According to the medical report submitted in support of the application for medical parole, the applicant has been diagnosed as suffering from lung cancer, heart failure and hypertension.<sup>121</sup> After receiving that application, the Medical Parole Advisory Board assigned two members of the Board, Dr Coetzee, and Dr Solombela, to perform a medical assessment on the applicant.<sup>122</sup>

The Medical Parole Advisory Board heard the matter on 9 July 2014. With the medical reports provided by Dr Coetzee and Dr Solombela, the Medical Parole Advisory Board reached the following conclusions: firstly, the applicant has stage IIIB Carcinoma of the lung, which is inoperable but has no distal spread or metastasis.<sup>123</sup> He was receiving chemotherapy and radiography at Eugene Marais Private Hospital at that time.<sup>124</sup> Secondly, he was receiving treatment, which he was tolerating well.<sup>125</sup> Thirdly, he was clinically well and could perform his daily duties as an inmate.<sup>126</sup> Fourthly, the applicant's stage of cancer did not meet the criteria for medical parole, as the Act

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<sup>118</sup> Mujuzi 2009:60.

<sup>119</sup> *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP).

<sup>120</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 16.

<sup>121</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 17.

<sup>122</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 17.

<sup>123</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

<sup>124</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

<sup>125</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

<sup>126</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

required stage IV with metastases.<sup>127</sup> Lastly, the Board concluded that there was insufficient reliable information showing this treatment's aim for this patient.<sup>128</sup>

The Medical Parole Advisory Board, in its meeting on 9 July 2014, decided that an independent team of specialists should examine the applicant.<sup>129</sup> The report that was provided by Dr Wadee and Professor Lollo, two of the independent specialists, stated that the applicant had stage IV Cancer based on the spread of the cancer to the left adrenal gland.<sup>130</sup> The third independent specialist, Professor Sathekge, stated in his report that the spread of the cancer was not a sign of stage IV cancer.<sup>131</sup>

The Medical Parole Advisory Board then recommended to the Minister of Justice and Correctional Services (hereinafter the Minister) that the applicant be released on medical parole.<sup>132</sup> On 30 January 2015, the Minister decided not to grant the applicant medical parole.<sup>133</sup>

The Minister provided several reasons for the refusal to grant medical parole. Firstly, the one recommendation that the applicant was not suffering from stage IV cancer was sufficient to prove that the applicant did not meet the requirements of the Act.<sup>134</sup> Secondly, the applicant did not seem physically incapacitated to take care of himself daily; thirdly, the applicant did not show any remorse or an indication of low risk of re-offending.<sup>135</sup> This decision was taken on review.

The applicant's counsel told the court that the applicant had met the jurisdictional requirements provided in section 79 of the *Correctional Services Act*.<sup>136</sup>

The court held that section 79 of the *Correctional Services Act* should not be applied rigorously, and the parties involved in such decision-making should follow a flexible approach.<sup>137</sup> The court further held that such legislation should be interpreted in line with the spirit of Ubuntu, which shows humaneness, and that is what medical parole

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<sup>127</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

<sup>128</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 18.

<sup>129</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 19.

<sup>130</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 24.

<sup>131</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 25.

<sup>132</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 26.

<sup>133</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 26.

<sup>134</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 28.

<sup>135</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 28.

<sup>136</sup> *Derby-Lewis v Minister of Justice and Correctional Services*.

<sup>137</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 55-56.

is about showing compassion. The court ordered that the offender be placed on medical parole immediately.<sup>138</sup>

### **3.5.2 *Democratic Alliance v National Commissioner of Correctional Services and Others***

Unlike the case of Mr Derby- Lewis, the National Commissioner of Correctional Services, Arthur Fraser, recently decided to grant Mr Jacob Zuma medical parole in less than two months into his sentence.<sup>139</sup> The Constitutional Court handed down its judgement on the 29 of June 2021 in *State v Zuma*.<sup>140</sup> The former president, Mr Jacob Zuma, was sentenced to 15 months imprisonment for contempt of court for failure to appear before the Zondo Commission as he was ordered to do so.<sup>141</sup>

Less than two months into his sentence, the then National Commissioner of Correctional Services, Mr Arthur Fraser, decided to grant Mr Zuma medical parole.<sup>142</sup> This was done under section 75(7)(a) of the *Correctional Services Act*. Section 75(7)(a) of the *Correctional Services Act* stipulates:

(7) Despite subsections (1) to (6), the Commissioner may— (a) place under correctional supervision or day parole or grant parole to a prisoner serving a sentence of less than 12 months imprisonment and prescribe conditions in terms of section 52; or<sup>143</sup>

Mr Jacob Zuma turned himself in for interment on 8 July 2021 at the Estcourt Correctional Services Centre to serve his sentence under the threat of arrest.<sup>144</sup> Upon his arrival, he was admitted to the Estcourt Correctional Services Centre hospital wing, where Dr Mafa examined him. The doctor produced a report on the same day recommending that Mr Zuma be referred to a specialist medical high care unit.<sup>145</sup>

The recommendation was not made because he was physically incapacitated or terminally ill, as required by the Act. It was merely so he could be medically assessed further.<sup>146</sup> Twenty days later, Dr Mafa applied for medical parole for the release of Mr

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<sup>138</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 55-56.

<sup>139</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 3.

<sup>140</sup> *S v Zuma and Another* 2022 SACR 575 (KZP).

<sup>141</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 2.

<sup>142</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 3.

<sup>143</sup> *Correctional Services Act*:sec. 75(7)(a).

<sup>144</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 24.

<sup>145</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 100.

<sup>146</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 27.

Zuma because he was suffering from a terminal disease or condition that is chronic and progressive.<sup>147</sup> Further stated that the condition of Mr Zuma has progressively deteriorated since 2018, and he cannot perform activities of daily living or self-care.<sup>148</sup> On 13 August 2021, another Dr, Mr Mphatswe, a member of the Medical Parole Advisory Board, recommended that Mr Zuma be released on medical parole immediately.<sup>149</sup> The Board met on 28 August and did not recommend that Mr Zuma be released on medical parole.<sup>150</sup> The Board decided not to recommend the release on medical parole because they did not have sufficient information to reach a decision.<sup>151</sup> The Board requested further medical records.<sup>152</sup> This was when the National Commissioner took it upon himself to put Mr Jacob Zuma on medical parole. The Democratic Alliance referred the matter to the High Court.<sup>153</sup> The High Court found the decision of the National Commissioner was unlawful.<sup>154</sup>

The court, as reasoning, stipulated that the decision of the Board, as an expert body established to provide an independent medical report on whether an offender is terminally ill or physically incapacitated, is ordinarily decisive and binding on the Commissioner.<sup>155</sup> The court stated that the Commissioner does not have the medical expertise to overrule the recommendation of the Board.<sup>156</sup>

The court further stipulated that in terms of regulation 29A(3) of the *Correctional Services Act*, the report of the correctional medical practitioner, which in this case was compiled by Drs Mafa and Mphatswe, to be provided to the Board in terms of section 79(2)(c) and not be considered by the Commissioner.<sup>157</sup> The Commissioner has impermissibly usurped the statutory functions of the Board.<sup>158</sup>

In conclusion, the court mentioned that the Board did investigate the reports, and the decision by the Commissioner to now rely on reports of the South African Military

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<sup>147</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 29.  
<sup>148</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 29.  
<sup>149</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 34.  
<sup>150</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 35.  
<sup>151</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 35.  
<sup>152</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 35.  
<sup>153</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 4.  
<sup>154</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 100.  
<sup>155</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 55.  
<sup>156</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 55.  
<sup>157</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 60.  
<sup>158</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 60.

Health Services and one of Dr Mphatswe to overturn the recommendation of the Board is irrational, unlawful and unconstitutional.<sup>159</sup> Consequently, the decision by the Commissioner was declared unlawful and set aside.

The court ordered that Mr Jacob Zuma be returned to the Department of Correctional Services custody.<sup>160</sup>

The above two cases might have had two different sentences and charges, but this inconsistency will again put the medical parole system under criticism. The main question which will be raised, for the second time in history, is whether the medical parole system of South Africa is biased, politically influenced, and based on status.

### 3.6 CONCLUSION

This chapter focused on the current criteria for placement on medical parole. The amended section 79(1) of the *Correctional Services Act* provides three requirements for the release of medical parole. As amended, the Correctional Services Regulations of 2004 also assist the Medical Parole Advisory Board by providing a list of medical conditions that can be considered when deciding which condition is terminal. The board is, however, not limited to the list provided.

In the *Derby- Lewis v Minister of Justice and Correctional Service* case,<sup>161</sup> the court provided that the board must not be too rigid when applying the requirements for medical parole to different instances. The board must consider the idea behind section 79 of the *Correctional Services Act*, which was to ensure that inmates' inherent right to dignity is respected.<sup>162</sup>

The *Democratic Alliance v National Commissioner of Correctional Services and Others*<sup>163</sup> addressed the Commissioner's power to release inmates on medical parole. According to this case, unlike during the Correctional Services Act 8 era of 1959, the Commissioner does not have powers more than that of the Board and cannot simply override the decision. This is an improvement from the previous position.

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<sup>159</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 61.

<sup>160</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*:par. 100.

<sup>161</sup> *Derby-Lewis v Minister of Justice and Correctional Services*.

<sup>162</sup> *Derby-Lewis v Minister of Justice and Correctional Services*:par. 55-56.

<sup>163</sup> *Democratic Alliance v National Commissioner of Correctional Services and Others*.

In the next chapter, the medical parole legislation of South Africa will be compared to that of Canada and the states of Mississippi and New York.

## CHAPTER 4 - COMPARATIVE STUDY

### 4.1 INTRODUCTION

A comparative study will be conducted in this chapter between the medical parole legislation of South Africa, Canada, the state of New York and Mississippi. The reason for comparing South Africa and Canada is that the law has similarities in that the Canadian Charter of Human Rights and Freedom was used as the template for the *Constitution of the Republic of South Africa* of 1996. Unlike Canada, the American states of Mississippi and New York were chosen because of their recent developments in the field of medical parole and the possible solutions they offer to South Africa. The whole purpose is to establish what South Africa can learn from them.

### 4.2 THE LEGAL POSITION IN CANADA

#### 4.2.1 Types of release

*Corrections and Conditional Release Act*<sup>164</sup> provides different release options in Canada to help inmates reintegrate into society.<sup>165</sup> Temporary absence release, relevant to this study, will be discussed below.

#### 4.2.2 Temporary absence release

Section 17 of the *Corrections and Conditional Release Act* is one of the sections that regulate temporary absences in Canada. Section 17(1) of the *Corrections and Conditional Release Act* stipulates:

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*, authorise 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 authorised by the institutional head and, in the opinion of the institutional head,

(a) the inmate will not, by re-offending, present an undue risk to society during an absence authorised under this section;

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<sup>164</sup> *Corrections and Conditional Release Act* 1992.  
<sup>165</sup> Iftene 2017:930.

(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 authorising 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 authorised 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 authorised for reasons other than medical reasons.

#### Exceptions

(2) Subsection (1) does not apply to an offender whose life or health is in danger and for whom an unescorted temporary absence is required in order to administer emergency medical treatment.

#### Maximum security

(3) Offenders who, pursuant to subsection 30(1) and the regulations made under paragraph 96(z.6), are classified as maximum security offenders are not eligible for an unescorted temporary absence

The Act provides that the institutional head, 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*, authorise temporary absence of inmates if it is desirable for the inmate to be absent from the penitentiary for medical reasons.<sup>166</sup> Temporary release involves temporary release from the institution for medical, social, rehabilitation and humanitarian reasons.<sup>167</sup> Temporary absence based on medical grounds can address anything from emergency treatment, medical routine, medical tests, dental care, surgeries, and treatment after injury.<sup>168</sup>

Federal offenders who want to apply for temporary absence will have to submit a form called the "application for temporary absence" form.<sup>169</sup> The parole or correctional officer will then review the application received, the inmate's progress, and the risk

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<sup>166</sup> *Corrections and Conditional Release Act*:sec 17(1).

<sup>167</sup> Polvi & Pease 1991:221.

<sup>168</sup> Van Wyk 2014:24.

<sup>169</sup> Van Wyk 2014:28-29.

involved if the inmate is to get released.<sup>170</sup> If any risk is found, special conditions must be in place to manage the risk.<sup>171</sup>

#### **4.2.3 Criteria for eligibility for temporary absence**

For temporary absence, an offender may apply for an escorted temporary absence during their sentence regardless of how long they have served. The difference between escorted and unescorted temporary release is found in supervision. Escorted temporary release differs from the unescorted temporary absence, which requires that an offender must have served one-sixth of their sentence if they are serving more than three years or six months if they are serving a sentence between two to three years.<sup>172</sup> Section 115 of the *Corrections and Conditional Release Act* regulates the minimum time to be served before unescorted temporary absence can be granted and states as follows:

(a) in the case of an offender serving a life sentence,  
other than an offender referred to in paragraph (a.1),  
the period required to be served by the offender to  
reach the offender's full parole eligibility date less  
three years;

(a.1) in the case of an offender described in subsection  
746.1(3) of the *Criminal Code*, the longer of

(i) the period that expires when all but one fifth of  
the period of imprisonment the offender is to serve  
without eligibility for parole has been served, and

(ii) the period required to be served by the offender  
to reach the offender's full parole eligibility date,

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<sup>170</sup> Van Wyk 2014:28-29.

<sup>171</sup> Van Wyk 2014:28-29.

<sup>172</sup> *Corrections and Conditional Release Act*:sec. 115(1)(a).

determined in accordance with subsection 120.2(2),

less three years;

(b) in the case of an offender serving a sentence for an

indeterminate period, other than an offender referred

to in paragraph (b.1), the longer of

(i) the period required to be served by the offender

to reach the offender's full parole eligibility date,

determined in accordance with section 761 of the

*Criminal Code*, less three years, and

(ii) the period required to be served by the offender

to reach the offender's full parole eligibility date,

determined in accordance with subsection 120.2(2),

less three years.

(b.1) in the case of an offender serving a sentence for an indeterminate period as of the date on which this paragraph comes into force, the longer of (i) three years, and (ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years; and (c) in any other case, the longer of (i) six months, and (ii) one half of the period required to be served by the offender to reach their full parole eligibility date.<sup>173</sup>

The Board will grant the temporary release if there is a belief that the offender will not be a risk to society by re-offending and there is a good reason for the release.<sup>174</sup> The Board will further investigate whether having the sentenced offender outside the correctional facility for the duration of the absence will be desirable.<sup>175</sup> The Board will also have to consider the offender's behaviour in the correctional facility before

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<sup>173</sup> *Corrections and Conditional Release Act*:sec. 115(1)(a).

<sup>174</sup> *Corrections and Conditional Release Act*:sec. 17.1 (a)-(b).

<sup>175</sup> *Corrections and Conditional Release Act*:sec. 17.1 (b).

applying for temporary absence.<sup>176</sup> Lastly, the Board has to be sure that there is a structured plan put in place by the offender for the period of absence.<sup>177</sup>

#### 4.2.4 Cancellation of temporary absence release

Both escorted and unescorted temporary absences may be cancelled.<sup>178</sup> A person on temporary absence for medical reasons may be released for an unlimited period but not indefinitely until full parole is granted.<sup>179</sup> This absence can be cancelled anytime if there is a breach of the release conditions when the institutional head believes it is necessary to cancel the temporary absence to avoid a breach; the decisions given for the temporary release no longer exist. New information changes the decision to let go of the prisoner.<sup>180</sup> The institutional head may cancel a temporary absence either before or after it.<sup>181</sup>

#### 4.2.5 Parole by exception

Section 121 of the *Corrections and Conditional Release Act* provides that there are exceptional cases in which parole may be granted, and some of these cases include when an offender is terminally ill or the offender suffers serious physical or mental illnesses in which their continuous stay in confinement will cause more damage.<sup>182</sup>

Section 121(1) of the *Corrections and Conditional Release Act* states as follows:

121 (1) Subject to section 102 — and despite sections 119 to 120.3 of this Act, sections 746.1 and 761 of the Criminal Code, subsection 226.1(2) of the National Defence Act and subsection 15(2) of the Crimes Against Humanity and War Crimes Act and any order made under section 743.6 of the Criminal Code or section 226.2 of the National Defence Act — parole may be granted at any time to an offender

(a) who is terminally ill;

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<sup>176</sup> *Corrections and Conditional Release Act*:sec. 17.1(c).

<sup>177</sup> *Corrections and Conditional Release Act*:sec. 17.1(d).

<sup>178</sup> *Corrections and Conditional Release Act*:sec. 17.1(2) & (3).

<sup>179</sup> *Corrections and Conditional Release Act*:sec. 17.1(3).

<sup>180</sup> The Law Foundation of British Columbia "Conditional release", [https://prisonjustice.org/wp-content/uploads/2019/01/Federal-Conditional-Release-2018\\_1.pdf](https://prisonjustice.org/wp-content/uploads/2019/01/Federal-Conditional-Release-2018_1.pdf) (accessed on 1 May 2022).

<sup>181</sup> *Corrections and Conditional Release Act*:sec. 17.1(3).

<sup>182</sup> *Corrections and Conditional Release Act*:sec. 121.

(b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

(c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or

(d) who is the subject of an order of surrender under the Extradition Act and who is to be detained until surrendered

This section was levelled with criticism by writers, including Iftene, for the reasons below. Iftene criticises that despite the increasing number of sick prisoners, this section is barely used, and it is not available to 40 per cent of the sample, being people serving life and indeterminate sentences.<sup>183</sup> In the study conducted by Iftene, it came to light that 70 per cent of participants had no disciplinary record, and many of them had illnesses including cancer, dementia, serious heart disease and other things. None of the prisoners who participated in the study were ever advised to apply for parole by exception or had heard of it before.<sup>184</sup>

Another criticism against this section is that how it is framed, regulated, and applied shows that this provision has little to do with compassionate release or release on humanitarian grounds.<sup>185</sup> It was further stated that the shortcomings of this section were also realised when it came to eligibility. It was stated that prisoners serving life sentences are not eligible for this release unless they are terminally ill. The offence committed is important in whether the prisoner has a low or high-risk status.<sup>186</sup>

Another criticism is that the provisions are extremely difficult to meet because of the procedure for such applications. An application for parole by exception requires substantial evidence by prison doctors indicating that the prisoner is suffering from a “disease incompatible with incarceration”.<sup>187</sup> The writer states that medical practitioners or health professionals in prison are very sceptical about writing these reports, which are provided as substantial evidence in proving incompatibility.<sup>188</sup> By making the judgement to make such a report, the health care practitioner or

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<sup>183</sup> Iftene 2017:932.

<sup>184</sup> Iftene 2017:932.

<sup>185</sup> Iftene 2017:930.

<sup>186</sup> Iftene 2017:937.

<sup>187</sup> Iftene 2017:937.

<sup>188</sup> Iftene 2017:937.

professional can be seen as raising a liability, which will not work in their favour as a health professional.<sup>189</sup> However, their decision to refuse to make such a report, even when the prisoner is terminally ill, does not carry any risk.<sup>190</sup>

#### **4.2.6 Case law dealing with compassion release in Canada**

##### **4.2.6.1 *Leblanc, Re, 2001 CarswellOnt***

In this case,<sup>191</sup> an inquest into the death of Michael Joseph Leblanc, who was a 45-year-old federal inmate serving a sentence at Kingston Penitentiary in Canada.<sup>192</sup> According to records received, he had multiple medical problems, including addiction, hepatitis and HIV/AIDS. It was stated that his health declined in the institution to the point that he requires admission to the Correctional Services Regional Hospital within the walls of Kingston Penitentiary.<sup>193</sup> On Wednesday, 17 November 1999, he was placed in the Palliative Care Room within the Health Care Facility due to the advance stage of his illness, which is deemed to be terminal.<sup>194</sup> He died on 18 November 1999.<sup>195</sup>

An inquest was mandatory, and it provided as follows:<sup>196</sup>

1. Name of Deceased: Michael Joseph Leblanc
2. Date and Time of Death: 18 November 1999 at 02:10 a.m.
3. Place of Death: Kingston Penitentiary, Regional Hospital
4. Cause of Death: Acute bronchopneumonia with diffuse alveolar damage from hepatic cirrhosis.
5. By What Means: Natural causes

Evidence provided by an attending physician and expert in HIV/AIDS care supported that on three different occasions, Mr Leblanc's antiviral medications to combat his

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<sup>189</sup> Iftene 2017:937.

<sup>190</sup> Iftene 2017:937.

<sup>191</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001).

<sup>192</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001):par. 3.

<sup>193</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001):par. 3.

<sup>194</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001):par. 3.

<sup>195</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001):par. 4.

<sup>196</sup> *Leblanc, Re, 2001 CarswellOnt* 11415 (2001):par. 6.

AIDS were interrupted for at least three successive days.<sup>197</sup> The physician further stated that a second interruption in medication could be harmful in that the HIV/AIDS virus changes to make it resistant to medication when the medication is interrupted for as short as a day.<sup>198</sup> According to the physician, this leaves the patient powerless to have medication from any other source.<sup>199</sup> Further evidence was led at the inquest that there was no record keeping on medication given to patients.<sup>200</sup>

Several witnesses also testified at this inquest that the Palliative Care Program and Palliative Room within the Regional Treatment Hospital were not up to the standard provided for the rest of the community.<sup>201</sup>

The Jury had the following recommendation: During the Inquest, the Jury heard testimony on many difficult comprehensive issues involving life in Kingston Penitentiary in particular.<sup>202</sup> One of the interesting discussions in this case is the comments made by the jury on compassionate release.<sup>203</sup> The court stated that there was a need for the Correctional Services of Canada to develop clear and publicised guidelines for inmates who may be eligible for compassionate release.<sup>204</sup>

According to the jury, evidence was heard at that inquest that compassionate release was rare at the Kingston Penitentiary, and some witnesses could not recall it being used.<sup>205</sup> The jury stated that there was a need to balance concerns about security and protection of the public with appropriate care of advanced terminally ill patients. The jury further stipulated that a published guideline would assist families and patients and ensure the department is not again faced with such controversy.<sup>206</sup>

From the above-discussed case, it becomes clear that medical parole or compassionate release is not something most prisoners in Canada are informed of, which prejudices inmates who are terminally ill and in need of compassionate release.

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<sup>197</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 8.*

<sup>198</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 8.*

<sup>199</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 8.*

<sup>200</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 8.*

<sup>201</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

<sup>202</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

<sup>203</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

<sup>204</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

<sup>205</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

<sup>206</sup> *Leblanc, Re, 2001 CarswellOnt 11415 (2001):par. 9.*

### 4.3 LEGAL POSITION IN THE UNITED STATES OF AMERICA

Correctional systems across the globe are faced with growing ageing and ill populations.<sup>207</sup> In the USA, approximately 200,000 adults aged 55 and above are incarcerated.<sup>208</sup> Many of them have complex health issues, social services and legal needs that are not addressed before and after release.<sup>209</sup> At the beginning of 1970, there was a growing awareness amongst state lawmakers and professionals of the need for compassionate and geriatric policies to address the ageing and health crisis in prison.<sup>210</sup>

In the United States of America, parole comes in two forms: mandatory and discretionary. Medical parole falls within the ambit of discretionary parole in that the Parole Board is given the discretion of deciding whether a prisoner should be placed on parole. Every US state has at least one compassionate release procedure.<sup>211</sup> Across the US states, medical parole emerges as the most common method of compassionate release.<sup>212</sup> Medical parole procedures can vary in form. Some states exclude categories of prisoners based on the conviction type. In other states, eligibility is based on the prisoner's age and health.<sup>213</sup> Some states take into consideration terminal and non-terminal illnesses the prisoners may be suffering from.<sup>214</sup> This study will focus on the legal position in Mississippi and New York.

#### 4.3.1 Mississippi

##### 4.3.1.1 Type of release

Mississippi provides compassionate release to eligible incarcerated people with severe medical conditions through conditional medical release. Provisions regulating the release are prescribed in the *Mississippi Code of 2018*.

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<sup>207</sup> Maschi *et al* 2016:165.

<sup>208</sup> Maschi *et al* 2016:165.

<sup>209</sup> Maschi *et al* 2016:165.

<sup>210</sup> Maschi *et al* 2016:165.

<sup>211</sup> Cooper & Bernard 2021:174.

<sup>212</sup> Cooper & Bernard 2021:174.

<sup>213</sup> Cooper & Bernard 2021:183.

<sup>214</sup> Cooper & Bernard 2021:183.

#### **4.3.1.2 Criteria for eligibility for conditional medical release**

In the state of Mississippi, the Commissioner and the Medical Director of the Department of Corrections may place offenders who have served not less than 1 year of their sentence (except sexual offenders) on conditional medical parole.<sup>215</sup> This is different from the situation of nonviolent offenders, who can be placed on conditional medical release when bedridden regardless of the time they served their sentence.<sup>216</sup>

Examples of conditions that meet the medical eligibility criteria include a cancer diagnosis appropriate for hospice care, end-stage lung disease, end-stage heart failure, severe stroke with a disabling neurologic manifestation, end-stage liver disease, end-stage AIDS, advanced Alzheimer's and severe, progressive neurological disease, including paraplegia and quadriplegia.<sup>217</sup>

The Commissioner shall not place an offender on conditional medical release unless the Medical Director of the Department of Corrections certifies to the Commissioner that, firstly, the offender is suffering from a significant permanent physical medical condition with no possibility of recovery, secondly, that his or her further incarceration will serve no rehabilitative purpose, and lastly, that the state will incur unreasonable expenses as a result of continued incarceration.<sup>218</sup>

#### **4.3.1.3 Termination of conditional medical release**

Offenders placed on conditional medical release shall be supervised by the Division of Community Corrections of the Department of Corrections for the remainder of their sentence.<sup>219</sup>

An offender on conditional medical release may be returned and placed in the custody of the Department of Corrections if the offender violates an order or conditions of his or her conditional release.<sup>220</sup> Therefore, this release may be revoked.

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<sup>215</sup> *Mississippi Code* 2018:sec. 47-7-4.

<sup>216</sup> *Mississippi Code* 2018:sec. 47-7-4.

<sup>217</sup> FAMM Compassionate Release, "Conditional medical release", [https://famm.org/wp-content/uploads/Mississippi\\_Final.pdf](https://famm.org/wp-content/uploads/Mississippi_Final.pdf) (accessed 4 September 2022).

<sup>218</sup> *Mississippi Code* 2018:sec. 47-7-4.

<sup>219</sup> *Mississippi Code* 2018:sec. 47-7-4.

<sup>220</sup> *Mississippi Code* 2018:sec 47-7-4.

When offenders are no longer bedridden, they shall be returned and placed in the department's custody.<sup>221</sup>

#### **4.3.1.4 Case dealing with compassionate release in Mississippi**

##### **4.3.1.4.1 *United states v Shundrake McKeel***

In the case *United states v Shundrake McKeel*,<sup>222</sup>McKeel pled guilty to one count of possession with intent to distribute oxycodone. On 25 August 2017, he was sentenced to imprisonment of 92 months, 36 months of supervised release, restitution for \$ 125 505,39 and a special assessment in the amount of \$100 000.00. On 18 May 2020, McKeel filed his first motion for compassionate release based on his fear of contracting Covid-19 in connection with his reported medical conditions, including HIV.<sup>223</sup> In July 2020, the court denied the motion for failure to exhaust administrative remedies. On 24 September 2021, McKeel filed his second motion seeking compassionate release. He repeated that he has HIV and stated that the most recent lab results showed that his CD4 count has dropped from 690 to 420 in six months.<sup>224</sup> He explained that the drop of 270 was alarming. He further stated in his motion that he requested medical attention from the prison, which was not availed to him. He added that should his cell count continue to drop like it was already, he would cross the threshold of full-blown AIDS, and his immune system would not be strong enough to fight off the infection. He stated that his chances of surviving COVID-19 are slim.<sup>225</sup>

The Government filed a response in opposition to this matter. The opposition's response in his case relied on the fact that they offered to vaccinate the defendant on 21 February 2021 with Pfizer for Covid-19, and he refused. The CDC recommends that persons with HIV get the Covid-19 vaccine as soon as possible.<sup>226</sup>

The court stated that where extraordinary and compelling reasons warrant a reduction, an inmate's sentence may be reduced.<sup>227</sup> However, the court stated that McKeel's refusal of the Covid-19 vaccine weighs heavily against his argument that his

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<sup>221</sup> *Mississippi Code* 2018:sec 47-7-4.

<sup>222</sup> *United States v Shundrake Mckeel* 2021 WL 5772927.

<sup>223</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par. 1.

<sup>224</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par. 1.

<sup>225</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par. 1.

<sup>226</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par. 1.

<sup>227</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par. 1.

susceptibility to the virus warrants compassionate release.<sup>228</sup> The court denied the motion.<sup>229</sup>

## 4.3.2 New York

### 4.3.2.1 Type of release

The New York Executive Laws regulate conditional medical parole in New York.<sup>230</sup> Section 259s(1)(a) of the *Executive Laws* provides as follows:

(a) The board shall have the power to release on medical parole any incarcerated individual serving an indeterminate or determinate sentence of imprisonment who, pursuant to subdivision two of this section, has been certified to be suffering from a significant and permanent non-terminal condition, disease or syndrome that has rendered the incarcerated individual so physically or cognitively debilitated or incapacitated as to create a reasonable probability that he or she does not present any danger to society, provided, however, that no incarcerated individual serving a sentence imposed upon a conviction for murder in the first degree or an attempt or conspiracy to commit murder in the first degree shall be eligible for such release, and provided further that no incarcerated individual serving a sentence imposed upon a conviction for any of the following offenses shall be eligible for such release unless in the case of an indeterminate sentence he or she has served at least one-half of the minimum period of the sentence and in the case of a determinate sentence he or she has served at least one-half of the term of his or her determinate sentence: murder in the second degree, manslaughter in the first degree, any offense defined in article one hundred thirty of the penal law or an attempt to commit any of these offenses. Solely for the purpose of determining medical parole eligibility pursuant to this section, such one-half of the minimum period of the indeterminate sentence and one-half of the term of the determinate sentence shall not be credited with any time served under the jurisdiction of the department prior to the commencement of such sentence pursuant to the opening paragraph of subdivision one of section 70.30 of the penal law or subdivision two-a of section 70.30 of the penal law, except to the extent authorized by subdivision three of section 70.30 of the penal law.<sup>231</sup>

The above is indicative of the powers of the Board in the release of inmates on medical parole when an inmate is serving a determined or an indetermined sentence. It further shows that the release on medical parole is only done when it is certified that the inmate suffers from a significant and permanent non-terminal condition, disease or syndrome. Most importantly, however, the non-terminal condition, disease or

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<sup>228</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par 1.

<sup>229</sup> *United States v Shundrake Mckeel* 2021 WL 5772927:par 2.

<sup>230</sup> *New York Executive Laws*.

<sup>231</sup> *New York Executive Laws*:sec. 259s(1)(a).

syndrome, must have rendered the inmate physically or cognitively debilitated or incapacitated to a point that they would not be able present any danger to society.<sup>232</sup> The section above also shows that there are inmates excluded from being released on conditional medical release based on the crimes they are convicted for.

The *New York Executive Laws* also makes provision for the Board to release incarcerated individuals serving an indeterminate or determinate sentence of imprisonment when it has been certified that they are suffering from a “terminal condition, disease or syndrome”.<sup>233</sup> This includes a person who is incapacitated to an extent that they are physically incapable of being any danger to society.<sup>234</sup> However, just like in the case of a significant and permanent non-terminal condition, disease or syndrome which has rendered the inmate physically or cognitively debilitated or incapacitated, “no person incarcerated serving a sentence imposed upon a conviction for murder in the first degree or an attempt or conspiracy to commit murder in the first degree shall be eligible for release”.<sup>235</sup> It was provided further that inmates serving a sentence for the following offence; “murder in the second degree, manslaughter in the first degree ,and any offence defined in terms of article one hundred thirty of the penal law or an attempt to commit any of the offenses”,<sup>236</sup> shall only be eligible for such release after having served at least one-half of the minimum period of the sentence in cases of a indeterminate sentence and at least one-half of a determinate sentence.

#### **4.3.2.2 Criteria for medical release**

For one to be released on medical parole, the Board has to consider whether, in the light of the inmate's medical condition, there is a reasonable possibility 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. The medical release shall also be subject to limits and conditions specified.<sup>237</sup>

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<sup>232</sup> *New York Executive Laws*:sec. 259s(1).

<sup>233</sup> *New York Executive Laws*:sec. 259r(1)(a).

<sup>234</sup> *New York Executive Laws*:sec. 259r(1)(a).

<sup>235</sup> *New York Executive Laws*:sec. 259r(1)(a).

<sup>236</sup> *New York Executive Laws*:sec. 259r(1)(a).

<sup>237</sup> *New York Executive Laws*:sec.259r(2).

In making this determination, the Board shall consider the nature and seriousness of inmate's crime, the inmate's prior criminal record, the inmate's disciplinary behavioural and rehabilitative record during the term of his or her incarceration, the amount of time the inmate must serve before becoming eligible for release, the current age of the inmate and his or her age at the time of the crime, the recommendations of the sentencing court, the district attorney, victim and the victim's representatives, the nature of the inmate's medical condition, disease or syndrome and the extent of medical treatment or care that the inmate will require as a result of that condition or syndrome, and any other relevant factor.<sup>238</sup>

Medical parole granted under section 259r of the *New York Executive Laws* is for six months.<sup>239</sup> As conditions of release on medical parole, the Board shall require that the parolee agree to remain under the care of the physician while on medical parole and in a hospital established under Article 28 of the public health law,<sup>240</sup> a hospice established according to Article 40 of the public health law<sup>241</sup> or any other placement that can provide appropriate medical care as specified on the medical discharge plan required by subdivision 2 of this section.<sup>242</sup> As another condition of release, the Board shall require that the medical parolee be supervised.<sup>243</sup>

The Board shall further require as a condition of release on medical parole that the parolee undergo periodic medical examination at least one month before the expiration of the period of medical parole and to make decisions.<sup>244</sup> The Board must receive reports prepared by the treating physician for such examination.<sup>245</sup> Such a report will specifically state whether or not the parolee continues to suffer from the terminal condition, disease or syndrome and to be debilitated or incapacitated as to severely restrict his/her ability to self-ambulance or perform significant normal adult daily duties.<sup>246</sup>

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<sup>238</sup> *New York Executive Laws:sec.259r(2).*

<sup>239</sup> *New York Executive Laws:sec.259r(4).*

<sup>240</sup> *2015 New York Laws - Public Health Article 28.*

<sup>241</sup> *2015 New York Laws - Public Health Article 40 - Hospice.*

<sup>242</sup> *New York Executive Laws:sec.259r(4).*

<sup>243</sup> *New York Executive Laws:sec.259r(4).*

<sup>244</sup> *New York Executive Laws:sec.259r(4).*

<sup>245</sup> *New York Executive Laws:sec.259r(4).*

<sup>246</sup> *New York Executive Laws:sec.259r(4).*

### 4.3.2.3 Cases dealing with compassionate release in New York

#### 4.3.2.3.1 *Richard Sunday Ifill v Lester N Wright*

In this case,<sup>247</sup> the inmate commenced proceedings against the Chief Medical Officer of the Department of Corrections and Community Supervision, challenging the decision of the Commissioner of Corrections and Community Supervision to deny his request for medical parole release. The Supreme Court of Albany County dismissed the petition, and the inmate appealed.<sup>248</sup>

The applicant was serving a prison sentence of 23 years to life for various crimes, including robbery in the first degree. In January 2010, the applicant appeared before the Board of Parole for the first time and his request to be released on medical parole was denied. After the first appearance, in February 2010, the medical staff member at the correctional facility in which the applicant was a patient, sent a memorandum to the Commissioner of Corrections and Community Supervision recommending that the applicant is eligible for parole based on his medical condition.<sup>249</sup> The Commissioner after having reviewed the medical records of the applicant, found that he did not meet the eligibility requirements and denied the request of the applicant that he be referred to the Board for consideration of his eligibility for medical parole.<sup>250</sup> The applicant then proceeded to institute proceedings in terms of the Civil Practice Law and Rules Article 78, and the Supreme Court dismissed the petition. The applicant then appealed.<sup>251</sup>

The court of appeal quoted that according to the *New York Executive Law* § 259–r(2)(b), an inmate may be certified to the Board for release on medical parole based on a terminal illness if it is determined that he or she "is suffering from such terminal condition, disease or syndrome and that the inmate is 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".<sup>252</sup> Added to that, the *New York Executive Law* § 259–s(2)(b) further states that an inmate may be certified to the Board for release on medical parole based on a significant debilitating illness if it is determined that he or she "is suffering from such condition, disease or syndrome and

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<sup>247</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.

<sup>248</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.:par. 1.

<sup>249</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.:par. 1.

<sup>250</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.:par. 1.

<sup>251</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.:par. 1.

<sup>252</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y.:par. 1.

that the inmate is 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".<sup>253</sup>

The court of appeal found that the records provided by the applicant, the very same which were used by the other court.<sup>254</sup> Upon consideration of the medical reports of the applicant from November 2009 and February 2010, and the decision of the Board from January 2010, the court further found that there was no reasonable probability that the applicant could be "free" again without violating the law.<sup>255</sup> As such, the court stated that it could not conclude that the Commissioner's decision exhibits "irrationality bordering on impropriety". The court thus confirmed the judgement.<sup>256</sup>

#### **4.3.2.3.2. Theresa McDonnell v Anthony J. Annucci**

In this case,<sup>257</sup> an Inmate, Theresa McDonnell, brought an Article 78 petition challenging the Department of Corrections and Community Supervision's denial of the inmate's request to be certified for medical parole release. The applicant was sentenced to 9 and a half to 19 years in prison for various crimes, including grand larceny in the second degree.<sup>258</sup> In May 2019, the facility medical director where the applicant was housed sent a memorandum to the respondent, John Morley, the Chief Medical Officer for the Department of Corrections and Community Supervision, recommending that the applicant be certified to the Board of Parole for consideration for medical parole release in terms of *Executive Law 259r* and *259s*.<sup>259</sup> After reviewing the applicant's medical records, the respondent determined that the applicant did not meet the eligibility requirements and denied certification. The applicant challenged the decision, and the Supreme Court dismissed the proceedings.<sup>260</sup>

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<sup>253</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y:par. 1.

<sup>254</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y:par. 2.

<sup>255</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y:par. 2.

<sup>256</sup> *Richard Sunday Ifill v Lester. N Wright* 941 N.Y.S. 2d. 812, 2012 N.Y:par. 2.

<sup>257</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York.

<sup>258</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>259</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>260</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

Judge Aarons of the Supreme Court, Appellate Division, held that the Department met all statutory requirements in denial of the inmate's request to be certified for medical parole release.<sup>261</sup>

The court stated that an inmate may be certified to the Board of Medical Parole when it is determined that they have a terminal illness by the Commissioner of Corrections and Community Supervision or his or her designee that the inmate is suffering from such a terminal condition, disease, syndrome and the inmate is dilatated or incapacitated to a point that it makes him incapable of presenting any danger to society.<sup>262</sup> The court further stated that the decision whether to certify an inmate or not is solely at the discretion of the Commissioner and it will not be disturbed where there is compliance with statutory requirements.<sup>263</sup> The medical records of the applicant, according to the Commissioner, did not indicate that she was eligible to be certified to the Board for medical parole release consideration.<sup>264</sup>

The court stated that as the records reflect that the statutory requirements were met, they could not find the decision by the Commissioner irrational.<sup>265</sup>

#### **4.4 CONCLUSION**

In conclusion, it is clear from the above that medical parole or compassionate release is challenging in South Africa and some Western countries. Generally, the purpose of medical parole or compassionate release is similar in all states; it is meant to assist inmates who are medically challenged to such an extent that they no longer pose a danger to the community.

The next chapter will summarise the findings of my study, elaborate further on the differences and similarities between the different states and make recommendations for South Africa's way forward.

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<sup>261</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>262</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>263</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>264</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

<sup>265</sup> *Theresa McDonnell v Anthony J Annucci* 189 A.D.3d 1871 Supreme Court, New York:par. 3.

## CHAPTER 5 - CONCLUSION AND RECOMMENDATIONS

### 5.1 INTRODUCTION

Medical parole or compassionate release seems to be a practice in many states, as reflected in Chapter 4. However, it has also been established that there is a difference between legislation in all the states. The purpose of this chapter is to compare the medical parole legislation of South Africa to that of Canada, Mississippi, and New York to establish what South Africa can learn from the other mentioned countries, what it can teach to the other countries and the effectiveness thereof.

### 5.2 SUMMARY: SOUTH AFRICA, CANADA AND THE UNITED STATES OF AMERICA (MISSISSIPPI AND NEW YORK) COMPARED

#### 5.2.1 Legislation

The South African *Correctional Services Act* clarifies that medical parole is available to prisoners in South Africa.<sup>266</sup> This is slightly different from Canadian law. The Canadian *Corrections and Conditional Release Act*<sup>267</sup> does not stipulate that there is anything like medical parole in Canadian law, except that offenders can be released conditionally but not permanently from prison. There are different types of releases available for medical purposes in Canada. These include temporary absence release.<sup>268</sup> This is also different to the discussed states in the United States of America. Mississippi and New York provide only for conditional release in terms of the *Mississippi Code* of 2018 and the *New York Executive Laws*, respectively.

#### 5.2.2 Eligibility

Eligibility for medical parole or absence for medical purposes is almost similar in all the countries. All the countries discussed state that eligibility is provided where there is a good reason for the release or parole. In all the countries mentioned above, an offender must be ill to qualify for medical parole. The below-mentioned factors are taken into consideration to determine eligibility.

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<sup>266</sup> *Correctional Services Act*:sec 79.

<sup>267</sup> *Correctional and Conditional Release Act*:secs. 17, 116, 121.

<sup>268</sup> *Correctional and Conditional Release Act*:sec 17.

### 5.2.2.1 Types of Illnesses

It is common knowledge that an inmate must have an illness of some kind for them to qualify for medical parole. In Mississippi, examples of conditions that meet the medical eligibility criteria include a cancer diagnosis appropriate for hospice care, end-stage lung disease, end-stage heart failure, severe stroke with a disabling neurologic manifestation, end-stage liver disease, end-stage AIDS, advanced Alzheimer's and severe, progressive neurological disease, including paraplegia and quadriplegia.<sup>269</sup> The *New York Executive Laws* in section 259s(1) provides that the Board can only place an inmate on conditional medical release if it is certified that the inmate is suffering from a significant and permanent non-terminal condition, syndrome or disease which renders them physically and cognitively debilitated or incapacitated.<sup>270</sup> The *New York Executive Laws* in section 259r(1) also provide for medical parole in instances of terminal illnesses.<sup>271</sup>

The Canadian *Corrections and Correctional Release Act* does not stipulate an offender's medical conditions, which will be sufficient for temporary absence release.<sup>272</sup> However, the *Correctional Services Act* of South Africa in section 79(1) provides that the inmate must be suffering from a terminal disease or condition and will allow medical parole if such offender is rendered physically incapacitated as a result of the injury, disease or illness so as to severely limit their daily activities.<sup>273</sup> The *Correctional Services Regulations* further elaborates on the types of illnesses an inmate should have to qualify for medical parole in section 29, as provided in Chapter 3. This list is not fixed, and the Board is open to reports from specialists for any other illness not mentioned on the list.

In conclusion, it is fair to state that all the countries mentioned above have differences in what illnesses determine eligibility for medical parole or conditional medical release. The advantage of a pre-approved list of illnesses/ conditions (extended over time), as

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<sup>269</sup> FAMM "Conditional medical release", [https://famm.org/wp-content/uploads/Mississippi\\_Final.pdf](https://famm.org/wp-content/uploads/Mississippi_Final.pdf) (accessed 4 September 2022).

<sup>270</sup> *New York Executive Laws*:sec.259s(1).

<sup>271</sup> *New York Executive Laws*:sec.259r(1).

<sup>272</sup> *Corrections and Conditional Release Act*:sec. 17.1.

<sup>273</sup> *Correctional Services Act*:sec. 79(1).

in the case in Mississippi and South Africa, speaks for itself and may provide more legal certainty.

### 5.2.2.2 Period served in prison

The countries mentioned above have differences regarding the period to be served before medical parole or conditional medical release is granted. In Canada, for temporary absence release, a prisoner may apply for escorted temporary release at any time.<sup>274</sup> Unescorted temporary absence requires that an offender must have served one-sixth of their sentence if they are serving more than three years or six months if they are serving a sentence between two to three years.<sup>275</sup>

In Mississippi, the *Mississippi Code* of 2018 provides that the Department of Corrections may place offenders who have served not less than one year of their sentence (except sexual offenders) on conditional medical parole.<sup>276</sup> This is different from the situation of nonviolent offenders, who can be placed on conditional medical release when bedridden regardless of the time they served their sentence.<sup>277278</sup> The *New York Executive Law* stipulates that inmates may be released on conditional medical release after serving one-half of the sentence's period, determined or undetermined.<sup>279</sup> In South Africa, the *Correctional Services Act* does not stipulate the period to be served before being released on medical parole.

From the above, it can be concluded that South Africa, unlike many other states, has not been able to disqualify certain offenders based on their time in prison. In New York and Mississippi, it is much easier to understand at what period one can apply for medical parole. Had South Africa had such a system, the Democratic Alliance would not have had to make an application against such an early release of the former president of South Africa. South African medical parole law has to move towards having periods in place that offenders must have served before qualifying for medical parole to avoid inmates making numerous applications for early release.

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<sup>274</sup> *Corrections and Conditional Release Act*:sec. 17.1.

<sup>275</sup> *Corrections and Conditional Release Act*:sec. 115(1)(a).

<sup>276</sup> *Mississippi Code* 2018:sec 47-7-4.

<sup>277</sup> *Mississippi Code* 2018:sec 47-7-4.

<sup>278</sup> FAMM Compassionate Release "Conditional medical release", [https://fammm.org/wp-content/uploads/Mississippi\\_Final.pdf](https://fammm.org/wp-content/uploads/Mississippi_Final.pdf) (accessed 4 September 2022). *Mississippi Code* 2013:sec 47-7-4.

<sup>279</sup> *New York Executive Laws*:sec.259s(1).

### 5.2.2.3 Type of conviction

Another difference between the countries mentioned above relates to the types of convictions determining eligibility for medical parole or conditional medical release. The *New York Executive Laws* stipulate that inmates who are convicted of first-degree murder and attempt or conspiracy to commit first-degree murder are excluded from being granted conditional medical release.<sup>280</sup> In Mississippi, inmates convicted of sex crimes are excluded from people eligible for conditional medical release.<sup>281</sup> The *Corrections and Conditional Release Act* regulating temporary absence release in Canada stipulate in section 17(1)(1) that the Parole Board of Canada may authorise the temporary absence of an inmate serving imprisonment for life as a minimum punishment if the inmate is escorted by a staff member or other person authorised by the institutional head.<sup>282</sup> Therefore, it can be concluded that life imprisonment does not prevent a person from being released. The countries mentioned above differ completely from South African medical parole, where there are no specifications for inmates excluded from medical parole.

From the above, it is safe to say South Africa is moving towards a constitutional transformation that the Constitution of the Republic of South Africa is based on, where the right to dignity of the inmate takes precedence over the crime they committed. As stated in the *Derby Clive* case,<sup>283</sup> the South African prison system is based on rehabilitation and the right to dignity of an inmate has to be considered in all cases of medical parole. Inmates should not be denied medical parole or, rather, proper palliative care based on the crime committed. Their right to human dignity, right to life, and the right to health care should outweigh the crime committed.

### 5.2.2.4 Cancellation

In all the comparative countries discussed, conditions are attached to the release, including the possibility of cancellation. The main difference between South African law on medical parole and Canadian law is that a period is attached to the release in

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<sup>280</sup> FAMM "Medical parole", [https://famm.org/wp-content/uploads/New-York\\_Final.pdf](https://famm.org/wp-content/uploads/New-York_Final.pdf) (accessed on 15 September 2022).

<sup>281</sup> FAMM Compassionate Release "Conditional medical release", [https://famm.org/wp-content/uploads/Mississippi\\_Final.pdf](https://famm.org/wp-content/uploads/Mississippi_Final.pdf) (accessed 4 September 2022). *Mississippi Code* 2013:sec 47-7-4.

<sup>282</sup> *Corrections and Conditional Release Act*:sec.17.1.1.

<sup>283</sup> *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP).

Canada. In instances where a person recovers from their health issue in Canada, they would then return to the correctional facility.<sup>284</sup>

This is completely different from the South African medical parole. Medical parole in South Africa aims to allow parolees to serve the remainder of their sentence outside the correctional facility. Section 79(7) of the *Correctional Services Act* further stipulates that parole cannot be cancelled merely because the parolee recovered.<sup>285</sup> Therefore, unlike the temporary absence provided by the Canadian *Correctional and Conditional Release Act*, when the reason for medical release or parole no longer exists, the offender remains on medical parole.

Canadian Law, Mississippi and New York States are similar in that medical parole is conditional. In New York State, for example, conditional medical release is only for six months. Should the parolee get better in Mississippi State, they will be returned to the department's custody. This is completely different from South African medical parole, which allows inmates on medical parole to continue with their lives regardless of their recovery from the illnesses which made them suitable for the medical release in the first place.

From the above, it is clear there is something South Africa must change in its medical parole legislation. South Africa, from the states mentioned above, is the only state that allows permanent medical release, making the medical parole law ineffective. This is mainly because inmates can somehow recover and have recovered with no option of going back to prison. Inmates in South Africa have successfully used medical parole as a way to escape prison for a better life outside, and that is problematic for a country that is trying to promote the importance of sentencing and the reasons behind imprisonment as punishment.

### **5.3 RECOMMENDATIONS AND CONCLUSION**

It is clear from the above that countries all over the world have taken into consideration the need to release inmates who are ill, terminal or non-terminal. It is also clear that

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<sup>284</sup> *Correctional and Conditional Release Act*:sec. 17.1.  
<sup>285</sup> *Correctional Services Act*:sec. 79(7).

countries do not have a unified system for how medical parole should work or legislation thereof.

From the above, it is safe to admit that the South African medical parole system is on a scale of 1 to 10, the easiest system in place for medical parole compared to the other three countries discussed. In South Africa, one must provide three requirements to be released on medical parole per section 79(1) of the Act. However, it is easy to notice that in all the requirements, nothing is stated about the convictions which qualify for medical parole and the time served in prison before eligibility for medical parole. The medical parole legislation of South Africa does not say much about any other alternative remedies to investigate before release on medical parole.

It is safe to say that the biggest highlight of the difference between South Africa and the countries compared is the cancellation of compassionate release or medical parole. South African law allows for permanent release, which is ineffective in combating crime or entrusting members of the society of the true role of punishment, especially imprisonment. The only advantage that comes with permanent medical parole is the fact that an inmate will die peacefully with their loved ones. However, with many other cases, it has been clear that the question has always been: what if the inmate does not die? What is it then can the Correctional Department do? This part of the legislation leaves the South African Correctional Services Department with no recourse.

The Canadian medical parole legislation clarifies that inmates can be released on temporary absence for a determined or undetermined period. This depends on the recovery of the inmate. The advantage of this system is that the Correctional Department will always have a right of recourse in cases where the inmate recovers. The only disadvantage one can imagine in such a case is the number of resources the Canada puts into ensuring that the inmates are tested every six months and regularly checked to establish if they have recovered. Our South African medical parole legislation is still better formulated and more often applied than the Canadian section 121 exceptional release. However, we can borrow from Canada the option to cancel medical parole when conditions of the inmate out on medical parole improve.

Mississippi and New York states also follow the cancellation of compassionate release upon recovery. This is a factor which the South African Correctional Department must implement to avoid the likes of Shabir Shaik and many others. This will bring back the trust in the Correctional Department and the purpose of punishment.

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