Overcrowding in prisons: A health risk in need of (re)consideration

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Introduction

It is inherent to prisoners’ punishment that they are delivered into the power of the State and that their autonomy and rights to freedom and choice are severely limited. Prisoners are also amongst the most vulnerable in society, however, and “a civilized and humane society demands that when the State takes away the autonomy of an individual by imprisonment, it must assume the obligation [to provide and ensure] conditions of detention that are consistent with human dignity.” This includes that prisoners are treated in a humane manner, that their right to dignity is preserved, and that their health needs are met.

This commentary will consider two cases: a decision of South Africa’s Constitutional Court, and a Russian case heard by the European Court of Human Rights. In both cases it was argued that the conditions of overcrowding in the prison/detention facility had a direct and negative impact on the inmates’ health and well-being. The South African case of Lee v Minister of Correctional Services was the first Constitutional Court case in which it was argued that overcrowding in a prison facility adversely affects prisoners’ health rights. And, while the European Court of Human Rights has decided a number of cases on how overcrowding in prisons and detention facilities infringes on inmates’ rights to privacy and human dignity, the case of Kalashnikov v Russia was also the first case in which the health risks of overcrowding in prisons and detention facilities were highlighted, and it was demanded that the relevant authorities take responsibility to ensure that prisoners/detainees’ health rights are met and their right to human dignity preserved.

These two cases should furthermore not be seen in isolation. Overcrowding in prisons and other detention facilities is a widespread problem and it is also a reality for the Correctional Service of Canada. The media recently reported that Canada’s “prison population has reached an all-time high” and warned that the possibility exists for Canadian prisoners to hold the government liable for “failing to follow its own laws to provide adequate care and protection for inmates.” The Office of the Correctional Investigator also reported in its 2011-2012 Annual Report that the prison population will continue to increase as the effects of recent legislative and policy reforms, which include the Truth in Sentencing Act, Tackling Violent Crime Act and the Safe Streets and Communities Act, start to materialise in terms of prison population growth.

The cases reviewed here are thus relevant to contemporary issues facing correctional services in Canada and other jurisdictions. Both decisions emphasise that States have the responsibility to ensure that prisoners/detainees live in conditions that preserve their human dignity and meet their basic health rights and entitlements.

The Court Rulings

South Africa

In Lee v Minister of Correctional Services the plaintiff, Dudley Lee, was detained in a South African prison, Pollsmoor, near Cape Town, for four and a half years from November 1999 to 27 September 2004. In June
In 2003, whilst incarcerated, he fell ill and was diagnosed with pulmonary tuberculosis (TB). The plaintiff was eventually acquitted of all criminal charges against him and instituted an action for damages against the Minister of Correctional Services on the basis that the prison authorities’ failure to take preventative and precautionary measures against the spread of TB in Pollsmoor prison caused him to become infected with TB. 

In Pollsmoor prison, the approved accommodation is 1619 inmates but the lock-up total during the plaintiff’s incarceration was as much as 3052, constituting a 189% occupation of the facility. Prisoners furthermore spent up to 23 hours a day in their overcrowded prison cells and cigarette smoke filled the cells and corridors. But it was not only the prison that was crowded; whenever the plaintiff went to court he was transported together with many other prisoners in a truck or van and they were then placed in cells which were “jam packed” with prisoners waiting their turn to appear in court. 

This overcrowding – which is the norm in most South African prisons – was problematic on a number of levels; it not only made it difficult to isolate infective TB patients from other prisoners, but it also created the ideal conditions for the airborne bacterium, mycobacterium tuberculosis, to survive and infect. The bacterium is sensitive to light and fresh air, two luxuries that prisoners at Pollsmoor prison are not privy to, and the bacterium can furthermore survive and ‘drift around for hours’ if expelled in a closed environment like a prison cell. South Africa furthermore has a high incidence of TB – it is estimated that more than half of the population has been infected with TB at one time or another. 

While authorities were aware of the presence of tuberculosis in the prison and the concomitant risk that this held for prisoners who were not yet infected, they did not attempt to eliminate or curtail the spread of TB in the prison. Nor did they avoid or minimize the risk of infection by separating actively infected prisoners from non-infected prisoners or by having regular and effective checkups of prisoners to determine whether or not they were actively infected and in need of treatment. Prisoners only received medical treatment if they themselves indicated that they had a medical problem and requested medical assistance. This resulted in great difficulty in identifying and treating those infected with TB, and preventing further infections as prisoners infected with TB generally kept quiet about their infection due to the stigma attached to this condition.

Russia

In Kalashnikov v Russia, the applicant, Valeri Yermilovich Kalashnikov, was held in pre-trial detention at a detention facility in the city of Magadan from 29 June 1995. He was eventually convicted on one charge of embezzlement on 3 August 1999, and was released on 26 June 2000 following an amnesty declared on 26 May 2000.

Kalashnikov was detained in a cell that measured 17m² and that was so overcrowded that the approximately 24 prisoners housed in each cell had to take turns at sleeping on the shared 8 bunk beds with which the cell was equipped. The ventilation in the cell was furthermore poor and was made worse by the prisoners’ excessive smoking. Prisoners were only allowed to walk outside their cell for one hour every day and they were only able to take a hot shower twice a month. The prison was infested with cockroaches and ants. Prisoners with TB and syphilis were sometimes housed in the same cell and Kalashnikov was required to receive antibiotic injections. He eventually contracting skin and fungal infections and lost toenails and some fingernails.

Recognising the Health-Related Rights of Prisoners

In the South African Lee case, the court of first instance, Western Cape High Court, held that prison authorities are responsible for the safety, health and wellbeing of prisoners, and that they must ensure that prisoners are not subjected to treatment that is inhumane or degrading and that prisoners’ rights and dignity are at all times preserved. It was also held that the prison authorities had the power and the authority to implement reasonable changes to address the poor conditions in prison, especially the spread of TB, and in this instance they had failed to do so.

On appeal, however, the Supreme Court of Appeal overturned this decision. While the appeal court agreed with the court of first instance that the prison authorities at Pollsmoor prison did not take reasonable steps to prevent and curb the spread of TB in the prison, it had a much more fatalistic point of view on the matter. It was held that it did not really matter what measures
the Department of Correctional Services adopted to deal with the TB problem in prisons, as there would always be a risk of infection since a prisoner may become contagious well before he/she is diagnosed and there is therefore no proof that an adequate system would have limited the risk of contagion for the plaintiff. Based on this reasoning, it was held that the plaintiff had failed to prove that his TB infection was a result of the prison authorities’ negligent omissions; it was argued that the plaintiff could just as well have been infected in one of the prison cells at the court room where he had to appear from time to time or in a van during the transportation to the court room. On the question of whether the plaintiff would have been infected if the prison authorities had taken reasonable steps to prevent and curb the spread of TB, the court stated: “Life has many hazards that will not be avoided even when reasonable steps are taken to do so.”

This seemingly fatalistic attitude towards the responsibilities of prison authorities to meet prisoners’ health-related needs was also evident in the Russian government’s defence in the Kalashnikov case. The Russian government argued that Kalashnikov’s conditions of detention “did not differ from, or at least were no worse than those of most detainees in Russia.” The fact that overcrowding is a general problem in pre-trial detention was stated as an unequivocal and unalterable norm. The Constitutional Court of South Africa in the Lee case and the European Court of Human Rights in the Kalashnikov case did not, however, agree with this noncommittal stance towards prisoners’ health rights.

While the Constitutional Court agreed with the Supreme Court of Appeal that there can indeed be no liability if it is not proved that the actions and/or omissions of the prison authorities caused the prisoners’ harm, it also found that in determining causation a strict adherence to logic is not always the answer. Indeed, an “empirical or common-sense view of causation” is often called for where a factually assured inference that the actions/omissions caused the harm is not possible. While an adequate system of precautionary measures may not have eliminated the risk of contagion altogether, the practical impossibility of total elimination was certainly no reason for finding that there was no duty at least to reduce the risk of contagion.

The European Court of Human Rights (“ECHR”) considered Kalashnikov’s claim that his detention amounted to “torture or inhuman or degrading treatment or punishment” under article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR emphasized that article 3 does not create a general obligation to release detainees on the basis of health issues, or to provide access to a hospital for treatment. States must, however, ensure that detention facilities provide conditions that respect human dignity and provide reasonable protection for health and well being, and that detention does not impose “distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.”

The Constitutional Court in the Lee case followed the same line of reasoning with reference to section 12 of the South African Constitution, which provides that no person, including detainees and prisoners, may be treated or punished in a cruel, inhumane or degrading manner. The Court held that prisoners’ right to physical (bodily) integrity must be respected and prisoners/detainees must be treated in a manner consistent with human dignity, which includes adequate accommodation, appropriate nutrition and exercise, and access to health care services. The Correctional Services Act also obliges prison authorities in South Africa to “provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life.”

In the Kalashnikov case, the ECHR concluded that the detention conditions Kalashnikov “had to endure for approximately 4 years and 10 months, must have caused him considerable mental suffering, diminished
his human dignity and arousing in him such feelings as to cause humiliation and debasement.” The Court found that he was subjected to degrading treatment.

In the South African context, the Constitutional Court found that it is indeed possible for South African prison authorities to implement reasonable, adequate and cost-effective measures to prevent and curb the spread of TB. The following practical guidelines and suggestions were offered: an increased number of qualified medical staff in prisons were needed, prisoners actively infected with communicable diseases had to be isolated from other prisoners and the prison cells had to be ventilated and modified to allow for adequate sunlight. Improved and regular screening of all prisoners is also necessary for the early detection of communicable diseases and adequate nutrition is to be provided to those prisoners/detainees who are undernourished and therefore vulnerable to disease.

### Public Health Guidance Documents on Health Rights and Responsibilities in Prisons/Detention Facilities

Curiously, neither the South African Constitutional Court nor the European Court of Human Rights considered relevant national policies or international public health guidance documents on health rights and responsibilities in prisons and detention facilities. For example, relevant to the Lee case in South Africa is the World Medical Association’s Declaration on Prison Conditions and the Spread of Tuberculosis and other Communicable Diseases. The World Medical Association unequivocally states that prisoners are entitled to the same health rights as other people and that the relationship between a prisoner-patient and his/her doctor is governed by the same ethical principles. The conditions in a prison or detention facility and the concomitant risk for the spread of communicable diseases like tuberculosis is emphasised in this declaration and reference is also made to various other international texts relating to medical care in prisons.

Since the Kalashnikov case, the World Health Organization has published a guidance document on prison health care, which sets basic standards of prison conditions and the protection and promotion of prisoners’ health. This document makes specific reference to the Moscow Declaration on Prison Health as Part of Public Health, also published after the Kalashnikov case. According to the Moscow Declaration, living conditions in prisons – which were the main point of contention in the Kalashnikov case – are inherently unhealthy, especially since vulnerable, marginalised persons with chronic health conditions are often over-represented in prison populations. It is therefore important to establish functional, working relationships between public health authorities and correctional services.

### Conclusion

It is evident from the discussion of these two landmark cases that prison authorities should not be able to hide behind economic considerations or structural barriers in fulfilling their responsibility to provide for the health needs of detainees/prisoners and ensuring that detainees/prisoners are kept under conditions that preserve their right to human dignity.

In both the Lee and Kalashnikov cases, two courts at great distance apart, each dealing with very different situations of detention and country-specific prison authorities, came to the same conclusion: A civilized and humane society demands that the State not only takes responsibility to provide a just and effective criminal justice system, but that it also takes responsibility to ensure that conditions of detention – whether it is pre-trial detention or a term of imprisonment – are consistent with human dignity. In these two cases the adverse effect that overcrowding can have on prisoners’ health was especially significant.

It is also clear that a fatalistic or non-committal attitude towards the systemic and structural problems that correctional facilities may face must not be tolerated. Even if it is difficult to prove that the particular conditions in the detention facility directly resulted in an adverse health-related effect and it is near impossible for any prisoner to trace the exact source of his/her infection, it would be a serious failure of justice to deny such detainees/prisoners their claim, especially because detainees/prisoners are so vulnerable. Prison authorities should therefore implement reasonable, adequate and cost-effective measures to ensure that the human dignity of detainees/prisoners is preserved and that their reasonable health needs are met.

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Endnotes

1 Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30 (CC) at para 65, online: Southern African Legal Information Institute <www.saflii.org/za/cases/ZACC/2012/30.html>.

2 Ibid.


7 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC).

8 For more information on Pollsmoor prison, and other prisons in Africa, see Jeremy Sarkin, ed. Human Rights in African Prisons (Cape Town: HSRC Press, 2008). For a list of the reports to the various Parliamentary Committees, especially the Committee for Correctional Services, on the conditions in Pollsmoor prison, see Parliamentary Monitoring Group, online: <www.pmg.org.za/search/apachesolr_search/Pollsmoor>.

9 In South Africa, prisons from part of the Department of Correctional Services (DCS) in South Africa are managed under the authority of the Minister of Correctional Services.

10 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at para 223.

11 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at para 224.

12 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at para 50.


14 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at para 96.

15 Ibid at para 164.

16 Ibid at para 264.

17 Ibid at para 220.

18 Ibid at para 45.


20 Ibid at para 80, 87 and 13. There was a brief period when the applicant was held in a penitentiary establishment in the village Talaya.

21 Ibid at para 97.

22 Ibid at para 16.

23 Ibid at para 19.

24 Ibid at para 17.

25 Ibid at para 18.

26 Ibid at para 18.

27 Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at para 263.

28 Ibid at para 256.

29 Minister of Correctional Services v Lee (2012) 1 SACR 492 (SCA).

30 Ibid at para 12.

31 Ibid at para 56.


33 Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30.

34 Ibid at para 46.


38 Ibid.


42 Ibid at para 102.

43 Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC at paras 15, read together with 61 and 71, and confirming Lee v Minister of Correctional Services (2011) 2 SACR 603 (WCC) at paras 247-250.


