

**A distribution of Condoms in Namibian Prisons: A survey of the policy and legal framework.**

**A Dissertation submitted in partial fulfillment for the Bachelors of laws (LLB) Degree.**

**By**

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## DECLARATION

"I the undersigned, Tuwilika Shailemo hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of Bachelor of Laws (LLB) is my own original work and that I have not used any sources other than those listed in the bibliography and quoted references.

Signature: .....

Date: .....

### **Supervisor's Certificate:**

I, Yvonne Dausab hereby certify that the research and writing of this was carried out under my supervision.

Supervisor's signature: .....

Date: .....

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## **DEDICATION**

This paper is dedicated to my aunt, Rauna Ndinoshiho for being my pillar of strength and for her guidance and support.

## **ABSTRACT**

The prisons in Namibia play a pivotal role in the rehabilitation of incarcerated offenders, however, there are pertinent issues that need to be addressed as a matter of utmost urgency. Prisons are undeniably overcrowded and hence the scourge of HIV/ AIDS is on the rise due to frequent unprotected sex among inmates. This paper discusses the various methods which the prisons services have implemented in an attempt curb the spread of HIV /AIDS in prisons. The focal point will be on determining whether such efforts have been successful or not, and to suggest viable options in the distribution of condoms in accordance with the laws of the Republic of Namibia. The writer will primarily employ desk research as a means of collecting data.

This research reveals that the prisons' facilities play a role in the spread of HIV/ AIDS and that the various methods employed by prisons' authorities have been unsuccessful due to lack of consistence in the implementation of policies in place as well as lack of resources. Therefore, the distribution of condoms in prisons appears to be the most viable option in the reduction of the spread of HIV/ AIDS in Namibian prisons.

## **ABBREVIATIONS**

AIDS	Acquired Immunodeficiency Syndrome. The most severe manifestation of infection with the human immunodeficiency virus (HIV).
ART/ARV	Antiretroviral Therapy
CAT	Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment
HIV	Human Immunodeficiency Virus. The virus that weakens the immune system, ultimately leading to AIDS.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights.
MP	Member of Parliament
NGO	Non-governmental organization
VCT	Voluntary Counseling and Testing

## CHAPTER ONE

### Introduction

#### Background to the research problem

A proposal by an opposition MP that government handout condoms to prisoners sparked a heated reaction from the Swapo benches in the National Assembly. Some Swapo members quickly rose to deny that sexual activities took place in prison at all.<sup>1</sup> Despite some officials' assertions to the contrary, sex does occur in prisons.

Our prisons and police holding cells are grossly overcrowded with convicts and trial-awaiting prisoners. Too many inmates are being crammed into tiny cells with adverse effects on their hygiene as well as their security. Some of our prisons are hellholes. They are breeding grounds for more serious crimes.<sup>2</sup> It was reported in the *New Era* newspaper dated that an trial awaiting prisoner at Ondangwa prison laid rape charges against another trial awaiting prisoner after he was allegedly sodomised in a cell. It is alleged that Lotti Sinjza 34 a Zambian national sodomised another trial awaiting prisoner on two different occasions.

Sinjza's case is just one of thousands cases of sodomy and rape that are allegedly taking place inside the Namibian prisons. Although a few cases are reported most of them go unreported. According to the Oshana Regional Commander, Commissioner Ndahangwapo Kashihakumwa, it is difficult to control Rape and Sodomy that is taking place in prison cells, "These things take place late at night".<sup>3</sup>

A mentally handicapped 16-year old boy has been a victim of sexual assaults while locked up with adult convicts in Windhoek Central Prison, the boy's mother claims in a case, in which she asked the High Court's help in getting her son released from jail.<sup>4</sup>

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<sup>1</sup> Weidlich, B. 2008. Sex and the "Prison's gets rise out of MP's". *The Namibian Newspaper*. p.1.

<sup>2</sup> Surihe Gaomes . 2008. "Shocking and horrendous". *New Era Newspaper*. p.2.

<sup>3</sup> Gaomes (2008: 2).

<sup>4</sup> Ibid.

Namibian inmates engage in consensual and non-consensual sexual relationships with other inmates for a variety of reasons. First, inmates may engage in sexual activity because of boredom. Second, the inmate may long for an intimate relationship since Namibian prisons prohibit conjugal visits with family. Third, consensual sexual activity in prison occur for the same reasons that sexual relationships from outside of prison- as a result of sexual attraction and sexual needs. This can occur between male and female inmates who find a way to get access to each other. An incident of such a nature is said to have happened at the Windhoek Central Prison a couple of years back, Male inmates were taken to the female section to make some renovations to the female section, under section. The warder who was responsible for these male inmates let one of them out of his sight, and this one inmate had sexual intercourse with a female inmate, in their cell.<sup>5</sup>

Coercive sex also occurs between inmates and other inmates and between wardens and inmates. At the Grootfontein prison a male warder had access to the keys of the female section, since he would be on duty alone he would usually have sex with three female inmates, interchangeably. One of the three inmates fell pregnant and this was when all his deeds were revealed.<sup>6</sup> Inmates often exchange sex for various privileges or benefits. First, inmates trade sex for protection. Second, inmates trade sex for food. Prisoners trade sex for other commodities as well. The necessities are what drive sex; inmates need soap and other basic needs and that drives sex most of the time. This type of behavior is common among the more 'affluent' inmates, the rich prisoners will exchange food, money, etc. for sex,

Sexual assault although shrouded in secrecy is an unfortunate reality in prison life. One former prisoner estimated that "every week", someone is raped in prison. Sodomy in the general prison population is a matter of power, if you are weak, then you get raped.<sup>7</sup>

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<sup>5</sup> Interview, October 23, 2011(Prison Warden, Windhoek).

<sup>6</sup> Interview, October 23, 2011 (Prison Warden Windhoek).

<sup>7</sup> The Legal Assistance Center AIDS Law Unit & University of Wyoming College of Law. *Struggle to Survive: A report on HIV/AIDS and Prisoners' Rights in Namibia*. Available at <http://www.lac.org.na/projects/alu/Pdf/Struggletosurvive.pdf>; last accessed on 06/05/2011.

## Statement of the research problem

The Namibian Policy on HIV and AIDS stipulates that all convicted prisoners, awaiting trial inmates and prison staff are entitled to have access to the same HIV-related prevention information, education, voluntary counseling and testing (VCT), means of prevention, treatment, care and support as is available to the general population.

While education and VCT are fairly easily offered in the prison, there is a challenge when it comes to prevention. The bone of contention has always been the issue of condom distribution in Namibian prisons.<sup>8</sup> The National Policy on HIV /AIDS has not been implemented to its fullest extent in prisons and detention facilities.<sup>9</sup> And the question that we need to interrogate is why?

The common law crime of sodomy has been cited by prison officials as well as by certain members of parliament, as a justification for the refusal to provide condoms to prisoners to prevent the spread of HIV. They argued that seeing as consensual sodomy is illegal, providing condoms might make prison officials accessories to crime.

## Significance of study/research

Officials, who are in power and responsible for the promulgation of laws are in denial that inmates do not engage in sexual intercourse while incarcerated. This research seeks to enlighten them on the true fact, that inmates do engage in sexual activities while in prison and to call for the decriminalization of the crime of sodomy, so as to allow the distribution of condoms in prison, in an effort to curb the spread of HIV/AIDS in these institutions. This may also mean the potential for engaging in issues of law reform and a constitutional challenge.

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<sup>8</sup> Sister Namibia. 2008. *Call to abolish Sodomy*. Available at [www.sisternamibia.com.na](http://www.sisternamibia.com.na) last accessed on 05/04/2011.

<sup>9</sup> The Legal Assistance Center AIDS Law Unit & University of Wyoming College of Law. (2008:7).

## Research question

Whether inmates are by Law, entitled to be provided with condoms?

## Research methodology

The research methods of this paper primarily include: document analysis, examination and evaluation of scholarly opinions and views on the subject-matter; observation of case law trends; and e-net research. It will be primarily desk research.

## Limitations of the research

This research will rely solely on desktop or academic research, as I anticipate that I may be denied access into prison facilities, and may not be able to carry out any other form of research. On this same note no interviews will be conducted seeing as the intended interviewees might not be willing to participate in the interviews or permission may not be granted for the interviewer to carry out the interviews. There is also the possibility of interviewees not giving accurate answers to the questions posed, and this could lead to contradictions as well as inaccurate research findings and defeat the whole purpose of this research paper.

## Literature review

There are a number of substantially significant scholarly articles as well as legislation on the subject of condom distribution in Namibia. However these articles and existing legislation do not seem to cover the distribution of condoms in prisons and where it is addressed as a topic it is not comprehensively covered. A number of reasons have been advanced as to why condoms should not be distributed in prisons. Sodomy has been cited by prison officials as a justification for refusing to provide condoms to inmates to prevent the spread of HIV/AIDS. The argument is that since consensual

sodomy is illegal, providing condoms will make prison officials accessories to crime. They also argued that it would promote homosexuality in prison.

According to Nepunda, the common law crime of sodomy violates the right to equality, and constitutes an infringement of the right to dignity which is enshrined in the Constitution<sup>10</sup> which provides that, the dignity of all persons shall be inviolable. The right to dignity is one of the corner stone's of our constitution. Its importance and significance is further reinforced and emphasized by the role accorded to it in Article 22 of the Constitution.<sup>11</sup>

Nepunda further states that the common law crime of sodomy limits the fundamental freedoms of gay men, as it infringes their dignity and privacy. Sodomy is also inconsistent with article 22 (a) as it is applied selectively and is only aimed at certain individual namely, gay men. Homosexual activities between women are not criminally punishable but homosexual activities between men are. This is a clear case of sex discrimination with no logical justification. In terms of the said provision, the limitation must be of general application.

The same author makes a recommendation that the limitation sanctioned by article 22 on fundamental right and freedoms must be reasonable and justifiable in an open and democratic society based on human dignity and freedoms. The Constitutional protection of dignity requires people to take note and acknowledge the value and worth of all individuals as members of our society. The common law prohibition of sodomy criminalize anal intercourse between men regardless of the relationship of the couple who engage therein, the age of such couple, the place where it occurs, or any circumstances of what so ever.<sup>12</sup>

Sodomy punishes a form of sexual conduct, which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. This will leave a long lasting stigma and the harm imposed by the criminal is thus more than symbolic. As a result of the criminal offence gay men are

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<sup>10</sup> Article 8 (1) of the Constitution Act 1 of 1990.

<sup>11</sup> Nepunda, S. 2005. *The common law proscription of sodomy as an infringement of the Namibian Constitution*. pp 7-8.

<sup>12</sup> Nepunda (2005:8).

at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.

The author is of the view that the offence of sodomy instills and builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of law that punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As a result it is an invasion of their dignity and a breach of article 8 (1) of the Namibian Constitution. The offence of sodomy is therefore unconstitutional as it breaches the rights to equality, dignity and privacy. The right of equality and dignity are closely related and so as are rights of dignity and privacy.<sup>13</sup>

The right of privacy is entrenched in the constitution.<sup>14</sup> This right entails and recognizes that we all have a right to a sphere of a private intimacy and autonomy which allows us to establish and nurture human relationship without interferences from the outside world/community. The Constitutional Court of South Africa in *National Coalition for Gays and Lesbians Equality and Another v Minister of Justice and Others*<sup>15</sup> held that the way in which we give expression to our sexuality is at the core of this area of private intimacy. The court stressed that in expressing our sexuality we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. The offence of sodomy, which lies at the heart of the discrimination, constitutes at the same time and independently a breach of the rights of privacy and dignity altogether, which without doubt strengthens the conclusion that the discrimination is unfair.<sup>16</sup>

An outline of the chapters of this research paper

This paper consists of four chapters. *Chapter 1*(Introduction) is introductory and essentially exposes the subject of the research, its focus and objectives including its significance and all other preliminary issues; *Chapter 2* is titled “Prison facilities and their role in the spread of HIV/AIDS, outlines the various ways in which prison conditions contribute to the spread of the virus in these facilities; *Chapter 3* is titled

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<sup>13</sup> Nepunda (2005: 8).

<sup>14</sup> Article 3 of the Namibian Constitution Act 1 of 1990

<sup>15</sup> 1998 (1) BCLR 1517 (CC)

<sup>16</sup> *ibid.*

“Government’s efforts to curb the spread of HIV/AIDS in prisons and looks at governments initiatives in fighting the epidemic within prisons”; *Chapter 4* titled “Analysis of National Policies on the distribution of Condoms” is the foundation of this study; *Chapter 5* titled “Conclusion and Recommendations” is basically an ultimate summary of the research, its findings, conclusions and possible recommendations which hopefully will be of significance to all parties having an interest in the subject-matter.

## CHAPTER TWO

Situation Analysis: An overview of Prison facilities and its contribution in the spread of HIV/AIDS

The overcrowded and deteriorating prison facilities are a breeding ground for many diseases. This chapter discusses how HIV/AIDS is spread in prison facilities and how unhygienic conditions in prison contribute to the spread of the virus. The Ministry of Safety and Security listed 4,031 inmates in detention in 2007, of which 494 inmates, where HIV- positive according to official records. This figure is not a true reflection as the number of inmates living with HIV/AIDS is certainly much higher. A doctor who provides HIV/AIDS testing stated that “90% of people living with HIV do not know their status because of the social stigma involved with HIV/AIDS. These statistics suggest the need for through, intensive HIV training for prison officials in order to properly care for HIV – positive inmates as well as prevent the transmission of HIV within the prisons.<sup>17</sup>

Thirteen prison facilities, which are located country wide, constitute Namibia’s prison and correctional service system. This system currently operates under the authority of the Ministry of Safety and Security, which forms part of the twenty Ministries in Namibia’s executive branch of government.<sup>18</sup>

Section 3 of the Prison Act 1998<sup>19</sup> states that the functions of the Prison Service shall be;

- a) To ensure that every prisoner is secured in a prison in safe custody until lawfully discharged or removed there from;
- b) As far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of labour and industry;

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<sup>17</sup>The Legal Assistance Center AIDS Law Unit & University of Wyoming College of Law. (2008: 8).

<sup>18</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:14)

<sup>19</sup> Act No. 17 of 1998.

- c) To perform all work necessary for, arising from, or incidental to, the effective management, administration and control of prisons; and
- d) To perform such other functions as the commissioner may from time to time assign to the Prison Service.

It is evident that all the above mentioned functions of the Prison Service aim to protect prisoners, while incarcerated, against any harm which may befall them, as opposed to causing them harm.

Prison conditions a factor for HIV transmission

Access to hygienic products<sup>20</sup>

As part of Prison rules inmates are expected to shave on a regular basis. However, prison officials do not provide inmates with hygienic means to do so, this has led to the sharing of razor blades. “The sharing of razor blades is a high-risk practice that encourages HIV transmission among prisoners. Generally, inmates will have a specific time to share a single razor, used under the supervision of a warden. As an inmate recalled, we only use one razor for all inmates to share. You shave, then I shave... on down the line. Then the razor is given back to the wardens”.

Clean-up of blood<sup>21</sup>

Violence is prevalent in prison. The injuries inflicted by such violence differ, depending on the type of ‘weapons’ used in the perpetration of the attack. Violence in prison usually results in the spillage of blood as well as other bodily fluids in cells. When this happens prison staff requires inmates, often the victim himself, to clean up pools of blood;

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<sup>20</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:14)

<sup>21</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:23).

*"With other inmates remaining in the area, the prisoner who was attacked had to clean up the blood, as long as he was not too hurt. The guards would not go near the blood. We clean up blood with a cloth and water. they gave us no cleaning supplies or any gloves".*

The mere fact of blood spillage and other bodily fluids exposes the other inmates in the cell to contracting HIV/AIDS as well as other infectious diseases. The practice of cleaning up pools of blood with a cloth and water, without wearing any protective gloves and without the use of proper sterilization techniques promotes the further spread of the HIV/AIDS pandemic.

### Overcrowding

Among African countries, Namibia is currently one of the top five countries with the highest per capita rates of imprisonment, with 267 per 100,000 currently serving sentences or in pretrial detention. According to data gathered by the Namibian Prison Services in 2004 alone, "the country's thirteen prisons were at more than 116 percent of capacity".<sup>22</sup>

Majority of these thirteen prisons, serve as maximum-security prisons and accommodate 59% of the prisoners. Inmates held in these prisons are of all risk levels with varying sentences. However majority of the violent prisoners' are kept in Windhoek Central Prison. In 2000, there were reportedly 1098 men and 61 women in that facility. While Prison Service data does not reflect severe overcrowding, interviews that were conducted offered examples of serious overcrowding within individual facilities. "One former inmate, held in Oluno Rehabilitation Center<sup>23</sup>, reported that his nine-bed cell contained twelve inmates and offered examples of others that held fifteen to seventeen inmates, meaning that many either shared beds in shifts or slept on the floor". Men and women in these prisons are kept separately, however this is not consistent as there were instances where young boys were mixed with the general male population.

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<sup>22</sup> *ibid*, 23-24.

<sup>23</sup> Although this institution is referred to as a rehabilitation center, it is a prison.

“Of some 600 inmates, one former inmate estimated that seven were only seventeen to eighteen years old”.<sup>24</sup>

While the Prison Service’s 2004 data suggests that the Oluno facility was just three percent over capacity, staff and inmate interviews suggest the problem is more serious. One prison warden said his facility often housed more than 300 inmates, even when the official capacity is 211.

“Reports from other facilities throughout the system corroborated such claims. Referring to conditions in Keetmanshoop, one former inmate described overcrowding that had transcended into critical levels”.<sup>25</sup>

*“There are many people in one cell and it is cramped. The normal space for one cell is eleven but sometimes more come in and it’s a nightmare. Sometimes you have to sleep on the floor. For each cell, there is a toilet and showers or basins that you shower with. But not everyone can do these things all at once. In order to avoid tension you have to stretch out times so everyone has a chance.”*

Although it is difficult to determine whether overcrowding per se could amount to cruel and inhuman” treatment, one clear factor is that overcrowding leads to staff shortages which results in limited oversight of inmates. Consequently, sex, violence, drug use and tattooing occur undetected and each is a potential factor in the transmission of HIV.<sup>26</sup>

The case for behavioral change

HIV is transmitted in a number of ways. Several identified behaviors put inmates at risk of contracting HIV while in prison.<sup>27</sup>

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<sup>24</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:24).

<sup>25</sup> *ibid*, 24-25.

<sup>26</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:25).

<sup>27</sup> *ibid*.

(a) violence

The Longman Dictionary of Contemporary English defines violence as behaviour that is intended to hurt other people physically.<sup>28</sup> Violence is a defining characteristic of prison life worldwide. Namibia is no exception. Violence, throughout the country's prisons and detention centers, is common and widespread. Former inmates interviewed consistently indicated that violence of some form was almost a daily occurrence.<sup>29</sup> In some instances, inmates used violence to assert power or dominance over another inmate or as a result of ethnic tensions. In other cases, an inmate would resort to violence to ward off sexual advances.

*“One time I received a proposition from another inmate to be his ‘lady’. I fought that person by using my fists. I was touched on the buttocks by the inmate and so I used my toothbrush to stab him, but it wasn’t sharp enough to penetrate the skin. The perpetrator never bothered me again...Those who cannot fight become victims of sodomy.”*

Violence is not only amongst the inmates themselves; one finds cases of wardens being the ones administering the violence on the inmates.<sup>30</sup> One former inmate attributed much of the violence to the “long-termers,” inmates who had nothing to lose and no hope of leaving prison.<sup>31</sup>

*“There are those that are serving many years and they feel like “What is the deal?” For them, there is really nothing to care for. It is among this population that [loss of hope] occurs. If someone is serving 2-3 years and is put in the same area as someone that has many years they can easily disorient you. Those serving 2-3 years often visualize having a better life.... If you have a soft spot,*

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<sup>28</sup> Quirk, R. et al. 2005. *Longman Dictionary of Contemporary English*. London: Pearson Longman. p. 1840.

<sup>29</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:25).

<sup>30</sup> Shumina, M.M. 2009. *Do Namibian Prisons meet the standards set by domestic and international law?* Namthesis. p. 28.

<sup>31</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:25).

*you will come out and end up stabbing someone.... The long serving prisoners have a very negative impact.”*

The occurrence of violence in prison, consequently leads to unprotected exposure of blood. It came to light that physical violence between inmates was a regular occurrence, and in most of these violent encounters blood was shed by either one or both of the inmates involved. The most frequent form of inmate-to-inmate violence involved stabbings.<sup>32</sup>

*“Every time there is fighting, killing, and bad things. Many times, you cannot even sleep in the prison. You have to sleep with your hands over your head.... There is a lot of fighting within the cells. Sometimes you are just playing games, they lose and may not accept the results. You see I’m a boxer and another prisoner is also a boxer so the prison authorities would put on a boxing match. I won. He took his defeat but was not really happy. So he sharpened a wire and stabbed me. My last fight I was cut with a very sharp knife. [Interviewee points to scars on his face]. I went to the hospital because I had lost too much blood. I was in the hospital for one week but if I don’t talk to them they don’t care. I was stabbed another time and didn’t have to go to the hospital because they say I was making an excuse to see the outside”*

Taking into account that the risk of transmission through exposure to infected blood is lower than the risk of exposure by unprotected sex or intravenous drug use, it still serves as a possible means of infection.<sup>33</sup>

#### b. tattooing

This term refers to the process of marking a permanent picture or writing on someone’s skin with a needle and ink.<sup>34</sup> The practice of tattooing is common in prisons worldwide.

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<sup>32</sup> *ibid*, p.26.

<sup>33</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:26).

<sup>34</sup> Quirk, R. *et al.* 2005. *Longman Dictionary of Contemporary English*. London: Pearson Longman.p.1699.

In Namibia, this practice is prohibited by prison policy, regardless it is still widely practiced. The existing system-wide ban of the practice does little to stop it. Several inmates usually make use of a single tattooing needle. At times when a needle is unavailable, sharpened items are used as substitutes which are then inserted under an inmate's skin.<sup>35</sup>

*“It was not a common thing but people who do tattoos join gangs in prison. Some of those are bored and want to pass the time do it to themselves. It was done with these types of rings [Interviewee points to his wrist]. It bends, they melt it and dip into ink and put it under the skin. Some of the guys like me, I wouldn't share my needle but others would share. Those that would share would burn the top of the needle before the next one used it.”*

The prevalence of tattooing seems to be among juvenile offenders. It was estimated that three out of every 10 juvenile offenders get tattoos while in prison.<sup>36</sup>

### c. Sex: Coercive

Despite some officials' assertions to the contrary, sex does occur in prisons. Sex can take place among inmates in one of three ways. First, there is consensual sex, which occurs when two inmates engage in a voluntary and consensual intimate relationship. Second, there is coercive sex. Coercive sex occurs when an inmate engages in sexual contact or a sexual relationship with another inmate in order to gain a perceived advantage or benefit (for example, submission in return for protection or other favors). Third, rape occurs when an inmate physically forces him/herself sexually upon another inmate. All three types of sexual encounters can transmit HIV/AIDS.<sup>37</sup>

#### (i) Consensual Sex

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<sup>35</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:26-27).

<sup>36</sup> *ibid*,p.27.

<sup>37</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:27).

An NGO representative stated that there is a need for conjugal visits and a “human touch” policy. The representative explained, “You have subcultures in prison and people have needs. [Prisons] need to provide conjugal visits.... This keeps the family together.” One former prisoner corroborated this claim. “There are no conjugal visits in prisons and many married men take ‘women’ [other male inmates] in prisons”.<sup>38</sup>

## (ii) Coercive Sex

Coercive sex occurs between inmates and other inmates and between wardens and inmates.<sup>39</sup> Inmates often exchange sex for various privileges or benefits. First, inmates trade sex for protection. As one former inmate explained, “Sexual relationships are quite common. Category 28 Gang [the gang known for sexual assaults] would select young-looking men as partners. There was a male section and a female section [of the prison] so you must date one of the same sex.”

Second, inmates trade sex for food.<sup>40</sup> A representative of a faith-based organization described how food is often a bartering tool to get sex from another inmate. “In the cell, bread is given in return for sex or something else. If you have sex one time, then you are that person’s wife and if you don’t give something usually a fight ensues.... Inmates bribe one another by using food for sex.” Groups of inmates engage in this behavior as well. “There was...a group called the Blue Jackets who would select other inmates as ladies, relationships were so intimate that you would do favors for them, even share your food with them because you owe that person something.” Inmates who worked as kitchen staff within the prison often initiated the exchange.

*“Some inmate chefs in the kitchen may give preferential treatment or food in return for sex and you must be cautious about taking offers. You know what is expected in return.... There was no prior engagement before, but food is prepared and given. If you accept the food, then you agree to a sexual*

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<sup>38</sup>Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:28).

<sup>39</sup> *ibid.*

<sup>40</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:28).

*relationship.... You were assaulted if you wanted to leave the relationship.... You must refuse food and if you know a person is engaged in such behavior, you must refuse any offers.”*

Prisoners trade sex for other commodities as well. One former inmate held the view that “The necessities are what drive sex; inmates need soap and other basic needs and that drives sex most of the time.” Another former inmate noted this type of behavior among the more ‘affluent’ inmates, “The rich prisoners will exchange food, money, etc. for sex.” Prisoners perceived as ‘weak’ often become targets for coercive sexual encounters.<sup>41</sup>

*“Prisoners usually target the weak with food and cigarettes. For example if a prisoner is transferred to Windhoek, he does not have family in the area so other prisoners give him the basic needs—soap, toothpaste and then they will come up to him for a reward [sex].”*

In addition, coercive relationships often are accompanied by jealousy, violence and an inability to leave the relationship if one inmate so chooses. A former inmate explained, “Jealousy counted and if it was seen that one is favoring another, then others might interfere with that relationship. Violence erupted uncontrollably; if you wanted out, then there were serious consequences. You might be beaten to death, or poisoned.”<sup>42</sup>

Some wardens also engage in sex with inmates.<sup>43</sup> A former prison warden stated, “I heard about staff and inmate sex. In 1997, a prisoner got a staff [member] pregnant” Sex between a prison official and a prisoner is inherently coercive because of the sharp discrepancy of power and control between the warden and the prisoner. The inmate may be engaging in the relationship solely for a perceived advantage or because the inmate feels that he or she has no choice.

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<sup>41</sup> Ibid, p. 29.

<sup>42</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:30).

<sup>43</sup> Ibid.

*“At the Windhoek police station, wardens would have sexual relationships with women in custody. I got this information from the person providing food to the inmates. I also saw it with my own eyes—they were in an intimate relationship. What I thought then was that those who were in a relationship with the wardens would receive better treatment—I was not in that type of relationship.”*

### (iii) Rape

Sexual assault, although shrouded in secrecy, is an unfortunate reality of prison life.<sup>44</sup> One former prisoner estimated that “every week, someone is raped in prison.” Rape can be the brutal result of a variety of altercations. One situation is the punishment for an inmate refusing to fulfill his or her end of the bargain in a coercive sexual relationship. As a former inmate explained, “If the guy does not pay up, the only option is rape.” Not only does actual physical violence often precipitate rape, the threat of physical violence can force inmates to engage in sex. “They [the perpetrator] will also make a threat, like ‘I am in a gang, I have friends, if you do not [have sex] you will suffer.’”

Second, rape can be the consequence of a disagreement between inmates.<sup>45</sup> For example, if one inmate has the same tattoo as another inmate, violence may result. “Quarrels, fights, or rape may break out if you [an inmate] use another’s number or signs because these are forms of one’s identity.” Certain inmates become targets for rape while in prison. Perpetrators prey upon those inmates whom are believed to be weak. “Sodomy in the general prison population is a matter of power; if [you are] weak, then [you] get raped.” Often times, “Prisoners will attack weaker prisoners and ask them for food, cigarettes, soap. If a prisoner doesn’t have a family, and the other person doesn’t pay them back [for food, cigarettes, soap], then they will get raped or there will be a threat of violence against the weaker person.”

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<sup>44</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:30).

<sup>45</sup> *ibid.*

Despite prison policy mandating separate housing for juveniles and adult inmates, adults prey upon juveniles in detention centers.<sup>46</sup> One former inmate described that, “The problem of youth mixed with older inmates is much worse in the detention centers. In the detention center, there will be boys as young as nine years old. These boys seemed to be subject to the same problems of rape as the prisoners in the prisons.” The police have also allegedly played a role in the rape of juveniles in detention facilities. One local HIV/AIDS program coordinator reported that, “[There are a] few cases where young boys are caught for drinking and driving and the cops say, ‘we will teach you a lesson,’ and put them in a cell where they know that they will be raped.”<sup>47</sup>

Although the risk of juvenile rape is probably greater in detention centers, sexual assault on juveniles is not unheard of in the prisons. One former inmate recounted facing the threat of sexual assault:

*“One night, prison wardens took me away from the juvenile section and locked me up with more hard-core prisoners. My mother’s intervention assisted. It was the kitchen inmates working with the staff that resulted in me being removed from the juvenile section to be locked up with the hardcore prisoners to have sex with me. I acted on the same day and complained that, “I am too young.” My mother complained and I was removed the same day.”*

Like jailers in detention centers, prison wardens sometimes play a role in allowing sex with or rape of juveniles to occur.<sup>48</sup> One former inmate, a victim of sexual assault in prison, explained, “At the time, there was no chance to complain to the prison wardens. Some [inmates] are paying officers to get the boys—you are in trouble if you complain.” Describing reporting procedures following an incident of rape, one former inmate recalled:

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<sup>46</sup>Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:31).

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

*“There are incidences of raping but a victim is very powerless when reporting it. If you report they simply call in the other guy and you are still in the same situation and in the same cell. For fear of being beaten up people are silent because you expose yourself to more injury. There is a fear to report because some of the wardens are being bribed by the prisoners.”*

Even if the wardens are not involved in the assault, they are sometimes indifferent to its occurrence. A former warden reported, “When I asked how prisoners [are] protected from rape and HIV, [the] supervisor said that we can’t do much because rape happens at night and we can’t protect. It is underground.” Namibian prisons, much like prisons around the world, have gangs. A number of former inmates explained, “There are three gangs. The 26’s, 27’s and the 28’s. The 26’s are the robbers. The 27’s are the murders. And the 28’s are the rape cases.” In certain prisons, there were gangs specifically formed to commit “sodomy.” As one former inmate simply stated, “The sodomy gang would get together and do sodomy on someone.” “Gang rape,” rape involving multiple perpetrators, is also a problem in Namibian prisons.<sup>49</sup>

A counselor explained that this is how rape often occurs in prison: “Groups of men gang up on a newcomer and it occurs usually through gang rape. The person is usually raped over a prolonged time, even for years.” Other inmates may serve as accomplices by alerting rapists when wardens are approaching.<sup>50</sup>

There are other measures that the government can implement, to curb the further spread of HIV/AIDS in prisons. Over the years, government has made the initiative to implement these measures, however for one or the other reason these measures were not consistently applied and as a result they proved to be unsuccessful in stopping the further spread of the virus. This leaves the distribution of condoms as the only viable option in curbing the further spread of HIV/AIDS pandemic in prison.

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<sup>49</sup> Legal Assistance Centre & University of Wyoming College of Law (2008:32).

<sup>50</sup> *ibid.*

## CHAPTER THREE

Government's efforts to curb the spread of HIV/AIDS in Prison facilities.

Government has limited oversight of HIV health practices among the country's thirteen prison facilities. Each prison operates semi-autonomously with discretion in implementing health and safety procedures. One official noted that currently some prisons lack access to a copy of Namibia's National Policy on HIV/AIDS and, thus, cannot implement its policies.<sup>51</sup>

### Condoms

Another significant impediment to controlling HIV transmission in prison is the government's refusal to distribute condoms in prison because of the criminal prohibition against Sodomy. To date no statutory law prohibiting sodomy exists in Namibia. However Namibian common law criminalizes sodomy. Namibia's prisons prohibit official condom distribution based on the rationale that it is illegal and might condone male-to-male sex. The judiciary has upheld the government's position by refusing to extend constitutional protection to individuals discriminated against based on their sexual orientation.<sup>52</sup>

Former inmates and wardens, as well as NGO officials, all state that prisons do not formally or officially distribute condoms. A prison social worker reported that male - to - male sex is a true fact and that it is happening in prisons. Sex, including violent, coercive, and consensual forms, does occur in prison, and condoms are often an effective way to prevent transmission of HIV and other sexually transmitted infections.<sup>53</sup>

Allowing condoms in prisons would aid efforts to curb the spread of HIV and other sexually transmitted diseases. The overwhelming feeling is that whether or not the government agrees with condom distribution or the law banning sodomy, "sex in prisons

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<sup>51</sup>Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:7).

<sup>52</sup> *ibid.*

<sup>53</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:33).

is taking place. When inmates get out of prison, they take the HIV virus home to their families.<sup>54</sup>

### ART/ARV Access

ART or ARVT is a treatment that uses antiretroviral medicines to suppress viral replication and improve symptoms.<sup>55</sup>

Antiretroviral therapy for an HIV-positive individual often prolongs life and renders the person less infectious, making it one of the most important elements in HIV/AIDS treatment. Despite this fact the prison system appears to have an inconsistent and problematic method of distributing these lifesaving drugs to those in need.

Doctors from outside the prison normally prescribe the drugs, but prison authorities are solely responsible for administering medications. Nursing staff and/or prison wardens are ought to distribute ART medication to HIV-positive inmates daily, however this is not the case, seeing as several former inmates complained that the distribution of those drugs was often inconsistent. A physician at Windhoek Central Hospital stated that his ability to treat patients often depends upon the willingness of wardens to follow through on prisoners' requests to see a doctor. Some interviewees reported that the decision to grant an inmate's request to see a doctor often depends on a single warden's discretion and that sometimes wardens deny inmates access based on their assessment of the prisoner's attitude or their attitude towards HIV/AIDS.

### Counseling

Counseling is a significant part of treating, caring for and supporting people who are living with HIV/AIDS. Counseling enables those living with HIV to live positive lives. Working to re-establish people living with HIV/AIDS positive self-esteem is very important. Another NGO official corroborated this sentiment: "HIV breaks integrity and

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<sup>54</sup> *ibid* 33-34.

<sup>55</sup> Faculty of Medical and Health Sciences. 2007-2008. *HIV and AIDS Resource Guide*. Windhoek: University of Namibia. p. 6.

dignity. One must make sure to do things that help the HIV- positive person, so they can help themselves.

Measures that the government can implement, to curb the further spread of HIV/AIDS in prisons, have been discussed above. Over the years, government has made the initiative to implement these measures, however for one or the other reason these measures were not consistently applied and as a result they proved to be unsuccessful in curbing the further spread of the virus.

It is also evident from the above discussion that the prison service is currently not providing the required care and treatment for inmates that are infected with HIV/AIDS. At times these inmates go for a certain period of time without their medication<sup>56</sup> and as a consequence their health deteriorates. Inmates living with HIV/AIDS in prison do not eat a balanced diet and are deprived off nutrients and minerals that are beneficial to their health. Failure of the Prison Service to curb the spread of the pandemic will result in new infections and an additional burden on them in caring for those infected with HIV/AIDS, seeing as they require medication and special diets. All these additional responsibilities will deplete the Prison Services already insufficient budget.<sup>57</sup>

The inadequate prevention and treatment of HIV in prison leaves the distribution of condoms as the only viable option in curbing the further spread of the HIV/AIDS pandemic in prison.

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<sup>56</sup> Antiretroviral therapy.

<sup>57</sup> The Prison Service operates on an annual budget of N\$ 228, 486 000.

## CHAPTER FOUR

### Analysis of National Policies on the distribution of condoms

#### The Namibian Constitution

The Namibian Constitution came into force on the eve of the country's independence as the Supreme Law of the Land, and therefore the ultimate source of law in Namibia.<sup>58</sup> All laws should conform to the provisions in the Constitution. Chapter 3 of the Namibian Constitution provides for the fundamental human rights and freedoms, which are entrenched. In a number of decided cases the High and Supreme Courts of Namibia accepted the principle that a constitution and more particularly one containing a Bill of Rights, calls for an interpretation different from that which courts traditionally apply to ordinary legislation.<sup>59</sup>

In the case of *Minister of Defence v Mwandighi*<sup>60</sup> the Namibian Supreme Court stated that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion”.

The late Judge Mahomed, C.J repeated this approach to the interpretation of the constitution in the case of *Government of the Republic of Namibia & Another v Cultura* 2000<sup>61</sup> as follows:

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<sup>58</sup> Article 6 (1) of the Constitution of Namibia, Act 1 of 1990.

<sup>59</sup> Amoo, S.K. 2008. *An Introduction to Namibian Law; Materials and Cases*. Windhoek: Macmillan Education Namibia. p.299.

<sup>60</sup> 1992 (2) SA 355 (NmSC)

<sup>61</sup> 1993 NR 328 (SC) at 340.

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government”.

#### Content of Article 6: “The right to life”

Article 6 of the Namibian Constitution entitled “Protection of Life” is contained in Chapter 3 that deals with “Fundamental Human Rights and Freedoms”. This Chapter has been described as expressing values and ideas which are consonant with the most enlightened view of a democratic society existing under law.<sup>62</sup> Article 6 provides as follows: “The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.”

The right to life is the justified moral claim that all human beings have to live. That right is inalienable. That is to say, it is not something any person can give up or any government can take away without committing a moral wrong. Taking any persons life, whether lawfully or unlawfully is a moral wrong, as the right to life is also protected by the principles of morality.<sup>63</sup> That right is inalienable; that is to say, it is so fundamental and foundational that it is not something that can be overridden by any other right.<sup>64</sup>

The importance afforded to the right to life has been stated in the case of *S v Tcoib*<sup>65</sup> and it was held to be applicable to all Namibians. It was contended that such is the importance that it obliged the authorities to protect its citizens against the infringement of this right.

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<sup>62</sup> *S v Minnies & Another* 1991 (3) SA 364 (Nm), 384

<sup>63</sup> The seventh commandment, says that thou shall not kill and makes no exceptions.

<sup>64</sup> Kalomo, E.M.. 2002. *Euthanasia, is it a Constitutional possibility in light of Article 6 of the Namibian Constitution?*- Comparative Perspectives. Namthesis. P.44.

<sup>65</sup> 1991 (2) SACR 627 (Nm), at 632. This case dealt with an appeal by the appellant against his sentence of life imprisonment on two charges of murder. In his judgement, Mahomed CJ deliberated on the importance of this right.

In the matter of *S v Makwanyane*<sup>66</sup> the South African Constitutional court was called upon for the first time to explore the extent of the right to life guaranteed under the Constitution. This matter revolved around the constitutionality of the death penalty. Although the death penalty is not at issue here the judgment is nevertheless very important because it stated what value and weight is to be attached to this most fundamental right. The decision was also subsequently applied in numerous cases following its ruling. The court ruled as follows on the right to life:

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such society”.

This case clearly illustrates the high value the highest court in South Africa places on the life of each and every person living in that country. Similarly, our own Constitution has a guarantee for life, however the provisions of our Constitution goes beyond merely declaring that every person has a right to life. In our instance it expressly states that no court may impose the death penalty nor shall any executions take place in Namibia. It therefore follows that the right is unqualified in Namibia.

O’Linn J stated that the right to life has a broader meaning so that the State must ensure that prison conditions are such that a prisoner’s life is not compromised.<sup>67</sup>

“Life” as protected in article 6 refers to qualitative life, i.e. healthy human beings who have the possibility of living for many years.<sup>68</sup> In essence inmates are ought to be provided with condoms, so as to exercise their right to leading a valuable life with the

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<sup>66</sup> 1995 (3) SA 391 (CC).

<sup>67</sup> Naldi, G.J. 1995. *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights*. South Africa: Juta & Co, Ltd. p.39.

<sup>68</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:46).

possibility of living for many years. This argument is based on a broad interpretation of the right to life, which it is submitted, should be given to it. It is acknowledged that the Constitution should also be interpreted purposively and that a construction most beneficial to the widest possible amplitude must be adopted.

By giving article 6 a broad and purposive interpretation it is submitted that quality of life should be read into it.<sup>69</sup> Living a life which is not of a qualitative nature does not confer upon any person his/her right to life as provided for by article 6 of the Constitution.

### Article 10 Equality and Freedom from Discrimination

Article 10(1) and (2) of the Namibian Constitution states, "All persons shall be equal before the law and no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed, or social, or economic status. Since the inception of the Namibian Constitution the adopted common law offence of sodomy conflicts with Article 10 (1) (2) and the failure to provide prisoners with condoms is discrimination and violates the Constitutional mandate to make all persons equal before the law. This is due to the fact that although Namibia has adopted an official National HIV/AIDS Policy, which makes provision for the distribution of condoms in prisons, as they are distributed in the general population the relevant authorities refused to allow the distribution of condoms in prisons, claiming that this will encourage sexual activities in prisons and make the state an accomplice to the commission of the crime of sodomy. Snyman, defines an accomplice as anybody who assists the "actual" or main perpetrator or who in some way furthers the commission of the crime by the latter.<sup>70</sup> Consequently distributing condoms in prison will assist inmates in the commission of the crimes of sodomy and rape.

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<sup>69</sup> *ibid.*

<sup>70</sup> Snyman, C.R. 2008. *Criminal Law*. 5<sup>th</sup> ed. Durban: LexisNexis. p.273.

## **The Namibian Prison's Act**

The Namibian Prison's Act, 1998<sup>71</sup> recognizes a natural obligation to provide for the health and security of its prisoners. Part I Section 3 (a) states that the function of the prison service "shall be to ensure that every prisoner is secured in a prison in safe custody until lawfully discharged or removed....

Part IV Section 25 (a) (b) of the Namibian Prisons Act requires that prison wardens be responsible for the "security and safe custody of all prisoners detained in custody in that prison; and the treatment and discipline of prisoner's therein are in accordance with this Act."<sup>72</sup> However this is not the case, prison authorities who are responsible for the security and safe custody of all prisoners are the very same people who refuse to distribute condoms to prisoners. The Ministry of Safety and Security is obliged to ensure that prison authorities act in a way that promotes the purpose and tenor of the Namibia Prison's Act.

## **National Policy on HIV/AIDS**

Seventeen years after Independence Namibia finally adopted an official National HIV/AIDS Policy. The Policy allows no discrimination in society or at the workplace against people living with AIDS and provides comprehensive guidelines for co-ordination of treatment, prevention impact mitigation, monitoring and research of the disease, which according to statistics has infected some 230 000 Namibians, mostly between the ages of 15 and 49.<sup>73</sup>

The policy also stipulates that prisoners, people awaiting trial and prison staff must have access to the same HIV-related information, education, counseling and treatment "as available in the general population."<sup>74</sup> The Policy embraces a position of equivalency, that the rights of access to health care enjoyed by the public must apply to all citizens,

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<sup>71</sup> No.17 of 1998.

<sup>72</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:39).

<sup>73</sup> Weidlich, B. 2007. "Parliament adopts national Aids policy". *The Namibian Newspaper*. p.1.

<sup>74</sup> *Ibid.*

including those incarcerated within the Namibian prison system.<sup>75</sup> This is a sharp U-turn compared to a few years ago, when the Cabinet Minister responsible for prisons declared in Parliament that prisoners did not receive condoms, because they “do not have sex in prisons”

While education and VCT are fairly easily offered in the prison, there is a challenge when it comes to prevention. The bone of contention has always been the issue of condom distribution in Namibian prisons. Various reports by parliamentary standing committees acknowledge that prisoners engage in sexual activities in jail and the spread of HIV /AIDS in these institutions is evident. However opponents of condom distribution in jail choose to bury their heads in the sand and deny the occurrence of sex between wardens and female prisoners as well as sex between men in prisons.<sup>76</sup>

## **International Law**

Article 144 of the Constitution of Namibia states that unless provided by the Constitution or Act of Parliament, the general rules of public international; law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.<sup>77</sup> The international agreements that Namibia enters into are therefore binding on Namibia. Namibia is a signatory to various international instruments that deal with the rights of those incarcerated.

## **United Nations Standard Minimum Rules for the Treatment of Prisoners**

This agreement was adopted at the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955. These rules are not intended to describe in detail a model system of penal institutions. They seek only on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being

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<sup>75</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:40).

<sup>76</sup> Sister Namibia. 2008. *Call to abolish Sodomy*. Available at [www.sisternamibia.com](http://www.sisternamibia.com) last accessed on 05/04/2011.

<sup>77</sup> Act 1 of 1990.

good principle and practice in the treatment of prisoners and the management of institutions.<sup>78</sup>

These rules state that it is desirable to have two prisoners in a cell or room in cases of temporary overcrowding.<sup>79</sup> In our prisons this is not the case as the cells are overcrowded. This overcrowding contributes to the spread of HIV/AIDS. This is because prison wardens have less or limited control over prisoners in overcrowded cells and the prisoner's take advantage of this fact and rape other prisoner's or engage in prohibited activities.

These same rules also make provision for personal hygiene<sup>80</sup> and state as follows "in order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard and men shall be enabled to shave regularly. In Namibia, it is expected of prisoners to shave, but no hygienic means for doing so are provided. Instead several prisoners share a razor blade, under the supervision of a warden and this is a high-risk practice that encourages HIV transmission.

### **International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights entered into force on 23 March 1976.<sup>81</sup> The preamble of the covenant states that all states parties to it recognize the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. It further states that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present covenant. Article 7 of the covenant states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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<sup>78</sup> Preamble of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

<sup>79</sup> Article 9 (1) of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>80</sup> Article 15 of the Standard of Minimum Rules for the Treatment of Prisoners.

<sup>81</sup> International Covenant on Civil and political Rights.

## **Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment**

On 28 November 1994, Namibia ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT).<sup>82</sup> The Convention imposes an obligation on its members to prevent acts of cruel, inhuman or degrading treatment or punishment by public officials or other persons acting in an official. This provision not only prohibits torture and ill treatment, but also imposes a positive duty on states to treat prisoners humanely.

Namibia is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These two international instruments expressly offer protection for the incarcerated. In compliance with these two instruments the government is obliged to ensure that no representative of the government inflicts cruel, inhuman or degrading treatment upon others and to protect the personal security of the Individual.<sup>83</sup>

Do these two instruments then incorporate an inmate's right to be provided with condoms? Merely being discriminated against on the basis of incarceration, certainly does amount to cruel, inhuman and degrading treatment, seeing as you are treated differently from others. Being exposed to HIV infection and not being provided with condom's to protect themselves is no protection of inmate's Personal Security. Therefore these two instruments do impliedly incorporate an inmate's right to be provided with condoms, so as to ensure that no representative of the government inflicts cruel, inhuman or degrading treatment upon the inmates and to protect the inmates' personal security.

## **International Covenant on Economic, Social and Cultural Rights**

This Covenant entered into force on 3 January 1976. Namibia is a signatory to this convention and therefore bound by it.

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<sup>82</sup> Preamble of CAT

<sup>83</sup> Legal Assistance Centre AIDS Law Unit & University of Wyoming College of Law (2008:44).

As a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Namibia also agrees to take progressive steps, utilizing the maximum available resources to do so, to support the full realization of rights in the ICESCR, including the rights to the enjoyment of the highest attainable standard of physical and mental health.<sup>84</sup> Inmates can only exercise such right to the enjoyment of the highest attainable standard of physical and mental health if condom distribution is allowed within prisons, as a measure to prevent HIV infections, as well as re-infections among inmates.

Adherence to the provisions of the ICESCR will also be in compliance with Article 6 of the Namibian Constitution which can be interpreted broadly so as to include the right to health which is a second generation right in international instruments.

Various other international documents also specifically expand on rights for the incarcerated that all countries should use as guidelines for the treatment and care of inmates.<sup>85</sup> These include the Body of Principles for the Protection of All Persons Under Any form of Detention or Imprisonment and the principles for the treatment of Prisoners.

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

## CHAPTER FIVE

### Conclusion and Recommendations

Majority of the thirteen prisons in Namibia were built before independence, in the colonial era. After the attainment of independence no efforts have been made to renovate or extend them. Most prison facilities are currently in a dilapidated state and serve as breeding ground for many diseases as well as the spread of HIV/AIDS. The Ministry of Prisons and Correctional services should make it a priority to renovate and expand the prison infrastructure countrywide.

Prison services should improve the level of hygiene in prison, so as to prevent the spread of infectious diseases and viruses. Inmates come from different backgrounds and it should not be assumed that they all know how HIV/AIDS is spread, therefore upon their incarceration they should be enlightened on how HIV/AIDS and other diseases are transmitted, in order to protect themselves. After all, prevention is better than cure. This will also encourage behavioral change as behavior also plays a role in HIV transmission.

The prison service's efforts in preventing the spread of HIV/AIDS in prison facilities are not in vain, but due to a lack of consistency in their implementation as well as a lack of resources these efforts have been unsuccessful. Having regard to this, the next available solution in curbing the further spread of HIV/AIDS is the distribution of Condoms in prisons. This option has its advantages as well as disadvantages, but regardless it is still a viable solution.

Government's refusal to distribute condoms in prisons is unfounded. This is because the crime of sodomy that they are citing as the main reason for the refusal to distribute condoms in prison, is a common law crime which violates individual's right to privacy (article 13) as well as the right to equality (article 10) as enshrined in the Constitution of Namibia. This consequently leads to the violation of the Supreme law of the land, and on this basis the crime of sodomy should be declared unconstitutional and

decriminalized. Further, government's refusal to distribute condoms to those incarcerated, infringes their right not to be discriminated against, seeing as the general public has access to condoms whereas they do not have access to this life saving product.

Article 6 of the Constitution guarantees the right to life and does not qualify this right. Case law under the Roman Dutch law has expressly declared that this is the most important human right, of all the basic fundamental rights and has further, placed a high value on the right to life. This therefore calls for a purposive interpretation of the right to life. Since the right to life has a broader meaning, the prison service must ensure that prison conditions are such that a prisoner's life is not compromised; this includes distributing condoms to prisoners, so as to protect themselves from contracting HIV/AIDS as well as from re-infection. This will firstly, be in accordance with their right to life and will enhance the quality of their lives and consequently allow them to exercise their right to (a qualitative) life.

Namibia is a party to a number of international instruments which provide for the rights of those incarcerated, it should incorporate the provisions of these international instruments in their domestic laws and adhere to them, as they agreed to be bound by them.

The official National HIV/AIDS Policy makes provision for the distribution of condoms in prisons' as available in the general population. The prison service should fully implement this policy in prison as well.

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