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Petition 329: A Legal Challenge to the Involuntary Confinement of TB Patients in Kenyan Prisons

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Background

The tension between public health and individual rights raises key questions in the face of public health crises such as tuberculosis (TB) and Ebola: What are the circumstances that warrant the obligatory detention of individuals with an infectious disease as a measure of protecting the general public?[1] What are the implications for the protection of privacy while managing and controlling the spread of diseases such as HIV? What must be done to obtain informed consent for research and epidemiological studies that benefit public health?[2] Recent handling of TB and Ebola patients in West Africa captures the tensions inherent in the attempt to balance public health and individual rights.[3] In this Perspective, we outline our experiences in handling Petition 329 of 2014, a constitutional petition filed in the High Court of Kenya in 2010, which sought to challenge the arrest and detention of two TB patients for interrupting their TB treatment.[4]

The two patients who were the first and second petitioners in the case, Daniel Ng'etich and Patrick Kipng'etich Kirui, were both detained in prison for failing to adhere to courses of TB medication. The Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) was the third petitioner in the case; the respondents were the cabinet secretary in Kenya's Ministry of Health, the public health officer of Nandi County, and the Kenyan attorney general. The petition challenged an eight-month custodial sentence handed down by the Resident Magistrate's Court in a criminal case initiated by the public health officer.[5] Temporary orders to allow the release of the petitioners were secured through Petition 329. The judge who oversaw the petition, Judge P.M. Mwilu, held that:

> *The G.K. Prison was the worst of choices to confine the petitioners and the period of eight months is unreasonably long seeing as it is not backed by any medical opinion. Why were the prisoners not confined to a medical facility? Why a prison? What is their crime?*[6]

The petitioners sought several declarations and orders from the Court: (1) a finding that Kenyan law does not allow confinement in prison for the purposes of TB treatment (as noted in the Public Health Act: Chapter 242 of the Laws of Kenya); (2) a declaration that confining TB patients in prison is unconstitutional; (3) an

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award for damages; and (4) an order that the Ministry of Health develop a policy on the involuntary confinement of persons with TB and other infectious diseases. Justice Mumbi Ngugi issued her judgment on World TB Day, March 24, 2016, granting the orders sought. She however declined to give monetary compensation to the two petitioners noting that they had an obligation of cultivating personal responsibility.[7]

Issues

The case focused on four issues:

1. the constitutionality of involuntary confinement as a measure to protect public health;
2. the use of Section 27 of the Public Health Act to confine persons with communicable diseases to a prison;
3. the award for general and exemplary damages for physical and psychological suffering occasioned by confinement in a prison; and
4. efficacy of remedies awarded.

We discuss each of the issues and the court's determination on them.

Constitutionality of involuntary confinement as a measure to protect public health

The court noted that the facts that informed Petition 329 of 2014 occurred before the Constitution of Kenya, 2010 (the Constitution) came into force. Therefore, both the 2010 and 1969 Constitutions were used in the determination of this case. The petitioners argued that their confinement violated the following rights: freedom of movement as guaranteed by Article 80 of the 1969 Constitution; the right to be free from torture, cruel, inhuman, or degrading treatment (Article 25(a) of the Constitution); the right to fair administrative action (Article 47 of the Constitution); and the rights of detained persons (Article 51 of the Constitution).

Justice Ngugi concluded: "isolation and detention is permissible in the interests of public health where a person infected with TB poses a threat to public health." She reasoned that while the petitioners' freedom of movement was limited, such limitation was in accordance with Article 24 of the Constitution and with the Siracusa Principles, and was thus necessary for the protection of public health.[8] According to The Siracusa Principles, the right to liberty may be limited under the following circumstances: an individual known to be contagious refuses treatment; an individual known to be contagious lacks the capacity to control the infection; and a person that is likely to be highly infectious refuses medical assessment.[9]

The use of Section 27 of the Public Health Act to confine persons with communicable diseases to a Government of Kenya prison

The court found that while confinement was a justifiable limitation in this case, it was not justifiable for the confinement to be in a penal institution. Most significantly, the judge noted: "it cannot be proper to take anything but a human rights approach to the treatment of persons in the position of the petitioners."

The court also found that Kenya's prisons were ill-equipped to care for TB patients. This conclusion was significantly informed by Section 27, which states:

> *Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such person is found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order.*[10]

The court considered Section 27 together with the definition of isolation, provided in the law as "the segregation and separation from and interdiction of communication with other persons who are or are suspected of being infected," and found that isolation, as required by the Public Health Act, is

for the purpose of treatment and not punishment. In issuing a prison sentence to the petitioners, the respondents failed to recognize that distinction.[11] The state countered with the argument that Section 27 should be read together with Section 28, which would justify a penalty for defaulting on medication. The court rejected this argument, as Section 28 differs significantly from Section 27: it creates a penalty for persons who, while suffering from an infectious disease, do not take proper precautions against spreading the disease.

Further, the court found that Kenyan prisons did not have the infrastructure or the legal framework in place to keep prisoners in isolation.[12] It noted that the purpose of the law could not be achieved given the condition of the prisons, which have dire problems including overcrowding; poor food, sanitation, clothing, and bedding; lack of clean water; infectious diseases, and other growing challenges.[13]

Finally, the judgment issued a scathing indictment of the Kenyan public health system, taking as an example the case of Mohammed Galgalo (deceased), a multidrug-resistant TB patient who, while his case was ongoing, was referred to the Kenyatta National Hospital for treatment and isolation, but was then informed that the isolation ward was not operational and was advised to stay at home. He later died at home. The court noted that if the largest referral hospital in the country did not have adequate facilities for isolation, little can be hoped for other facilities. The court concluded that it seemed that health officials were conveniently relying on prisons to carry out a task they are neither equipped nor legally allowed to perform.

The award for general and exemplary damages for physical and psychological suffering occasioned by the confinement in a prison

The court declined to give damages to the petitioners, saying that it would not be in the interest of the public. The court also found that while confinement in a prison for 46 days was unlawful, the state took the correct option in confining the patients, but chose the wrong forum for confinement. Finally, the court found that an element of personal responsibility must be borne by the petitioners and the limited resources of the state would be put to best use in setting out policies and providing facilities in public health institutions.

Efficacy of remedies awarded

A positive aspect of this judgment is the use of structural interdicts, which are "a type of remedy requiring the government to report back to the court at regular intervals about the steps taken to comply with the orders given."[14] The petitioners had already had success at the Eldoret High Court, which found that a penal institution was the worst choice for confinement. Despite this finding, the state continued to use Section 27 to confine TB patients in prison.[15] As a result, KELIN lodged Petition 329 of 2014, and employed a strategy to seek remedies and policy changes that would be beneficial for all people with TB. The court ordered the cabinet secretary for health to issue a circular within 30 days and develop, in a consultative process, an involuntary confinement policy within 90 days. To ensure that such orders are respected and upheld, the court additionally ordered the cabinet secretary for health to file an affidavit in court detailing the policy measures put in place within 90 days of the delivery of the judgment.[16]

Analysis of the implication of the judgment

Petition 329 was mostly successful for the petitioners, due largely to the finding that "confinement of patients suffering from infectious diseases in prison facilities for the purposes of treatment under section 27 of the [law] violates the Constitution and any use of this provision to order such detention in prison is at all times unconstitutional."[17] This finding of unconstitutionality will have the effect that persons suffering from infectious diseases, including TB, may no longer be subjected to arbitrary confinement in prison under the guise of public health while relying on Section 27 of the Public Health Act.

A significant takeaway is the application of the right to health and burden of proof. The Petitioners argued that detained persons have the right to the highest attainable standard of health as guaranteed by Article 43. The respondents refuted this, claim-

ing that the petitioners had failed to show this right was violated because they had failed to prove they were not held in isolation. Relying on Article 21, the court held that "the onus in this regard lay with the respondents to place before the court material on which it could find that there are proper isolation facilities in prisons for the treatment of persons in the position of the petitioners." The court found that the petition is grounded in the right to health and the state is required to show the steps it is taking to comply with Article 43 and cannot shift the burden of proving progressive realization of the right to health to petitioners.

The granting of structural interdicts is useful, and a welcome aspect of the judgment, as it provides an opportunity for stakeholders to engage with the national and county governments in development of the policy on involuntary confinement. The interdicts will ensure that the court is appraised on the progress of implementation of its orders. The structural interdicts will equally provide an avenue for continued advocacy by communities and civil society organizations working on TB issues, which remains a key component of using social movements to create pressure on government to be held accountable for their obligations.

While the case holds a lot of positive aspects, there are some negatives. Most significant is the finding that the petitioners' right to liberty in Section 29 was violated, but that the limitation was justifiable. This finding is problematic because the petitioners relied on Article 29(f), which states: "every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner." Article 29(f) is a non-derogable right in terms of Article 25(a) of the Constitution. While the judgment broadly states that the limitation of Article 29 is justifiable, the previous references to Article 29(f) may lead to the unwarranted conclusion that, contrary to Article 25(a), one may justifiably limit a non-derogable right. While this was possibly not the court's intention, the ambiguity could cause concern.

The second concern raises a jurisprudential issue: the failure to provide analysis in terms of Article 24. The court concluded that it is justifiable to confine and hold people for the sake of treatment if they have previously defaulted on that treatment, but failed to explain how it reached this conclusion. In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape),* the South African Supreme Court of Appeal considered the exercise of balancing conflicting rights, and ruled that "where constitutional rights have the potential to be mutually limiting, in that full enjoyment of one right necessarily curtails the full enjoyment of another, a court must reconcile them."[18] These rights should not be reconciled by weighing the value of one right against another, since all the protected rights have equal value. It is not so much the values of the rights themselves that are to be weighed, but rather the benefit flowing from the intrusion to be weighed against the loss that the intrusion would entail.[19] While we may agree with the court's conclusion, its failure to provide an analysis in terms of Article 24 leads to a lack of understanding on how the conflicting rights were weighed against each other, leading to the conclusion that when the needs of public health require it, individual rights may be limited.

Finally, the court failed to award the petitioners damages for physical and psychological harm occasioned by their unlawful detention in prison with other inmates. The reasons given for refusal, when considering the resources in the country, may be understandable—but they are unconvincing. First, having found that the confinement was unlawful, the court was bound by its own jurisprudence to award damages.[20] Second, the judgment is contradictory: in refusing to award damages, the court relied on imputing personal responsibility on the petitioners after recognizing that:

> *We have the tragedy of a largely poor, uneducated population, with scant information about the dangers of diseases such as TB, and therefore apt, for a variety of reasons, not to follow treatment.*

The court went further:

> *It appears to me that in addition to lack of adequate facilities for the treatment of TB, as the case of Galgalo illustrates, the lack of access to treatment*

facilities and information about TB, as well as to counseling on the dangers that it poses if not properly treated, is doubtless responsible for many cases of default to follow the course of treatment.

The court recognized that default was largely caused by inadequate facilities coupled with lack of education and scant information. We believe, therefore, that the judgment was harsh to impute personal responsibility in these circumstances.

Conclusion

TB is not a crime and to treat it as if it were is an injustice that promotes stigma towards persons with TB. The Public Health Act, passed in 1921, is best described as draconian because it does not include provisions necessary to meet the modern-day challenges faced in addressing TB. Involuntary confinement in Kenya has been proven to do more harm than good; it exposes persons to the disease—as opposed to protecting them from it—and aggravates the condition of those infected. Significantly, involuntary confinement fails to meet the requirement that it respects individual rights and that limitation should be necessary to ensure public health. As seen from Petition 329 of 2014, confinement neither respects human rights nor does it ensure public health. It is therefore necessary for interventions in Kenya to become more effective, and this can only be ensured in a society that respects human rights and incorporates human rights principles in its health laws, policies, operational tools, and in service delivery.

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