What the Doctor Ordered: Lessons From Abroad to Strengthen South Africa's Medical-Parole System

Rinda Botha
B Iuris LLB LLM LLD
Senior Lecturer, Public Law, University of the Free State, Bloemfontein, South Africa
https://orcid.org/0009-0003-9134-342X

Karabo Sease
LLB LLM
LLD student, University of the Free State Bloemfontein, South Africa

SUMMARY

Certain outcomes of South Africa's medical-parole system in recent years have raised questions about the adequacy of the legislation governing the system, particularly in respect of eligibility criteria and cancellation of parole should the offender recover. Cases in point include the to-ing and fro-ing on compliance with criteria in the Derby-Lewis matter, Jacob Zuma's near-immediate release on medical parole, and the granting of medical parole on grounds of terminal illness to Zuma's former advisor Shabir Shaik, who served barely two and-a-half years of his fifteen-year sentence and has since been spotted out and about. To ascertain how the medical-parole regime in South Africa compares with other jurisdictions, this article juxtaposes it with the systems in Canada and the American states of Mississippi, New York and California. The comparison takes into account the type of parole available, illnesses that would typically qualify a prisoner for medical parole, the minimum period of imprisonment to be served, types of conviction excluded from medical parole, as well as the option to cancel medical parole. A comparative strength of the South African system appears to be the delineation of a clear, transparent application process, which not unimportantly includes the provision of a comprehensive, well-defined list of eligible illnesses and conditions. South Africa should also be commended for not relying on the type of conviction as a deciding factor in granting medical parole, thereby adhering to the nation's founding value of human dignity enshrined in the Constitution. Yet there is also ample room for improvement. Requiring prisoners to serve a minimum period of imprisonment before they can apply for medical parole could help prevent abuse of the system as a quick escape route. In addition, arguably the most important step South Africa could take to strengthen the system would be to provide for the cancellation of medical parole where the parolee recovers.

https://doi.org/10.17159/r3n3gv92

KEYWORDS: Medical parole, Correctional Services Act 111 of 1998, application process, human dignity, cancellation of medical parole, Canada, Mississippi, California

1 INTRODUCTION

Medical parole, or "compassionate release", allows prisoners with a "serious terminal, non-terminal, and/or age-related health issue" to seek early release.[1]

Different jurisdictions use different sets of criteria to determine eligibility for this special form of parole.[2] In South Africa, medical parole is governed by the Correctional Services Act,[3] (the amended) section 79 of which stipulates:

> "Any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if–
> (*a*) such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;
> (*b*) the risk of re-offending is low; and
> (*c*) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released."[4]

Yet, despite amendments made over the years, South Africa's medical-parole system is not in optimal shape. When Shabir Shaik, the financial advisor to former President Jacob Zuma, was released on medical parole, having served less than three of his fifteen years, the first major public debate on the issue was triggered.[5] More recently, Zuma's own early release elicited more criticism of the seemingly afflicted system.[6] One cannot help but question the adequacy of the current legislative regime governing medical parole in the country, in particular the eligibility criteria for medical parole, and the cancellation of parole should the offender recover.

To shed light on this question, this article first charts the historical development of South Africa's medical-parole law and offers insight into relevant case law. This serves as a backdrop for a comparison between the South African medical-parole system and that of Canada and the United

---

1 Cooper and Bernard "Medical Parole-Related Petitions in U.S. Courts: Support for Reforming Compassionate Release" 2021 54(2) *Creighton Law Review* 173 173.

2 Pro and Marzell "Medical Parole and Aging Prisoners: A Qualitative Study" 2017 23(2) *Journal of Correctional Health Care* 162 162.

3 111 of 1998.

4 S 79(1) of the Correctional Services Act.

5 Albertus "Protecting Inmates' Dignity and the Public's Safety: A Critical Analysis of the New Law on Medical Parole in South Africa" 2012 16(1) *Law, Democracy and Development* 185 186.

6 *The Democratic Alliance v National Commissioner of Correctional Services* (unreported) 2021-12-15 Case no 2021/45997.

States, respectively.[7] As the Canadian Charter of Human Rights and Freedoms was used as a template for the drafting of the Constitution of the Republic of South Africa, 1996 (the Constitution), a comparison of these two jurisdictions' medical-parole systems seems sensible.[8] In addition, while having less in common with American law, South Africa could stand to learn from recent medical-parole developments in the states of Mississippi, New York and California.

2 SOUTH AFRICA'S MEDICAL-PAROLE LAW THROUGH THE YEARS

2 1 Correctional Services Act 8 of 1959

The first attempt at creating a consistent penal and prison regime for the then-newly established Union of South Africa[9] was the enactment of the Prisons and Reformatories Act.[10] It was later repealed and replaced by the Prisons Act,[11] section 71 of which stipulated the following regarding "release on medical grounds":

> "Any prisoner who is detained in any prison under sentence of court and–
> *(a)* who is suffering from a dangerous infectious or contagious disease; or
> *(b)* whose life is endangered by his detention in a prison; or
> *(c)* whose release is expedient on grounds of advanced pregnancy,
> may, on the recommendation of the medical officer, be released by the Minister either unconditionally or on probation or on parole as the Minister may direct."

Some believed that this stipulation signified an indirect avoidance tactic by correctional facilities not to provide care to ill or pregnant prisoners.[12] The broad terms of the stipulation also failed to clarify whether only transmissible diseases would qualify a prisoner for release, and what would happen should a supposedly dangerous disease not lead to the prisoner's death.[13]

Shortly following its promulgation, the Prisons Act was renamed the Correctional Services Act,[14] which contained the following, very similar provisions on medical parole in section 69:

> "A prisoner serving any sentence in a prison

---

7 With a specific focus on Mississippi, New York and California state law.

8 Sarkin "The Effect of Constitutional Borrowing on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" 1998 1(2) *Journal of Constitutional Law* 176 184 186.

9 Singh "The Historical Development of Prisons in South Africa" 2005 1(1) *New Contree* 15 21.

10 13 of 1911. See Singh 2005 *New Contree* 21.

11 8 of 1959. See Singh 2005 *New Contree* 21.

12 Pillay *A Critical Assessment of the Constitutionality of Section 79(7) of the Correctional Services Act 111 of 1998, With Specific Reference to the Proviso* (LLM thesis, University of the Western Cape) 2019 17.

13 *Ibid*.

14 8 of 1959. See Pillay *A Critical Assessment of the Constitutionality of Section 79(7)* 17.

> *(a)* who suffers from a dangerous, infectious or contagious disease; or
> *(b)* whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy,
>
> may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister."

Aside from not resolving the uncertainties created by its vague language, the Act also conferred extensive powers on both the Minister of Justice and the Commissioner of Prisons to decide on inmates' release on medical parole.[15]

2 2 Correctional Services Act 111 of 1998

The main rationale behind replacing the 1959 Correctional Services Act with the 1998 Correctional Services Act was to align it with the Bill of Rights contained in the newly adopted South African Constitution.[16] While medical parole today continues to be governed by the provisions of section 79 of this Act, the terms of the provision were amended in 2011 by section 14 of the Correctional Matters Amendment Act.[17] The amendment, which took effect on 1 March 2012, extended the qualifying circumstances for medical parole and further expanded the procedures to be followed for a prisoner to be placed on such parole.

2 2 1 Section 79 prior to amendment

Originally, section 79 of the Correctional Services Act read as follows:

> "Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death."

To qualify for medical parole, therefore, three criteria had to be met. These were a diagnosis with a terminal illness or condition in the final phase, made in writing by the treating medical practitioner, and a decision on release by the Commissioner, the Correctional Supervision and Parole Board, or the court. While probably intended to provide greater clarity than its predecessor, section 79, too, came in for criticism.[18]

Critics first lamented the fact that the section did not specify who could make an application for medical parole, which resulted in many applications not being considered.[19]

---

15 *Mazibuko v Minister of Correctional Services* (unreported) 2005-12-07 Case no 38151/05.
16 Preamble to the Correctional Services Act.
17 5 of 2011.
18 Albertus 2012 *Law, Democracy and Development* 185.
19 *Ibid*.

A second, more serious objection was raised against the requirement that prisoners had to have reached the "final phase" of their terminal illness to be considered for medical parole.[20] Determining what constituted a phase as "final",[21] and proving that an inmate had indeed reached this stage of illness was as difficult then as it is today. In essence, the medical practitioner's diagnosis had to show that there was no chance of recovery and that the diagnosed condition would inevitably result in death.[22] Moreover, the prognosis had to confirm that the prisoner's condition was so severe that death was imminent.[23] Critics insisted that the "final phase" was immeasurable and open to various interpretations by different physicians.[24] Indeed, the difficulty surrounding proving final-phase illness caused an understandable reluctance among physicians to recommend release on medical grounds.[25] This, in turn, is believed to have contributed to the high number of deaths owing to natural causes reported in correctional centres during this time,[26] as well as inconsistencies in the granting of medical parole.[27]

A third point of criticism was that section 79 violated prisoners' right to dignity.[28] In *Stanfield v Minister of Correctional Services*,[29] for instance, the court held that to insist that terminally ill inmates remain incarcerated until they become visibly debilitated and bedridden could not be regarded as humane and inherently dignified treatment.[30] Similarly, the continued incarceration of a terminally ill person without access to the necessary palliative care facilities was also found to be a dignity violation.[31]

2 2 2 Section 79 following amendment

In developing the amended provision, the drafters appear to have taken to heart the criticism levelled at the previous provision.

The amended stipulation[32] no longer contains the controversial phrase "final phase of a terminal illness", thereby broadening the scope of those who may qualify for medical parole. The procedures for lodging a medical-parole application are also more clearly defined in subsequent subsections: an application must be lodged with the National Commissioner, the Correctional Supervision and Parole Board or the Minister, by a medical practitioner, a sentenced offender, or a person acting on the offender's

---

20 *Ibid*.

21 Dintwe "Nascent Policy Framework Regulating Medical Parole" 2011 46(4) *Journal of Public Administration* 1397 1406.

22 *Ibid*.

23 *Ibid*.

24 *Ibid*.

25 Albertus 2012 *Law, Democracy and Development* 187.

26 *Ibid*.

27 Dintwe 2022 *Journal of Public Administration* 1406.

28 S 10 of the Constitution.

29 2004 (4) SA 43 (C).

30 *Stanfield v Minister of Correctional Services supra* par 123–125.

31 *Ibid*.

32 As quoted in the introduction to this article.

behalf.[33] The application will not be considered if not supported by a written medical report by the prisoner's attending medical practitioner recommending medical parole.[34] The report must include a complete diagnosis and prognosis of the terminal illness or physical incapacity, a statement regarding the extent to which the condition limits the person's activity or self-care, and reasons for considering medical parole.[35]

Providing further clarity, regulation 29A(5) of the amended Correctional Services Regulations[36] contains the following list of medical conditions to be considered by the Medical Parole Advisory Board, established in terms of section 79(3) of the Act:

> "(a) Infectious conditions–
> (i) World Health Organisation Stage IV of Acquired immune deficiency syndrome despite good compliance and optimal treatment with antiretroviral therapy;
> (ii) Severe cerebral malaria;
> (iii) Methicilin resistance staph aurias despite optimal treatment;
> (iv) MDR or XDR tuberculosis despite optimal treatment; or
> (b) Non-infectious conditions–
> (i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure;
> (ii) Ischaemic heart disease with more than two ischaemic events in a period of one year with proven cardiac enzyme abnormalities;
> (iii) Chronic obstructive airway disease grade Ill to IV dyspnoea;
> (iv) Cor-pulmonale;
> (v) Cardiac disease with multiple organ failure;
> (vi) Diabetes mellitus with end organ failure;
> (vii) Pancytopenia;
> (viii) End stage renal failure;
> (ix) Liver cirrhosis with evidence of liver failure;
> (x) Space occupying lesion in the brain;
> (xi) Severe head injury with altered level of consciousness;
> (xii) Multisystem organ failure;
> (xiii) Chronic inflammatory demyelinating Poliradiculoneuropathy;
> (xiv) Neurological sequelae of infectious diseases with a Kamofky score of 30 percent and less;
> (xv) Tetanus;
> (xvi) Dementia; and
> (xvii) Severe disabling rheumatoid arthritis, and whether such condition constitutes a terminal disease or condition or the offender is rendered physically incapacitated as result of injury, disease or illness so as to severely limit daily activity or inmate self-care."

Regulation 29A(6) provides that the Medical Parole Advisory Board may also consider any other condition not listed in subregulation (5) above if it complies with the principles in section 79(1) of the Act. If an examination

---

33 S 79(2)(*a*) of the 1998 Correctional Services Act.
34 S 79(2)(*b*) of the 1998 Correctional Services Act.
35 S 79(2)(*c*) of the 1998 Correctional Services Act.
36 GN 323 in *GG* 35277 of 2012-04-25 (the Correctional Services Regulations).

reveals that a sentenced offender is suffering from any such condition, this must be recorded in a prescribed register.[37]

The Medical Parole Advisory Board must recommend the appropriateness of medical parole to the National Commissioner, the Correctional Supervision and Parole Board or the Minister, who, should parole be recommended, needs to consider the prisoner's risk of re-offending and the adequacy of arrangements for the person's supervision, care and treatment once released.[38]

2 3 Cancellation of medical parole

A prickly matter that remains is the effect of subsequent recovery from injury, disease or illness on granted medical parole.[39] In this regard, the Act provides that a decision to cancel medical parole should not be taken merely on the basis of a parolee's improved medical condition.[40] Therefore, should a parolee's condition improve, they will not necessarily be returned to prison to serve the remainder of their sentence.[41] Some might interpret this as a contradiction in terms: if medical parole is granted on account of illness, recovery from such illness could be seen as sufficient reason for the parole to be cancelled.

Added to this is the issue of recovered medical parolees re-offending, as evidenced by media reports over the years.[42] To mitigate the danger of re-offending, scholars[43] have – in our view, rightly – argued that the Department of Correctional Services ought to put measures in place to ensure close monitoring of medical parolees, and that, should a parolee subsequently recover, they should be returned to prison to serve the remainder of their sentence.

3 CASE LAW SHOWS SYMPTOMS OF AN AFFLICTED SYSTEM

The following cursory look at two South African medical-parole cases confirms that all is not well with the system. Blatant inconsistencies not only expose correctional authorities and society to the risk of sentenced offenders being wrongfully released but also give rise to the disconcerting possibility that terminally ill prisoners may be refused the chance to die a dignified death.

---

37 Reg 29A(1) of the Correctional Services Regulations.

38 In compliance with s 79(1)(*b*) and (*c*) of the 1998 Correctional Services Act.

39 Mujuzi "Releasing Terminally Ill Prisoners on Medical Parole in South Africa" 2009 2(2) *South African Journal of Bioethics and Law* 59 60.

40 S 79(7) of the 1998 Correctional Services Act.

41 *Ibid*.

42 Mujuzi 2009 *South African Journal of Bioethics and Law* 60.

43 Mujuzi 2009 *South African Journal of Bioethics and Law* 60; Van Wyk *The Legal Framework Regulating Medical Parole: A Comparative Study* (LLM thesis, University of Pretoria) 2014 38.

3 1 To-ing and fro-ing on compliance with criteria: the Derby-Lewis matter

In *Derby-Lewis v Minister of Justice and Correctional Services,*[44] the applicant was a male serving life for murder. At the time of his application for medical parole in May 2014, he had already served 21 years and six months.[45] The application was supported by a medical report by his treating physician confirming that the applicant had been diagnosed with lung cancer, heart failure and hypertension.[46] On receiving the application, the Medical Parole Advisory Board assigned two of its members to perform a medical assessment on the applicant.[47]

The Board heard the matter in July 2014. Based on its own two members' reports, the Board concluded that the applicant had stage IIIB carcinoma of the lung, which was inoperable, but had not metastasised.[48] His system appeared to tolerate his ongoing chemotherapy and radiography treatment,[49] and he was clinically well and able to perform his daily duties as a prisoner.[50] The Board found that the applicant's stage of cancer did not meet the medical-parole criteria,[51] and that there was neither sufficient reliable information on the treatment aims for the patient nor an unbiased assessment of his prognosis.[52] In a subsequent independent examination of the applicant requested by the Board,[53] two specialists found stage IV cancer based on metastasis to the left adrenal gland,[54] while a third did not believe the spread of the cancer indicated stage IV.[55] The Board ultimately recommended to the Minister[56] that the applicant be released on medical parole.[57]

In January 2015, the Minister refused the applicant medical parole,[58] furnishing a number of reasons for doing so. These included, based on one specialist's opinion that the applicant did not have stage IV cancer, that the requirements of the Act were not met,[59] as well as that the applicant was not

---

44 2015 (2) SACR 412 (GP).
45 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 16.
46 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 17.
47 *Ibid*.
48 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 18.
49 *Ibid*.
50 *Ibid*.
51 As per reg 29A(5)(*b*)(*i*) of the Correctional Services Regulations; *Derby-Lewis v Minister of Justice and Correctional Services supra* par 18.
52 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 18.
53 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 19.
54 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 24.
55 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 25.
56 Minister of Justice and Correctional Services.
57 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 26.
58 *Ibid*.
59 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 28.

physically incapacitated and did not show any remorse or indication of a low risk of re-offending.[60]

On review of this decision, the court held that section 79 of the Correctional Services Act should not be applied rigorously, but that decision-makers should follow a flexible approach.[61] It was further established that the Act should be interpreted in line with the spirit of *ubuntu*, and that medical parole was essentially about showing compassion. The court ordered that the offender be placed on medical parole immediately.[62] He died in November 2016, 16 months following his release, with the cancer having spread throughout his body.[63]

3 2 Potential for abuse: The Zuma case

In stark contrast to the *Derby-Lewis* matter, the National Commissioner[64] granted Jacob Zuma medical parole less than two months into his fifteen-month prison sentence in 2021.[65] In doing so, the Commissioner relied on section 75(7)(*a*) of the Correctional Services Act, which stipulates:

> "[T]he National Commissioner may … place under correctional supervision or day parole, or grant parole or medical parole to, a sentenced offender serving a sentence of incarceration for 24 months or less and prescribe conditions in terms of section 52."

As the Zuma case illustrated, this stipulation exposes the system to potential abuse. Zuma turned himself in for internment at the Estcourt Correctional Services Centre on 8 July 2021 under threat of arrest[66] for contempt of court, having failed to comply with a court order to appear before the Zondo Commission on state capture, corruption and fraud.[67] Upon arrival, he was admitted to the Centre's hospital wing and examined. On the same day, the physician produced a report recommending that Zuma be referred to a specialist high-care unit.[68] This recommendation was not made for reasons of physical incapacitation or terminal illness, as required by the Act, but merely to allow for further medical assessment.[69] Twenty days later, the physician applied for Zuma's release on medical parole, as the former statesman was found to be suffering from a terminal disease that was chronic and progressive.[70] The application stated that Zuma's condition had progressively deteriorated since 2018 and that he could not perform

60 *Ibid*.

61 *Derby-Lewis v Minister of Justice and Correctional Services supra* 55–56.

62 *Ibid*.

63 Germaner and Venter "Clive Derby-Lewis Dies" (4 November 2016) https://www.iol.co.za/dailynews/news/south-africa/clive-derby-lewis-dies-2086705 (accessed 2024-04-29).

64 National Commissioner of Correctional Services.

65 *Democratic Alliance v National Commissioner of Correctional Services supra* par 3.

66 *Democratic Alliance v National Commissioner of Correctional Services supra* par 24.

67 *Democratic Alliance v National Commissioner of Correctional Services supra* par 2.

68 *Democratic Alliance v National Commissioner of Correctional Services supra* par 100.

69 *Democratic Alliance v National Commissioner of Correctional Services supra* par 27.

70 *Democratic Alliance v National Commissioner of Correctional Services supra* par 29.

activities of daily life or self-care.[71] On 13 August 2021, another physician, this time a member of the Medical Parole Advisory Board, also recommended Zuma's immediate release on medical parole.[72] When the Board subsequently decided to deny the application[73] based on insufficient information,[74] the Commissioner took it upon himself to release Zuma on medical parole.

Taken on review by the Democratic Alliance, the Commissioner's decision was found to be unlawful.[75] The court ruled that the decision of the Board, being an expert body established to provide an independent medical report on a prisoner's illness or physical incapacitation, was binding on the Commissioner, who lacked the medical expertise to overrule the Board's recommendation.[76] In addition, in terms of regulation 29A(3), the report of the correctional medical practitioner had to be provided to the Board, and not be considered by the Commissioner.[77] In this respect, therefore, the Commissioner had "impermissibly usurped the statutory functions of the Board".[78] The court also called it "irrational, unlawful and unconstitutional" for the Commissioner to have relied on the same reports that the Board had used to decline medical parole, to overturn the Board's recommendation.[79] Setting aside the Commissioner's decision, the court ordered that Zuma be returned to the custody of Correctional Services.[80] Yet a special remission process to address overcrowding in the country's prisons meant that he never served the remainder of his sentence.[81]

4 MEDICAL-PAROLE LAW IN CANADA

Parole in Canada is governed by the Corrections and Conditional Release Act,[82] which offers different release options to help prisoners reintegrate into society.[83] In the following sections, we discuss two relevant options.

4 1 Temporary absence

Section 17(1) of the Corrections and Conditional Release Act provides the following in relation to escorted temporary absences:

---

71 *Ibid*.
72 *Democratic Alliance v National Commissioner of Correctional Services supra* par 34.
73 *Democratic Alliance v National Commissioner of Correctional Services supra* par 35.
74 *Ibid*.
75 *Democratic Alliance v National Commissioner of Correctional Services supra* par 100.
76 *Democratic Alliance v National Commissioner of Correctional Services supra* par 58.
77 *Democratic Alliance v National Commissioner of Correctional Services supra* par 60.
78 *Ibid*.
79 *Democratic Alliance v National Commissioner of Correctional Services supra* par 61.
80 *Democratic Alliance v National Commissioner of Correctional Services supra* par 100.
81 Tshangela "Zuma Will Not Serve Remainder of His Sentence Due to Remission Process" (11 August 2023) https://www.sabcnews.com/sabcnews/zuma-will-not-serve-the-remainder-of-his-sentence-due-to-remission-process/ (accessed 2024-05-02).
82 S.C. 1992, C. 20.
83 Iftene "The Case for a New Compassionate Release Statutory Provision" 2017 54(4) *Alberta Law Review* 929 930.

> "17(1) The institutional head may … authorize the temporary absence of an inmate … if the inmate is escorted by a staff member or other person authorized by the institutional head and, in the opinion of the institutional head,
> (a) the inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section;
> (b) it is desirable for the inmate to be absent from the penitentiary for *medical*[84] or administrative reasons, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;
> (c) the inmate's behaviour while under sentence does not preclude authorizing the absence; and
> (d) a structured plan for the absence has been prepared.
> The temporary absence may be for an *unlimited period if it is authorised for medical reasons*[85] or for a period of not more than five days or, with the Commissioner's approval, for a period of more than five days but not more than 15 days if it is authorized for reasons other than medical reasons."

Section 116(1) of the Act lays down similar conditions for the authorisation of unescorted temporary absences.

The temporary absence provided for by Canada's Corrections and Conditional Release Act, therefore, may be for medical, social, rehabilitation and humanitarian reasons.[86] Absence based on medical grounds may be for emergency treatment, routine medical procedures, medical tests, dental care, surgeries, and treatment after injury.[87] Federal offenders who wish to apply for temporary absence need to submit a prescribed form.[88] The parole or correctional officer would typically review the application, the inmate's progress, and the risk involved in their potential release.[89] If any risk is found, special mitigation measures must be in place.[90]

4 1 1 Eligibility criteria

Escorted temporary absence may be applied for regardless of the time the prisoner has served. To be considered for unescorted temporary absence, in turn, a prisoner must have served (the longer of) six months, or half of the term required to reach full parole eligibility, as regulated by section 115(1)(*c*) of the Act.

Importantly, subsections 115(2) and (3) contain the following qualifying provisions regarding unescorted temporary absence:

---

84 Authors' own emphasis.

85 Authors' own emphasis.

86 Polvi and Pease "Parole and Its Problems: A Canadian English Comparison" 1991 30(3) *Howard Journal of Criminal Justice* 218 221.

87 Van Wyk *The Legal Framework Regulating Medical Parole* 24.

88 Van Wyk *The Legal Framework Regulating Medical Parole* 28–29.

89 *Ibid*.

90 *Ibid*.

> "(2) Subsection (1) [which prescribes the minimum time to be served] does not apply to an offender whose life or health is in danger and for whom an unescorted temporary absence is required in order to administer emergency medical treatment.
>
> …
>
> (3) Offenders who … are classified as maximum security offenders are not eligible for an unescorted temporary absence."

Canada's Parole Board will grant a temporary release if it believes that the prisoner will not pose a risk to society by re-offending, and if there is a good reason for the release.[91] The Board will further investigate whether having the sentenced offender outside the correctional facility for the duration of the absence would be desirable.[92] Other considerations include the prisoner's behaviour in the correctional facility prior to the application,[93] and the furnishing of a structured plan for the absence.[94]

4 1 2 Cancellation of temporary absence

Both escorted and unescorted temporary absences may be cancelled.[95] A prisoner on a temporary absence for medical reasons may be released for an unlimited period, but not indefinitely, until full parole is granted.[96] The absence may be cancelled at any time in the event of a breach of the release conditions, if the institutional head believes cancellation is necessary to avoid a breach, or if the reasons for the temporary release no longer exist.[97] Cancellation may occur either before or after the commencement of the temporary absence.[98] Unlike the position in South Africa, therefore, a temporary absence granted for medical reasons may be cancelled should the parolee recover.

4 2 Parole by exception

Apart from temporary absence, the closest form to "compassionate release" in Canada is parole by exception, as provided for in section 121 of the Corrections and Conditional Release Act,[99] which stipulates:

> "(1) … [P]arole may be granted at any time to an offender
>
> (a) who is terminally ill;
>
> (b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

---

91 S 17.1(*a*)–(*b*) of the Corrections and Conditional Release Act.

92 S 17.1(*b*) of the Corrections and Conditional Release Act.

93 S 17.1(*c*) of the Corrections and Conditional Release Act.

94 S 17.1(*d*) of the Corrections and Conditional Release Act.

95 S 17.1(2) and (3) of the Corrections and Conditional Release Act.

96 S 17.1(3) of the Corrections and Conditional Release Act.

97 Prisoners' Legal Services "Conditional Release" (2018) https://prisonjustice.org/wp-content/uploads/2019/01/Federal-Conditional-Release-2018_1.pdf (accessed 2022-05-01).

98 S 17(3) of the Corrections and Conditional Release Act.

99 Iftene 2017 *Alberta Law Review* 929.

> (c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or
>
> (d) who is the subject of an order of surrender under the Extradition Act and who is to be detained until surrendered.
>
> Exceptions
>
> (2) Paragraphs (1)(b) to (d) do not apply to an offender who is
>
> (a) serving a life sentence imposed as a minimum punishment or commuted from a sentence of death; or
>
> (b) serving, in a penitentiary, a sentence for an indeterminate period."

Reportedly, however, despite an increasing number of ill prisoners, section 121 is rarely used.[100] Iftene's study[101] of 197 male prisoners over the age of 50 revealed that even though 70 per cent of participants had no disciplinary record and many of them had illnesses such as cancer, dementia and serious heart disease, none of them had ever been advised to apply for parole by exception or had even heard of it before.[102]

The procedure for this type of parole application further hampers its use, as it requires substantial evidence from prison doctors that the prisoner is suffering from a "disease incompatible with incarceration".[103] Medical practitioners in the prison environment are reluctant to give such evidence for fear of being seen as raising "a liability issue". Refusal to give evidence, on the other hand, carries no risk to the practitioner, even though the prisoner may be terminally ill.[104]

In addition, since parole by exception falls under "general parole", the application requires information similar to that for general parole, including the prisoner's criminal history, institutional behaviour, and completion of a correction plan.[105] However, as Iftene correctly argues, only health and risk factors should matter for compassionate release – ultimately, "completing correctional plans and working to build a release plan might not be a dying person's priority".[106]

Iftene[107] also highlights the double standard in respect of illness in the Canadian judicial and correctional systems, respectively. Knowing that medical parole is rarely available, sentencing judges are inclined to impose less harsh punishments depending on the offender's health. The Parole Board, on the other hand, fails to accommodate those who fall sick during incarceration, even though the law provides for it.[108] To ensure more consistent treatment, Iftene suggests that compassionate release responsibilities be moved away from parole boards and rather be entrusted

---

100 Iftene 2017 *Alberta Law Review* 932.
101 Concluded in 2015. See Iftene 2017 *Alberta Law Review* 935.
102 Iftene 2017 *Alberta Law Review* 936.
103 Iftene 2017 *Alberta Law Review* 937.
104 *Ibid*.
105 *Ibid*.
106 *Ibid*.
107 Iftene 2017 *Alberta Law Review* 942.
108 *Ibid*.

to sentencing judges.[109] Interestingly, her proposal aligns with the approach already adopted to compassionate release in California.[110]

Overall, the Canadian position with regard to compassionate release appears much stricter than South Africa's, although not without flaws. Calling the current system "disconnected from any medical, penological, humanitarian or constitutional requirements",[111] Iftene argues that terminal illness and health incompatible with imprisonment should be the only criteria for a decision about parole by exception.[112] She also calls for an expert panel to draft a list of diseases that would qualify for this type of release[113] – something that South Africa already has in place.

5 MEDICAL-PAROLE LAW IN THE UNITED STATES

Parole in the United States takes one of two forms, namely mandatory or discretionary, with medical parole falling within the ambit of the latter. Every American state has at least one compassionate-release procedure.[114] While medical parole appears to be the most common form of compassionate release,[115] procedures vary across states. Some states exclude prisoner categories based on the type of conviction, while others base eligibility on the prisoner's age and health.[116] The following sections offer an overview of the position in the states of Mississippi, New York and California.

5 1 Mississippi

5 1 1 Type of release

In Mississippi, eligible prisoners with severe medical conditions have access to conditional medical release. This form of release is governed by Title 47 of the 2018 Mississippi Code.[117]

5 1 2 Eligibility criteria

The state's Commissioner and Medical Director of the Department of Corrections may grant conditional medical parole to offenders who have served at least one year of their sentence.[118] Non-violent offenders who are

109 Iftene 2017 *Alberta Law Review* 943.
110 See discussion under heading 5.3.
111 Iftene 2017 *Alberta Law Review* 929.
112 Iftene 2017 *Alberta Law Review* 950.
113 Iftene 2017 *Alberta Law Review* 951.
114 Cooper and Bernard 2021 *Creighton Law Review* 174.
115 *Ibid*.
116 Cooper and Bernard 2021 *Creighton Law Review* 183.
117 Prisons and Prisoners; Probation and Parole, ch 1–7.
118 S 47-7-4 of the Mississippi Code; Robina Institute of Criminal Law and Criminal Justice "Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States" (2019) https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states (accessed 2022-05-01). Note that sexual offenders are excluded from conditional release.

bedridden may receive conditional medical release regardless of the time they have served.[119]

Conditions that meet the medical eligibility criteria include a cancer diagnosis appropriate for hospice care, end-stage lung disease, end-stage heart failure, severe stroke with a disabling neurologic manifestation, end-stage liver disease, end-stage Aids, advanced Alzheimer's disease, and severe, progressive neurological disease, including paraplegia and quadriplegia.[120] For the Commissioner to grant conditional medical release, the Medical Director needs to certify that the offender is suffering from such a significant, permanent condition with no possibility of recovery, as well as that further incarceration would serve no rehabilitative purpose and would cause the state to incur unreasonable expenses.[121]

5 1 3 Cancellation of conditional medical release

Offenders placed on conditional medical release are supervised by the Department of Corrections for the remainder of their sentence terms.[122] Medical parolees who violate an order or the conditions of their conditional release[123] or recover to the point of no longer being bedridden[124] are returned to the Department's custody.

5 2 New York

5 2 1 Type of release

The New York Executive Law[125] governs conditional medical parole in New York State. Section 259s(1)(*a*) provides as follows:

> "The board shall have the power to release on medical parole any inmate serving an indeterminate or determinate sentence of imprisonment who … has been certified to be suffering from a significant and permanent non-terminal condition, disease or syndrome that has rendered the inmate so physically or cognitively debilitated or incapacitated as to create a reasonable probability that he or she does not present any danger to society, provided, however, that *no inmate serving a sentence imposed upon a conviction for murder in the first degree or an attempt or conspiracy to commit murder in the*

---

119 S 47-7-4 of the Mississippi Code; Robina Institute of Criminal Law and Criminal Justice https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states.

120 FAMM "Conditional Medical Release" (2021) https://famm.org/wp-content/uploads/2018/06/Mississippi_Final.pdf (accessed 2022-09-04).

121 S 47-7-4 of the Mississippi Code; Robina Institute of Criminal Law and Criminal Justice https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states.

122 S 47-7-4 of the Mississippi Code.

123 *Ibid*.

124 S 47-7-4 of the Mississippi Code; Robina Institute of Criminal Law and Criminal Justice https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states.

125 New York Consolidated Laws, Executive Law, art 12-B, s 259s, Release on Medical Parole for Inmates Suffering Significant Debilitating Illnesses.

> *first degree shall be eligible for such release*,[126] and provided further that no inmate serving a sentence imposed upon a conviction for any of the following offenses shall be eligible for such release unless in the case of an indeterminate sentence he or she has served at least one-half of the minimum period of the sentence and in the case of a determinate sentence he or she has served at least one-half of the term of his or her determinate sentence: murder in the second degree, manslaughter in the first degree, any offense defined in article one hundred thirty of the penal law or an attempt to commit any of these offenses. Solely for the purpose of determining medical parole eligibility pursuant to this section, such one-half of the minimum period of the indeterminate sentence and one-half of the term of the determinate sentence shall not be credited with any time served under the jurisdiction of the department prior to the commencement of such sentence."[127]

Section 259r lays down similar terms for the release of prisoners suffering from a "terminal condition, disease or syndrome".[128]

Of note here is the express requirement that the illness, whether terminal or non-terminal, must have debilitated the prisoner to the point that they would not pose a danger to society, and that those who have committed certain crimes are excluded from conditional medical release.

5 2 2 Criteria for, and duration of, medical release

To be released on medical parole, the state parole board needs to consider whether, in light of the prisoner's condition, there is a reasonable possibility that, if released, the person would not violate the law. In addition, the board should be satisfied that such a release is compatible with the welfare of society and would not serve to diminish the seriousness of the crime and thereby undermine respect for the law.[129] The medical release is also subject to certain specified terms and conditions.[130]

In deciding an application for medical parole, the parole board is expected to consider a list of factors,[131] including the nature of the prisoner's crime, the person's prior criminal record, and behaviour during incarceration. Other considerations are the remaining period before the prisoner becomes eligible for release, current age, as well as age at the time of the crime, the recommendations of the sentencing court, district attorney, victim and the victim's representatives, the nature of the prisoner's condition, and the extent of treatment required. Similar to Iftene's objections in the context of parole by exception in Canada, a number of these prescribed considerations are unrelated to humanitarian grounds, including the prisoner's record of behaviour and rehabilitation.

---

126 Authors' own emphasis.

127 S 259s(1)(*a*) of the New York Executive Law; Silber, Digard, Masci, Williams and LaChance "A Question of Compassion: Medical Parole in New York State" (2018) https://www.vera.org/downloads/publications/a-question-of-compassion-full-report_180501_154111.pdf (accessed 2024-04-29) 10.

128 S 259r(1)(*a*) of the New York Executive Law.

129 Ss 259s(1)(*b*) and 259r(1)(*b*) of the New York Executive Law.

130 Ss 259s(4) and 259r(4) of the New York Executive Law.

131 S 259s(1)(*b*) of the New York Executive Law.

Medical parole is granted for an initial period of six months,[132] provided that the parolee agrees to remain under the attending physician's care while on medical parole and to be treated in a designated hospital,[133] hospice[134] or other facility specified on the medical discharge plan.[135] Another condition of release is that the parolee be supervised.[136] Moreover, the parolee is expected to undergo periodic medical examinations, and specifically also an examination at least one month before the medical parole expires.[137] Based on the treating physician's report following such examination,[138] particularly the findings as to whether the parolee continues to suffer from the condition and remains unable to move on their own or perform normal daily duties,[139] the parole board will consider granting a further period of medical parole.

5 3 California

Unlike Mississippi and New York, the state of California distinguishes between medical parole and compassionate release, and each has its own set of eligibility criteria. The former falls under the California Code of Regulations (CCR),[140] and the latter under the California Penal Code.[141]

5 3 1 Eligibility criteria for medical parole

In respect of medical parole, section 3359.1[142] of the CCR provides as follows:

> "(a) [A]n inmate who is found to be permanently medically incapacitated, as defined in (a)(1) below, with a medical condition that renders him or her permanently unable to perform the activities of daily living and results in the inmate requiring 24-hour care, shall be referred to the Board of Parole Hearings, within 30 working days of the Chief Medical Officer or Chief Medical Executive determination, if all of the following conditions exist:
>
> (1) The inmate is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living and results in the inmate requiring 24-hour care. Activities of basic daily living are breathing, eating, bathing, dressing, transferring, elimination, arm use, or physical ambulation.
>
> (2) The medical/physical limitations documented in subsection (a)(1) above did not exist at the time the inmate was sentenced to the current incarceration.

132 Ss 259s(4) and 259r(4) of the New York Executive Law.
133 In terms of art 28 of 2015 New York Laws - Public Health.
134 In terms of art 40 of 2015 New York Laws - Public Health.
135 Ss 259s(4) and 259r(4) of the New York Executive Law.
136 *Ibid*.
137 *Ibid*.
138 *Ibid*.
139 *Ibid*.
140 CCR 2019 (latest version).
141 CA Penal Code 2023.
142 Medical Parole General Policy, under title 15.

(3) The inmate is not serving a life sentence without the possibility of parole.
(4) The inmate is not sentenced to death."

Similar to the requirements in Mississippi and New York, an applicant for medical parole in California must suffer from a permanent medical condition that renders them unable to perform basic daily activities and be in need of full-time care. Additional requirements are that the medical condition must not have been pre-existing at the time of sentencing, and that the person's release should not "reasonably pose a threat to public safety".[143]

Offenders sentenced to death and life imprisonment without the option of parole are excluded from medical parole.

5 3 2 Eligibility criteria for compassionate release

With regard to compassionate release, section 1172.2[144] of the California Penal Code stipulates:

"(a) [I]f the statewide chief medical executive, in consultation with other clinical executives, as needed, determines that an incarcerated person satisfies the medical criteria set forth in subdivision (b), the department shall recommend to the court that the incarcerated person's sentence be recalled.
(b) There shall be a presumption favoring recall and resentencing under this section if the court finds that the facts described in paragraph (1) or (2) exist, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety … based on the incarcerated person's current physical and mental condition.
(1) The incarcerated person has a serious and advanced illness with an end-of-life trajectory. Examples include, but are not limited to, metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced end-stage dementia.
(2) The incarcerated person is permanently medically incapacitated with a medical condition or functional impairment that renders them permanently unable to complete basic activities of daily living, including, but not limited to, bathing, eating, dressing, toileting, transferring, and ambulation, or has progressive end-stage dementia and that incapacitation did not exist at the time of the original sentencing."

Similar to medical parole, compassionate release is not available to offenders sentenced to death or life imprisonment without the possibility of parole.[145]

The matter is heard by the original sentencing judge, wherever possible,[146] and the referring physicians are expected to be available to the court throughout the recall/resentencing proceedings.[147] This aligns with

143 S 3359.1(d) of the CCR.
144 Part 2, title 7, chapter 4.5, article 1.5.
145 S 1172.2(*o*) of the CA Penal Code.
146 S 1172.2(*i*) of the CA Penal Code.
147 S 1172.2(*j*) of the CA Penal Code.

Iftene's suggestion in the Canadian context,[148] and is to be applauded, as the sentencing judge's background knowledge of the case is bound to ensure more consistency in dealing with these matters.

Another commendable initiative is California's stated aim to release an annual report on its compassionate-release programme with effect from January 2024. Facts to be included in the report are the number of people referred to the court for recall/resentencing, and the criteria applied to their applications, whether terminal illness, functional impairment or cognitive impairment.[149] The report will also state the number of people released on and denied compassionate release.[150]

5 3 3 Cancellation of medical parole

Medical parole in California may be cancelled in terms of section 3359.6 of the CCR. This may occur if, following an examination, the attending physician finds that the medical parolee's condition "has improved to the extent that the medical parolee no longer qualifies for medical parole". Alternatively, medical parole may be terminated if the parole agent regards the parolee as posing "a threat to himself or herself, another person, or to public safety, or there has been a significant change in his or her conditions of release".[151]

6 COMPARATIVE OVERVIEW

The following table offers a quick overview of key elements of the medical-parole systems in the jurisdictions discussed above:

	SOUTH AFRICA	**CANADA**	**UNITED STATES**		
			Mississippi	**New York**	**California**
Type of parole	Medical parole	Temporary absence and parole by exception	Conditional release	Conditional release	Medical parole and compassion-ate release
Eligible types of illnesses	Terminal condition rendering offender physically incapacitated and severely limited in daily activity[152]	Temporary absence: No stipulated illnesses[154] Parole by exception: Terminal illness or risk of serious	Limited number of defined examples provided[157]	Significant, permanent non-terminal or terminal condition, syndrome or disease rendering prisoner physically	Medical parole: Medical condition that renders prisoner permanently unable to perform daily activities and

148 Iftene 2017 *Alberta Law Review* 943.
149 S 1172.2(*p*)(1) of the CA Penal Code.
150 S 1172.2(*p*)(2) and (3) of the CA Penal Code.
151 S 3359.6(*a*)(1) and (2) of the CCR.
152 S 79(1) of the 1998 Correctional Services Act.

	Comprehensive yet non-exhaustive list of illnesses provided[153]	harm to physical or mental health during ongoing confinement [155] *Qualification: Only terminal illness for offenders sentenced to life or an indeterminate sentence*[156]		and cognitively debilitated or incapacitated [158]	in need of 24-hour care Compassionate release: Serious and advanced illness with an end-of-life trajectory, with only a few examples given[159]
Minimum period served to be eligible	No minimum period stipulated	Temporary absence: Escorted – no minimum[160] Unescorted – has served (the longer of) six months or half of the term required to reach full parole eligibility, as regulated by section 115(1)(c) of the Act[161] Parole by exception: No minimum[162]	At least a year of sentence[163] *Qualifications:* ● *Sexual offenders excluded* [164] ● *No minimum for bedridden non-violent offenders* [165]	Half of sentence[166]	No minimum period required *Qualification: Condition must not have existed at the time of sentencing*[167]

154 S 17.1 of the Corrections and Conditional Release Act.
157 FAMM https://famm.org/wp-content/uploads/2018/06/Mississippi_Final.pdf.
153 Reg 29A(5) of the Correctional Services Regulations.
155 S 121 of the Corrections and Conditional Release Act.
156 S 121(2) of the Corrections and Conditional Release Act.
158 S 259s(1) and 259r(1) of the New York Executive Law.
159 S 1172.2(*b*)(1) of the CA Penal Code.
160 S 17.1 of the Corrections and Conditional Release Act.
161 S 115(1)(*c*) of the Corrections and Conditional Release Act.
162 S 121 of the Corrections and Conditional Release Act.
163 S 47-7-4 of the Mississippi Code.
164 *Ibid*.
165 *Ibid*.
166 S 259s(1) of the New York Executive Law.
167 S 3359.1(*a*)(2) of CCR; S 1172.2.(*a*)(2) of the CA Penal Code.

Types of conviction excluded	None stipulated	Temporary absence: None stipulated[168] Parole by exception: None in event of terminal illness[169] *Qualification: Not available to offenders serving life or indeterminate sentence and who are not terminally ill*[170]	Offenders convicted of first-degree murder and attempt or conspiracy to commit first-degree murder excluded[171]	Offenders convicted of sex crimes excluded[172]	Offenders sentenced to death or life imprisonment without parole excluded from both medical parole and compassion-ate release[173]
Cancellation of parole	No provision for cancellation	Return to prison in the event of recovery or violation of conditions[174]	Return to prison in the event of recovery or violation of conditions [175]	Medical parole terminates after six months[176]	Return to prison in the event of recovery or violation of conditions [177]

6 1 Comparative strengths of the South African system

While the jurisdictions reviewed have different definitions for the types of illness eligible for medical parole or conditional medical release, the benefit of a pre-approved list of illnesses or conditions speaks for itself in providing maximum legal certainty. South Africa[178] provides such a list in regulation 29A(5) of its Correctional Services Regulations. Section 29A(6) of the Regulations also stipulates that the list is not exhaustive, allowing the Medical Parole Advisory Board to consider any other, unlisted illness based on reports from specialists.

In addition, South Africa's approach of not taking into account the type of conviction as a deciding factor for medical parole, while different from the other jurisdictions, is in line with the country's esteemed Constitution. The

168 S 17 of the Corrections and Conditional Release Act.

169 S 121(1)(*a*) of the Corrections and Conditional Release Act.

170 S 121(1)(*b*) of the Corrections and Conditional Release Act. See also the exceptions in terms of s 121(2).

171 FAMM https://famm.org/wp-content/uploads/2018/06/Mississippi_Final.pdf.

172 FAMM https://famm.org/wp-content/uploads/2018/06/Mississippi_Final.pdf; s 47-7-4 of the Mississippi Code.

173 S 3359.1(*d*) of the CCR. See also S 1172.2(*o*) of the CA Penal Code.

174 S 17(3) of the Correctional and Conditional Release Act.

175 S 47-7-4 of the Mississippi Code.

176 S 259r(4) of the New York Executive Law.

177 S 3359.6(*a*)(1) and (2) of the CCR.

178 And, to a lesser extent, the state of Mississippi.

Constitution entrenches human dignity as one of the nation's founding values. It follows that the prisoner's right to dignity takes precedence over the crime they committed. This was confirmed in the Derby-Lewis matter,[179] where the court held that "the provisions of any statute ought to be interpreted as far as is possible in a manner that upholds basic tenets of our law which are entrenched in the supreme law of the land, our Constitution".

6 2 Comparative weaknesses of the South African system

Unlike jurisdictions such as Canada (in relation to unescorted temporary absence) and the states of New York and Mississippi, South Africa has no legal provision to disqualify certain offenders from medical parole based on their time served. Such a provision would go a long way towards preventing inconsistent treatment, as in the case of Jacob Zuma's release on medical parole less than two months into his fifteen-month sentence.

Of the jurisdictions discussed, South Africa is also the only one that lacks a legislative provision on cancellation of medical parole. Whereas all the other jurisdictions provide for termination of such parole where parolees have recovered from their medical condition, South Africa's Correctional Services Act stipulates that parole cannot be cancelled merely because the parolee has recovered.[180] In other words, medical parole continues, even when the reason for granting it has ceased to exist. This clearly exposes the system to abuse.

7 CONCLUSION AND RECOMMENDATIONS

South Africa's medical-parole law has come a long way since the promulgation of the Prisons Act. The current provisions and regulations on medical parole can be applauded for delineating a clear and transparent process for applying for such parole, as well as for providing a comprehensive and well-defined list of eligible illnesses and conditions.[181] Also, medical parole is not a rarity, as is the case with parole by exception in Canada.[182]

By not relying on the type of conviction when deciding eligibility for medical parole, South Africa adheres to the Constitution and, more specifically, the nation's founding value of human dignity.[183] When a prisoner contracts an illness that severely limits daily activity and self-care, their dignity should be prioritised.[184]

Yet there is ample room to strengthen the country's medical-parole system and safeguard it from future abuse. Requiring prisoners to serve a

---

179 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 55.
180 S 79(7) of the Correctional Services Act.
181 Reg 29A(5) of the Correctional Services Regulations.
182 Iftene 2017 *Alberta Law Review* 929.
183 S 10 of the Constitution.
184 *Derby-Lewis v Minister of Justice and Correctional Services supra* par 55–56.

minimum period of imprisonment before they can apply for medical parole[185] could help prevent abuse of this type of parole as a quick escape route. Perhaps an even better option would be to allow medical parole only for conditions that did not exist at the time of sentencing,[186] considering that courts already consider health factors when imposing a sentence.[187] The move introduced in California to refer cases of compassionate release back to the original sentencing court, together with the reports compiled by the medical-parole board, is another avenue worth exploring to ensure more consistent treatment of prospective medical parolees.[188]

However, arguably the most important step South Africa can take to strengthen its current medical-parole system is to provide for the cancellation of medical parole where the parolee recovers. This is the practice in all the other jurisdictions discussed. If all else fails, the implementation of such a provision on its own may be just what the doctor ordered.

[185] Similar to s 47-7-4 of the Mississippi Code and s 259s(1) of the New York Executive Law.

[186] Similar to s 3359.1(*a*)(2) of the CCR. See also FAMM https://famm.org/wp-content/uploads/2018/06/Mississippi_Final.pdf.

[187] Iftene 2017 *Alberta Law Review* 942.

[188] Iftene 2017 *Alberta Law Review* 943.