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Healthcare practitioners' ethical and legal obligations towards hunger strikers

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HEALTHCARE PRACTITIONERS' ETHICAL and LEGAL OBLIGATIONS TOWARDS HUNGER STRIKERS

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A research report submitted in partial fulfilment of the degree of MSc. Med (Bioethics and Health Law), Steve Biko Centre for Bioethics, Faculty of Health Sciences, University of the Witwatersrand, Johannesburg

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ABSTRACT

When faced with a hunger striking prisoner, health practitioners face the dilemma of their ethical duty to save lives on the one hand and their duty to respect the patient/prisoner's right to autonomy on the other.

Whilst some regimes opt for the approach that force-feeding should be mandatory, other bodies such as the World Medical Association favour the approach that force-feeding is cruel, inhuman and degrading. I take this further and argue that it also amounts to torture.

There is insufficient guidance for health practitioners dealing with hunger striking prisoners. I therefore explore this topic further and provide insights as well as make proposals for health practitioners who find themselves in this situation.

I examine the various methods used to force-feed a hunger striker, most of which are extremely cruel and inhuman, and demonstrate how these methods fall within the definition of torture.

I look at the ways in which various countries around the world respond to hunger strikers and use these to highlight and illustrate some of my arguments and proposals.

I also examine the ethical situation regarding force-feeding and make proposals regarding a health practitioner's ethical obligations towards hunger strikers.

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CHAPTER 1: INTRODUCTION

1.1

There is a lack of clarity and consensus regarding force-feeding of hunger strikers. Certain regimes are taking the bold step to legislate for mandatory force-feeding of hunger strikers and there are human rights organisations worldwide that seem to favour the opposite approach namely that force-feeding amounts to an infringement of dignity and is cruel, degrading and inhumane.[1]

For example, Dr. Steven Miles, President of the American Association of Bioethics and author of "*Oath Betrayed: America's Torture Doctors*" has stated that: "the persistence of the military's force-feeding policy in the face of international law, and the manner in which it is done, constitutes torture." [2]

When discussing the principles of the UN resolution regarding the ethics of health practitioners treating prisoners, Pont, Stover and Wolff argue that these principles preclude health practitioners from force-feeding prisoners.[3] They also consider the unusual relationship that exists between a prisoner and a health practitioner, and argue that this should place an extraordinary ethical obligation upon the health practitioner, particularly when considering the prisoner's vulnerability. Pont et al argue that health practitioners too, are vulnerable not only because of this relationship of dependency but also because of their

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1 World Medical Association Declaration Of Malta (2006) available from <http://www.wma.net/en/10home/index.html> (accessed 1 October 2014)

2 S Miles *Oath betrayed America's Torture Doctors* (2009) 210

3 J Pont, H Stover, H Wolff: *"Resolving ethical conflicts in Practice and Research" American Journal of Public Health,* (2012) (102). 3 475

conflicted loyalty to their employer and because they may be under pressure to "serve medical interests other than patient care."[4]

I will explore the relationship between the health practitioner and the prisoner, and the hunger striking prisoner in particular and I will examine the ethics of both dealing with hunger striking prisoners and force-feeding hunger strikers. Hunger strikes can have serious consequences and ultimately can result in death. The question I will look at is whether such serious consequences justify intervening against the express wishes of the striking prisoner. My claim is that it does not.

In chapter 2, I will explore the definitions of the relevant concepts. Chapter 3 illustrates the problems that may arise in prisons concerning hunger strikers, force-feeding, health practitioners and the ethics of force-feeding hunger strikers. I also examine whether hunger striker's rights of autonomy are limited by incarceration and if so, whether it ought to be so. A discussion on the bioethical analysis relative to force-feeding and the ethics of health practitioners involved in force-feeding will follow. Chapter 4 outlines the gruesome and cruel methods of force-feeding. Chapter 5 considers the differences and parallels between hunger strikers and euthanasia patients. Chapter 6 examines international as well as South African law and treaties dealing with prisoners, hunger strikers and force-feeding. Chapter 7 compares the arguments for and against force-feeding. In chapter 8 I draw conclusions and make proposals and recommendations. The conclusion I come to is that force-feeding in its present form is tantamount to torture and that health practitioners should not be required to participate in force-feeding hunger strikers. I furthermore make

[4] J Pont, H Stover, H Wolff: *"Resolving ethical conflicts in Practice and Research" American Journal of Public Health,* (2012) (102). 3 476

recommendations as to how to safeguard health practitioners should they find themselves in a situation of being required to force-feed a hunger striker.

CHAPTER 2 : DEFINITIONS

2.1

The following are definitions of the most important terms relating to my study:

2.1.1 ***Prisoner***

"Prisoner" is defined in the Collins dictionary as "a person kept in custody as a punishment for a crime or while awaiting trial or for some other reason."[5]

This seems to be the most encompassing definition covering both prisoners awaiting trial and those sentenced and should be differentiated from the term detainee which refers to those who are deprived of their freedom but not in a criminal context. For the purposes of this report, I am concerned with those prisoners who are imprisoned because of a crime or those awaiting trial, including those detained in police custody.

2.1.2 ***Prison***

Considering the above, "prison" can be defined as a place in which prisoners are held. The Collins dictionary defines prison as: "a public building used to house convicted criminals and accused persons awaiting trial."[6]

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5 Collins *Concise Dictionary* 5th ed (2001) 1192

6 Collins *Concise Dictionary* 5th ed (2001) 1192

2.1.3 ***Hunger Striker***

The World Medical Association (WMA) defines a "hunger striker" as a "mentally competent person who has indicated that he or she has decided to refuse to take food and or fluids for a significant interval."[7] Despite this clear definition there appears to be much confusion worldwide about what is the actual definition. The reason for this confusion is because within the prison context, the term hunger strike can mean many things. Reyes refers to what he calls a real hunger strike as "voluntary total fasting".[8] Reyes argues that the best description is from the French phrase "jeune de protestation" which means fasting as a form of protest and that this is the best way to describe a hunger strike because it gives a motive behind the fast as opposed to only specifying the fast.[9] According to Reyes, fasting, voluntariness, and a stated purpose are necessary before a prisoner can be said to be on a hunger strike. [10]

The issue of competence relating to hunger strikers is important. Almost all of the definitions of hunger strikers include a reference to "competence". Reyes stated that "fasting prisoners who are mentally ill or otherwise incapable of unimpaired rational judgment and decision-making cannot be considered real hunger strikers, whatever their own claims".[11] I support Reye's definition with the proviso that voluntariness by implication includes competence, thus, fasting, voluntariness/competence and stated purpose are the key elements.

World Medical Association Declaration of Malta (2006) available from http://www.wma.net/en/10home/index.html (accessed 12 November 2014)

8 H Reyes: "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" Geneva ICRC Resource Centre (1998) http://www.icrc.org/web/eng/siteeng0.nsf/html/health-article-010198 (accessed 1 October 2014)

9 H Reves "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" Geneva ICRC Resource Centre (1998) http://www.icrc.org/web/eng/siteeng0.nsf/html/health-article-010198 (accessed 1 October 2014)

10 H Reves "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" Geneva ICRC Resource Centre (1998) http://www.icrc.org/web/eng/siteeng0.nsf/html/health-article-010198 (accessed 1 October 2014)

11 H Reves "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" Geneva ICRC Resource Centre (1998) http://www.icrc.org/web/eng/siteeng0.nsf/html/health-article-010198 (accessed 1 October 2014)

2.1.4 ***Health Care Practitioner***

"Health care practitioner" refers to all those health professionals who come into contact with the prisoner. In terms of the National Health Act[12] the term "health personnel" includes health care providers and health workers. The NHA definition of health care providers is "persons providing health services in terms of any law."[13] Doctors clearly fall within the definition of healthcare providers. In terms of the Act, the duties of health care personnel are to provide emergency medical treatment; ensure health care users participate in decision making; obtain informed consent; respect confidentiality; protect health records and provide access to information.[14]

2.1.5 ***Hunger Strike and Food Refusal***

A "hunger strike" is food refusal used as a form of protest or demand. The World Medical Association's Declaration of Malta defines a hunger strike as the refusal of nutrition for a significant period.[15] Hunger strikes have also been known to be called voluntary total fasting. However, the WMA in its Declaration of Malta noted that fasts in detention are not always voluntary and are seldom "total".[16] Voluntariness can be influenced by coercion, persuasion or manipulation and especially in the case of group hunger strikes, one would need to determine whether the strike had been embarked upon freely and voluntarily or under some kind of coercion, persuasion or manipulation. Disclosure requires that the health practitioner inform the prisoner of the possible physical and mental consequences of his hunger strike and also continuously remind him of the options available to him as well

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12 Act 61 of 2003

13 section 1

14 NHA section s 1

15 SS Crosby, CM Apovian, MA Grodin: "Hunger Strikes, Force-feeding and Physician's responsibilities" *JAMA* (2007) 298(5) 563.

16 World Medical Association Declaration of Malta (2006) available from http://www.wma.net/en/10home/index.html (accessed 1 October 2014)

as the kinds of vitamins and supplements he should be taking to prevent irreversible damage once the strike is over. The health practitioner is also obliged to ensure that the hunger striker fully understands what the implications are of embarking upon a hunger strike.

The duration of a hunger strike also appears relevant to its definition. According to the WMA, anything under 72 hours cannot be classified as a hunger strike because this "short term rejection of food" rarely gives rise to an ethical dilemma as the health of the prisoner is not damaged provided fluids continue to be taken.[17] Thus, the WMA's definition of a hunger strike implies that the strike should last longer than 72 hours with water being ingested during this period. What is also relevant to the definition of a hunger strike is that it involves the refusal of food but not water. Refusal of fluids is called a "thirst strike" and cannot be maintained for longer than 4-10 days before permanent damage or death occurs. Because death occurs so quickly a thirst strike could never be an effective means of protest.[18]

It is important to differentiate between food refusal and hunger strike and key here is the intention behind it. Prisoners might refuse food for medical reasons which should not fall within the definition of a hunger strike, despite the fact that it would fall within the WMA's definition of a hunger strike. The intention behind the hunger strike is crucial and it must be a form of protest against something. Reyes is of the view that a hunger strike must be for a particular reason or purpose and this is what differentiates it from food

[17] P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 16
[18] P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 16

refusal.[19] I concur with Reyes that the intention behind the strike must be the key factor in determining whether or not it is a hunger strike.

The definition I prefer as it encompasses all the requirements is by Muller quoting from Jorg Pont that a hunger strike is: "a total or partial prolonged refusal to eat by a person initially in full possession of his mental faculties, whose intention is to protest against circumstances or measures, or to demand something that does not appear to be attainable by other means."[20]

Muller contends that the "hunger strike is distinguishable on the one hand from the voluntary refusal to eat with exclusively suicidal intent, and on the other hand from an involuntary, psychosis induced refusal to eat."[21]

What is key and this will be discussed more fully below, is that the intention behind the hunger strike is not death and at the time of making the decision to strike the prisoner was still in control of his mental faculties, thus mentally competent to take the decision to strike.[22]

*2.1.6 **Force-feeding and artificial feeding***

Force-feeding has also been called forcible feeding, compulsory feeding or artificial feeding.[23]

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19 H Reyes: "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" Geneva ICRC Resource Centre (1998) http://www.icrc.org/web/eng/siteeng0.nsf/html/health-article-010198 (accessed 1 October 2014)

20 M Muller "Hunger Strikes and Force-Feeding" January 2011 *SAZ* revised English Edition <http://www.oefre.unibe.ch/content/e700/e1357/e770/e8489/e9259/hungerstreik_engl_ger.pdf (accessed 15 November 2014)

21 M Muller "Hunger Strikes and Force-Feeding" January 2011 *SAZ* revised English Edition <http://www.oefre.unibe.ch/content/e700/e1357/e770/e8489/e9259/hungerstreik_engl_ger.pdf (accessed 15 November 2014)

22 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 22

23 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 15

Although these terms tend to be used interchangeably, Pauline Jacobs argues that they do not mean the same thing. She highlights that while all force-feeding is artificial, not all artificial feeding is forced. Forced feeding also implies a degree of coercion whereas artificial feeding does not. Both forced feeding and artificial feeding require medical intervention but the one (forced feeding) requires force and the other (artificial feeding) does not.[24]

The WMA's Declaration of Malta also distinguishes between artificial feeding and forcible feeding and declares that artificial feeding can be ethically appropriate if agreed to by the hunger striker whereas they declare forcible feeding as being "never ethically appropriate."[25]

The appropriate definition of force-feeding appears to be the administering of medical treatment by which the hunger striker is compelled to ingest food. What the definition fails to show however, is that the use of the word "compelled" indicates that a degree of persuasion is involved. My contention is that there is no persuasion involved. The insertion of a food tube whilst he is strapped down implies non-compliance as well as no co-operation, in other words, force. The administering of anti-nausea medication compounds this because it prevents him from vomiting out the food that he has been forced to ingest. So in other words, the degree of force involved is entirely relevant.

Wikipedia defines force-feeding as the administration of feeding through a tube against the person's will.[26] I have chosen to highlight Wikipedia's definition because it makes use of

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[24] P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 16

[25] World Medical Association Declaration of Malta (2006) guidelines 12 & 13 available from http://www.wma.net/en/10home/index.html (accessed 1 October 2014)

[26] http://en.wikipedia.org/wiki/euthanasia accessed on 18 September 2014

the wording "against the person's will" which I consider to be the most crucial part of the definition because it implies a degree of force and usually restraint.

2.1.7 ***Euthanasia***

The Collins dictionary definition of "euthanasia" is "the act of killing someone painlessly to relieve suffering from an incurable illness."[27] McQuoid-Mason and Dada define it as "an act or omission that brings about an easy and painless death for persons suffering from an incurable or painful terminal disease."[28]

"Euthanasia" can be differentiated into active and passive euthanasia. Active euthanasia implies that a person intentionally or actively participates in the patient's death while passive euthanasia involves the withdrawal or withholding of treatment thereby leading to a person's death. It is the intention of the person undergoing euthanasia to end their life.[29] There are those who argue that a hunger strike is a form of suicide, but it is important to remember that a hunger striker does not intend to die, he hopes that his demands will be met and that he can start eating again.[30] The differences between a hunger strike and euthanasia will be discussed in more detail below.

2.1.8 ***Suicide***

Suicide occurs where a person takes his or her own life. There is no law in South Africa that governs suicide but the applicable law would be the common law of murder, particularly when someone has assisted another to commit suicide. South African courts have held that if someone knowingly assist another to take his life, that person will be

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27 Collins *Concise Dictionary* 5th ed (2001) 498
28 D. McQuoid-Mason and M Dada *A-Z of Medical Law* (2011) 185
29 D. McQuoid-Mason and M Dada *A-Z of Medical Law* (2011) 185
30 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 22

guilty of murder.[31] A Commission was appointed in South Africa to examine the situation of assisted dying. This commission proposed a Euthanasia Act which has not been implemented. A further proposal in 1997 recommended that doctor assisted suicide should be allowed for those suffering from a terminal illness or experiencing unbearable suffering.[32] It is important to note however, that complying with a mentally competent patient's informed wishes not to receive any further treatment which results in the patient's death, is not regarded as assisted suicide but a form of passive euthanasia.[33]

2.1.9 ***Torture***

The WMA's Tokyo Declaration defines torture as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority to force another person to yield information, make a concession or for any other reason."[34]

Miller and Seumas in a discussion on torture and its definition conclude that torture is:

> (a) the intentional infliction of extreme physical suffering on some non-consenting, defenseless person:
>
> (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a));
>
> in general, undertaken for the purpose of breaking the victim's will.[35]

The Prevention of Combating and Torture of Persons Act[36] defines torture as:

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31 Ex parte Min Justice: In re Grotjohn 1970 (2) SA 355 A

32 SA Law Commission *Euthanasia and the Artificial preservation of life* Project 86 (1998) xxii

33 D. McQuoid-Mason and M Dada A-Z of Medical Law (2011) 406

34 D. McQuoid-Mason and M Dada *A-Z of Medical Law* (2011) 418

35 Miller Seumas "Torture" *Stanford Encyclopedia of Philosophy* (Summer 2011) EN Zalta (Ed) url http://plato.stanford.edu/archives/sum2011/entries/torture (accessed Jan 24 2015)

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person-

a) for such purposes as to-

(i) obtain information or a confession from him…;

(ii) punish him…for an act he….has committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him…to refrain from doing anything or

b) for any reason based on any discrimination of any kind, when such pain is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[37]

CONCLUSION :

I have examined the definitions of some of the core words and concepts that will be used and referred to throughout this paper. A hunger strike can be defined as a prolonged refusal of food made by a competent individual in protest against something or in protest to something and which is not thought to be attainable by any other means. I have distinguished between forcible feeding and artificial feeding. The distinction is important because the WMA finds artificial feeding when it is agreed to by the patient, to be ethically appropriate and finds forcible feeding to never be ethically acceptable. I have also

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[36] Act 13 of 2013
[37] Act 13 of 2013

highlighted the differences between a hunger strike, euthanasia and suicide and noted that euthanasia can be active or passive. I have included the definition of torture which I find to be relevant in the light of my suggestion that force-feeding be regarded as torture.

CHAPTER 3 : BIOETHICAL ISSUES

In this chapter I will look at the problems encountered in prisons when dealing with hunger strikers. Central to this is the dilemma between health practitioners employed by the State or institution and prisoners held by the institution or in the charge of the State. Allied to this is the notion of the prisoner's right to personal autonomy versus the health practitioner's duty of beneficence. The issue of dual loyalty is also a factor. Particularly that of the health practitioner's loyalty to his employer and to his patient, the prisoner. Hunger strikers will refuse to be fed by definition and in this way health practitioners will be confronted with the prisoner's autonomy and his right to self-determination. Below is an evaluation of these key bioethical concepts. I will also consider whether incarceration does or ought to limit a prisoner's right to personal autonomy.

3.1 PROBLEMS IN PRISONS RELATING TO HUNGER STRIKES

3.1.1 Ethical issues faced by Health Practitioners: Dual Loyalty

The British Medical Association, in their Human Rights Handbook state that:

> The relationship of health professionals in a prison system to their detainee-patients is a difficult one in any society because the health professionals' medical and ethical responsibilities to their patients may conflict with their perceived responsibilities to the prison system which controls and directs their work. [38]

The problem for health practitioners dealing with hunger striking prisoners is two-fold. One issue is their commitment to saving lives and the other is their loyalty to their employer. Health practitioners dealing with hunger striking prisoners, are usually employees of the State and therefore find themselves in a situation of dual loyalty.

Pont, Stover and Wolff[39] define dual loyalty as: "a clinical role conflict between professional duties to a patient and obligations, whether express or implied, to the interests of a third party be it an employer, an insurer or the State."[40]

When dealing with prisoners, this dual loyalty is to the prisoner who is the patient and to the State who is the employer.

Muller argues that when health practitioners are employed by the State their duty is first and foremost to the State.[41] I cannot agree with this viewpoint. I argue that the health practitioner's duty should always be first and foremost to the patient or, in this instance, to the prisoner on hunger strike.[42] I furthermore recommend that, in order to prevent the blurring of lines between duties that prison health services should be kept independent of

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38 British Medical Association *The Medical Profession and Human Rights Handbook* (2001) 103

39 J Pont, H Stover, H Wolff: *"Resolving ethical conflicts in Practice and Research" American Journal of Public Health,* (2012) (102). 3 475

40 J Pont, H Stover, H Wolff: *"Resolving ethical conflicts in Practice and Research" American Journal of Public Health,* (2012) (102). 3 475

41 M Muller "Hunger Strikers and Force-Feeding" (2011) *SAZ* revised English Ed. http://www.oefre.unibe.ch/content/e700/e1357/e770/e8489/e9259/hungerstreik_engl_ger_pdf. accessed 15 November 2014)

42 M Silver is also a proponent of this view as is G Annas

the prison authorities. Health practitioners treating prisoners should not be employed by the prison service but should be independently employed.

Health practitioner's dealing with hunger striking prisoners are caught in a dilemma between the need to preserve life and respect for the autonomy of the individual hunger striker.[43] As Silver notes: "instructing doctors to treat patients against their will pits doctor against patient creating a very unhealthy dynamic for the medical profession in general."[44] This becomes especially problematic given that the doctor-patient relationship is one based on trust. In order to avoid undermining this trust I suggest that this scenario be avoided at all costs.

Whenever a prisoner refuses food, he poses an ethical dilemma for the physician treating him.[45] Lazarus describes this dilemma as one between the detainee's autonomy and the physician's duty of beneficence.[46] To put it more simply, the physician is faced with having to balance his professional obligations between respecting the informed decisions of a competent patient and serving the patient's best medical interests.[47]

Lazarus refers to opinion E8-08 of the American Medical Association's (AMA) code of Medical Ethics which provides that "informed consent is a basic policy in both ethics and law that physicians must honor, unless the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent."[48]

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43 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 147

44 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review* (2005) (58) 2 653

45 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705

46 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705

47 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705

48 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705

Added to this, according to opinion E2.067 of the same ethics code, the use of restraints to force-feed hunger strikers is deemed to be inhumane and degrading and falls within the prohibition against torture which is contained in the code. Lazarus argues that where an individual makes a decision not to eat in order to achieve a political end, this does not fall within the category of when it would be appropriate to provide medical care without consent. He reiterates that "someone who is able to object so vigorously to an unwanted intervention that it can only be administered under restraint cannot be said to be in a situation in which harm from failure to treat is imminent." [49] In other words, Lazarus is saying that if the prisoner is able to object strenuously to being force-fed this ought to be an indication that he is in control of his person and aware of what he is doing by refusing food. The fact that he would need to be restrained in order to be fed should also highlight how vociferously committed he is to his purpose. Lazarus ultimately concludes that "an individual who has decision-making capacity and has made a voluntary decision to refuse food to achieve a political end meets none of the conditions under which it would be appropriate to provide medical care without consent." [50]This must be correct as it is in line with a person exercising his rights to physical and psychological integrity.

The fourth principle of the Malta Declaration looks at the concept of dual loyalty and concludes that the physician's primary loyalty always must be to his patient:

> Physicians attending hunger strikers can experience a conflict between their loyalty to the employing authority (such as prison management) and their loyalty to patients. Physicians with dual loyalties are bound by the same ethical principles as other physicians, that is to say that their primary obligation is to their patient.

[49] J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705
[50] J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *British Medical Journal* (2013)., 346:f3705

This principle needs to be read together with principle 5 of the Declaration which states that:

> Physicians must remain objective in their assessments and not allow third parties to influence their medical judgment. They must not allow themselves to be pressured to breach ethical principles, such as intervening medically for non-clinical reasons.

These principles make it clear that physician loyalty must always be first and foremost to the prisoner patient and that the physician should not allow the prison authorities to influence him otherwise.

In a clinical setting, it is widely accepted that a patient can refuse life sustaining nutrition and the decision to do so will be respected by health practitioners and authorities due to the accepted principle of autonomy. [51] However, it appears that in the prison setting this is not necessarily as widely accepted. Chapter 7 considers possible scenarios where it might be acceptable for the health practitioner to interfere, for example where a prisoner embarks upon a hunger strike in an attempt to avoid serving out his sentence. A discussion on the role of justice is also considered in section 7.2.6.

An issue which warrants consideration is whether it can be said that a prisoner's personal autonomy is limited or ought to be limited during incarceration. This question will be dealt with below.

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[51] section 6 (1) (d) National Health Act

3.1.2 **Can incarceration justify limiting a prisoner's personal autonomy?**

There is no doubt that the right of personal autonomy is well established in medical ethics. Patient autonomy can be defined as the ethical principle that respects the ability of mentally competent patients to make decisions for themselves. [52] In the clinical setting it is accepted that a patient can refuse life sustaining medical treatment if he so chooses and the health practitioner usually cannot refuse to recognize this right.[53] The question then arises as to whether, once a person is detained in prison, this right can be or ought to be limited by virtue of the incarceration. An argument that is sometimes used to justify force-feeding is that a prisoner by virtue of being incarcerated does not enjoy the same rights to personal autonomy as the ordinary citizen. This argument is discussed in more depth in chapter 7 below. I will argue that incarceration ought not to limit a prisoner's right to personal autonomy. In the South African appeal court case of Min of Justice v Hoymeyer, the court quoted from the dissenting judgement of Corbett JA in Goldberg's[54] case that "a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those rights expressly taken away by virtue of his incarceration……he will no longer enjoy freedom of movement nor any choice in the place of his imprisonment and his contact with the outside world will be curtailed and regulated……nevertheless there is a substantial residuum of basic rights which he cannot be denied."[55]

I will also examine two relevant cases that came before the US Supreme Court in this regard.

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52 D McQuoid and Dada A-Z of Medical Law (2011) 32

53 National Health Act s 6 (1) (d); *Clarke v Hurst NO* 1992 (4) SA 630D

54 *Goldberg and others v Min Prisons and others* 1979 (1) SA 14 (A)

55 *Min Justice v Hofmeyer* 1993 (3) SA 131 (AD)

In *Turner v Safley*, the US Supreme Court maintained that a prisoner retains those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[56] This ought to be a fairly persuasive argument in favour of the prisoner retaining the right to personal autonomy as it cannot be said to be one which interferes with the "legitimate penological objectives of the correctional system." In Turner's case the court stated that prison walls do not separate prisoners from the protections of the constitution. Hence for example, prisoners retain the constitutional rights to petition the government for redress of grievance; they are protected against invidious discrimination and they enjoy the protections of due process".[57]

The Cruzan case in 1990, established the sanctity of self-determination and that individuals possess the right to refuse life sustaining treatment.[58] Nancy Cruzan was a teenager when she was involved in a car accident which left her in a permanent vegetative state. She was placed on an artificial feeding and hydration system but four years later, her parents applied to withdraw all feeding. The court found in favour of her parents and established a broad substantive due process right to refuse palliative care. However, it is apparent that prisoners (particularly those that embark upon a hunger strike) are still considered to be without full medical autonomy. And US courts have been reluctant to apply the Cruzan rule to cases involving prisoners on hunger strike. The very fact that so many prisoners have brought applications to court to determine the legality of force-feeding shows that officials all over the world opt to force-feed instead of recognizing that the prisoner enjoys the same rights of personal autonomy that his counterparts in the outside world do.

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[56] *Turner v Safley* 482 US 78 (1987) Silver, 2005, 641

[57] *Turner v Safley* 482 US 78 (1987) Silver, 2005, 641

[58] *Cruzan v Director, Missouri Department of Health* 497 US 261, (1990)

Neumann, when discussing force-feeding in Catholic hospitals and prisons comes to the conclusion that the patients in these hospitals as well as prisoners have fewer autonomy rights than those in non-Catholic hospitals.[59] Thus, she concludes that despite the rulings of various courts, it is clear that particularly in prisons and Catholic hospitals, a prisoner/patient's rights to personal autonomy are curtailed. In prison they are curtailed by virtue of their incarceration and in Catholic Hospitals they are curtailed by virtue of a religious belief that it is immoral to allow one to take one's own life and the sanctity of life is paramount.[60] In South Africa, the Constitution provides for, amongst others, a right to privacy, a right to freedom and security of the person and a right to respect for and protection of dignity. Dhai and McQuoid-Mason[61] argue that these rights may outweigh the rights to life in euthanasia cases and recently in the North Gauteng High Court, it was stated that any doctor who accedes to a request to assist in dying shall not be subject to prosecution nor disciplinary proceedings.[62] This may yet be considered by the South African Constitutional Court for a final say on the position.

Conclusion:

The conclusion must be drawn in the light of the above that despite rulings from the courts to the contrary, prisoners do have fewer rights of autonomy than the ordinary citizen. Ordinary citizens have the rights to freedom of movement, rights to privacy, and an unfettered right to personal autonomy. Prisoner's rights to autonomy appear to have been limited but I cannot conclude that such limitation is justified. The landmark case in the United States of Cruzan which established the right of a patient to refuse life-giving treatment has not been followed by the courts in regard to hunger striking prisoners. It

59 A. Neumann "The limits of Autonomy: Force-feeding in Catholic Hospitals and Prisons" 58 New York Law School Law Review (2013-2014) 305

60 Neumann op cit

61 A Dhai and D McQuoid-Mason *Bioethics, Human Rights and Health Law*, (2011) 133

62 Stransham-Ford v Minister of Justice And Correctional Services and Others (27401/15) [2015] ZAGPPHC 230 (4 May 2015

would seem that the courts are prepared to follow Cruzan when it comes to ordinary citizens but are loathe to choose prisoner autonomy over the rights and duties of the state. Only 3 cases in the US have come out in favour of recognizing a prisoner's right to starve.[63] This will be discussed further in chapter 7. I do not support the argument that a prisoner, by virtue of his incarceration, should have his rights to personal autonomy limited. I support the view that a prisoner should retain his constitutional rights despite his imprisonment. The approach by South African courts as indicated in Hofmeyer and the Goldberg case is encouraging.

3.2 BENEFICENCE v AUTONOMY

Four essential principles underlie medical ethics. They are the principles of autonomy, beneficence, non-maleficence and justice.[64]

Simply put, the principle of autonomy recognizes the duty on healthcare professionals to respect the freedom of patients to make decisions for themselves. The principles of beneficence and non-maleficence recognize the duty on healthcare professionals to do good for their patients (which would include keeping them alive where appropriate) and to not harm them. The principle of justice places a duty upon healthcare professionals to treat their patients justly and fairly.

One of the aspects concerning medical ethics is reconciling respect for the sanctity of life and respect for individual decisions.

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63 see note 159 below and 7.1.1 for further discussion on this

64 TL Beauchamp and JF Childress *Principles of Biomedical Ethics* 6 Ed (2009) 209

Beauchamp and Childress[65] note that whilst there is no generally accepted definition of autonomy, there seems to be general agreement that two conditions are essential for autonomy: liberty and agency. However, there is no agreement as to what each of these conditions mean nor whether there are other essential conditions. Their definition of personal autonomy is that it reflects the fundamental norm that each individual is entitled to determine his own course in life in accordance with a plan chosen by himself. [66] Beauchamp and Childress state that "the autonomous individual acts freely in accordance with a self-chosen plan, analogous to the way an independent government manages its territories and establishes its policies." [67]

Autonomy is recognized and protected in many Patient Charters worldwide, taking their lead from the Universal Declaration of Human Rights which recognizes in its preamble the inherent dignity of all.

The principle of autonomy recognizes the duty of healthcare practitioners to respect the freedom of patients to make decisions for themselves. The principle of beneficence recognises the duty on healthcare practitioners to practice patient benevolence. Reference to both of these principles is found in the International Bill of Rights, the African Charter, the Constitution and the Patient's Rights Charter.[68] These duties are protected within many constitutions. The South African Constitution protects amongst others, the rights to bodily and physical integrity, the right to life and the right to privacy.[69] Encompassed by these principles is the doctrine of informed consent. Because of the Nuremberg Trials in the late 1940s as well as documents such as the Universal Declaration of Human Rights and

65 TL Beauchamp and JF Childress *Principles of Biomedical Ethics* 6 Ed (2009) 209
66 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 39
67 TL Beauchamp and JF Childress *Principles of Biomedical Ethics* 6 Ed (2009) 209
68 A Dhai and D McQuoid-Mason *Bioethics, Human Rights and Health Law*, (2011) 38-39
69 Constitution s12, 16, 21

guidelines from the World Medical Association such as the Tokyo and Malta Declarations, "the values of autonomy and self-determination have been recognized as paramount"[70]

By refusing food, a hunger striker forces the State and the healthcare professional to confront the prisoner's right to self-determination.[71] By force-feeding them, the health practitioner is usually enforcing the principle of beneficence whilst ignoring the prisoner's autonomy and the doctrine of informed consent.

The WMA's Declaration of Malta recognizes both of these principles in its principles 2 and 3 which read as follows and have a direct bearing on hunger strikers:

2. Respect for Autonomy

   Physicians should respect individual's autonomy. This can involve difficult assessments as hunger striker's true wishes may not be as clear as they appear. Any decisions lack moral force if made voluntarily by use of threats, peer pressure or coercion. Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger striker's explicit or implied consent is ethically acceptable.

3. "Benefit" and "Harm"

   Physicians must exercise their skills and knowledge to benefit those they treat. This is the concept of "beneficence" which is complemented by that

[70] A Dhai and D McQuoid-Mason *Bioethics, Human Rights and Health Law*, (2011) 69
[71] P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 67

> of "non-maleficence". These two concepts need to be in balance. "Benefit" includes respecting individual's wishes as well as promoting their welfare. Avoiding "harm" means not only minimizing damage to health but also not forcing treatment upon competent people nor coercing them to stop fasting. Beneficence does not necessarily involve prolonging life at all costs, irrespective of other values.[72]

Thus, when a hunger striker makes an informed and voluntary decision to embark upon a hunger strike, this decision needs to be respected and force-feeding him contrary to this decision is not justified. Also of relevance is that the third principle of the Malta Declaration as evidenced above states that beneficence does not involve prolonging life at all costs.

In fact, Neumann,[73] in her discussion on force-feeding in Catholic hospitals and prisons notes that personal autonomy came to be "enshrined" into medical ethics during the 1970s with the advent of medical technologies that were able to keep patients alive. This led to a more "patient centered recognition of personal autonomy." She is critical of the fact, and I concur, that despite the introduction of the recognition of patient autonomy during the 1970s, there remain two places in which people continue to be fed against their will namely Catholic hospitals and prisons.[74]

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[72] World Medical Association Declaration of Malta (2006) available from http://www.wma.net/en/10home/index.html (accessed 1 October 2014)

[73] A Neumann "The limits of Autonomy: Force-feeding in Catholic Hospitals and in Prisons" 58 *New York Law School Law Review* (2013-2014) 305

[74] A Neumann "The limits of Autonomy: Force-feeding in Catholic Hospitals and in Prisons" 58 *New York Law School Law Review* (2013-2014) 305

In examining the way in which certain courts have dealt with the discrepancy between personal autonomy and the duty of beneficence within the prison setting, the majority of decisions have favoured the prison physicians carrying out State interests. [75]In chapter 7 (7.1.1) I will discuss this further.

It will be clear from the documenting of certain global examples of force-feeding in the chapters below, that hunger striking prisoners continue to be force-fed. This demonstrates that authorities view the principle of autonomy as it pertains to prisoners in a limited way and it would seem that this is supported by court decisions. In the 1982 US case of *State ex rel. White v Narick*[76] the court said that a prisoner's constitutional rights can be restricted when they substantially interfere with orderly prison administration. The court did however also acknowledge that in the Supreme Court decision of *Price v Johnston*[77] the court had stated that no iron curtain could be drawn between the constitution and the prisoners of the country. Effectively what the court said in Johnston's case is that incarceration does not eradicate a prisoner's constitutional rights. These rights may be limited but they are not removed completely. This is important because it supports the argument that a prisoner does possess a right to personal autonomy and it gives support to the argument that incarceration does not limit this right provided it does not interfere in the running of the prison. I agree with this argument and my submission is that it would be the position followed in the South African Courts giving recognition to the Constitution.

The South African courts have tended use their powers to enforce the rights of prisoners in terms of the Constitution, specifically their right to medical treatment. [78] Worryingly, the Supreme Court of Appeal did make reference to the fact in Lee's case that "a person who

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75 D Sneed D and H Stonecipher "Prisoner Fasting as Symbolic Speech Conference Paper" AEJHC Convention 11 Aug 1989 Washington available from http://files.eric.ed.gov/fulltext/ED 309485.pdf (accessed on 1 October 2014)

76 State ex rel White v Narick 292 S.E 3d 54 (W. Va.1982) cf. Sneed & Stonecipher

77 Price V Johnston 334 U.S. 266 68 SCrt. 1049, L.Ed (1948) cf. Sneed & Stonecipher

78 see for eg *Van Biljon v Min Corr Services* 1997 (4) SA 441 (C); *N& Others v Govt of RSA and others* 2006 (6) SA 543 (D) Lee v Min Corr Services 2013 (2) SA 144 (CC)

is imprisoned is delivered into the absolute power of the State and loses his or her autonomy."[79] This however was said in the light of the court wanting to give recognition to the prisoner's rights afforded to him by the Constitution.

John Stuart Mill, the English philosopher, was a liberal thinker and argued that:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of another, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.[80]

He referred to this as the "harm principle."[81]That is, as long as the individual's choices do not cause harm to another, then they should be respected. Thus, according to Mills's harm principle, forced treatment such as force-feeding could never be justified.[82] I support this extension of the principle. For as long as the actions of the hunger striker do not harm another or impinge upon another and provided that it has been made clear at the time of embarking upon the hunger strike what his intention and wishes are and that they are made voluntarily, force-feeding cannot be justified. It is unethical on the basis of Mill's harm principle, it is also unethical on the basis of autonomy and non-maleficence.

Jacobs[83] on the other hand, argues that few decisions in health care, no matter how personal, do not have an impact on others. Furthermore she says that a patient's refusal of

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79 Min Corr Services v Lee 2012 (3) SA 617 (SCA)
80 JS Mill *On Liberty* (1958) 1863 cf. P. Jacobs 42
81 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 42
82 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 42
83 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 42-43

treatment cannot be as absolute as Mills advocates but that other people's interests as well as society's may play a role in the decision to apply forced treatment. In support of her view Jacobs states that a prisoner's autonomy over his own body is not absolute. In cases, for instance where the prisoner is still awaiting a verdict in his trial, she argues that the need for justice would override the hunger striker's decision to refuse food. A further exception is when allowing a hunger striker to die would result in him or her avoiding serving their sentences in full. Jacobs refers to Silver who notes that this is particularly controversial in relation to death row prisoners.[84] As Silver says "doing the time" is crucial to Society and allowing him to starve himself to death allows him to absolve himself of accountability for his crime.[85] This philosophical, retributive justice notion, that prisoners should be forced to live out their sentences as a form of retribution, is an argument that has not often been advanced by officials arguing in favour of force-feeding. Silver advances the notion that "this utilitarian theory" is a better argument than some of those that have been put forward. He finds it more persuasive an argument to say that it is critical that a prisoner is seen to be doing his time and not avoiding accountability by starving himself to death. However, he ultimately concludes that even this argument cannot justify disregarding the prisoner's autonomy. "The philosophical point is simply not sufficient when compared to an individual's right to control the course of his own life or death."[86] I agree with Silver. It is an argument worthy of consideration but not one sufficient to justify force-feeding.

Much is made of the dilemma that health practitioners face when dealing with a hunger striking prisoner. Silver, however is of the view that this is questionable. He argues that the

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[84] M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 643

[85] M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 643

[86] M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 643

dilemma these health practitioners face should be no different to what they would face when dealing with patients who wish to refuse treatment. In the non-prison setting health practitioners would have to abide by their patient's wishes and Silver argues that this should also be the case when dealing with prisoners. If it is made clear what a prisoner's rights are regarding the refusal of treatment then the consequence would simply be that the prison officials would have to, as Silver states, ' let a sane and fasting prisoner meet his death.'[87]

A prisoner on a hunger strike is declaring his intention not to eat. He is furthermore declaring that he does not wish to be fed (provided the requirements have been met such as that he embarked upon the strike voluntarily and understands the implications of it). Closely linked to the refusal to be given treatment is the doctrine of informed consent. It is one of the basic ethico-legal principles that a patient needs to consent to being given medical treatment. McQuoid-Mason and Dhai describe the doctrine of informed consent as "a process of information sharing and decision making based on mutual respect and participation."[88]

The literature is opaque on the definition of informed consent, which is a very necessary element in the determination of whether to force-feed a hunger striking prisoner and is crucial in protecting the patient's dignity in the healthcare environment. In South Africa, the common law position on informed consent means the patient must have knowledge of what is involved, understands the risks and consent to such treatment and agrees to the consequences of said treatment.[89] In terms of the National Health Act[90]informed consent

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87 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) 653

88 A Dhai and D McQuoid-Mason *Bioethics, Human Rights and Health Law*, (2011) 70

89 As set out in Castell V De Greef 1994 (4) SA 408 (C)

90 61 of 2003

means consent for the provision of a specified health service given by a person with legal capacity based on information which includes (a) the user's health status (b) the range of diagnostic procedures and treatment options available to the patient, (c) the benefits, risks and consequences associated with each option and (d) the user's right to refuse health services.[91]

Personal autonomy and the right to self- determination are the foundations of the concept of informed consent.[92] Since the mid-1970s, the main justification for using informed consent has been to protect autonomous choices, with reference to autonomy of patients.[93] Beauchamp and Childress have identified the following elements as crucial to the make-up of informed consent: voluntariness, competence, disclosure, understanding, decision, recommendation and authorization.[94] A hunger strike is an ongoing process and decisions need to be made continuously along the way and thus it would require a continual process of seeking informed consent from the hunger striker.[95]Informed consent also needs to be counterbalanced by informed refusal. Just as a patient needs to consent to a medical procedure, he also has the right to refuse such a medical procedure. McQuoid-Mason and Dhai have argued that health practitioners have a duty to recognize and respect the fact that patients have the right to decide what is in their own best interests. To not do so, they argue is to treat them as less than persons.[96] I would argue that this should also extend to prisoners on hunger strike. Regarding patients who are unconscious or unable to give consent in a medical emergency, the South African position is that in terms of the NHA, patients may not be treated without their consent unless a delay in the provision of

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91 section (7) (3) read with s (6)(1)
92 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 76
93 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 46
94 TL Beauchamp and JF Childress *Principles of Biomedical Ethics* 6 Ed (2009) 105-107
95 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 49
96 A Dhai and D McQuoid-Mason *Bioethics, Human Rights and Health Law*, (2011) 69

treatment would likely result in the patient's death or irreversible damage [97]and they have not expressly refused such services.

Conclusion:

In chapter 3 the concepts of dual loyalty and informed consent were explored as well as the principles of autonomy and beneficence. Beauchamp and Childress' definition of personal autonomy was accepted, which is encapsulated by the declaration that each individual is entitled to determine his own course in life in accordance with a plan chosen by himself. The concept of dual loyalty was also examined and various arguments were considered as to whether the loyalty of the health practitioner should be to the State/employer or the prisoner/patient. Lazarus's argument that a hunger striker deciding not to eat does not fall within the category of when it would be appropriate to provide medical care without consent, is a compelling one. He describes the dilemma faced by physicians treating hunger strikers as one between respecting the informed decision of a competent patient and serving the patient's best (medical) interests. He goes on to describe how the American Medical Associations' code of ethics deals with this dilemma. Lazarus underlines code 8.08 which provides that "informed consent is a basic policy in both ethics and law that physicians must honor, unless the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent". I find Lazarus's conclusion, namely that an individual who has decided to refuse food in order to achieve a political end does not meet the requirements for interfering by way of force-feeding, to be the more justifiable conclusion. Consideration was also given to whether incarceration does and if it does, whether it ought to limit a prisoner's right to personal autonomy. It seems clear that the very nature of incarceration is to limit a person's personal autonomy

[97] section 7 Act 61 of 2003

but I would argue that it ought not to justify the imposition of additional restrictions on a prisoner's autonomy. A prisoner should still be entitled to make decisions about his own person. The extension of Mills' harm principle to force-feeding was explored and it was found that force-feeding can never be justified in terms of the harm principle. The notion of retributive justice was also examined in relation to hunger strikers and declared to be an argument worthy of consideration but not sufficient to justify force-feeding. The concept of informed consent and voluntariness were shown to be dependent upon information and disclosure when dealing with hunger strikers.

CHAPTER 4 : METHODS OF FORCE-FEEDING

4.1 Introduction

In chapter 2, I dealt with the definition of force-feeding and looked at the differences between artificial feeding and force-feeding. In this chapter I will examine the methods of force-feeding and will consider instances globally where there have been documented accounts of the methods of force-feeding. It will be clear that the methods described are tantamount to torture and support my argument that force-feeding is effectively torture and thus unethical for health practitioners to administer. I will also argue that taking into account the definition of torture contained in chapter 2, that force-feeding falls within this definition.

Despite the huge advances in medical science since the beginning of the last century, the methods of force-feeding are little changed. At the turn of the last century, female suffragettes famously embarked upon hunger strikes protesting against the injustices

suffered by women due to their gender. The force-feeding of the suffragettes was justified on paternalistic grounds. In other words, that the "doctor knew best" and intervention was based on the 'greater good' argument.[98] This is an argument based on classical utilitarianism which says that an act is right or correct if it leads to the best overall consequences for everyone. In other words, force-feeding the female suffragettes was deemed to be for the greater good of all.

What will become clear is that the force-feeding methods used in 1909 have changed very little over the years. The methods used to force-feed those women have been described as follows:

> The women were held down forcibly on the bed by more than one wardress, or tied to a chair which was tilted backwards. A rubber tube was then forced down the nose and into the stomach. This was helped by inserting a steel gap into the mouth which held the mouth as wide open as possible. The tissues in the nose and mouth as well as the alimentary canal were often damaged and more dangerously, the tube often went into the lungs, thus endangering the life of the detainee. Some of these women were force-fed more than 200 times.[99]

In February 1974, the Action Committee supporting Irish prisoners wrote an open letter to the British Medical Association in which they described the manner in which the prisoners were being force-fed:

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98 B Brockman. "Food refusal in Prisons: A Communication or Method of Self Killing" *Journal Medical Ethics* (1991) (25) 2 451-456 >http:www.jme.bmj.com> (GJ 2006)(B 1999) (accessed 3 October 2014)

99 J Purvis The Guardian 6 July 2009 http://www.theguardian.com/commentisfree/libertycontrol/2009/jul/06/suffragette-hunger-strike-protest (accessed 7 October 2014)

> They are forcibly fed in the following manner. Their mouths are forced open with a surgical instrument and a thick greased orange tube is pushed down their throats. A liquid mixture is then poured down and this is almost always followed by vomiting and nausea. The prisoners are held down by wardens.[100]

George Annas, when writing about the force-feeding of hunger strikers at Guantanamo Bay in 2006 makes reference to the description of the force-feeding of Soviet political prisoner Vladimir Bukovsky. Bukovsky was detained in a Russian prison during 2006 and was on a hunger strike protesting the refusal by prison authorities to provide a lawyer for a fellow inmate who was awaiting trial. Bukovsy is quoted as saying:

> They started feeding me forcibly through the nostril. By a rather thick rubber tube with a metal end on it… The procedure will be that four or five KGB guys will come to my cell, take me to a medical unit, put a straitjacket on me, tie me up to a table, and somebody will be still holding, even so I was tied down, holding my shoulders and head and legs, and one will be pushing this thing through my nostril. It's painful like hell I must tell you, because for some reason nose is very sensitive part of body and the tears will be filling your eyes and sort of streaming down because it is so painful and - awful thing.[101]

During 2007, a man by the name of Tudor Ciorap was imprisoned for fraud in Moldova. [102] He embarked upon a hunger strike in order to protest against his detention conditions and he was subsequently force-fed. He brought an application to the European Court of

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100 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 33

101 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 33

102 ECtHR 19 June 2007, *Ciorap v Moldove*, App. No. 12066/02

Human Rights and in the judgment the method by which he was force-fed is described thus:

> He complained of being handcuffed, despite offering no resistance; that the prison staff forced him to open his mouth by pulling his hair and gripping his neck; that his mouth was then fixed in an open position by means of a metal mouth widener; that his tongue was pulled out with a pair of metal tongs; and that a hard tube was inserted as far as his stomach, through which liquidised food passed into his stomach.[103]

Little has changed in these methods over many years.

Al Jazeera, the news agency, obtained a 30 page document during July 2013 entitled 'The Standard Operating Procedures for the Medical Management of Detainees on Hunger Strike: Joint Task Force, Guantanamo Bay.' [104] This document sets out the methods to be used by physicians dealing with hunger striking detainees. The methods are documented and include the detainee being shackled to a chair resembling an electric chair and placed in head restraints. Anti-nausea medication such as Reglan is forcibly administered. Reglan has terrible side effects not least of which is the twitching disease known as tardive dyskinesia. The feeding tube is then forced down the nose into the stomach. After this process the detainee is transferred to a dry cell and monitored for possible vomiting. If the hunger striker does vomit, the procedure is repeated and can be repeated many times.[105]

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103 Human Rights and Public law update http://www.1cor.com/1315//form-1155.replyids=1111 (accessed 21 October 2014)

104 J Leopold, "Revised Guantanamo Force-Feed Policy Exposed" 13 May 2013 <http://www.aljazeera.com/humanrights/2013/2013585152317954140.html.> (accessed 5 October 2014)

105 J. Leopold op cit

There are essentially two ways of force-feeding: enteral feeding and parenteral feeding. Enteral feeding is also known as tube feeding and is similar to the description above. A feeding tube is placed into the stomach via the nasal passage (called a nasogastric tube) or alternatively it can go via the stomach (a gastric feeding tube) or the small intestine (a jejunostomy tube). Liquid food is then passed via this tube into the system. The tube via the nose or mouth is the one most commonly used to force feed detainees. [106]

The application of the nasal tube carries serious medical risks, especially if used over a long period. These include permanent handicaps, damage to vital organs, and even death if the tube is wrongly inserted and enters the lungs.[107]

Parenteral feeding occurs when the patient is fed via an intravenous tube. There are two types of parenteral feeding: Total Parenteral Nutrition (TPN) and Peripheral Parenteral Nutrition (PPN).[108]

TPN occurs when it is the only form of feeding and is administered via a catheter which is placed in a blood vessel leading directly to the heart, bypassing eating and digestion.[109] This is mostly used in patients who cannot take nutrition via their mouth and are not able to absorb enough nutrients via their stomach. It can also be used for patients who are in a coma, a possible consequence of hunger striking.

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106 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 29-30
107 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 30
108 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 30
109 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 31

The problems with TPN are firstly that the patients can remove the needle from their arms (and so would need to be sedated in order to insert it) and secondly that there is a real danger of infection and venous thrombosis at the site where the needle enters the body.

PPN is also administered intravenously but because the nutritional compounds are in a lower concentration it can be delivered via peripheral veins. Because of the size of the veins this can only be used in the short term.

The account of Irish prisoners in 1974, is no different to what was described regarding the force-feeding of suffragettes in 1909, of Ciarop in 2007 and detainees at Guantanamo Bay in 2013. Plainly, the application of force-feeding has been consistent since the beginning of the last century.[110]

Gregory, a physician, notes in this respect:

> Let us be under no illusion as to what force-feeding means. Anyone who has tried to pass a nasogastric tube or insert an intravenous infusion into an uncooperative and confused postoperative patient knows how grim that can be. Force-feeding against someone's will must entail force, restraint or sedation. It does not conjure up a pretty picture.[111]

Conclusion:

It is my argument that based on the methods of force-feeding described above these methods are cruel and inhuman and an infringement of the dignity of the hunger striker and

[110] P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 34

[111] B Gregory "Hunger Striking Prisoners: The Doctors Dilemma" *British Medical Journal* (2005) (331) 7521 913

amount to torture. The methods described necessarily involve the use of both force and restraint and entail certain medical risks, especially when the hunger striker refuses treatment. Taking into account the definitions of torture as contained in chapter 2 above, it is my argument that these methods fall within the definition of torture. Miller and Seumas refer to torture as" the intentional, substantial curtailment of the exercise of the person's autonomy"[112] which is exactly what force-feeding is. Of concern is how little the methods used to force-feed have changed over the last 100 years. As the US court so aptly stated in *In re Caulk*: "It is difficult to imagine a greater intrusion upon one's right to bodily integrity and self-determination than force-feeding."[113] From reading the methods described above, I must agree. I would like to recommend that force-feeding be unreservedly declared to be torture.

CHAPTER 5: PARALLELS AND DIFFERENCES BETWEEN HUNGER STRIKERS AND EUTHANASIA PATIENTS

It is sometimes argued that a hunger strike is a form of suicide. Prison officials tend to use this as an argument in favour of force-feeding. This chapter will examine the parallels in the debate and the differences between the two.

In 2013, Jeremy Lazarus, writing in his capacity as the president of the American Medical Association, described a hunger striker as someone who is "willing to die to achieve a political purpose but [who] does not seek death."[114]

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112 Miller Seumas "Torture" *Stanford Encyclopedia of Philosophy* (Summer 2011) EN Zalta (Ed) url http://plato.stanford.edu/archives/sum2011/entries/torture (accessed Jan 24 2015)

113 *In re Caulk* 9 BR.242 (Bankr. ED Pa. 1981)

114 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *The British Medical Journal* (2013) 346

An assisted suicide patient on the other hand, does seek death, and his or her intention is to die prematurely in order to end his or her suffering. Euthanasia needs to be distinguished from a hunger strike, as the intention behind a hunger strike is not death, even though it may be a possible outcome.

It can be argued that a hunger strike is a form of suicide. Some countries have used this as a reason to interfere in a hunger strike because it is generally accepted that it is acceptable for prison authorities to prevent prisoners from committing suicide. And so the argument is that force-feeding is justified in order to prevent suicide or death. However, what is incorrect about this supposition is that in accordance with the definition outlined in Chapter 2 above, death is not the desired outcome of a hunger strike. Whilst the hunger striker does accept that death may occur, it is never the intention. The hunger striker is prepared to risk death as a means to an end, for example, to seek an improvement of conditions, or for a political cause or as access to justice.

A further significant difference between a hunger strike and euthanasia is that in the case of a hunger strike, the death is a slow one. The hunger striker needs it to be a long and drawn out process in order for his demands to be met- his intention being that his demands will be met before he dies. The idea behind euthanasia is to speed up, not slow down, the dying process. The intention is to die prematurely in order to put an end to suffering. [115]

In both hunger strikers and euthanasia patients, the right to life is at stake.[116] The hunger striker may want to improve his living conditions for example and is prepared to die in order to achieve this end. His risking death is a means to an end, not the end goal itself.

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115 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *The British Medical Journal* (2013) 346

116 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 23

The euthanasia patient wants to decide when and how to end his life. His end goal is death.[117]

An important distinction between euthanasia patients and hunger striking prisoners is that the hunger striker is exercising his right to freedom of expression by embarking upon a hunger strike as a means of protesting against something whereas the euthanasia patient's decision to die involves the rights of dignity and consent but not necessarily the right to freedom of expression. [118]

Another interesting element to this is that in countries where euthanasia is legal (for example, the Netherlands), there is tension between the acceptance of voluntary death as a means to end suffering and death as a form of protest. The one is permitted and the other is not.[119] Schor and Martina sum this tension up as one between an ethics of care that accepts death as an outcome in the case of euthanasia yet refuses to accept death as a form of protest for prisoners' hunger striking.[120]

Conclusion:

The similarities and differences between hunger striking and euthanasia as well as suicide have been highlighted in this chapter. The similarities are that both are concerned with the right to life and a hunger strike is often labeled as a form of suicide. The differences include that euthanasia involves a speeding up of the death process whereas a hunger

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117 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 23

118 J Lazarus "Physician's Ethical Obligations to Hunger Strikers" *The British Medical Journal* (2013) 346

119 P Schor and E Martina: "The Alien Body Seekers" *Critical Legal Thinking* October 14, 2013. http://criticallegalthinking.com?2013/10/14alien-body-contmeporary-netherlands-incarceration-force-feeding-asylum-seekers (accessed 16 September 2014). See their discussion on this.

120 P Schor and E Martina: "The Alien Body Seekers" *Critical Legal Thinking* October 14, 2013. http://criticallegalthinking.com?2013/10/14alien-body-contmeporary-netherlands-incarceration-force-feeding-asylum-seekers (accessed 16 September 2014). See their discussion on this.

striker's death is protracted. Death is not the desired outcome of the hunger strike whereas it is the desired outcome of euthanasia. Hunger strikes involve the right to freedom of expression and euthanasia involves the right to dignity and consent. In the Netherlands where euthanasia is legal, there exists a tension between the acceptance of death as a means to ending suffering yet death as a form of protest is not acceptable.

CHAPTER 6: PRINCIPLES, GUIDELINES, DECLARATIONS AND LEGISLATION

6.1 DISCUSSION AND ANALYSIS OF INTERNATIONAL TREATIES AND DOCUMENTS

This Chapter discusses international guidelines pertaining to force-feeding and against which force-feeding practices will be evaluated in subsequent Chapters. I will also look at the situation in various countries including Canada, Germany, Israel, Great Britain. In chapter 6.2 I will examine the situation in South Africa. These will demonstrate the different approaches taken by different countries and the lack of a uniform approach to force-feeding. The acceptance by some nations of force-feeding shows the conflicting opinions concerning it and adds to the rationale behind my research. The UN has developed a number of international human rights instruments. These have been enshrined in treaties and other types of instruments such as declarations, recommendations, guidelines and bodies of principles. Covenants, statutes, protocols and conventions have binding and legal effect for those states that have ratified them. Other instruments such as declararions, guidelines, recommendations, bodies of principle are not legally binding on States in and of themselves but they have moral force and provide practical guidelines to

States in their conduct. Because they are ratified and accepted by many States, although not having legal effect, they may be seen as declarations of principle that are broadly accepted by the greater international community. They may form part of what is known as "soft law" which is not law itself but it holds sufficient importance that warrants particular attention being paid to it.[121]

There are few international documents that deal entirely with force-feeding of which one is the WMA Declaration of Malta. Other documents pertaining to prisoners and hunger strikes include:

The United Nations Agreements on Human Rights which incorporates:

- Body of Principles for the Protection of all Persons under any form of Detention 1988;
- Basic Principles for the treatment of Prisoners 1990;
- Principles of Medical Ethics 1982;[122]
- Standard Minimum Rules for the Treatment of Prisoners 1957;[123]
- The four Geneva Conventions of 1949 together with their additional protocols.[124]

These documents underline the need for the protection of prisoner's and detainee's rights and dignity. They provide standards and safeguards for the protection of prisoner's rights but have no binding legal effect.

The four Geneva conventions are: the first Geneva Convention of 1949, protects wounded and sick soldiers on land during war; The second Geneva Convention of 1949, protects

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121 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 148

122 Adopted in 1982 by the UN General Assembly. Gives ethical guidelines for health practitioners

123 Sets out generally accepted good practice and principles for the treatment of prisoners

124 Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949

wounded, sick and shipwrecked military personnel at sea during war; The third Geneva Convention of 1949, protects prisoners of war; the fourth Geneva Convention of 1949, provides protection to civilians including in occupied territory: Protocol 1of 1977; Protocol 2 of 1977; and Protocol 3 of 2005. [125] The Geneva Convention however, has limited application to hunger striking prisoners as it deals only with those prisoners in the armed forces.

There are various International Conventions which deal more directly with all hunger striking prisoners, namely:

The International Covenant on Civil and Political Rights (ICCPR).[126] This Convention was adopted by the UN in 1966. Article 7 of the Covenant prohibits torture and Article 10 states that prisoners and detainees shall be treated with humanity and respect for their inherent dignity.[127]

The Convention against Torture and other Cruel, Inhuman, Degrading Punishment (Convention against Torture) [128]came into force in 1987 and defines torture and prohibits all forms of torture. South Africa is a signatory to this Convention.[129]

The International Convention on eliminating all forms of Discrimination (ICERD)[130] came into effect in 1996 and prohibits all forms of racism and discrimination.[131]

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[132] was adopted in 1966 but came into force in 1976. South Africa signed this in 1995 but only

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125 British Medical Association, *The Medical Profession and Human Rights Handbook* (2001) 245
126 United Nations International Covenant on Civil and Political Rights (1996)
127 Available from http://www.ohchr.org/en/professionalinterest/pages/ccpf.aspx
128 Convention against Torture and other cruel, inhuman or degrading treatment or punishment UN Treaty Series vol 1465, 85 (1987)
129 GA res. 39/46, annex 39 UN GAR SUPP. (No.51) at 197, UN Doc A/39/51(1984), 1465 UNTS 85
130 International Convention Eliminating all forms of racial Discrimination UN Convention 1969
131 Available From http://www.ohchr.org/EN/Professioanlinterest/pages/CERD.aspx

ratified it this year in January 2015. The Covenant commits its parties to working towards granting social, economic and cultural rights to all its inhabitants including rights to health, education, labour and an adequate standard of living.[133]

What seems clear is that there is no UN standard concerning force-feeding of prisoners and detainees on hunger strike.

The World Medical Association came into being shortly after the Nuremberg trials in 1947. It is a body that represents physicians worldwide. It aims to ensure independence and high standards of ethical behavior for physicians.[134]

It is the only worldwide organization that has issued ethical guidelines that deal specifically with prisoners and detainees on hunger strike.[135] It has issued two main documents referring to hunger strikers, the first in 1975 known as the Declaration of Tokyo and the second in 2006, the Declaration of Malta.

The Declaration of Tokyo was adopted in 1975 as a guideline for medical doctors concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment.[136]

Declaration 5 states:

> Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such

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132 United Nations International Covenant on Economic, Social and Cultural Rights (1966)
133 Available from http://www.ohchr.org/EN/Professioanl interest/CESCR.aspx
134 World Medical Association International Code of Medical Ethics and the Declaration of Geneva (2006)
135 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 165
136 British Medical Association, *The Medical Profession and Human Rights Handbook* (2001) 539

> voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.[137]

The Declaration of Malta was drafted in 1991 and was amended or revised in 1992 and 2006. It deals exclusively with hunger strikes and the difficulties faced by health practitioners treating hunger strikers. It also differentiates between food refusal and hunger strikes. In its preamble it recognizes the conflicts faced by health practitioners dealing with hunger strikers and emphasizes the importance of health practitioners ascertaining the true intention of the hunger strikers before they began the strike.

The Declaration has formulated seven principles for physicians to follow when managing hunger strikers. These include:

1. Duty to act ethically;
2. Respect for autonomy;
3. Benefit and harm; They must benefit those they treat and avoid harm;
4. Balancing dual loyalties; The health practitioner's primary duty is to his patient;
5. Clinical independence; Health Practitioner's must remain objective in their Assessments and not allow third parties to influence them;
6. Confidentiality;
7. Gaining trust. This is dependant upon the health practitioner being frank

[137] British Medical Association, *The Medical Profession and Human Rights Handbook* (2001) 540

and forthcoming with the patient.

The Declaration sets out thirteen guidelines for the management of hunger strikes. Guidelines 12 and 13 are particularly relevant. Declaration 12 states that 'artificial feeding can be ethically appropriate if competent hunger strikers agree to it. It can also be acceptable if incompetent individuals have left no unpressured advance instructions refusing it.'

Artificial feeding is accepted by the WMA as an appropriate remedy for incompetent individuals who have left no advance directive refusing it. This does not necessarily clash with my argument because my argument pertains to those individuals who are competent and who have made it clear what their intention is. And artificial feeding is very different from force-feeding. Guideline 13 states: 'forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is force-feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting'.[138]

The Declaration of Malta is however merely a declaration and part of what is called "soft law." It is not law but many of its principles can be found in the SA Constitution, the National Health Act and in common law. [139]Although some states respect such guidance,

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138 World Medical Association Declaration of Malta on Hunger Strikes (2006) available from http://www.wma.net/en/30publications/10policies/h31> (accessed 31 Oct 2014)

139 D. McQuoid-Mason, M Dada *A-Z of Medical Law* (Juta) 2011 142

there are those who refuse to abide by it on the grounds that it is not part of any treaty their governments have signed or ratified.[140]

I will now examine various regions around the world in an attempt to gain some insight into the different ways in which various countries have approached the vexing question of hunger striking prisoners. I have focused on several countries with differing approaches towards force-feeding hunger strikers.

Canada

In Canada it is prohibited to give medical treatment without consent and the Correctional Services will not force-feed in any manner provided the prisoner was capable of understanding the consequences of his decision at the time he chose to strike.[141]

Europe

The European Committee for the Prevention of Torture lists seven essential principles of medical care in prisons. They are:

i) Free access to medical care

ii) Equivalence of prison health care and community health care

iii) Confidentiality

iv) Patient's consent

v) Preventive health care

vi) Humanitarian assistance

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[140] H Reyes "Force-feeding and Coercion No Physician Complicity" (2007) *in Virtual Mentor* <http://virtualmentor.ama.assn.org/2007/10/pfor1-0710.html>

[141] M Borow "Hunger Strikers in Detention-The Legal Perspective" Nov 2013 Paper presented at the 2013 Bioethical Conference, Naples

vii) Complete professional independence and competence.[142]

According to Pont, Stover and Wolff, "the sole task of health practitioners working in prisons [in Europe] is to care for the physical and mental wellbeing of the prisoners and to observe these seven essential principles of medical care in prisons. [143]

In Germany, force-feeding is allowed provided three conditions are met, namely: there is a danger to life or serious danger to health; and the measures used are reasonable; the measures used do not entail serious danger to the prisoner's life or health. Section 101 of their Prisons Act provides that " the prison authorities shall not implement force-feeding for as long as it can be assumed that the prisoner acts upon his own free will."[144]

Interestingly, in the European Court of Human Rights in 2005, the court declared that the use of force-feeding when needed to save lives could not be considered to be inhumane.[145] However, this amounted to the court setting out that in principle it need not be considered inhumane. But the court did go on to say that it would not be considered inhumane provided certain conditions had been met namely: that the force-feeding had been shown to be medically necessary to save the detainee's life; that they had followed the correct procedures and that the methods used to force-feed had not been extreme. However, the State of Ukraine failed to comply with any of these requirements and so the court found in favour of the prisoner.

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142 European Committee for the prevention of Torture and Inhuman or degrading punishment available from http://www.cpt.coe.int.en/documents/eng-standards.pdf. (accessed 29 September 2014)

143 J Pont, H Stover, H Wolff: *"Resolving ethical conflicts in Practice and Research" American Journal of Public Health,* (2012) (102). 3 475

144 s 101 Prisons Act 16 of 1976 (Federal Law Gazette part 1 pg 581)

145 M Borow "Hunger Strikers in Detention-The Legal Perspective" Nov 2013 Paper presented at the 2013 Bioethical Conference, Naples *Nevmerzehitsky v Ukraine* App. No. 54825/00

Great Britain has officially recognized a prisoner's legal right to starve. In 1994, in the High Court case of *Secretary of State v Robb* the court decided that the right of an individual to decide his own fate outweighed the state interest in preventing starvation.[146]

Israel

During June 2014 the Israeli Government attempted to push through certain amendments to their Prison Services Act which would make it mandatory for health practitioners to force-feed hunger striking Palestinian prisoners. There was an outcry against this both by Israeli doctors as well as the international community. The Israeli Medical Association launched a petition to the Israeli High Court to object to the proposed bill[147] and the WMA wrote to Prime Minister Benjamin Netanyahu, imploring him not to continue with this legislation. They stated the following in a letter addressed directly to him: "Force-feeding is violent, often painful and against the principle of individual autonomy. It is a degrading treatment, inhumane and may amount to torture. Worse still, it is the most unsuitable approach to save lives."[148] In response, Netanyahu declared he would find doctors willing to carry out the controversial practice and made reference in support of this to the US's routine practice of force-feeding hunger strikers at Guantanamo Bay.[149]

In *State of Israel v Rachamim Jibli et al* [150] the Israeli Ministry of Health appealed to be allowed to feed and medically treat 13 incarcerated hunger strikers against their will. The court found that in considering the competing interests of human dignity and preservation

146 *R v Home Sec, ex parte Robb* [1995] All ER 677

147 A Dhai "To Feed or not to Feed" editorial *SAMA Insider* August 2014 5

148 http://www.haaretz.com/news/diplomacy-defense/1.600049

149 <http://www.commondreams.org/news/2014/06/03/Netanyahulooks-gitmo-justify-force-feeding-palestinian-hunger-strikers

150 State of Israel v Rachamam Jibli et al הפ 829/96 cf Malke Borow

of life and health (thus personal autonomy and beneficence,) the preservation of life took precedence. [151]

An earlier example is that of three thousand Palestinian prisoners in Israel during 2004 who went on hunger strike protesting their incarceration conditions. The response from the Israeli Public security Minister to their hunger strike was that "the prisoners could starve themselves to death, the government would not yield to demands."[152] This makes for an intriguing contrast in the approaches adopted by the various other governments listed.

New Zealand

In June 2014, a case came before the New Zealand High Court, that of *Chief Executive of the Department of Corrections v All Means All.*[153]

It concerned a prisoner on hunger strike. The New Zealand Department of Corrections sought a declaratory order from the court as to what their rights and obligations were in terms of the hunger striking prisoner. They essentially wanted to know whether they could force-feed the prisoner if he refused to consent to being fed. The court examined chapter 11 of the New Zealand Bill of Rights Act 1990 which states that everyone has the right to refuse to undergo any medical treatment provided they have capacity and competency. The court found that an adult with full capacity and competency is entitled to refuse treatment even if the result of doing so would mean death. The court furthermore found that this was not akin to suicide but simply the patient/prisoner declining to consent to

151 M Borow "Hunger Strikers in Detention-The Legal Perspective" Nov 2013 Paper presented at the 2013 Bioethical Conference, Naples

152 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 634

153 *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC1433 25 June 2014

treatment that may prolong his life. Ultimately the court declared that the sanctity of human life must yield to the principle of self-determination.[154]

154 <http://www.nzlii.or/cgi-bin/sindisp/nz/cases/NZHC/2014/1433.html>

6.2 SOUTH AFRICAN TREATIES, DOCUMENTS AND LEGISLATION

In South Africa, the Prevention and Combating of Torture Act[155] (The Torture Act) was passed in July 2014. The Torture Act does not specifically deal with force-feeding but only with forms of torture. However, it could be argued that force-feeding is a form of torture as claimed in Chapter 2. If so, the Act would be applicable to force-feeding where it amounts to torture as defined in the Act. Chapter 3 of the Act deals with which acts constitute torture. S 3 (a) (iii) states that:

> torture means any act by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as to :
>
> (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing something;

A credible argument, I suggest in support of outlawing force-feeding is that force-feeding falls within the definition of torture as contained in Chapter 3 (a) (iii) of the Act. Force-feeding involves the coercion of a prisoner, making him do something against his will. It coerces him to refrain from his hunger strike or to eat against his expressed wishes. And the coercion necessarily involves a great deal of pain and degrading treatment. This would seem to thus separate force-feeding from ordinary means of coercion or persuasion.

What is relevant about this Act is that it states that any official who commits the above mentioned offence will be precluded from relying on the defence that they were acting as

[155] The Prevention and Combating of Torture Act 13 of 2013

an agent of the State, as that has been precluded as a competent defence to a charge in terms of this Act.[156] Consequently, State officials can no longer rely on the defence that they were carrying out orders when mistreating prisoners, as was so famously done by the Nazi doctors during the Nuremberg Trials.[157]

The South African Constitution is one of the most liberal in the world and, I would argue that force-feeding infringes a number of rights protected under the bill of rights including, the right to physical and mental integrity, the right to freedom of movement (when restrained) and the right to freedom of expression and opinion.[158]

In South Africa, during 1989, 33 political prisoners, all men between the ages of 17 and 37 years were detained without trial. After having been detained for periods ranging between 4 and 32 months, they embarked upon a hunger strike protesting the conditions under which they were being held. They were admitted to hospital. The doctors treating them continued to allow them to fast whilst monitoring their health and keeping them informed at all times of their physical progress.[159] Once the hunger strike was over the doctors refused to return the prisoners to the prison until they were totally recovered from their fast and because the conditions against which they were protesting had not changed. One of the doctors involved was named Kalk. The refusal became known as "Kalk's refusal" and has created a precedent in South Africa for the future treatment of hunger striking prisoners. The doctors stated that "the principles of full patient participation and consent in all clinical decisions was adhered to." [160] The provisions of the Tokyo Declaration were

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156 Act 13 of 2013 s4(3)

157 See generally: G. Annas, M Grodin *The Nazi Doctors and the Nuremberg Code* Oxford Univ Press 1992

158 Sections 10, 12, 16 and 21 of the Bill of Rights

159 WJ Kalk, M Felix, ER Snoey, Y Veriawa: "Voluntary Total Fasting in Political Prisoners: Clinical and Biochemical Observations" *South African Medical Journal* (1993) (83) 6 392

160 WJ Kalk, M Felix, ER Snoey, Y Veriawa: "Voluntary Total Fasting in Political Prisoners: Clinical and Biochemical Observations" *South African Medical Journal* (1993) (83) 6 391-394

explained to the prisoners and full confidentiality was maintained. Any attempts by the prison authorities to become involved were strenuously resisted. What is relevant however is that the doctors were not employed by the prison authorities (although they were still State employees at a government hospital) and were thus more easily able to maintain their independence? It was following Kalk's refusal that a group of South African doctors represented by the South African Medical Association, approached the WMA stating that they did not consider the Tokyo Declaration as adequately providing ethical guidelines for doctors dealing with hunger strikes. In response to this together with lobbying from other quarters, the Declaration of Malta was drawn up.[161]

Section 6 of the National Health Act[162] deals with the patient having full knowledge of the treatment being administered to him as well as the right of the patient to refuse health services. The relevant Chapter reads as follows:

> 6(1) Every healthcare provider must inform a user of:
>
> (a) the benefits, risks, costs and consequences generally associated with each option;
>
> (b) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.

Section 6 ties in with the notion of the prisoner being kept informed at all times of his hunger strike what the outcome could be as well as the treatment options available to him or her.

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[161] H Reyes "Force-feeding and Coercion No Physician Complicity" *Virtual Mentor* AMA, (October 2007) (9) (10) 703 < http://virtualmentor.ama-assn.org/2007/10/pfor1-0710.html

[162] Act 61 of 2003

It also illustrates that the doctrine of informed consent as well as the principle of personal autonomy are required to be observed under South African Law and without argument to the contrary this should extend to hunger striking prisoners as well.

As matters stand, the South African Medical Association (SAMA) does not have a policy on force-feeding but in the light of the recent developments in Israel to make force-feeding of Palestinian prisoners mandatory, SAMA has indicated that they intend compiling a policy document on the issues of force-feeding and hunger strikers.[163]The HPCSA should follow suit.

The Declaration of Malta is the most comprehensive document concerning hunger striking prisoners, its only weakness being that it does not have strong legislative effect and is merely declarative. Canada, Great Britain and New Zealand are the only states of the ones explored to give recognition to the prisoner's right not to be force-fed. South African legislation on the topic is promising and although it has not been tested in the courts, the prisoner's right to personal autonomy would appear to be sacrosanct and the doctrine of informed consent seems to be well respected, as evidenced by Kalk's refusal. I propose that medical bodies develop clear guidelines on the treatment of hunger strikers by health practitioners. These rules must be clear and concise with no room for interpretation.

[163] A Dhai "To Feed or not to Feed" editorial *SAMA Insider* August 2014 5

CHAPTER 7

ARGUMENTS FOR AND AGAINST FORCE-FEEDING

There are various arguments that come to light in the literature, as well as in cases that are brought before the courts concerning hunger strikers and the question of force-feeding. Below are the arguments raised both in favour of and against force-feeding.[164] The arguments against force-feeding support the view that hunger strikers should be allowed to continue their strike without interference. The arguments in favour of force-feeding support intervening during the strike and thus preventing the hunger striker from possible death. There are compelling arguments on both sides.

7.1 Against Force Feeding

7.1.1 *Infringes the prisoner's right to self determination*

The argument that tends to be used most often against force-feeding is that it infringes upon the prisoner's right to self-determination. This right as an important element of the principle of personal autonomy has been discussed above and it is important to note that the right to self-determination as well as the principle of personal autonomy both require that patients give their informed consent before any medical procedure can be performed. On the basis of this right it would appear that force-feeding ought not to occur without the prisoner's consent.

However, courts in only 3 States in the US have ruled against force-feeding, and the majority of cases clearly illustrate that the prisoner's right to self-determination is not

[164] I have borrowed some of these headings from Pauline Jacobs who has completed a comprehensive study on the subject in her book

accorded much weight by the courts.[165] Silver discusses the three judgments that do and is hopeful that they have "planted a strong seed for recognizing a prisoner's right to starve."[166] In all three of these cases the courts came out in favour of the prisoner's right to privacy as a compelling reason not to deny him his freedom of choice.

In Prevatte and Thor's cases, the court looked at whether the hunger strike was likely to be a danger or threat to the security of the institution or public safety and found it did not. In Costello's case the court found that "both the US and Florida constitutions protected the prisoner's right to refuse treatment and that his status as a prisoner did not forfeit his privacy claim."[167]

This argument makes a strong case for the prisoner's right of personal autonomy as the over-riding principle to be considered in the debate.

7.1.2 ***Is a form of torture/inhumane degrading treatment.***

The president of the AMA, James Lazarus, wrote in the British Medical Journal that "in the AMA's view, the use of restraints to force-feed detainees is an inhumane and degrading intervention that falls within the prohibition of torture."[168]

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165 In Florida, *Singletary v Costello* 665 So. 2d 1099 (Fla Dist. Ct. App 1996), California, *Thor v Superior Court,* 855 P.2d 375 (Cal 1993, Georgia *Zant v Prevatte* 286 S.E.2d 715, (Ga 1982)

166 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 659

167 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 659

168 J Lazarus, "Physician's Ethical Obligations to Hunger Strikers" *British Medical* Journal (2013) 346

The British Medical Association in its Human Rights handbook states that "force-feeding of hunger strikers has sometimes been carried out with medical help but in a deliberately painful and humiliating way which can be considered [to be] torture." [169]

There can be no doubt that certain of the methods used to force-feed which have already been described, do constitute torture and are an infringement of the most basic of human rights. Force-feeding is cruel, inhuman and degrading and ought to be declared to be torture. It falls within the definition of torture as set out in Chapter 2.

7.1.3 *Contravenes medical ethics*

What is interesting about the argument that force-feeding contravenes medical ethics is that there are opposing medical ethics at play. The Hippocratic Oath itself contains these opposing principles. On the one hand the physician must do her best to preserve life and act in the patient's best medical interests and on the other hand the physician is required to avoid harming the patient in any way, to respect the patient's autonomy and the doctor-patient relationship is required to be one based on trust.[170]

As mentioned above in chapter 3, the opposing principles of personal autonomy and beneficence and non-maleficence are also at play - how does one decide which principle should hold more weight than the other? I have argued that the patient's autonomy ought to be the overriding principle, as propounded in the Declaration of Malta. The jurisprudence on this needs to be clear so that health practitioners will know what is expected when treating a hunger striker with unequivocal guidance from medical bodies. I would like to echo the Constitution Project's bipartisan task force which concluded in April 2013 that

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169 British Medical Association , *The Medical Profession and Human Rights Handbook* (2001) 73

170 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 130

'force-feeding of detainees is a form of abuse that must end' and urged the US government to adopt standards of care, policies and procedures for hunger striking prisoners that are in keeping with established medical ethics and care standards.[171]

7.1.4 *Violates the hunger striker's freedom of expression*

Steven Miles has made mention of the fact that prison hunger strikes are often the only "form of expression available to a prisoner."[172] The prisoner is powerless and stripped of many of his basic rights and therefore ought to be allowed this one form of expression and protest still available to him. Miles asks whether or not he ought to be entitled to some form of bargaining tool, especially when placed in a situation of intolerable human rights abuses. This must be correct. What a hunger strike also does, is to act as a form of communication between the prisoner and the authorities as well as with the outside world. One has to only examine the public outcry to the force-feeding of Guantanamo Bay prisoners to realize how effective a communication tool their hunger strike was.

By disallowing this form of protest through forcible feeding, the authorities are in effect disallowing the prisoner his right of freedom to express. The hunger strike is a way in which to show the outside world how intolerable conditions or human rights abuses are, especially in non-democratic societies.

The ethical and legal principle of freedom of expression which is enshrined in many constitutions around the world, gives a prisoner the right to embark upon a hunger strike. Once incarcerated, any other forms of protest or expression are removed from him and so to remove the ability to hunger strike is to remove the only form of expression still

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171 GJ Annas, SH Crosby, LH GLantz: "Guantanamo Bay-a Medical Ethics-free Zone?" *New Engl J Med* (2013) 369 101-103

172 S Miles, *Oath Betrayed: American Torture Doctors (2009)* 107-108

available to him. This argument relates to the principle of justice. It does not seem right to remove the prisoner's only form of expression or protest.

7.1.5 *Is a form of non-violent protest that ought to be tolerated*

This is a utilitarian argument and one which is useful. One of the world's most famous hunger strikers was Mahatma Ghandi, the father of non-violent protest. He embarked upon many hunger strikes during his incarceration, often with good effect.[173] The key factor about a hunger strike in this context is that it does not harm anyone and only has the potential to harm the hunger striker himself.

It is a form of peaceful protest and Tagawa has argued that preventing it or stopping it by force-feeding, may result in more violent, less desirable forms of protest.[174] I find merit in Tagawa's argument and it would seem far more preferable for a protesting prisoner to embark on a hunger strike than a more disruptive means of protest.

7.1.6 *Violation of the hunger striker's right to health*

Following the public outcry after the Guantanamo Bay force-feedings, the UN appointed a task force to investigate and report on the force-feeding of hunger strikers at Guantanamo Bay. From this emerged guidelines and recommendations for physicians managing hunger strikers.[175] Importantly, the report recommended that force-feeding be considered to be torture and declared that force-feeding violated the prisoner's right to health and breaches the ethical duties of health practitioners required to implement force-feeding.[176] The

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173 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 133

174 B Tagawa "Prisoner Hunger Strikes: Constitutional Protection for a Fundamental Right" *American Criminal Law Review* (1983) (*20*) 4 590 http://ethics/iit.edu/ecodes/node/4622> (accessed Oct 28 2014)

175 UN Special Rapporteur report on the situation of detainees at Guantanamo Bay A/HRC/26/68

176 B Tagawa "Prisoner Hunger Strikes: Constitutional Protection for a Fundamental Right" *American Criminal Law Review* (1983) (*20*) 4 590 <http://ethics/iit.edu/ecodes/node/4622> (accessed Oct 28 2014)

report, in making a statement about the violation of the hunger striker's right to health, presupposed that such a right does exist.

The above-mentioned six arguments should illustrate that force-feeding is unethical and that health practitioners should abstain from force-feeding hunger striking prisoners. The very intrusiveness of force-feeding alone should be an indication of how much of an infringement it is upon a prisoner's right to bodily integrity and personal autonomy. As Silver has said, "recognising the physical intrusiveness involved in force-feeding is a critical step in recognizing the prisoner's right to refuse treatment. The more invasive a procedure, the more critical an individual liberty interest becomes."[177] The arguments are mostly based on the idea that prisoner's rights should be respected and protected and that third parties should not be entitled to infringe upon these rights.

7.2 **In favour of force-feeding**

Other arguments have been put forward to justify the force-feeding of hunger strikers. The most important arguments in favour of force-feeding seem to be the prevention of suicide and the need to maintain order within the prison.[178]

It can be argued that a hunger strike is a form of suicide. A prisoner intent on suicide could well use a hunger strike as a means of attaining this aim. However, in the vast majority of hunger strikes, the intention is not suicide as has been discussed in chapter 5. The intention is to achieve a specific aim and if death occurs, it is not the intent but shows that the prisoner is prepared to die to achieve the cause.

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177 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 636

178 These arguments have been raised in various applications which have come before the courts in the US as well as elsewhere in the world

There is an argument to be made that a hunger strike is a form of suicide and the State is obliged to prevent prisoners from committing suicide. I do not support this view purely because I do not believe that a hunger strike is a form of suicide. I do accept there could be cases in which an attempt at suicide is shrouded in the cloak of a hunger strike and then it may be acceptable to interfere. Therefore it would always be crucial to determine the true intention behind the hunger strike. According to the European Court of Human Rights, if information indicates that a prisoner is intent on suicide then the State authorities are obliged to prevent this from happening.[179] I support this view. I also support the fact that society expects the State to prevent suicides in prison. In fact I would argue that there is a duty upon the State to ensure that those in their care as prisoners must be prevented from committing suicide.

7.2.1 *The need to maintain order within the prison*

There can be no doubt that the State does have a legitimate interest to ensure that order is maintained within a prison. Whilst accepting that hunger strikes can be disruptive to the general prison population, it is interesting to note that Neumann found that there is scant evidence to support the notion that hunger strikes disrupt the prison.[180] However, when the hunger strike is far reaching and involves a large section of the prison population there have been clear examples of these disrupting the general prison population such as in the famous hunger strikes in Irish prisons during the early eighties and the Turkish strikes in 2000-2003.[181]

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179 Keenan v United Kingdom App. No. 27229/95 ECtHR 3 April 2001;
Renolde v France App. No. 5608/05 ECtHR 16 Oct 2008 cf. P Jacobs 139

180 A Neumann "The Limits of Autonomy: Force-Feedings in Catholic Hospitals and in Prisons" *New York Law School Law Review* (2013-2014) 305

181 IRA prisoners in the HM Maze Prison cf British Medical Association *The Medical Profession and Human Rights Handbook*

By force-feeding the hunger strikers the prison authorities can use this to show that they will not tolerate efforts to be manipulated or disruptive behaviour.

The US Supreme Court stated in *Bell v Wolfish* that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."[182]

One also cannot ignore the obvious fact that prison officials would be placed in an invidious position if an inmate were to die by virtue of a hunger strike.

I find substance in Neumann's findings that there is little evidence to show that hunger strikes disrupt an entire prison and it would always be open to the authorities to isolate the hunger strike from the rest of the prison.

7.2.2 ***Preservation of life***

The State is obliged to protect those in their care, albeit as a prisoner. By depriving someone of their liberty they take on the duty to take care of them.[183] This is perhaps the strongest argument raised in favour of force-feeding hunger striking prisoners. Article 2 of the European Convention on Human Rights places a duty on States and their authorities to preserve the life of prisoners and detainees.[184] Every court in the US to have dealt with this issue has found the State's interest in preserving the life of its inmates to be the central

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182 *Bell v Wolfish* 441 U.S. 520, 546 (1979) cf. M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 648 n 106

183 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 135

184 The ECHR was signed in Rome on 4 Nov 1950 and is the most important document in the field of human rights in Europe

government interest at stake.[185] Allied to this is the health practitioners' duty to preserve life (the duty of beneficence). Whilst I accept that the State does have an interest in protecting those in their care I do not believe that this comes at the expense of the prisoner's right to make decisions about his own health. I have argued that in accordance with international guidelines the prisoner has the right to make decisions about his own health and this overrides the duty of beneficence in this context.[186] There would seem to be support for this argument in some of the South African judgements.[187]

7.2.3 *The need to constrain manipulative efforts by prisoners*

Prison officials would be aware that prisoners may attempt to manipulate them through a hunger strike. A hunger strike could easily be seen as a form of manipulation and, again, the reason behind the hunger strike would be crucial to understand. Through a hunger strike, the prisoner forces the authorities from a dominant position into a subordinate position.[188] It also gives the prisoner a platform and gains attention from the media and society, which is often the prisoner's intention. It places the authorities in a very difficult position: either to give in to the demands of the prisoner or to stand by and watch the prisoner slowly die. It becomes an almost untenable position for the authorities to be in.

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185 M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58)(2 644

186 see in this regard the court's view in Lee v Min Corr Services 2013 (2) SA 144 (CC)

187 see in this regard, Goldberg, Lee and Hofmeyer's cases note note 78, 79 above

188 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012)136

7.2.4 ***Prevent copycat strikes***

In the US case of *Lantz v Coleman*,[189] the court ruled in favour of the authorities force-feeding Coleman on the basis that they wished to prevent any further "copycat strikes" from erupting in the prison. As Silver puts it, "the only thing worse than one hunger strike would be many hunger strikes." However Silver also argues that if the State wants to discourage copycat strikes there is no evidence showing that force-feeding would achieve this. The hunger striker could be moved to a separate part of the prison to ensure that this does not happen.

7.2.5 ***Prevention of martyrdom***

The argument that force-feeding will prevent a hunger striker from becoming a martyr is especially relevant in politically motivated hunger strikes. The best example is the case of the IRA's Bobby Sands during the early 1980s who died from his hunger strike and became a hero in the struggle for Irish autonomy. However there have not been many examples of this subsequent to Bobby Sands. And it is not the health practitioner's responsibility to prevent martyrdom.

7.2.6 ***Ensuring awaiting trial prisoner is brought to trial and this is not thwarted by death through hunger strike***

Society requires that justice be seen to be done and victims often need this to find closure. The notion that retribution is often necessary for victims and their families to be able to move forward with their lives would be a strong argument in favour of force-feeding an awaiting trial prisoner to ensure that he stands trial so that justice can run its course.

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189 *Lantz V Coleman* 978 A 2d 164 Conn. Supr. Crt 2009

An interesting illustration of this argument was the case of Volkert Van Der G in the Netherlands in 2002.[190] Volkert Van der G assassinated the Dutch politician Pim Fortuyn. Whilst awaiting trial he embarked upon a hunger strike in protest against the cameras that had been installed into his cell to monitor him as the fear was that he may commit suicide. His hunger strike caused an uproar in society and among politicians who feared that he would die from his hunger strike and thereby avoid standing trial. As it happened he terminated his hunger strike on his own accord and did stand trial. This is a powerful example of the attitude that society held towards a suspect believed to be avoiding trial by means of a hunger strike. The Dutch parliamentarians were fully in favour of him being force-fed. Great value was placed on the fact that he should "live to stand trial so that justice could run its course."[191]

7.2.7 *Gathering information from awaiting trial prisoner*

It will often be necessary to gather information prior to trial and this process would be thwarted by allowing prisoners to hunger strike. However it would be necessary for authorities not to ignore the constitutionally entrenched right to remain silent and to not incriminate oneself. But the gathering of information such as DNA samples may be relevant and necessary. It could be argued that the samples may still be obtained whilst the prisoner is hunger striking. [192]

7.2.8 *Interests of dependent third parties*

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190 ECtHR 1 June 2004, Volkert Van der Graaf v The Netherlands, App. No.8704/03 cf.P Jacobs: *Force-feeding of Prisoners* (2012) 213

191 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 233

192 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 233

This argument raised occasionally in the US courts is that it would not be in the interests of the hunger striker's dependents if he were to die whilst on hunger strike. This argument detracts from the detainee's personal autonomy and the right he has to make those decisions for himself. It is a paternalistic argument but beneficence is one of the main principles behind paternalism. [193]

7.2.9 *Hunger strikers own interest in preserving his health and life*

This argument that the prisoner needs to be protected from either injuring himself or dying despite the fact that he has made the decision to embark upon the hunger strike himself, is a paternalistic one and indicates that the prisoner needs to be protected from himself. [194] It could be argued that the prisoner may not have fully understood the implications of the hunger strike and the damage it could cause, but I would argue that this underlines the reasons why a hunger striker should be kept fully informed of these consequences at all times during the strike so that his decision can be one based on full disclosure and understanding.

7.2.10 *Religious beliefs*

Mention has been made of the situation in Catholic hospitals where personal autonomy is secondary to the preservation of life. However, just as I find this argument to be incorrect in prisons, so too do I find it wrong that Catholic hospitals choose to restrict personal autonomy in this way.

Conclusion:

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193 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 233

194 P Jacobs: *Force-feeding of Prisoners and Detainees on Hunger Strike* (2012) 234

It is clear that the arguments for and against force-feeding have many facets to them including legal, ethical, political, societal and medical. When a prisoner embarks upon a hunger strike the decision needs to be made as to whether his rights or whether the rights and duties of other persons or bodies should prevail. The arguments raised in opposition to force-feeding include that it is an infringement of the prisoner's right to self-determination, it is a form of torture or degrading treatment, it contravenes medical ethics, it violates the hunger strikers freedom of expression and is a violation of the hunger strikers' right to health and is a form of non-violent protest that ought to be tolerated. All of these arguments support the view that prisoners should be free to embark upon a hunger strike without interference from the State and that the prisoner's rights should prevail over those rights and duties of the State.

The arguments raised in favour of force-feeding include preventing suicide, maintaining order within the prison, preserving the life of the hunger striker, preventing the prisoner manipulating the authorities, preventing copycat strikes, preventing martyrdom, ensuring justice is served, gathering of information from awaiting trial prisoners, considering the interests of dependent third parties, considering the interest in preserving the hunger strikers own life, and the impact of religious beliefs. These arguments in favour of force-feeding support the view that other parties or the State's interests should prevail over those of the prisoner. Whilst there are many more arguments in favour of force-feeding, I do not find all these arguments to be persuasive. I do not support the view that the State must act in the prisoner's own best interests even if it is against his wishes because the State decides it is for his own good or the common good. I believe that prisoners ought to be entitled to embark upon a hunger strike without intervention.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

8.1 Conclusion

Hunger strikes have become increasingly common throughout the world and they pose a moral problem for health practitioners. The dilemma between the responsibility of the State to care for those in their care as well as the interests of third parties as opposed to the right to self-determination as derived from the principles of autonomy and human dignity for the prisoner, is most intense. International guidelines provide inadequate guidance for health practitioners. Despite the World Medical Association's clear stance on force-feeding, its declarations are not enforceable and the result is that hunger strikers continue to be force-fed, often very cruelly. As recently as December 2014, a case was brought before the Washington District Court of a Syrian prisoner who has been held at the Gunatanamo Bay prison for the last 12 years without having been brought to trial. His name is Abu Wa'el Dhiab.[195] He had embarked upon a hunger strike and finally brought an application to court to protest against the methods being used to force-feed him. Judge Galdys Kessler ordered that video tapes showing the prisoner being force-fed be produced for the court to view. The US government was vehemently opposed to the showing of these video tapes and appealed against the judgement. Abu Dhiab was released to Uruguay late in December 2014, thus the tapes have not been seen. But Abu Dhiab is a reminder that these gruesome methods of force-feeding continue even today.[196]

8.2 Recommendations

[195] *Dhiab v Obama* 2014, US Dist. LEXIS 14068 (DDC Oct 3, 2014)
[196] Available from http://www.reprive.org.uk (accessed 25 January 2015)

The force-feeding of prisoners on a hunger strike is in stark contrast to patients within the clinical setting who decide to no longer receive life-saving treatment. Their autonomy in these situations is usually paramount and health practitioners accept that the patient's wishes trump their duty of beneficence.[197] Medical bodies including the HPCSA and SAMA need to develop clear guidelines on the treatment of hunger strikers by health practitioners. These rules need to be clear and concise leaving no room for interpretation.

It should be clear from this report that the methods used to force-feed are cruel, inhuman and infringe upon the dignity of the prisoner. These methods cannot be condoned and should not be allowed. In chapter 2 I recommend that the methods used to force-feed prisoners be labelled torture. Annas, Crosby and Glantz have gone so far as to say that "force-feeding a competent person is not the practice of medicine, it is aggravated assault."[198]

Health practitioners should not be placed in situations in which they are compelled to act against their ethical beliefs and which make them complicit in the torture or ill treatment of hunger strikers. Health practitioners need to be assisted in maintaining their neutrality at all times when dealing with hunger striking prisoners. I recommend that health practitioners treating hunger strikers in prisons should be independent and not employed by the prison service. I recommend that when examining the hunger striking prisoner they do so in an unmonitored room, thus allowing the prisoner to speak freely.

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197 Except as noted above in Catholic Hospitals and countries where the Catholic Church is dominant like Italy, Ireland and Brazil. The example of Piergeorgio Welby is indicative of this. He campaigned to have treatment withdrawn from him in Italy. He suffered with muscular dystrophy but the State, urged by the church, refused to allow it. <http://www.nytimes.com/2006/12/20/world/europe/20welby.html>

198 G Annas and SS Crosby *The New England Journal of Medicine* (2013) http://www.**nejm**.org/doi/full/10.1056/**NEJM**p1306065 (accessed 25 January 2015)

I agree with Silver when he says that "there is no place for physicians in force-feeding."[199] But there is a place for independent health practitioners within prisons, ensuring that hunger strikers' wishes are recognized and that sufficient care is given to them for the duration of their strike. I would echo Silver's recommendations that there be safeguards in place ensuring that the decision to embark upon the strike was made freely and voluntarily. The prisoner must have the medical consequences of his strike explained to him by the health practitioner. Silver also recommends that the prisoner execute an official release, relieving the prison and government of any liability in his death as well as giving an advance directive setting out instructions for once he becomes incompetent. I would like to echo this.

Just as the patient's autonomy in the clinical setting is deemed to be sacrosanct, I would recommend that the prisoner's autonomy ought to carry the same weight. There can be no justification for limiting a prisoner's rights to personal autonomy by virtue of his incarceration. The International Human Rights regime has acknowledged that prisoners enjoy the same human rights as other citizens and there needs to be greater recognition of this. If a prisoner embarks upon a hunger strike and is mentally competent to do so and makes the decision freely and voluntarily, I conclude that he should be allowed to continue with his strike without interference and that health practitioners should be able to monitor him for the duration of the strike. I have argued that it is unethical for health practitioners to get involved in force-feeding hunger strikers. After four weeks on a hunger strike, a hunger striker is considered to be in a state of serious danger. In this situation, I would recommend that an ethics committee should hear from the prisoner or his guardian before making a decision on whether to begin feeding or not (by this I mean artificial feeding.)

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[199] M Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" *Stanford Law Review (*2005*)* (58) (2) 643

I would furthermore propose that any feeding that is done be done by way of artificial feeding only.

I am encouraged by the precedent set by Kalk's refusal in South Africa. I look forward to the adopting of guidelines by the South African Medical Association and their policy document on force-feeding and hunger strikes as well as the Health Professional's Council of South Africa. The promulgation of the Torture Act is encouraging and I would argue that force-feeding falls within its definition of torture.

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