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POSITION PAPER

A VIOLATION OF MEDICAL ETHICS & PROFESSIONALISM:

PRISONS ORDINANCE AMENDMENT BILL

(LIMITING LIFE ENHANCING HEALTH CARE
FOR SECURITY PRISONERS), 2022

MAY 2023

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Position paper – Physicians for Human Rights Israel Ethics Committee

Preface

In recent years, the Israel Prison Service (IPS) has steadily diminished its commitment to maintaining the right to health of those held within its system on both criminal and "security" charges. Until a few years ago, the IPS still considered itself obligated to provide incarcerated individuals the same health services available to all residents through the national health basket. Recently however, the IPS implemented unilateral and illegal policy changes, rejecting its responsibility to provide health services aligned with the health basket. Current IPS directives do not clearly state which treatments and medications must be provided to incarcerated individuals, and in practice, the IPS sometimes fails to provide services mandated by the health basket. Amid the IPS's refusal to comply with the health basket stipulated in the National Health Insurance Law, its prison health care system operates without publicly defining the services it provides, giving way to arbitrary decisions and violations of its obligations as an administrative authority. Now, legislators hope to cement and expand this abdication of fundamental responsibilities.

The Bill

The proposed bill states the following: "Security prisoners will not be entitled to state funding for medical care intended to enhance their quality of life, including cosmetic treatments and medication that are not included in the national health basket." The bill emphasizes that "the provisions of this section do not detract from those stipulated in section 3 of the Patient's Rights Act (1996)." But is this so?

The bill contradicts the Patient's Rights Act and other legislation

Section 3 of the Patient's Rights Act states that a) Every person is entitled to medical care in accordance with all laws and in accordance with conditions and arrangements of the Israeli health care system; b) In medical emergency, anyone is entitled to receive emergency medical treatment unconditionally.

Israeli health care policies do not distinguish between life-enhancing care and other medical treatments. Section 5 of the Patient's Rights Act states that "patients are entitled to suitable medical care both from the standpoint of medical and professional standards and quality, as well as proper personal relations." Incarcerated individuals are not excluded from the Patient's Rights Act, which explicitly applies to the IPS – as stipulated in section 27 of the law.

Moreover, the right to health is a fundamental constitutional right protected under the right to dignity and anchored in Article 2 of the Basic Law: Human Dignity and Liberty.¹ This constitutional law not only prohibits violating the rights it lists but also "embodies an operative meaning beyond the mere recognition of these fundamental rights..."² As such, the right to preserve life, body, and dignity and the right to health "stand at the core of human rights protection in Israel."³

The bill contradicts international treaties – including those to which Israel is a signatory

The explanatory notes to the bill argue that "it does not harm the fundamental rights of patients as stipulated in the Patient's Rights Act and **international treaties to which Israel is a signatory** (emphasis added)." And yet, the International Covenant on Economic, Social and Cultural Rights (1966), ratified by Israel in 1991, enshrines the right to the highest attainable standard of physical and mental health of every human being.⁴ The Committee on Economic, Social, and Cultural Rights

¹ See PCA 4905/98 Gamzo v. N. Yeshayahu (27.3.01) and Guy Mondleck, "Socio-Economic Rights in Contemporary Constitutional Discourse," Mishpat Haavoda 7, p. 65 [Hebrew].

² PCA 9185/03 Tenenbaum v. Haaretz (22.10.03).

³ HCJ 2887/04 Madigam v. Israel Land Administration (15.04.07).

⁴ In addition, see, for example, Article 25 of the Universal Declaration of Human Rights (1948).

(CESCR) is responsible for interpreting and overseeing the convention's implementation by its signatory states. In 2000, the committee published General Comment No. 14, which interprets Article 12 and its implementation.⁵ The comment clarifies that States Parties must ensure that the right to health is implemented without discrimination of any kind, including regarding incarcerated individuals. It also asserts that States Parties must take deliberate and concrete steps toward fully realizing Article 12. States Parties are obligated to act tirelessly and constantly to implement the article, and **any deliberately retrogressive measures in the implementation of the right to health are prohibited.**⁶

Moreover, by targeting only Palestinians who committed "security" violations and not Jews, the proposed bill violates the obligation to prevent any discrimination in the implementation of the right to health. This discrimination is evident from the bill's explanatory notes: "The bill aims to establish a clear legislative proviso on the matter and deny prisoners accused of subversive acts against the State of Israel the right to any medical treatment defined as life-enhancing or which is not included in the health basket." Of course, even if the bill was to be equally applied to Jewish Israelis, it would remain fundamentally wrong, yet its discriminatory language emphasizes its punitive political dimensions. General Comment No. 14 emphasizes the principle of non-discrimination as fundamental to the accessibility of health services:

"Accessibility has four overlapping dimensions: (i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds."⁷

⁵ CESCR, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000. Full text is available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en.

⁶ Id. at 32. "If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources."

⁷ General Comment No. 14, section 12 (b).

Article 18 of General Comment No. 14 elaborates on the circumstances due to which discrimination is prohibited:

"The Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health."⁸

Although Israel is not a signatory to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Israel's High Court has referred to and relied upon them. Furthermore, they are intrinsic to public international law and emphasize the obligation to provide equal health services to those available in the community:

"The provision of health care for prisoners is a State responsibility. **Prisoners should enjoy the same standards of health care that are available in the community**, and should have access to necessary health care services free of charge without discrimination on the grounds of their legal status."

A 2020 World Health Organization (WHO) position paper titled "Organizational models of prison health: considerations for better governance" states the following:⁹

"Since 2013, as set out in the policy brief Good governance for prison health in the 21st century, WHO and partners have recognized that states have a special, sovereign duty of care for people in prison (1). Furthermore, states are accountable for all avoidable health impairments to people in prison that are caused by inadequate health-care measures or inadequate prison conditions with respect to hygiene, catering, space, heating, lighting, ventilation, physical activity and social contacts. **This implies that prison health services**

⁸ Ibid, section 18.

⁹ <https://apps.who.int/iris/bitstream/handle/10665/336214/WHO-EURO-2020-1268-41018-55685-eng.pdf>

should maintain professional, ethical and technical standards that are at least equivalent to those applying to public health services in the community (emphasis added)."

Distinguishing between life-enhancing and life-preserving care: unethical and wrong

It is impossible to define which forms of care enhance patients' quality of life and which constitute primary care. While this topic is subject to long-running debate within bioethics, the arguments for limiting human enhancement practices are based on concerns for justice, resource equity, and unexpected adverse effects (Hofmann 2017), not whether it can be used to discriminate or prevent treatment. It is, therefore, clear that promoting such definitions in order to prevent treatment from particular individuals or groups is entirely unethical and violates the right to health as defined by the WHO – as an inalienable right belonging to all persons, regardless of their actions.

Indeed, various models exist worldwide to evaluate the efficacy of technologies, treatments, and medications. In Israel, the most well-known is the Health Services Basket Expansion Public Committee (the Public Committee). Yet, there are fundamental differences between such models and the proposed bill.

The Public Committee's mission is to "create a basket of health services that offer a balanced societal response by guaranteeing a broad infrastructure that adequately meets society's wide range of medical needs and allocates the limited existing resources most effectively."¹⁰

In other words, the committee adheres to the considerations that underpin both international conventions and medical professionalism and ethics. The committee does not bring forth any conditions relating

¹⁰ See Ministry of Health, the Health Services Basket Expansion Public Committee, Ministry of Health website. The committee's criteria for assessing technologies include efficacy in treating disease; capacity to prevent illness and mortality or saves lives; life extension capacity and expected quality of life; therapeutic alternatives and their effectiveness; pilot experiments in Israel and abroad; projected national and individual costs; expected long-term and short-term benefits of its inclusion in the basket.

to individual or communal actions or a perception of health care as a reward that must be earned. Similar to the principles of the National Health Insurance Law and Health Ministry directives, its guiding principles aim to promote "equality across all health policies."¹¹ Yet, in complete contrast, the proposed bill seeks to prevent treatment from specific populations.

PHRI engaged in a similar debate when Israeli security forces escalated their permit policy for Gazan patients seeking to enter or travel through Israel for medical treatment amid the 2007 political strife between Hamas and Fatah.¹² Israel argued that it has no obligations toward the residents of Gaza and that patient travel would only be authorized in "life-threatening cases" – and not when their "quality of life" was at risk. A review of patient data indicated that "the primary medical criterion for granting travel permits seems to be preventing deaths directly caused by being denied entry into Israel. Since there is no medical justification for this form of "triage," the reason for establishing this criterion is likely political rather than medical." The authors determined that such prioritization violates medical ethics by performing a quasi-medical procedure that is not based on medical considerations, for non-medical purposes, and against the patient's best interests. Similarly, decisions regarding which medical care incarcerated individuals can receive are based not on medical needs but on punitive political considerations.

In the case of the proposed bill, its previously mentioned discriminatory elements emphasize its political-punitive dimensions.

Such circumstances, in which the legislator will force health professionals to withhold certain treatments, will put them in a dual loyalty, forcing them to decide between adhering to medical professionalism and ethics and obeying politicized directives. If the law is passed, physicians and other medical staff – if and when faced with such a decision – must refuse to

¹¹ As stated by Moshe Bar Siman Tov, Health Ministry Director, in: Shlomit Avni and Emma Averbuch, "Health Equality in Every Policy – A Training Manual for Planning and Evaluating Equality-driven Health Policies," Director of Strategic and Economic Planning on Reducing Health Disparities, Ministry of Health, January 2017 [Hebrew].

¹² See "Israel's Policy at the Erez Crossing: A Medical Ethics Expert Opinion," Miri Weingarten. Ethical analysis: Prof. Michael Weingarten and Dr. Kobi Arad.

follow it, relying on relevant medical covenants and codes of practice.

The WHO states that even persons whose liberty has been restricted must receive the same medical treatment available to individuals living outside of prison:

"The term "persons deprived of liberty" refers to all regardless of the reason for their detention as well as of their legal status, from pre-trial detainees to sentenced persons."¹³

The American Nurses Association's (ANA) Code of Ethics, which addresses the obligations of health professionals working at incarceration facilities, offers further insight into the issue at hand. Articles 8 and 9 of the ANA code emphasize the protection of human rights and the integration of social justice into nursing and health policy.

Indeed, beyond the fact that the bill contradicts national and international law, physicians and other health professionals are obligated to do good - and not only avoid harm. From the moment a nation adopts standards of medical care to reflect its values and the values of its health professionals, they must be equally followed for all patients - especially those held in custody and who cannot access treatment on their own.

Therefore, we are convinced that this is an illegal bill that, if passed, we are obligated to refuse to follow.

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¹³ <https://www.wma.net/policies-post/wma-declaration-of-edinburgh-on-prison-conditions-and-the-spread-of-tuberculosis-and-other-communicable-diseases/>