

**The impact and constitutionality of delayed trials on the rights of a suspect or accused
person during criminal proceedings**

by

ARUSHA GOPAUL

Submitted in accordance with the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF J P SWANEPOEL

February 2015

Student number: 42055989

I declare that, "The impact and constitutionality of delayed trials on the rights of a suspect or accused during criminal proceedings" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

ARUSHA GOPAUL

DATE

ABSTRACT

The Constitution of the Republic of South Africa guarantees every person a fair trial; the right to a fair trial must begin and conclude within a reasonable time and without undue delay. Internationally the same guarantees and protections are available to unconvicted suspects. However, the South African criminal justice system lacks behind internationally and falls short of promoting these guarantees.

Investigation was done on delays in commencing and finalising trials in light of constitutional provisions, the consequence and the impact of the delay with discussion on prison conditions and overcrowding with reference to the Constitution, legislation and case law.

Delayed trial, prison overcrowding and poor prison conditions are still an issue in South Africa and there needs to be positive change to enforce and practice prescribed directives. South Africa's justice system through its servants, need to do more to gain a higher status of having a constitutionally democratic country that fully promotes' rights of detainees.

KEYWORDS

Accused

Bail

Constitutional rights

Detainee

Plea bargaining

Prison conditions

Overcrowding

Speedy trial

Suspect

Unreasonable delay

ACKNOWLEDGEMENTS

I would like to express my gratitude to the following people whose contributions and support have been invaluable:

Professor J. P. Swanepoel, my supervisor for her full support, guidance, supervision, advice and assistance during the research and writing of the dissertation.

Ms Rosin, the department secretary for her prompt assistance.

Stevens Stationers' for their prompt assistance in printing and photocopying of documents during the writing of the dissertation.

Mohan and Radhika Gopaul, my parents, for their continued support and patience during the research and writing of the dissertation.

Advocate Kerina Gopaul, my sister, for editing the dissertation and for her patience and positive advices while researching and writing the dissertation.

LIST OF ABBREVIATIONS

DCS	Department of Correctional Services
DOJ&CD	Department of Justice and Constitutional Development
DPP	Director of Public Prosecutions
ICCPR	International Covenant for Civil and Political Rights
ICRC	International Committee of the Red Cross
IMLU	Independent Medico-Legal Unit
IPID	Independent Police Investigating Directorate
JICS	Judicial Inspectorate for Correctional Services
MPS	Municipal Police Service
NEPAD	New Economic Program for African Development
OAS	Organisation of American States
OAU	Organisation of African Unity
OCJ	Ontario Court of Justice
PSC	Public Service Commission
SAPS	South African Police Service
SMRs	Standard Minimum Rules for Treatment of Prisoners

Table of Contents	Page Numbers
Declaration.....	ii
Abstract.....	iii
Keywords.....	iv
Acknowledgements.....	v
List of Abbreviations.....	vi

CHAPTER 1

INTRODUCTION

1.1	Background to the study	1
1.2	Definition and concepts used	4
1.3	Problem statement	7
1.4	Objectives of the study	7
1.5	Methodology and Research Design	8
1.6	Organization of the dissertation	9

CHAPTER 2

INTERNATIONAL LAW AND THE LAW OF SELECTED FOREIGN JURISDICTIONS RELATING TO DELAYED TRIALS WHICH DO NOT COMMENCE AND FINALISE WITHIN A REASONABLE TIME AND WITHOUT UNDUE DELAY

2.1	Introduction	11
2.1.1	The International Covenant on Civil and Political Rights in the context of the right to a speedy trial	15
2.1.2	The European Convention for the Protection of Human Rights and Fundamental Freedoms in the the context of the right to a trial within a reasonable time and without undue delay.....	17

2.1.3	The African Charter on Human and People’s Rights	17
2.2	Delayed trials in foreign jurisdictions	18
2.2.1	Delayed trials and fair trial rights	18
2.2.2	Pre-trial delays and pre-trial detention	26
2.2.3	“Unreasonable delay” and a speedy trial in foreign jurisdictions	32
2.2.3.1	<i>Canada</i>	32
2.2.3.1(a)	<i>Systematic delays during pre-trial and trial</i>	33
2.2.3.2	<i>United States of America</i>	35
2.2.3.3	<i>Australia</i>	38
2.2.3.4	<i>Namibia</i>	41
2.3	South Africa and its connection to International Law	44
2.4	International correctional facilities and human rights in relation to delay in trials	45
2.4.1	The right to life	46
2.4.2	Freedom from arbitrary arrest and detention	47
2.4.2.1	<i>Ghana</i>	47
2.4.2.2	<i>South Africa</i>	48
2.4.3	Freedom from torture, cruel, inhuman or degrading treatment	49
2.4.3.1	<i>Torture of suspects and detainees</i>	50
2.4.4	Right to be detained in conditions that is consistent with human dignity	55
2.4.4.1	<i>Right to adequate accommodation, nutrition and medical treatment</i> ..	57
2.4.4.1(a)	<i>India</i>	57
2.4.4.1(b)	<i>United States of America</i>	58
2.4.5	Right to freedom and liberty	59
2.4.6	The presumption of innocence.....	60
2.5	International human rights and the Standard Minimum Rules for the Treatment of Prisoners	61

2.6	Child offenders and children in detention	65
2.6.1	United Nations Convention on the Rights of the Child	65
2.6.2	‘Beijing Rules’	66
2.6.3	United Nations Rules for the Protection of Juveniles Deprived of their Liberty	66
2.6.4	United Nations Standard Minimum Rules for Non-Custodial Measures	66
2.6.5	African Charter on the Rights and Welfare of the Child	67
2.7	Conclusion on international law and foreign law in relation to delayed trials	68

CHAPTER 3

SOUTH AFRICAN LAW RELATING TO DELAYED TRIALS

3.1	Introduction	70
3.1.1	Right to a trial without undue delay	70
3.2	Delayed trials in respect of awaiting trial persons	71
3.2.1	Introduction	71
3.2.2	Brief overview relating to remand detainees	71
3.3	“Unreasonable delay” in the start and conclusion of a trial	74
3.4	South African legislation and Constitutional provisions relating to delays	82
3.4.1	The Correctional Services Act 111 of 1998	82
3.4.2	Section 342 A of the Criminal Procedure Act 51 of 1977	82
3.5	South African cases pending and complete as illustrations of delayed trials	85
3.6	Systematic delays in South African courts pending or completed cases ..	87

3.7	The Constitution of the Republic of South Africa, 1996 and the relevant provisions	88
3.7.1	Section 35(3) (a) of the Constitution	89
3.7.2	Section 35(3) (d) of the Constitution	91
3.7.3	Section 35(2) (e) and (f) of the Constitution.....	93
3.7.4	Section 35(3) (h) of the Constitution	95
3.7.5	Section 10 of the Constitution	97
3.7.6	Section 11 of the Constitution.....	99
3.7.7	Section 12 of the Constitution.....	99
3.8	Special protection for children in detention	100
3.9	Conclusion on delayed trials in South Africa	103

CHAPTER 4

CONSEQUENCES AND IMPACT OF DELAYED TRIALS IN SOUTH AFRICA

4.1	Introduction	104
4.2	Prison conditions and framework	105
4.2.1	Position prior to the coming into operation of the Correctional Services Act 111 of 1998.....	106
4.2.1.1	<i>Physical welfare of the detained</i>	106
4.2.2	Position after the coming into operation of the Correctional Matters Amendment Act 5 of 2011	110
4.2.3	Position after the coming into operation of the Correctional Matters Amendment Act 5 of 2011	112
4.2.3.1	<i>Chapter V of Act 111 of 1998 as introduced by Act 5 of 2011</i>	113
4.2.3.2	<i>Section 49G of Chapter V of Act 111 of 1998 and period of remand detention</i>	116
4.2.3.3	<i>Comparative examples – limits on period of pre-trial detentions</i>	118
4.2.3.4	<i>Conditions of detention for juveniles/children</i>	119

4.2.3.5	<i>Social and health conditions of detention for inmates</i>	120
4.3	Overcrowding	122
4.3.1	Position prior to the coming into operation of the Correctional Matters Amendment Act 111 of 1998	122
4.3.2	Position after the introduction of the Correctional Services Act 111 of 1998	123
4.3.2.1	<i>Overcrowding and awaiting trial prisoners between 2004 and 2011</i>	124
4.3.3	Position after the coming into operation of the amendments to Act 111 of 1998 by the Correctional Matters Amendment Act 5 of 2011	127
4.3.3.1	<i>Overcrowding and remand detainees after 2011</i>	127
4.3.3.2	<i>Overcrowding and section 35(3) (e) of the Constitution, after Act 5 of 2011</i>	132
4.3.3.3	<i>Overcrowding and prison violence</i>	133
4.3.3.4	<i>Gangs</i>	138
4.3.3.5	<i>Overcrowding - human rights in international law and foreign jurisdictions</i>	139
4.3.3.6	<i>Conclusion on overcrowding</i>	139
4.4	Poor Administration within the Justice Department	140
4.4.1	Causes and justifiability of court delays	145
4.4.2	Conclusion on court administration	146
4.5	Delay in appeal proceedings and its effect on a detained person's rights and concomitant remedy	149
4.6	Conclusion on the consequences and impact of delayed trials in South Africa	153

CHAPTER 5**SOLUTIONS, RECOMMENDATIONS AND CONCLUSION**

5.1	Introduction	154
5.2	Solutions proposed	154
5.2.1	Bail	157
5.2.2	Non-custodial measures	160
5.2.3	Plea bargaining	161
5.2.4	Overcrowding in correctional facilities	164
5.3	Recommendations	167
5.4	Conclusions	171
	Bibliography	174
	Subject Index	195

LIST OF TABLES

TABLE 1: Average remand detainee population from 2009/2010 to 2013/2014

TABLE 2: Backlog of cases at Regional Courts in Limpopo

CHAPTER 1

INTRODUCTION

1.1 Background to the study

Section 35(3) (a) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to a public trial before an ordinary court of law within a reasonable time after being charged.¹ The South African criminal justice system has placed blame for the delayed trials on the high crime rate and shortage of staff as a reason for delayed trials. As a result, the accused or suspect has to suffer the consequence of being incarcerated for lengthy periods.

Judge Fagan, in his report to Parliament's Correctional Services Committee in 2001 commented on the long delay in conducting trials, "It's atrocious. This is detention without trial as far as I'm concerned, and I'm really waiting for someone to take this to the Constitutional Court".² Furthermore, section 35(3) (d) of the Constitution provides that every accused person has the right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay.³ Section 35(3) (d) of the Constitution is concerned with the liberty interests of an accused.⁴ Locating the problem is simply one of the factors to be assessed in the broader question of whether fairness of trial will be affected by the lengthy pre-trial delays.⁵

In terms of section 35(3) (h) of the Constitution, every accused, detained and arrested person has a right to a fair trial, which includes the right to be presumed innocent until proven guilty.

¹ The Constitution of the Republic of South Africa, 1996, section 35(3)(a).

² Fagan, H (2001) "Report on Visits to Johannesburg, Pretoria & Pollsmoor Prisons" in his report to Parliaments Correctional Services Committee, page 1, available at: <http://www.pmg.org.za/minutes/20020212-report-visits-johannesburg-pretoria-pollsmoor-prisons> (accessed on 18 December 2014).

³ The Constitution of the Republic of South Africa, *op cit.*, (fn 1) section 35(3)(d).

⁴ Ballard, C (2011) "Research Report on Remand Detention in South Africa: an overview of the current law and proposals for reform." Community Law Centre, page 6, available at: <http://cspri.org.za/publications/research-reports/Remand%20detention%20in%20South%20Africa.pdf> (accessed on 7 December 2014).

⁵ *Ibid.*

In *Sanderson v Attorney-General, Eastern Cape*⁶, the Court held that the criminal justice system aims to punish only those arrestees and detainees who have been found guilty in a court of law and who have had a fair trial. The Court went on to state that prior to a finding on culpability, and as part of the fair procedure itself, the accused is presumed innocent.⁷ He or she must be tried in an open court of law so that the trial can be seen to satisfy the substantive requirements of a fair trial.⁸ The Court emphasised that the profound difficulty with which one is confronted with is that an accused person, despite being presumed innocent⁹, is subject to various forms of prejudice and penalty merely by virtue of being an accused.¹⁰ It was emphasised that these forms of prejudice are consequential and unintended by-products of the system.¹¹

The rights of accused persons are further affected by the fact that the majority of the accused persons are either unable to afford bail or they are refused bail by police officials, a prosecutor or a court.¹² Accused persons who are denied this opportunity become dependent on being allowed bail in order to prevent a long period of incarceration before trial. The accused has an interest in being granted bail as the denial of freedom is disruptive to his running a normal life.¹³ There can be no doubt that there is a need for bail in most cases, mainly because the accused is presumed innocent until proven guilty.¹⁴ The Constitution entrenches the right of every accused person to be granted bail. Denial of bail may not be used as a means to punish the accused before he is convicted.¹⁵ Public interest considerations relating to release of the accused on bail should be balanced against the accused's interest to liberty, especially where there is a real likelihood that it will be a long time before the accused appears before trial.¹⁶

⁶ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), paragraph 23.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3)(h).

¹⁰ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 23.

¹¹ *Ibid.*

¹² Makiwane, P N (2008) *Rights and Constitutionalism – A bias towards offenders?* available at: http://uir.unisa.ac.za/xmlui/bitstream/handle/10500/2696/dissertation_makiwane_%20p.pdf?sequence=1 (accessed on 3 August 2015).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Fagan, *op. cit.*, (fn 2) page 1.

Plea bargaining in South Africa is a procedure which has been introduced through legislation and practice since 2001 to facilitate the quick and speedy resolution of matters. It is aimed at alleviating the large number of trials being set down and large court rolls. It is also said to assist in avoiding delays in trials. However, the researcher will undertake careful research to determine whether plea bargaining actually fulfils its initial objectives or whether South Africa continues to have delayed trials as a major constitutional impediment.

Crouse¹⁷ states that “we are worried about the number of people who are in prison just because they cannot afford to pay bail.” Crouse also emphasises that many inmates have been waiting to be tried for periods ranging from a month up to two years and their common response when asked why they were not paying bail was that they cannot afford it.¹⁸

The Bill of Rights, chapter 2 of the Constitution¹⁹ guarantees fundamental rights for all South African citizens, including the rights of persons who are suspects or accused in criminal proceedings. The Constitution provides for rights relating to human dignity²⁰, the right to life²¹, the right to freedom and security of person²², the presumption of innocence²³ and the right to be detained in conditions that are consistent with human dignity, which includes the right to adequate accommodation, nutrition and medical treatment (section 35(2) (e) of the Constitution²⁴). These rights are inherent to every suspect or accused person. A discussion of these rights will follow in respect of their application to suspects and accused persons who await pre-trial appearances or even trial.

International law plays an important role in determining the constitutionality of the rights related to suspects and awaiting trial persons. International covenants or treaties ratified by

¹⁷ Crouse, A (2011) “Hope for prisoners awaiting trial who cannot afford bail.” Wits Justice Project, page 1, available at: <http://witsjusticeproject.com/2011/06/11/hope-for-prisoners-awaiting-trial-who-cannot-afford-bail/> (accessed on 18 December 2014).

¹⁸ *Ibid.*

¹⁹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) sections 10, 11, 12 and 35.

²⁰ *Ibid.*, section 10. This section provides that everyone has inherent dignity and the right to have their dignity respected and protected.

²¹ *Ibid.*, section 11. This section provides that everyone has the right to life.

²² *Ibid.*, section 12(1). This section provides that everyone has a right to freedom and security of the person, which includes the right (a) not to be deprived arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

²³ *Ibid.*, section 35.

²⁴ *Ibid.*, section 35(2)(e) includes the right to medical treatment and nutrition.

South Africa are binding and South Africa then has a duty to uphold and implement the provisions of such treaties or covenants that it is a party to. The law of foreign jurisdictions is not binding on South Africa more especially in terms of section 39 of the Constitution²⁵

South African courts **may** consider foreign law. However, courts may find that foreign law may serve as a guide in deciding cases by making reference and use of other laws in relation to the rights of suspects or accused persons as well as the enquiry dealing with delay in trials.

1.2 Definition of concepts used

1.2.1 Abuse of process – failure due to incompetence and disinterest calculated abuse of law, or a genuine inability to meet generous deadlines.²⁶ More appropriately, abuse of process is an intentional or negligent subversion of the judicial process which results in a miscarriage of justice.

1.2.2 Accused/suspect – a person/s charged with the commission of a crime.²⁷ A suspect is any person accused or suspected to be guilty of a crime or offence.²⁸

1.2.3 Appellant – the party who appeals a trial court decision he/she has lost.²⁹

1.2.4 Bail – a sum of money deposited to secure an accused person’s release from custody in order to guarantee that the person appears at court at his or her next date for appearance.³⁰

1.2.5 Correctional centre/facility – any place established under the Act³¹ as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to detention in placement under protective custody, and land, outbuildings and premises adjacent to any such place and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, protection, labour, treatment or otherwise, and all

²⁵ *Ibid.*, section 39.

²⁶ Louw, L (2013) “Are Court delays an abuse of the legal process?” Free Market Foundation, page 1.

²⁷ Dyson, M (2013) *The Criminal Justice and You: A guide to the South African Criminal Justice System for Refugees and Migrants*. Independent Projects Trust. Glossary of terms, page 4, available at: <http://www.ipt.co.za> (accessed on 7 October 2014).

²⁸ Oxford Dictionary Press (2014) “Oxford Dictionary Definition,” page 2, available at: <http://www.oxforddictionaries.com/definition/english/suspect> (accessed on 24 November 2014).

²⁹ The Free Dictionary by Farlex, available at: <http://legal-dictionary.thefreedictionary.com/appellant> (accessed on 8 December 2014).

³⁰ Dyson, *op. cit.*, (fn 27) page 4.

³¹ Correctional Services Act 111 of 1998, section 1.

quarters of correctional officials used in connection with any such prison, and for the purposes of sections 115 and 117 of the Act includes every place used as a police cell or lock-up.³²

1.2.6 Delay of trial – a delay in court proceedings is known as a continuance.³³ Delay is the time between an accused is arrested and continues up to and including judgment and sentencing.³⁴

1.2.7 Fair trial – in a constitutional dispensation, a trial by a neutral, fair court, conducted so as to accord each party the due process rights required by applicable law; and of a criminal trial, that the accused’s constitutional rights will be respected.³⁵ The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life³⁶ and freedom and security of person^{37, 38}. This can be broken down into two categories; substantial fairness and procedural fairness. Procedural fairness has two sub-categories, namely a general right to a fair trial and specific (procedural) rights.

1.2.8 Foreign jurisdiction – authority over people in a foreign country or region.³⁹

1.2.9 Inmate – any person, whether convicted or not, who is detained in custody in any prison or who is being transferred in custody or is en route from one prison to another prison.⁴⁰

1.2.10 Norm – is a standard of appropriate behaviour for the actors within a given identity.⁴¹

³² *Ibid.*

³³ Criminal Law Process (2014) “Defendant’s right to a speedy trial.” lawyers.com. Internet Brands, page 2, available at: <http://www.research.lawyers.com/glosary/speedy-trial> (accessed on 17 October 2014).

³⁴ Tobi, N (1997) *Delay in the administration of justice* Fourth Dimension Publishing Co. Ltd: Enugu, page 21.

³⁵ Webster’s New World Law Dictionary (2010) page 20, available at: <http://www.yourdictionary.com/fairtrial> (accessed on 17 October 2014).

³⁶ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 11.

³⁷ *Id* at fn 1, section 12.

³⁸ Lawyers Committee for Human Rights (2000) “What is fair trial? A Basic Guide to Legal Standards and Practice,” page 1, available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf (accessed on 22 January 2015).

³⁹ McMohan, M (2014) “What is foreign jurisdiction?” page 1, available at: <http://wisegeek.com> (accessed on 9 November 2014).

⁴⁰ Correctional Services Act, *op. cit.*, fn 31, section 1.

1.2.11 Legal norm – is a mandatory rule of social behaviour established by the State.⁴² A legal norm aims at developing certain social relations in the interests of the ruling class.⁴³ A legal norm indicates the conditions of its execution, the subjects of the relationships that it regulates the mutual rights and duties of the subjects, and the sanctions for the failure to perform a duty.⁴⁴ Legal norms are adopted by authorized State agencies, and are made binding by the State through the fostering of legal consciousness in its citizens and the application of measures of a State coercion to violators of the legal norms. The body of legal norms in a given society constitutes its law.⁴⁵

1.2.12 Remand detainees – defined as people who have been arrested and charged, but whose trials have not been completed. They have not yet been found guilty, and are presumed innocent under the South African Constitution.⁴⁶

1.2.13 Torture – any act by which severe pain or suffering, whether physical or mental, is intentionally or inadvertently inflicted on a person for such purposes as obtaining from him or a third person information or a confession.⁴⁷ The definition also includes punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering 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.⁴⁸

1.2.14 Unsentenced detainee - any person who is lawfully detained in prison, but who has not been sentenced to imprisonment .⁴⁹

⁴¹ Finnemore, M and Sikkink, K (2014) “International norm dynamics and political change.” International Organisation 52, No 4. Norms and International Relations, pages 887-917, available at: <http://www.wikispaces.com> (accessed on 17 September 2014).

⁴² Oxford Dictionary Press, *op.cit.*, (fn 28).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Wits Justice Project (2013) “Innocent but Incarcerated: An Analysis of Remand Detention in South Africa,” page 1, available at: <https://witsjusticeproject.files.wordpress.com/2013/10/remand-detention-in-south-africa.pdf> (accessed on 15 February 2015).

⁴⁷ United Nations General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, article 1, available at: <http://www.refworld.org/docid/3ae6b3a94.html> (accessed on 9 December 2014).

⁴⁸ *Ibid.*

⁴⁹ Correctional Services Act, *op. cit.*, (fn 31) section 1.

1.3 Problem Statement

South Africa is a democratic country. Its constitution guarantees fundamental rights. These rights are enshrined in the Constitution of the Republic of South Africa, 1996⁵⁰. Although the Constitution is fair and just, its provisions are not always practiced accordingly during South African criminal proceedings. When specific reference to section 35(3) (a) of the Constitution is made, it can be said that these rights are ignored or by-passed because of the manner in which our criminal proceedings are conducted and, in many instances proceedings are not fully guided by the rights of a suspect or accused person as entrenched in the Bill of Rights. An example is when several postponements are granted to the State during criminal proceedings, which go on for months or sometimes even years. This, in turn, is a violation of the right to a trial within a reasonable time, contrary to what section 35(3) (a) provides. Section 35(3)(a) provides that every accused person shall have the right to a fair trial, which includes the right to a public trial before an ordinary court of law within a reasonable time after being charged. Delayed trials are a major cause of long periods of incarceration of an accused or suspect. Emphasis will be placed in this dissertation on the impact that trials which are not conducted and finalised within a reasonable time have on the rights of an accused or suspect. Also a large section of the study will focus on the extent to which trials which are not conducted and finalised within a reasonable time are justified in the light of South Africa's constitutional framework. Research will be conducted through the use of literature review, enhanced by a comparative study of foreign and international law using examples of democratic countries such as the United States of America, Australia and Canada in order to evaluate and substantiate any findings on how we compare with these democratic countries.

1.4 Objectives of the study

The main objectives of the study are as follows:

- To determine the impact that trials which have not commenced or finalised within a reasonable time, has on a suspect or accused person's rights during criminal proceedings.

⁵⁰ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

- To undertake a comparative study on the scope of South African law in relation to trials which have not commenced or finalised within a reasonable time, and international law.
- To determine the extent to which trials which have not commenced or finalised within a reasonable time, is constitutional.
- To determine the reasons for trials which have not commenced or finalised within a reasonable time in South Africa.

1.5 Methodology and Research Design

A research design is a blueprint or detailed plan of how a research study is to be conducted.⁵¹ The study will constitute literature review of the constitutionality and impact of trials which have not commenced or finalised within a reasonable time on the rights of a suspect or accused person during criminal proceedings. The research will be conducted by examining South African sources of law such as the Constitution, legislation, case law, journal articles and legal texts. Comparative studies will be based on international sources of law such as international covenants, international custom, and general principles of law recognised by civilised nations, judicial precedent and the teachings of highly qualified publicists.

Emphasis will be placed on the Constitution which contains several provisions that are beneficial to accused persons. These benefits include sections 35 (3) (a), 35 (3) (h) and 12 (1) (e) of the Constitution. Legislation is paramount when properly administered with due regard to an accused person's constitutional rights. The Criminal Procedure Act⁵² and the Correctional Services Act⁵³ contain regulations on the rights and treatment of a suspect or accused person. These pieces of legislation will be discussed in the research. Various case laws will also be examined and discussed. Journal articles and legal texts by academics in law will also be considered.

International law, which may be defined as a body of rules and principles which are binding upon states in their relations with one another, forms part of the research.⁵⁴

⁵¹ Thyer, B A (1993) *Single-system research designs*, in Grinnell, R M, 4th edition, Itasca, IL: Peacock.

⁵² The Criminal Procedure Act 51 of 1977.

⁵³ The Correctional Services Act, *op. cit.*, (fn 31).

⁵⁴ Dugard, J (2011) *International Law A South African Perspective*, (4th edition) Cape Town, Juta & Co, page 1.

With regard to international precedent, there is a natural tendency for courts to follow their own previous decisions or the decisions of other international tribunals.⁵⁵ Since the establishment of the new constitutional order in 1994 both the Constitutional Court and the ordinary courts have shown a great willingness to be guided by international human rights law.⁵⁶

A comparative study will examine an understanding of the rights of an accused person and by doing so will provide an insight to South Africa's law. The comparative study will constitute a comparison of the South African legal system of constitutional rights and trials which have not commenced or finalised within a reasonable time, with that of other countries such as Canada, the United States of America Australia and some African countries such as Ghana predominantly and international law. Both findings will be compared with each other to determine the similarities and differences in our law and laws of other nations. This will enable the researcher to draw a conclusion as to whether South African accused persons' rights are violated in terms of having a trial within a reasonable time; whether South Africa is going against its own principles as enshrined in the Constitution and in regard to international law; and whether violations of accused person's rights is practised in other countries.

1.6 Organisation of the dissertation

The dissertation consists of five chapters. Chapter 1 is an introductory chapter and provides the introduction and an overview of the main issues to be discussed in the dissertation. The statement of problem, objectives of the study, literature review, research design which includes the method used to conduct the research, organisation of the thesis and the projected time scale forms the basis of this chapter.

Chapter 2 provides a literature review and a comparative study of the impact and constitutionality of the right to have one's trial commence or finalise within a reasonable time on the rights of an accused or suspect during criminal proceedings. International law and the law of foreign jurisdictions will be examined, drawing on from sources such as articles, covenants and case law. These international law sources will then be compared and studied

⁵⁵ *Id* at (fn 54) page 35.

⁵⁶ *Id* at (fn 54) page 63.

within the context of South African law to determine their impact on the rights of an accused, suspect and detained person.

Chapter 3 provides a literature review in terms of South African law relating to the constitutionality of trials which do not commence and finalise within a reasonable time on the rights of an accused or suspect during criminal proceedings. The right to a trial within a reasonable time and without undue delay will be examined under the subdivision of “the right to a trial within a reasonable delay”. Relevant South African legislation will be discussed and references will be made to current and recent trials in South Africa. Relevant sections of the Constitution will be examined.

Chapter 4 focuses on the consequences and impact of trials that are not within a reasonable time on an accused person or a suspect. The question of prison conditions, overcrowding, administration within the Justice Department and the delay in appeal proceedings and its effect on a detained person’s rights will be discussed in detail.

Chapter 5 comprises of proposed solutions to the problems raised throughout the research as well as recommendations and conclusions. Authorities are cited in support and substantiation of the proposed solutions. Solutions are discussed in light of trials that are delayed within an unreasonable time, and overcrowding. The procedure of plea bargaining and the system of bail will be discussed in order to determine whether such procedures are effective and sufficient, and whether these procedures are abused by the justice system to the detriment of an accused person or a suspect.

CHAPTER 2

INTERNATIONAL LAW AND THE LAW OF SELECTED FOREIGN JURISDICTIONS RELATING TO TRIALS WHICH DO NOT COMMENCE AND FINALISE WITHIN A REASONABLE TIME AND WITHOUT UNDUE DELAY

2.1 Introduction

Section 39 of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, **must** consider international law and may consider foreign law. Foreign law, or national law, defines the role of governments to the people it governs and controls relationships between people.⁵⁷ It may regulate foreign persons and entities, but it does not have effect outside the boundaries of a nation.⁵⁸ Section 39 of the Constitution makes it peremptory for South African courts to consider international law. International law is a combination of treaties and customs which regulates the conduct of states amongst themselves, and persons who trade or have legal relationships which involve the jurisdiction of more than one state.⁵⁹ Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This provision shows the role of international law in South African national law under the Constitution. Therefore, international law is important when examining compliance of sections in the Constitution such as section 35 (3) of the Constitution with international law.

The right to a trial within a reasonable time and without undue delay⁶⁰ is considered one of the fundamental procedural rights of a person accused of a criminal trial.⁶¹ The right is enshrined in the constitutions and laws of many nations and is also found in numerous international instruments. It is no surprise, then, that the right to a trial within a reasonable

⁵⁷ Hoffman, M and Topulos, K (2015) "International Legal Research Tutorial." Duke University School of Law and University of California, Berkeley, School of Law, available at: https://law.duke.edu/ilrt/def_terms_4.htm (accessed on 2 July 2015), page 1.

⁵⁸ *Ibid.*

⁵⁹ Duhaime, L (2015) "Duhaime's Law Dictionary," available at: <http://www.duhaime.org/LegalDictionary/I/InternationalLaw.aspx> (accessed on 6 July 2015), page 1.

⁶⁰ Farrell, B (2005) "The Right to a Speedy Trial Before International Criminal Tribunals." 19 SAJHR 98, page 3.

⁶¹ *Ibid.*

time has been guaranteed in international law.⁶² South Africa has signed and ratified international treaties and covenant. South Africa is therefore are legally bound to the provisions of international and regional instruments such as the International Covenant on Civil and Political Rights⁶³ and the African Charter on Human and Peoples Rights.⁶⁴

Detentions while awaiting trial is not an internationally accepted default practice.⁶⁵ In fact, international standards suggest that there are a variety of conditions that have to be met before someone can be legally detained before trial.⁶⁶ Unlike for example, cruel and unusual punishment or torture, pre-trial detention does not, *per se*, constitute a human rights violation.⁶⁷ International human rights norms recognise the need for pre-trial detention provided it is applied fairly, rationally and sparingly.⁶⁸ International norms dictate that overcrowding of prisons is a crucial human rights issue. Thus, South African society should be moving away from the premise that remand detention is inevitable.⁶⁹

Most international law human rights instruments make provision for the right to a trial within a reasonable time. International instruments that protect an accused in criminal proceedings include human rights and humanitarian treaties.⁷⁰ Provisions under these treaties are often couched as “right to speedy trial”, “trial within a reasonable time” and “trial without undue delay”.⁷¹ This right is enshrined in international instruments such as in article 14(3) (c) of the International Covenant on Civil and Political Rights⁷²; articles 20 (4) (c) and 21 (4) (c) of the

⁶² *Ibid.*

⁶³ International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, volume 999, p. 171, available at <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed on 20 May 2014).

⁶⁴ African Charter of Human and People’s Rights (also known as the Banjul Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, (1982) 21 I.L.M. 58, entered into force on October 21, available at <http://www1.umn.edu/humanrts/instree/z1afchar.html> (accessed on 20 May 2014). Cited as the African Charter.

⁶⁵ Leslie, R (2012) “Bail and Detention”. Wits Justice Project, page 3, available at: <http://www.canoncollins.org.uk/robynlesliebailremanddetentionfinal.pdf> (accessed on 22 January 2015).

⁶⁶ *Ibid.*

⁶⁷ Schonteich, M (2013) *Pre-trial detention and human rights in Africa*, page 104, available at: www.hsrcpress.ac.za/downloadpdf.php?...African...Human%20Rights%20in%20African%20Prisons%200 (accessed on 20 January 2015).

⁶⁸ *Ibid.*

⁶⁹ United States’ Lawyers Committee for Human Rights (2000) page 1.

⁷⁰ Farrell, *op. cit.*, (fn 60) page 3.

⁷¹ *Ibid.*

⁷² International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

Statutes of International Criminal Tribunals for Rwanda⁷³ and the former Yugoslavia⁷⁴ respectively; article 8 (1) of the American Convention on Human Rights⁷⁵; and article 6 (1) of the European Convention for the Protection of Human Rights⁷⁶.

Article 6(1) of the 1950 European Convention on Human Rights⁷⁷ provides that everyone is entitled to a fair and public hearing within a reasonable time”. Article 5(3) of the 1950 European Convention for the Protection of Human Rights⁷⁸ provides that “everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article (5)...shall be entitled to a trial within a reasonable time”. In the case of *Foti v Italy*,⁷⁹ Gubbay CJ of the European Court for Human Rights stated that the two factors to be considered in a determination of whether an accused person has been afforded a fair hearing within a reasonable time are:⁸⁰

- the length of the proceedings which is to some extent a triggering mechanism; and
- the reasonableness of the length of the proceedings.

Only if there is some form of delay which is presumptively prejudicial, will there be a necessity for an inquiry into the other factors that go into the balance of what constitutes delay.⁸¹ Nevertheless, because of the impression of the right to a speedy trial, the length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.⁸² Closely related to the length of the delay is the reason the State

⁷³ United Nations Security Council, Statute of International Criminal Tribunals for Rwanda (as last amended on 13 October 2006), 8 November 1994, available at <http://www.refworld.org/docid/3ae6b3952c.html> (accessed on 20 May 2014).

⁷⁴ United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, available at <http://www.refworld.org/docid/3dda28414.html> (accessed on 20 May 2014).

American Convention on Human Rights, OAS Treaty Series No. 36; 1144 Units 123;9 I. L. M. 99 (1969). Amends: Protocol to the American Convention on Human Rights, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.html> (accesses on 20 May 2014).

European Convention on Human Rights (formally the Convention on the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new member states are expected to ratify the convention at the earliest opportunity, available at <http://www.refworld.org/docid/3ae6b3b04.html> (accessed on 30 January 2015).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Foti v Italy* (1983) 5 EHRR 313, paragraph 50.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

ascribes to justify delay.⁸³ Here, too, different weights should be assigned to different reasons.⁸⁴

A deliberate attempt by the State to delay the trial in order to impede the defence should be weighed heavily against the State.⁸⁵ A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the accused.⁸⁶

Article 14 (3) (c) of Part III of the International Covenant on Civil and Political Rights⁸⁷ provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (c) to be tried without undue delay.” This right is an important element of a criminally accused person’s due process rights.

Furthermore, Article 9(1) of the International Covenant on Civil and Political Rights⁸⁸ provides that every person has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.⁸⁹ The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is imprisoned or detained in a correctional facility.⁹⁰

The Sixth Amendment of the American Constitution⁹¹ contains a provision relating to the rights of an accused in criminal prosecutions with particular emphasis on the right to a speedy trial and a public trial.

Amoo⁹² explains the application of international human rights Conventions and Standards in the sense that treaty bodies have been established and empowered with the jurisdiction to

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63) article 14(3)(c) Part III.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Lawyers Committee for Human Rights, *op. cit.*, (fn 38) page 4.

⁹¹ The Constitution of the United States, 1971. Amendment VI, available at: http://www.law.cornell.edu/constitution/sixth_amendment (accessed on 23 January 2015).

enforce compliance of the obligations under such treaties.⁹³ The term ‘reasonable time,’ according to Amoo,⁹⁴ may be interpreted to mean that a party upon whom it is binding duly fulfils its obligation notwithstanding practiced delay, so long as such delay is attributable to cause beyond its control, and it has neither acted negligently nor unreasonably.⁹⁵

Fundamental rights that apply to detained persons are of the utmost importance. Every country has its own set of rules or provisions that aim to protect the rights of its citizens, including those who are suspected or accused of having committed a crime. Conventions or treaties as well as foreign case law play an important role in highlighting the importance of these rights to suspects or accused persons who are awaiting pre-trial appearances or trial. The United Nations Standard Minimum Rules for Non-Custodial Measures⁹⁶ is an example discussed in detail in paragraph 2.2.2 below.

2.1.1 The International Covenant on Civil and Political Rights⁹⁷ in the context of the right to a speedy trial

The International Covenant on Civil and Political Rights is an expanded hard-law version of the Universal Declaration of Human Rights.⁹⁸ The International Covenant on Civil and Political Rights sets a basic enforceable minimum standard for the respect of human rights around the world.⁹⁹ Its provisions cover a wide variety of rights, *inter alia* fair trial and freedom from arbitrary detention.¹⁰⁰ The International Covenant on Civil and Political Rights

⁹² Amoo, S K (2010) *The Jurisprudence of the Rights to a trial within a reasonable time in Namibia and Zambia*, Volume 2, Issue 2, page 10, available at: http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/10-2/NLJ_section_3.pdf (accessed on 3 December 2014).

⁹³ *Id* at (fn 92), page 14.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ United Nations Standard Minimum Rules for Non-Custodial Measures, adopted by General Assembly Resolution 45/110 of 14 December 1990, Rule 6, available at: <http://www.ohchr.org.english/law/tokyorules.htm> (accessed on 30 November 2014).

⁹⁷ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

⁹⁸ Universal Declaration of Human Rights Paris, December 10, 1948, available at: <http://www.legal.un.org/avl/ha/udhr.html> (accessed on 15 October 2014).

⁹⁹ Harland, C (2000) “The Status of the International Covenant on Civil and Political Rights in the Domestic Law of State Parties: an initial Global Survey through UN Human Rights Committee Documents.” Volume 22, Number 1, page 189.

¹⁰⁰ *Ibid.*

is an appropriate tool with which to increase judicial awareness of and respect for minimum international human rights standards.¹⁰¹ Article 14(3) (c) of the International Covenant on Civil and Political Rights¹⁰² makes provision for the “right to be tried without undue delay”. Linked with article 14(1) of this Covenant¹⁰³ article 14(3) (c) provides for the general hearing of rights of an accused and is a powerful tool for condemning delay.¹⁰⁴ The precise meaning of the term “undue delay” is not set out in the International Covenant on Civil and Political Rights or in its *Travaux Préparatoires*.¹⁰⁵ However, according to the Human Rights Committee¹⁰⁶ this guarantee relates both to the time when a trial should **commence** and the time by which such trial should **end** and judgment is recorded.¹⁰⁷ This procedure must be available to ensure that a trial proceeds without undue delay both in the first instance and during post-trial procedures.¹⁰⁸ The import of this is that in defining delay, the period to be taken into consideration begins to run from the moment a charge is drawn up to the final determination of the case whether on appeal or in the court of the first instance.¹⁰⁹ In *Earl Pratt and Ivan Morgan v Jamaica*¹¹⁰ the Human Rights Commission held that article 14(3)(c), and article 14(5), are to be read together so that the right to review of conviction and sentence must be made available without undue delay. Although this case outlines the scope of the proceedings to which article 14(3) (c) applies, it does not define what constitutes “undue delay in proceedings”.¹¹¹

¹⁰¹ *Ibid.*

¹⁰² International Covenant on Civil and Political Rights, *op. cit.*, (fn 63) article 14(3)(c).

¹⁰³ *Id* at (fn 63), article 14(1).

¹⁰⁴ Obiokoye, I (2005) *Eradicating delay in the administration of justice in African courts: a comparative analysis of South African and Nigerian courts*, (unpublished LLM dissertation, University of Pretoria) page 12, available at: <http://www.repository.up.ac.za/bitstream/handle/2263/942/Obiokoye-io-1> (accessed on 15 October 2014).

¹⁰⁵ Bossuyt, M (1987) *Guide to the “travaux Préparatoires” of the International Covenant on Civil and Political Rights*, page 297. The *Travaux Préparatoires* records the negotiation and discussion during the treaty process and may be consulted in interpreting treaties.

¹⁰⁶ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U. N. Doc.HRI/GEN/1Rev.6 2003, page 135, available at: <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm> (accessed on 13 December 2014).

¹⁰⁷ Obiokoye, *op. cit.*, (fn 104) page 12.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Earl Pratt and Ivan Morgan v Jamaica* Communication No 225/1987:07/04/89 (Human Rights Commission), paragraph 13.3-13.5.

¹¹⁰ *Ibid.*

¹¹¹ Obiokoye, *op. cit.*, (fn 104), page 13.

2.1.2 The European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹² in the context of the right to a trial within a reasonable time and without undue delay

The decisions of the European Court of Human Rights, which was established to enforce the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, provide useful guidance on the scope of rights in relation to both the Convention¹¹³ and the South African Bill of Rights^{114, 115}.

Article 6(1) of the European Convention provides that “in the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.¹¹⁶ From this provision, delay is conceived as a situation where proceedings are not concluded within a reasonable time.¹¹⁷ In defining the concept of “reasonable time” as used in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has held in *Buchholz v Germany*¹¹⁸ that the definition will depend on the circumstances of each particular case. In this matter the court held that a temporary backlog in employing sufficient judges to overcome substantial delays, did not involve liability on the part of the German government, provided that the government had taken reasonably prompt remedial action to deal with the delay in the hearing.¹¹⁹

2.1.3 The African Charter on Human and People’s Rights

Article 7(1) (d) of the African Charter¹²⁰ provides that every individual shall have the right to have a trial within a reasonable time by an impartial court or tribunal. The importance of this provision is that the African Charter seeks to regulate delay in criminal proceedings.¹²¹ In

¹¹² European Convention on Human Rights, *op. cit.*, (fn 76).

¹¹³ *Ibid.*

¹¹⁴ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) Bill of Rights, chapter 2, section 35(3).

¹¹⁵ Botha, N *et al* (2008) *Study Guide for International Law Module: LCP401H*, page 4, Public Constitutional and International Law. University of South Africa.

¹¹⁶ European Convention for Human Rights, *op. cit.*, (fn 76).

¹¹⁷ Obiokoye, *op. cit.*, (fn 104) page 15.

¹¹⁸ *Buchholz v Germany* (1981) 42 ECHR, series ‘A’, page 20-21.

¹¹⁹ *Ibid.*

¹²⁰ African Charter, *op. cit.*, (fn 64), article 7(1)(d).

¹²¹ Obiokoye, *op. cit.*, (fn 104) page 18.

*Pagnouille v Cameroon*¹²² the African Commission on Human and Peoples' Rights held that a period of fifteen years in which no action was taken in the case, nor was any decision made either on the fate of the accused person or on the relief sought, does constitute a denial of justice and therefore a violation of article 7(1) (d) of the African Charter.¹²³ In *Constitutional Rights Project v Nigeria*¹²⁴ the African Commission on Human and Peoples' Rights¹²⁵ held that in any criminal case, especially one in which an accused is in custody pending finalisation of his or trial, the trial must be held with all possible speed in order to minimise and avoid the negative effects on the life of such accused, who may at the end be innocent.

2.2 Delayed trials in foreign jurisdictions

2.2.1 Delayed trials and fair trial rights

The conduct of trials must conform to norms. A norm is generally defined as a "standard of appropriate behaviour for actors within a given identity".¹²⁶ Sometimes the use of the word institution is used interchangeably with the term norm.¹²⁷ An institution is a collection of norms and rules about a particular subject such as sovereignty and slavery.¹²⁸ There are different types of norms.¹²⁹ Regulatory norms define what behaviours states can or cannot do.¹³⁰ Constitutive norms set up new actors, behaviours or interests.¹³¹ Prescriptive norms prescribe actions or non-actions that are to be taken in certain situations.¹³² Domestic norms affect international norms. Domestic norms can determine if a norm will become an international one.¹³³ International norms can also affect domestic ones. The basic right to

¹²² *Pagnouille v Cameroon* 1997, African Commission on Human and Peoples' Rights, Communication No 39/90, paragraph 16.

¹²³ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, *op. cit.*, (fn 57) section 7(1)(d).

¹²⁴ *Constitutional Rights Project v Nigeria*, African Commission on Human and Peoples' Rights, Communication No 153/96, 13th AARACHPR, paragraph 19-20.

¹²⁵ African Commission on Human and Peoples' Rights. Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU.), available at: www.achpr.org/ (accessed on 7 December 2014).

¹²⁶ Finnemore and Sikkink, *op. cit.*, (fn 41) pages 887-917.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

inter alia life, food and shelter have become an international norm.¹³⁴ This is because as certain states become aware of the need for humanitarian rights at home, they have influenced other states to look at their own humanitarian domestic changes as well.¹³⁵ Then these states also want to incorporate their own basic rights to life norms in other countries to make these rights become an international norm.¹³⁶

The right to a fair trial is a norm of international rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of basic rights and freedoms, the most prominent of which are the right to life and liberty of person.¹³⁷ However, international norms and standards on criminal justice do not provide effective guidance on efforts to improve practices in pre-trial detention.¹³⁸ Most of the Rules of the United Nations and the African Charter on Human and Peoples' Rights are sufficiently vague that countries can demonstrate both fidelity to and compliance with such norms without substantially rewriting their statutes or modifying practices.¹³⁹

Delay is recognised as a category of abuse of process.¹⁴⁰ A failure due to incompetence and disinterest amounts to abuse of process, or a genuine inability to meet generous deadlines.¹⁴¹

According to Zvikomborero Chadambuka¹⁴² a delay in a trial results in a state of continued accusation and is thus anathema to the presumption of innocence. In *R v Askov*¹⁴³ the Canadian Supreme Court held that all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ United States' Lawyers Committee for Human Rights, *op. cit.*, (fn 69) page 1.

¹³⁸ Schonteich, *op. cit.*, (fn 67), page 98.

¹³⁹ For example, Article 9(3) of the International Covenant on Civil and Political Rights stipulates that 'it shall not be the general rule that persons awaiting trial shall be detained in custody'. It is not clear how one could find practices in conflict with the 'general rule'.

¹⁴⁰ Kovacevich, J (1989) "Abuse of Process." *New Zealand Law Journal*, page 184, available at: <http://www.sabar.co.za/law-journals/1989/october/1989-october-vol002-no2-pp113-114-and-122.pdf> (accessed on 30 July 2015).

¹⁴¹ Louw, *op. cit.*, (fn 26) page 1.

¹⁴² Chadambuka, Z (2013) *Serious Offences And The Right To Trial Within A Reasonable Time*, 1 *Essex Human Rights Review* Vol. 9 No. 1, page 3.

¹⁴³ *R v Askov* (1990) 2 S. C. R. 1199 (Canada).

face.¹⁴⁴ Furthermore, they should be given an opportunity to have their name cleared and reputation re-established at the earliest possible time.

It may be a delay in processing cases through the system which keeps pre-trial detainees behind bars for lengthy periods of time.¹⁴⁵ Such delays may be the consequence of legal and procedural problems, but also as a result of practices which do not consider adequately the need to define priorities in clearing backlogs of cases.¹⁴⁶

As mentioned above the right to a fair trial is a norm of the international rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.¹⁴⁷ Section 11(d) of the Canadian Charter¹⁴⁸ provides that everyone charged with an offence has the legal right to be presumed innocent until proven guilty. This right provision is contemplated in Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).¹⁴⁹ Courts are generally reluctant to stay proceedings.¹⁵⁰ The presumption of innocence has been interpreted as requiring the court to acquit an accused if there is a reasonable doubt about any element of the offence or any defence collated matter which would prevent the accused's conviction.¹⁵¹ Roach and Friedland¹⁵² explain further that a mandatory presumption also violates the presumption of innocence, even if it does not require the accused to prove something on the standard of a balance of probabilities used in civil

¹⁴⁴ *Ibid.*

¹⁴⁵ ICRC Bulletin No. 91/2010, 3 February 2010. 'Protecting Life and Dignity in Places of Detention'. Philippines.

¹⁴⁶ Hans-Jörg A (2012) 'Prison Overcrowding – Finding effective Solutions.' Strategies and Best Practices Against Overcrowding in correctional Facilities. Max Planck Institute for Foreign and International Criminal Law, page 30, available at: https://www.mpicc.de/files/pdf1/rib_43_albrecht.pdf (accessed on 10 February 2015).

¹⁴⁷ United States' Lawyers Committee for Human Rights, *op. cit.*, (fn 69) page 4.

¹⁴⁸ Canadian Charter of Rights and Freedoms, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, available at: [https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) (accessed on 12 December 2014).

¹⁴⁹ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

¹⁵⁰ Weisbrodt D and Wolfrum R (eds) (2013) "The Right to a fair trial in Canada" in *The Right to a fair Trial* available at: <http://www.gbv.de/dms/spk/sbb/recht/toc/272182362.pdf> (accessed on 3 August 2015). The Canadian judiciary has, however, held that several laws violating the presumption of innocence constitute a justified and reasonable limitation on the presumption of innocence that is necessary to facilitate the prosecution of specific crimes and regulatory offences. A person must also prove on a balance of probabilities that his or her Charter rights were violated in order to obtain a remedy.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

trials, but rather to point to some evidence capable of raising a reasonable doubt about an element of a crime.¹⁵³

The right to a fair trial in Canada depends on the common law, federal legislation such as the Criminal Code of Canada,¹⁵⁴ provincial programmes relating to the administration of justice, constitutional conventions and the Canadian Charter of Rights and Freedoms¹⁵⁵ as which was added to Canada's Constitution Act, 1982.¹⁵⁶ The Charter was heavily influenced by international rights protection instruments and many of its provisions mirror fair trial rights protected in the International Covenant on Civil and Political Rights¹⁵⁷. Since 1982, the Canadian Charter of Rights and Freedoms¹⁵⁸ has rapidly become the primary focus for ensuring that an accused person has a fair trial.¹⁵⁹

Globally, detainees also experience a wide range of due process shortcomings during trial.¹⁶⁰ In Cuba, for instance, despite the fact that the law presumes defendants to be innocent until proven guilty, authorities often place the burden on the defendant to prove innocence rather than on the prosecution to prove guilt.¹⁶¹ Politically motivated trials are often held in secret, citing exceptions to the right to a public trial for crimes involving “state security” or “extraordinary circumstances”.¹⁶² The criteria for admitting evidence are often arbitrary and discriminatory. Many detainees, especially those accused of political crimes, report that their attorneys have difficulties accessing their files due to bureaucratic and administrative obstacles.¹⁶³

Article 19(1) of the Constitution of the Republic of Ghana¹⁶⁴ states that persons charged with a criminal offence shall be given a fair hearing within a reasonable time by a court. The

¹⁵³

Ibid.

¹⁵⁴

Criminal Code, RSC 1985, c C-46, <http://canlii.ca/t/52cv4> (accessed on 24 January 2015).

¹⁵⁵

Canadian Charter of Rights and Freedoms, *op. cit.*, (fn 148).

¹⁵⁶

Weisbrodt and Wolfrum, *op. cit.*, (fn 150), page 4.

¹⁵⁷

International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

¹⁵⁸

Canadian Charter of Rights and Freedoms, *op. cit.*, (fn 148).

¹⁵⁹

Weisbrodt and Wolfrum, *op. cit.*, (fn 150), page 4.

¹⁶⁰

United States Report on International Prison Conditions (2013) Department of State, page 7, available at: <http://www.state.gov/documents/organization/210160.pdf> (accessed on 21 January 2015).

¹⁶¹

Ibid.

¹⁶²

Ibid.

¹⁶³

Ibid.

¹⁶⁴

Constitution of the Republic of Ghana 1992 (last amended 1996), available at: <http://www.refworld.org/docid/3ae6b5850.html> (accessed on 5 October 2014).

Ghanaian Constitution¹⁶⁵ further provides that a detainee who has not been tried within a reasonable time shall be released either unconditionally or subject to conditions necessary to ensure that the person appears in court at a later date. Despite these legal provisions, delays have become a routine reality in the judicial process, denying detainees their fair trial rights in many cases.¹⁶⁶

The criminal justice department in Ghana has avoided blame for the delay in prosecuting cases.¹⁶⁷ The Judicial Service has denied accusations that are in process with regard to the prosecution of criminals, saying it is the responsibility of the Attorney-General's Department and the Ghanaian police department.¹⁶⁸ Furthermore, they have attributed the adjournment of cases to the inability of the prosecution to produce witnesses.¹⁶⁹ However, the Attorney-General's Department has blamed the delay in the prosecution of cases on the police for being slow in submitting dockets and not on the prosecution division side.¹⁷⁰ The police describe the delays as inadequate staff, unwillingness of complaints and witnesses to collaborate, corruption and use of extensive and exhaustive investigative techniques.¹⁷¹ The blame shifting is a reflection of a serious lack of coordination among the law enforcement actors¹⁷² and Judges in Ghana have complete control of a case as soon as it comes to court.¹⁷³ It is their paramount duty to ensure that fair trial norms assured by the 1992 Ghanaian Constitution are adhered to.¹⁷⁴ Therefore, non-compliance with any single norm at any stage can disrupt all further proceedings, taint the entire process and gravely impinge on the rights of all parties before court and more particularly the rights of the accused person.¹⁷⁵

¹⁶⁵ *Ibid.*

¹⁶⁶ Gubrie, R (2013) "Excessive Delay Of Cases: A Violation Of The Right To Fair Trial." Access to Justice CHRI- Africa Office, page 1, available at: <http://thechronicle.com.gh/excessive-delay-of-cases-a-violation-of-the-right-to-fair-trial/> (accessed on 22 January 2015).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Id* at (fn 166) page 2.

Article 19(1) of the Ghanaian Constitution¹⁷⁶ expressly requires that hearings take place within a reasonable time. The International Covenant on Civil and Political Rights¹⁷⁷ to which Ghana is a signatory speaks of expeditious hearings. This implies that justice should be delivered expeditiously and within a reasonable time.¹⁷⁸ It is especially important for a person charged with a criminal offence not to remain longer than necessary in a state of uncertainty about his or her fate.¹⁷⁹ According to the United States Lawyers Committee for Human Rights, with regard to delay in a trial, the time limit begins to run when a suspect or an accused person is informed that the authorities are taking specific steps to prosecute him.¹⁸⁰ The assessment of what may constitute undue delay will depend on the circumstances of the case.¹⁸¹ The circumstances of the case include the complexity of the case, the conduct of the parties and whether or not the accused is in detention.¹⁸²

Trials lasting longer than ten years have been regarded as being reasonable, while other trials lasting less than one year have been found to be unreasonably delayed.¹⁸³ What is a reasonable time depends on the complexity of the case, its importance, the behaviour of both the accused person and relevant authorities.¹⁸⁴

The Commonwealth Human Rights Initiative's Justice Centre Project¹⁸⁵ is aimed at promoting increased access to justice for suspects at the early stages of the criminal justice system and protecting the human rights of the poor and indigent. It has regrettably revealed that a significant number of people accused of non-serious offences such as breach of peace or getting into a fight spend an average of two days in detention in blatant violation of the 48-hour rule.¹⁸⁶

¹⁷⁶ Constitution of the Republic of Ghana, *op. cit.*, (fn 164).

¹⁷⁷ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

¹⁷⁸ Gubrie, *op. cit.*, (fn 166) page 2.

¹⁷⁹ *Ibid.*, (fn 166) page 2.

¹⁸⁰ United States' Lawyers Committee for Human Rights, *op. cit.*, (fn 69) page 4.

¹⁸¹ Gubrie, *op. cit.*, (fn 166) page 2.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Commonwealth Human Rights Initiative Justice Centre Project (2013) "Access to Justice," page 1-2, available at: <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1175&context=jlasc> (accessed on 12 December 2014).

¹⁸⁶ *Ibid.*

Section 48 of the Criminal Procedure Act 51 of 1977 provides that an arrested person must be brought before a court of law within 48 hours. Section 35(1) (d) of the Bill of Rights states that an accused person has the right to be brought before court as soon as reasonably possible, but no later than 48 hours after the arrest or the end of the first court day after expiry of the 48 hours if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day. The 48 hour period applies only to ordinary court hours and days and as such excludes weekends and public holidays from the calculation. Blatant violation of the 48-hour rule may very well be the first indication of violation of the right to be tried within a reasonable time, especially in less serious offences or where there is sufficient evidential material to bring the accused before court without delay.

In Ghana several other accused who faced charges of fraud and theft spent about one year in pre-trial detention with their cases not heard.¹⁸⁷ It is particularly disturbing that so much time is spent on such minor cases, especially in situations where complainants are only interested in getting their monies or properties back.¹⁸⁸ The result of such delays is that the parties to the dispute get frustrated and lose confidence in the entire criminal justice system.¹⁸⁹ This therefore means that the overall length, which is usually between one to two years for some minor offences such as petty theft, as observed by Commonwealth Human Rights Initiative Justice Centres Project¹⁹⁰, is excessive and constitutes a breach of the reasonable time requirement.¹⁹¹ It is therefore essential to bear in mind that a delay of justice is often equal to a denial of justice.¹⁹²

¹⁸⁷ Gubrie, *op. cit.*, (fn 166) page 3.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Commonwealth Human Rights Initiative Justice Centre Project, *op. cit.*, (fn 185) pages 1-2.

¹⁹¹ Gubrie, *op. cit.*, (fn 166) page 3.

¹⁹² *Ibid.*

These delays, if not addressed, could negatively impact on the speedy finalisation of cases, which will in turn cast doubt upon the basic canons that make the process of litigation credible and reliable.¹⁹³ Fair trial, which includes the right to be heard within a reasonable time, is therefore not a favour afforded to the applicant at law but an embodiment of legally enforceable rights¹⁹⁴ guaranteed by the State to its citizens.¹⁹⁵

Guaranteeing the right to a fair trial aims at protecting individuals from abuse of process, unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms such as pre-trial detention.¹⁹⁶

The importance of the right to a fair trial is illustrated not only by international instruments and the extensive body of interpretation it has generated, but also most recently, by a proposal to include it in the non-derogable rights stipulated in Article 4(2) of the International Covenant on Civil and Political Rights.¹⁹⁷ Standards for a fair trial may stem from binding obligations that are included in human rights treaties to which a State is a party, but they may also be found in documents and practices which, though not binding, express the direction in which legal norms are evolving.¹⁹⁸ One of the problems which confront the law is that human rights have been viewed largely as western concepts, and have therefore been defined and valued through a western view.¹⁹⁹ First, there are many non-western societies in which law and human rights thus defined, is impractical and mechanisms for protecting human rights in non-western justice systems are not recognised as comparable counterparts to those in western societies.²⁰⁰ Second, African states have failed to abide by their international fair trial obligations because, probably, these standards are impractical given the realities like poverty, illiteracy and strong cultural beliefs that characterise most African communities.²⁰¹

¹⁹³ *Id* at (166) page 4.

¹⁹⁴ Rights as provided in section 35(3)(a) – (o) of the Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

¹⁹⁵ Gubrie, *op. cit.*, (fn 166) page 4.

¹⁹⁶ Kayitare, F (2004) "Respect of the right to a fair trial in indigenous African criminal justice systems – the case of Rwanda and South Africa," page 1, available at: http://repository.up.ac.za/bitstream/handle/2263/1087/kayitare_f_1.pdf?sequence=1 (accessed on 20 January 2015).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

As a result, the law applied by the western style courts is felt to be so out of touch with the needs of most African communities, and coercion to resort to them amounts to denial of justice.²⁰²

International standards require that pre-trial detention be used only if there is a demonstrable risk that the person concerned will abscond, interfere with the course of justice, or commit a serious offence.²⁰³ African jurisprudence and resolutions adopted by the African Commission on Human and Peoples' Rights²⁰⁴ have confirmed the need for African states to be respectful of international standards and prevent arbitrary and excessive use of pre-trial detention.²⁰⁵

2.2.2 Pre-trial delays and pre-trial detention

Like elsewhere in Africa, the excessive and extended use of pre-trial detention in Zambia is suggestive of the failings in the criminal justice systems relating to the effective and efficient management of case flow.²⁰⁶ Excessive and extended pre-trial detention violates a number of rights, key among which are the right to liberty, the right to dignity and the right to a fair and speedy trial.²⁰⁷ It is especially the poor and powerless who bear the brunt of excessive and extended pre-trial detention, and the pre-trial detention, even for short periods, reaches well beyond the individual concerned, affecting families and communities.²⁰⁸

A case in point is that of six Kenyans who were illegally removed from Kenya and taken to Uganda to stand trial for the 2010 Kampala bombings. They were among the 12 detainees on a go-slow at the Luzira Upper Prison protesting delay of their case that has been pending before courts since they were formally charged in 2011.²⁰⁹ The 12 detainees served their

²⁰² *Id* at (196) page 2.

²⁰³ Schonteich, *op. cit.*, (fn 67) page 93.

²⁰⁴ African Commission on Human and Peoples' Rights, *op. cit.*, (fn 125).

²⁰⁵ Schonteich *op. cit.*, (fn 67) page 93.

²⁰⁶ Olivier, L (2011) "Research into pre-trial detention in Zambia," page 1, available at: <http://www.osisa.org//open-learning/law/zambia/research-pre-trial-detention-zambia> (accessed on 10 October 2014).

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Kurunziafrika, A (2013) "Uganda: Terrorism Detainees Plan Strike Over Delayed Trials." Issue 10, page 2, available at: <https://kurunziafrika.wordpress.com/2013/11/22/uganda-terrorism-detainees-plan-strike-over-delayed-trials/> (accessed on 22 January 2015).

notice of intention to go on a hunger strike.²¹⁰ The remand detainees accused the State of deliberately delaying their hearing.²¹¹ They maintained that due to the delay and lengthy incarceration their health had deteriorated.²¹² The medical state of some detainees was critical.²¹³ They suffered from diverse ailments.²¹⁴ This had been exacerbated by the lack of specialised medical personnel or access to the same.²¹⁵ These were justifiable acts of treatment.²¹⁶ The detainees had been abandoned by their own government and subjected to lengthy disguised detention-without-trial by the other.²¹⁷ The delays were deliberately executed by the State in the absence of evidence to sustain a prosecution.²¹⁸ Currently, their trial has not even commenced. These accused have lost a bid to block their trial in the High Court until their intended appeal is heard and determined by the Supreme Court.²¹⁹ The group, through their legal representatives, had asked the court to stay the trial to allow them to pursue an appeal challenging the Constitutional Court decision that dismissed their pleadings on torture and human rights violations against the state. However, High Court Judge Alphonse Owiny-Dollo, who presided over the case on 20 January 2015, ruled that the trial of the suspects shall proceed as per the Constitutional Court order in which five justices directed the High Court to try the accused persons without any more delays.

In order to recognize the use of pre-trial detention in Southern Africa and its impact on the rule of law, access to justice and adherence to human rights standards, the Open Society

²¹⁰

Ibid.

²¹¹

Ibid.

²¹²

Ibid.

²¹³

Ibid.

²¹⁴

Ibid. Ailments such as high blood pressure, chronic ulcers, hernia, falling eye sight, joint pains, kidney and inner complications.

²¹⁵

Ibid.

²¹⁶

Ibid.

²¹⁷

Ibid.

²¹⁸

Ibid.

²¹⁹

Kigongo, E K (2015) "July 2010 bomb suspects lose bid to block their trial," page 1, *Daily Monitor*, available at: <http://www.monitor.co.ug/News/National/July-2010-bomb-suspects-lose-bid-to-block-their-trial/-/688334/2595964/-/14kff6vz/-/index.html> (accessed on 18 February 2015).

Initiative for Southern Africa²²⁰ – in partnership with Open Society Foundation for South Africa²²¹ and the Open Society Foundations Global Criminal Justice Fund²²² – commissioned an audit of a sample of police stations, prisons and courts in Zambia to gather information on both the legal status of awaiting trial detainees and issues pertaining to conditions of detention in prisons and police stations.²²³ Following a review of literature, data was collected from a number of police stations, prisons, subordinate courts and High courts.²²⁴ This focused on quantitative data on case flow management and qualitative data on conditions of detention.²²⁵ The research found that a number of issues relating to the Directorate of Public Prosecutions hamper effective case flow management.²²⁶ Examples of these issues are:

- delays in sending instructions from the Directorate of Public Prosecutions to the police;
- under-staffing in the office of the Directorate of Public Prosecutions;
- lack of autonomy of the Directorate of Public Prosecutions as well as the Minister of Justice;
- lack of supervision of prosecutors by the Directorate of Public Prosecutions;
- lack of, or limited, follow-up of cases by prosecutors; and
- lack of transport to transfer case files between police stations and the Directorate of Public Prosecutions.²²⁷

Limited resources place restrictions on all criminal justice institutions in a variety of ways.²²⁸ However, cost effective and sustainable solutions need to be sought to improve record

²²⁰ Open Society Initiative for Southern Africa (2011) page 1, available at: <http://www.osisa.org> (accessed on 10 October 2014).

²²¹ Open Society Initiative for Southern Africa (2010) "Research into pre-trial detention in Zambia," page 1, available at: <http://www.osisa.org//open-learning/law/zambia/research-pre-trial-detention-zambia> (accessed on 10 October 2014).

²²² Open Society Foundations. "Global Criminal Justice Reform" 2010, page 1, available at: <http://www.wikipedia.org/wiki/open-society-foundation> (accessed on 15 October 2014).

²²³ Olivier, *op. cit.*, (fn 206) page 1.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Id* at (fn 206) page 2.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

keeping and monitoring of case flow.²²⁹ In respect of the police department, a number of problem areas create bottlenecks in respect of effective case flow management. These include:

- logistical challenges (transport, printing and stationery);
- non-selective charging of suspects by police and prosecutors;
- lack of forensic capacity to investigate cases;
- abuse of police powers to arrest and detain; and
- poor communication between prosecutors and investigators of cases.²³⁰

Investigation procedures and collection of evidence are the most costly parts of the trial.²³¹ However, excessive costs and delays limit the ability of courts to try a broad range of people, leading to an element of arbitrariness where an individual will only be tried if it is probable that the budget of courts permit.²³² The delay also creates a conflict between the positive obligation of the state to investigate the right to freedom or liberty²³³ and the right of the accused to a trial within a reasonable time²³⁴ without undue delay.²³⁵

Olivier²³⁶ explains the legislative framework for pre-trial detention. According to Olivier,²³⁷ the Constitution of Zambia²³⁸ and other legislation regulating the criminal justice system provides a sufficient framework for regulating pre-trial detention and fair-trial rights. The legislation makes provision for the following areas within the criminal justice system:

- bail;
- due process guarantee;

²²⁹ *Ibid.*

²³⁰ *Id* at (fn 206) page 3.

²³¹ Skilbeck, R (2013) "Funding for Justice: The War Crimes Trial," page 6, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=hrbrief> (accessed on 22 January 2015).

²³² *Ibid.*

²³³ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 11.

²³⁴ *Id* at fn 1, section 35(3)(d).

²³⁵ Skilbeck, *op. cit.*, (fn 231) page 6.

²³⁶ Olivier, *op. cit.*, (fn 206) page 4.

²³⁷ *Id* at fn 206, page 4.

²³⁸ Constitution of Zambia, 1991 (last amended 1996), available at: <http://www.refworld.org/docid/3ae6b5610.html> (accessed on 29 January 2015).

- the right to be informed of the reasons for arrests and compensation for unlawful arrest;
- the right to be brought to court within 24 hours;
- the right to be tried within a reasonable time by a competent tribunal or authority;
- the presumption of innocence;
- access to legal representation; and
- the general rights to liberty and security of person.²³⁹

Skilbeck²⁴⁰ explains pre-trial procedures and in particular, detention before trial as follows: Article 9(3) of the 1966 International Covenant on Civil and Political Rights²⁴¹ provides that “anyone arrested or detained on a criminal charge...shall be entitled to a trial within a reasonable time or to release”. As contemplated in Article 9(3) of the International Covenant on Civil and Political Rights²⁴², it is not the general rule that persons awaiting trial shall be detained in custody.²⁴³

Remand detention is not a uniquely South African problem.²⁴⁴ On any particular day, about three million people are held in pre-trial detention around the world, an average 10 million are admitted into remand each year. The region with the highest pre-trial detainees is Asia (47.8 percent), followed by Africa (35.2 percent). Europe has the lowest portion, with 20.5 percent.²⁴⁵

The United States Report on International Prison Conditions²⁴⁶ explains the inadequate legal process. The report states that prisoners are often denied the minimum legal protections and legal process guarantees in the two phases of their detention or imprisonment: in the pre-trial phase and at the trial phase.²⁴⁷ A significant number of countries deny fair and adequate process to detainees before they reach trial. Throughout the Americas, for example, between

²³⁹ Olivier, *op. cit.*, (fn 206) page 1.

²⁴⁰ Skilbeck, *op.cit.*, (fn 231) page 4.

²⁴¹ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

²⁴² *Id* at fn 63.

²⁴³ *Ibid.*, Article 9(3).

²⁴⁴ Wits Justice Project, *op. cit.*, (fn 46) page 11.

²⁴⁵ *Ibid.*

²⁴⁶ United States Report on International Prison Conditions, *op. cit.*, (fn 160).

²⁴⁷ *Ibid.*

ten to forty percent of the entire incarcerated population is behind bars without a conviction.²⁴⁸

One of the major achievements of the English United Nations Congress was the adoption, by consensus, of the United Nations Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules).²⁴⁹ In particular these Rules²⁵⁰ provide that:

- a) pre-trial detention should be a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim;
- b) alternatives to pre-trial detention shall be employed at as early a stage as possible;
- c) pre-trial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; and
- d) the accused shall have the right to appeal to a judicial officer or other competent independent authority in cases in which pre-trial detention is employed.

These Rules aim to alleviate the tension relating to pre-trial detention internationally. If countries around the world appreciate and put these Rules into practice, it may assist in decreasing the number of pre-trial detainees world-wide.

In conclusion the right to a speedy trial is crucial to the guarantee of a fair trial because undue delays may cause the loss of evidence through the fading of the memories of the witnesses.²⁵¹ Moreover, correlation exists between the passage of time and the accuracy of eyewitnesses and other testimonial evidence.²⁵²

²⁴⁸ *Ibid.* In Panama, the government regularly imprisons inmates for more than a year before a Judge's pre-trial hearing, and in some cases, pre-trial detention exceeds the minimum sentence for the alleged crime. In China, pre-trial detention periods of a year or longer are common and police often deny detainees the ability to meet with defence counsel. Moreover, while Chinese law requires notification of family members within 24 hours of detention, individuals are often held without notification for significantly longer periods, especially in politically sensitive cases. In Eritrea, very few detained for national security or political reasons, were brought to trial in 2012, despite many arrests on national security grounds.

²⁴⁹ United Nations Standard Minimum Rules for Non-Custodial Measures, *op. cit.*, (fn 96).

²⁵⁰ *Ibid.*

²⁵¹ Farrell, *op. cit.*, (fn 60) page 6.

²⁵² *Ibid.*

A lengthy delay prior to the trial increases the possibility that physical evidence will become lost, tainted or destroyed.²⁵³ Although this may be prejudicial to the prosecution or defence in a criminal trial, it is the accused whose rights must be more scrupulously protected.²⁵⁴

2.2.3 “Unreasonable delay” and a speedy trial in foreign jurisdictions

Section 39(1) of the South African Constitution makes provision that the law of foreign jurisdictions may be considered when a right in the Bill of Rights is interpreted by courts.²⁵⁵ This provision can be understood to mean that it applies to section 35(3) (a) of the Constitution in respect of a trial within a reasonable time. Countries such as Canada, the United States of America, Australia and Namibia may be useful examples with regards the law of foreign jurisdictions.²⁵⁶

2.2.3.1 *Canada*

Section 11 of the Canadian Charter²⁵⁷ provides that a person who is charged with an offence has the right to be tried within a reasonable time. Where there is a breach of this right, the available remedy to a court is a stay of proceedings.²⁵⁸ In Canada, the burden is on the applicant to prove a breach of section 11(b) of the Charter.²⁵⁹ The Crown has the burden of proving any waiver of rights.²⁶⁰ The applicant must first establish that the period raises the issue of “reasonableness”.²⁶¹

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ The Constitution of the Republic of South Africa, 1996 in section 39(1) that is entitled “interpretation of Bill of Rights” provides that when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

²⁵⁶ McMohan, *op. cit.*, (fn 39). Foreign jurisdiction is authority over people in a foreign country or region. It is a form of territorial jurisdiction, a type of authority determined by location rather than the type of people involved or the type of activities being regulated. When legal decisions are made or crimes are committed in an area with foreign jurisdiction, they are not subject to rulings or decisions made by domestic courts. The matter of jurisdiction can become very important in some cases.

²⁵⁷ Canadian Charter of Rights and Freedoms, *op. cit.*, (fn 148).

²⁵⁸ McMohan, *op. cit.*, (fn 39) page 1.

²⁵⁹ *R v Morin* (1992) 1 SCR 77, paragraph 5.

²⁶⁰ *R v C.S.* 1999 CanLII 18948 (NL CA), (1999), 172 Nfld. & P.E.I.R. 175 (N.L.C.A.), paragraph 9.

²⁶¹ *Ibid.*

Once reasonableness has been raised, the delay that can be attributed to the applicant or waived by the applicant must be calculated to be subtracted from the overall calculation.²⁶² An inquiry into unreasonable delay should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness.²⁶³ A shorter period of delay will raise the issue if the applicant shows prejudice, as for example if the accused was in custody. If by agreement or conduct the accused has waived any part of this time period, the length of the period of delay will be reduced accordingly. The court considers whether the actions of either the accused or the Crown have led to delay. These latter two factors do not assign "blame" but simply provide a convenient mechanism by which the conduct of the parties may be examined.²⁶⁴

In the case of *R v Rahey*²⁶⁵ the Canadian Supreme Court pointed out that if a court finds that there has been a contravention of the right to a trial within a reasonable time, then the sole acceptable and minimum possible remedy would be a stay of proceedings. The Court in the *Rahey* case emphasised that any further action in the matter would only exacerbate the violation as it would amount to a trial outside a reasonable time.²⁶⁶ This is also the practice in countries such as Canada, United States and Zimbabwe.²⁶⁷

It is evident that the Canadian judicial system acknowledges the right to a trial within a reasonable time and has endorsed it in its Charter of Rights. The judiciary is seen to be enforcing this right in cases as it is evident in the *Rahey* case.

2.2.3.1(a) *Systematic delays during pre-trial and trial*

Roach and Friedland²⁶⁸ comment on the right to a trial without undue delay in Canada.²⁶⁹ The primary protection against undue delay is the accused's right under section 11(b) of the Canadian Charter²⁷⁰ to a trial within a reasonable time.²⁷¹ This right does not apply to delay

²⁶² *R v Morin, op. cit.*, (fn 259) paragraph 5.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *R v Rahey* (1987) 1 S. C. R. 588 (Canada), paragraph 9.

²⁶⁶ *Ibid.*

²⁶⁷ *Id* at (fn 265) paragraph 13.

²⁶⁸ Weisbrodt D and Wolfrum, *op. cit.*, (fn 150) page 2.

²⁶⁹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3)(d).

²⁷⁰ Canadian Charter of Rights and Freedoms, *op. cit.*, (fn 148).

²⁷¹ Weisbrodt D and Wolfrum, *op. cit.*, (fn 150) page 2.

before a charge is laid and the prosecution of serious offences committed long ago.²⁷² Whether the accused's right to a trial within a reasonable time has been violated depends on the length of the delay (such as delays more than eight to ten months which are suspect); any explanation for the delay, waiver by the accused, and prejudice suffered by the accused.²⁷³ The courts will allow more time for complex cases, but systematic delay caused by the unavailability of courts or prosecutors is charged against the prosecution.²⁷⁴ The minimum remedy for a violation of the right to a trial within a reasonable time is a stay of proceedings which permanently terminates the prosecution.²⁷⁵

Similar to the constitutional provision in South Africa are section 38(3) and section 342A of the Criminal Procedure Act 51 of 1977, which place a duty on the presiding officer regarding trial fairness and delayed trials. Article 20(1) of the Canadian Charter is significant for the positive obligation that is placed on Trial Chambers to ensure a fair and expeditious trial. An important feature of Article 20(1) is the twinning of the requirement of a fair trial with the requirement of an expeditious trial; the requirements are cumulative.²⁷⁶ Robinson²⁷⁷ explains the relation between fair trial and an expeditious trial. A trial may proceed expeditiously, but not fairly. On the other hand, a trial cannot be fair if it is not expeditious.²⁷⁸ Fairness therefore remains the overarching requirement, of which an expeditious trial is one element.²⁷⁹ In support of this statement, Article 8(1) of the American Convention on Human Rights of 1969²⁸⁰ states that "every person has the right to a hearing with due guarantees and within a reasonable time". Similarly article 8(1) states that "right to a hearing with due guarantees" which can mean that an accused person has the right to a fair trial and attached to this right is the right to have such trial without an unreasonable delay²⁸¹.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ Robinson, P L (2000) "Ensuring fair and expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia." EJIL, page 3, available at: <http://ejil.oxfordjournals.org/content/11/3/569.short> (accessed on 22 January 2015).

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ American Convention on Human Rights, *op. cit.*, (fn 75).

²⁸¹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3)(d).

After 1990 Canadian courts appeared to set a six to eight month limit on systematic delay with over 50 000 charges having been stayed in Ontario.²⁸² Courts seemed determined to avoid a repetition of this experience, even if the result is somewhat less protection for speedy trials.²⁸³ Courts are increasingly unwilling to hold that the accused's participation in setting of trial dates constitute waiver and are more reluctant to find a violation in the absence of evidence that the accused has suffered prejudice such as pre-trial detention or the inability to make answer and defence.²⁸⁴

A well-functioning judiciary is a central element of civil society in terms of the civil system and the accused's right to a fair criminal trial.²⁸⁵ It is the sole adjudicator in trials over political, social and economic spheres.²⁸⁶ Judiciaries in many African countries suffer from backlogs, delays and corruption.²⁸⁷ In countries such as Nigeria, Ghana, Tanzania and Uganda, speedy resolutions of disputes are becoming increasingly elusive.²⁸⁸ Although many African countries have constitutional provisions against delay, and have identified congestion, excessive adjournments, local legal culture and corruption as some of the major causes of delay, nevertheless, the problem continues to be a feature in African courts.²⁸⁹ In South Africa, despite many programs and projects in place to solve the problem, delay in finalising trials is still a problem,²⁹⁰ which will be addressed in chapter 3 in more detail.

2.2.3.2 *United States of America*

In *Strunk v United States*,²⁹¹ the Supreme Court of the United States ruled that if the reviewing court finds that a defendant's right to a speedy trial was violated, then the indictment must be dismissed and/or the conviction overturned.

²⁸² Robinson, *op. cit.*, (fn 276) page 3.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ Obiokoye, *op. cit.*, (fn 104) page 4.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Strunk v United States* 412 U.S. (1973).

The Court in the *Strunk* case held that since the delayed trial is the State action which violates the defendant's rights, no other remedy would be appropriate.²⁹² Thus, a reversal of a criminal case on speedy trial grounds means no further prosecution for the alleged offence can take place.²⁹³

The United States of America Supreme Court's decision in *Barker v Wingo*,²⁹⁴ is considered to be the classical case on the right to a speedy trial in American law and is generally taken as a reference point in many other legal systems. This case established that the factors to consider in deciding whether there has been a violation of the right to a trial within a reasonable time are the length of the delay, the reasons for the delay, failure to assert the right to trial within a reasonable time, and prejudice to the accused person.²⁹⁵ The Court in the *Wingo* case further stated that such prejudice relates chiefly to unjust pre-trial incarceration, anxiety of the accused (implicating the right to liberty and security of person) and concern to the accused person (often termed 'social prejudice') and prejudice to the defence (often termed 'trial prejudice').²⁹⁶

The right to a speedy trial in American law was derived from a provision of the common law embedded in the *Magna Carta*²⁹⁷ and it was a right so interpreted by Sir Coke. Much the same language was incorporated into the Virginia Declaration of Rights of 1776²⁹⁸ and from there into the Sixth Amendment of the American Constitution.²⁹⁹ This guarantee can be attributable to reasons which have to do with the rights of and infliction of harms to both defendants and society.³⁰⁰ The Court in the *Barker v Wingo* case held that this provision is important in order to prevent undue and oppressive incarceration of an accused person prior to trial, to minimize anxiety and concern accompanying public accusation and limit the possibility that long delay will impair the ability of the accused to defend himself.³⁰¹

²⁹² *Ibid.*, paragraph 2.

²⁹³ *Id* at (fn 286) paragraph 3.

²⁹⁴ *Barker v Wingo* 407 U. S. 314 (1972).

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Magna Carta*, Article 40. 1215, June 15, available at: <http://www.en.wikipedia.org/wiki/magna-carta> (accessed on 7 October 2014).

²⁹⁸ Virginia Declaration of Rights, Holograph Manuscript, May 1776, Manuscript Division, available at <http://www.loc.gov/exhibits/treasures/trt006html> (accessed on 20 May 2014).

²⁹⁹ *Magna Carta*, *op. cit.*, (fn 297).

³⁰⁰ *Barker v Wingo*, *op. cit.*, (fn 294) paragraph 2.

³⁰¹ *Ibid.*

The passage of time alone may lead to loss of witnesses through death or other reasons and the blurring of memories of available witnesses.³⁰² However, on the other hand, the Court held in *Barker* that there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to the interests of the accused.³⁰³ Persons in jail must be supported at considerable public expense and often families must be assisted as well.³⁰⁴

The Court in *Barker* held that because the guarantee of a speedy trial is one of the most basic rights preserved by our Constitution, it is one of those ‘fundamental’ liberties embodied in our Bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States.³⁰⁵ The protection afforded by this guarantee starts only when a criminal prosecution has begun and applies only to those persons who have been ‘accused’ in the course of that prosecution.³⁰⁶ Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if those restraints precede the formal preferring charges.³⁰⁷

The right to a speedy trial has been violated by States which preferred criminal charges against persons who were already incarcerated in prisons of other jurisdictions following convictions on other charges when those States ignored the defendants’ request to be given prompt trials and made no effort through requests to prison authorities to obtain custody of the prisoners for purposes of trial.³⁰⁸

The Court in the *Barker* case also explained the ratio for when a right is denied; it held that “the right to a speedy trial is necessarily relative.³⁰⁹ It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice”.³¹⁰ No length of time is *per se* too long to pass scrutiny under this guarantee, but on the other hand neither does the defendant have to show actual prejudice by delay.³¹¹

302

Ibid.

303

Ibid.

304

Ibid.

305

Ibid.

306

Ibid.

307

Ibid.

308

Ibid.

309

Id at (fn 294) paragraph 4.

310

Ibid.

311

Ibid.

The Court adopted an *ad hoc* balancing approach. The Court identified some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial.³¹² It identified four such factors:

- the length of the delay;
- the reason for the delay;
- the defendant’s assertion of his right; and
- any prejudice to the defendant”.³¹³

The fact of delay triggers an enquiry and is dependent on the circumstances of the case.³¹⁴ Reasons for the delay will vary.³¹⁵ A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such systematic factors as crowded dockets and negligence will fall between these other factors.³¹⁶ It is the duty of the prosecution to bring a defendant to trial, and failure of the defendant to demand the right is not to be construed as a waiver of the right.³¹⁷ However, the defendant’s acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, and the defendant’s responsibility for the delay would be conclusive.³¹⁸ Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.³¹⁹

2.2.3.3 *Australia*

In the case of *R v Mills*,³²⁰ the Australian Capital Territory Supreme Court delivered a judgment which dealt with the right to a fair trial in criminal proceedings, with particular

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *R v Mills* (2011) ACTSC 109 (1 July 2011), paragraph 38. The facts of the case are as follows: in October 2006, Kara Mills was charged with four offences including trafficking in a controlled drug, or alternatively, with possessing that drug, and receiving stolen property. On 6 September 2007, following a committal hearing, Mills was committed to stand trial. On 28 July 2008, the trial commenced but was later aborted after the informant revealed evidence that DNA analysis of bags containing the drugs had been tested, contrary to the defence being told that they had not. This was highly relevant to Mill’s defence that the bags were left by someone else. On 30 June 2009, a pre-

focus on circumstances that may constitute an unreasonable delay. While the decision largely turned on the facts of the case, it serves as an important guide to what may amount to unreasonable delay.³²¹ The Court also focused on the options available to a Court to provide a suitable remedy such as a permanent stay of prosecution.³²²

Higgins CJ granted a permanent stay of proceedings. He found that for a matter to take four years to come to trial after the decision to prosecute was made was unreasonable.³²³ Higgins CJ said that a delay of two and a half years from the first trial, in a relatively simple case is egregiously unreasonable, irrespective of the reason it might happen.³²⁴ The Court relied on the decision in *R v Upton*,³²⁵ stating that the relevant test is one of proportionality. The relevant factors to be considered by the Court in the *Mills* case were:

- the length of the delay;
- reasons for the delay,
- Mills timely assertion of the right in question; and
- possible prejudice.³²⁶

The Court in the *Mills* case then addressed the particular circumstances of the case – the accused had raised the unfair delay point early; she had been put through the angst and expense of two trials.³²⁷

arraignment conference was scheduled, but it was twice adjourned (because of counsel and witness unavailability) and when the matter returned on 11 August 2009, Counsel for Mills indicated that representations were being made to the DPP regarding a permanent stay of proceedings because of delays. Consideration of the issue led to further adjournments. On 29 October 2009, the next case conference was held and the matter was set down for trial on 7 March 2011. The stay application was foreshadowed and a timetable set. On 14 April 2010, the prosecution informed Mill's solicitors that no DNA analysis of the seized packaging would be conducted. On 15 April 2010, the pre-trial application was part-heard but then not re-listed until 18 February 2011, apparently because of a death in the family for counsel for the prosecution. On 7 March 2011, four years after Mills was charged, the rest of the application was heard.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *R v Upton* (2005) ACTSC 52.

³²⁶ *Ibid.*

³²⁷ *R v Mills, op. cit.*, (fn 320) paragraph 39.

Furthermore, the prosecution had advanced no positive reasons for the delay, and most importantly, the prosecution had failed to explain why the drug bags had not been tested sooner.³²⁸ Interestingly, the Court in the *Mills* case went on to criticise the lack of resources available to the Courts, which may also have contributed to the delay.³²⁹ The Court also emphasised that the failure to provide adequate resources will, if unreasonable delay results, be a breach of human rights.³³⁰

The decision in *Mills*³³¹ is consistent with the trend in international and comparative jurisprudence to closely monitor delays in bringing matters to trial in criminal proceedings. The monitoring of the delays happens in circumstances where the prosecution is unable to sufficiently explain the delays.³³² In Victoria (Australia), delays in various trials have been recently questioned by judges and defence teams alike, particularly those with multiple accused such as in alleged terrorist trials.³³³ Finally, the Court's approach in *Mills*³³⁴ to section 22(1) (c) will certainly inform the interpretation of section 24 (the right to a fair hearing, section 25 (rights in criminal proceedings), section 25(2) (c) (the right to be tried without unreasonable delay) of the Victorian Charter.³³⁵ Given the national and international trends, it seems likely that Victorian Courts would take a similar approach to that in *Mills*³³⁶ and look closely at delays on a case by case basis.³³⁷

Australian foreign law has established certain factors surrounding the unreasonable delay. Similarly, South African courts have recognised similar factors relating to an enquiry on what constitutes an unreasonable delay, as was the case in *Sanderson v Attorney-General, Eastern Cape*.³³⁸

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² Creasey, D (2011) "Right to a fair trial without unreasonable delay." Human Rights Law Centre, page 1, available at: <http://www.hrlc.org.au/right-to-a-fair-trial-without-unreasonable-delay> (accessed on 7 October 2014).

³³³ *Ibid.*

³³⁴ *R v Mills, op. cit.*, (fn 320) paragraph 39.

³³⁵ Victorian Charter of Human Rights and Responsibilities Act 43 of 2006, available at: <http://www.legislation.vic.gov.au.Domino/web/notes> (accessed on 30 October 2014).

³³⁶ *R v Mills, op. cit.*, (fn 320) paragraph 40.

³³⁷ Creasey, *op. cit.*, (fn 332) page 1.

³³⁸ *Sanderson v Attorney-General, Eastern Cape, op. cit.* (fn 6).

2.2.3.4 *Namibia*

The Namibian Supreme Court case of *S v Myburgh*³³⁹ is accepted as guidance for criminal law systems of democratic countries. The Supreme Court of Namibia in the *Myburgh* case held that it is important to emphasise that the principle and requirement of a “speedy trial” or a “trial within a reasonable time” has been accepted in South African and Namibian common law and criminal law and procedure long before the entering into force of the Namibian Independence Constitution³⁴⁰ and the South African interim Constitution of 1993.³⁴¹ The significance of this fact is that the common law has been developed by statute and court precedents into a body of law not only recognising the right of an accused to a trial within a reasonable time as one of the many requirements of a fair trial, but has provided remedies for ensuring a fair trial and for even quashing a conviction and sentence where the accepted requirements for a fair trial were not met.³⁴² In *Sanderson v Attorney-General, Eastern Cape*³⁴³ Kriegler highlighted the three protected interests: liberty, security and trial-related interests.

Article (12) (1) (b) of the Constitution of the Republic of Namibia³⁴⁴ provides that a trial must take place within a reasonable time, failing which the accused shall be released. The term reasonable time is not defined in the Constitution, but it may be interpreted to mean that a party upon whom it is incumbent duly fulfils his or her obligation notwithstanding protracted delay, so long as such delay is attributable to cause beyond his or her control, and she or he has neither acted negligently nor unreasonably.³⁴⁵

The continental human rights regime under whose jurisdiction cases of alleged violations of the right to speedy or reasonable time may be redressed is the African Charter on Human and People’s Rights³⁴⁶ and its Protocol.

³³⁹ *S v Myburgh* (2002) 16 NASC, page 5.

³⁴⁰ Constitution of the Republic of Namibia (amended 1998), 21 March 1990, available at: <http://www.refworld.org/docid/47175fd361> (accessed on 7 October 2014).

³⁴¹ The Interim Constitution of the Republic of South Africa Act 200 of 1993. Section 25(3)(a) of the interim constitution was equivalent to the present section 35(3)(d) of the 1996 Constitution.

³⁴² *S v Myburgh*, *op. cit.*, (fn 339).

³⁴³ *Sanderson v Attorney-General, Eastern Cape*, *op. cit.* (fn 6), paragraph 22 and 25.

³⁴⁴ Constitution of the Republic of Namibia, *op. cit.*, (fn 340).

³⁴⁵ Amoo, *op. cit.*, (fn 92) page 16.

³⁴⁶ African Charter, *op. cit.*, (fn 64).

Under Article 7(d), the Charter states that every individual has the right to be tried within a reasonable time by an impartial court or tribunal. However, this provision does not operate in a vacuum. Its application and enforceability are found in the jurisdiction of the Commission³⁴⁷ and the Protocol to the Charter on the establishment of an African Court on Human and Peoples' Rights.³⁴⁸ Article 30 of the Charter establishes the Commission, the primary function of which is the promotion and protection of human and peoples' rights in Africa.³⁴⁹ The modus operandi employed by the Commission includes submission of communications by both states parties and individuals – or what are referred to as non-state communications.³⁵⁰

A review of the jurisprudence of the African Commission on Human and Peoples' Rights show that it has refrained from defining delay but prefers a case by case approach, taking into account the circumstances of each individual's case.³⁵¹ This approach is based on a reasonableness standard taking into consideration factors such as:

- the seriousness of the offence;³⁵²
- the complexity of the case;³⁵³
- the accused's contribution to the delay;³⁵⁴
- the length of time it takes a court to reach a decision;³⁵⁵ and
- the inability of the State party to adduce exceptional reasons to justify delay.³⁵⁶

³⁴⁷ African Commission, *op. cit.*, (fn 125).

³⁴⁸ Amoo, *op.cit.*, (fn 92) page 9.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ Girjadat Siewpersaud v Trinidad and Tobago, Communication No. 938/2000, U.N. Doc. CCPR/C/81/D/938/2000 (2004), available at: <http://www1.umn.edu/humanrts/undocs/html/938-2000.html> (accessed on 29 January 2015).

³⁵² Glenroy Francis v Trinidad and Tobago, Communication No. 899/1999, U.N. Doc. CCPR/C/75/D/899/1999 (2002), paragraph 5.4, available at: <http://www1.umn.edu/humanrts/undocs/899-1999.html> (accessed on 29 January 2015).

³⁵³ *Franz and Maria Deisl v Austria* Communication No 1060/2002:23/08/2004, paragraph 11.5-11.6.

³⁵⁴ *Leon Rouse v Philippines* Communication No 1089/2002:05/08/2005, paragraph 7.4.

³⁵⁵ *Bozize v Central Africa Republic* Communication No 428/1990 (1994) paragraph 2.1 and 5.3.

³⁵⁶ *Antonio Martinez Munoz v Spain* Communication No 1006/2001:04/02/2004, paragraph 7.1.

Thus, where the State fails to show that the delays were justified, a violation will be found.³⁵⁷ In *Clyde Neptune v Trinidad and Tobago*³⁵⁸ the African Human Rights Commission held that in the absence of any explanation by the State party, a 29 month pre-trial delay and seven years and five months delay from the time of trial to appeal was irreconcilable with article 14(3)(c) of the International Covenant on Civil and Political Rights³⁵⁹. In the case *S v Amujekela*³⁶⁰ Frank J explained that by allowing an accused to languish away in custody at the whim of the Prosecutor-General, pending his authority to proceed with the trial, was contrary to article 12 of the Namibian Constitution.

The right to a trial within a reasonable time has always been regarded as a fundamental component of the right to a fair trial and the African Charter has made adequate provision in this regard.³⁶¹ The reality is that, in many African countries, government officials are given powers to detain citizens arbitrarily and sometimes without trial.³⁶² Governments often use emergencies to ground such detentions, notwithstanding that the African Charter permits no derogation of rights during emergencies.³⁶³ Most times, the arrests and detentions are made during peace times but sheltered under some bogus reasons of state security. The African Commission has pronounced on such detentions.³⁶⁴ The African Commission has held that a two-year detention without charges being filed is an unreasonable delay and a violation of article 7(1) (d) of the African Charter.³⁶⁵

³⁵⁷ Weissbrodt, D (2001) *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Background, Development and Interpretation, articles 8, 10 and 11 of the Universal Declaration of Human Rights*, The Hague, Kluwer Law International, (Book Series: The Universal Declaration of Human Rights, Vol. 1), page 176, available at: http://experts.umn.edu/expertPubs.asp?n=David+Weissbrodt&u_id=3013&order=cc (accessed on 22 January 2015).

³⁵⁸ *Clyde Neptune v Trinidad and Tobago* Communication No 523/1992:01/08/96.

³⁵⁹ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63) Article 14(3)(c).

³⁶⁰ *S v Amujekela* 1991 NR 303 HC 16.

³⁶¹ Art 7(1)(d) African Charter; art 6(1) European Convention: In the determination of his civil rights and obligations or of any criminal charge against him, a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Note that the African Charters provision does not expressly include determination of civil rights and obligations, though this may be implied from the use of the word cause in art 7(1).

³⁶² Udombana, N J (2006) "The African Commission on Human and People's Right and the development of fair trial norms in Africa," AHR LJ Vol 6 No 2, page 303, available at: <http://www.ahrj.up.ac.za/udombana-nj> (accessed on 12 July 2015).

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Id* at (fn 362) page 304.

Detentions for shorter periods could also be unreasonable, especially where there are no genuine grounds to support such detentions. The problem that the African Commission might confront in future is that the test of a reasonable time generally differs between the common law and civil law systems of criminal justice.³⁶⁶ By the nature of a civil law jurisprudence, which is inquisitorial in nature, investigation of a crime generally takes a longer period, during which an accused may spend several years in detention.³⁶⁷ Striking a balance between these two competing systems is a task that the Commission needs to work on.³⁶⁸

2.3 South Africa and its connection to International Law

South Africa is a contracting party to several human rights treaties. For a treaty to become part of South African Law it must be incorporated into an Act of Parliament. However, a self-executing provision of a treaty has the force of law domestically if Parliament approves it, unless it is inconsistent with the Constitution or any other domestic law. The South African Constitution gives effect to the common law rule requiring courts to interpret laws in compliance with international law. The Constitution expressly provides that a court “must consider” international law in interpreting the Bill of Rights, which is modelled on international human rights conventions.

In practice, South African courts, including the Constitutional Court, have been more disposed to interpret the Bill of Rights through the prism of case law enunciated by international judicial bodies and international supervisory bodies than to apply a human rights treaty law directly. However, according to the United States’ Lawyers Committee for Human Rights³⁶⁹ in relation to evaluating the fair trial process, before observing such a trial, an observer should read relevant materials pertaining to domestic legislation.³⁷⁰ The Committee explains that because of the various legal systems and legal orders, as well as the differing stages of their development, it is not possible to develop a comprehensive list of essential texts.³⁷¹ The aim of an observer at this level of examination is to assess whether applicable provisions of domestic law guaranteeing a fair trial have been implemented, and if so, to what

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ United States’ Lawyers Committee for Human Rights, *op. cit.*, (fn 69) page 6.

³⁷⁰ *Id* at (fn 69) page 7.

³⁷¹ *Ibid.*

extent.³⁷² It is well-known that while Constitutions and statutes generally provide for some measure of fairness in criminal proceedings, implementation by the court is often not adequate.³⁷³

2.4 International correctional facilities and human rights in relation to delay in trials

Throughout the world, each country's criminal justice system aims at providing its incarcerated persons with the most humane and non-degrading conditions and treatment as possible. The state of a correctional facility and possible infringement of human rights on a suspect or an accused may have a negative impact on the speediness of trials.

It is internationally accepted that prisoners retain all the basic human rights that are not lost as a consequence of incarceration (which are most commonly the rights to freedom of movement and privacy).³⁷⁴ The International Bill of Rights consists of the Universal Declaration on Human Rights³⁷⁵, the International Covenant on Civil and Political Rights³⁷⁶ and the International Covenant on Social, Economic and Cultural Rights³⁷⁷. The right to personal security; the right to life; the right to be free from arbitrary arrest and detention; and the right to be free from torture and from other forms of cruel, degrading and inhuman treatment, are among the rights that put human security in the utmost jeopardy.³⁷⁸ The ban on torture is one of the few international human rights norms that have acquired the status of a

³⁷² *Id* at (fn 69) page 8.

³⁷³ *Ibid.* A minimum list would comprise: (i) a State's Constitution, especially its provisions on human rights and the judicial system; (ii) its Criminal Code or Code of Criminal Procedure; statutes on the establishment and jurisdiction of the Courts and on the public prosecutor's office; and (iii) landmark court decisions pertaining to human rights, particularly in common law countries.

³⁷⁴ Motala, N and McQuoid-Mason, D (2013) "Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?" *South African Journal of bioethics and law*, Vol 6, No 2, page 1, available at: <http://www.sajbl.org.za/index.php/sajbl/article/view/290/311> (accessed on 21 November 2014).

³⁷⁵ Universal Declaration of Human Rights, *op. cit.*, (fn 98).

³⁷⁶ International Covenant on Civil and Political Rights, *op. cit.*, (fn 63).

³⁷⁷ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed on 7 December 2014).

³⁷⁸ Cherubin-Doumbia, G (2014) *African Commitments to Human Rights: A Review of Eight NEPAD Countries: right to personal safety and security*, page 26, available at: <http://www.sahrc.org.za/home/index.php?ipkContentID=109&ipkMenuID=91> (accessed on 21 January 2015).

rule of customary international law that can be enforced against any country – regardless of whether that country has signed and ratified any of the human rights treaties.³⁷⁹

2.4.1 The right to life

The general commitment used is article 4 of the Constitutive Act of the African Union³⁸⁰, which states that the African Union and its members will uphold the respect for the inviolability of human life. The specific commitment used to evaluate the countries under review is article 4 of the African Charter on Human and Peoples' Rights³⁸¹ which guarantees that all human beings are inviolable. The article also provides that every human being shall be entitled to respect for his life and the integrity of his person.³⁸² Furthermore, the article provides that no one may be indiscriminately deprived of this right.³⁸³ This provision applies to detained persons as well.³⁸⁴

The unqualified right to life vested in every person by section 11 of the Constitution³⁸⁵ is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution.³⁸⁶ The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Two.³⁸⁷ By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.³⁸⁸

³⁷⁹ De Vos, P (2010) "Constitutionally Speaking: on torture and human dignity," page 1, available at: <http://constitutionallyspeaking.co.za/on-torture-and-human-dignity/> (accessed on 21 November 2014).

³⁸⁰ Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, available at: <http://www.refworld.org/docid/4937e0142.html> (accessed 7 December 2014).

³⁸¹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, *op. cit.*, (fn 123).

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1), section 11.

³⁸⁶ *S v Makwanyane and Another* 1995 (6) BCLR 665, paragraph 70.

³⁸⁷ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) Chapter Two, Section 11.

³⁸⁸ *S v Makwanyane op. cit.*, (fn 386) paragraph 144.

2.4.2 Freedom from arbitrary arrest and detention

The specific commitment to freedom from arbitrary arrest and detention is contained in article 6 of the African Charter on Human and Peoples' Rights.³⁸⁹ This article guarantees every individual the right to liberty and to security of person.³⁹⁰ Furthermore, no one shall be deprived of his freedom except for reasons and conditions previously laid down by law.³⁹¹ In particular, no one may be arbitrarily arrested or detained.³⁹² The African Commission has interpreted article 6 of the African Charter on Human and Peoples' Rights³⁹³ to permit arrests only in the exercise of powers normally granted to the security forces of a democratic society.

Each country has provisions that are entrenched in its Constitution which safeguard the rights of its citizens, including awaiting trial persons.

2.4.2.1 *Ghana*

Freedom from arbitrary arrest and detention is addressed in articles 14(1) and 14(2) of the Constitution of the Republic of Ghana.³⁹⁴ These articles guarantee the right to personal liberty and also address the rights of arrested and detained persons.³⁹⁵ The Constitution of the Republic of Ghana³⁹⁶ guarantees accused persons the right to be informed immediately of the charges against him or her, in a language that he or she understands, and also provides the right to a lawyer of his or her choice. It further requires that detained and arrested persons be brought before a court within 48 hours.³⁹⁷ The Constitution of the Republic of Ghana³⁹⁸ also stipulates that if not tried within a reasonable time, the arrested or detained person should be released, either unconditionally or upon reasonable conditions. Compensation is also stipulated in cases of unlawful arrest, detention or restraint.³⁹⁹

³⁸⁹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, *op. cit.*, (fn 123).

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ Constitution of the Republic of Ghana, *op. cit.*, (fn 164).

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ Cherubin-Doumbia, *op. cit.*, (fn 378) page 37.

2.4.2.2 South Africa

The Constitution of the Republic of South Africa⁴⁰⁰ is very specific about the rights of arrested and detained persons. Section 12(1) of the Constitution of the Republic of South Africa⁴⁰¹ provides that everyone has the right to freedom and security⁴⁰². This includes the right not to be arbitrarily deprived of one's freedom without just cause⁴⁰³ and the right not to be detained without trial⁴⁰⁴. Section 35(1) of the Constitution of the Republic of South Africa⁴⁰⁵ provides that arrested persons have the right to remain silent⁴⁰⁶; the right to be informed promptly of their rights⁴⁰⁷; the right not to be compelled to incriminate oneself⁴⁰⁸; the right to be brought before a court as soon as is reasonably possible but not later than 48 hours after arrest, or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day⁴⁰⁹.

At the first court appearance, arrested persons also have the right to be charged or informed of the reasons of detention, or to be released, and to be released from detention *if the interest of justice permits subject to reasonable conditions*.⁴¹⁰ Furthermore, section 35(2) makes provision for the right of detained persons, including sentenced prisoners, to be informed promptly for the reason for their reasons for detention⁴¹¹; the right to choose and consult with a legal practitioner and to be informed of this right⁴¹²; and to have a legal practitioner assigned to them by the state, at the state's expense, if substantial injustice would otherwise result, and to be informed of this right⁴¹³. Detained persons also have the right to challenge the lawfulness of their detention and to be released if the detention is unlawful.⁴¹⁴ Conditions

⁴⁰⁰ The Constitution of the Republic of South Africa, 1996, *op. cit.*, (fn 1).

⁴⁰¹ *Ibid.*, fn 1, under section 12, the right to freedom and to security of person also encompasses the right to be free from all forms of violence from public and private sources, the right to be free from torture, and the right not to be treated or punished in a cruel, inhuman or degrading way.

⁴⁰² *Ibid.*, section 12(1).

⁴⁰³ *Ibid.*, section 12(1)(a).

⁴⁰⁴ *Ibid.*, section 12(1)(b).

⁴⁰⁵ *Ibid.*, section 35(1).

⁴⁰⁶ *Ibid.*, section 35(1)(a).

⁴⁰⁷ *Ibid.*, section 35(1)(b)(i) and (ii).

⁴⁰⁸ *Ibid.*, section 35(1)(c).

⁴⁰⁹ *Ibid.*, section 35(1)(d)(i) and (ii).

⁴¹⁰ *Ibid.*, section 35(1)(e) and (f).

⁴¹¹ *Ibid.*, section 35(2)(a).

⁴¹² *Ibid.*, section 35(2)(b).

⁴¹³ *Ibid.*, section 35(2)(c).

⁴¹⁴ *Ibid.*, section 35(2)(d).

of detention are also addressed in the Constitution of the Republic of South Africa, which states that those conditions must be consistent with human dignity, and that provision for adequate accommodation, nutrition, reading material and medical treatment⁴¹⁵ must be made at the state's expense. The detained person also has the right to communicate with their spouse or partner, next of kin, chosen religious counsellor and chosen legal practitioner.⁴¹⁶

2.4.3 Freedom from torture, cruel, inhuman or degrading treatment⁴¹⁷

Similar to the right to life⁴¹⁸, and freedom from arbitrary arrest and detention⁴¹⁹, freedom from torture, cruel, inhuman or degrading treatment⁴²⁰ is a fundamental right, one that must be protected if human security is to be achieved in society, which includes suspects and accused persons.⁴²¹

The specific commitments to this right are contained in article 5 of the African Charter on Human and People's Rights⁴²² and the Organisation of African Unity Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).⁴²³

⁴¹⁵ *Ibid.*, section 35(2)(e).

⁴¹⁶ *Ibid.*, section 35(2)(f).

⁴¹⁷ *Ibid.*, section 12.

⁴¹⁸ *Ibid.*, section 11.

⁴¹⁹ *Ibid.*, section 12.

⁴²⁰ *Ibid.*, section 12(1)(e).

⁴²¹ Cherubin-Doumbia, *op. cit.*, (fn 378) page 43.

⁴²² Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, *op. cit.*, (fn 123).

⁴²³ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. The Robben Island Guidelines, which were adopted by the OAU in February 2002, reinforce Africa's commitment to end the practice of torture by state authorities and aim specifically to effectively implement article 5 of the African Charter. The Guidelines encourage the criminalisation of acts of torture within national legal systems as defined by article 1 of the UN Convention Against Torture and seek "jurisdictional competence" at the national level, to hear cases involving allegations of torture "in accordance with article 5(2) of the Convention Against Torture. Further, the Guidelines forbid derogation of this right under any circumstances including war, threat of war, political instability or any other public emergency. It also excludes the use of necessity, national emergency or public order as justification for the use of torture, available at: <http://www1.umn.edu/humanrts/instree/RobbenIslandGuidelines.pdf> (accessed on 8 December 2014).

Article 5 of the African Charter on Human and People's Rights⁴²⁴ states that all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. The African Commission on Human and People's Rights⁴²⁵ has stated that this article also encompasses acts which humiliate the individual, or which force the person to act against his or her will or conscience.⁴²⁶

Ethiopia, Ghana, Nigeria and South Africa and Uganda prohibit torture, cruel or degrading treatment in their constitutions.⁴²⁷ South Africa has given effect to the Robben Island Guidelines by enacting the Prevention of Combatting and Torture of Persons Act 13 of 2013 which clearly prohibits the use of torture.

2.4.3.1 *Torture of suspects and detainees*

Torture is an issue in most countries, with criminal suspects and detainees being particularly vulnerable.⁴²⁸ It is a very serious problem in Algeria, Uganda, Kenya, Ethiopia, Nigeria, Ghana and South Africa.

Torture is a serious abuse of human rights and is strictly forbidden by international law.⁴²⁹ As the use of torture strikes at the very heart of civil and political freedoms, it was one of the first issues dealt with by the United Nations (UN) in its development of human rights standards.⁴³⁰ One of its earliest measures was to abolish corporal punishment in colonial territories in 1949.⁴³¹ International law prohibits torture and other forms of inhuman and degrading treatment, which cannot be accepted under any circumstances.⁴³²

⁴²⁴ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, *op. cit.*, (fn 123).

⁴²⁵ Cherubin-Doumbia, *op. cit.*, (fn 378) page 43.

⁴²⁶ Communication 17/94, 139/94, 154/96, 161/97 International PEN, Constitutional Rights Project, Inter-rights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jr.0/ Nigeria, 12th annual activity report of the OAU, 1998–1999, paragraph 79, available at: <http://www.issafrica.org/pubs/Other/ahsi/ChrubinMono/Chap3.pdf> (accessed on 22 January 2015).

⁴²⁷ Cherubin-Doumbia, *op. cit.*, (fn 378) page 45.

⁴²⁸ *Id* at (fn 378) page 46.

⁴²⁹ Human Rights Education Associates (2011) "Torture, Inhuman or degrading treatment," page 1, available at: http://www.hrea.org/index.php?base_id=134 (accessed on 7 December 2014).

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² *Ibid.*

In the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴³³ torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.⁴³⁴ It is punishment for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.⁴³⁵ Torture also occurs when such pain or suffering is inflicted by or at the instigation of or with the consent or consent of a public official or other person acting in an official capacity.⁴³⁶

In Algeria, the government has emphasised that the systematic use of torture is not to be practiced.⁴³⁷ Persons being held in secret detention and who are primarily suspected of terrorist activity are most often subject to torture and ill-treatment.⁴³⁸ State authorities reportedly use beatings with fists, batons, belts, iron bars and rifle butts.⁴³⁹ Whippings, use of cigarette butts on bare skin, cuttings and electrical shocks have also been reported. The “chiffon” method, whereby a dirty rag which might be doused with chemicals is placed over the nose and mouth to induce choking, is also reported to be one of the most commonly used methods of torture in Algeria.⁴⁴⁰ This method is preferred because it leaves no physical marks or traces on the individual’s body.⁴⁴¹

In Uganda, similar to Algeria, suspects are often tortured and subjected to ill-treatment when detained in unregistered facilities known as “safe houses”.⁴⁴² Suspects are primarily political opponents and persons suspected of rebel activity.⁴⁴³ Methods of torture allegedly include hanging suspects upside down with their hands and feet tied (for hours or days), beatings with wooden and metal rods, cables, hammers or sticks with protruding nails.⁴⁴⁴ “Water torture”

⁴³³ United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* Article 1, *op. cit.*, (fn 47).

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ Cherubin-Doumbia, *op. cit.*, (fn 378) page 46.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

is also used.⁴⁴⁵ This form of torture is when the victim lies face up while a water spigot is opened directly into his mouth.⁴⁴⁶

In Kenya, allegations of torture by Kenyan authorities are also widespread and security forces are said to use torture on pre-trial detainees, during interrogations.⁴⁴⁷ There are over 200 allegations of torture by Kenyan state authorities with most of those acts occurring in police stations before suspects are charged for an offence.⁴⁴⁸ Kenya's Independent Medico Legal Unit (IMLU) reported that torture is widespread and where implicated, police often do not record victim statements, nor do they issue the victim's official medical reports.⁴⁴⁹

In Ethiopia, journalists and religious group members are reported to have been subjected to torture, cruel, degrading or inhuman treatment by Ethiopian authorities.⁴⁵⁰ For example, in February 2003, more than 30 members of a church group were arrested and taken to a police training camp. As a form of torture, for two days, they were beaten, forced to run barefoot and made to crawl on their knees and elbows on gravel and sand.⁴⁵¹

Torture and other ill-treatment of prisoners were widespread, particularly during interrogation in pre-trial police detention.⁴⁵² Typically, prisoners are punched, slapped, beaten with sticks and other objects, handcuffed and suspended from the wall or ceiling, denied sleep and left in solitary confinement for long periods.⁴⁵³ Even worse, is that electrocution, mock-drowning

⁴⁴⁵ *Human Rights Watch* (2004) "State of Pain: Torture in Uganda," Vol. 16, No. 4 (A), available at: <http://www.hrw.org/reports/2004/03/28/state-pain> - accessed on 22 January 2015.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Cherubin-Doumbia, *op. cit.*, (fn 378) page 47.

⁴⁴⁸ *Id* at (fn 378) page 46. Commonly used methods practiced by police include: hanging persons upside down for long periods; genital mutilation; electric shocks; and submersion of one's head in water.

⁴⁴⁹ State of Torture and Related Human Rights Violations in Kenya "Alternative Report to the Human Rights Committee to Inform its Review of Kenya's Third Periodic Report," 105th Session (9 - 2 July 2012) on the Implementation of the Provisions Of the International Covenant On Civil And Political Rights In Relation To Torture, available at: http://www.omct.org/files/2012/07/21869/state_of_torture_and_related_human_rights_violations_in_kenyuhrc.pdf - accessed on 7 December 2014.

⁴⁵⁰ *Human Rights Watch* (2004) "Essential Background: Overview of human rights issues in Ethiopia," available at: <http://hrw.org/english/docs/2004/01/21/ethiop6983txt.htm> - accessed on 30 November 2014.

⁴⁵¹ *Id* at (fn 450) page 39.

⁴⁵² Amnesty International, *Nigeria: Security Forces: Serving to protect and respect human rights?* (2002) December 19, AFR 44/023/2002, page 2, available at: <http://www.refworld.org/docid/3f15241e4.html> (accessed on 7 December 2014).

⁴⁵³ *Ibid.*

and hanging weights from genitalia have been reported in some cases.⁴⁵⁴ Many detainees are forced to sign confessions.⁴⁵⁵ Detainees have been reported to mete out physical punishment against other prisoners.⁴⁵⁶ Allegations of torture made by detainees, including in court, are not investigated.⁴⁵⁷ Prison conditions are harsh.⁴⁵⁸ Food and water is scarce and sanitation was very poor.⁴⁵⁹ Medical treatment was inadequate, and was sometimes withheld from prisoners.⁴⁶⁰ Deaths in detention have been reported.⁴⁶¹

In Nigeria, the police, anti-crime task forces, armed vigilante groups and the military have all been accused of using torture against criminal suspects, protestors and prisoners.⁴⁶² Police often use torture to extract confessions or bribes from suspected criminals.⁴⁶³

In Ghana, even customs officials reportedly beat citizens. The beating of suspects is said to be widespread throughout the country.⁴⁶⁴

In South Africa, the Independent Police Investigating Directorate (IPID) reported over 20 cases of torture and 16 rapes committed by police officers between April 2002 and March 2003.⁴⁶⁵ According to the 2013/14 annual report, 7370 remand inmates were assaulted.⁴⁶⁶

The Independent Police Investigating Directorate Act 1 of 2011 was signed into law on 12 May 2011.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2003 - Ghana*, 25 February 2004, available at: <http://www.refworld.org/docid/403f57b1c.html> (accessed on 7 December 2014).

⁴⁶⁵ Cherubin-Doumbia, *op. cit.*, (fn 378) page 48.

⁴⁶⁶ Judicial Inspectorate for Correctional Services 2013/2014 Annual Report by Judge Tshabalala, "Treatment of inmates and conditions in correctional centres", available at: <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf> – accessed on 27 December 2014.

The IPID is an independent organisation that reports to the Minister of Police and functions independently of the South African Police Service (SAPS).⁴⁶⁷ The Act empowers IPID to investigate serious criminal offences by SAPS and Municipal Police Service (MPS) members, including all deaths in police custody or as a result of police action, criminal offences and acts of serious misconduct allegedly committed by SAPS and MPS members.⁴⁶⁸

The Directorate is obliged to investigate matters such as complaints relating to the discharge of an official firearm by a police officer; rape by a police officer, whether the police officer is on or off duty; rape of any person in police custody and any complaint of torture or assault against a police officer in the execution of his, or her, duties. It is also mandated to investigate police-related corruption.⁴⁶⁹ For the entire 2013/2014 reporting period, the IPID had no permanent head and nine provincial head posts were vacant. As a result, there were inconsistencies in performance, with some provinces meeting their performance target and others failing to do so.⁴⁷⁰ The IPID received 5 745 complaints during the 2013/2014. Of these, 3 916 were assault cases, 429 were complaints relating to the discharge of official firearms, 390 were incidents of deaths resulting from police action, 374 related to other criminal matters and 234 were incidents of deaths in police custody.⁴⁷¹

In 2013/2014 the IPID showed a 56% rise in complaints of torture against the South African Police Service, compared with 2012/2013.⁴⁷² Empowering the IPID with the financial, human and legal capacity to investigate complaints of torture effectively is an important first step to addressing the increase in torture complaints against the SAPS.⁴⁷³ Prompt investigations are essential to resolving complaints of torture as vital physical evidence will

⁴⁶⁷ Wits Justice Project (2015) "Ten facts about SA's watch-dog – Independent Police Investigative Directorate (IPID)," page 1, available at: <http://witsjusticeproject.com/2015/04/30/ten-facts-about-sas-watch-dog-independent-police-investigative-directorate-ipid/> (accessed on 18 July 2015).

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² Edwards, L (2014) "Spike in claims of police torture is worrying," *Business Day Live*, paragraph 1, available at <http://www.bdlive.co.za/opinion/columnists/2014/10/15/spike-in-claims-of-police-torture-is-worrying> (accessed on 18 July 2015).

⁴⁷³ *Id* at (fn 472) paragraph 8.

be lost if there is a delay, and complainants may remain under the control of the very officials against whom the allegations of torture are made, putting them in danger of further abuse.⁴⁷⁴ Under international law, "prompt" is defined as within hours or days of the complaint.⁴⁷⁵ It is concerning, therefore, that in its 2013/2014 annual report, the IPID completed investigations for only 8% of torture complaints within 90 days, against a target of 50% within that time, citing capacity constraints, unavailability of or difficulty in tracing witnesses, and delays of technical reports.⁴⁷⁶ Eradicating torture in South Africa requires strong political and ethical leadership from the executive and the national police commissioner.⁴⁷⁷ It also requires effective systems of accountability that work to identify, investigate and prosecute officials who torture, and mechanisms and initiatives that remedy and rectify factors contributing to why police torture.⁴⁷⁸

As one of the few independent police oversight authorities on the continent, the IPID has an important role to play in detecting, prosecuting and eradicating torture.⁴⁷⁹ There is no acceptable explanation for a 56% increase in complaints of torture.⁴⁸⁰ There is a serious problem that requires action by decision makers, including immediate action to ensure that the IPID is equipped to deal more effectively with one of the most serious human rights abuses under the constitution.⁴⁸¹

Torture is defined in great detail in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁸² Despite the fact that torture is strongly prohibited in several countries, many suspects or accused persons suffer the brunt of the conduct of those state officials who disregard this prohibition and practice torture.

2.4.4 Right to be detained in conditions that is consistent with human dignity⁴⁸³

⁴⁷⁴

Ibid.

⁴⁷⁵

Ibid.

⁴⁷⁶

Ibid.

⁴⁷⁷

Id at (fn 472) paragraph 9.

⁴⁷⁸

Ibid.

⁴⁷⁹

Id at (fn 472) paragraph 10.

⁴⁸⁰

Ibid.

⁴⁸¹

Ibid.

⁴⁸²

United Nations General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, *op. cit.*, (fn 47).

⁴⁸³

The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(2)(e).

Degrading treatment and the poor conditions faced by detainees in police custody and pre-trial detention are a widespread and an overlooked area of the criminal justice transformation in Africa.⁴⁸⁴ Conditions of detention for pre-trial detainees in Africa frequently fail to meet minimal international and regional standards due to lack of respect for national legislation and appropriate monitoring mechanisms.⁴⁸⁵ Furthermore, arbitrary arrest due to discrimination, lack of accountability and transparency of the police, compromised judicial independence and poor case flow management, all contribute to a weakened criminal justice system currently prevalent in many African countries.⁴⁸⁶ As a result, many pre-trial detainees lack access to healthcare and nutrition and are subjected to torture, exploitation through bribes, lengthy holding periods and overcrowded and unsanitary living spaces.⁴⁸⁷

Generally speaking, those incarcerated in African prisons face years of confinement in often cramped and dirty quarters, with insufficient food allocations, inadequate hygiene, and little or no clothing or amenities.⁴⁸⁸ While these conditions are not uniform throughout the continent, their prevalence raises concern and needs to be addressed through prison reform and attention to human rights.⁴⁸⁹ Moreover, there are also several barriers – including State secrecy, weak civil society, and lack of public interest – that inhibit the collection of reliable data on African prisons.⁴⁹⁰ This veil of ignorance as to prison conditions merely fuels the neglect and abuse of Africa's awaiting trial prisoners.⁴⁹¹ In some countries, relevant international obligations and standards are deliberately disregarded.⁴⁹²

Although the United States Constitution does not contain a specific guarantee of human dignity, it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of "cruel and unusual punishment" by the Eighth and

⁴⁸⁴ Discussion on Pre-Trial Detention (2014) "Campaign for safe communities: Background on Pre-trial Detention in Africa and the African Commission," available at: <http://safecommunities.sjc.org.za/discussion-on-pre-trial-detention/> (accessed on 20 November 2014).

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Sarkin, J (2013) "Prisons in Africa: An Evaluation from a Human Rights Perspective," page 1, available at: http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo_sarkin.htm (accessed on 22 January 2015).

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Id* at (fn 453), page 3.

⁴⁹² United States Report on International Prison Conditions, *op. cit.*, (fn 160).

Fourteenth Amendments to the American Constitution.⁴⁹³ In *S v Makwanyane* the Constitutional Court has stressed this aspect of punishment,⁴⁹⁴ namely that respect for human dignity especially, requires the prohibition of cruel, inhuman, and degrading punishments.⁴⁹⁵

2.4.4.1 *Right to adequate accommodation, nutrition and medical treatment*

This is a fundamental right applicable to all suspects and detainees. India and the United States of America provide examples of countries that make provision for and guarantee this inherent right.

2.4.4.1(a) *India*

In the case of *Paschim Banga khet Mazdoor Samity v State of West Bengal*⁴⁹⁶ Agrawal, J held that the Indian Constitution⁴⁹⁷ envisages the establishment of a welfare state in which the primary responsibility of the state is to secure the welfare of the people. The government discharges this obligation by running hospitals and health centres which provide medical care to persons seeking to avail those facilities.⁴⁹⁸ The Indian Constitution⁴⁹⁹ imposes an obligation on the state to safeguard the right to life of every person and preservation of life is of paramount importance. The government hospitals and the medical officers in them are duty bound in this respect.⁵⁰⁰ Failure on their part amounts to violation of the individual right to life.⁵⁰¹ The obligation on the state stands irrespective of constraints in financial resources. The state, it was said, should have a time bound plan for providing these services.⁵⁰²

⁴⁹³ *Trop v. Dulles*, (1958) USSC 55; 356 U.S. 86, 101 (1958), paragraph 100.

⁴⁹⁴ *S v Makwanyane and Another*, *op. cit.*, (fn 386) paragraph 59.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Paschim Banga khet Mazdoor Samity v State of West Bengal* 1996 SOL Case No. 169 (Supreme Court of India).

⁴⁹⁷ The Constitution of India, 1950, available at: <http://ox.libguides.com/content.php?pid=192789&sid=1616525> – accessed on 8 December 2014.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

2.4.4.1(b) *United States of America*

The Constitution of the United States of America⁵⁰³ provides rights to pre-trial detainees in respect of medical care, protection from violence, and food and housing. The State's affirmative obligation is to provide for awaiting trial persons basic needs while they are detained. It covers rights to: (1) food and housing; (2) medical care; and (3) protection from assault. Some courts have referred to these rights as 'conditions of confinement';⁵⁰⁴ others have described them as 'basic necessities';⁵⁰⁵ or 'basic human needs'.⁵⁰⁶ The United States Supreme Court has not ruled on whether pre-trial detainees are entitled to a higher standard of care than convicted prisoners with respect to food, housing, medical treatment and protection from assault.⁵⁰⁷ Most of the federal circuit courts in the United States of America have abandoned trying to describe this difference.⁵⁰⁸ Instead, they have found that the same standards for conditions of confinement, medical care, and protection from violence apply to convicted prisoners and pre-trial detainees alike.⁵⁰⁹

⁵⁰³ United States of America: Constitution, 17 September 1787, available at: <http://www.refworld.org/docid/3ae6b54d1c.html> (accessed on 1 February 2015).

⁵⁰⁴ *Wilson v Williams*, 83 F.3d 870, 875 (7th Cir. 1996), available at: http://njlaw.rutgers.edu/collections/resource.org/fed_reporter/F3/93/93.F3d.418.html (accessed on 1 February 2015).

⁵⁰⁵ *Boswell v Sherburne County*, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988). This case describes circuit split on issue of whether pre-trial detainees are entitled to greater rights than convicted prisoners with respect to 'such basic necessities as food, living space, and medical care', available at: <https://casetext.com/#!/case/boswell-v-sherburne-county> (accessed on 1 February 2015).

⁵⁰⁶ *Hare v City of Corinth*, 135 F.3d 320, 324 (5th Cir. 1998), available at: http://www.leagle.com/decision/1998455135F3d320_1419.xml/HARE%20v.%20CITY%20OF%20CORINTH,%20MISS. (accessed on 1 February 2015).

⁵⁰⁷ *Daniels v Williams*, 474 U.S. 327, 335, 106 S. Ct. 662, 667, 88 L. Ed. 2d 672, 670 n.3 (1986). This case deals with declining to decide whether a standard between negligence and intentional conduct violates the due process clause; see also *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989). Declining again to decide whether something less than deliberate indifference may suffice to establish a deprivation in violation of due process of a pre-trial detainee's right to medical care.

⁵⁰⁸ *Davis v Hall*, 992 F.2d 151, 152–53 (8th Cir. 1993).

⁵⁰⁹ *Caiozzo v Koreman*, 581 F.3d 63, 69–72 (2d Cir. 2009), *Ford v County of Grand Traverse*, 535 F.3d 483, 494–95 (6th Cir. 2008). This case held that pre-trial detainees are guaranteed the 'right to adequate medical treatment by the Due Process Clause of the Fourteenth Amendment, and are subject to the same deliberate-indifference standard of care' as are convicted prisoners; *Liscio v Warren*, 901 F.2d 274 (2d Cir. 1990). This case found that there was a deliberate indifference standard applicable to pre-trial detainee's claim of failure to provide medical care for drug and alcohol withdrawal. Often courts retain the language that pre-trial detainees are at least afforded the 8th Amendment protections granted to convicted prisoners but other courts, in coming to this conclusion, have stated that when it comes to "basic necessities" or "basic human needs" the same standard applies to convicted prisoners and pre-trial detainees. See, e.g., *Hamm v DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) where the court held that with regard to providing pre-trial detainees with such basic

2.4.5 Right to freedom and liberty

Deprivation of freedom is one of the most severe infringements of a person's liberty, and therefore needs to be strictly regulated⁵¹⁰ Awaiting trial prisoners are vulnerable groups. It is often believed that because they have committed the crime, they do not deserve to have their rights protected.⁵¹¹ They are usually completely under the power of others and maltreatment can flourish in circumstances which are mostly closed off from outside inspection.⁵¹² Therefore, it is necessary to take precautions against abuse and maltreatment. According to international statistics, the use of imprisonment is growing alarmingly with South Africa towing the line.⁵¹³

Central to the arguments to promote prison reforms is a human rights argument – the premise on which many United Nations standards and norms have been developed.⁵¹⁴ However, this argument is often insufficient to encourage prison reform programmes in countries with scarce human and financial resources.⁵¹⁵ Recognising that Africa is home to 53 countries of profound diversity, several common themes of human rights abuse nonetheless emerge upon continental examination, including the shortcomings of resources and good prison governance; overcrowding and poor conditions within prisons; the failure to protect the rights

necessities as food, living space, and medical care, the minimum standard required by the due process clause is the same as that required by the 8th Amendment for convicted prisoners; see also *Hare v City of Corinth*, 74 F.3d 633 (5th Cir. 1996) where the court applied the deliberate indifference standard to a section 1983 claim involving the failure of state officials to prevent a suicide by a pre-trial detainee, and holding that when a state official's acts or omissions are at issue, the deliberate indifference standard applies to claims involving the basic human needs of pre-trial detainees; *Jordan v Doe*, 38 F.3d 1559, 1565 (11th Cir. 1994) where the court applied the 8th Amendment standard to unsanitary prison conditions, and citing Hamm for the proposition that when it comes to providing pre-trial detainees with 'such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the eight amendment for convicted persons.'

⁵¹⁰ Dissel, A (1996) "South Africa's Prison Conditions: the inmates talk." Imbizo, Issue number 2, page 1, available at: <http://www.ritecodev.co.za/csvrorig/index.php/publications/1364-south-africas-prison-conditions-the-inmates-talk.html> (accessed on 7 January 2015).

⁵¹¹ *Id* at (fn 510) page 2.

⁵¹² *Ibid.*

⁵¹³ *Id* at (fn 510) page 3.

⁵¹⁴ United Nations Office of Drugs and Crime Vienna (2014) "World Drug Report," page 13, available at: http://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf (accessed on 17 February 2015).

⁵¹⁵ *Ibid.*

of pre-trial detainees, women and children; the untapped potential of alternative sentencing; and the unfulfilled mandate of rehabilitation.⁵¹⁶

2.4.6 The presumption of innocence

Limiting the use of pre-trial detention, as well as the protecting process leading up to a pre-trial detention determination, is vital to preserving one of the cornerstone of a rights-based criminal justice system: the presumption of innocence.⁵¹⁷ That is, the right of accused persons to be presumed innocent of the allegations against them until found guilty by a competent court. Disregard for the Rule of Law and for the presumption of innocence can have a spill-over effect on other areas of the law.⁵¹⁸ This is exacerbated by the fact that the very agencies tasked to protect the rule of law – the judiciary, the police and the prosecution – are most likely to undermine it once the presumption of innocence is weakened.⁵¹⁹ For example, in some countries where pre-trial detention is not used sparingly and in accordance with international norms and the use of force, which sometimes amounts to torture, by investigating authorities such as the police is common in order to extract confessions'.⁵²⁰

The excessive use of pre-trial detention also undermines the presumption of innocence in other less explicit ways. If an accused is ordered to be held in custody, or if money bail is set at an amount the accused cannot meet, several significant consequences may result:⁵²¹

- a) the accused who remains in prison may have difficulty participating in his or her own defence; and
- b) the accused person held in detention often has a heightened incentive to plead guilty, even though he or she may have a valid defence, simply to gain his or her freedom – particularly if he or she can receive a sentence of ‘time served’ or receive credit for his or her jail time against a relatively short prison sentence.

⁵¹⁶ Sarkin, *op. cit.*, (fn 488) page 1.

⁵¹⁷ Schonteich, *op. cit.*, (fn 67) page 111.

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.*

⁵²⁰ International Centre for Prison Studies (2001) “The African Charter on Human and Peoples’ Rights,” available at: <http://www1.umn.edu/humanrts.instreet/z1afchar.htm> (accessed on 30 November 2014).

⁵²¹ Schonteich, *op. cit.*, (fn 66) page 111.

2.5 International human rights and the Standard Minimum Rules for the Treatment of Prisoners⁵²²

In some countries there has been considerable discussion on the legal rights of awaiting trial prisoners⁵²³ Dissel⁵²⁴ explains two options that are usually considered. The first question is whether awaiting trial prisoners retain all their civil rights except those expressly taken away by their imprisonment and the second question is whether the awaiting trial prisoners' rights are taken away except those which the prison authorities grant them, either as privilege or as rights.⁵²⁵

Various English decisions emphasise that an awaiting trial prisoner retains all civil rights except those rights which are taken away expressly or by necessary implication by the fact of him or her being in prison.⁵²⁶ South Africa has followed the same direction in the case of *Minister of Justice v Hofmeyr*.⁵²⁷ According to Dissel⁵²⁸ some countries safeguard the rights of their citizens constitutionally in a Bill of Rights which may have specific reference to prisoners.⁵²⁹

International treaties and declarations constitute part of a large body of international law but their motion of awaiting trial prisoners is very general, and recourse needs to be made to more specific instruments which assist in defining and interpreting the rights contained within such instruments.⁵³⁰ Although the Standard Minimum Rules for the Treatment of Prisoners⁵³¹ (SMRs) does not constitute an international treaty or legally binding document, it does assist in giving content to the international human rights instruments.⁵³²

⁵²² Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, United Nations, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at <http://www.refworld.org/docid/3ae6b36e8.html> (accessed on 20 May 2014).

⁵²³ Dissel, *op. cit.*, (fn 510) page 2.

⁵²⁴ *Id* at (fn 510) page 3.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ *Minister of Justice v Hofmeyr* 1993 (2) All SA 232 (A).

⁵²⁸ Dissel, *op. cit.*, (fn 510) page 3.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ Standard Minimum Rules for the Treatment of Prisoners (SMRs), *op.cit.*, (fn 522).

⁵³² Dissel, *op. cit.*, (fn 510) page 3.

The Standard Minimum Rules for the Treatment of Prisoners⁵³³ contains 95 Rules which set out what is considered to be good practice and principle. But they are also intended to guard against maltreatment, particularly in relation to the enforcement of discipline.⁵³⁴ The rules are minimum standards below which prison administrators should not fall.⁵³⁵

‘Untried prisoners’ are defined as a detainee who is arrested or imprisoned on a criminal charge.⁵³⁶ It is further defined with reference to an awaiting trial prisoner who is detained in police custody or in a prison, but who has not yet been tried or sentenced.⁵³⁷ This is an important group of prisoners.⁵³⁸ As they have not been found guilty, they are presumed innocent until the law finds them guilty.⁵³⁹ Similarly persons arrested or detained without a charge are treated likewise.⁵⁴⁰ They are regarded as having all the rights and protections of sentenced prisoners as well as further protections.⁵⁴¹

Maintaining contact with their families and legal advisors is even more important for untried prisoners.⁵⁴² Consequently Rule 92⁵⁴³ provides that they should be able to inform their families where they are being detained. They should be able to communicate with them and receive visits subject only to security requirements.⁵⁴⁴

Pre-trial prisoners should be allowed to contact legal aid advisors and receive visits from their advisors to discuss their defence.⁵⁴⁵ Dissel⁵⁴⁶ explains that many breaches of human rights occur while detainees are held in lockups, especially during the investigation stage of a case. It is important that prison and police administration are aware that all the rights, including the

⁵³³ Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*, (fn 522).

⁵³⁴ Dissel, *op. cit.*, (fn 510) page 3.

⁵³⁵ *Ibid.*

⁵³⁶ *Id* at (fn 510) page 4.

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*, such prisoners should be able to obtain their food from the outside, wear their own clothing if suitable or to wear different clothing issued by the prison to that provided to sentenced prisoners. Although the detainees should not be *required* to work, they should be *allowed* to work. Furthermore, they should be able to obtain books or other educational resources. The detainees should also be entitled to be visited by their own doctor or dentist if the grounds are reasonable.

⁵⁴² Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*, (fn 522).

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Dissel, *op. cit.*, (fn 510) page 4.

⁵⁴⁶ *Ibid.*

prohibition on torture, cruel, inhumane or degrading treatment, does not occur during a detainee's detention.⁵⁴⁷

African prison systems face a host of serious problems, including poor prison conditions of detention, torture and ill-treatment, dilapidated and inadequate infrastructure; overcrowding; no or limited services, antiquated legislation; poorly trained staff, and a lack of oversight.⁵⁴⁸ It should come as no surprise that prisons throughout Africa languish in disrepair.⁵⁴⁹ The buildings are old, poorly ventilated, with inadequate sewage systems.⁵⁵⁰ Such conditions are ripe for the transmission of communicable diseases. Prisons often lack space to sleep or sit, hygiene is poor, and food and clothing are inadequate. Amid such deprivation, overburdened prison staff has found it difficult to supervise prisoners or provide higher standards of sanitation and nutrition.⁵⁵¹

The Standard Minimum Rules for Treatment of Prisoners⁵⁵² provide only a basic framework for the treatment of untried prisoners. Following the principle that untried prisoners are deemed to be innocent, the administration should attempt to provide better conditions than those which are provided for in the Rules.⁵⁵³ However, in reality, prisoners awaiting trial constitute a transient population and often resources are not concentrated on these awaiting trial prisoners.⁵⁵⁴ Awaiting trial prisoners do not have the same access to recreation and occupational programmes offered by a correctional facility.⁵⁵⁵ There are instances where detainees are accommodated in more crowded conditions than sentenced prisoners, despite the principle that awaiting trial prisoners should be accommodated in single cells and shall be detained in separate institutions.⁵⁵⁶

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Muntingh, L and Ehlers, L (2011) *Pretrial Detention in Malawi: understanding caseflow management and conditions of incarceration*, page 8.

⁵⁴⁹ Sarkin, *op. cit.*, (fn 488) page 22.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.* The Rule further states that such an arrested or imprisoned detainee shall be accorded the same protection as that accorded under Part 1 and Part 11 section C. Section C provides for persons under arrest or awaiting trial and prisoners under sentence, but such a section is without any due imposition of rehabilitation measures.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Dissel, *op. cit.*, (fn 510) page 4.

⁵⁵⁶ SMRs, Rule 96 (1955), *op.cit.*, (fn 522).

Like elsewhere in Africa, the excessive and extended use of pre-trial detention in Malawi is symptomatic of failings in the criminal justice systems relating to, *inter alia* the effective and efficient management of case flow.⁵⁵⁷ Muntingh *et al*⁵⁵⁸ explain that excessive and extended pre-trial detention violates a number of rights, key among which are the right to liberty, dignity, a fair and speedy trial, and to be free from torture and other ill treatment.⁵⁵⁹ It is especially the poor and the powerless that bear the brunt of excessive and extended pre-trial detention.⁵⁶⁰ However, the impact of pre-trial detention, even for short periods, reaches well beyond the detainee concerned.⁵⁶¹ It even affects families and communities.⁵⁶²

Excessive pre-trial detention also has a broader socio-economic impact: Pre-trial detainees could lose their jobs, could be forced to abandon their education and could be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends.⁵⁶³

Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income.⁵⁶⁴ The ripple effect does not stop there: communities and States marked by the over-use of pre-trial detention must absorb its socio-economic impact.⁵⁶⁵ Many accused persons are eventually acquitted or have their cases struck off the roll after spending lengthy periods in detention. Their detention ultimately serves no purpose, except to harm them and their families – and the legitimacy of the criminal justice system itself.⁵⁶⁶

Lengthy pre-trial detention is not legally justifiable under international and region human rights instruments and States must take measures to prevent and eradicate this phenomenon.⁵⁶⁷

⁵⁵⁷ Muntingh and Ehlers, *op. cit.*, (fn 548) page 8.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Id* at (fn 548) page 10.

⁵⁶⁶ *Id* at (fn 548) page 11.

⁵⁶⁷ *Ibid.*

2.6 Child offenders and children in detention

Internationally, the issue regarding child offenders in detention as suspects or accused persons is very important. There are conventions or treaties that provide for and guarantee the rights of such children.⁵⁶⁸ Apart from section 28(1) (b)-(f) of the Constitution,⁵⁶⁹ which protects a child below the age of 18 from detention and exploitation deprivation of basic health care, the main issue is whether South Africa actually gives practical effect to these provisions or are they there merely there as a means of indicating that relevant provisions are in place or truly in the best interests of the child.

A discussion will follow on the rights that are afforded children who are suspects or accused persons in detention.

2.6.1 United Nations Convention on the Rights of the Child⁵⁷⁰

South Africa has ratified the United Nations Convention on the Rights of the Child.⁵⁷¹ The document has specific articles dealing with child justice – articles 37 and 40 of the United Nations Convention on the Rights of the Child.⁵⁷² South Africa has an obligation to ensure that its domestic laws comply with the provisions contained in these international and regional treaties.⁵⁷³ The significance of the United Nations Convention on the Rights of the Child⁵⁷⁴ with regard to juvenile justice is that it has raised diversion to a legal norm which is binding on South Africa since ratification. Article 40(3) (a) of the United Nations Convention on the Rights of the Child⁵⁷⁵ provides that State parties to the Convention must aim to promote the establishment of laws, procedures, authorities and institutions specifically applicable to juveniles who have been accused of an offence for infringing penal law. More particularly is section (b) which provides:

⁵⁶⁸ United Nations General Assembly, Convention on the Rights of the Child (also referred to as the CRC, CROC, UNCR) 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> (accessed on 9 December 2014).

⁵⁶⁹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 28(1)(b)-(f).

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Child Justice Alliance (2014) “Why do we need the child justice Bill?” page 1, available at: www.childjustice.org.za (accessed on 4 December 2014).

⁵⁷⁴ United Nations General Assembly, Convention on the Rights of the Child, *op. cit.*, (fn 533).

⁵⁷⁵ *Ibid.*

“(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

States parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time which is effected in section 28(9) of the Constitution and in section 69 of the Child Justice Act 75 of 2008.⁵⁷⁶

2.6.2 ‘Beijing Rules’⁵⁷⁷

The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.⁵⁷⁸ Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.⁵⁷⁹ Each case shall from the outset be handled expeditiously, without any unnecessary delay.⁵⁸⁰

2.6.3 United Nations Rules for the Protection of Juveniles Deprived of their Liberty⁵⁸¹

Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.⁵⁸²

2.6.4 United Nations Standard Minimum Rules for Non-Custodial Measures⁵⁸³

⁵⁷⁶ *Ibid.*, article 37(b).

United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"): resolution / adopted by the General Assembly., 29 November 1985, A/RES/40/33, available at: <http://www.refworld.org/docid/3b00f2203c.html> (accessed on 4 December 2014).

⁵⁷⁸ *Ibid.*, article 19(1).

⁵⁷⁹ *Ibid.*, article 13(2).

⁵⁸⁰ *Ibid.*, article 20(1).

⁵⁸¹ United Nations General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly., 2 April 1991, A/RES/45/113, article 2, available at: <http://www.refworld.org/docid/3b00f18628.html> (accessed on 4 December 2014).

⁵⁸² *Ibid.*, article 2.

⁵⁸³ United Nations General Assembly, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly., 2 April 1991, A/RES/45/110, available at: <http://www.refworld.org/docid/3b00f22117.html> (accessed on 4 December 2014).

Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.⁵⁸⁴

2.6.5 African Charter on the Rights and Welfare of the Child⁵⁸⁵

Article 2 of the Charter defines a child as “every human being below the age of 18 years”.⁵⁸⁶ Furthermore, article 17 of the Charter provides for administration of juvenile justice and states that every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.⁵⁸⁷ Article 17 also contains a provision ensuring that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment.⁵⁸⁸ State parties to the Charter shall in particular have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal.⁵⁸⁹

These international standards call on governments to ensure that children in conflict with the law are treated with dignity and respect, in recognition of their level of development, and in ways which privilege re-education and rehabilitation rather than repression and punitive sanctions.⁵⁹⁰ Despite these international standards the reality is that the majority of children in conflict with the law still end up in the formal criminal justice system.⁵⁹¹

There are at least 1 million children in the world behind bars - often in conditions which constitute inhumane or degrading treatment.⁵⁹² Most of the children behind bars do not

584

Ibid.

585

Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> (accessed on 4 December 2014).

586

Ibid., article 2.

587

Ibid., article 17(1).

588

Ibid., article 17(2)(a).

589

Ibid., article 17(2)(c)(iv).

590

Defence for Children International (2014) “Juvenile Justice,” page 1, available at: <http://www.defenceforchildren.org/juvenile-justice.html> (accessed on 9 December 2014).

591

Ibid.

592

Ibid.

belong there. The majority are awaiting trial and have not yet been convicted of a crime.⁵⁹³ Many are detained for behaviours which would not be considered crimes when committed by adults – such as begging, loitering or living on the street - and very few children behind bars have been accused or convicted of a violent crime.⁵⁹⁴ However, in South Africa, children under the age of 18 years are not permitted to be held in prisons, and instead are held in secure care centres.⁵⁹⁵ There are 13 such centres in South Africa.⁵⁹⁶

2.7 Conclusion on international law and foreign law in relation to delayed trials

This chapter focused on the impact of delayed trials on a suspect, accused or detained person during criminal proceedings, in light of international law binding law and of the importance of foreign jurisdictions. From the research, it is evident that delayed trials are a world-wide issue. Several countries experience problems with speedy finalisation of trials. Research in this chapter highlighted and emphasised the position of an accused person from an international perspective. This part of the research is used as a method of comparison of international law in order to determine how bad or how good South Africa fares with promotion of the Bill of Rights (section 35 of the Constitution) provisions and with efficiency in our justice system, which will be discussed in chapter 3.

Prison conditions and prison overcrowding in relation to international law, international standards and practices have been researched. The problems of prison conditions and prison overcrowding reveal that these two factors are prevalent world-wide. It is not only prevalent, but also current and damaging to an accused persons rights.

In so far as international law in terms of international covenants, treaties and conventions is concerned, it can be accepted that conventions such as the European Convention on Human and Peoples' Rights and covenants such as the International Covenant on Civil and Political Rights emphasise and direct that trials are to be held speedily and without undue delay.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Jules-Macquet, R (2014) "The State of South African Prisons," National Institute For Crime Prevention And The Reintegration Of Offenders, 1st edition, NICRO Public Education Series, page 10, <http://www.nicro.org.za/wp-content/uploads/2014/04/Public-Education-Paper-The-State-of-South-African-Prisons-2014.pdf> (accessed on 18 February 2015).

⁵⁹⁶ *Ibid.*

Case law of selected foreign jurisdictions shows that courts echo similar sentiments in recognising the rights to a trial within a reasonable time and the right to a speedy trial. For example, the court in *Foti v Italy*,⁵⁹⁷ *Barker v Wingo*⁵⁹⁸ and *R v Upton*⁵⁹⁹ all held that there are specific factors which must be considered and applied to the facts of a particular case when determining whether “unreasonable delay” has occurred. The courts stated that the length of the delay is one of the factors to be examined and to be analysed. International cases researched throughout this chapter have adopted a similar approach; that an unreasonable delay is unacceptable.

The inherent rights that are afforded to all suspects and accused persons such as the right to life, the right to be presumed innocent, the right to freedom from arbitrary arrest and detention, the right to be detained in conditions that are consistent with human dignity including the right to adequate accommodation, nutrition and medical treatment⁶⁰⁰ have been addressed in this chapter. Clearly these rights are recognised world-wide. Several countries have been used as examples. These rights should be balanced against the seriousness of the offence which a particular suspect or accused is blamed for as well as the interests of justice, in order to determine whether there is an infringement on the constitutional rights of a suspect or detained person.

The next phase of the study examines and analyses the South African justice system regarding delayed trials and the constitutional rights afforded to suspects or accused persons, in order to draw a comparison with the research done in this chapter.

⁵⁹⁷ *Foti v Italy, op. cit.*, (fn 79) paragraph 50.

⁵⁹⁸ *Barker v Wingo, op. cit.*, (fn 294) paragraph 4.

⁵⁹⁹ *R v Upton, op. cit.*, (fn 325).

⁶⁰⁰ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(2)(e).

CHAPTER 3

SOUTH AFRICAN LAW RELATING TO DELAYED TRIALS

3.1 Introduction

This chapter focuses on the reasons of and the constitutionality of delayed trials on the rights of a suspect, accused or detained person in South Africa. One of the first priorities of the democratic government that assumed power in 1994 was to transform the racially oppressive criminal justice system that existed until then.⁶⁰¹ The new government enacted several pieces of legislation giving effect to the Rule of Law and the Bill of Rights tenets underpinning the right to a fair trial. Despite the introduction of these other enlightened enactments, the South African criminal justice system is severely criticised by Fernandez⁶⁰² for its failure to live up to the human rights standards set out in the Constitution and in international human rights instruments.

Legislation such as the Criminal Procedure Act 51 of 1977, the Correctional Services Act 111 of 1998, the Criminal Procedure Second Amendment Act 41 of 2001, amending the Criminal Procedure Act 51 of 1977, and the Constitution are important sources in this research. The research will investigate the inherent rights enshrined in the Constitution in order to determine the seriousness and effect that a possible infringement may have on a suspect or accused person in respect of delayed trials. Obviously, case law as always, will play an important role in terms of referencing.

When researching delayed trials in the South African justice system, the researcher aims to (1) determine the reasons for delayed trials in South Africa, and (2) to determine the extent to which delayed trials is constitutional.

3.1.1 Right to a trial without undue delay

As pointed out in chapter 1, in the determination of any criminal charge, a person charged with an offence, is entitled to be tried without undue delay.⁶⁰³ This requirement has been interpreted to mean the right to a trial that produces a final judgment and, if appropriate, a

⁶⁰¹ Fernandez, L (2011) *South Africa: The Protection of fundamental Human Rights in Criminal Process*, page 1.

⁶⁰² *Ibid.*

⁶⁰³ *Id* at (fn 601) page 16.

sentence without undue delay.⁶⁰⁴ The time limit begins to run when the suspect or accused is informed that the authorities are taking specific steps to prosecute him.⁶⁰⁵ The assessment of what may be considered undue delay will depend on the circumstances of a case, such as its complexity, the conduct of the parties, and whether the accused is in detention.⁶⁰⁶ The right is, however, not contingent on a request by the accused to be tried without undue delay.⁶⁰⁷ A speedy trial is a trial conducted according to prevailing rules and procedures that take place without unreasonable or undue delay or within a statutory period.⁶⁰⁸

3.2 Delayed trials in respect of awaiting trial persons

3.2.1 Introduction

The South African criminal justice system should be aimed at promoting those rights entrenched in the Constitution in line with international law. It should aim to promote and protect awaiting trial persons, who are accused and detained for an offence of which the trial has not yet begun. A trial which begins as reasonably possible should conclude as reasonably possible and should not jeopardise an accused person's rights and freedoms. However, a trial which is delayed for various reasons, whether for administrative reasons or any other reason, may jeopardise a detained person's constitutional rights. In paragraph 3.2.2 and 3.3 the legal position regarding delayed trials prior to the final 1996 Constitution will be investigated.

3.2.2 Brief overview relating to remand detainees

In December 2000, prisoners⁶⁰⁹ spent an average of 136 days awaiting trial due to backlogs in the system.⁶¹⁰ However, there were cases of remand detainees spending two years for a trial date.⁶¹¹

⁶⁰⁴ Lawyers Committee for Human Rights, *op. cit.*, (fn 38) page 16.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Criminal Law Process, *op. cit.*, (fn 33) page 2.

⁶⁰⁹ The former Correctional Services Act 8 of 1959 also known as the 'Prisons Act' was repealed and substituted by the Correctional Services Act 111 of 1998 that came into operation on 1 July 2004. It was then amended substantially by Act 25 of 2008 and again by the Correctional Matters Amendment Act 5 of 2011. The amendment effected by the Correctional Services Act 25 of 2008 substituted or repealed a number of words or definitions previously used such as 'prisoner;' 'prison;' 'sentenced;' 'unsentenced prisoner;' and replaced them with 'inmate;' 'correctional centre;' 'sentenced offender;' and 'unsentenced offender'. The definition of 'remand detainee' was inserted by Act 5 of 2011.

The late Inspecting Judge, Justice Fagan, appealed to the Correctional Services Committee in 2001 to amend legislation to allow the release of thousands of awaiting trial prisoners from prison.⁶¹² Fagan said that the length of time prisoners were held before their cases were heard was “*atrocious*”.⁶¹³ The country’s 236 prisons, designed to accommodate 101 000, had 172 000 inmates. Of the 172 000 inmates, 64 000 were awaiting trial prisoners.⁶¹⁴ Fagan told members of Parliament that four years prior to 2001, a total of 250 awaiting trial prisoners were found to have been locked up for more than two years. The figure in 2001 was up to a thousand. “It’s shocking...prisoners used to be in Courts within weeks,” was Fagan’s comment.⁶¹⁵ He said that it used to be that awaiting trial prisoners were in jail for at most two months before their cases were heard.

“Now the average is 138 days waiting time. That’s four-and-a half-months... that you’re kept in prison before your case is heard. In the Regional Court it’s much longer, seven months or so.” “It’s atrocious. This is detention without trial as far as I’m concerned, and I’m really waiting for someone to take this to the Constitutional Court.”⁶¹⁶

Fagan went on to say that the country’s Bill of Rights entitles an accused person the right to a speedy trial.⁶¹⁷ Nationally, there are about 2 700 awaiting trial detainees who have been incarcerated for more than two years. This is despite constitutional requirements which stipulate that awaiting trial detainees have the right to a trial that begins and ends without unreasonable delay.⁶¹⁸

According to Advocate J du Preez,⁶¹⁹ there is a clear need to investigate the manner in which South Africa’s lower courts are dealing with their workload.⁶²⁰

⁶¹⁰ Gist, N E (2000) “A Second Look at Alleviating Jail Crowding: A Systems Perspective” Monograph, US Department of Justice, Office of Justice Programs, Bureau for Justice Assistance, PhotoDisc Inc, page 1, available at: <https://www.ncjrs.gov/pdffiles1/bja/182507.pdf> (accessed on 30 July 2015).

⁶¹¹ *Ibid.*

⁶¹² Fagan, *op. cit.*, (fn 2) page 1.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

⁶¹⁹ Advocate du Preez, J (2012) “Justice delayed is justice denied.” FW De Klerk Foundation, page 1, available at: <http://www.politicsweb.co.za> (accessed on 1 November 2014).

⁶²⁰ *Ibid.*

The situation impacted adversely on a person's various constitutional rights including a victim's right to dignity, everyone's right to access to the courts and an accused person's right to a fair trial which must be concluded without undue delay.⁶²¹ In order to respect and give effect to these rights, government would do well to assess and address the dire backlogs in South Africa's lower courts.⁶²²

In Gauteng, more than 1 000 unconvicted remand detainees have been held in prison for more than two years, some for as long as six, in conditions described by Inspecting Judge of Prisons Deon Van Zyl in his 2009/10 report as 'shockingly inhumane'.⁶²³ According to Professor Bonita Meyersfeld⁶²⁴ 'a lack of enforcement is the biggest weakness in the human rights system. Contravening international conventions based on non-coercive compliance carries no punishment, except naming and shaming'.⁶²⁵

In *Wild v Hoffert*⁶²⁶ Kriegler J stated that the State is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the case against them. This, in turn, means that both State prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial.⁶²⁷ The Court in the *Wild* case further stated that the bench-mark set by the constitutional demand for a reasonably speedy trial does not propose anything revolutionary nor advocate standards of perfection.⁶²⁸ More importantly, it is not concerned with theory but with practical justice. Kriegler J highlighted factors that could minimise remands.⁶²⁹

- Prosecutors should know that remands should not be applied for merely because the investigating officer so requests.

⁶²¹ *Ibid.*

⁶²² *Ibid.*

⁶²³ Judge Van Zyl, D (2010) "Annual Report for the period 1 April 2009 to 31 March 2010". Judicial Inspectorate of Correctional Services, page 8. This report was produced 10 years after South Africa's 1998 ratification of UN CAT and the specific prohibition of acts of cruel, inhumane or degrading treatment or punishment in Article 16, available at: <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202009%20-2010.pdf> (accessed on 22 January 2015).

⁶²⁴ Meyersfeld, B (2011) "The view that the dead in this country can wait for justice is not just illegal but unethical," page 1, available at: <http://www.journalism.co.za> (accessed on 6 October 2014).

⁶²⁵ *Ibid.*

⁶²⁶ *Wild and Another v Hoffert NO and Others* 1998 (6) BCLR 656, paragraph 11.

⁶²⁷ *Ibid.*

⁶²⁸ *Id* at (fn 626), paragraph 33.

⁶²⁹ *Ibid.*

- An application to court which involves possible impairment of fundamental right should not be made lightly and prosecutors and officers of the court should exercise independent professional judgment before making such applications. Such judgments may not be abdicated for the sake of cordiality with the police.
- Should an application for remand be made by the prosecutor, the magistrate must remain mindful of the provisions of the Bill of Rights. The magistrate should keep in mind the demands of section 25(3)(a) of the Interim Constitution⁶³⁰ (now section 35(3)(a)⁶³¹), and need to consider countering prejudice by using an appropriate remedy. An explanation can be demanded from the investigating officer, if necessary under oath. If the accused is in custody, his or her release can be considered.

In *S v Acheson*⁶³², Mahomed J remarked that “an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court.” Release on bail is no substitute for an accused’s right to be tried within a reasonable period.⁶³³

3.3 “Unreasonable delay” in the start and conclusion of a trial

The right to have the trial begin and conclude without unreasonable delay⁶³⁴ is a right which cannot be over emphasised. Even before international criminal tribunals this right is guaranteed. The importance of this right is that it serves the purpose of ensuring that the accused receives a fair trial.⁶³⁵ The Court in the *Broome*⁶³⁶ case held that in South Africa’s criminal justice system, a recognised norm and a touchstone for a fair trial of an accused person is the efficient and speedy conclusion of criminal proceedings.

⁶³⁰ The interim Constitution of the Republic of South Africa Act 200 of 1993, *op. cit.*, (fn 341).

⁶³¹ The Constitution of the Republic of South Africa, 1996, *op. cit.*, (fn 1).

⁶³² *S v Acheson* 1991 (2) SA 805 (Nm), page 822.

⁶³³ Du Toit *et al* (1997) *Commentary on the Criminal Procedure Act* 2nd edition, Cape Town. Juta & Co, page 9-6.

⁶³⁴ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3)(d).

⁶³⁵ Singh, N “Heads of Argument on Behalf of the Second and Third Accused in *S v Zuma and Others* 2005 (3) BCLR 385 (SA),” submitted on 28 August 2006 to the Registrar of the then Appellate Division (now Supreme Court of Appeal), available at: www.armsdeal-vpo.co.za/.../Thint%20Heads%20of%20Argument%20-%20Right%20to%20a%20fair%20trial.doc (accessed on 22 January 2015).

⁶³⁶ *Broome v Director of Public Prosecutions, Western Cape and Others, Wiggins v W/NMDE Streeklanddros, Cape Town and Others* 2008 (1) SACR 178 (C), paragraph 44.

In *Barker v Wingo*⁶³⁷ the Court emphasised that the critical question is how American courts determine whether a particular lapse of time is reasonable or unreasonable. Once a court determines whether a lapse of time is reasonable or unreasonable, the next question is what the appropriate remedy is in the particular circumstances.⁶³⁸

In the *Ndibe*⁶³⁹ case, the Court held that courts have a duty to ensure that rights in terms of section 35 (3) of the Constitution to have trials commencing and being completed without unreasonable delay are enforced. The Court held that it can be accepted that judicial officers to a larger extent, and as they should, proactively recognise the forms of prejudice an accused can potentially suffer due to slow grinding of the wheels of justice.⁶⁴⁰

According to Kriegler J in the *Sanderson*⁶⁴¹ case, the right to a trial within a reasonable time also seeks to render the criminal justice system more articulate and fair by justifying the tension between the presumption of innocence and the publicity of trial. The Court acknowledged that the accused although presumed innocent is nevertheless “punished,” and in some cases, such as during pre-trial incarceration, the “punishment” is severe.⁶⁴² The response of the Constitution is a reasonable one - the trial must be “within a reasonable time”.⁶⁴³ According to Kriegler J in the *Sanderson* case, it makes sense then that a substantively fair trial, along the lines contemplated by Kentridge AJ in *S v Zuma and Others*,⁶⁴⁴ would include a provision that minimized non-trial related prejudice suffered by an accused. The right in section 25(3) (a) of the interim Constitution, insofar as it protects non-trial related interests, is perfectly situated and is fundamental to the fairness of the trial.⁶⁴⁵

In determining the question of undue or unreasonable delay in proceedings, a court has to take into account all the relevant factors: these were listed in *Feedmill Development (PTY) LTD and Another v Attorney-General of KwaZulu-Natal*⁶⁴⁶, to be: (1) the length of the delay,

⁶³⁷ *Barker v Wingo*, *op. cit.*, (fn 294) paragraph 2.

⁶³⁸ *Ibid.*

⁶³⁹ *S v Ndibe* (2012) ZACHC 245, paragraph 18.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Sanderson v Attorney-General, Eastern Cape*, *op. cit.*, (fn 6) paragraph 24.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ *S v Zuma and Others* 1995 (2) SA 642 (CC) 651 I-652 D.

⁶⁴⁵ *Sanderson v Attorney-General, Eastern Cape*, *op. cit.*, (fn 6) paragraph 24.

⁶⁴⁶ *Feedmill Development (PTY) LTD and Another v Attorney-General of KwaZulu-Natal* 1998 (2) SACR 539 (N), paragraph 57.

among which would be the availability of witnesses; (2) the difficulties encountered in the investigation of the case for trial; (3) the marshalling of the evidence; (3) the tracing of witnesses and the preparation of the case for trial; (4) and any substantial prejudice suffered or is likely to suffer as a result of the delay.

The Court, in *Sanderson v Attorney-General, Eastern Cape*⁶⁴⁷, when dealing with section 25 of the Interim Constitution,⁶⁴⁸ fully outlined the three factors bearing on the enquiry of what constitutes “unreasonable delay”:

(a) *Nature of the prejudice*

Trial related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial.⁶⁴⁹

An important issue related to prejudice should be elucidated.⁶⁵⁰ What is important is the accused’s desire that the trial be expedited.⁶⁵¹ On a wide range, from incarceration through restrictive bail conditions and trial prejudice to mild forms of anxiety, the shorter must be the period within which the accused is tried.⁶⁵² Awaiting trial prisoners, in particular, must be the beneficiaries of the right in section 25(3) (a) of the interim Constitution (now section 35(3) (a) of the Constitution). Section 23(3) (a) and section 35(3) (a) are equivalent. In principle, the continuing enforcement of section 35(3) (a) rights should tend to compel the State to prioritise cases in a rational way. Those cases involving pre-trial incarceration, a serious occupational disruption of stigma, or the likelihood of prejudice to the accused’s defence, or – in general – cases that are already delayed or involve serious prejudice, should be expedited by the State. If it fails to do this it runs the risk of infringing section 35(3) (a).⁶⁵³ An accused should not have to show a genuine desire to go to trial in order to benefit

⁶⁴⁷ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 31.

⁶⁴⁸ The Interim Constitution of the Republic of South Africa Act 200 of 1993, *op. cit.*, (fn 341). Section 25(3)(a) stated that “every accused person shall have the right to a fair trial which shall include the right to a public trial before an ordinary court of law within a reasonable time after having being charged.”

⁶⁴⁹ *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC), paragraph 51.

⁶⁵⁰ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 32.

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

⁶⁵³ *Id* at (fn 6), paragraph 31.

from the right.⁶⁵⁴ However an accused must show that he can establish any of the three kinds of prejudice protected by the right.⁶⁵⁵ The question is not whether he *wants* to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.⁶⁵⁶ There should also be some proportionality between the kind of sentences available for a crime, and the prejudice being suffered by the accused.⁶⁵⁷ In *Zanner v Director of Public Prosecutions*,⁶⁵⁸ the Court held that the focus is on whether the accused has suffered significant trial-related prejudice. The Court in *S v Jackson & Others*⁶⁵⁹ also confirmed the three basic forms of prejudice which can be caused by unreasonable delays: loss of personal liberty; impairment of personal security; and trial-related prejudice, such as witnesses becoming unavailable.

In *McCarthy v Additional Magistrate, Johannesburg*⁶⁶⁰ Farlam JA commented on the time lapse and the grounds relied for on the alleged trial-related prejudice by stating that the lapse of 13 years (now 15 years) since the alleged conspiracy advocates very strongly that fairness of the trial will be materially adversely affected, in at least the following respects: the applicant's memory of events, the tracking down of such witnesses for the defence as may survive, the willingness to testify, the recollection of those witnesses and locating real evidence.⁶⁶¹ The conduct of the prosecution could be highly relevant, particularly if it has a direct involvement in the disappearance of crucial evidence.⁶⁶² Loss of faculties to make a proper defence could be another factor.⁶⁶³ The loss of evidence through death of witnesses or disappearance of documents would also require consideration.⁶⁶⁴ According to the Court in the *Bothma*⁶⁶⁵ case, improper motives, such as a complainant having a long delay in initiating proceedings for the purpose of blackmail or the making up of a State misdemeanour purely to

654

Ibid.

655

Ibid.

656

Ibid.

657

Ibid.

658

Zanner v Director of Public Prosecutions 2006 (8) SCA 56 (SCA), paragraph 16.

659

S v Jackson & Others 2008 (2) SACR 274 (CC), paragraph 42.

660

McCarthy v Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA), paragraph 204J-205F.

661

Id at (fn 660) paragraph 41.

662

Bothma v Els & Others 2010 (2) SA 622 (CC), paragraph 75.

663

Ibid.

664

Ibid.

665

Ibid.

impede the competitor's career could impact so severely on the integrity of the administration of justice as to call for a stay of prosecution.

In *Joseph v The State*⁶⁶⁶ Lesetedi AJA stated that it is accepted by the authorities on the subject that the longer the time that elapses after the charge, the more the presumption that the accused person would be prejudiced thereby. The question of elapsed time is one which appears to be widely recognised even in other jurisdictions as a primary factor in the enquiry on unreasonable delay.⁶⁶⁷

One is therefore not so much concerned with the prejudice flowing from the charges and the publicity they initially generated, but with the aggravation of that prejudice as a result of the delay.⁶⁶⁸ Moreover, when one considers the nature and cause of that prejudice, a permanent stay of prosecution certainly does not present itself as an obvious remedy.⁶⁶⁹ The more appropriate remedy would most likely be the release from custody of an awaiting-trial prisoner who has been held too long.⁶⁷⁰

(b) Nature of the case

Judges should use their own experiences as a guide when determining whether a delay seems over-lengthy.⁶⁷¹ This is not simply a matter of conflicting fundamentally simple and complex cases.⁶⁷² Certainly, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than one which does not.⁶⁷³ But the prosecution should also be aware of these unavoidable delays and factor them into the decision of when to charge a suspect.⁶⁷⁴ If a person has been charged very early in a complex case that has been defectively prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay.⁶⁷⁵

⁶⁶⁶ *Joseph v The State* 2007 (1) BCLR 345 (CA), paragraph 1.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Sanderson v Attorney-General, Eastern Cape supra, op. cit.*, (fn 6) paragraph 41.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Id* at (fn 6) paragraph 34.

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

Furthermore, even cases which appear simple may involve factors which justify delay.⁶⁷⁶ The personal circumstances and nature of the witnesses, for example, should be considered.⁶⁷⁷ There should also be some proportionality between the kind of sentences available for a crime, and the prejudice being suffered by the accused.⁶⁷⁸ In *Godi v S*,⁶⁷⁹ the Court held that it is the duty of the presiding officer to assume primary responsibility for ensuring that the constitutional right to a speedy trial is protected in the day-to-day functioning of their courts. In the case of *Zanner v Director of Public Prosecutions*⁶⁸⁰ the court held that the accused must show definite and not speculative prejudice. According to the Court in the *Sanderson*⁶⁸¹ case, pre-trial incarceration of a period of five months for a crime where the possible maximum sentence is six months, clearly points in the direction of unreasonableness. Two aspects relevant to the nature of the case are the following:

(i) Postponements

The Court in *Godi v S*⁶⁸² stated that on at least five occasions the presiding magistrate (of the court *a quo*) had noted that this would be a final postponement and on at least one occasion he had warned that warrants would be issued for anyone who did not arrive on time.⁶⁸³

Unnecessary postponements may be one of the main causes of unreasonable delay in commencing or finalising a trial.

(ii) Witnesses and expert evidence

According to the Court in the *Sanderson*⁶⁸⁴ case, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than a case which does not require this type of witnesses.⁶⁸⁵ Furthermore, the personal circumstances of the witnesses, for example, should be considered.⁶⁸⁶

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Godi v S* 2011 (4) ZAWCHC 247, paragraph 15.

⁶⁸⁰ *Zanner v Director of Public Prosecutions, op. cit.*, (fn 658) paragraph 16.

⁶⁸¹ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 34.

⁶⁸² *Godi v S, op. cit.*, (fn 679) paragraph 6.

⁶⁸³ *Ibid.*

⁶⁸⁴ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 34.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid.*

(c) *Systematic delays*

Systematic factors are probably more excusable than cases of individual dereliction of duty.⁶⁸⁷ Nevertheless, there must come a time when systematic causes can no longer be regarded as exculpatory.⁶⁸⁸ The Bill of Rights is not a set of (aspirational) directive principles of State policy.⁶⁸⁹ It is intended that the State should make whatever arrangements are necessary to avoid detainee rights violations.⁶⁹⁰ One has to also accept that we have not yet reached that stage.⁶⁹¹ Even if one does accept that systematic factors justify delay, one can only do so for certain period of time.⁶⁹² It would be legitimate, for instance, for an accused to bring evidence showing that the average systematic delay for a particular jurisdiction had been exceeded.⁶⁹³ In the absence of such evidence, courts may find it difficult to determine how much systematic delay to tolerate.⁶⁹⁴ In principle, however, they should not allow claims of systemic delay to render the right nugatory.⁶⁹⁵

(d) *Public interest and a fair trial*

Kriegler J stated in the *Sanderson*⁶⁹⁶ case that although the case was concerned with the rights of the accused under section 25(3) (a) of the Interim Constitution, the point should not be overlooked that it is by no means only the accused who has a legitimate interest in and a right to a fair criminal trial commencing and concluding reasonably expeditiously. It is an established principle that public interest is served by bringing a trial to finality.⁶⁹⁷ Though the interests of others should not be ignored in deciding what is reasonable but the demands of section 25(3) (a) require the accused's right to a fair trial to be given precedence.⁶⁹⁸

⁶⁸⁷ *Id* at (fn 6) paragraph 35.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Id* at (fn 6) paragraph 37.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Ibid.*

It is the duty of the presiding officers to assume primary responsibility for ensuring that this constitutional right is protected in the day-to-day functioning of their courts.⁶⁹⁹

An unreasonable delay (or unreasonable duration of a case) can affect the fairness of the trial.⁷⁰⁰ In *S v Maredi*⁷⁰¹ the accused was in custody for 22 months before the case was concluded. Mynhardt J referred the matter to the authorities to investigate the conduct of the prosecutor and magistrate concerned.⁷⁰² In *Broome v DPP, Cape Town and Others; Wiggins and Another v Wnde Streeklanddros, Cape Town and Others*⁷⁰³ the Court held that trial prejudice is really significant and fairness of the trial related and that infringements of the accused's fundamental rights were flagrant and the delay inexcusable. The Court mentioned that this case spent approximately seven years in the office of the DPP with no further investigation taking place.⁷⁰⁴

The threshold of what amounts to 'unreasonable delay' is not benchmarked by any time frames.⁷⁰⁵ In approaching the enquiry therefore, a Court must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in the country.⁷⁰⁶ The Court in the *Jackson and Others*⁷⁰⁷ case also referred to the case of *Bell v Director of Public Prosecutions and Another*.⁷⁰⁸

In conclusion, the process from the arrest of an accused person, his arraignment and trial of necessity takes a period of time. There would be those delays inherent on the system. Systematic delays which may impact on the extent of the delay include resource limitations, (which hamper the effectiveness of police investigations), prosecution of the case and or the speedy disposal of cases by judicial offices.⁷⁰⁹ The consideration requires a value judgment

699

Ibid.

700

Du Toit *et al*, *op. cit.*, (fn 633) page 54.

701

S v Maredi 2000 (1) SACR (T), paragraph 8.

702

Ibid.

703

Broome v DPP, Cape Town; Wiggins and v Wnde Streeklanddros, Cape Town 2007 (3) JOL 210412 (C).

704

Id at (fn 703) paragraph 79.

705

Ibid.

706

Joseph v The State, *op. cit.*, (fn 666) paragraph 2.

707

S v Jackson & Others, *op. cit.*, (fn 659) paragraph 5.

708

Bell v Director of Public Prosecutions and Another 1985 AC 937 (PC).

709

Id at (fn 708) paragraph 23.

based upon a judicial balance of interests that came into play.⁷¹⁰ Although the accused's rights are central to the whole enquiry, it has to be examined within the context of all other considerations.⁷¹¹

3.4 South African legislation and Constitutional provisions relating to delays

3.4.1 The Correctional Services Act 111 of 1998

Section 49G of the Correctional Services Act states that the period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility.⁷¹²

3.4.2 Section 342 A of the Criminal Procedure Act 51 of 1977

This Criminal Procedure Act makes provision for the control of delayed trials. Section 342 A provides that a court in which criminal proceedings are taking place, must investigate any possible delay in the completion of proceedings which may according to the court, amount to an unreasonable delay.⁷¹³ Furthermore, an investigation must be done where such delay could cause substantial prejudice to the prosecution, to the accused or his or her legal advisor, the State or a witness.⁷¹⁴ However, the Constitutional Court in the *Sanderson* case limited its enquiry in respect of one of the factors determining whether there was an unreasonable delay, on the prejudice to the **accused**.⁷¹⁵ The Court did not base the enquiry of prejudice on either the accused or his or her legal advisor, the State or a witness as provided for in the Act.

Section 342A was inserted in the Criminal Procedure Act in 1977 following the investigation by the South African Law Reform Commission into delays in the finalisation of criminal cases.⁷¹⁶ The background to and the motivation for the insertion of the section was based on an analysis of the causes of the delays in the disposal of criminal cases.⁷¹⁷ The Review

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² Correctional Services Act 111 of 1998, *op. cit.*, (fn 31), section 49G.

⁷¹³ *Ibid.*

⁷¹⁴ Criminal Procedure Act, *op. cit.*, (fn 52) section 342A.

⁷¹⁵ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 31.

⁷¹⁶ Criminal Justice Review (2002) "Report on Section 342A of the Criminal Procedure Act 51 of 1977." Justice Crime Prevention and Security (JCPS), page 2, available at: <http://www.justice.gov.za> (accessed on 22 January 2015).

⁷¹⁷ *Ibid.*

explains that section 342A focuses on the unreasonable delays in the finalisation of criminal trials and also attempts to empower the courts to deal effectively with the conduct which falls in the category of abuse of the process.

Section 342A (2) (a) of the Criminal Procedure Act sets out the factors to be taken into account in making a determination on whether there has been an unreasonable delay. The factors include:⁷¹⁸

- (a) the duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witness;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or defence by the delay, including weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; and
- (i) any other factor which in the opinion of the court ought to be taken into account.

These factors are a concise description of the trial-related interests.⁷¹⁹ It is worth mentioning that even the provision detailing prejudice to the defence as a result of the delay does not include consideration as to whether the accused has been detained or not.⁷²⁰

Society demands a degree of tranquillity for its members.⁷²¹ People should be able to get on with their lives, with the ability to redeem the misconduct of their early years.⁷²²

⁷¹⁸ Criminal Procedure Act, *op. cit.*, (fn 52) section 342A(a)-(i).

⁷¹⁹ Criminal Justice Review, *op. cit.*, (fn 716) page 2.

⁷²⁰ *Ibid.*

⁷²¹ *Bothma v Els and Others*, *op. cit.*, (fn 662) paragraph 77.

⁷²² *Ibid.*

To prosecute someone for shop-lifting more than a decade after the incident occurred could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt.⁷²³

The Act was amended to incorporate subsection (7) (a) in terms of the Judicial Matters Second Amendment Act 55 of 2003. This provision requires that, after every six months, the National Director of Public Prosecutions must submit a report to the Minister of Justice and Constitutional Development detailing each accused whose trial has not yet commenced and who has been in custody for a continuous period exceeding:

- (1) 18 months from date of arrest, where the trial is to be conducted in a High Court;
- (2) 12 months from date of arrest, where the trial is to be conducted in a regional court and;
- (3) six months from date of arrest, where the trial is to be conducted in a magistrate's court.

The Minister of Justice and Constitutional Development is then required to table the report in Parliament. While this provision indicates political concern for the number of remand detainees, it is nevertheless isolated from the “undue delay” enquiry and serves little purpose other than to indicate the extent to which court processes are being delayed.

In *S v Van Huysteen*⁷²⁴ Traverso J (as she then was) held that s 342A merely provides guidelines for the factors which a court should take into account when deciding whether to refuse a postponement or not. The learned Judge held further that section 342A (3) does not require that a formal enquiry be held or a formal finding be made.

The Court in *S v Ndibe*⁷²⁵ held that where a court is faced with an application for the striking off the roll of a case due to unreasonable delays, thereby invoking the provisions of s 342A, such a court is compelled to give effect to the provisions of the section. A holistic reading of the provisions of s 342A leaves the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course necessitates an enquiry.⁷²⁶

⁷²³ *Ibid.*

⁷²⁴ *S v Van Huysteen* 2004 (2) SACR 478 (C), paragraph 8.

⁷²⁵ *S v Ndibe, op. cit.*, (fn 639) paragraph 6.

⁷²⁶ *Ibid.*

However, in *Naidoo*,⁷²⁷ the Court mentioned that section 342A is limited in effect to unreasonable delay which occurs *after* the commencement of criminal proceedings, which is intra-curial.⁷²⁸ It does not apply in respect of delay that has occurred before the commencement of proceedings, which is extra-curial.⁷²⁹ The limitation of the reach of section 342A does not mean, however, that a magistrate is thereby precluded from giving an effective remedy if it appears, in the context of a criminal trial conducted in the magistrate's court, that an accused person has suffered irremediable trial prejudice as a consequence of an unreasonable delay before the commencement of proceedings.⁷³⁰

This section of the Criminal Procedure Act⁷³¹ states "*shall*" which is interpreted to be a directive of the legislature. The judiciary has acknowledged section 342A, as is evident in the *Huysteen*, the *Ndibe* and the *Naidoo* cases. However the issue remains: South Africa's delay in commencing and finalising trials even though the legislature has provided for an enquiry in terms of sections 342A of the Criminal Procedure Act.

3.5 South African cases pending and complete as illustrations of delayed trials

There are South African examples of cases that are delayed. These cases are either pending or have recently been finalised. Research of such cases helps to emphasise the seriousness and prevalence of delayed trials in South Africa.

Desmond Prinsloo faces a fraud trial in Port Elizabeth commercial crime court from afar for over many years.⁷³² He faces charges relating to his involvement in the Port Elizabeth Optical Group, where he was a shareholder and responsible for the financial management of

⁷²⁷ *S v Naidoo* 2012 SACR 126 (WCHC), paragraph 14.

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid.*

⁷³¹ Criminal Procedure Act 51 of 1977, *op. cit.*, (fn 53) section 342A.

⁷³² Hartle, R (2014) "Classic Case of Justice Delayed is Justice Denied." SowetanLive Newspaper. The Judicial Service Commission has moved to impeach four judges over their tardiness in delivering judgments, including Judge Ntsikelelo Poswa, who has outstanding judgments dating to 2005. The JSC described as "astounding" Poswa's assertion that once judgment was delayed for more than a year it made no difference whether it was 366 or 730 days old. With all imponderables, there is one certainty: the delays in finalising this trial are outrageous, a blight on the justice system and a gross abuse of an accused's rights. It is high time somebody is held accountable, page 1, available at: <http://www.news24.com/Tags/Companies/sowetan> (accessed on 22 January 2015).

the firm.⁷³³ Prinsloo has been waiting for judgment since the evidence in the trial was completed in November 2011. The matter was postponed to July for an application for Magistrate Rene Esterhyse to recuse himself after the prosecutor, Henning Van Der Walt, allegedly put pressure on the magistrate to deliver judgment.⁷³⁴ In an interview in March 2014, following yet another postponement, Esterhyse acknowledged that the Prinsloo judgment had been outstanding “for a long time”. He listed various reasons for doing so, including the complexity of the case and the heavy workload, with other cases having to take precedence.⁷³⁵ In July 2014, the magistrate decided that he will not recuse himself from the case.⁷³⁶ As a result, the decision will be taken on review to the High Court.⁷³⁷ This will further delay the matter (it was on the roll for the past three years) by several months while the defence waits for a High Court date to be set.⁷³⁸

Such a delay is an abuse, recognised most recently in the norms and standards for presiding officers published by the Office of the Chief Justice (OCJ), which stipulate that judgments must be handed down within three months of the hearing.⁷³⁹ In total, criminal matters must be finalised within six months after an accused has pleaded to the charge.⁷⁴⁰ The norms and standards are premised on fostering a “culture of independence, impartiality and accountability”, according to president of the Supreme Court of Appeal Lex Mpati, in an address to the Law Society of South Africa in March 2014.⁷⁴¹ Presiding officers cannot maintain the respect of the populace if they are neither accessible nor accountable.⁷⁴² Judges cannot use “their independence as a defence against criticism levelled at them for judgments delayed”.⁷⁴³

⁷³³ *Ibid.*

⁷³⁴ *Ibid.*

⁷³⁵ *Id* at (fn 732) page 2.

⁷³⁶ Kimberley, K (2014) “High Court review to delay case.” Herald Live Newspaper, page 1, available at: <http://www.heraldlive.co.za> (accessed on 8 November 2014).

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*

⁷³⁹ *Id* at (fn 736) page 2.

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² Mpati, L (2014) “A changing profession in a changing environment,” President of the Supreme Court of Appeal’s address to the Law Society of South Africa, page 3, available at: <http://www.saflii.org.za> (accessed on 8 November 2014).

⁷⁴³ *Ibid.*

3.6 Systematic delays in South African courts pending or completed cases

In 2011 the sentencing of four men found guilty of murdering a woman had been postponed for the second time in a trial that has seen more than forty postponements over five years.⁷⁴⁴ Magistrate Raadiya Whaten postponed their sentencing again in the Khayalitsha Magistrates Court, this time because a report from correctional services had not been submitted in time.⁷⁴⁵ The trial has been characterised by bureaucratic bundling and delays. Five of the original nine men who were charged with the deceased's murder have been acquitted due to lack of evidence, a fact that gay activists link to shoddy police work and the effect of five years of delay on witnesses.⁷⁴⁶

In another matter, two unsentenced detainees have been made to wait a year and six months for their trial to resume after the Magistrate Mr Jacobs of the Upington Regional Court retired in February 2011 in the middle of their proceedings.⁷⁴⁷ Mthuli Dube and Jabulani Radebe, accused of robbery, had already been awaiting trial since 2009. They are both first time offenders. In February 2012, a year after the magistrate retired, Regional Court President Khandilizwe Nqadala ordered Mr Jacobs to return to duty to finish proceedings. But Mr Jacobs was still not present when the trial resumed in October 10 in the Postmasburg Magistrates Court. Another Magistrate oversaw the case and postponed it to December 5 2012, at whichpoint Jacobs was supposed to be in attendance.⁷⁴⁸ According to the Magistrates Commission, a Magistrate may not retire if he or she still has cases on his or her roll. If a Magistrate is suspended, retrenched, passes away or is similarly indisposed, cases have to be re-heard from scratch. This adds months to an awaiting trial detainee's time in detention.⁷⁴⁹ The accused are calling for their case to either be thrown out or referred to the High Court, as they feel their right to a fair trial⁷⁵⁰ has been infringed.⁷⁵¹

⁷⁴⁴ Gay News in South Africa (2011) "Absurdity Reigns a Zoliswa Trial Delayed Again," page 1, available at: <http://www.mambaonline.com> (accessed 17 October 2014).

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Koen, G "Two Upington Detainees awaiting Trial since 2009" *The Citizen* 17 November 2012, page 1, available at: <http://www.journalism.co.za/investigative-journalism-homepage/the-justice-project/> (accessed on 22 January 2015).

⁷⁴⁸ *Ibid.*

⁷⁴⁹ *Ibid.*

⁷⁵⁰ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3).

The retired magistrate has not been the only issue that has caused delays in Dube and Radebe's trial.⁷⁵² These delays are indicative of the fate of many remand detainees.⁷⁵³

Koen⁷⁵⁴ argues that while court officials and oversight bodies fail to take action, two men – supposed to be presumed innocent until proven guilty⁷⁵⁵ under South African law, have been held in a remand cell, deprived of their freedom, family and future.

The longest awaiting trial detainee in the country, Victor Nkomo, has been incarcerated in the remand section of a correctional facility for nearly eight years, because of systematic delays.⁷⁵⁶ Nkomo was accused of aiding an armed robbery at his workplace in Montecasino in 2005. He allegedly showed the robbers where the vault was. Despite the unconstitutionality of his disproportionately lengthy pre-trial detention, Magistrate Vincent Pienaar recently turned down an application for him to be released, as it was 'not in the interests of justice'. He responded to Nkomo's lawyer's 30-page legal memo arguing his release in five minutes flat and did not offer any further motivation. The prosecutor has indicated that the trial will most likely last another three years.⁷⁵⁷ This case is an example of systematic delay within the justice system. No reasons were furnished by the State in respect of its delay in commencing the trial.

3.7 The Constitution of the Republic of South Africa, 1996 and the relevant provisions

South Africa is a democratic country and through its Constitution guarantees rights to the citizens of the country. These rights are enshrined in the Bill of Rights. The Bill of Rights consists of a set of rights that is firmly entrenched in one complete document. These rights are applicable to each and every citizen of South Africa.

⁷⁵¹ Koen, *op. cit.*, (fn 747) page 1.

⁷⁵² *Ibid.*

⁷⁵³ *Ibid.*

⁷⁵⁴ *Ibid.*

⁷⁵⁵ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35(3)(h).

⁷⁵⁶ Koen, *op. cit.*, (fn 747) page 5.

⁷⁵⁷ Hopkins, R (2014) "Broken Beyond Imagination: South Africa's Justice System," page 5, Daily Maverick 14 April 2014, available at: <http://www.dailymaverick.co.za/article/2014-04-14-broken-beyond-imagination-south-africas-justice-system/> (accessed on 22 January 2015).

3.7.1 Section 35(3) (a) of the Constitution

Section 35 of the Constitution is especially designed to promote the rights of South African persons who are suspects, accused and detained in prison. The right to a fair trial conferred by section 35 of the Constitution is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.⁷⁵⁸

In the case of *Bothma v Els and Others*⁷⁵⁹ Sachs J held that major pre-trial abuses by the State have been firmly prohibited by the Constitution⁷⁶⁰. It is not a coincidence that section 35 of the Constitution⁷⁶¹, which deals with arrested and detained persons, is by far the longest section in the Bill of Rights.⁷⁶² It sets out precise protections against treating people in arbitrary ways after they have been placed under arrest.⁷⁶³ The most prominent right that becomes operative as soon as someone becomes an accused person is the right to have the trial begin and conclude without unreasonable delay.⁷⁶⁴ Although section 35 of the Bill of Rights does not deal expressly with pre-trial delay, it must be construed in the light of the value accorded to human dignity and freedom in our Constitution⁷⁶⁵. Freedom is protected by section 12⁷⁶⁶ of the Constitution. Section 12 and 35 of the Constitution should accordingly be viewed in seamless conjunction, providing carefully thought through procedural protections designed to prevent repetitive infringements of people's rights and dignity experienced in the past.⁷⁶⁷

⁷⁵⁸ *S v Zuma and Others, op. cit.*, (fn 644) paragraph 16.

⁷⁵⁹ *Bothma v Els, op. cit.*, (fn 662) paragraph 31.

⁷⁶⁰ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

⁷⁶¹ *Ibid.*

⁷⁶² *Bothma v Els, op. cit.*, (fn 662) paragraph 31.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

⁷⁶⁵ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

⁷⁶⁶ Section 12 provides that everyone has the right to freedom and security of the person, and expressly includes both the right not to be deprived of freedom arbitrarily or without just cause, and the right not to be detained without trial. It also provides that no one should be tortured in any way or treated or punished in a cruel, inhuman or degrading way.

⁷⁶⁷ *Bothma v Els and Others, op. cit.*, (fn 662) paragraph 32.

In the *Naidoo*⁷⁶⁸ case the Court held that the rights of an accused person to a fair trial, as provided in terms of section 35 of the Constitution,⁷⁶⁹ is a fundamental consideration to such a large extent that it should be implied that any magistrate presiding in criminal proceedings must be empowered to exercise authority to give effect to such rights.

Specific reference is made to section 35(3)(a) of the Constitution when dealing with delayed trials and its impact on an accused person's constitutional rights. Section 35(3) (a) states that every accused person shall have the right to a fair trial, which includes the right to a public trial before an ordinary court of law within a reasonable time after being charged.⁷⁷⁰

In *Berg v Prokureur-General van Gauteng*⁷⁷¹ Eloff JP made reference to section 25(3) (a) of the Interim Constitution⁷⁷² (now section 35(3) (a) of the 1996 Constitution). Section 35(3) (a) provides that every accused person shall have the right to a fair trial, which includes the right to a public trial before an ordinary court of law within a reasonable time after being charged.⁷⁷³ The Court in the *Berg*⁷⁷⁴ case emphasised that an accused person who wishes to enforce his right to a trial within a reasonable time is required to establish that he had been improperly prejudiced by the long delay.⁷⁷⁵ In 1996, Friedman JP in *Moeketsi v Attorney-General, Bophuthatswana and Another*⁷⁷⁶ dealt with the accused's constitutional right to be tried within a reasonable period after having been charged. The Court in this case listed the consequences of a delay in the conclusion of criminal proceedings as follows:

- it might seriously interfere with the freedom of the accused;
- interrupt his or her employment;
- drain his or her financial resources;
- restrain his or her associations; and

⁷⁶⁸ *S v Naidoo, op. cit.*, (fn 727) paragraph 14.

⁷⁶⁹ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 35.

⁷⁷⁰ *Ibid.*, section 35(3)(a)

⁷⁷¹ *Berg v Prokureur – Generaal van Gauteng* 1995 (11) BCLR 1441 (T).

⁷⁷² The Interim Constitution of South Africa Act 200 of 1993, *op. cit.*, (fn 341) section 25(3)(a).

⁷⁷³ The Constitution of the Republic of South Africa, 1996, *op. cit.*, (fn 1) section 35(3)(a).

⁷⁷⁴ *Berg v Prokureur – Generaal van Gauteng, op. cit.*, (fn 771).

⁷⁷⁵ *Ibid.*, paragraph 37.

⁷⁷⁶ *Moeketsi v Attorney – General, Bophuthatswana and Another* 1996 (1) SACR 675 (B) pages 695;1996 (7) BCLR 947 (B), pages 963-4.

- be the cause of anxiety and subjection to public criticism.⁷⁷⁷

The Court in the *Moeketsi* case also confirmed that the concepts of fairness of trial and delayed trials come from the explanation that “ the right to be tried within a reasonable time after being charged is indissolubly associated with the canon of a fair trial and that the concept of a fair trial also connotes just and lawful pre-trial procedures”. Friedman JP also emphasised that an extremely unexplained long delay negates the concept of a fair trial.⁷⁷⁸ Human memory can be seen to be flimsy, mercurial, and wayward and this factor may cause prejudice to the accused if his or her trial is delayed for a very long period.⁷⁷⁹

3.7.2 Section 35(3) (d) of the Constitution

In *Klein v Attorney-General, Witwatersrand Local Division and Another*⁷⁸⁰, Van Schalkwyk J held that a Court has, as the common law has always required, a clear duty to ensure that an accused person is afforded a fair trial. A recognized norm and touchstone for a fair trial is the efficient and speedy conclusion of proceedings against an accused person in criminal proceedings.⁷⁸¹ Undue delay in a prosecution may result in an accused not enjoying a fair trial.⁷⁸²

Clare Ballard⁷⁸³ from the Community Law Centre in her research on remand detention in South Africa reported two relevant constitutional protections relevant to remand detainees. The first is the right to freedom and security of person⁷⁸⁴, and second is the right to have one’s trial begin and conclude without unreasonable delay⁷⁸⁵. Although both rights are relevant to the problems associated with the lengthy remand detention, the right to liberty directly supports the ideologies that pre-trial detention should be a last resort, and for the shortest time possible.⁷⁸⁶

⁷⁷⁷

Ibid.

⁷⁷⁸

Ibid.

⁷⁷⁹

Ibid.

⁷⁸⁰

Klein v Attorney – General, Witwatersrand Local Division and Another 1995 (2) SACR 210 (W).

⁷⁸¹

S v Mokoena 1983 (4) SA 401 (C), paragraph 29.

⁷⁸²

S v Scholtz and Others 1996 (2) SACR 623 (C).

⁷⁸³

Ballard, *op. cit.*, (fn 4) page 6.

⁷⁸⁴

The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 12.

⁷⁸⁵

Ibid., section 35(3)(d).

⁷⁸⁶

Ballard, *op. cit.*, (fn 4) page 6.

In the case of *S v Maredi*⁷⁸⁷, the accused was detained for a period of 17 months before the charge was put to him. Thereafter, the case was concluded after a further period of 6 months. In review proceedings, the High Court ordered that the judgment be sent to the Director of Public Prosecutions and the Magistrate in order to allow them to institute such steps as are necessary.

The Court in *Maredi*⁷⁸⁸ indicated that such steps were a shocking state of affairs and also emphasised the contents of section 35(3) (d) with regard to fair trial rights. The Court further indicated that it felt that the right of the particular accused was deliberately ignored by the prosecutors who dealt with the matter as well as the magistrates who were hearing the matter because those particular magistrates had made matters worse by granting postponements without holding an enquiry as to whether such postponements was unreasonable and justified.

The Court in the *Moeketsi* case also held that it is important to remember that a remand detainee's lengthy detention is only one of several factors to be considered when deciding whether such accused person's detention is unreasonably long and whether his or her fair trial rights have been infringed.⁷⁸⁹ Its importance as a liberty interest is therefore diluted by other more "typical" fair trial issues, such as whether the delay will affect the accused's and witnesses' recollection of events.⁷⁹⁰

The Court in *Moeketsi* further emphasised that every judicial officer should bear in mind that he or she also has to consider the position of an accused person, especially an unrepresented accused, when the prosecutor asks for a postponement of the case and that a postponement of the case is not to be granted merely because the prosecutor requests for a postponement.⁷⁹¹ Consequently, it is the duty and function of the Court and the prosecution to ensure that proceedings are concluded expeditiously in order to assist in the administration of justice.

⁷⁸⁷ *S v Maredi, op. cit.*, (fn 701) paragraph 15.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Moeketsi v Attorney - General, Bophuthatswana and Another, op. cit.*, (fn 776).

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.*

3.7.3 Section 35(2) (e) and (f) of the Constitution

The right to dignity is a founding value of our Constitution and in a number of cases the Courts have invoked this right to support decisions in favour of remand detainees.

The leading case in point is *Lee v Minister of Correctional Services*⁷⁹². This case concerned the main question of whether the applicant's detention and the systemic failure to take preventative and precautionary measures by the Correctional Services authorities caused the applicant to be infected with Tuberculosis while in detention.⁷⁹³ The complaint was that the unlawful detention and specific omissions violated the applicant's right to freedom and security of the person⁷⁹⁴ and the right to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at state expense.⁷⁹⁵

The Constitutional Court in the *Lee* case agreed with the Supreme Court of Appeal's comment in *Minister of Correctional Services v Lee*⁷⁹⁶ that remand detainees are amongst the most susceptible in our society in light of the failure of the State to meet its constitutional and statutory obligations. Furthermore, the Court stressed that a civilised and a humane society would require that when the State deprives an individual his or her freedom and independence by detaining such person, the State must assume its obligation as stated in the Bill of Rights, which provides for conditions of detention that are consistent with human dignity.⁷⁹⁷ The Constitutional Court in the *Lee*⁷⁹⁸ case also agreed with the Supreme Court of Appeal's decision, that there is every reason why the law should recognise a claim for damages to uphold a remand detainees rights.⁷⁹⁹ The Court emphasised that to suggest otherwise, in circumstances where a legal duty exists to protect Lee and others similarly placed, will fail to give effect to their rights to human dignity,⁸⁰⁰ bodily integrity⁸⁰¹ and the right to be detained in conditions that are consistent with human dignity under the

⁷⁹² *Lee v Minister of Correctional Services* 2013 (2) BCLR 129 (CC), paragraph 2.

⁷⁹³ *Ibid.*

⁷⁹⁴ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 12.

⁷⁹⁵ *Lee v Minister of Correctional Services*, *op. cit.*, (fn 792), paragraph 2.

⁷⁹⁶ *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA), paragraph 42.

⁷⁹⁷ *Id* at paragraph 26.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Id* at paragraph 42.

⁸⁰⁰ The Constitution of the Republic of South Africa, 1996, *op cit.*, (fn 1) section 11.

Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment.⁸⁰²

The question in the *Lee*⁸⁰³ case was whether the causation aspect of the common law test for delictual liability was established.⁸⁰⁴ However, if the answer is in the negative, the next question is whether the common law needs to be developed to prevent an unjust outcome.⁸⁰⁵ The Court held that the injustice of an inflexible legal approach to factual causation is also recognised in foreign jurisprudence.⁸⁰⁶ Although the common law may well have to develop from time to time in this area, as in others,⁸⁰⁷ but in the circumstances of this case, particularly the nature of the omission, our law does not need to be developed in accordance with the casuistic approach endorsed by the cases referred to.⁸⁰⁸ The Court opined that a case by case approach is more inflexible as in line with our law that has always recognised that the delictual ‘but-for’ test should not be applied inflexibly.⁸⁰⁹ A court ultimately has to make a finding as to whether causation was established on a balance of probabilities on the facts of each specific case.⁸¹⁰ Causation will not always follow whenever a wrongful and negligent omission is shown.⁸¹¹

In *Van Biljon and Others v Minister of Correctional Services and Others*,⁸¹² Brand J noted that remand detainees are dependent on the state to provide care as they are in no position to seek alternative care.

⁸⁰¹ *Ibid.*, section 12(2).

⁸⁰² *Lee v Minister of Correctional Services, op. cit.*, (fn 792) paragraph 55.

⁸⁰³ *Ibid.*

⁸⁰⁴ *Minister of Correctional Services v Lee, op. cit.*, (fn 792) paragraph 42.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Id* at fn 792, paragraph 72.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Id* at (fn 792) paragraph 73.

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*

⁸¹² *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441, paragraph 58. Four HIV-positive prisoners sued the Minister of Correctional Services and others for failing to provide them with anti-retroviral treatment claiming the failure amounted to a violation of their right to adequate medical treatment. The Minister of Correctional Services argued that providing anti-retroviral treatment to relevant prisoners was beyond the resources of the prison. The High Court held that the government was required to provide anti-retroviral treatment to those for whom it has been medically prescribed and that failure to do so would be a violation of their right to adequate medical treatment under the Constitution. Despite the government’s argument of monetary constraints, the Court reasoned that prisoners were entitled to anti-retroviral treatment at

Furthermore, especially in respect of HIV-positive remand detainees, the state owed a higher duty of care due to the overall conditions in prisons and the increased risk of opportunistic infections.⁸¹³

The physical conditions of imprisonment were dealt with in *Strydom v Minister of Correctional Services*.⁸¹⁴ The Court focused on access to electricity, emphasising that access to electricity cannot be regarded as ‘a necessity of life’ but for those remand detainees who spend long periods in their cells with little to provide stimulation, access to a television (for which electricity is required) becomes more than a comfort or a diversion.⁸¹⁵ It can in fact make the difference between mental stability and derangement.⁸¹⁶ The Court in the *Strydom*⁸¹⁷ case went further by stating that access to electricity in the prison context could materially affect a remand detainee’s prospects of rehabilitation and denial of this amenity could result in the remand detainee being treated and punished in a cruel or degrading manner.⁸¹⁸

3.7.4 Section 35(3) (h) of the Constitution

In *Sanderson v Attorney General, Eastern Cape* in relation to the interim Constitution of 1993,⁸¹⁹ the Court emphasised that the intense difficulty with which one is confronted with is that an accused person, despite being presumptively innocent, experiences various forms of prejudice and punishment merely by virtue of being an accused. The Court emphasised that these forms of prejudice are unfringeable and unintended consequences of the criminal justice system.⁸²⁰ Section 12 of the 1996 Constitution protects the public against arbitrary deprivation of liberty without any cause, and prohibits detention without trial.

government expense because they had no access to resources to obtain alternative medical treatment while in prison and were more likely to be exposed to opportunistic infections while in prison.

⁸¹³ Schwikkard, PJ (2005) “Arrested, detained and accused persons” In Currie, I and De Waal, J. *The Bill of Rights handbook*. (5th Ed.). Cape Town: Juta, page 774.

⁸¹⁴ *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W), paragraph 39.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 23.

⁸²⁰ *Ibid.*

In *Prinsloo v Nasionale Vervolgingsgesag*⁸²¹ the Court held that it cannot be permitted that the right to freedom is dealt with lightly and mindlessly. The Court further held that an accused cannot be detained without trial, unless it is constitutionally justified in terms of existing legislation which places a limitation on the Constitutional right and that is justified.⁸²² Bail is just a procedure that is intended to minimise the infringement of an accused's freedom at a time when an accused has not been convicted.⁸²³ It is not a right that can be ignored.⁸²⁴ Kriegler J indicated the connection of delayed trials, the presumption of innocence and fair trial when he stated that in principle, the criminal justice system intends to penalise only those persons whose guilt has been established during a fair trial.⁸²⁵ Prior to a finding on guilt or innocence, and as part of the fair trial procedure itself, the accused is presumed innocent.⁸²⁶ He or she is also tried publically so that the trial can be seen to satisfy the substantive requirements of a fair trial.⁸²⁷

The Constitutional Court in *De Lange v Smuts NO and Others*⁸²⁸ dealt with the issue of detention without trial. The Court held that the most notorious form of deprivation of liberty that comes to mind when considering the creation of the expression 'detained without trial' in section 12(1) (b) is the infamous administrative detention without trial for purposes of political control. The Court also emphasised how important the right not to be detained is and how important proper judicial control is in order to prevent the abuses which must almost unavoidably flow from such judicially uncontrolled detention.⁸²⁹

The accused is also experiences infringement to his or her right to liberty that range from incarceration or onerous bail conditions to repeated attendance at a remote court for formal remands.⁸³⁰ This kind of prejudice is similar to the kind of 'punishment' that should only (and ideally) be imposed on convicted persons.⁸³¹

⁸²¹ *Prinsloo v Nasionale Vervolgingsgesag* 2011 (2) SA 214 (GNP), paragraph 47 and 49.

⁸²² *Ibid.*

⁸²³ *Ibid.*

⁸²⁴ *Ibid.*

⁸²⁵ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 23.

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.*

⁸²⁸ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779; [1998] ZACC 6, paragraph 26-27.

⁸²⁹ *Ibid.*

⁸³⁰ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 23.

⁸³¹ *Ibid.*

Judge Fagan has stated in his report as Inspecting Judge of Prisons, in August 2000, that awaiting trial prisoners are presumed to be innocent.⁸³² He emphasised that this is a very important principle of law accepted by democratic countries internationally and it is meant to protect innocent people from being wrongly convicted, and necessary to ensure that all people get a fair and proper trial.⁸³³ People do not go to prison voluntarily, they are placed there by the state as unsentenced prisoners waiting for their cases to be finalised.⁸³⁴ It is for this reason that the state is responsible for the well-being of prisoners. The state cannot place people in prison and not care for them properly.⁸³⁵ The state has a total and inescapable duty to care for prisoners in a manner that does not violate or compromise their constitutional rights.⁸³⁶ The fact that a person may have committed a crime or is suspected of having committed a crime is not an excuse for the state not to take proper care of that person.⁸³⁷ Imprisonment should only curtail a person's freedom and may not add other punishments in a direct or indirect manner.⁸³⁸

In the *Sanderson*⁸³⁹ case, the Court held that the delay in finalising a trial cannot be allowed to disregard the presumption of innocence which is enshrined in the Bill of Rights, and allow the delay to become in itself a form of extra-curial punishment.⁸⁴⁰ A person's time has profound value, and it should not become the 'play-thing' of the State or of society.⁸⁴¹

3.7.5 Section 10 of the Constitution⁸⁴²

⁸³² "Annual Report of the Judicial Inspectorate" (2000) page 3, available at: www.cplo.org.za/?wpdmdl=58&&ind=9 (accessed on 22 January 2015).

⁸³³ *Ibid.*

⁸³⁴ *Ibid.*

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.*

⁸³⁸ Muntingh, L (2006) "Prison in a Democratic South Africa – a guide to rights of prisoners as described in the Correctional Services and Regulations." Open Society Foundation (OSF) and the Ford Foundation. Community Law Centre. Cape Town, page 4, available at: <http://cspri.org.za/publications/research-reports/Prisons%20in%20a%20Democratic%20South%20Africa%20%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf> (accessed on 22 January 2015).

⁸³⁹ *Sanderson v Attorney – General, Eastern Cape, op. cit.*, (fn 6) paragraph 36.

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*

⁸⁴² The Constitution of the Republic of South Africa, 1996, *9p cit.*, (fn 1) section 10.

Section 10 of the Constitution guarantees the right to dignity. Acknowledging and protecting the right to dignity⁸⁴³ of remand detainees is well enunciated in various international instruments and domestic law.⁸⁴⁴ The South African Constitutional Court in *S v Makwanyane*⁸⁴⁵ has held that “even the vilest criminal remains a human being possessed of common human dignity”. Furthermore, Chaskalson⁸⁴⁶ concluded that in a broad and general sense, respect for human dignity⁸⁴⁷ implies respect for the independence of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner. In *S v Williams*⁸⁴⁸ the Constitutional Court concluded on punishment by stating that the obvious message to the State is that when it imposes punishment, it must do so in accordance with certain standards. By doing this, it will reflect the values that are enshrined in the Bill of Rights.⁸⁴⁹ This means that any punishment must respect the right to human dignity and must be in line with the provisions of the Bill of Rights.⁸⁵⁰

Degrading and humiliating treatment and conditions do not create an environment supportive of rehabilitation.⁸⁵¹ However, it actively undermines it.⁸⁵² The right to dignity therefore lies at the core of a remand detainees rights in a constitutional democracy and should be understood in very real terms, emphasising the positive measures undertaken to give effect to personal worth and autonomy.⁸⁵³

⁸⁴³ *Ibid.*, section 10.

⁸⁴⁴ Muntingh, L (2007) “Prisons in South Africa’s Constitutional Democracy.” Centre for the study of violence and reconciliation. Criminal Justice Programme, page 10, available at: www.kms1.isn.ethz.ch/serviceengine/.../prisonsinsa%5B1%5D.pdf (accessed on 22 January 2015).

⁸⁴⁵ *S v Makwanyane and Another, op. cit.*, (fn 386) paragraphs 57 and 59.

⁸⁴⁶ Chaskalson, A (2002) “Human dignity as a constitutional value.” In Kretzmer, D., and Klien, E. (Eds.). *The concept of human dignity in the human rights discourse*, The Netherlands: Kluwer Law International, The Hebrew University of Jerusalem Tel Aviv University, page 134.

⁸⁴⁷ The Constitution of the Republic of South Africa, 1996, *9p cit.*, (fn 1) section 10.

⁸⁴⁸ *S v Williams* 1995 (7) BCLR 861 (CC), paragraph 38.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*

⁸⁵¹ Muntingh, *op. cit.*, (fn 838) page 11.

⁸⁵² *Ibid.*

⁸⁵³ *Ibid.*

3.7.6 Section 11 of the Constitution

In *Mohamed v President of the Republic of South Africa*⁸⁵⁴ the Constitutional Court had to deal with the extradition of a remand detainee to the United States. The detainee faced the risk of the death penalty.⁸⁵⁵ The Court in the *Mohamed*⁸⁵⁶ case found that the state had failed in its positive duty to protect the right to life by extraditing Mohammed to the United States where he could receive the death penalty, and, more specifically, that the State failed to seek assurances from the United States government that the detainee would be protected from the death penalty.⁸⁵⁷ The problem then appears to lie in the willingness and the ability of the State to meet its positive obligations in respect of the right to life^{858 859}.

In 2011, there were 47 unnatural deaths in prisons, which included 12 cases of murder, four of which were as a result of violence by warders on inmates.⁸⁶⁰ For 16 cases, the department was not able to supply the cause of the deaths because it did not have the post-mortem reports. Suicide is still the primary cause of unnatural deaths in prisons.⁸⁶¹

Section 11 of the South African Constitution clearly provides its citizens (including remand detainees) with the inherent right to life. However, the main question that arises is whether this right is ‘really’ applicable to a suspect or accused person. The right to life coincides with the right to adequate accommodation, nutrition and medical care. If the state is found to have failed in its duty to provide in terms of these rights, how can it guarantee the right to life?

3.7.7 Section 12 of the Constitution

The right to freedom and security of the person is described in five subsections in the Constitution⁸⁶², two of which are non-derogable. The non-degradable rights are the right not

⁸⁵⁴ *Mohamed and Another v President of the Republic of South Africa* 2001 (3) SA 893 (CC), paragraph 2.

⁸⁵⁵ *Ibid.*

⁸⁵⁶ *Ibid.*

⁸⁵⁷ *Id* at (fn 854) paragraph 77.

⁸⁵⁸ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1) section 11.

⁸⁵⁹ *Mohamed and Another v President of the Republic of South Africa*, *op. cit.*, (fn 854), paragraph 2.

⁸⁶⁰ Rawoot, I (2012) “Report shows sorry state of South Africa’s prisons.” *Mail & Guardian Newspaper*, page 2, available at: <http://mg.co.za/article/2012-10-14-report-shows-sorry-state-of-sa-prisons> (accessed on 8 December 2014).

⁸⁶¹ *Ibid.*

⁸⁶² The Constitution of the Republic of South Africa, 1996, *op cit.*, (fn 1).

to be tortured⁸⁶³ and the right not to be treated or punished in a cruel, inhuman or degrading way^{864 865}.

The international ban on the use of torture also has the enhanced status of a peremptory norm of general international law.⁸⁶⁶ This means that as a peremptory norm it stands on a higher rank in the international hierarchy as compared to treaty law and ordinary customary rules.⁸⁶⁷ The most obvious consequence of this higher rank is the fact that a principle in issue cannot be derogated from by States through international treaties or special or local customs or even general customary rules that is not awarded the same normative force.⁸⁶⁸

South Africa ratified the United Nations Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment⁸⁶⁹ in 1998. Despite the status of the prohibition of torture as a peremptory norm, and the requirement under article 4 of the Convention,⁸⁷⁰ States' parties ensure that acts, attempts thereto and complicity in torture are made offences under national law.⁸⁷¹

3.8 Special protection for children in detention

Children, including those detained and awaiting trial, enjoy the protection of a number of rights described in section 28 of the Constitution;⁸⁷² these rights are closely linked to sections 12 and 35 of the Constitution. As a general principle the best interests of the child are of vital importance in every matter concerning a child who is a suspect or an accused.⁸⁷³ Importantly children may only be detained as a measure of last resort and then for the shortest possible

⁸⁶³ *Ibid.*, section 12(1)(d).

⁸⁶⁴ *Ibid.*, section 12(1)(e).

⁸⁶⁵ *Ibid.*, section 12(1)(d)–(e).

⁸⁶⁶ House of Lords decision in *A (FC) and others (FC) v. Secretary of State for the Home Department* (2004); *A and others (FC) and others v. Secretary of State for the Home Department* [2005] UKHL 71, paragraph 33. See also *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 197–199; *Prosecutor v. Furundzija* ICTY (Trial Chamber), judgment of 10 December 1998, paragraphs 147–157.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ *Prosecutor v Furundzija* ICTY (Trial Chamber), judgment of 10 December 1998, paragraph 153.

⁸⁶⁹ United Nations General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *op. cit.*, (fn 47).

⁸⁷⁰ *Ibid.*

⁸⁷¹ Muntingh, *op. cit.*, (fn 838) page 11.

⁸⁷² The Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

⁸⁷³ Muntingh, *op. cit.*, (fn 838) page 13.

period.⁸⁷⁴ The rights that detention is a measure of last resort and for the shortest possible period of time, is not non-derogable rights.⁸⁷⁵ Furthermore, child detainees must be detained separate from adults and under conditions that take account of the child's age.⁸⁷⁶ It is important to ensure that children in detention are indeed detained under conditions that take account of their age.⁸⁷⁷ When considering the release or detention of a child who has been arrested, preference must be given to releasing the child.⁸⁷⁸

The present South African position regarding children in detention is regulated by the Constitution,⁸⁷⁹ the Criminal Procedure Act,⁸⁸⁰ the Correctional Services Act⁸⁸¹ (as amended by the Correctional Matters Amendment Act)⁸⁸² and the Child Justice Act.⁸⁸³

The Child Justice Act 75 of 2008 provides for a criminal justice system for child accused, separate from the criminal justice system which continues to apply for adult accused in South Africa.⁸⁸⁴ The Child Justice Act aims to keep children out of detention and away from the formal criminal justice system, mainly through diversion.⁸⁸⁵ When these interventions would be inadequate or unsuccessful, this Act provides for child offenders to be tried and sentenced in child justice courts.⁸⁸⁶ It is one of the central themes of the Child Justice Act that children in conflict with the law should be diverted from the formal criminal justice system whenever possible.⁸⁸⁷ Diversion means that an accused child is not put through formal criminal

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Id* at (fn 838) page 14.

⁸⁷⁶ The Constitution of the Republic of South Africa, 1996, *op. cit.*, (fn 1) section 28(1)(1)(g)(i–ii).

⁸⁷⁷ Odongo, G and Gallinetti, J (2005) "The treatment of children in South African prisons: A report on the applicable domestic and international minimum standards." CSPRI Research Report, No. 11. CSPRI, Cape Town, page 3, available at: <http://db3sqepoi5n3s.cloudfront.net/files/docs/080307researchunit.htm> (accessed on 22 January 2015).

⁸⁷⁸ Child Justice Act 75 of 2008, Section 21(1).

⁸⁷⁹ The Constitution of the Republic of South Africa, 1996, *op. cit.*, (fn 1) section 28.

⁸⁸⁰ The Criminal Procedure Act 51 of 1977, *op. cit.*, (fn 52).

⁸⁸¹ The Correctional Services Act 111 of 1998, *op. cit.*, (fn 31).

⁸⁸² The Correctional Matters Amendment Act 5 of 2011.

⁸⁸³ Child Justice Act 75 of 2008, *op. cit.*, (fn 878).

⁸⁸⁴ Terblanche S S (2012) "The *Child Justice Act*: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders." Per vol.15 n.5 Potchefstroom, page 1, available at: http://www.scielo.org.za/scielo.php?pid=S1727-37812012000500014&script=sci_arttext (accessed on 19 February 2015).

⁸⁸⁵ *Ibid.*

⁸⁸⁶ *Ibid.*

⁸⁸⁷ Child Justice Act 75 of 2008, *op. cit.*, (fn 878), chapter 8.

proceedings but is subjected to an alternative process that does *not* involve a formal trial, conviction and a criminal record.⁸⁸⁸

The Criminal Procedure Act⁸⁸⁹ contains several mechanisms designed to facilitate pre-trial release once a child has been arrested. These include:⁸⁹⁰

- a) a written notice to appear,⁸⁹¹ which can be issued at the police station where minor offences are involved. The effect is the release of the child from custody;
- b) bail, which can be granted either before first appearance in court at the police station in the instance of certain minor offences⁸⁹² or by a judicial officer after appearance in court;⁸⁹³ or
- c) release on warning by a judicial officer after first appearance in court.⁸⁹⁴ This section provides that in the instance of a juvenile under the age of 18 years, the accused can be released in the custody of the person in whose custody he or she is, and that person would then be warned to return with the accused to court on a specified day.

Widespread attention has been devoted over recent years to the continued pre-trial detention of children under the age of 18, despite the above alternative provisions.⁸⁹⁵ With respect to pre-trial detention after first appearance in court, this may be either be in a place of safety, designated for the detention of children awaiting trial, and established in terms of the Child Justice Act 75 of 2008.⁸⁹⁶ However, police cells have also been used, and are still sometimes utilised as places of detention after court appearances.⁸⁹⁷

⁸⁸⁸

Ibid.

⁸⁸⁹

The Criminal Procedure Act 51 of 1977, *op. cit.*, (fn 52).

⁸⁹⁰

Ibid.

⁸⁹¹

Ibid., section 56.

⁸⁹²

Ibid., section 59.

⁸⁹³

Ibid., section 60.

⁸⁹⁴

Ibid., section 72.

⁸⁹⁵

Mahomed, I (1997) "Juvenile Justice" South African Law Commission, Issue paper 9, Project 106, page 1 available at: http://www.justice.gov.za/salrc/ipapers/ip09_prj106_1997.pdf (accessed on 4 December 2014).

⁸⁹⁶

Ibid.

⁸⁹⁷

Ibid.

A report on a study between 2011 and 2012 at 41 prisons across South Africa by Professor Lukas Muntingh and Clare Ballard, paints a dim picture of children in jail.⁸⁹⁸ Some of the shocking findings of the report are that; (1) juveniles were detained for 120 days awaiting trial; (2) no steps were taken by prison officials to ensure that children remain in contact with families; (3) unsentenced children did not have access to a psychologist; and (4) children had, on average, access to 3.3 square metres of floor space, which is less than the international standard.⁸⁹⁹

These figures and statistics indicate that as at 2011-2012, despite South Africa making provision for the rights of children who are suspects or accused in detention, there still remained an issue regarding implementation in South African prisons.

3.9 Conclusion on delayed trials in South Africa

This Chapter focused on the constitutionality of delayed trials on the rights of a suspect, accused or detained person during criminal proceedings in South Africa. In dealing with these aspects, several factors have been highlighted.

South African legislation relating to delayed trials has been discussed. The legislation discussed in this chapter are also important sources of South African Criminal Law and Procedure in light of delayed trials and an accused person's rights during criminal proceedings. The shocking statistics that reveal South Africa's position with regard to delay in trials indicate the prevalence and seriousness of delayed trials in South Africa.

Constitutional rights that are aimed at suspects and accused persons have been addressed and it is clear that South Africa has guaranteed certain rights to these persons to such an extent that it dedicated a specific section in its Constitution only for these persons. However, as indicated in this chapter, there still remains a problem with the State implementing and respecting these rights.

⁸⁹⁸ Muntingh, L and Ballard, C (2012) "Report on children in prison in South Africa," pages 12-16, available at: <http://cspri.org.za/publications/research-reports/report-on-children-in-prison-in-south-africa> (accessed on 22 January 2015).

⁸⁹⁹ *Ibid.*

CHAPTER 4

CONSEQUENCES AND IMPACT OF DELAYED TRIALS IN SOUTH AFRICA

4.1 Introduction

This chapter focuses on the consequences and impact of delayed trials on the rights of a suspect, accused or detained person in South Africa. In dealing with these aspects, several factors will be highlighted. Focus will be given to prison conditions and overcrowding in South Africa,⁹⁰⁰ the administration within the Department of Correctional Services⁹⁰¹ and delays in courts' management of cases, appeal proceedings and stay of proceedings as a remedy against unreasonable delays. The research is based, besides legal writings, case law and official reports, on white papers⁹⁰² issued by the department of Correctional Services and on the Correctional Service Act 111 of 1998 which came into operation in 2004 in a piecemeal fashion⁹⁰³ as well as the various amendments⁹⁰⁴ to the said Act even before it

⁹⁰⁰ Overcrowding has always been historically a problem in prison disciplines. The Prison's Act (Act 8 of 1959) did not give much attention to the internationally accepted meaning of the word 'parole' nor took much cognisance of the United Nations' Standard Minimum Rules for the Treatment of Prisoners as far as the emphasis on rehabilitation was concerned, but also ignored other humane treatment such as the prohibition of corporal punishment for prison offences. In 1984 the *Judicial Inquiry into the Structure and Functioning of the Courts* reported that the incarceration of prisoners as a result of influx control measures was a major cause of the overcrowding in prisons and it condemned these measures. The system of paroling prisoners under paid contracts was phased out but prisons remained mainly overcrowded places of security and not much more - *The White Paper on Corrections in South Africa (2005)* page 26 and see paragraph 4.4 below for a detailed discussion.

⁹⁰¹ The separation of the Prison Service from the Justice Department and the subsequent change of its name to the Department of Correctional Services, happened in the early 1990's- see *The White Paper on Corrections in South Africa (2005)* page 21.

⁹⁰² *The White Paper on Corrections in South Africa (2005)* ('2005 White Paper'), replacing the former *White Paper on Correctional Services*, as adopted on 21st October 1994 (1994 White paper), obliged the department to – (i) capacitate the Department of Correctional Services to play its role as a security institution responsible for promotion of public safety in breaking the cycle of crime; (2) develop the Department of Correctional Services into an institution of rehabilitation and social reintegration; (3) promote corrections as a societal responsibility. The inadequacies of the 1994 White Paper forced correctional services to bring about the 2005 White paper mainly because it was based on the 1993 Interim Constitution (Act 200 of 1993), and thus did not benefit from important subsequent legislation, including the 1996 Constitution, (Act 108 of 1996), and the 1998 Correctional Services Act (Act No. 111 of 1998). It did not provide an appropriate basis for the formulation of a departmental policy that fully integrated the causes and unique nature of crime in South Africa within a correction and rehabilitation framework. The Draft *White Paper on Remand: Detention Management in South Africa* March 2013, which had been approved by Cabinet in 2010 for consultation with stakeholders and Parliament is relevant in relation to the mandate on remand detention and is consistent with the Correctional Matters Amendment Act 5 of 2011.

⁹⁰³ Correctional Services Act 111 of 1998 repealed the former Correctional Services Act (Act 8 of 1959) also known as the "Prison's Act", as a whole in 2004 and sought to provide amongst others, for a correctional system to be implemented; the establishment, functions and control of the Department of Correctional Services; the custody of all offenders under conditions of human dignity; the rights

commenced in 2004. The most significant of these amendments are those introduced by the Correctional Matters Amendment Act 5 of 2011 whereby a new incarceration framework has been set for remand or unsentenced detainees although a number of role players within the system such as the courts, the inspecting prison judge and legal writers provided significant *stimuli* for amending the existing framework.

4.2 Prison conditions and framework

A discussion on South African prison conditions will be divided below into three parts. First, is the position regarding prison conditions for awaiting trial prisoners before the Correctional Services Act came into force in 2004. This is the period where the Prisons Act 8 of 1959 provided for the then prison services. It falls beyond the scope of this dissertation to consider the historical development of the prison framework, yet it is necessary to look briefly at legal provisions and circumstances relating to detention before trial or detention before the finalisation of trial proceedings. Second, is the period after the Correctional Services Act came into force until the new incarceration framework was introduced by the Correctional Services Amendment Act, 2008 (Act No. 25 of 2008). Third, is the period after the Correctional Matters Amendment Act 5 of 2011 was introduced, signed and came partly into

and obligations of sentenced offenders; the rights and obligations of un-sentenced offenders; a system of community corrections; release from correctional centres and placement under correctional supervision, on day parole and parole; a National Council for Correctional Services; a Judicial Inspectorate; Independent Correctional Centre Visitors; an internal service evaluation; officials of the Department; joint venture correctional facilities; penalties for offences; the repeal and amendment of certain laws; and matters connected therewith. Commencement dates for the various sections amending Act 8 of 1959 were as follows: ss 1, 83-95, 97, 103-130, 134-136 and 138 which came into operation on 19 February 1999. Section 5 came into operation on 1 July 1999. Section 3 came into operation on 25 February 2000. The Act came into operation as a whole in July 2004 replacing Act 8 of 1959 in total.

904

This Act has been updated and amended by the following: the Correctional Services Amendment Act, 2001 (Act No. 32 of 2001) as published in Government Gazette no. 22930, dated 14 December 2001; Correctional Services Regulations published in Government Gazette No. 26626, dated 30 July 2004; Amendment to the above Regulations published in Government Gazette No. 30119, dated 3 August 2007; Notice No. 1331 of 2007 regarding Delegation of Authority, in Government Gazette No. 30412, dated 31 October 2007; the Correctional Services Amendment Act, 2008 (Act No. 25 of 2008), as published in Government Gazette No. 31593, dated 11 November 2008; Correctional Matters Amendment Act, 2011 (Act No 5 of 2011) as published in Government Gazette R. 13, 2012 commenced in respect of all sections on 1 March 2012 as the date on which all the sections of the said Act came into operation, except for section 9 of the said Act of 2011 which came into operation on different dates with regard to sections 46,47,49,49 A, 49B, 49C, 49D, and 49F. Section 49E of the Correctional Matters Amendment Act, 2011 (Act No 5 of 2011) as published in Government Gazette No. 35909 came into operation on 30 November 2012. Section 49G came in operation on 1 July 2013 leaving s 48 but that section came into operation on 5 January 2015.

force on 1 March 2012; it introduced or rather defined a new group of inmates, namely ‘remand detainees’, which group was always there but was provided for in a haphazard manner or not at all. This Act introduced new provisions in Chapter V in respect of such ‘remand detainees’ and brings us to the current date. Each period will now be discussed.

4.2.1 Position prior to the coming into operation of the Correctional Services Act 111 of 1998

4.2.1.1 *Physical welfare of the detained*

Prisoners and detainees awaiting trial are endowed with the rights enshrined in South Africa’s Constitution. These rights include the right to health, the right to be detained in conditions consistent with dignity and every suspect, accused or detained person incarcerated in any correctional services facility in South Africa is, in terms of section 35(2)(e) of the Constitution of 1996, entitled to decent, hygienic and humane prison conditions. The interim Constitution of 1993 provided in section 25(1) (b) basically the same.⁹⁰⁵ Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights⁹⁰⁶ premised that everyone in detention is entitled to the enjoyment “. . . of the highest attainable standard of physical and mental health.”

The right to physical welfare and mental health are fundamental rights of a detained person but overcrowded prisons with infected inmates and with poor hygiene and sanitation is a dominant threat in the field of communicable diseases in many regions and impacts on basic human rights. Many countries are endeavouring to make prison health a priority.⁹⁰⁷ However, that ideal did not manifest in the position prior to 1998 in South Africa. “There’s no doubt in my mind that prison conditions are far worse now than pre-1994,” opined one retired (now

⁹⁰⁵ The Interim Constitution, Act 200 of 1993, provided in s 25(1)(b) that: “Every person who is detained, including every sentenced prisoner, shall have the right- ... (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense..”

⁹⁰⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

⁹⁰⁷ Statement made by the Heads of Government at the 4th Baltic Sea States Summit on the Threat of Communicable Diseases, Issued at St Petersburg on 10 June 2002 and quoted in 2005 White paper, paragraph 10.8.3 at page 78.

deceased) Judge.⁹⁰⁸ Judge Fagan mentioned that during the period 1995 to 2000, the increase in the prisoner population was caused mainly “by the explosion in the number of awaiting-trial prisoners from 24 265 in January 1995 to 63 964 in April 2000. Since April 2000 the number of awaiting-trial prisoners has decreased, owing to the concerted efforts of inter alia the police, the prosecutors, the magistrates, the judges, the heads of prison and NICRO with its diversion programmes.”⁹⁰⁹

It should be noted that the profile of the offender in South Africa had been constantly changing, in particular since 1994. Some of the changes in the composition of offender population were ascribed to an increase in the aggressive and sexual crimes categories; to an increase since 1994 in the number of offenders serving long sentences; and to a significant increase in the post-1994 period in the number of children sentenced to custody in correctional centres (with transgressions showing an increasingly violent nature). These rising numbers were also accredited to the increase in the number of inmates sentenced to life sentences; the introduction of a system of minimum sentencing by courts; and an increase in the prosecution of serious aggressive crimes.⁹¹⁰

In 1996, the Centre for the Study of Violence and Reconciliation⁹¹¹ conducted a survey on the prison conditions of awaiting trial prisoners at the Modderbee Prison in Benoni, Gauteng. At the awaiting trial section, prisoners slept on double mattresses, two to one mattress on the floor. Between thirty to forty people were held in one cell. Only one toilet and shower were available for these prisoners, which were separated from the main part of the cell by a wall. Personal hygiene had been raised as a problem.⁹¹² The Centre for the Study of Violence and Reconciliation also conducted interviews on awaiting trial prisoners at the prison. One awaiting trial prisoner, Pieter, said that they gave them five rolls of toilet paper every two

⁹⁰⁸ Raphaely, C “Prisoners of the system,” Saturday Star 10 August 2011, page 4, paragraph 17, available at: <http://www.iol.co.za/saturday-star/prisoners-of-the-system-1.1115118> (accessed on 20 February 2015). Quotation cited from this newspaper by an unknown Judge and whose name was not quoted.

⁹⁰⁹ Fagan H, Inspecting Judge of Prisons, in his paper “Our Bursting Prisons” delivered at Conference “Consolidating Transformation; a new decade” on 7-8 February 2005, conducted under the auspices of the Centre for the Study of Violence and Reconciliation Criminal Justice Conference Proceedings.

⁹¹⁰ 2005 White Paper at paragraphs 7.3.1 and 7.3.2.

⁹¹¹ Centre for the Study of Violence and Reconciliation (1996), available at <http://www.csvr.org.za/index.php/publications/1778-html> (accessed on 5 January 2015).

⁹¹² *Ibid.*

weeks which had to be used by all of the forty two prisoners in a cell. Another awaiting trial prisoner, Ronald, said –

“The prison is overcrowded. I feel horrible. In the morning, the people in our cell start to wash from 4 a.m. to 6 a.m., and then in the evening from 3 p.m. to 7 p.m.. There is only one toilet and one bathroom and you have to shower with someone else.”

Several prisoners at the awaiting trial section complained that their blankets were dirty and were infected with lice. One bar of soap was given to prisoners every two weeks which had to serve for both personal use and washing of clothes. Awaiting trial prisoners washed their own clothes in their cells.⁹¹³ The cells were cold, damp and overcrowded.⁹¹⁴ There was little space, perhaps a foot between the mattresses arranged on the floor. The toilets were dirty, the tiles were chipped and broken, the walls unpainted or dirty. The air in the cell was stale and filled with cigarette smoke.⁹¹⁵

According to the prison authorities at the Modderbee Prison, awaiting trial prisoners were allowed out of their cells for exercise every second day.⁹¹⁶ However, two awaiting trial prisoners stated that they had rarely, if ever, allowed out for exercise. They were released from their cells to collect food in the morning and again in the afternoon. The rest of the day was spent in the cells.⁹¹⁷

The Centre for the Study of Violence and Reconciliation came to the conclusion that the slow processes of the courts and the backlog in respect of many cases, frequently resulted in prisoners being held awaiting trial for many months, sometimes six (6) months to a year.⁹¹⁸ Theoretically, their conditions should be better than in the case of sentenced prisoners, as they had not yet been convicted of any offence. Despite having access to a greater number of visitors and being allowed to wear their own clothing, conditions for awaiting trial prisoners were grim.⁹¹⁹

⁹¹³ *Ibid.*

⁹¹⁴ *Ibid.*

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*

According to Dissel⁹²⁰ the slow process of courts and the backlog of many cases frequently results in prisoners being held awaiting trial for many months, sometimes six months to a year.⁹²¹ Dissel visited the Leeukop Maximum Prison and Modderbee Prison in May 1996 to talk to prisoners about their experiences in prison. In Leeukop most prisoners stay in communal cells. The communal cells were fairly large and clean with high ceilings. The cells open onto small courtyards where the prisoners are able to spend most of their day. Prisoners complained that there was no privacy and that they were required to use the toilet in the same place and sometimes at the same times as prisoners who were eating or cooking. Not only is it unhygienic but it is also humiliating.⁹²²

Dissel⁹²³ observed that at Modderbee Prison, prisoners sleep on bunk beds, about 35 to a cell. The walls were dirty and had not been painted for several years. The corridors and staircases were filthy and looked as though they had not been swept or washed for several days. According to one inmate, James at Modderbee –

“The prison is filthy, the ablution facilities are filthy. The showers get blocked and take time to fix. We spent a week with the toilet blocked. We had a leaking tap for ages and only after many complaints was it fixed. We don’t have polish or soap to clean with. The problem is that you get prisoners who are cleaners for the sections and there are warders who are supposed to supervise them. Every day they open the cells for cleaners to clean, but at the end of the day the place is not clean.”

Awaiting trial prisoners were allowed out of their cells for their exercise every second day.⁹²⁴ The only activities available to awaiting trial prisoners were cards and board games, which they had procured or made themselves. They also complained that although the television was available to prisoners, this had to be hired by the cell at a cost of R5 a day, and most inmates of the cell were unable to afford this sum.⁹²⁵

The Centre for the Study of Violence and Reconciliation conducted a direct observation of prison conditions of awaiting trial prisoners at chosen places and found that prison conditions

⁹²⁰ Dissel, *op cit.*, (fn 510) page 8.

⁹²¹ *Ibid.*

⁹²² *Id* at (fn 510) page 4.

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*

⁹²⁵ *Ibid.*

at those particular prisons were unacceptable and inhumane. This had been the position prior to the Correctional Services Act 111 of 1998.

4.2.2 Position after the coming into operation of the Correctional Services Act 111 of 1998 between the period 1999 and 2011

The Department of Correctional Services (DCS) in its Annual Report from 1 April 2001 to 31 March 2002, had undertaken that they would be redoubling their efforts to reduce overcrowding in the prisons⁹²⁶ by adopting various crime reduction and expansion strategies, such as seeking alternatives to imprisonment; considering the release of offenders who have committed less serious crimes, increasing the accommodation capacity of the prison system by building low-cost new generations' prison facilities for medium and low-risk prisoner categories who form the majority of the country's prison population, and increasing existing accommodation capacity by commissioning new prisons. Again in the *White Paper on Corrections in South Africa (2005)* ('2005 White Paper')⁹²⁷ overcrowding was described as the department's most important challenge, as it had significant negative implications on the ability of the correctional services to deliver on its new constitutional mandate. They blamed various causes for overcrowding, including, the levels of awaiting-trial detainees held in correctional centres; inefficient functioning of the criminal justice system; the particularly high incarceration rate in South Africa when compared to international trends; introduction of minimum sentences for particular categories of serious crime in 1997 resulting in an increase in the proportion of long-term offenders in the DCS facilities that affected availability of bed space now and in the coming decade and crime trends in South Africa, particularly in relation to serious violent crimes and serious economic offences.

In an effort to humanise the Correctional Service Act, the Correctional Services Amendment

⁹²⁶ Skosana, B M (2002) "Department of Correctional Services Annual Report 1 April 2002-31 March 2003," foreword to the report in Part 1, available at: <http://www.dcs.gov.za/Publications/Annual%20Reports/DCS%20Annual%20Report%202002.pdf> (accessed 18 January 2015). According to the report, on 31 March 2002, the Department had cell accommodation for 109 prisoners as opposed to a total prison population of 178 998 prisoners. This situation constituted an average national level of overcrowding of 64%. The prison population increased from 170 959 prisoners on 31 March 2001 to 178 998 prisoners on 31 March 2002 which represents an increase of 4,49%.

⁹²⁷ *The White Paper on Corrections in South Africa (2005)* ('2005 White Paper') at paragraph 2.9.2, page 32.

Act 25 of 2008⁹²⁸ became law. It inserted in section 1 of Act 111 of 1998, apart from a number of other changes, the definitions of 'correction', 'correctional centre' and deleted the words 'prison' and 'prisoners'. It inserted a definition of "inmate" and substituted the definition of "sentenced prisoner" to "sentenced offender" and substituted the definition of "unsentenced prisoner" being a person who is awaiting sentencing, to "unsentenced offender".

In the now repealed and amended Chapter V of Act 111 of 1998 entitled, then in 2008 as 'unsentenced prisoners', provision had been made for general principles relating to well-being,⁹²⁹ clothing,⁹³⁰ food and drink,⁹³¹ and visitors and communication.⁹³² Yet, despite these provisions Judge Fagan⁹³³ in his 2002 report stated that conditions under which awaiting trial prisoners were held remained ghastly. For example, one toilet was shared by more than 60 prisoners; an overwhelming stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two a bed while others slept on the concrete floors, sometimes with a blanket only; insufficient hot water, no facilities for washing or drying clothes, broken windows and lights; and insufficient medical treatment for the contagious diseases rife in prison. Immediate action was required.⁹³⁴

However, the provisions of the unsentenced prisoners - Chapter V of Act 11 of 1998 were somewhat vague and too limited in that there was no provision for the situation where

⁹²⁸ The Correctional Services Amendment Act 25 of 2008 was signed in 2008 and commenced on 1 October 2009.

⁹²⁹ *Ibid*, section 46. Section 46 of the Act 111 of 1998 stated that unsentenced prisoners may be subjected only to those restrictions necessary for the maintenance of security and good order in the prison and must, where practicable, be allowed all the amenities to which they could have access outside prison.

⁹³⁰ *Ibid*, section 47. Section 47 provided that no unsentenced prisoner may be compelled to wear prison clothes, unless the prisoner's own clothing is improper or insanitary or needs to be preserved in the interests of the administration of justice and the prisoner is unable to obtain other suitable clothing from another source.

⁹³¹ *Ibid*, section 48. In terms of section 48 of the Act, subject to restrictions which may be prescribed by regulation, unsentenced prisoners were allowed to have food and drink sent to them in prison.

⁹³² *Ibid*, section 49. Section 49 provided that subject to restrictions which may be laid down by regulation, unsentenced prisoners were allowed to receive visitors and to write and receive letters and communicate telephonically. The contents of this provision were excluded by Act 5 of 2011 and s 49 now provides for the safekeeping of information.

⁹³³ Fagan H (2002) *Prison Overcrowding; One of our biggest challenges to transformation*. Track Two.Vol.11 No.2., available at: http://ccrweb.ccr.uct.ac.za/two/11_2/overcrowding.html (accessed on 9 January 2015).

⁹³⁴ *Ibid*.

unsentenced prisoners had been incarcerated for very lengthy periods of time while awaiting their trial, hence the rewriting and renaming of chapter V by Act 5 of 2011.

4.2.3 Position after the coming into operation of the Correctional Matters Amendment Act 5 of 2011

The Correctional Matters Amendment Act 5 of 2011 introduced the term ‘remand detainees’⁹³⁵ in section 1 of the Correctional Services Act 111 of 1998. Penal Reform International⁹³⁶ describes remand detainees as unconvicted offenders, and defines them as follows: “prisoners in pre-trial detention, or on remand, are those who . . . are awaiting legal proceedings. They are also known as untried or unconvicted prisoners.” Unsentenced prisoners clearly refer to a group of inmates awaiting to be sentenced but already convicted. “Remand detainees”, refers to, according to section 1 of Act 111 of 1998 all people who have been arrested and charged but whose trials have not been completed whether by acquittal or conviction or sentence.⁹³⁷ In the latter instance the offender is unsentenced but is still entitled to better conditions.

Under international law, people awaiting trial may be detained pending trial only in exceptional circumstances.⁹³⁸ There must be reasonable grounds to believe the person committed the alleged offence and a real risk of the person absconding, posing a danger to the community, or interfering with the course of justice.⁹³⁹

⁹³⁵ 'Remand detainee'- in terms of s 1 of Act 111 of 1998 - (a) means “a person detained in a remand detention facility awaiting the finalisation of his or her trial, whether by acquittal or sentence, if such person has not commenced serving a sentence or is not already serving a prior sentence; and (b) includes a person contemplated in section 9 of the Extradition Act, 1962, (Act 67 of 1962), detained for the purposes of extradition”.

⁹³⁶ Penal Reform International (2012) *Pre-trial Detention*, page 3, available at: <http://www.pri.ge/eng/Pre-trialDetention.php> (accessed on 27 December 2014).

⁹³⁷ Gordin, J and Cloete, I (2013) “Imprisoned Before Being Found Guilty: Remand Detainees in South Africa”, Volume 80, Issue 4, Article 6, page 1168, available at <http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1137&context=uclr> (accessed on 9 January 2015).

⁹³⁸ *Ibid*, at page 1169.

⁹³⁹ Shaw, M (2008) “Pretrial Detention: Reducing the Excessive Use of Pre-trial Detention,” pages 1–2, available at: http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf (accessed on 27 December 2014).

4.2.3.1 Chapter V of Act 111 of 1998 as introduced by Act 5 of 2011

Chapter V of Act 5 of 2011 is entitled ‘management, safe custody and well-being of remand detainees’ and is more detailed in its provisions as compared to Chapter V of Act 111 of 1998. The amended chapter excludes ‘visitors and communication’ because these areas are covered in section 13 of Act 111 of 1998. The amended chapter provides, in addition to the existing provisions, for the management, safe custody and well-being of remand detainees,⁹⁴⁰ safekeeping of information and records,⁹⁴¹ provisions regarding women alleging that they are pregnant when detained,⁹⁴² disabled remand detainees,⁹⁴³ aged remand detainees,⁹⁴⁴ mentally ill remand detainees,⁹⁴⁵ referral of terminally ill or severely incapacitated remand detainee to court,⁹⁴⁶ releasing remand detainees under supervision of the South African Police Service,⁹⁴⁷ and maximum incarceration period.⁹⁴⁸ Although it is realised that the wellbeing of a person and respecting his dignity must be assessed holistically, only selected sections of these provisions will be discussed in order to evaluate the improved position of detained persons impacting on overcrowded facilities and improved conditions of well- being.

Section 46 provides that remand detainees may be subjected only to those restrictions necessary for the maintenance of security and good order in the remand detention facility and must, where practicable, be allowed all the amenities to which they could have access outside the remand detention facility.⁹⁴⁹ The Act also states that the amenities available to remand

⁹⁴⁰ Act 111 of 1998 as amended by Act 5 of 2011, section 46.

⁹⁴¹ *Ibid*, section 49.

⁹⁴² *Ibid*, section 49A. A remand detainee who on admission claims to be pregnant, must immediately be referred to a registered medical practitioner for a full medical examination in order to confirm such pregnancy. Further to this, section 49A(2) provides that the National Commissioner must, within the Department's available resources, ensure that a unit is available for the accommodation of pregnant remand detainees and that every pregnant remand detainee must be provided with an adequate diet to promote good health, as prescribed by regulation.

⁹⁴³ *Ibid*, section 49B.

⁹⁴⁴ *Ibid*, section 49C.

⁹⁴⁵ *Ibid*, section 49D.

⁹⁴⁶ *Ibid*, section 49E. Section 49E provides for the referral of terminally ill or severely incapacitated remand detainees to court.⁹⁴⁶ The provisions of this section were not included in Act 111 of 1998 and it is apparent that the legislature was aiming to make this provision to accommodate for mentally ill persons who are remand detainees. The amendment provides clarity on the situation of such remand detainees and, importantly, shifts the responsibility of attending to such detainees to the Head of the Centre.

⁹⁴⁷ *Ibid*, section 49F.

⁹⁴⁸ *Ibid*, section 49G.

⁹⁴⁹ *Ibid*, section 46(1).

detainees may be restricted for disciplinary purposes, and may be prescribed by regulation.⁹⁵⁰ However, according to Muntingh and Ballard⁹⁵¹, this provision is not new and had been previously in the Correctional Services Act 111 of 1998, but the regulations to operationalize it have not been developed.

Section 47 allows detainees, access to outside suppliers of food and drinks. Act 111 of 1998 provided before the amendment that ‘no unsentenced prisoner may be compelled to wear prison clothes, unless the prisoner’s own clothing is improper or insanitary or needs to be preserved in the interests of the administration of justice and the prisoner is unable to obtain other suitable clothing from another source’.⁹⁵² In contrast, Act 5 of 2011 now provides that ‘every remand detainee **must wear** a prescribed uniform which distinguishes him or her from a sentenced offender for the maintenance of security and good order in the remand detention facility’.⁹⁵³ But this uniform may not be used outside the facilities in court as ‘no remand detainee is to appear in any court proceedings dressed in a prescribed uniform’⁹⁵⁴ and ‘if a remand detainee does not have adequate or proper clothing to appear in court, he or she must be provided at State expense with appropriate clothing to enable him or her to appear in court’.⁹⁵⁵ The 2013/2014 Annual Report⁹⁵⁶ of the Judicial Inspectorate states that despite the amendment to the legislation that remand detainees should also wear a uniform, this was generally found not to be the case. It is expected that the problem will be resolved once the new uniforms become available.⁹⁵⁷ Clothing for sentenced inmates was generally found not to be a problem.⁹⁵⁸

⁹⁵⁰ *Ibid*, section 46(2).

⁹⁵¹ Muntingh, L and Ballard, C (2011) “Correctional Matters Amendment Bill (41 of 2010).” Civil Society Prison Reform Initiative Newsletter June 2011, page 1, available at: <http://cspri.org.za/publications/newsletter/38%20-%20June%202011.pdf> (accessed on 8 January 2015).

⁹⁵² Correctional Services Act 111 of 1998, chapter V, section 47.

⁹⁵³ *Ibid*, section 48(1).

⁹⁵⁴ *Ibid*, section 48(2).

⁹⁵⁵ *Ibid*, section 48(3).

⁹⁵⁶ Judicial Inspectorate for Correctional Services 2013/2014 Annual Report, “Treatment of inmates and conditions in correctional centres”, “Treatment of inmates and conditions in correctional centres”, page 93, available at: <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf> (accessed on 27 December 2014).

⁹⁵⁷ *Ibid*, page 93.

⁹⁵⁸ *Ibid*, page 93.

Section 49B provides for disabled remand detainees and states that if the National Commissioner considers it necessary, having regard to remand detainees' disability, the National Commissioner may detain disabled remand detainees separately in single or communal cells, depending on the availability of accommodation specifically designed for persons with disabilities⁹⁵⁹. This section further provides that the Department must provide, within its available resources, additional health care services, based on the principles of primary health care, in order to allow the remand detainee to lead a healthy life⁹⁶⁰ and the Department must provide, within its available resources, additional psychological services, if recommended by a medical practitioner.⁹⁶¹ According to Muntingh and Ballard⁹⁶² a shortcoming in this provision is that disabled people may require services of a non-medical nature, such as Braille services, sign-language, wheel-chair ramps or remedial attention but these are not provided for in the amendment. Section 49C deals with aged remand detainees and provides that the National Commissioner may detain remand detainees over the age of 65 years in single or communal cells, depending on the availability of accommodation⁹⁶³ and a registered medical practitioner may order a variation in the prescribed diet for an aged remand detainee and the intervals at which the food is served, when such a variation is required for medical reasons and is within the available resources of the Department.⁹⁶⁴ In terms of section 49D, the National Commissioner may detain a person suspected to be mentally ill or not able to stand his trial in terms of section 77(1) of the Criminal Procedure Act 51 of 1977 or a person showing signs of mental health care problems, may be kept in a single cell or correctional health facility for purposes of observation by a medical practitioner.⁹⁶⁵ Mental health is a severely marginalised issue in the prison system in general,

⁹⁵⁹ Correctional Services Act, 1998 as amended by the Correctional Matters Amendment Act 5 of 2011, section 49B(1).

⁹⁶⁰ *Ibid*, section 49B(2).

⁹⁶¹ *Ibid*, section 49B(3).

⁹⁶² Muntingh and Ballard, *op. cit.*, (fn 951) page 1.

⁹⁶³ Correctional Services Act, 1998 as amended by the Correctional Matters Amendment Act 5 of 2011, in s 49C(1).

⁹⁶⁴ *Ibid*, section 49C (2).

⁹⁶⁵ The Act also provides in s 49D (2) and (3) that the Department must provide, within its available resources, adequate health care services for the prescribed care and treatment of the mentally ill remand detainee and the Department must, within its available resources, provide social and psychological services in order to support mentally ill remand detainees and promote their mental health.

a problem reflected in the high number of suicides as reported by the Judicial Inspectorate for Correctional Services.⁹⁶⁶

An important provision regarding responsibility and accountability of the correctional facility for remand detainees is contained in section 49F, dealing with the release of a remand detainee under supervision of the South African Police Service. It states that ‘no remand detainee may be surrendered to the South African Police Service for the purpose of further investigation, without authorisation by the National Commissioner’⁹⁶⁷ and ‘the National Commissioner may authorise the surrender of a remand detainee to the South African Police Service for a period not exceeding seven days’.⁹⁶⁸

4.2.3.2 Section 49G of Chapter V of Act 111 of 1998 and period of remand detention

Section 49G⁹⁶⁹ is one of the new provisions inserted by Act 5 of 2011 to the Correctional Services Act 111 of 1998. In an effort to reduce the time remand detainees spend in prison awaiting trial, the new legislation aims to better regulate the situation of remand detainees in

⁹⁶⁶ Office of the Inspecting Judge (2010) Annual Report of the Judicial Inspectorate for Correctional Services 2009/10, Cape Town, pages 59-76 also available at: <http://cspri.org.za/publications/newsletter/38%20-%20June%202011.pdf> (accessed on 9 January 2015).

⁹⁶⁷ Correctional Services Act 111 of 1998 as amended by Correctional Matters Amendment Act 5 of 2011, section 49F(1).

⁹⁶⁸ *Ibid*, section 49F(2).

⁹⁶⁹ *Ibid*, section 49G. This section provides that: “(1) The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned in the manner set out in this section: Provided that no remand detainee shall be brought before a court in terms of this section if such remand detainee had appeared before a court three months immediately prior to the expiry of such two year period and the court during that appearance considered the continued detention of such detainee.

(2) The Head of the remand detention facility must report to the relevant Director of Public Prosecutions at six-monthly intervals the cases of remand detainees in his or her facility that are being detained for a successive six-month period.

(3) Any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the Head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under conditions appropriate to the case.

(4) If, subsequent to the referral of the remand detainee to court as contemplated in subsection (3), the finalisation of his or her case is further delayed, the Head of the remand facility or correctional centre, as the case may be, must refer the matter back to the court on a yearly basis to determine the remand detainee's further detention or release under conditions appropriate to the case. “

(5) The National Commissioner may, in consultation with the National Director of Public Prosecutions, issue directives regarding the procedure to be followed by a Head of a remand detention facility or

South Africa's prisons.⁹⁷⁰ Section 49G sets two years as the maximum period of incarceration for remand detainees without appearing before a court. However, this does not necessarily mean that all detainees who have been in prison awaiting trial for longer than two years will have to be released.⁹⁷¹ The Act does allow for the extension of this two-year period which is entailed in the proviso providing that no remand detainee shall be brought before a court in terms of section 49G (1) if such remand detainee had appeared before a court three months immediately prior to the expiry of such two year period and the court during that appearance considered the continued detention of such detainee. However, this may be done only if the head of the relevant prison refers the case to court, and the court orders that the period of incarceration be extended.⁹⁷² If the case is still delayed by the courts, the case must be referred back to the courts on a yearly basis.

Although the amendment to the Act is to be welcomed as a positive step, it must be noted that the Department of Correctional Services (DCS) can only do so much to eradicate the problem of remand detainees in South Africa's prisons. The DCS cannot control the length of court processes – and if the problems in the other branches of the criminal justice system persist– it is uncertain whether or not the legislative changes will actually lead to a reduction in the trial delays for remand detainees.⁹⁷³ Unfortunately, provisions such as these tend to be over-inclusive.⁹⁷⁴ For example, if a case is brought to the attention of a court three months or less prior to the expiry of the two-year period, it would not be covered by the provisions in the amendment.⁹⁷⁵ In 2013, Gordin and Cloete⁹⁷⁶ opined that whether or not the Act will in fact have any meaningful effect on the delays suffered by remand detainees, still remains to be seen.⁹⁷⁷ However, according to a governmental 2014 South African Government News

correctional centre, as the case may be, and a Director of Public Prosecutions whenever it is necessary to bring an application contemplated in subsection (3) or (4)'.
 Gordin and Cloete, *op. cit.*, (fn 937) page 1176.

970

Gordin and Cloete, *op. cit.*, (fn 937) page 1176.

971

Id at (fn 937) page 1177.

972

Ibid.

973

Ramagaga, T (2011) "The Conditions of Awaiting Trial 'Prisoners' Look Set to Improve in South Africa", Institute For Security Studies, available at: <http://www.polity.org.za/the-conditions-ofawaiting-trial-prisoners-look-set-to-improve-in-south-africa> (accessed on 27 December 2014).

974

Ibid.

975

Ibid.

976

Gordin and Cloete, *op. cit.*, (fn 937) page 1177.

977

Id at (fn 937) page 1178.

Agency report,⁹⁷⁸ published in Pretoria, more than 380 awaiting trial detainees who were in custody in correctional centres for more than two years, are no longer in remand detention. This is, according to the report, a direct result of the implementation of section 49G of the principal Act, Act 111 of 1998 by the Correctional Matters Amendment Act of 2011. According to the South African Government News Agency,⁹⁷⁹ the number of remand detainees who have been in detention for more than 24 months, was reduced from approximately 2 200 to 1816.

If, for example, cases are routinely referred back to court in order to extend the maximum period of detention, the legislation will have little effect on the problem. Given the excessive periods of detention that South Africa's remand detainees are frequently forced to suffer, a provision such as this is welcomed.⁹⁸⁰

4.2.3.3 Comparative examples – limits on period of pre-trial detentions

Most countries within the Latin American region have limits on pre-trial custody. Venezuelan law stipulates that under no circumstances may an accused person be detained for longer than the possible minimum sentence for the alleged crime, nor may the detention exceed two years.⁹⁸¹ In Guatemala, pursuant to various reforms which began in 1994, detention may not last for more than one year, or for a period exceeding punishment for the alleged offence.⁹⁸² The Criminal Code of Bolivia fixes the maximum custody period at 18 months.⁹⁸³ Similar provisions exist in Costa Rica and⁹⁸⁴ El Salvador.⁹⁸⁵

⁹⁷⁸ South African Government News Agency (2014) "Management of remand detainees improves," available at: <http://www.sanews.gov.za/south-africa/management-remand-detainees-improves> (accessed on 8 January 2015).

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Muntingh and Ballard, *op. cit.*, (fn 951) page 2

⁹⁸¹ Código Orgánico Procesal Penal (Organic Penal Procedure Code), adopted on 4 September 2009, published in *Gaceta Oficial de la República de Venezuela*, No. 5.930 Extraordinaria, 4 September 2009, pp. 7–47. https://www.icrc.org/customary-ihl/eng/docs/src_ivnale (accessed on 6 January 2015).

⁹⁸² *Hernández Lima v. Guatemala*, Case 11. 297, Inter-American Commission on Human Rights (IACHR), 16 October 1996, <http://www.refworld.org/docid/3ae6b69c24.html> (accessed on 6 January 2015).

⁹⁸³ Law No. 1970-86, 15 December 1970, *Nationality Law*, 18 December 1970, <http://www.refworld.org/docid/3ae6b4d714.html> (accessed on 6 January 2015). Unofficial translation published in *Nationality and Statelessness, A Collection of National Laws, Volume I*, Independent Bureau for Humanitarian Affairs, Ferney Voltaire, France, 1996.

4.2.3.4 Conditions of detention for juveniles/children

The 2013/2014 Annual Report⁹⁸⁶ of DCS provides an overview of the key findings from its survey relating to conditions of detention for children/juveniles in several correctional facilities⁹⁸⁷:

a) *Cell occupation*

Cell occupation rate measures as available square metre per inmate, vary greatly, ranging from as low as 1 square metre to as high as 16 square metres. It therefore follows that a substantial number of children and juveniles are detained under conditions that do not comply with the Department's minimum space norm of 3.344 square metres per inmate. There appears to be a general trend that cells for remand detainees are occupied at higher rates than for sentenced offenders.⁹⁸⁸

b) *Cleanliness and ventilation*

In general it was found that cells were clean and well-ventilated. At a small number of centres this was found not to be the case and there were reports of cockroach and lice infestations. Rubbish bins were available at most cells where children and juveniles were detained but at a number of centres rubbish bags are available but not placed in a bin.⁹⁸⁹

c) *Access to water*

⁹⁸⁴ Bureau of Democracy, Human Rights, and Labor (2014) "2013 Human Rights Reports: Costa Rica," US Department of State, Diplomacy in Action, section 1, paragraph d. available at: <http://www.state.gov/j/drl/rls/hrrpt/2013/wha/220432.htm> (accessed on 20 February 2015). Detention may not exceed 12 months.

⁹⁸⁵ Bureau of Democracy, Human Rights, and Labor (2014) "2013 Human Rights Reports: El Salvador," US Department of State, Diplomacy in Action, section 1, paragraph d. available at: <http://www.state.gov/j/drl/rls/hrrpt/2013/wha/220442.htm> (accessed on 20 February 2015). Detention cannot exceed the maximum sentence provided for in the law or 12 months (in less serious crimes) or 24 months (serious crimes).

⁹⁸⁶ Judicial Inspectorate for Correctional Services 2013/2014 Annual Report, *op. cit.*, (fn 956) page 93.

⁹⁸⁷ *Ibid.* The survey was conducted at Barberton Town, Bizzah Makhate, Boksburg, Cradock, Durban, Kirkwood, Mosselbay, Pollsmoor Correctional Facilities.

⁹⁸⁸ *Ibid.*

⁹⁸⁹ *Ibid.*

Access to clean drinking water was found not to be a problem at all the centres surveyed. However, a small number of centres reported problems with their hot water supply.⁹⁹⁰

d) *Bedding*

Children and juveniles slept on beds and were supplied with mattresses and blankets.⁹⁹¹ At a few centres it was found that due to overcrowding the beds had been removed. The availability of sheets is a more general problem.⁹⁹²

4.2.3.5 *Social and health conditions of detention for inmates*

According to Koen⁹⁹³ while convicted inmates have access to educational and vocational training programmes, to rehabilitation and social services and to psycho-social support, remand detainees are seen to be in a ‘waiting room’ and so only the barest essentials are provided.⁹⁹⁴ Habitual criminals share the same facility as first time offenders. Being in a prison means detainees are exposed to institutional violence and are at a great risk of contracting a disease like HIV or tuberculosis.⁹⁹⁵

Inhumane conditions in South African prisons are making the Department of Correctional Services vulnerable to legal action.⁹⁹⁶ Prisoners did not come out worse because of who they are, but because they were abused and dehumanised at facilities meant to rectify their behaviour.⁹⁹⁷

The awaiting trial section of a South African prison has a really bad reputation for sexual violence.⁹⁹⁸ However, contrary to this finding the Department of Correctional Services has

⁹⁹⁰ *Ibid.*

⁹⁹¹ *Ibid.*

⁹⁹² *Ibid.*

⁹⁹³ Koen, *op. cit.*, (fn 747) page 29.

⁹⁹⁴ *Ibid.*

⁹⁹⁵ *Ibid.*

⁹⁹⁶ Smith (2012) “South Africa: MPs warn of inhumane Prison Conditions,” page 1. News 24 – Breaking News, available at: <http://www.news24.com/SouthAfrica/News/MPs-warn-of-inhumane-prison-conditions-20121024> - accessed on 9 January 2015.

⁹⁹⁷ Fagan, *op. cit.*, (fn 909), page 1.

⁹⁹⁸ Maphumulo, Z (2013) “The New Age: Scourge of Male Rape.” Article which included a comment by Sasha Gear, who has studied sexual violence in prisons extensively and works for the South African

acknowledged that sexual violence was taking place under its watch but disputed that it was a huge problem.⁹⁹⁹ In June 2013, Tom Moyane, National Commissioner of Correctional Services, admitted that it was not a “problem”.¹⁰⁰⁰ He said “[t]hrough our investigations we found that sex between inmates was consensual.” Moyane’s comments contradict the findings of the Jali Commission of Inquiry Report that was released in 2006, which revealed that rape was rife in South African prisons. The Commission also made a link between sexual violence and HIV in prison when it said that “there was an extreme likelihood that prisoners who are exposed to violent unprotected sex will be infected with HIV”.¹⁰⁰¹

In the judgment in the case of *Lee v Minister of Correctional Services*¹⁰⁰² the Court describes a justice system that is under-resourced, cruel and careless and explains the effect of prison conditions on the prisoner:

“Given that prisoners who were awaiting trial spent approximately 23 hours out of every 24 in their cells, there must clearly have been little to distinguish one day from another. Indeed, the Plaintiff said that one day was much like the next. The Plaintiff spent approximately four and a half years in prison awaiting trial and attended Court on approximately 70 occasions during the time. In these circumstances it does not appear to me to be surprising that the Plaintiff became confused at times.”

It seems then that South Africa’s remand detention problem begins with an overreliance on pre-trial detention.¹⁰⁰³ Although alternative measures are available to ensure that an accused person appears at his trial, the courts tend to resort to detention as the default position.¹⁰⁰⁴

The Correctional Matters Amendment Act brought about important changes with regard to the rights of remand detainees. Its provisions catered for remand detainees who were incarcerated for very lengthy periods of time, it catered for various types of detainees. However, despite the detailed provisions of the amended Act 111 of 1998, South African case law indicates that poor prison conditions is still a severe problem in the country, as shown in the *Lee* case.

Office of Just Detention International, paragraph 20, available at:
http://thenewage.co.za/blogdetail.aspx?mid=186&blog_id=%201213 (accessed on 6 January 2015).

999

Ibid.

1000

Ibid.

1001

Ibid.

1002

Lee v Minister of Correctional Services, op. cit., (fn 792) paragraph 8.

1003

Gordin and Cloete, *op. cit.*, (fn 937) page 1170.

1004

Ibid.

4.3 Overcrowding

A discussion on overcrowding in South African prisons can be divided into three parts. First, is the position regarding prison conditions for awaiting trial prisoners before the Correctional Services Act came into force. Second, is the period after the Correctional Services Act came into force. Third, is the period after the Correctional Matters Amendment Act came into force, which brings us to the current date. Each period will now be discussed in detail.

4.3.1 Position prior to the coming into operation of the Correctional Matters Amendment Act 111 of 1998¹⁰⁰⁵

Overcrowding of prisons in South Africa has always been a major topic and a crisis. Pre-1994 the situation was an issue. However, post-1994, the situation has worsened. Overcrowding is still a problem in South African prisons as a result of the large number of awaiting trial prisoners who are incarcerated for lengthy periods before they stand trial. Its ripple-effect has a negative impact on detainees. The researcher aims to highlight the intensity of overcrowding and the impact it has on the constitutional rights of an accused and detained person.

The growth in the prison population simply reflects to some extent the growth in reported crime since 1994 and delays in processing court cases, partially responsible for the growth in the number of people awaiting trial.¹⁰⁰⁶ One of the rights of every South African citizen is the right to have one's inherent dignity respected and protected, a right which is specifically extended to prisoners.¹⁰⁰⁷ According to section 35(2) (e) of the Constitution¹⁰⁰⁸ a prisoner is entitled to conditions of detention that are consistent with human dignity, including at least exercise and the provision (at State expense) of adequate accommodation, nutrition, reading material and medical treatment¹⁰⁰⁹ and to have communication with and visitation rights by a selected group¹⁰¹⁰.

¹⁰⁰⁵ Correctional Matters Amendment Act 111 of 1998, *op. cit.*, (fn 882).

¹⁰⁰⁶ Dissel, A and Ellis, S (2013) "Reform and Stasis: Transformation in South African Prisons," page 7, available at: <http://www.csvr.org.za/docs/correctional/reform.pdf> - accessed on 6 January 2015.

¹⁰⁰⁷ Fagan, *op. cit.*, (fn 909).

¹⁰⁰⁸ The Constitution of the Republic of South Africa, *op. cit.*, (fn 1).

¹⁰⁰⁹ *Ibid*, section 35(3)(e).

¹⁰¹⁰ *Ibid*, section 35(3)(f).

After 1994, an increase in South Africa's prison population took place.¹⁰¹¹ In 1995, South African prisons held more than 111 090 prisoners; after nine years there were more than 180 000 prisoners making South Africa the country with the largest number of inmates of any African nation and the ninth largest prison population in the world.¹⁰¹² As at the end of March 2014, the total inmate population was 148,210.¹⁰¹³

Sadly, the overcrowding in prisons for awaiting trial prisoners is in no way a reflection of the energy or tenacity of the National Prosecuting Authority.¹⁰¹⁴

4.3.2 Position after the introduction of the Correctional Services Act 111 of 1998

The increase in the number of awaiting trial has been far greater than the increase in the number of those who have been sentenced.¹⁰¹⁵ In December 2000 the detention cycle for prisoners awaiting trial was 136 days.¹⁰¹⁶ However, there were cases of prisoners spending two years or more awaiting trial.¹⁰¹⁷ In the year 2000, the Judicial Inspectorate of Prisons found that conditions in our prisons fell short of the fundamental values of the Constitution.¹⁰¹⁸ On 30th April 2000, the 236 prisons built to accommodate 100 668 prisoners in South Africa were accommodating 172 271 prisoners.¹⁰¹⁹ This means that about 72 000 more prisoners, including awaiting trial prisoners, were kept in prisons without the necessary infrastructure such as toilets, beds, showers and other basic amenities being available to them. The gross overcrowding in numerous prisons has led to detention under horrendous conditions, especially for awaiting trial prisoners.¹⁰²⁰

¹⁰¹¹ Fuzier, E C (2011) "South African Prison System – An Indicator of a Country's Attitude" page 58 available at: <http://www.capechameleon.co.za/printed-issue/issue-7/human-rights2/> (accessed on 3 August 2015).

¹⁰¹² *Ibid.*

¹⁰¹³ Annual Report 2013/2014, Department of Correctional Services Vote 21, page 27, available at: <http://www.dcs.gov.za/docs/landing/DCS%20Annual%20Report%202013-14.pdf> (accessed on 6 January 2015).

¹⁰¹⁴ Raphaely, *op. cit.*, (fn 908) page 4.

¹⁰¹⁵ Ntuli *et al* (2001) "Enhancement of Community-Based Alternatives to Incarceration at all Stages of the Criminal Justice Process in South Africa", page 3, available at: <http://www.restorativejustice.org/articlesdb/articles/4357> - accessed on 6 January 2015.

¹⁰¹⁶ Dissel and Ellis, *op. cit.*, (fn 1006) page 7.

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ Annual Report for the Judicial Inspectorate of Prisons, *op. cit.*, (fn 832).

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ *Ibid.*

As of 31 March 2001 the Department of Correctional Services had a cell accommodation of 102, 048 prisoners against a population of 170,959 prisoners. The situation constituted a national average level of 167, 35 percent.¹⁰²¹ By June 2001 this figure decreased slightly to 134 days. This means that, on average, alleged offenders are held in prison for over four months awaiting trial. However, in some cases, they are held for years.¹⁰²² The high number of prisoners awaiting trial was and still is an enormous cost to the South African Government. As at 2001, the cost of imprisonment was estimated at R88 per day per prisoner.¹⁰²³ The June 2001 figures of awaiting trial prisoners suggested the State was spending over R4.5 million a day to hold those awaiting trial.¹⁰²⁴

It is clear that the Correctional Services Act was not very effective in providing a standard for alleviating overcrowding and its consequences on awaiting trial prisoners.

4.3.2.1 Overcrowding and awaiting trial prisoners between 2004 and 2011

On 31 May 2004, the total capacity of South Africa's prisons stood at 114 821 prisoners, while the actual number of inmates stood at 184 806.¹⁰²⁵ The occupation rate, in other words, was 161percent. If the capacity is calculated on the basis of 3, 344 square metres per prisoner, this means that an inmate in an average communal cell has less than 2.1 square metres of floor space. In some prisons conditions are considerably worse. In mid-2004, Durban Medium C was 387 percent full, and Umtata Medium C was 377 percent full, giving the average prisoner housed in a communal cell about 0.9 square metres of floor space.¹⁰²⁶ The DCS calculates the capacity of its prisons on the basis of 3,344 square metres per prisoner in a criminal cell and five square metres in a single cell.¹⁰²⁷ Whether this calculation of capacity meets the constitutional standard of "adequate accommodation" is a moot point.

Most of South Africa's prisons are overcrowded, unhygienic, lack adequate health care facilities and do little to rehabilitate inmates, according to the Judicial Inspectorate of Prisons

¹⁰²¹ Fuzier, *op. cit.*, (fn 1011) page 59.

¹⁰²² Ntuli *et al*, *op. cit.*, (fn 1015) page 5.

¹⁰²³ *Ibid.*

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Centre for the Study of Violence and Reconciliation (2005), available at: <http://www.csvr.org.za/wits/publist/pubstrc.htm> - accessed on 9 January 2015.

¹⁰²⁶ *Ibid.*

¹⁰²⁷ *Ibid.*

(JIOP) 2006/7 annual report.¹⁰²⁸ The report says that in prisons reporting critical levels of overcrowding, “prisoners often have less than 1,2 square metres, the size of an average office table in which they must sleep, eat and spend 23 hours a day”.¹⁰²⁹ The so-called “correctional centres” are more than 200 percent full and two; one in Thohyandou and the other in Umtata are over 300 percent full. Health care in most of the prisons is in crisis. A lack of medical staff, prison overcrowding, poorly resourced prison hospitals and operational inefficiencies are some of the contributing factors.¹⁰³⁰

A South African Institute of Race Relations survey, published on 17 January 2011, paints a bleak picture of worsening overcrowding inside prisons, especially for those yet to be tried and who have not been released on bail. Prison overcrowding is a continuing problem in South Africa and is worsened by the length of time awaiting trial prisoners are held in custody.¹⁰³¹ According to the survey, overcrowding in prisons for awaiting trial prisoners increased 72% between 1996 and 2009. This was partly due to the long period that awaiting trial prisoners were kept in custody instead of being released on bail.¹⁰³² Between 1995 and 2009, the number of awaiting trial prisoners increased 1044%. Of these, those awaiting trial for more than two years rose a staggering 5000%.¹⁰³³ The then Judicial Inspector of Correctional Services, Judge Deon van Zyl, in his annual report¹⁰³⁴, stated that critically overcrowded prisoners awaiting trial are classified as those with occupancy of more than 200% and that most of awaiting trial detainees are males.¹⁰³⁵ He also stated that awaiting trial detainees make up the bulk of those inmates detained in centres which have reached a critical level of overcrowding.¹⁰³⁶ The one reason for the overcrowding was that incarceration

¹⁰²⁸ Judicial Inspectorate of Prisons Annual 2006/07 “Report on Prisoners and Prisons,” available at: <http://www.pmg.org.za/minutes/20071115-judicial-inspectorate-prisons-annual-200607-report-prisoners-and-prisons> (accessed on 9 January 2015).

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Ibid.*

¹⁰³¹ Lebone, K (2011) “SA inmates serving longer sentences.” South African Institute of Race Relations, page 1, available at: <http://www.news24.com/SouthAfrica/News/SA-inmates-serving-longer-sentences-20120305> - accessed on 9 January 2015.

¹⁰³² *Ibid.*

¹⁰³³ *Ibid.*

¹⁰³⁴ Judge van Zyl, *op. cit.*, (fn 623).

¹⁰³⁵ *Ibid.*

¹⁰³⁶ *Ibid.*

was happening without problems and there are more awaiting trial prisoners in in detention than outside.¹⁰³⁷

In 2008, prison occupation in 173 prisons stood at 144, 76 percent of capacity on average as at March 2008. The total bed capacity was 114 559, but there were 113 178 sentenced prisoners and 52 662 awaiting trial detainees – a total number of 165 840 inmates.¹⁰³⁸

One of the worst situations regarding overcrowding of prisons was Umtata Medium, with a capacity for 580 inmates, but accommodating 902 sentenced and 1229 awaiting trial prisoners – a total of 2131 inmates, or 367,41percent capacity.¹⁰³⁹ Another one was Johannesburg Medium A, which had 2630 beds, but had 6529 awaiting trial and 152 sentenced prisoners – altogether 6681 inmates, or 254, 03 percent capacity.¹⁰⁴⁰ Cape Town's Pollsmoor Maximum was designed to hold 1872 inmates, but had 3813 offenders awaiting trial and 718 sentenced prisoners – a total of 4531, or 242, 04 percent capacity. For the financial year 2007/8, the cost amounted to R168, 68 per day per awaiting trial prisoner.¹⁰⁴¹

Since 2009 there has been a steady increase in the number of persons awaiting trial for more than two years in South African prisons. Figures indicate there were a total of 46 432 persons being held in detention while awaiting trial in October 2010. Of these, 2 080 had been in prison for more than two years with the vast majority of these (1 516) having been detained for more than three years.¹⁰⁴²

According to the Inspecting Judge Deon Van Zyl in the Judicial Inspectorate of Prison's annual report released in 2009, the root cause of overcrowding is the incarceration of vast numbers of awaiting trial prisoners, given the fact that they were approximately 50 000 of the 160 000 detainees throughout South Africa.¹⁰⁴³ Van Zyl commented as follows:

¹⁰³⁷ Kharsany, Z (2008) "R1,5bn to keep suspects behind bars," *Mail & Guardian Newspaper*, paragraph 3-6, available at: <http://mg.co.za/article/2008-07-17-r15bn-to-keep-suspects-behind-bars> (accessed on 20 February 2015).

¹⁰³⁸ *Ibid.*

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ *Ibid.*

¹⁰⁴² Advocate du Preez, J (2012) "Justice delayed is justice denied." FW De Klerk Foundation, available at: <http://www.politicsweb.co.za> (accessed on 1 November 2014).

¹⁰⁴³ Judge van Zyl, *op. cit.*, (fn 623).

“...the vast majority were arrested without a warrant of arrest, on the basis of a reasonable suspicion or belief that they had committed an offence. It may well be, of course, that further investigations may unearth sufficient supplementary evidence to sustain a conviction. In far too many cases, however, no such evidence is produced and prosecutors are compelled to withdraw charges after numerous postponements as a result of which the accused might have been detained for months, if not years.”¹⁰⁴⁴

As a result of this chronic overcrowding, the life conditions in many prisons do not meet the minimum standards established in national and international legislation and declarations and represent serious breaches of the rights guaranteed in the Constitution.¹⁰⁴⁵

The large number of statistics indicates the severity and seriousness of overcrowding in prisons after the Correctional Service Act had come into force.

4.3.3 Position after the coming into operation of the amendments to Act 111 of 1998 by the Correctional Matters Amendment Act 5 of 2011

4.3.3.1 Overcrowding and remand detainees after 2011

The Correctional Matters Amendment Act brought new changes which were aimed at alleviating the problem of overcrowding in South African prisons. There are statistics for the years 2011 to 2014 which will either show to have increased overcrowding or decreased the overcrowding problem South Africa was facing.

a) *During 2011 to 2012*

In 2011, the Department of Correctional Services estimated overcrowding in South Africa’s 243 correctional centres at 137 percent, with 18 correctional centres more than 200 percent overcrowded.¹⁰⁴⁶

Awaiting trial prisoners are taking up too much prison capacity primarily because it takes too long to finalise their cases.¹⁰⁴⁷ According to the Department of Correctional Services the total population at the end of March 2012 stood at 162 162. Of these, 112 467 are sentenced

¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ Raphaely, C (2012) “Awaiting trial prisoners held in grim conditions,” page 1, available at: <http://www.bdlive.co.za/opinion/2012/08/23/awaiting-trial-prisoners-held-in-grim-conditions> - accessed on 23 December 2014.

prisoners and 49 467 are awaiting trial. The country's prisons are meant to house 118 154 prisoners.¹⁰⁴⁸

b) From 2012 to 2013

In 2012, on backlog in respect of completing court cases, Correctional Services Minister Sbu' Ndebele revealed in his written reply to a Parliamentary question that:

“a loss of court records and non-appearance of witnesses are just some of the reasons for the backlog. The cost of keeping an inmate in jail is around R88 000 per year.”¹⁰⁴⁹

He continued to attribute the overcrowding of prisons to either a loss of records or non-appearance of witnesses.

The total inmate population was almost 150 000 while the approved bed space was only about 120 000, resulting in an over-occupancy rate of about 25 percent.¹⁰⁵⁰

At the end of March 2012, 49 467 of South Africa's 162 162 prison inmates were remand detainees living in conditions best described as inhumane. Remand detainee overcrowding is worsened by the fact that police success is measured by the number of arrests made, not the number of convictions secured.¹⁰⁵¹

¹⁰⁴⁷ Advocate du Preez, *op. cit.*, (fn 1042) page 1.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ Ndebele, S (2012, November 19) “Overcrowding requires prisoner release,” public address by Minister of Correctional Services, as published in the Mail & Guardian Newspaper, page 1, available at: <http://mg.co.za/tag/sbu-ndebele> (accessed on 6 January 2015).

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ Raphaely, *op. cit.*, (fn 1046) page 1.

c) *From 2013 to beginning of 2014*

In 2013, the number of awaiting trial prisoners in South African jails stood at 46 309.¹⁰⁵² The longest period for awaiting trial detainees was nine years and six months.¹⁰⁵³ In 2013, the Minister of Correctional Services¹⁰⁵⁴ acknowledged that South Africa has the highest prison population in Africa.¹⁰⁵⁵ He correctly stated:

“... we are currently ranked in the world in terms of prison population, with approximately 160 000 inmates. At least 30 percent of those detained were awaiting trial.”¹⁰⁵⁶

In Cape Town, out of a total prison population of 152 514, only 107 471 have been sentenced and are serving time, while 45 043 people or 29,5percent are detainees on remand, who are clogging up the system.¹⁰⁵⁷ The Correctional Services Minister stated in a press briefing that on average, 15 to 20 percent of the awaiting trial detainees are in custody because they cannot afford bail. This has resulted in the poorest of the poor being removed from their families with related socio-economic implications¹⁰⁵⁸ and

“on top of the large number of remand prisoners, Correctional Services only had beds for 119 000 people, while there were more than 140 000 in prison. It’s a crisis for us.”¹⁰⁵⁹

The then Minister of Justice and Constitutional Development, Jeff Radebe, attributed the overcrowded prisons to the excellent work done by the prosecution weight and the number of convictions secured by the prosecution.¹⁰⁶⁰ When pressed by the media on the efficiency of

¹⁰⁵² SABC News (2013, June 06) “SA awaiting trial prisoners stand at 46 309,” page 1, available at: http://www.sabc.co.za/news/a/f59ccb004fe4f0ad919df30b5d39e4bb/SA-awaiting-trial-prisoners-stands-at-46-309_ (accessed on 10 January 2015).

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ Ndebele, *op. cit.*, (fn 1049) page 1.

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ *Ibid.*

¹⁰⁵⁷ Cruywagen, D (2013) “Awaiting trial inmates filling up SA Prison,” page 1, available at: <http://www.sanews.gov.za/south-africa/awaiting-trial-inmates-filling-sa-prisons-ndebele> (accessed on 6 January 2015).

¹⁰⁵⁸ Ndebele, S “Ndebele: SA has highest prison population in Africa” Report on overcrowding by Minister of Correctional Services as published in the Mail & Guardian Newspaper 11 February 2013, page 1, available at: <http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele> (accessed on 10 January 2015).

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ Radebe, J (2013) “Radebe: Prisons are full, stop complaining about NPA.” Public address by Minister of Justice and Constitutional Development as published in the Mail & Guardian Newspaper. He also stated that “people don’t volunteer to go to prison. It is because we’ve got energetic prosecutors on

the National Prosecuting Authority, Radebe defended the public prosecution by claiming that South Africa's severely overcrowded jails are indicative of a proactive and successful National Prosecuting Authority.¹⁰⁶¹ While energetic prosecutors are not necessarily a bad thing, the assumed correlation between their energy and successfully convicted criminals who overcrowd jails is not as clear-cut as Radebe makes it out to be.¹⁰⁶²

Prisons are overcrowded because, besides the deserving detentions, there are many inmates in detention who lack the finances to pay for bail.¹⁰⁶³ According to Legal Aid South Africa, in 2013 there were about 10 000 inmates awaiting trial in prison, who have the right to bail, but could not afford the bail sum.¹⁰⁶⁴ In half the cases, this sum was below R1000. In 2013, nationally, there were about 2 700 awaiting trial detainees who had been incarcerated for more than two years.¹⁰⁶⁵ This is despite constitutional requirements which stipulate that awaiting trial detainees have the right to a trial that begins and ends without unreasonable delay¹⁰⁶⁶ and despite the amended Correctional Services Act 111 of 1998 that provided for a time limit being that remand detention should not last beyond two years. Furthermore, section 49G of the Correctional Services Act 111 of 1998 clearly sets out the maximum incarceration period and prescribes that the period of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility.

According to the 2013 Annual Report by the Judicial Inspectorate for Correctional Services¹⁰⁶⁷ it is accepted that the over-population of inmates per available infrastructure is a problem in certain centres and then, within such centres, largely in the communal cells and, in some instances, single cells where inmates are "doubled-up"¹⁰⁶⁸ or even "tripled-up".¹⁰⁶⁹ These conditions are unacceptable and have been found to be so during inspections around

all levels in our country who prosecute without fear, favour or prejudice," available at: <http://mg.co.za/article/2013-05-29-radebe-prisons-are-full-so-stop-complaining-about-npa> (accessed on 27 December 2014).

1061

Ibid.

1062

Raphaely, *op. cit.*, (fn 908), page 4.

1063

Ibid.

1064

Legal Aid South Africa Annual Report 2012-2013, page 40, available at: <http://www.legal-aid.co.za/wp-content/uploads/2012/12/Legal-Aid-SA-Annual-Report-2013.pdf> (accessed on 10 January 2015).

1065

Raphaely, *op. cit.*, (fn 908), page 4.

1066

Ibid., (fn 908) page 4.

1067

Judicial Inspectorate for Correctional Services 2013/2014 Annual Report, *op. cit.*, (fn 956) page 37.

1068

Ibid., 2 per single cell.

the country.¹⁰⁷⁰ In other instances, the inmate population is within acceptable standards, not only in terms of design but also locality and strategies to reduce overcrowding have been satisfactorily addressed.¹⁰⁷¹

According to the 2013/2014 Annual Report¹⁰⁷², as at end of March 2014, the inmate population was 148,210. The table below gives a breakdown of the inmate population between the 2009/2010 and 2013/2014 reporting periods:

Table 1: Average remand detainee population from 2009/2010 to 2013/2014¹⁰⁷³

Financial Year	Remand Detainees	
	Females	Males
2009/2010	1027	47398
2010/2011	693	46794
2011/2012	1030	44868
2012/2013	988	44742
2013/2014	1005	43853

In the years 2009/2010, there were 1027 female remand detainees and 47398 male remand detainees, totalling 48425 remand detainees for this period.

In the year 2010/2011, there were 693 female remand detainees and 46794 male remand detainees, totalling 47487 remand detainees. The number of remand detainees increased by 938 in 2010/2011.

In the year 2011/2012, the female remand detainee population was 1030 and male remand detainee population was 44868, totalling 45898. The total remand detainee population had decreased between 2010/2011 and 2011/2012 by 1589.

There were 988 female remand detainees and 44742 male remand detainees in 2012/2013, totalling 45730 remand detainees. There was a slight decrease by 168 remand detainees.

¹⁰⁶⁹ *Ibid.*, 3 per single cell.

¹⁰⁷⁰ *Ibid.*

¹⁰⁷¹ *Ibid.* The larger urban centres are generally more overcrowded.

¹⁰⁷² Table and figures copied from the Annual Report 2013/2014, Department of Correctional Services Vote 21, *op. cit.*, (fn 980) page 27.

¹⁰⁷³ *Ibid.*

In 2013/2014, there were 1005 female remand detainees and 43853 male remand detainees, a total population of 44858 remand detainees. At this stage, there was a larger decrease in the remand detainee population by 872, as compared to the slight decrease in 2012/2013.

The 2013/2014 Annual Report indicates the position regarding bed capacity:

As at 31 March 2014, the department had 243 correctional facilities which are classified as follows:¹⁰⁷⁴

- 111 centres with a bed capacity less than 250 each;
- 42 centres with bed capacity of 250<500 each;
- 62 centres with bed capacity of 500<1000 each;
- 13 centres with bed capacity 1000<1500 each; and
- 15 centres with bed capacity >1500 each

4.3.3.2 Overcrowding and section 35(3) (e) of the Constitution, after Act 5 of 2011

The constitutional obligation that provides, inter alia, for adequate health care,¹⁰⁷⁵ read with the provisions of the legislative regime and policy framework pertaining to health care, is varied; and in a confined environment the management of disease prevention, the treatment of illnesses is exacerbated.¹⁰⁷⁶ One of the consequences of overcrowding is that it leads to poor sanitation and hygiene and adversely affects prisoner health.¹⁰⁷⁷ There are limited resources and inadequate provision of basic and more advanced health care. Prisoners complained to the Judicial Inspectorate more about health care and food than any other aspect of prison life.¹⁰⁷⁸ Because of the poor environment and medical treatment, contagious diseases flourish in prison, and the department has inadequate resources or strategy to deal with them.¹⁰⁷⁹ Whenever a person's internal bodily system becomes vulnerable because of HIV/AIDS, a range of opportunistic diseases flourish, with tuberculosis being the most common among them.¹⁰⁸⁰

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ The Constitution of the Republic of South Africa, *Op. Cit.*, fn 1, section 35(2)(e) of Chapter 2.

¹⁰⁷⁶ Judicial Inspectorate for Correctional Services 2013/2014 Annual Report, *op. cit.*, (fn 956) page 57.

¹⁰⁷⁷ Dissel and Ellis, *op. cit.*, (fn 1006) page 10.

¹⁰⁷⁸ *Ibid.*

Ibid. The most prevalent diseases are Hepatitis B and C, syphilis, tuberculosis and Human Immunodeficiency Virus or Acquired Immunodeficiency Syndrome (HIV/AIDS).

¹⁰⁸⁰ *Ibid.*

The 2014 Africa Check Report¹⁰⁸¹ concluded that:¹⁰⁸²

- As at 31 July 2014, there were 1,469 healthcare professionals employed by the DCS, in addition to contract workers. (This equates to roughly one healthcare professional for every 105 prisoners);
- All inmates undergo a general health assessment on admission;
- Awareness sessions, training for officials and isolation facilities are in place to manage and prevent the spread of communicable diseases;
- Inmates are provided with nutritionally balanced meals, and therapeutic diets are available for those who require them;
- The number of natural deaths in detention dropped 65% between 2004 and the 2013/14 financial year: from 0.9% of the prison population to 0.37%; and
- There have been improvements in the management of HIV/AIDS and TB, two of the biggest killers in prison.

This follows the 2012 Constitutional Court ruling of *Lee v Minister of Correctional Services*.¹⁰⁸³ The court upheld a Western Cape High Court decision that the department was responsible for an inmate, Dudley Lee, contracting tuberculosis (TB) while in detention, likely through overcrowding in cells and prisoner transport; a lack of adequate screening for tuberculosis; poorly ventilated cells and poor nutrition.¹⁰⁸⁴

While the Department of Correctional Services appears to be taking a more aggressive stance towards healthcare provision in correctional centers following the Constitutional Court finding in the *Lee* case, studies by civil society¹⁰⁸⁵ organizations show that under-staffing, overcrowding and inconsistent treatment of disease in prisons remain a serious cause for concern. Many prisons remain hothouses of disease.¹⁰⁸⁶

4.3.3.3 Overcrowding and prison violence

¹⁰⁸¹ Rademeyer J (2014) "Do prisoners have access to better medical facilities than the public?" Africa Check page 1 available at: <http://africacheck.org/reports/do-prisoners-have-access-to-better-medical-facilities-than-the-public/> (accessed on 28 December 2014).

¹⁰⁸² *Ibid.*

¹⁰⁸³ *Lee v Minister of Correctional Services, op. cit.*, (fn 792).

¹⁰⁸⁴ Rademeyer, *op. cit.*, (fn 1081) page 1.

¹⁰⁸⁵ *Ibid.*

¹⁰⁸⁶ *Ibid.*

The realities of prison violence according to Homel and Thompson¹⁰⁸⁷ cannot be explained through an overarching theory of prison violence, but influential schools of thought have emerged and two well-established models can be distinguished.

a) *The deprivation model*

The *deprivation model* argues that the prison environment and deprivation of liberty result in deep psychological trauma and that for reasons of psychological self-preservation prisoners create a deviant prison subculture that promotes violence.¹⁰⁸⁸

b) *The importation model*

The *importation model*, on the other hand, focuses on what prisoners bring into the prison in the form of their personal histories, personal characteristics and social networks, including associations with criminal groups.¹⁰⁸⁹ Even though the empirical research supports both models, there has been an increasing acknowledgement of the critical importance of specific attributes of the social and physical environment of the prison and the “minutiae of the average prison day”.¹⁰⁹⁰ How the prison is organised and how individuals interact with one another shape a dynamic environment and the role of specific situational factors in mediating violence have emerged as crucial to understanding prison violence.¹⁰⁹¹ There have thus emerged two additional theoretical positions in the form of the ‘transactional model’ and the ‘situational model’.¹⁰⁹²

i) *The transactional model*

According to Homel and Thompson¹⁰⁹³ research on the *transactional model* demonstrates a set of complex interactions of individual prisoner characteristics and the prison environment and it can be concluded that prisoners behave differently in different prison settings. This is important because it implies that the variables that increase the risk for violence can be changed and that it should not be assumed that they are inflexible and outside of the control

¹⁰⁸⁷ Homel, R & Thompson, C (2005) *Causes and Prevention of Prison Violence*. In S. O'Toole, & S. Eylands, *Corrections Criminology*, pages 101-108. Sydney: Hawkins Press.

¹⁰⁸⁸ *Id* at (fn 1087) pages 101-108.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*

of prison managers.¹⁰⁹⁴ In this regard, particular mention is made of an institutional variable measuring a defiant or compliant attitude of prisoners towards the prison regime and it was found that if the prison lacked order, prevented prisoner autonomy and used severe punishments even older, normally compliant prisoners were likely to be defiant and non-compliant.¹⁰⁹⁵

ii) *The situational model*

The situational model had its original focus on using the physical and security environment to reduce violence.¹⁰⁹⁶ The situational model, now distinguishes between situational precipitators and situational regulators in a two-stage model.¹⁰⁹⁷

In the first stage of the model, a range of psychological processes are proposed that may actively induce individuals to engage in conduct that they may not otherwise have performed.¹⁰⁹⁸ The behaviour may be avoided entirely if relevant precipitators are adequately controlled. In the event that behaviour is initiated, then, in the second stage of the model, performance of that behaviour is subject to consideration of the consequences that are likely to follow.¹⁰⁹⁹ The absence of appropriate disincentives or constraints will permit or encourage behaviour while appropriate disincentives or constraints will prevent or discourage behaviour.¹¹⁰⁰ Situational precipitators include:¹¹⁰¹

- environmental cues that prompt the individual to behave antisocially, which can be controlled by such means as “controlling triggers”;
- environmental cues that exert pressure to misbehave, which can be controlled by such means as “reducing inappropriate conformity”;
- environmental cues that reduce self-control and allow individuals to engage in behaviour that they would otherwise self-censure, which can be controlled by means such as rule setting or clarifying responsibility; and

¹⁰⁹⁴ *Ibid.*

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ *Ibid.*

¹⁰⁹⁷ Wortley, R (2002) *Situational prison control: crime prevention in correctional institutions*. Cambridge: Cambridge University Press.

¹⁰⁹⁸ *Ibid.*, at page 64.

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ *Ibid.*

¹¹⁰¹ Homel and Thompson, *op. cit.*, (fn 1087) pages 101-108.

- environmental cues that can produce emotional arousal that provokes a violent reaction which can be controlled by reducing frustration, for example reducing overcrowding.

Prisoners face a substantial risk of being coerced, assaulted, raped and even killed at the hands of prison officials and fellow prisoners.¹¹⁰² Officials also face a substantial risk of violent victimisation by prisoners. Even though the Correctional Services Act and case law¹¹⁰³ are clear that it is the duty of the state to ensure safe custody and to maintain standards of human dignity, violence and the threat of violence forms an integral part of the prison experience.¹¹⁰⁴

The first issue is to clarify what is meant by “violence” or “violent incidents” in a prison setting. Official statistics from the Department of Correctional Services and the Judicial Inspectorate for Correctional Services (JICS) refer firstly to “deaths due to unnatural causes” as opposed to “deaths due to natural causes”.

Unnatural causes include murders, suicides, and accidents.¹¹⁰⁵ It should, however, be added that a prisoner may die due to so-called natural causes (for example Aids related illnesses) but if that HIV was initially contracted as a result of being raped in prison, the distinction between natural and unnatural causes then becomes blurred. Similarly, a prisoner may die due to, for example, diabetes or asthma because he was not receiving proper care from the Department of Correctional Services.¹¹⁰⁶ From a human rights perspective such a death was not the result of natural causes. It is therefore foreseeable that the number of prisoners dying from unnatural causes may indeed be higher if more thorough investigations are done of all deaths recorded as due to “natural causes” and some will be reclassified as due to “unnatural

¹¹⁰² Muntingh, L (2009) “Reducing prison violence: implications from the literature for South Africa”. Civil Society Prison Reform Initiative Research Report No. 17, page 5, available at: <http://cspri.org.za/publications/research-reports/Reducing%20Prison%20Violence.pdf> (accessed on 27 December 2014).

¹¹⁰³ *Whittaker and Morant v Roos and Bateman* 1912 AD 92.

¹¹⁰⁴ Muntingh, *op. cit.*, (fn 1102) page 5.

¹¹⁰⁵ *Id* at (fn 1102), page 6.

¹¹⁰⁶ *Ibid.*

causes”.¹¹⁰⁷ The second category of data is “assault” which is sub-divided into inmate-on-inmate assaults, official-on-inmate assaults, and inmate-on-official assault.¹¹⁰⁸

Studies on overcrowding has nonetheless linked it with a range of adverse outcomes for prisoners such as increased self-injury, heightened stress levels and perceptions of aggressive behaviour in other prisoners, increased drug use, and higher levels in inter-prisoner violence.¹¹⁰⁹ It then appears that overcrowding creates the environment for other adverse consequences which in turn have a closer link with prison violence.¹¹¹⁰

According to Oneale,¹¹¹¹ there is no end to the shocking abuse that continues to flourish inside South African prisons. The disgraceful and uncontrolled criminal elements lurking inside the prison walls often go unnoticed by citizens of the country.¹¹¹² Deterioration and active illegal crimes within prisons pose a danger to remand detainees who are often victims of prison gangs.¹¹¹³ The claims of abuse spans back over a decade and prisoners from 2005 are suing a maximum-security prison near Port Elizabeth.¹¹¹⁴ They are seeking financial compensation for injuries they sustained while serving their time including claims of electrical shocks, being forced to strip naked, and being subjected to beatings. Inmates allege that wardens often smell of alcohol and walk around with their uniforms covered in blood from prisoners they have hit.¹¹¹⁵ There are also claims that medical treatment was denied to prisoners after they had sustained severe injuries. South African prisons are appallingly overcrowded.¹¹¹⁶

¹¹⁰⁷ *Ibid.*

¹¹⁰⁸ *Ibid.*

¹¹⁰⁹ Byrne, J and Hummer, D (2008) *Examining the Impact of Institutional Culture on Prison Violence and Disorder - an evidence-based review*. In J. Byrne, D. Hummer, & F. Taxman *The Culture of Prison Violence*. Boston: Pearson, page 47.

¹¹¹⁰ Muntingh, *op. cit.*, (fn 1102) page 14.

¹¹¹¹ Oneale, L (2014) “South African prisons: shocking abuse recorded - prisoners often victimized by prison gangs and wardens,” page 1, also available at: <http://www.censorbugbear.org/farmitracker/reports/view/2645#rOzZMR3jJHC7qh4p.99> (accessed on 5 January 2015).

¹¹¹² *Ibid.*

¹¹¹³ *Ibid.*

¹¹¹⁴ *Ibid.*

¹¹¹⁵ *Ibid.*

¹¹¹⁶ *Ibid.*

Fights often happen between inmates over trivial matters such as a slice of stolen bread.¹¹¹⁷ The guards do not hesitate to use their batons and hit prisoners who appear to cause trouble. If any attempt is made to double cross inmates, beatings occur delivered by inmate gangs who have their own set of rules control numbers.¹¹¹⁸

According to Oneale,¹¹¹⁹ many inmates spend years behind bars just waiting for their trial to reach the courts, and the declining justice system does little to protect the criminals who are subjected to more crime inside the prison walls than outside. The justice system fails the entire correctional department services and corruption rules inside the South African prisons. The shocking abuse continues without any apparent intention on the part of authorities to prohibit the ill-treatment of prisoners.¹¹²⁰

4.3.3.4 *Gangs*

According to Corbett,¹¹²¹ the issue of overcrowding in Pollsmoor Prison has been a topic of contention for many years and is symptomatic of a global issue of prison overcrowding. In 2014, Pollsmoor prison had a reputation for being one of the worst prisons in the world, where gang culture prevails and people get lost in the system, with some detainees awaiting trial for more than two years.¹¹²² Overcrowding is not a simple problem to resolve; it reflects certain inadequacies and a lack of accountability in the South African justice system, while also holding a mirror up to the deep sutures in our society at large.¹¹²³

Money is the ruler inside the prison and can be used to smuggle drugs into the cells.¹¹²⁴ The guards are often bribed to bring phones, drugs, and other commodities into the cells and inmates claim more drugs are available inside than on the outside.¹¹²⁵ Money will buy protection from gang related rapes but guards, for a price, will arrange rapes of young prisoners. Two guards will stand outside a cell door while up to eight people rape the victim

¹¹¹⁷ *Ibid.*

¹¹¹⁸ *Ibid.*

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.*

¹¹²¹ Corbett, S "Analysis: Combating the global epidemic of prison overcrowding." Daily Maverick 14 October 2014, paragraph 1, available at: <http://www.dailymaverick.co.za/article/2014-10-14-analysis-combating-the-global-epidemic-of-prison-overcrowding/> - accessed on 5 January 2015.

¹¹²² *Ibid.*

¹¹²³ *Ibid.*

¹¹²⁴ Oneale, *op. cit.*, (fn 1111) page 1.

¹¹²⁵ *Ibid.*

and condoms are an absolute necessity in prison. Gang leaders have the option of buying a juvenile prisoner by negotiating with wardens who will then transfer the selected person to the leader's cell where he will be used as a sex slave until he is discarded or sold to another prisoner.¹¹²⁶ First time rape victims often are exposed to repeated rape abuse.¹¹²⁷

4.3.3.5 Overcrowding - human rights in international law and foreign jurisdictions

Lawyers for Human Rights¹¹²⁸ established the Penal Reform Programme in July 2014 amid concerns for the protection of the rights of prisoners and detainees and constitutional compliance in relation to the imposition of punishment, sentencing, independent oversight and conditions of detentions. As at 2014, prisons were occupied at a fairly moderate rate of approximately 130 percent.¹¹²⁹ There are 43712 remand inmates out of a total of 157179 inmates.¹¹³⁰

It is vitally important to note that international law has made it abundantly clear that overcrowding itself (the simple breach of space norms without any exacerbatory factors) amounts to ill treatment.¹¹³¹

4.3.3.6 Conclusion on overcrowding

Several factors of overcrowding may be distinguished:

- overcrowding results first of all in a restricted living space and associated losses of privacy and human dignity (which in turn affects trust and confidence of prisoners in the legitimacy of prison regimes);¹¹³²

¹¹²⁶ *Ibid.*

¹¹²⁷ *Ibid.*

¹¹²⁸ Ballard, C (2014) Lawyers for Human Rights Submissions. Department of Correctional Services' 2013/2014 Annual Report, page 1, available at: <http://www.pmg.org.za/files/141015lhr.pdf> - accessed on 28 December 2014.

¹¹²⁹ *Ibid.*

¹¹³⁰ *Id* at (fn 1128) page 2.

¹¹³¹ *Peers v Greece* (2001) 33 EHRR 51; *Kalashnikov v Russia* (2003) 36 EHRR 34; *Poltoratskiy v Ukraine* (application no. 38812/97); reported judgment of 29 April 2003. Similarly, the Human Rights Committee has found that overcrowding constitutes a violation of Article 10(1) of the International Covenant on Civil and Political Rights, which requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

¹¹³² Hans-Jörg, *op. cit.*, (fn 146) page 1.

- overcrowding may result in a reduction of general services to be provided in a prison facility in order to comply with the standards set for access to medical treatment, sanitary equipment and educational, training or rehabilitative programs; and¹¹³³
- rehabilitative needs may be affected also through assigning low risk prisoners to maximum security units because other prison space is not available.¹¹³⁴

Prison overcrowding is not just a matter of statistics and numbers.¹¹³⁵ The effects on the lives of inmates are severe. Victor Nkomo, who was arrested for alleged complicity in a casino heist, has been detained in remand for nearly seven years now. He is allowed out of his cell for an hour a day and has no access to educational or other reading material.¹¹³⁶ Slowly but surely Nkomo grew apart from his wife, who married a new partner in his absence. His son, who was 10 years old when Nkomo was arrested, is now a teenager who does not really know his father behind bars.¹¹³⁷

Prison overcrowding, then is to some extent a reflection of the number of people in society at large without significant assets, more likely than others to find themselves in trouble with the law and are above all a reflection of a more stringent public demand for punishment that stands in clear contradiction to the official policy of rehabilitating offenders.¹¹³⁸

4.4 Poor Administration within the Justice Department

The poor administration within South Africa's justice department may be regarded as one of the reasons for the poor prison conditions and high number of overcrowding in the remand detention section of prisons. This department administers both the department of justice and constitutional development as well as the correctional services department. This could be one of the factors for the high number of overcrowding within the correctional facilities.

¹¹³³ *Ibid.*

¹¹³⁴ *Ibid.*

¹¹³⁵ Hopkins, *op. cit.*, (fn 757) page 5.

¹¹³⁶ *Ibid.*

¹¹³⁷ *Ibid.*

¹¹³⁸ Dissel and Ellis, *op. cit.*, (fn 1006) page 10.

During 2010 the Public Service Commission (PSC) conducted inspections in the Department of Police focusing on the detective services.¹¹³⁹ One of the key findings of the inspections was the delay in the finalisation of cases in the courts which led to a backlog. The definition given by the Department of Justice and Constitutional Development (DOJ&CD) to the concept of a backlog, refers to “all cases longer than six (6) months on the district court roll, nine (9) months on the regional courts roll and twelve (12) months on the High Court’s roll”.

Given the crucial role played by the courts in effecting justice, the PSC decided in 2011 to conduct service delivery inspections of the courts¹¹⁴⁰ in the Limpopo Province in the DOJ&CD. The purpose of these inspections was to determine the reasons for the backlog of cases at courts, especially those that require detective service.¹¹⁴¹ The inspections led by the PSC found that insufficient human and infrastructural resources at the regional courts have contributed to the backlog of cases.¹¹⁴² Whilst protocols and case flow management structures have been put in place to enhance the flow of cases, the lack of cooperation amongst stakeholders has undermined the efficiency thereof.¹¹⁴³

The report comments on the status of backlog cases in regional courts as defined by the DOJ&CD. During engagement with officials at DOJ&CD, it was acknowledged that there was a backlog of cases at all levels of the courts. However, the matter is more prevalent at regional courts. The backlog of cases has a negative impact on the constitutional obligation for speedy justice to society as cases drag for longer periods before they are finalised.¹¹⁴⁴

¹¹³⁹ Report on Inspections of Regional Courts, Department of Justice and Constitutional Development: Limpopo Province (2011) Public Service Commission, available at: <http://www.psc.gov.za/documents/2013/INSPECTIONS%20DOJCD%20LIMPOPO%20REPORT%2006%20DEC%202011.pdf> (accessed on 10 January 2015).

¹¹⁴⁰ *Ibid.* Courts that were inspected were: Tzaneen Regional Court, Polokwane Regional Court and Polokwane Magistrate’s Court.

¹¹⁴¹ *Ibid.*

¹¹⁴² *Ibid.*

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Ibid.*

The PSC drew up the following table which indicates case backlog in regional courts in Limpopo from 30 June 2006 up to and including 30 June 2011:

*Table 2: Backlog of cases at Regional Courts in Limpopo*¹¹⁴⁵

CASE BACKLOG	OUTSTANDING ROLL	BACKLOG	% BACKLOG
Baseline:			
30 June 2006	47 343	20 452	43%
31 March 2007	46 418	19 481	42%
31 March 2008	50 483	17 333	34%
31 March 2009	51 796	16 083	31%
31 March 2010	50 708	16 054	31%
31 March 2011	52 756	16 875	32%
30 June 2011	51 521	17 785	34.5%
(8.8% increase from 47 343 in June 2006 to 51 521 in June 2011)		(13% decrease from 20 452 in June 2006 to 17 785 in June 2011)	

The report explains the reasons contributing to the backlog of cases. The inspection team established that there were various challenges that contributed to the backlog of cases at the regional court. The following shows some of the challenges that contributed immensely to the case backlog:

(a) Human resource constraints:

One of the challenges experienced by the courts was the insufficient number of court interpreters. This is further exacerbated by the lack of interpreters to interpret certain (mostly foreign) languages. Furthermore, it was established that there are insufficient human resources, such as prosecutors and Legal Aid practitioners at the courts. The shortage of such central resources impacts on the finalisation of the case. In addition, it was found that the creation and filing of vacant magistrates' posts takes long and thus hampers performance in many provinces.¹¹⁴⁶

It was suggested that courts were equipped with the sufficient human resources to enable them to deliver efficient services to the citizens.¹¹⁴⁷

¹¹⁴⁵ Public Service Commission Annual Report 2010/2011, page 18, available at: http://www.psc.gov.za/documents/2011/PSC%20Annual%20Report%202010_2011.pdf (accessed on 23 December 2014).

¹¹⁴⁶ Report on Inspections of Regional Courts, Department of Justice and Constitutional Development: Limpopo Province, *op. cit.*, (fn 1139).

¹¹⁴⁷ *Ibid.*

(b) Lack of infrastructure:

The inspection team also found that there is a lack of infrastructure (insufficient court rooms) to render court services and also serve as offices. Furthermore, the inspection team learnt that in some instances the hearing of cases could not take place as a result of a lack of court rooms. It was also established that some of the facilities at the courts are appalling to an extent where some courts do not have drinking water on site or toilet facilities are not in working order. Without the necessary facilities such as court rooms and required equipment, it would be difficult for court sessions to take place, thus contributing to the case backlog.¹¹⁴⁸

(c) Poor utilisation of court hours:

The practical guide on court and case flow management stipulates that prescribed court hours are from 09h00 to 16h00 with relevant adjournments. This should translate into an average of 4 hours and 30 minutes court sitting a day.¹¹⁴⁹ However, regional courts generally sit for 03:31 hours per day.¹¹⁵⁰

(d) Poor Police Investigation:

Poor police investigation was affecting progress of some cases, in some instances, very serious cases. As a result, a heavy burden was placed on the prosecutors to not only guide the investigation, but often to direct the investigations to ensure that justice is served.¹¹⁵¹

On-going or incomplete police investigations, frequently cited by the State as a reason for denying bail or the continued detention of an accused in terms of section 60(4) (c) of the Criminal Procedure Act of 1977, has been considered in several judgments.¹¹⁵² In *Sanderson*

¹¹⁴⁸

Ibid.

¹¹⁴⁹

Ibid.

¹¹⁵⁰

Ibid. Table indicates the average courts hours for the regional courts.

Regional Court hours financial years	Court hours
Average hours 2011/12	03:31
Average hours 2010/11	03:34
Average hours 2009/10	03:45
Average hours 2008/09	03:49

¹¹⁵¹

Ibid.

¹¹⁵²

Ballard, *op. cit.*, (fn 1128) page 2. Clare Ballard, from the Community Law Centre conducted a research on remand detention in South Africa and reported on the current law and proposals for reform.

*v Attorney-General, Eastern Cape*¹¹⁵³ and *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins v Acting Regional Magistrate, Cape Town*¹¹⁵⁴ the courts looked at systematic delays. In the *Sanderson* case, Kriegler J commented on systematic delay as follows:¹¹⁵⁵

“Under this heading I would place resource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion. Systematic delays are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systematic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of State policy – it is intended the State should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage. Even if one does accept that systematic factors justify delay, as one must at present, they can only do so for a certain time...in principle (courts) should not allow claims of systematic delay to render the right nugatory.”

In addition to the comments of Kriegler J in the *Sanderson*¹¹⁵⁶ case, the court in the *Broome*¹¹⁵⁷ case also commented on systematic delays by stating as follows:

“I am in agreement with the contention of counsel for the respective accused that this delay is both inexplicable and inexcusable. The court a quo, according to me, was correct in making the finding that the prosecuting authority had been responsible for an undue and excessive delay and that the fundamental rights of the accused to a speedy trial had been infringed. In my view, however, the court a quo misdirected itself in coming to the conclusion that the delay in bringing the matter to court, from October 1997 to September 2004, was to a large extent caused by staff shortages and other systematic factors in the office of the DPP and that these factors, to some extent, mitigate the duration of the delay. The discrepancies in the two reports of the DPP clearly demonstrate that the delay cannot reasonably and adequately be explained by them. There are, if any, reasonable or substantial factors that mitigate the undue delay from October 1997 to September 2004 in bringing this matter to court.”

¹¹⁵³ *Sanderson v Attorney-General, Eastern Cape op. cit.*, (fn 6) paragraph 35-37.

¹¹⁵⁴ *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins v Acting Regional Magistrate, Cape Town, op. cit.*, (fn 703).

¹¹⁵⁵ *Sanderson v Attorney-General, Eastern Cape op. cit.*, (fn 6) paragraph 35-37.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins v Acting Regional Magistrate, Cape Town, op. cit.*, (fn 703) paragraph 66.

4.4.1 Causes and justifiability of court delays

The *Wits Justice Project* followed a case of ill co-accused, charged with murder and robbery, allegedly committed in 2007 in Krugersdorp. They have been in remand detention in Johannesburg's Sun City Prison for six years.¹¹⁵⁸ The delay was for various reasons. The Judge was allocated to another case, which ground the trial to a stand-still for months. Then lawyers and the prosecutor claimed illness or vehicle problems and did not show up, often communicating their absence through last-minute text messages. There were about 50 ad-hoc postponements, in addition to longer-term delays that ended up to 13 months in total.¹¹⁵⁹

Most of the delays are not attributable to individual offices involved in the management of the court through the value chain, but are systemic.¹¹⁶⁰ They range from lack of capacity to ineffective coordination between the various role players in the criminal justice system,¹¹⁶¹ inadequate skilled personnel, lack of adequate court infrastructure, limited capacity of the Legal Aid Board, manual systems coupled with the introduction of new technology, strikes by public servants (usually interpreters) are the usual causes of delays in the finalization of cases.¹¹⁶² These factors contribute to the case backlog.

This situation was explained in the case of *S v Motsasi*¹¹⁶³ Where the court ordered an investigation under section 342A of the Criminal Procedure Act 51 of 1977, into the reasons for the unreasonable delay in the finalization of the case as a result of the fact that one of the accused persons, who was in custody, was not brought to court on time. Initially the investigation was limited to the Department of Correctional Services, but upon receiving its report the court also requested the Department of Justice and the South African Police Service to report to it on their role in the matter.¹¹⁶⁴ The Court finally held in the end that the finalization of the proceedings in the case had been unreasonably delayed as a result of the non-availability of the State Advocate, the over-population of the prison, the actions of members of the prison service who were absent without leave, and the actions of the

¹¹⁵⁸ Wits Justice Project, *op. cit.*, (fn 46) page 5.

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ Criminal Justice Review, *op.cit.*, (716) page 23.

¹¹⁶¹ *Ibid.*

¹¹⁶² *Ibid.*

¹¹⁶³ *S v Motsasi* 1998 (2) SACR 35 (W).

¹¹⁶⁴ Criminal Justice Review, *op.cit.*, (716) page 24.

Registrar's office which failed to communicate properly with the prison authorities.¹¹⁶⁵ Again, the question could be raised whether in a different court in a different area there would really have been different conclusions to be reached, as a result of a section 342A investigation, in the absence of the implementation of measures to address the well known and documented short comings of the criminal justice system.¹¹⁶⁶ In the final instance the court did warn that courts in general should be careful in undertaking section 342A investigations, due to the extent of such investigations and the fact that departments blame each other, which in turn broadens the scope of such investigations.¹¹⁶⁷

In the case of *Wynne-Jones and Another v S In re: S v Wynne-Jones and Another*¹¹⁶⁸ the court is of the view and finding that in spite of the fact of the applicants apportioned and arrogated all blame and guilt on the respondent for delays in the start of or in this prosecution, both parties have played a part in the delays. The question is, to what extent did each contribute and whether the respondent's contribution was such that it would move the Court to strike the matter off the roll in terms of section 342A of the Act.¹¹⁶⁹ Although the Court agrees that there is delay in the prosecution of the case, the Court cannot agree that the reasons advanced by the respondent are unreasonable. Equally, it is the Court's view and finding that the applicants were selective in laying bare their grounds for the case to be struck off the roll based on this ground.¹¹⁷⁰

4.4.2 Conclusion on court administration

It does not matter how competent court officials are, or how delicately constructed the legislative framework is – if there is no physical infrastructure to support it, delays and postponements are inevitable.¹¹⁷¹ It is not only physical infrastructure that hampers operations. Electronic court infrastructure is also an issue that plagues the effectiveness of our criminal justice system. An over-loaded court roll is a key part of the delayed proceedings, which can result in multiple remands and lengthy detention.¹¹⁷² Other factors,

¹¹⁶⁵ *S v Motsasi, op.cit.*, (fn 1163).

¹¹⁶⁶ Criminal Justice Review, *op.cit.*, (716) page 24.

¹¹⁶⁷ *S v Motsasi, op.cit.*, (fn 1163).

¹¹⁶⁸ *Wynne-Jones and Another v S In re: S v Wynne-Jones and Another* (2012) 2 All SA 311 (GSJ).

¹¹⁶⁹ *Id* at (fn 1168) paragraph 69.

¹¹⁷⁰ *Id* at (fn 1168) paragraph 80.

¹¹⁷¹ Leslie, *op. cit.*, (fn 65) page 21.

¹¹⁷² *Id* at (fn 65), page 22.

such as number of judicial officers working, the number of support and administrative personnel available, and the ability to get court interpreters in court quickly, will also affect court efficiency.¹¹⁷³

South Africa needs a policy that regulates the time-frame for dealing with specific cases such as with sexual offences cases.¹¹⁷⁴ One of the main issues in respect of delays in South Africa is the lack of forensic capability.¹¹⁷⁵ Sometimes forensic evidence needs to be sent to Pretoria to be analysed and that takes time, but what is of most concern is that some cases are dealt with speedily while others drag on. This inconsistency needs to be addressed.¹¹⁷⁶

Poorly filled out cover sheets have a direct impact on the length of detention in a remand facility.¹¹⁷⁷ These are a range of factors that influence the quality of detective work in South Africa:

- (a) dockets are often carried over (from the previous year) for reasons outside the control of the detective, for example, delays with forensic analysis, court delays because of long court rolls and repeatedly remanded cases;¹¹⁷⁸
- (b) in some cases, individual detectives add to their burden by their own sloppy work such as poor police docket administration, poor quality of statements, and bad time management;¹¹⁷⁹
- (c) pressures increase and quality of work deteriorate at stations or units where there is a lack of or poor detective and/or station management.¹¹⁸⁰

According to a report by from *The FW De Klerk Foundation* practitioners within the legal fraternity such as attorneys, advocates and prosecutors have identified the following factors as causes for unacceptable backlogs:

¹¹⁷³ *Ibid.*

¹¹⁷⁴ Stander, Y (2014) "Rape, Murder Trial Delay 'Criminal'." IOL News. Cape Argus, page 1 available at: <http://www.iol.co.za/news/crime-courts/rape-murder-trial-delay-criminal-1.1629310> (accessed on 6 January 2015).

¹¹⁷⁵ *Ibid.*

¹¹⁷⁶ *Ibid.*

¹¹⁷⁷ Leslie, *op. cit.*, (fn 65) page 20.

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ *Ibid.*

- The South African Police Services (SAPS) take very long to finish their investigations;
- The poor quality of many SAPS investigations;
- Court rolls (Regional and District Courts) that are supposed to start at 09:00am but only start as late as 12:00 noon or thereafter;
- Magistrates arriving for work only after 12:00 noon or thereafter (note that this is contrary to Table 1 above which states that courts work 03:49 hours per day);
- Instances where presiding officers take or are granted inordinate periods of leave of absence during Court proceedings or running trials;
- Escalating crime figures;
- Understaffing of courts especially magistrates, prosecutors and interpreters;
- A severe shortage of adequate courtrooms and/or buildings;
- Poor case management;
- Tampering with, or loss of case records;
- Mismanagement of the salaries of legal professionals within the department; and
- Failure to fill large numbers of vacant magistrates and judges posts – even where suitable candidates are available.¹¹⁸¹

One may tend to agree with Lancaster¹¹⁸² that South Africa's system of criminal justice is in crisis.¹¹⁸³ If its ability to prevent and deter crime is any measure of its effectiveness, then reforming the system is now not only a necessity but a national priority. Unfortunately, the system cannot be fixed easily and quickly; it is not characterised by a single problem that can be resolved speedily, but is characterised by multiple factors, many of which cause delays in other parts of the criminal justice pipeline.¹¹⁸⁴ Support for this statement can be found in the

¹¹⁸¹ Advocate du Preez, *op. cit.*, (fn 1042).

¹¹⁸² Lancaster, L (2013) "Twenty years of Justice Reform in South Africa: what is there to show for it?" Institute for Security Studies, Crime and Justice Hub. Governance, Crime and Justice Division, ISS, Pretoria, page 1, available at: <http://www.issafrica.org/uploads/5th-crime-conference-Booklet-FINAL.pdf> (accessed on 6 January 2015).

¹¹⁸³ *Ibid.*

¹¹⁸⁴ *Ibid.*

Sanderson case where Kriegler J not only expressed dissatisfaction with systematic delays but also emphasised with violation of the rights enshrined in the Bill of Rights.¹¹⁸⁵

The presumption of innocence is the cornerstone of the Constitution.¹¹⁸⁶ If Judges and Magistrates fully understood the effect on inmates lives' of repeated postponements or the implications of unreasonable delays resulting from lost transcripts, the granting of unaffordable bail or shoddy police investigations, they might consider the human rights implications of their decisions.¹¹⁸⁷

4.5 Delay in appeal proceedings and its effect on a detained person's rights and concomitant remedy

The timing of the hearing of an appeal post-conviction, post- acquittal or post- a denial of bail, is not and cannot be cast in stone¹¹⁸⁸ and obviously impacts on the unsentenced or, sentenced offender or remand detainee. There are many variables, ranging from procuring of a record to allocation of date for hearing, which are beyond the control of the litigants.¹¹⁸⁹ However, what can be required by an appellant are diligence on the part of those managing the process, knowledge of both the law and procedure on the part of legal representatives, mindfulness of and adherence to Constitutional principles on the part of the litigant and legal representatives. Where the appellant is an organ of State and where the State seeks to appeal an acquittal,¹¹⁹⁰ then the standards should be more stringently demanded and more carefully observed.¹¹⁹¹

Until the appeal process is concluded, it cannot be said that a trial has reached finality.¹¹⁹² In *Phillips v The Director of Public Prosecutions and Another*,¹¹⁹³ the Court held that standards

¹¹⁸⁵ *Sanderson v Attorney-General, Eastern Cape, op. cit.*, (fn 6) paragraph 36, where the Court held that "Nevertheless, there must come a time when systematic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of State policy – it is intended the State should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage. Even if one does accept that systematic factors justify delay, as one must at present, they can only do so for a certain time...in principle (courts) should not allow claims of systematic delay to render the right nugatory."

¹¹⁸⁶ Raphaely, *op. cit.*, (fn 1046) page 4.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ *Phillips v The Director of Public Prosecutions and Another* 2011 (ZAGPJHC) 51 (10 June 2011), paragraph 56.

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ The State can only appeal an acquittal on a point of law and not on the merits or facts of the case.

¹¹⁹¹ *Ibid.*

¹¹⁹² *Ibid.*

of expedition to procure a “fair trial” continue to apply to all appeals. Furthermore, the Court emphasised that when scrutinizing appeals from the magistrate’s courts, one must be mindful that every accused person has the right “to have their trial begin and conclude without unreasonable delay”.¹¹⁹⁴

In the case of *The Director of Public Prosecutions and Minister of Justice and Constitutional Development v Phillips*,¹¹⁹⁵ Navsa JA analysed the judgment by Satchwell J in the Court of first instance. Navsa JA stated that Satchwell J considered the delay in the prosecution of the appeal, which related in the main to the filing of the record, to be the primary question to be addressed.

Satchwell J stated that since the State was *dominus litis* in the appeal, it was the primary responsibility of the State to ensure the compilation and filing with the Court of Appeal. Satchwell J had regard to the DPP’s tardiness in obtaining funding for obtaining the record.

Satchwell J noted that it took almost eight months after the DPP’s notice of appeal before his office applied for such funding.¹¹⁹⁶ She noted further that the details of the difficulties which the DPP had encountered in respect of the record that had been supplied by the service provider, had not been communicated to Phillip’s legal representatives. This, Satchwell J reasoned, rightly caused legal representatives to be sceptical. The real reason for the delay was funding and inexplicable extensive delays that occurred subsequent to the record being supplied by the service provider.¹¹⁹⁷

Satchwell J went on to consider whether the delay was such as to justify the remedy of a permanent stay of the DPP’s appeal by taking consideration of the following factors of the case:

- (a) more than eleven years have elapsed since the respondent was arrested. Seven years

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ *The Director of Public Prosecutions and Minister of Justice and Constitutional Development v Phillips* (2012) ZASCA 140.

¹¹⁹⁶ *Ibid*, paragraph 43.

¹¹⁹⁷ *Ibid.*

have passed since he first pleaded. The trial concluded some four and a half years from date of this Court's finding. There has been a hiatus of two and a half years since judgment was handed down;¹¹⁹⁸

- (b) the State noted its appeal two and a half years and five months from date of this Court's finding. The appeal has not yet been heard which delay must be ascribed to the office of the DPP;¹¹⁹⁹
- (c) absent a complete record, the epic continues without land in sight. There is no indication how missing portions of the record will be reconstructed to the approval of an appeal court. Such further delay would continue to fall upon the shoulders of the office of the DPP;¹²⁰⁰
- (d) if the Respondent's acquittal is overturned and trial is reopened, then the Respondent will have to mount his defence at eleven to twelve years after he was initially charged. The prejudice to the Respondent is considerable: witnesses become unavailable and neither the Respondent nor the defence witnesses can be expected to remember events more than eleven years ago clearly or confidently;¹²⁰¹
- (e) the Respondent suffers on-going prejudice as a result of the delays in pursuit of finalizing the appeal. Some of these would be suffered by all accused persons in his position;¹²⁰²
- (f) financial burden cannot have been or continue to be inconsiderable. The State has disclosed it has spent "millions" on this litigation and so, the court assumes, Respondent has.¹²⁰³

Satchwell J was satisfied that the Respondent's right to a fair trial had been infringed by the delay in finalizing the appeal. Satchwell J took the view that the delay in prosecuting the appeal served inevitably and irremediably to taint the overall substantive fairness of the trial.¹²⁰⁴

¹¹⁹⁸ *Ibid*, paragraph 49.

¹¹⁹⁹ *Ibid*, paragraph 55.

¹²⁰⁰ *Ibid*.

¹²⁰¹ *Ibid*.

¹²⁰² *Ibid*.

¹²⁰³ *Ibid*.

¹²⁰⁴ *Ibid*.

The Court addressed the Respondent's contention that his right to a fair trial was infringed, more especially because of the delay in prosecuting the appeal. The following were considered to be the most important factors on the enquiry: (1) the nature of the prejudice suffered by the accused, from incarceration to restrictive bail conditions and trial prejudice even carried through to mild forms of anxiety. The greater the prejudice, the shorter should the period be within which the accused is tried; (2) the nature of the case is important. In this regard, Judges must bring their own experiences to bear in determining whether a delay is over-lengthy and; (3) systematic delays should be considered.¹²⁰⁵

At the crux of the application is the question what constitutes 'reasonable' delay'.¹²⁰⁶ The Court held that this question must be answered against the background of the time already lapsed from arrest and the reasons therefore, the time elapsed from noting the appeal and the reasons therefore, the time likely to pass before appeal is finalized, the nature of the charges, the import of the appeal, the implications of delay upon trial proceedings, the impact upon the accused and broader considerations for the criminal justice system.¹²⁰⁷

Navsa JA held that the decision by the Court below (decision of Satchwell J) to order a permanent stay of proceedings was correct:¹²⁰⁸ she was correct in laying the fault for the delay at the door of the Director of Public Prosecutions; she was correct to conclude that the inordinate delay was inexcusable.¹²⁰⁹ The learned judge was correct in her reasoning about the impact of the delay on the trial that itself was unduly prolonged.¹²¹⁰ The respondent (in the appeal Court) placed reliance on the delay in the prosecution of that appeal, which he contended ultimately infringed his rights to a fair trial guaranteed by s 35(3) of the Constitution.¹²¹¹ Navsa JA agreed with this submission that this part of the respondent's case is based on distinct facts which arose, in the main, subsequent to the order that is intended to be appealed against.¹²¹² The Phillips case is very important in respect of the circumstances under which a Court will grant a permanent stay of prosecution. It confirms the principles

¹²⁰⁵ *Ibid.*

¹²⁰⁶ *Ibid.*

¹²⁰⁷ *Ibid.*

¹²⁰⁸ *Ibid.*

¹²⁰⁹ *Ibid.*

¹²¹⁰ *Ibid.*

¹²¹¹ *Id* at (fn 1195) paragraph 31.

¹²¹² *Ibid.*

that appeals must be prosecuted within a reasonable time and the effect which a failure will have on an accused's constitutional rights.

4.6 Conclusion on the consequences and impact of delayed trials in South Africa

The prevalence of poor prison conditions and serious overcrowding in South African prisons indicate that detained and unconvicted accused persons' are being "punished" for a crime which they have not yet been found to have committed. Their constitutional rights to proper hygiene and sanitation, humane living conditions and non-degrading treatment are infringed as a result of poor prison conditions and serious overcrowding. The right to proper hygiene and sanitation and humane living conditions are of paramount importance. These rights also fall within the list of international human rights that are guaranteed to each and every citizen of a country.

The poor administration within the Justice Department is unacceptable. Servants or employees of the State do not seem to be bothered about striving to uphold the provisions of our Constitution. It seems that government employees merely report to work only to receive a salary at the end of the month. There needs to be a shift in the objectives aimed to be achieved to promote good values.

Internationally, South Africa does not fare well under the subject of prison conditions and overcrowding. However, South African poor prison conditions and overcrowding is not too far off from several international countries experiencing the same problem. Evidently South Africa is failing to abide by international agreements and covenants, of which it is a party to. Several of the covenants provide for detained persons rights to proper, decent and humane conditions of living. South Africa's failure to meet up to these international standards and rules creates a poor and negative image for the country and at the same time the country's detained awaiting trial population are suffering.

Despite attempts by the legislature to alleviate the issues relating to poor prison conditions, overcrowding and infringement of remand detainees human rights, there seems to be only a slight decrease in remand detainee population, as indicated by the annual report in 2013/2014. However, the issue of poor prison conditions still remains.

CHAPTER 5

SOLUTIONS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter focuses on possible solutions and recommendations in respect of the problems discussed in Chapters 2, 3 and 4.

Focus will be given to solutions in respect of remand detention in South Africa relating to the bail system in South Africa and the issue of overcrowding in South Africa. Plea bargaining may be a useful procedure for speedy completion of a trial but it may be used by the State in such a way that it infringes on the rights of a suspect. The Constitution and relevant legislation provides for the instances of delayed trials and unreasonable delay as well as the procedure for infringements. However, could the problem lie in the fact that these laws are not properly enforced and executed?

Section 49G of Act 111 of 1998 addressed several problems relating to pre-trial detention and remand detainees' rights. However, there still remains a vital problem regarding detention of remand detainees and their length of stay in a correctional facility.

5.2 Solutions proposed

A high share of remand detainees could be as a result of criminal courts making excessive use of pre-trial detention.¹²¹³ This again may be as a result of practices which despite available alternatives do not make adequate use of such instruments, such as section 49G of Act 111 of 1998.¹²¹⁴

Arbitrary arrest, in which case people are arrested while police are still finalising their investigation, must be reduced.¹²¹⁵ When the police do make an arrest, they must have enough evidence to present at the first hearing.¹²¹⁶ This will reduce the number of appearances and help to set earlier dates.¹²¹⁷

¹²¹³ Hans-Jörg, *op. cit.*, (fn 146), page 34.

¹²¹⁴ *Ibid.*

¹²¹⁵ Wits Justice Project, *op. cit.*, (fn 46) page 8.

¹²¹⁶ *Ibid.*

¹²¹⁷ *Ibid.*

It is of extreme importance that prison reform is not regarded in isolation from the broader criminal justice reform.¹²¹⁸ Ineffective prison reform is dependent on the improvement and reasoning of criminal justice policies, including crime prevention and sentencing policies, and on the care and treatment made available to vulnerable groups in the community.¹²¹⁹ Reform of the prison system should therefore always take into account the needs relating to the reform of the criminal justice system as a whole and employ an integrated, multi-disciplinary strategy to achieve a sustainable effect.¹²²⁰ Thus, reform initiatives other than the prison service, such as the judiciary, the prosecution and the police service, are relevant.¹²²¹

The remand detention department was established on 1 April 2012.¹²²² The section 49E – protocol of Act 111 of 1998 was implemented in December 2012.¹²²³ The section 49G - protocols was implemented in July 2013.¹²²⁴

A form of information technology as a solution for implementation of and accurate data capturing, was developed in 2012 and implemented in April 2013.¹²²⁵ The solution assisted in determining which remand detainees qualify for referral to court at certain intervals in line with the provisions of section 49G.¹²²⁶ The first three months (April to June 2013) constituted the test phase during which the accuracy of information as well as referral of backlog cases was tested.¹²²⁷ A method for calculating the length of detention was also developed and implemented in April 2013.¹²²⁸ In addition, a monitoring tool was developed for completion by all the regions that would make it easier to calculate a national average length of detention.¹²²⁹

¹²¹⁸ United Nations Office of Drugs and Crime Vienna, *op. cit.*, (fn 514), page 13.

¹²¹⁹ *Ibid.*

¹²²⁰ *Ibid.*

¹²²¹ *Ibid.*

¹²²² South African Yearbook 2013/14. "Justice and Correctional Services," page 299, available at: <http://www.doc.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2013-4Justice.pdf> (accessed on 10 February 2015).

¹²²³ *Ibid.*

¹²²⁴ *Ibid.*

¹²²⁵ *Ibid.*

¹²²⁶ *Ibid.*

¹²²⁷ *Ibid.*

¹²²⁸ *Ibid.*

¹²²⁹ *Ibid.*

The Correctional Services Act as amended by the Correctional Matters Amendment Act 5 of 2011, established a mechanism whereby the Head of Centre would notify the relevant court if a remand detainee had been in custody for longer than two years with a view to expedite the matter. The Annual Report¹²³⁰ reflects that the average duration of custody had been reduced by a mere 13 days. It is not clear if this is direct result of the operation of section 49G of the Correctional Services Act or attributable to other trends in the criminal justice system.¹²³¹ There remains the argument that as well-intentioned as section 49G may be, it will not have the desired effect as it does not regulate the criminal justice process.¹²³² Indeed judicial oversight should be compulsory at a much earlier stage than after two years.¹²³³ It should furthermore not be assumed that if a Head of Centre brings the case of a remand detainee to court in terms of section 49G of the Correctional Services Act that the court will indeed undertake an investigation in terms of section 342A of the Criminal Procedure Act.¹²³⁴ Plainly put, the Correctional Services Act does not tell the court what to do with a section 49G case.¹²³⁵ According to Muntingh and Dereymaeker,¹²³⁶ a period of two years before a delayed matter is brought to the attention of the court renders the constitutional right to a speedy trial meaningless.

Through constant change of the country's remand detention system, South Africa is now urging closer to the ideal international target of 25% of all inmates being remand detainees.¹²³⁷ Since the year 2000, remand detainees have been reduced by 31.9% from 63 954 to 41 690 in June 2014, of which 5% (1922) has spent at least two years in custody.¹²³⁸

¹²³⁰ Annual Report 2013/14, *op. cit.*, (fn 1013).

¹²³¹ Muntingh, L and Dereymaeker, G (2014) "Submission to the Portfolio Committee on Justice and Correctional Services Oct 2014," page 10, CSPRI Submission on the 2013/14 DCS Annual Report, available at: <http://cspri.org.za/publications/submissions-and-presentations/cspri-submission-to-portfolio-committee-on-justice-and-correctional-services-on-dcs-annual-report-2014.pdf> (accessed on 11 February 2015).

¹²³² *Ibid.*

¹²³³ *Ibid.*

¹²³⁴ *Ibid.*

¹²³⁵ *Ibid.*

¹²³⁶ *Ibid.*

¹²³⁷ Correctional Services Budget Vote Speech 2014/15 (2014) By Advocate Michael Masutha, Minister of Justice and Correctional Services, MP National Assembly, Cape Town, page 4, available at: <http://www.dcs.gov.za/docs/landing/Address%20by%20%20Minister%20Micheal%20Masutha%20at%20the%20Budget%20Vote%20Speech.pdf> (accessed on 16 February 2015).

¹²³⁸ *Ibid.*

Solutions include the tracking of remand detainees for periodic referral to courts in line with Section 49G of Act 111 of 1998.¹²³⁹

5.2.1 Bail

Bail is an excellent diagnostic tool for assessing the health of the criminal justice system.¹²⁴⁰ Bail laws, when correctly applied should result in those who pose a risk to security and are at risk of absconding from their trials being detained – and those who do not fit that description are released. Although a thorough research on the principals involved in granting or denying bail is beyond the scope of this dissertation, considering bail as a possible solution to the issues relating to remand detention as an entry point, this research aims to better understand some of the critical workings of the criminal justice system, and thereby identify issues that are crucial to the correct functioning of the system.

Bail can be described as an agreement in terms of which an accused who is being held in custody is set at liberty upon his payment of, or his furnishing of a guarantee to pay, a fixed sum of money and, further, upon his express or implied undertaking to comply with the general conditions and specific conditions relating to his release.¹²⁴¹ The purpose of bail is to strike a balance between the interests of society which means that the accused should stand his trial and there should be no interference with the administration of justice, and the liberty of an accused who, pending the outcome of his trial, is presumed to be innocent.¹²⁴²

The effect of bail on remand detention is clear: if people accused of crimes are not granted bail, or cannot afford to pay the bail amount set, they will be detained in a remand facility until their trial date.¹²⁴³ If bail is ineffective or unable to be given, the numbers of people in remand will rise, resulting in overcrowding and the ripple effects of poor living conditions, spread of communicable disease, and a violation of the right to dignity.¹²⁴⁴ Bail is thus inextricably linked to remand detention.¹²⁴⁵

¹²³⁹ *Ibid.*

¹²⁴⁰ *Id* at (fn 1237) page 5.

¹²⁴¹ Du Toit *et al, op. cit.*, (fn 633) page 9-1.

¹²⁴² *Id* at (fn 633) page 9-2.

¹²⁴³ Leslie, *op. cit.*, (fn 65) page 8.

¹²⁴⁴ *Ibid.*

¹²⁴⁵ *Ibid.*

One hurdle faced by the State when administering the bail system is the constitutional requirement that accused persons must to be brought before the court without unreasonable delay.¹²⁴⁶ For a court to properly consider the bail criteria, it needs to know, at least, the correct identity of the arrested individual and his or her previous criminal record, if any.¹²⁴⁷ It is useful to know whether there are pending criminal matters faced by the individual.¹²⁴⁸ Despite the fact that the arrested individual is statutorily required to disclose this information at a bail hearing, this disclosure of information does not always take place.¹²⁴⁹ In practice this means that the prosecutor is dependent on records held by other state agencies. Getting hold of these records within a short time often poses a challenge.¹²⁵⁰

The National Prosecuting Policy Directives require prosecutors to reassess continually the State's attitude to bail in respect of the awaiting trial detainee.¹²⁵¹ Where an accused has spent more than three months awaiting trial behind bars, the prosecutor must, at each subsequent court appearance, specifically raise the issue and ask the court to record the reasons for further detention.¹²⁵²

In the case of *S v Acheson*,¹²⁵³ Mahomed J stated that “an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court”.¹²⁵⁴ Release on bail is no substitute for an accused's right to be tried within a reasonable period.¹²⁵⁵

One of the main reasons for the large number of people awaiting trial was their inability to pay bail.¹²⁵⁶ As they are in custody, they have either not been granted bail, or have been granted a bail amount they cannot afford.

¹²⁴⁶ Chaskalson, J and De Yong, Y (2009) “Criminal (In)Justice in South Africa A Civil Society Perspective,” chapter 4, entitled ‘Bail’. Institute for Security Studies, page 88, available at: <http://www.issafrica.org/uploads/Book2009CrimeInJust.pdf> (accessed on 15 February 2015).

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid.*

¹²⁴⁹ *Ibid.*

¹²⁵⁰ *Ibid.*

¹²⁵¹ Fernandez, *op.cit.*, (fn 601) page 8.

¹²⁵² *Ibid.*

¹²⁵³ *S v Acheson*, *op. cit.*, (fn 632).

¹²⁵⁴ *Ibid.*

¹²⁵⁵ Du Toit *et al*, *op. cit.*, (fn 633) page 9-6.

¹²⁵⁶ Ntuli *et al*, *op. cit.*, (fn 1015) page 7.

In practice, bail is often granted subject to a financial provision.¹²⁵⁷ An accused is set a financial amount, if paid, secures his liberty. If an accused fails to attend proceedings the bail amount is forfeited to the State.¹²⁵⁸ However, many accused people in South Africa are unable to afford bail, even when the amount set is less than R1000.¹²⁵⁹ This direct result is that South Africa has a significant awaiting trial detainee population who have been granted the option of paying bail but have not exercised this option.¹²⁶⁰

The large awaiting trial detainee population imposes both infrastructural and financial pressures on the Department of Correctional Services. These pressures are intensified by the fact that it often takes long periods of time before a criminal matter is finalised. The Department of Correctional Services does not provide rehabilitative programmes or projects to awaiting trial detainees who also do not have access to the educational or recreational programmes available to convicted offenders.¹²⁶¹

When the bail system malfunctions or is incorrectly applied, the result is dangerous.¹²⁶² An imbalance in a bail regime can result in many people being incorrectly detained, leading to overcrowding in a correctional facility and remand detention facilities, and those who should be under correctional supervision, potentially incorrectly released.¹²⁶³ This can lead to spiralling socio-political problems for the criminal justice sector.¹²⁶⁴

It would be beneficial to the criminal justice system to have a better understanding of the offences committed by the remand detainee population. For instance, if 78 percent of these individuals have been denied bail, on what basis were these decisions made? Are all of the awaiting detainees individuals accused of Schedule 5 and 6 offences, in the interests of justice that they be released? Or, are there large numbers of detainees who have been refused bail for less serious offences?¹²⁶⁵

¹²⁵⁷ Chaskalson, J and De Yong, Y, *op. cit.*, (fn 1246) page 2.

¹²⁵⁸ *Ibid.*

¹²⁵⁹ *Ibid.*

¹²⁶⁰ *Ibid.*

¹²⁶¹ *Ibid.*

¹²⁶² Leslie, *op. cit.*, (fn 65) page 5.

¹²⁶³ *Ibid.*

¹²⁶⁴ *Ibid.*

¹²⁶⁵ Chaskalson, J and De Yong, Y, *op. cit.*, (fn 1246) page 2.

The answers to these types of questions will help shed light on both how the courts are applying the bail legislation and the impact of the legislation itself.¹²⁶⁶

A possible solution to solving the problem in the application of bail is the provision of pre-trial services. Such services help judicial officers make correct and fair decisions when deciding whether to grant bail or not, by providing verified information about the accused.¹²⁶⁷

5.2.2 Non-custodial measures

South Africa turns in the direction of non-custodial measures to avoid remand detention in correctional facilities.¹²⁶⁸

a) Community custody and guarantees

The Courts allow community members to address the court on the issue of bail on whether or not the community is willing to have the accused released provisionally.¹²⁶⁹ This helps the magistrate to learn about the accused's character, the seriousness which the community regards the particular offence and the likely threat of harm against the accused.¹²⁷⁰ It also serves to inform the community about the purpose of bail and it publicises the return date to the community so that the community ensures that the accused does attend court on the trial day.¹²⁷¹

b) Electronic tagging

In March 2013, the Department of Correctional Services introduced the electronic monitoring project.¹²⁷² There have been issues surrounding the use of such device on people who are presumed innocent, but it is a preferable alternative to remand detention.¹²⁷³

¹²⁶⁶ *Ibid.*

¹²⁶⁷ Wits Justice Project, *op. cit.*, (fn 46).

¹²⁶⁸ *Id* at (fn 46) page 17.

¹²⁶⁹ *Id* at (fn 46) page 18.

¹²⁷⁰ *Ibid.*

¹²⁷¹ *Ibid.*

¹²⁷² *Ibid.*

¹²⁷³ *Ibid.*

c) Community mediation and resolution

This alternative method can assist in reducing the number of cases that reach courts and result in detention.¹²⁷⁴ The process is participatory and the maximum participation of the community bestows title of the process and helps to improve compliance.¹²⁷⁵

5.2.3 Plea bargaining

The historical development in South Africa of the informal practice generally referred to as plea bargaining in criminal proceedings in terms of which the prosecution and defence negotiate on a guilty plea by an accused person to a (lesser) charge/s in exchange for the possible imposition of a specific (reduced) sentence, is well documented¹²⁷⁶ and need not be covered here, save the following few comments. The powers of the prosecution service in South Africa are extensive, particularly when it comes to the exercise of its discretion to institute criminal proceedings, to negotiate plea and sentence agreements and divert matters from the criminal process.¹²⁷⁷ In South Africa which is in as far as criminal procedure is concerned can be classed as a common law system, the practice of negotiation prior to the plea was not regulated by any statute or policy and was seldom labelled as ‘plea bargaining’. It lacked recognition as a pre-trial procedure that fulfilled a specific function in the criminal process.¹²⁷⁸ In 2001 plea bargaining was endorsed by section 105A of the Criminal Procedure Act 51 of 1977 providing an accused, but only with the assistance of legal counsel, to enter into a plea and sentence agreement with the prosecution. This amendment sought to regulate and legalise the operation of traditional plea agreements which have been taking place in South Africa, even in the absence of legislation. This section allows prosecutors who have been approved by the National Director of Public Prosecutions (NDPP) to conclude agreements with the accused to determine which charges will be brought and what sentence

¹²⁷⁴ *Ibid.*

¹²⁷⁵ *Ibid.*

¹²⁷⁶ Watney, M (2006) “Judicial Scrutiny of Plea and Sentence Agreements,” TSAR 224, available at: <http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi%20issue%204%20June%202006.pdf> (accessed on 13 February 2015).

¹²⁷⁷ Steyn, E (2007) “Plea bargaining in South Africa: current concerns and future prospects,” South African Journal of Criminal Justice, Volume 20, Issue 2.

¹²⁷⁸ *Ibid.*

will be recommended.¹²⁷⁹ Whenever a prosecutor concludes such an agreement, he or she must consider, at least, the following:¹²⁸⁰

- (a) nature of and the circumstances relating to the offence;
- (b) personal circumstances of the accused;
- (c) previous convictions of the accused; and
- (d) interests of the community

Kassan and Gallinetti opine that while the option of ‘plea bargaining’ is viewed by the public as being ‘soft on criminals’, a procedure that provides for plea and sentence agreements will have important advantages for the criminal justice system.¹²⁸¹ It is a system which formalises plea agreements and which makes the outcome of the cases more predictable and made it easier for practitioners to permit their clients who are guilty to plead guilty.¹²⁸² Lengthy trials which may possibly result in an acquittal can be avoided.¹²⁸³

Without definite statistics regarding the impact of plea bargaining has in respect of reducing overcrowded case loads and court hours, it can only be hoped that it had eased and will in future ease the overburdened and clogged criminal justice system and reduce the current backlogs in our criminal courts.¹²⁸⁴

¹²⁷⁹ Woolaver, H and Bishop, M (2008) “Submission to the Enquiry into the National Director of Public Prosecutions,” The South African Institute for Advanced Constitutional, Public, Human Rights and International Law, page 28, available at: <http://www.sabar.co.za/law-journals/2008/august/2008-august-vol021-no2-pp26-32.pdf> (accessed on 12 February 2015).

¹²⁸⁰ *Ibid.*

¹²⁸¹ Kassan, D and Gallinetti, J (2003) “Chapter 16: Sentencing, Victim Impact Statements and Plea Bargaining,” University of the Western Cape. Published by Community Law Centre.

¹²⁸² *Ibid.* A Durban Magistrate, Anand Maharaj was the first magistrate in South Africa to use the amended law officially. A Westville businessman, Mziwakhe Solomon Msane, pleaded guilty to 1246 counts of theft and fraud relating to credit cards. According to an agreement set out by Msane’s counsel and the prosecutor, he would pay back the R266 633 – 03 he stole, and also pay a R250 000 fine which would be donated to various charities. In return, Msane would not go to prison but would have an additional three-year sentence suspended for five years. The Learned Magistrate Maharaj said he hoped plea bargaining would gain momentum in other courts. Maharaj said that plea bargaining would also help to speed up matters in court.

¹²⁸³ *Ibid.*

¹²⁸⁴ Cohen, J R (2001) “South African Human Rights Commission: Submission to the Justice and Constitutional Development Portfolio Committee, National Assembly,” Cape Town, page 1, available at: <http://www.sahrc.org.za/home/21/files/6%20SAHRC%20Submission%20on%20Criminal%20Procedur>

The overwhelming justification for the use of plea bargaining is that, in the face of overcrowded prisons and clogged court roles, it is an efficient instrument to concentrate on more meritorious cases.¹²⁸⁵

Lawyers have to contend with overloaded court rolls as well as backlogs in the huge number of remand detainees which in turn results in overcrowded prisons reaching crisis proportions.¹²⁸⁶ Plea bargaining is a method of easing those problems and at the same time complies with the constitutional obligation of a speedy trial.¹²⁸⁷

It is widely accepted that without plea bargaining negotiations between the prosecutor and the accused, time-consuming trials would cause many courts to choke on overcrowded dockets.¹²⁸⁸ According to Dervan,¹²⁸⁹ even a 10 percent reduction in plea bargaining would double the number of trials.¹²⁹⁰

Justice Mokgoro explains the advantages of out-of-court settlements.¹²⁹¹ One advantage is that it will contribute to saving precious court time and costs, since the case can be finalised without going to court, and without the time-consuming task of settling factual disputes. Another advantage is that the saving of time should improve the perception of the administration of justice.¹²⁹² Caunhye¹²⁹³ explains the advantages of plea bargaining to the accused and the State as follows:

Advantages of plea bargaining to the accused include the following:

-
- e%20Amendment%20Bill%20(Plea%20Bargaining)%20(Parl)%20Oct%202001.pdf (accessed on 13 February 2015).
- 1285 Dervan, L (2008) "The Case for Plea Bargaining in South Africa and a Blast from the Past," pages 1-2, available at: <http://thepleabargainingblog.blogspot.com/2008/07/case-for-plea-bargaining-in-south.html> (accessed on 13 February 2015).
- 1286 Caunhye, A (2013) "Sentencing: Human Rights Standards and Non-Custodial Measures," page 5, available at: http://webcache.googleusercontent.com/search?q=cache:_wF60eG7DXsJ:supremecourt.govmu.org/s-court/cjei/doc/SENTENCING.doc+&cd=1&hl=en&ct=clnk&gl=za (accessed on 30 July 2015).
- 1287 *Ibid.*
- 1288 Dervan, *op. cit.*, (fn 1285).
- 1289 *Ibid.*
- 1290 *Ibid.*
- 1291 Mokgoro, Y (2002) "The need for out-of-court settlements in criminal cases," South African Law Commission, Project 73, Sixth Interim Report on Simplification of Criminal Procedure, page 8, available at: http://www.justice.gov.za/salrc/reports/r_prj73_intrep6_2002aug.pdf (accessed on 13 February 2015).
- 1292 *Id* at (fn 1291) page 10.
- 1293 *Ibid*, at page 6.

- cases will be finalised swiftly and lead to reduced costs;
- uncertainties of trial will be reduced; and
- conviction may be a lesser charge, hence a reduced sentence.

*The advantages of plea bargaining to the State are the following:*¹²⁹⁴

- the State will benefit from a greater flexibility in disposing of criminal trials;
- protracted and costly trials will be avoided;
- overloading of court rolls will be minimized; and
- burden on resources will be reduced and uncertainties of trial will be reverted.

Plea bargaining is not an uncontroversial subject.¹²⁹⁵ In the United States there have been repeated calls for the abolition of plea bargaining because it acts to deny accused persons the right to a proper trial. These detractors argue that “there is something dirty about plea bargaining, something corruptive or potentially corruptive in negotiating with criminals for punishment less than could be levied if the full force of the law were used”.¹²⁹⁶

South Africa recognises plea bargaining as an integral part of the criminal justice system, primarily to speed up cases.¹²⁹⁷ The victim gets compensation, and the State saves on time and money and secures a conviction.¹²⁹⁸ But plea bargains are often challenged as only helping those with deep pockets.¹²⁹⁹ Often it is seen as a necessary evil, indemnifying lesser accomplices to spill the beans.¹³⁰⁰

5.2.4 Overcrowding in correctional facilities

Overcrowding has been on international and national policy agenda since decades.¹³⁰¹ Insofar, it does not come as a surprise that strategies to reduce overcrowding have been extensively discussed and widely disseminated.¹³⁰²

¹²⁹⁴

Ibid.

¹²⁹⁵

Woolaver, H and Bishop, M, *op. cit.*, (fn 1279).

¹²⁹⁶

Dervan, *op. cit.*, (fn 1285).

¹²⁹⁷

SABC News (2011) “Plea Bargaining Agreements in the Spotlight Again,” page 1, available at: <http://www.sabc.co.za/news/a/3fae4600485da4629fcdf3d930f6e8b/Plea-bargain-agreements-in-the-spotlight-again-20110918> (accessed on 13 February 2015).

¹²⁹⁸

Ibid.

¹²⁹⁹

Ibid.

¹³⁰⁰

Ibid.

¹³⁰¹

Hans-Jörg, *op. cit.*, (fn 146).

In general, approaches to deal with overcrowding refer to reduction of admissions to prison and detention and reduction in the length of the stay.¹³⁰³

With regard to prison overcrowding, which is the major challenge of the criminal justice system, the problem usually starts from the time of arrest.¹³⁰⁴ The African Charter on Human and Peoples' Rights demands that arrested persons are promptly charged and brought before a presiding officer.¹³⁰⁵ Such person must be tried within a reasonable time.¹³⁰⁶ These legal provisions should be enforced to prevent arbitrary arrests and detention, and will also enable the courts to determine if pre-trial detention is necessary to permit the suspect to challenge the legality of his arrest and detention.¹³⁰⁷ It will help to reduce overcrowding.¹³⁰⁸

Overcrowding could be further alleviated by decriminalizing some minor offences, making attempts to accelerate trials, making cost orders against lawyers to penalize them for delays.¹³⁰⁹ Prisons could become more self-sufficient if prison staff were better trained.¹³¹⁰ The goals of rehabilitation and reintegration could be better achieved if prisoners were involved in industries, their interaction with their families and communities increased.¹³¹¹

Alternative sentencing, restorative and traditional justice, and connections between the customary and formal criminal justice system would help to solve the problem of overcrowding in prisons.¹³¹²

Prison administrators should be more accountable for their abuses of prisoners through the adoption of national legislation that is consistent with international human rights obligations and independent prison inspections.¹³¹³

1302

Ibid.

1303

Ibid.

1304

Kaggwa, S K (2012) "Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa," The 52nd Ordinary Session of the African Commission on Human and People's Rights, Yamousoukro, Cote d'Ivoire, page 2, available at: <http://www.achpr.org/sessions/52nd/intersession-activity-reports/prisons-and-conditions-of-detention/> (accessed on 13 February 2015).

1305

Ibid.

1306

Ibid.

1307

Ibid.

1308

Ibid.

1309

Ibid.

1310

Ibid.

1311

Ibid.

1312

Ibid.

States Parties are encouraged to release inmates on self-bail who pose little or no risk to society, or where the crime is not a serious one.¹³¹⁴ States Parties should also explore the use of alternative sentences to expectant and nursing mothers including elderly people of more than seventy years, instead of sending them to prison.¹³¹⁵ States Parties are also urged to improve management practices in individual prisons, and in the penitentiary as a whole to increase transparency and efficiency within the prison service.¹³¹⁶

States Parties should ensure that prisoners be given the opportunity to maintain and develop links with their families and the outside world, and in particular be allowed access to lawyers and accredited paralegals and religious visitors as well as provide training programmes to prison staff which will incorporate human rights standards.¹³¹⁷

Strategies to achieve goals of reductions in admissions and length of stay include the use of alternatives to penal prosecution (diversion), the recognition of restorative justice, decriminalization, reducing the numbers of un-sentenced prisoners through effective co-operation between the police, the prison services and the courts to ensure speedy trials and effective case management, recognition of the last resort principle, better access to defence counsels and greater use of paralegals in the criminal process, setting targets for reducing the prison population, and increased use of proven effective alternatives.¹³¹⁸

Overcrowding evidently is recognised and understood to represent a grave problem. However policy options which inflate prison populations are obviously more attractive. Overcrowded prisons and prison reform are not dealt with as priority issues in political systems.¹³¹⁹ Solutions to overcrowding have to deal with the complexity of the decision making processes which have generated overcrowding.¹³²⁰

1313

Ibid.

1314

Ibid.

1315

Ibid.

1316

Ibid.

1317

Ibid.

1318

Hans-Jörg, *op. cit.*, fn 146, page 38.

1319

Sekhonyane, M (2005) "Prison Reform in Africa: Recent Trends." CSPRI Newsletter No. 10.

1320

Ibid.

Possible solutions to the problem of overcrowding include the following:¹³²¹

- (a) identifying and removing remand detainees who have been detained past their pre-trial date or who should have been released on bail initially;
- (b) the use of mobile court within the prisons, which reduce delays in trials and deal with the issue of transportation of remand detainees to court for their trials;
- (c) engaging with other criminal justice stakeholders (for example police, judiciary, probation, social services and non-governmental organisations (NGOs) and creating an interagency dialogue to discuss local issues and develop solutions;
- (d) using diversion, bail and fines rather than remand as a default option;
- (e) using alternative dispute resolution as a means of decongesting the prison system;
- (f) using alternatives to the imprisonment system;
- (g) establishing, updating and modernising rehabilitation programmes so remand detainees can gain relevant employment on release;
- (h) using traditional and community courts or procedures;
- (i) setting time limits for bringing cases to trial; and
- (j) the need to stigmatise ex-prisoners to improve reintegration and reduce reoffending, educate awareness among the public to show the impact of imprisonment.

One of the more fundamental solutions may very well be to ensure that the police and prosecutors, in particular, respect, uphold and insist on the values enshrined in the Constitution, especially the Bill of Rights and the right to a fair trial. There does not appear to be a greater understanding and appreciation of the nature, reach and significance of the Constitution and the Bill of Rights among the police and prosecutors. The question that arises is why is it that judicial officers (judges in particular) are keen and prepared to enforce the Constitution and its Bill of Rights more than the police or prosecutors?

5.3 Recommendations

Chapters 2, 3 and 4 focused on the problems relating to delay in trials, both nationally and internationally, and the impact that such delay has on an accused person's rights during

¹³²¹ Roy, N (2013) "Ten African Solutions to the problem of Overcrowding in Africa." Penal Reform International, page 2, available at: <http://www.penalreform.org/blog/ten-african-solutions-problem-prison-overcrowding-africa/> (accessed on 13 February 2015).

criminal proceedings. When problems and questions arise and are discussed, it is thereafter followed by recommendations with an aim to solving such problems. Section 49G of Act 111 of 1998 is a legislative creation intended to cure the problem of lengthy remand detention. However, there still needs to be proper implementation and possible amendments to include further solutions to this problem.

The question arises as to whether any suggested solution will ever materialise? In order for there to be change and positivity in the criminal justice system, government employees need to adjust for the better and need to aim towards promoting the constitutional rights of remand detainees, especially their fundamental rights enshrined in the Bill of Rights provisions. It is unacceptable for remand detainees, who should be treated as normal human beings and citizens of a country, and are presumed innocent until proven guilty in a court of law, to be faced with serious infringements of their guaranteed rights without valid and reasonable grounds for doing so.

South Africa's justice system and its servants need to realise that South Africa as a country does not exist in isolation. South Africa is a country that boasts international relations. It is a party to several covenants and treaties and is therefore bound by the international provisions regarding speedy trials and the proper treatment of awaiting trial persons during criminal proceedings. There should be a sense of obligation and duty to fulfil its promise to abide by international rules and standards. If this is done, South Africa will automatically place itself on a competitive level to other countries, to be one of the best countries at promoting its constitutional rights and fair criminal justice.

There needs to be change within the justice system and its servants. People working under the system need to have thorough and extensive education and training of how the criminal justice system ought to work and must have thorough knowledge of the provisions of the Constitution, legislation and applicable case laws. In order for the police officials to enforce the law, they need to have knowledge of the law and the consequences of infringements of the provisions of law. Therefore, they also need to be educated and trained. In fact, it should be a requirement that police officials complete certain legal studies and obtain certificates or diplomas relating to criminal procedure. This will ensure that procedure where police arrest a suspect without a warrant and enquiries regarding bail applications, are done lawfully,

promptly, efficiently, without unreasonable delay and without prejudice to an accused person. The critical issue is to ensure that the police, in particular, **respect** and uphold the **values** enshrined in the Constitution as well as the **Rule of Law**. The Courts must be able to call upon the police and prosecution management to come to account to the Courts for excessive and or unreasonable delays.

There cannot be representatives of the State and the judiciary who merely play a passive role as creatures of statute. They must play an active role in the administration of justice. The Government needs to elect certain academics in the field of criminal law and procedure (especially academics that have knowledge on procedure relating to speedy trials and promoting the rights of accused persons) who will conduct thorough training of State employees in order to make them most suitable for effective running of the system. The trainers or educators could include academic writers, Professors or lecturers from recognised Universities or former judicial officers.

A further recommendation is that more focus must be on the release of suspects at the bail hearing stage. If an accused cannot afford bail money but all other requirements have been met, the Court should consider releasing the accused on warning or place strict conditions on his on his release but without having to pay bail money. In this way, fewer persons will be detained pending (possible) trial.

Furthermore, the correctional services department must have a team who continuously monitor each remand detainee by researching his background, possibility of release pending trial, whether there is possibility that a family member or friend can pay an amount as bail (even though bail was not granted at the bail hearing in court). The correctional services department must be tasked with this duty and the judiciary must not have sole authority to release a remand detainee from detention. Should the detained suspect be released from detention by the prison, such person must be given conditions such as reporting to the prison on prescribed days and times.

Courts should have a set of practice directives regarding administration and procedure for the proper functioning of the system. These directives must be equally applicable and binding on all courts in South Africa. In the directives, provision should be made for working time. Court must commence strictly at 9:00am and run strictly until 11:00am. It must resume at

11:30am and run again until 4:00pm. This will ensure that the day is properly utilised for legal proceedings. The directive should strictly prescribe that police dockets must reach the prosecutor the day before the matter is to be heard in order for the prosecutor to peruse the docket and make an informed and objective decision on how to proceed with the matter. This will prevent the situation where prosecutors quickly scan through a police docket in the morning on which the matter is to be heard and thereafter proceed without having being properly acquainted with the information. This results in an infringement of an accused's right to a fair and speedy trial. All this can well be said and stipulated in writing but the next important step is for the servants of the State to properly carry out the directives.

Furthermore, the excessive delays are shown to have a subsequent impact or consequence on the constitutional rights of a suspect or accused person during criminal proceedings. A detained person who is in custody pending the commencement of his or her trial suffers the harsh realities of imprisonment. An accused is detained just the same way as a sentenced prisoner is detained. He or she is confined to a prison cell and his or her liberty is restricted. Rights as enshrined in our Constitution (the right to be presumed innocent until proven guilty and the right not to cruel, humane and degrading treatment and the right to liberty) are supposed to apply to every single citizen of South Africa. However, remand detainees remain in prison in poor living conditions and excessive overcrowding.

It is recommended that, in addition to the Constitution and legislation already enacted (such as section 49G of Act 111 of 1998) current legislation must be amended or further legislation must be enacted which specifically addresses these issues. This law must be enforced and must bind the State and the prison system, since it is these organs that are responsible for the proper well-being of every detainee. Legislation must prescribe and enforce provisions for proper living conditions for remand detainees. It must prescribe that accused persons must be placed in certain fields of work while awaiting trial so that they learn certain skills, instead of having them sit in a prison cell the whole day and do nothing. It will also prevent remand detainees from spending time communicating with each other and teaching each other 'bad habits'.

The prison officials must be empowered to authorise remand detainees to undertake work in large agricultural and farming industries where they will keep busy, learn different skills and

learn to interact on a good social level. By doing this, it will make their stay in detention productive and useful, while they await their trial.

Placing remand detainees in associations formed within the detainee population (for example groups of detainees formed for religion, sport, arts and crafts, dramatic acts, or even technical aspects) will benefit them and will alleviate the experience of harsh conditions in prison. It will also reduce cramping of detainees in cells. Their activities, however, should be limited to the perimeters of the correctional facility and they should be guarded by wardens who, themselves, should not be left to remain idle every day. By placing detainees in these groups, their stay in detention will result in something fruitful. They will have learnt a skill when released from detention.

These recommendations do not have any effect on the question of their guilt. It merely aims at alleviating the constitutional infringements of their rights and lessening the negative impact that delayed trials have on them.

Another recommendation is that detainees must be placed in groups and given certain chores to undertake within the prison. Some detainees would be tasked with sweeping, cleaning and mopping while other detainees would be tasked with washing and other domestic chores. The benefit of this to the remand detainees is that the environment within the cells will be liveable and clean (detainees themselves will assist in ensuring clean conditions in which they are detained). It will also assist in 'passing time' while they await trial. Furthermore, the State must ensure that basic necessities such as sanitary equipment and health equipment are provided, in appropriate quantities for all remand detainees. The State has a duty to ensure this and it should be required to fulfil its obligation through a prescriptive piece of legislation.

5.4 Conclusion

The main focus of the research relate to the impact and constitutionality of delayed trials on the rights of a suspect or accused person. In order to highlight and discuss the important issues or problems, the researcher listed four main objectives of the study. The objectives were: (1) to determine the impact that delayed trials have on a suspect or accused person's rights during criminal proceedings, (2) to undertake a comparative study on the scope of South African law in relation to delayed trials, and international law, (3) to determine the

extent to which delayed trials is constitutional and (4) to determine the reasons for delayed trials in South Africa.

With regard to the first objective of the study, the research is aimed at determining the impact that delayed trials have on the rights of a suspect or accused in criminal proceedings; in this respect it can be said that there is sufficient authority to conclude that delayed trials have a negative impact on these persons and their rights.

With regard to the second objective, the research has shown that, comparatively, South Africa is no different to the rest of the world in terms of delay. Several countries around the world experience similar problems. The research shows that South Africa defies its international promise to keep up to standard and practice with international instruments despite the fact that it boasts good international relations.

With regard to the third objective, the research entailed a discussion on specific constitutional rights, in terms of the Bill of Rights, on a suspect or accused person. Furthermore, the Correctional Services Act formed an important part of this discussion, especially in terms of section 49G of this Act. Despite the fact that South Africa has a Constitution that makes provision for the rights of remand detainees as is expanded in the amended Correctional Services Act, South Africa still faces many problems regarding specifically the number of remand detainees and their length of stay in detention.

Research on the fourth objective entailed a discussion on the reasons for the delay in trials in South Africa. Several factors were highlighted and discussed and it was discovered that the majority of factors that contributed for delays arose from the Criminal Justice Department.

It can be stated that South African suspects and accused persons have an abundance of constitutional rights in their favour but the criminal justice system still has a lot more to do to implement positive and transparent results. This is important for international recognition and compliance with the Constitution, the rule of law and international standards. The Constitution and amended legislation is the ground-work but state servants must comply with their obligations and duties. State servants must be called upon to account when they fail to comply with their duties and obligations.

Evidently, there needs to be a change in order to properly cater for the rights of every South African accused person awaiting a trial. The researcher hopes that the recommendations suggested will assist the government in a small way to re-evaluate the problems relevant to remand detainees and in bringing about some kind of positive change in the lives of remand detainees.

BIBLIOGRAPHY

BOOKS

Amnesty International *Nigeria: Security Forces: Serving to protect and respect human rights?* (2002) December 19, AFR 44/023/2002 available at: <http://www.refworld.org/docid/3f15241e4.html> (accessed on 7 December 2014).

Bossuyt M (1987) *Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights*.

Botha N et al (2008) *Study Guide for International Law Module: LCP401H Public Constitutional and International Law* University of South Africa.

Byrne, J and Hummer D (2008) *Examining the Impact of Institutional Culture on Prison Violence and Disorder - an evidence-based review*. In J. Byrne, D. Hummer, & F. Taxman, *The Culture of Prison Violence*. Boston: Pearson.

Chaskalson A (2002) *Human dignity as a constitutional value*. In Kretzmer, D., and Klien, E. (Eds.) *The concept of human dignity in the human rights discourse*, The Minerva Centre for Human Rights the Hebrew University of Jerusalem Tel Aviv University.

Cherubin-Doumbia G (2014) *African Commitments to Human Rights: A Review of Eight NEPAD Countries: right to personal safety and security* available at: <http://www.sahrc.org.za/home/index.php?ipkContentID=109&ipkMenuID=91> (accessed on 21 January 2015).

Dugard J (2011) *International Law A South African Perspective* 4th edition. Cape Town Juta & Co.

Duhaime L (2015) *Duhaime's Law Dictionary* available at: <http://www.duhaime.org/LegalDictionary/I/InternationalLaw.aspx> (accessed on 6 July 2015).

Du Toit *et al* (1997) *Commentary on the Criminal Procedure Act*. 2nd edition. Cape Town. Juta & Co.

Dyson M (2013) *The Criminal Justice and You: A guide to the South African Criminal Justice System for Refugees and Migrants*. Independent Projects Trust. Glossary of terms available at: <http://www.ipt.co.za> (accessed on 7 October 2014).

Homel R & Thompson C (2005) *Causes and prevention of violence in prisons*. In S. O'Toole, & S. Eylands, *Corrections Criminology*. Sydney: Hawkins Press.

Jules-Macquet R (2014) *The State of South African Prisons* National Institute For Crime Prevention And The Reintegration Of Offenders, 1st edition, NICRO Public Education Series, available at: <http://www.nicro.org.za/wp-content/uploads/2014/04/Public-Education-Paper-The-State-of-South-African-Prisons-2014.pdf> (accessed on 18 February 2015).

Kassan D and Gallinetti J (2003) *Chapter 16: Sentencing, Victim Impact Statements and Plea Bargaining*, University of the Western Cape. Published by Community Law Centre.

McMohan M (2014) *What is foreign jurisdiction?* available at: <http://wisegeek.com> (accessed on 9 November 2014).

Muntingh L and Ehlers L (2011) *Pretrial Detention in Malawi: understanding caseflow management and conditions of incarceration* Open Society Initiative for Southern Africa available at: http://www.osisa.org/sites/default/files/sup_files/open_learning_-_pretrial_detention_in_malawi.pdf (accessed on 3 August 2015).

Oxford Dictionary Press (2014) *Oxford Dictionary Definition* available at: <http://www.oxforddictionaries.com/definition/english/suspect> (accessed on 24 November 2014).

Schwikkard P J (2005) *Arrested, detained and accused persons*. In Currie, I and De Waal, J. *The Bill of Rights handbook*. (5th Ed.). Cape Town: Juta.

Tobi N (1997) *Delay in the administration of justice* Fourth Dimension Publishing Co. Ltd: Enugu.

Thyer B A (1993) *Single-system research designs*. In Grinnell, R. M., *Social Network research and evaluation*, 4th edition, Itasca, IL: Peacock.

The Free Dictionary by Farlex available at: <http://legaldictionary.thefreedictionary.com/appellant> (accessed on 8 December 2014).

Webster's New World Law Dictionary (2010) available at: <http://www.yourdictionary.com/fairtrial> (accessed on 17 October 2014).

Weissbrodt D and Wolfrum R (eds) (2013) "The Right to a fair trial in Canada" in *The Right to a fair Trial* available at: <http://www.gbv.de/dms/spk/sbb/recht/toc/272182362.pdf> (accessed on 3 August 2015).

Weissbrodt D (2001) *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Background, Development and Interpretation*, articles 8, 10 and 11 of the Universal Declaration of Human Rights, The Hague, Kluwer Law International, (Book Series: The Universal Declaration of Human Rights, Vol. 1) available at: http://experts.umn.edu/expertPubs.asp?n=David+Weissbrodt&u_id=3013&order=cc (accessed on 22 January 2015).

Wortley R (2002) *Situational prison control: crime prevention in correctional institutions*. Cambridge: Cambridge University Press.

ARTICLES/ JOURNALS/ NEWSPAPERS/ BULLETINS

Advocate du Preez J (2012) "Justice delayed is justice denied." FW De Klerk Foundation available at: <http://www.politicsweb.co.za> (accessed on 1 November 2014).

Amoo S K (2010) “The Jurisprudence of the Rights to a trial within a reasonable time in Namibia and Zambia”, Volume 2, Issue 2 available at: http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/10-2/NLJ_section_3.pdf (accessed on 3 December 2014).

Caunhye A (2013) “Sentencing: Human Rights Standards and Non-Custodial Measures” available at: <http://webcache.googleusercontent.com/search?q=cache:wF60eG7DXsJ:supremecourt.gov.mu.org/scourt/cjei/doc/SENTENCING.doc+&cd=1&hl=en&ct=clnk&gl=za> (accessed on 30 July 2015).

Chadambuka Z (2013) “Serious Offences and the Right to Trial within a Reasonable Time” 1 Essex Human Rights Review Vol. 9 No. 1.

Centre for the Study of Violence and Reconciliation (1996) available at: <http://www.csvr.org.za/index.php/publications/1778-html> (accessed on 5 January 2015).

Centre for the Study of Violence and Reconciliation (2005) available at: <http://www.csvr.org.za/wits/publist/pubstrc.htm> (accessed on 9 January 2015).

Chaskalson J and De Yong Y (2009) “Criminal (In)Justice in South Africa A Civil Society Perspective,” chapter 4, entitled ‘Bail’. Institute for Security Studies available at: <http://www.issafrica.org/uploads/Book2009CrimeInJust.pdf> (accessed on 15 February 2015).

Child Justice Alliance (2014) “Why do we need the child justice bill?” available at: www.childjustice.org.za (accessed on 4 December 2014).

Commonwealth Human Rights Initiative Justice Centre Project (2013) “Access to Justice” available at: <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1175&context=jlasc> (accessed on 12 December 2014).

Corbett S “Analysis: Combating the global epidemic of prison overcrowding” Daily Maverick 14 October 2014 available at: <http://www.dailymaverick.co.za/article/2014-10-14-analysis-combating-the-global-epidemic-of-prison-overcrowding/> (accessed on 5 January 2015).

Creasey D (2011) “Right to a fair trial without unreasonable delay” Human Rights Law Centre available at: <http://www.hrlc.org.au/right-to-a-fair-trial-without-unreasonable-delay> (accessed on 7 October 2014).

Criminal Law Process (2014) “Defendant’s right to a speedy trial” lawyers.com. Internet Brands available at: <http://www.research.lawyers.com/glosary/speedy-trial> (accessed on 17 October 2014).

Crouse A (2011) “Hope for prisoners awaiting trial who cannot afford bail” Wits Justice Project, available at: <http://witsjusticeproject.com/2011/06/11/hope-for-prisoners-awaiting-trial-who-cannot-afford-bail/> (accessed on 18 December 2014).

Cruywagen D (2013) “Awaiting trial inmates filling up SA Prison” available at: <http://www.sanews.gov.za/south-africa/awaiting-trial-inmates-filling-sa-prisons-ndebele> (accessed on 6 January 2015).

Defence for Children International (2014) “Juvenile Justice” available at: <http://www.defenceforchildren.org/juvenile-justice.html> (accessed on 9 December 2014).

Dervan L (2008) “The Case for Plea Bargaining in South Africa and a Blast from the Past” available at: <http://thepleabargainingblog.blogspot.com/2008/07/case-for-plea-bargaining-in-south.html> (accessed on 13 February 2015).

Discussion on Pre-Trial Detention (2014) “Campaign for safe communities: Background on Pre-trial Detention in Africa and the African Commission” available at: <http://safecommunities.sjc.org.za/discussion-on-pre-trial-detention/> (accessed on 20 November 2014).

De Vos P (2010) “Constitutionally Speaking: on torture and human dignity” available at: <http://constitutionallyspeaking.co.za/on-torture-and-human-dignity/> (accessed on 21 November 2014).

Dissel A and Ellis S (2013) “Reform and Stasis: Transformation in South African Prisons” available at: <http://www.csvr.org.za/docs/correctional/reform.pdf> (accessed on 6 January 2015).

Dissel A (1996) “South Africa’s Prison Conditions: the inmates talk.” *Imbizo*, Issue number 2 available at: <http://www.ritecodev.co.za/csvrorig/index.php/publications/1364-south-africas-prison-conditions-the-inmates-talk.html> (accessed on 7 January 2015).

Edwards L (2014) “Spike in claims of police torture is worrying” *Business Day Live*, available at: <http://www.bdlive.co.za/opinion/columnists/2014/10/15/spike-in-claims-of-police-torture-is-worrying> (accessed on 18 July 2015).

ETSI World Class Standards (2008) “What are Standards?” available at: <http://www.etsi.org/standards/what-are-standards> (accessed on 17 October 2014).

Farrell B (2005) “The Right to a Speedy Trial Before International Criminal Tribunals” 19 SAJHR 98.

Fernandez L (2011) “South Africa: The Protection of fundamental Human Rights in Criminal Process.”

Finnemore M and Sikkink K (2014) “International norm dynamics and political change” *International Organisation* 52, No 4. Norms and International Relations available at: <http://www.wikispaces.com> (accessed on 17 September 2014).

Fuzier E C (2011) “South African Prison System – An Indicator of a Country’s Attitude” available at: <http://www.capechameleon.co.za/printed-issue/issue-7/human-rights2/> (accessed on 3 August 2015).

Gay News in South Africa (2011) “Absurdity Reigns a Zoliswa Trial Delayed Again” available at: <http://www.mambaonline.com> (accessed 17 October 2014).

Gist N E (2000) “A Second Look at Alleviating Jail Crowding: A Systems Perspective” Monograph, US Department of Justice, Office of Justice Programs, Bureau for Justice Assistance, PhotoDisc Inc available at: <https://www.ncjrs.gov/pdffiles1/bja/182507.pdf> (accessed on 30 July 2015).

Gordin J and Cloete I (2013) “Imprisoned Before Being Found Guilty: Remand Detainees in South Africa”, Volume 80, Issue 4, Article 6 available at: <http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1137&context=uclr> (accessed on 9 January 2015).

Hans-Jörg A (2012) ‘Prison Overcrowding – Finding effective Solutions.’ Strategies and Best Practices Against Overcrowding in correctional Facilities. Max Planck Institute for Foreign and International Criminal Law available at: https://www.mpicc.de/files/pdf1/rib_43_albrecht.pdf (accessed on 10 February 2015).

Harland C (2000) “The Status of the International Covenant on Civil and Political Rights in the Domestic Law of State Parties: an initial Global Survey through UN Human Rights Committee Documents” Volume 22, Number 1.

Hartle R (2014) “Classic Case of Justice Delayed is Justice Denied.” Sowetan Live Newspaper available at: <http://www.news24.com/Tags/Companies/sowetan> (accessed on 22 January 2015).

Hopkins R (2014) “Broken Beyond Imagination: South Africa’s Justice System” Daily Maverick 14 April 2014 available at: <http://www.dailymaverick.co.za/article/2014-04-14-broken-beyond-imagination-south-africas-justice-system/> (accessed on 22 January 2015).

Human Rights Education Associates (2011) “Torture, Inhuman or Degrading Treatment” available at: http://www.hrea.org/index.php?base_id=134 (accessed on 7 December 2014).

Human Rights Watch (2004) ‘Essential Background: Overview of human rights issues in Ethiopia’ available at: <http://hrw.org/english/docs/2004/01/21/ethiop6983txt.htm> (accessed on 30 November 2014).

Human Rights Watch (2004) “State of pain: Torture in Uganda” Vol. 16, No. 4 (A) available at: <http://www.hrw.org/reports/2004/03/28/state-pain> (accessed on 22 January 2015).

ICRC Bulletin No. 91/2010, 3 February 2010 ‘Protecting Life and Dignity in Places of Detention’. Philippines.

International Centre for Prison Studies (2001) “African Charter on Human and Peoples’ Rights” available at: <http://www1.umn.edu/humanrts.instree/z1afchar.htm> (accessed on 30 November 2014).

Kharsany Z (2008) “R1,5bn to keep suspects behind bars,” *Mail & Guardian Newspaper* available at: <http://mg.co.za/article/2008-07-17-r15bn-to-keep-suspects-behind-bars> (accessed on 20 February 2015).

Kigongo E K (2015) ‘July 2010 bomb suspects lose bid to block their trial,’ *Daily Monitor* available at: <http://www.monitor.co.ug/News/National/July-2010-bomb-suspects-lose-bid-to-block-their-trial/-/688334/2595964/-/14kff6vz/-/index.html> (accessed on 18 February 2015).

Kimberley K (2014) “High Court review to delay case” Herald Live Newspaper available at: <http://www.heraldlive.co.za> (accessed on 8 November 2014).

Koen G “Two Upington Detainees awaiting trial since 2009” *The Citizen* 17 November 2012 available at: <http://www.journalism.co.za/investigative-journalism-homepage/the-justice-project/> (accessed on 22 January 2015).

Kovacevich J (1989) “Abuse of Process.” *New Zealand Law Journal* available at: <http://www.sabar.co.za/law-journals/1989/october/1989-october-vol002-no2-pp113-114-and-122.pdf> (accessed on 30 July 2015).

Kurunziafrika A (2013) “Uganda: Terrorism Detainees Plan Strike Over Delayed Trials” Issue 10, available at: <https://kurunziafrika.wordpress.com/2013/11/22/uganda-terrorism-detainees-plan-strike-over-delayed-trials/> (accessed on 22 January 2015).

Lawyers Committee for Human Rights (2000) “What is fair trial? A Basic Guide to Legal Standards and Practice” available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf (accessed on 22 January 2015).

Lebone K (2011) “SA inmates serving longer sentences” *South African Institute of Race Relations* available at: <http://www.news24.com/SouthAfrica/News/SA-inmates-serving-longer-sentences-20120305> (accessed on 9 January 2015).

Leslie R (2012) “Bail and Detention” *Wits Justice Project* available at: <http://www.canoncollins.org.uk/robynlesliebailremanddetentionfinal.pdf> (accessed on 22 January 2015).

Louw L (2013) “Are Court delays an abuse of the legal process?” *Free Market Foundation*.

Maphumulo Z (2013) “The New Age: Scourge of Male Rape” Article which included a comment by Sasha Gear, who has studied sexual violence in prisons extensively and works for the South African Office of Just Detention International available at: http://thenewage.co.za/blogdetail.aspx?mid=186&blog_id=%201213 (accessed on 6 January 2015).

McMohan M (2014) “What is foreign jurisdiction?” available at: <http://wisegeek.com> (accessed on 9 November 2014).

Meyersfeld B (2011) “The view that the dead in this country can wait for justice is not just illegal but unethical,” available at: <http://www.journalism.co.za> (accessed on 6 October 2014).

Mokgoro Y (2002) “The need for out-of-court settlements in criminal cases” *South African Law Commission, Project 73, Sixth Interim Report on Simplification of Criminal Procedure* available at: http://www.justice.gov.za/salrc/reports/r_prj73_intrep6_2002aug.pdf (accessed on 13 February 2015).

Motala N and McQuoid-Mason, D (2013) “Do prisoners in South Africa have a constitutional right to a holistic approach to antiretroviral treatment?” *South African Journal of bioethics and law*, Vol. 6, No 2 available at: <http://www.sajbl.org.za/index.php/sajbl/article/view/290/311> (accessed on 21 November 2014).

Mpati L (2014) ‘A changing profession in a changing environment’ President of the Supreme Court of Appeal’s address to the Law Society of South Africa available at: <http://www.saflii.org.za> (accessed on 8 November 2014).

Muntingh L and Ballard C (2011) “Correctional Matters Amendment Bill (41 of 2010)” *Civil Society Prison Reform Initiative Newsletter June 2011* available at: <http://cspri.org.za/publications/newsletter/38%20-%20June%202011.pdf> (accessed on 8 January 2015).

Muntingh L (2007) “Prisons in South Africa’s Constitutional Democracy” Centre for the study of violence and reconciliation. *Criminal Justice Programme* available at: www.kms1.isn.ethz.ch/serviceengine/.../prisonsinsa%5B1%5D.pdf (accessed on 22 January 2015).

Ndebele S “Ndebele: SA has highest prison population in Africa.” Report on overcrowding by Minister of Correctional Services as published in the *Mail & Guardian Newspaper* 11 February 2013 available at: <http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele> (accessed on 10 January 2015).

Ndebele S “Overcrowding requires prisoner release” public address by Minister of Correctional Services, as published in the *Mail & Guardian Newspaper* 19 November 2012 available at: <http://mg.co.za/tag/sbu-ndebele> (accessed on 6 January 2015).

Ntuli *et al* (2001) “Enhancement of Community-Based Alternatives to Incarceration at all Stages of the Criminal Justice Process in South Africa” available at: <http://www.restorativejustice.org/articlesdb/articles/4357> (accessed on 6 January 2015).

Oneale L (2014) “South African prisons: shocking abuse recorded - prisoners often victimized by prison gangs and wardens” available at: <http://www.censorbugbear.org/farmitracker/reports/view/2645#rOzZMR3jJHC7qh4p.99> (accessed on 5 January 2015).

Open Society Foundation for South Africa (2010) available at: <http://www.osisa.org//open-learning/law/zambia/research-pre-trial-detention-zambia> (accessed on 10 October 2014).

Porogo D (1998) “Pretrial services and Awaiting Trial Prisoners” Department of Justice. *Consultus* available at: <http://www.sabar.co.za/law-journals/1998/may/1998-may-vol011-no1-pp73-and-85.pdf> (accessed on 6 January 2015).

Radebe J (2013) “Radebe: Prisons are full, stop complaining about NPA” Public address by Minister of Justice and Constitutional Development as published in the *Mail & Guardian Newspaper* available at: <http://mg.co.za/article/2013-05-29-radebe-prisons-are-full-so-stop-complaining-about-npa> (accessed on 27 December 2014).

Rademeyer J (2014) “Do prisoners have access to better medical facilities than the public?” Africa Check available at: <http://africacheck.org/reports/do-prisoners-have-access-to-better-medical-facilities-than-the-public/> (accessed on 28 December 2014).

Ramagaga T (2011) “The Conditions of Awaiting Trial ‘Prisoners’ Look Set to Improve in South Africa” Institute For Security Studies, available at: <http://www.polity.org.za/article/the-conditions-ofawaiting-trial-prisoners-look-set-to-improve-in-south-africa> (accessed on 27 December 2014).

Raphaely C (2012) “Awaiting trial prisoners held in grim conditions” available at: <http://www.bdlive.co.za/opinion/2012/08/23/awaiting-trial-prisoners-held-in-grim-conditions> (accessed on 23 December 2014).

Raphaely C “Prisoners of the system” Saturday Star 10 August 2011 available at: <http://www.iol.co.za/saturday-star/prisoners-of-the-system-1.1115118> - accessed on 20 February 2015.

Rawoot I (2012) “Report shows sorry state of South Africa’s prisons” Mail & Guardian Newspaper available at: <http://mg.co.za/article/2012-10-14-report-shows-sorry-state-of-sa-prisons> (accessed on 8 December 2014).

Robinson P L (2000) “Ensuring fair and expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia” EJIL available at: <http://www.ejil.org/article.php?article=543&issue=41> (accessed on 22 January 2015).

Roy N (2013) “Ten African Solutions to the problem of Overcrowding in Africa” Penal Reform International available at: <http://www.penalreform.org/blog/ten-african-solutions-problem-prison-overcrowding-africa/> (accessed on 13 February 2015).

SABC News (2011) “Plea Bargaining Agreements in the Spotlight Again” available at: <http://www.sabc.co.za/news/a/3fae4600485da4629fcfdf3d930f6e8b/Plea-bargain-agreements-in-the-spotlight-again-20110918> (accessed on 13 February 2015).

SABC News (2013) “SA awaiting trial prisoners stand at 46 309” available at: <http://www.sabc.co.za/news/a/f59ccb004fe4f0ad919df30b5d39e4bb/SA-awaiting-trial-prisoners-stands-at-46-309> (accessed on 10 January 2015).

Sarkin J (2013) “Prisons in Africa: An Evaluation from a Human Rights Perspective” available at: http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo_sarkin.htm (accessed on 22 January 2015).

Schonteich M (2013) “Pre-trial detention and human rights in Africa” available at: www.hscrepress.ac.za/downloadpdf.php?...African...Human%20Rights%20in%20African%20Prisons%20 (accessed on 20 January 2015).

Sekhonyane M (2005) “Prison Reform in Africa: Recent Trends” CSPRI Newsletter No. 10.

Shaw M (2008) “Pretrial Detention: Reducing the Excessive Use of Pre-trial Detention” available at: http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf (accessed on 27 December 2014).

Skilbeck R (2013) “Funding for Justice: The War Crimes Trial” available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=hrbrief> (accessed on 22 January 2015).

Smith (2012) “South Africa: MPs warn of inhumane Prison Conditions” News 24 – Breaking News available at: <http://www.news24.com/SouthAfrica/News/MPs-warn-of-inhumane-prison-conditions-20121024> (accessed on 9 January 2015).

South African Government News Agency (2014) “Management of remand detainees improves” available at: <http://www.sanews.gov.za/south-africa/management-remand-detainees-improves> (accessed on 8 January 2015).

Stander Y (2014) “Rape, Murder Trial Delay ‘Criminal’” IOL News. Cape Argus, available at: <http://www.iol.co.za/news/crime-courts/rape-murder-trial-delay-criminal-1.1629310> (accessed on 6 January 2015).

Stephens J (2013) “Justice denied: inmates sickened in SA prisons get another day in Court” Daily Maverick, available at: <http://www.dailymaverick.co.za/opinionistas> (accessed on 9 January 2015).

Terblanche S S (2012) “The Child Justice Act: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders” Per vol.15 n.5 Potchefstroom available at: http://www.scielo.org.za/scielo.php?pid=S1727-37812012000500014&script=sci_arttext (accessed on 19 February 2015).

Udombana N J (2006) “The African Commission on Human and People’s Right and the development of fair trial norms in Africa” AHRLJ Vol 6 No 2 available at: <http://www.ahrlj.up.ac.za/udombana-nj> (accessed on 12 July 2015).

Watney M (2006) “Judicial Scrutiny of Plea and Sentence Agreements” TSAR 224, available at: <http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi%20issue%204%20June%202006.pdf> (accessed on 13 February 2015).

Wits Justice Project (2013) “Innocent but Incarcerated: An Analysis of Remand Detention in South Africa” available at: <http://witsjusticeproject.files.wordpress.com/2013/10/remand-detention-in-south-africa> (accessed on 8 July 2014).

Woolaver H and Bishop M (2008) “Submission to the Enquiry into the National Director of Public Prosecutions,” The South African Institute for Advanced Constitutional, Public, Human Rights and International Law available at: <http://www.sabar.co.za/law-journals/2008/august/2008-august-vol021-no2-pp26-32.pdf> (accessed on 12 February 2015).

PAPERS

Fagan H Inspecting Judge of Prisons, in his paper “Our Bursting Prisons” delivered at Conference “Consolidating Transformation; a new decade” on 7-8 February 2005, conducted under the auspices of the Centre for the Study of Violence and Reconciliation Criminal Justice Conference Proceedings.

Fagan H (2002) “Prison Overcrowding; One of our biggest challenges to transformation” Track Two.Vol.11 No.2 available at: http://ccrweb.ccr.uct.ac.za/two/11_2/overcrowding.html (accessed on 9 January 2015).

Hoffman M and Topulos K “International Legal Research Tutorial” Duke University School of Law and University of California, Berkeley, School of Law available at: https://law.duke.edu/ilrt/def_terms_4.htm (accessed on 2 July 2015).

Kayitare F (2004) “Respect of the right to a fair trial in indigenous African criminal justice systems – the case of Rwanda and South Africa” available at: http://repository.up.ac.za/bitstream/handle/2263/1087/kayitare_f_1.pdf?sequence=1 (accessed on 20 January 2015).

Mahomed I (1997) “Juvenile Justice” South African Law Commission, Issue paper 9, Project 106 available at: http://www.justice.gov.za/salrc/ipapers/ip09_prj106_1997.pdf (accessed on 4 December 2014).

Olivier L (2011) “Research into pre-trial detention in Zambia” available at: <http://www.osisa.org//open-learning/law/zambia/research-pre-trial-detention-zambia> (accessed on 10 October 2014).

THESIS AND DISSERTATION

Makiwane P N (2008) *Rights and Constitutionalism – A bias towards offenders?* available at: http://uir.unisa.ac.za/xmlui/bitstream/handle/10500/2696/dissertation_makiwane_%20p.pdf?sequence=1 (accessed on 3 August 2015).

Obiokoye I (2005) *Eradicating Delay in the Administration of Justice in African Courts: A Comparative Analysis of South African and Nigerian Courts* available at: <http://www.repository.up.ac.za/bitstream/handle/2263/942/Obiokoye-io-1> (accessed on 15 October 2014).

INTERNATIONAL INSTRUMENTS

American Convention on Human Rights, OAS Treaty Series No. 36; 1144 Units 123;9 I. L. M. 99 (1969). Amends: Protocol to the American Convention on Human Rights available at: <http://www1.umn.edu/humanrts/oasinstr/zoas3con.html> (accesses on 20 May 2014).

BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (2014) “2013 Human Rights Reports: Costa Rica,” US Department of State, Diplomacy in Action, section 1, paragraph d. available at: <http://www.state.gov/j/drl/rls/hrrpt/2013/wha/220432.htm> (accessed on 20 February 2015).

Bureau of Democracy, Human Rights, and Labor (2014) “2013 Human Rights Reports: El Salvador,” US Department of State, Diplomacy in Action, section 1, paragraph d. available at: <http://www.state.gov/j/drl/rls/hrrpt/2013/wha/220442.htm> (accessed on 20 February 2015).

Canadian Charter of Rights and Freedoms, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 available at: <https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html> (accessed on 12 December 2014).

Código Orgánico Procesal Penal (Organic Penal Procedure Code), adopted on 4 September 2009, published in *Gaceta Oficial de la República de Venezuela*, No. 5.930 Extraordinaria, 4 September 2009 available at: <https://www.icrc.org/customary-ihl/eng/docs/srcivnale> (accessed on 6 January 2015).

Criminal Code, RSC 1985, c C-46, available at: <http://canlii.ca/t/52cv4> (accessed on 24 January 2015).

European Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14, 4 November 1950, ETS available at <http://www.refworld.org/docid/3ae6b3b04.html> (accessed on 20 May 2014).

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. 2002 available at: <http://www1.umn.edu/humanrts/instree/RobbenIslandGuidelines.pdf> (accessed on 8 December 2014).

Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaties Treaty Bodies, U. N. Doc.HRI/GEN/1Rev.6 2003 available at: <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm> (accessed on 13 December 2014).

International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, volume 999 available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed on 20 May 2014).

Law No. 1970-86, 15 December 1970, Nationality Law, 18 December 1970, available at: <http://www.refworld.org/docid/3ae6b4d714.html> (accessed on 6 January 2015). Unofficial translation published in *Nationality and Statelessness, A Collection of National Laws, Volume I*, Independent Bureau for Humanitarian Affairs, Ferney Voltaire, France, 1996.

Magna Carta, Article 40. 1215, June 15 available at: <http://www.en.wikipedia.org/wiki/magna-carta> (accessed on 7 October 2014).

Open Society Foundations. “Global Criminal Justice Reform” 2010 available at: <http://www.wikipedia.org/wiki/open-society-foundation> (accessed on 15 October 2014).

Open Society Initiative for Southern Africa (2010) “Research into pre-trial detention in Zambia” available at: <http://www.osisa.org/open-learning/law/zambia/research-pre-trial-detention-zambia> (accessed on 10 October 2014).

“Standard Minimum Rules for the Treatment of Prisoners,” 30 August 1955, United Nations, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 available at: <http://www.refworld.org/docid/3ae6b36e8.html> (accessed on 20 May 2014).

Statute of The International Criminal Tribunal for Rwanda (as last amended on 13 October 2006) 8 November 1994, UN Security Council available at: <http://www.refworld.org/country,...INTINSTRUMENT,RWA,...0.html> (accessed on 31 July 2015).

United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465 available at: <http://www.refworld.org/docid/3ae6b3a94.html> (accessed on 9 December 2014).

United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 157 available at: <http://www.refworld.org/docid/3ae6b38f0.html> (accessed on 9 December 2014).

United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993 available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed on 7 December 2014).

United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly.*, 2 April 1991, A/RES/45/113, article 2 available at: <http://www.refworld.org/docid/3b00f18628.html> (accessed on 4 December 2014).

United Nations General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly.*, 2 April 1991, A/RES/45/110 available at: <http://www.refworld.org/docid/3b00f22117.html> (accessed on 4 December 2014).

United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") : resolution / adopted by the General Assembly.*, 29 November 1985, A/RES/40/33 available at: <http://www.refworld.org/docid/3b00f2203c.html> (accessed on 4 December 2014).

United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993 available at <http://www.refworld.org/docid/3dda28414.html> (accessed on 20 May 2014).

United Nations Standard Minimum Rules for Non-Custodial Measures, adopted by General Assembly Resolution 45/110 of 14 December 1990, Rule 6, available at: <http://www.ohchr.org.english/law/tokyorules.htm> (accessed on 30 November 2014).

Universal Declaration of Human Rights Paris, December 10, 1948 available at: <http://www.legal.un.org/avl/ha/udhr.html> (accessed on 15 October 2014).

Victorian Charter of Human Rights and Responsibilities Act 43 of 2006 available at: <http://www.legislation.vic.gov.au/Domino/web/notes> (accessed on 30 October 2014).

Virginia Declaration of Rights, Holograph Manuscript, May 1776, Manuscript Division available at: <http://www.loc.gov/exhibits/treasures/trt006html> (accessed on 20 May 2014).

REGIONAL INSTRUMENTS

African Charter of Human and People's Rights (also known as the Banjul Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), entered into force on October 21 available at: <http://www1.umn.edu/humanrts/instree/z1afchar.html> (accessed on 20 May 2014).

African Commission on Human and Peoples' Rights. Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU.) available at: www.achpr.org/ (accessed on 7 December 2014).

Open Society Initiative for Southern Africa. 2011 available at: <http://www.osisa.org> (accessed on 10 October 2014).

Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990) available at: <http://www.refworld.org/docid/3ae6b38c18.html> (accessed on 4 December 2014).

Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000 available at: <http://www.refworld.org/docid/4937e0142.html> (accessed 7 December 2014).

CONSTITUTIONS

Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, article 17 available at: <http://www.refworld.org/docid/3ae6b5a84.html> (accessed on 22 January 2015).

Constitution of the Federal Republic of Nigeria, 1999 available at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed on 22 January 2015).

Constitution of the Republic of Ghana 1992 (last amended 1996) available at: <http://www.refworld.org/docid/3ae6b5850.html> (accessed on 5 October 2014).

Constitution of the Republic of Namibia (amended 1998), 21 March 1990 available at: <http://www.refworld.org/docid/47175fd361> (accessed on 7 October 2014).

Constitution of the Republic of Uganda, 22 September 1995 available at: <http://www.refworld.org/docid/3ae6b5ba0.html> (accessed 22 January 2015).

Constitution of Zambia, 1991 (last amended 1996) available at: <http://www.refworld.org/docid/3ae6b5610.html> (accessed on 29 January 2015).

The Constitution of India, 1950 available at: <http://ox.libguides.com/content.php?pid=192789&sid=1616525> (accessed on 8 December 2014).

The Constitution of the Republic of South Africa, 1996.

The Constitution of the United States, 1971. Amendment VI (which is based on the *Magna Carta*, Article 40), available at: http://www.law.cornell.edu/constitution/sixth_amendment (accessed on 23 January 2015).

United States of America: Constitution, 17 September 1787 available at: <http://www.refworld.org/docid/3ae6b54d1c.html> (accessed on 1 February 2015).

STATUTES

Child Justice Act 75 of 2008.

Children's Act 38 of 2005.

Correctional Services Act 111 of 1998.

The Correctional Matters Amendment Act 5 of 2011.

The Criminal Procedure Act 51 of 1977.

The Interim Constitution of the Republic of South Africa Act 200 of 1993.

REPORTS

Amnesty International (2013) "Annual Report: The state of the world's human rights" available at: <http://www.amnesty.org/en/region/ethiopia/report-2013> (accessed on 7 December 2014).

Annual Report 2013/2014, Department of Correctional Services Vote 21 available at: <http://www.dcs.gov.za/docs/landing/DCS%20Annual%20Report%202013-14.pdf> (accessed on 6 January 2015).

Annual Report of the Judicial Inspectorate (2000) available at: www.cplo.org.za/?wpdmdl=58&&ind=9 (accessed on 22 January 2015).

Ballard C (2011) “Research Report on Remand Detention in South Africa: an overview of the current law and proposals for reform.” Community Law Centre available at: <http://cspri.org.za/publications/research/reports/Remand%20detention%20in%20South%20Africa.pdf> (accessed on 7 December 2014).

Ballard C (2014) Lawyers for Human Rights Submissions. Department of Correctional Services’ 2013/2014 Annual Report available at: <http://www.pmg.org.za/files/141015lhr.pdf> (accessed on 28 December 2014).

Cohen J R (2001) “South African Human Rights Commission: Submission to the Justice and Constitutional Development Portfolio Committee, National Assembly” Cape Town available at: [http://www.sahrc.org.za/home/21/files/6%20SAHRC%20Submission%20on%20Criminal%20Procedure%20Amendment%20Bill%20\(Plea%20Bargaining\)%20\(Parl\)%20Oct%202001.pdf](http://www.sahrc.org.za/home/21/files/6%20SAHRC%20Submission%20on%20Criminal%20Procedure%20Amendment%20Bill%20(Plea%20Bargaining)%20(Parl)%20Oct%202001.pdf) (accessed on 13 February 2015).

Communication 17/94, 139/94, 154/96, 161/97 International PEN, Constitutional Rights Project, Inter-rights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jr./Nigeria, 12th annual activity report of the OAU, 1998–1999 available at: <http://www.issafrica.org/pubs/Other/ahsi/ChrubinMono/Chap3.pdf> (accessed on 22 January 2015).

Correctional Services Budget Vote Speech 2014/15 (2014) By Advocate Michael Masutha, Minister of Justice and Correctional Services, MP National Assembly, Cape Town available at: <http://www.dcs.gov.za/docs/landing/Address%20by%20%20Minister%20Micheal%20Masutha%20at%20the%20Budget%20Vote%20Speech.pdf> (accessed on 16 February 2015).

Criminal Justice Review (2002) “Report on Section 342A of the Criminal Procedure Act 51 of 1977.” Justice Crime Prevention and Security (JCPS) available at: www.joasa.org.za/articles/SEC%20342A%20Report-22Oct.doc (accessed on 22 January 2015).

Fagan H (2001) “Report on Visits to Johannesburg, Pretoria & Pollsmoor Prisons” in his report to Parliaments Correctional Services Committee available at: <http://www.pmg.org.za/minutes/20020212-report-visits-johannesburg-pretoria-pollsmoor-prisons> (accessed on 18 December 2014).

Gubrie R (2013) “Excessive Delay Of Cases: A Violation Of The Right To Fair Trial,” Access to Justice CHRI- Africa Office available at: <http://thechronicle.com.gh/excessive-delay-of-cases-a-violation-of-the-right-to-fair-trial/> (accessed on 22 January 2015).

Judge Van Zyl D (2010) “Annual report for the period 1 April 2009 to 31 March 2010.” Judicial Inspectorate of Correctional Services available at: <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202009%20-2010.pdf> (accessed on 22 January 2015).

Judicial Inspectorate for Correctional Services 2013/2014 Annual Report by Judge Tshabalala “Treatment of inmates and conditions in correctional centres” available at: <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf> (accessed on 27 December 2014).

Judicial Inspectorate for Correctional Services 2013/2014 Annual Report “Treatment of inmates and conditions in correctional centres”, “Treatment of inmates and conditions in correctional centres” available at: <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf> (accessed on 27 December 2014).

Judicial Inspectorate of Prisons Annual 2006/07 Report on Prisoners and Prisons available at: <http://www.pmg.org.za/minutes/20071115-judicial-inspectorate-prisons-annual-200607-report-prisoners-and-prisons> (accessed on 9 January 2015).

Judicial Inspectorate of Prisons Report (2000) available at: www.cplo.org.za/?wpdmdl=58&&ind=9 (accessed on 22 January 2015).

Kaggwa S K (2012) “Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa,” The 52nd Ordinary Session of the African Commission on Human and People’s Rights, Yamoussoukro, Cote d’Ivoire available at: <http://www.achpr.org/sessions/52nd/intersession-activity-reports/prisons-and-conditions-of-detention/> (accessed on 13 February 2015).

Lancaster L (2013) Institute for Security Studies: twenty years of Justice Reform in South Africa: what is there to show for it? Crime and Justice Hub. Governance, Crime and Justice Division, ISS, Pretoria available at: <http://www.issafrica.org/uploads/5th-crime-conference-Booklet-FINAL.pdf> (accessed on 6 January 2015).

Legal Aid South Africa Annual Report 2012-2013 available at: <http://www.legal-aid.co.za/wp-content/uploads/2012/12/Legal-Aid-SA-Annual-Report-2013.pdf> (accessed on 10 January 2015).

Mahomed I (1997) “Juvenile Justice” South African Law Commission, Issue paper 9, Project 106 available at: http://www.justice.gov.za/salrc/ipapers/ip09_prj106_1997.pdf (accessed on 4 December 2014).

Mutingh L (2006) “Prison in a Democratic South Africa – a guide to rights of prisoners as described in the Correctional Services and Regulations”. Open Society Foundation (OSF) and the Ford Foundation. Community Law Centre. Cape Town available at: <http://cspri.org.za/publications/research/reports/Prisons%20in%20a%20Democratic%20South%20Africa%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf> (accessed on 22 January 2015).

Muntingh L (2009) “Reducing prison violence: implications from the literature for South Africa”. Civil Society Prison Reform Initiative Research Report No. 17 available at: <http://cspri.org.za/publications/research-reports/Reducing%20Prison%20Violence.pdf> (accessed on 27 December 2014).

Muntingh L and Ballard, C (2012) “Report on children in prison in South Africa” available at: <http://cspri.org.za/publications/research-reports/report-on-children-in-prison-in-south-africa> (accessed on 22 January 2015).

Muntingh L and Dereymaeker, G (2014) “Submission to the Portfolio Committee on Justice and Correctional Services Oct 2014” CSPRI Submission on the 2013/14 DCS Annual Report available at: <http://cspri.org.za/publications/submissions-and-presentations/cspri-submission-to-portfolio-committee-on-justice-and-correctional-services-on-dcs-annual-report-2014.pdf> (accessed on 11 February 2015).

Odongo G and Gallinetti J (2005) “The treatment of children in South African prisons: A report on the applicable domestic and international minimum standards” CSPRI Research Report, No. 11. CSPRI, Cape Town available at: <http://db3sqepoi5n3s.cloudfront.net/files/docs/080307researchunit.htm> (accessed on 22 January 2015).

Office of the Inspecting Judge (2010) Annual Report of the Judicial Inspectorate for Correctional Services 2009/10 Cape Town available at: <http://cspri.org.za/publications/newsletter/38%20-%20June%202011.pdf> (accessed on 9 January 2015).

Penal Reform International (2012) “Pre-trial Detention” available at: <http://www.pri.ge/eng/Pre-trialDetention.php> (accessed on 27 December 2014).

Public Service Commission Annual Report 2010/2011 available at: http://www.psc.gov.za/documents/2011/PSC%20Annual%20Report%202010_2011.pdf (accessed on 23 December 2014).

Report on Inspections of Regional Courts, Department of Justice and Constitutional Development: Limpopo Province. 2011. Public Service Commission available at: <http://www.psc.gov.za/documents/2013/INSPECTIONS%20DOJCD%20LIMPOPO%20REPORT%2006%20DEC%202011.pdf> (accessed on 10 January 2015).

Singh N “Heads of Argument on Behalf of the Second and Third Accused in S v Zuma and Others 2005 (3) BCLR 385 (SA),” submitted on 28 August 2006 to the Registrar of the then Appellate Division (now Supreme Court of Appeal) available at: www.armsdeal-vpo.co.za/.../Thint%20Heads%20of%20Argument%20%20Right%20to%20a%20fair%20trial.docc (accessed on 22 January 2015).

Skosana B M (2002) “Department of Correctional Services Annual Report 1 April 2002-31 March 2003,” foreword to the report in Part 1 available at: <http://www.dcs.gov.za/Publications/Annual%20Reports/DCS%20Annual%20Report%202002.pdf> (accessed on 18 January 2015).

South African Yearbook 2013/14 “Justice and Correctional Services” available at: <http://www.doc.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2013-4Justice.pdf> (accessed on 10 February 2015).

State of Torture and Related Human Rights Violations in Kenya Alternative Report to the Human Rights Committee to Inform its Review of Kenya’s Third Periodic Report at Its 105th

Session (9 - 2 July 2012) on the Implementation of the Provisions Of the International Covenant On Civil And Political Rights In Relation To Torture available at: http://www.omct.org/files/2012/07/21869/state_of_torture_and_related_human_rights_violations_in_kenyuhrc.pdf (accessed on 7 December 2014).

Mahomed I (1997) “Juvenile Justice” South African Law Commission, Issue paper 9, Project 106 available at: http://www.justice.gov.za/salrc/ipapers/ip09_prj106_1997.pdf (accessed on 4 December 2014).

United Nations Office of Drugs and Crime Vienna (2014) “World Drug Report” available at: http://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf (accessed on 17 February 2015).

United States Department of State *U.S. Department of State Country Report on Human Rights Practices 2003 - Ghana*, 25 February 2004 available at: <http://www.refworld.org/docid/403f57b1c.html> (accessed on 7 December 2014).

United States’ Lawyers Committee for Human Rights (2000).

United States Report on International Prison Conditions (2013) Department of State. Bureau of Democracy, Human Rights and Labour available at: <http://www.state.gov/documents/organization/210160.pdf> (accessed on 21 January 2015).

Wits Justice Project (2013) “Innocent but Incarcerated: An Analysis of Remand Detention in South Africa” available at: <http://www.witsjusticeproject.files.wordpress.com/2013/10/remand-detention-in-south-africa> (accessed on 1 October 2014).

Wits Justice Project (2015) “Ten facts about SA’s watch-dog – Independent Police Investigative Directorate (IPID)” available at: <http://witsjusticeproject.com/2015/04/30/ten-facts-about-sas-watch-dog-independent-police-investigative-directorate-ipid/> (accessed on 18 July 2015).

The White Paper on Corrections in South Africa (2005) Department of Correctional Services available at: www.dcs.gov.za/AboutUs/ (accessed on 20 February 2015).

CASE LAW

Antonio Martinez Munoz v Spain Communication No 1006/2001:04/02/2004.

Van Biljon and Others v Minister of Correctional Services and Others 1997 (4) SA 441.

Barker v Wingo 407 U. S. 314 (1972).

Berg v Prokureur – Generaal van Gauteng 1995 (11) BCLR 1441 (T).

Boswell v. Sherburne County, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988), available at: <https://casetext.com/#!/case/boswell-v-sherburne-county> (accessed on 1 February 2015).

Bothma v Els & Others 2010 (1) BCLR 1 (CC).

Bozize v Central Africa Republic Communication No 428/1990 (1994).

Broome v DPP, Cape Town; Wiggins and v Wnde Streeklanddros, Cape Town 2007 (3) JOL 210412 (C).

Broome v Director of Public Prosecutions, Western Cape and Others, Wiggins v W/NMDE Streeklanddros, Cape Town and Others 2008 (1) SACR 178 (C).

Buchholz v Germany 42 (1981) ECHR, series A.

Caiozzo v Koreman, 581 F.3d 63 , 69–72 (2d Cir. 2009).

Clyde Neptune v Trinidad and Tobago Communication No 523/1992:01/08/96.

Constitutional Rights Project v Nigeria, African Commission on Human and Peoples' Rights, Communication No 153/96, 13th AARACHPR.

Daniels v. Williams, 474 U.S. 327, 335, 106 S. Ct. 662, 667, 88 L. Ed. 2d 672, 670 n.3 (1986).

Davis v. Hall, 992 F.2d 151, 152–53 (8th Cir. 1993).

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) (1998 (7) BCLR 779; [1998] ZACC 6.

Earl Pratt and Ivan Morgan v Jamaica Communication No 225/1987:07/04/89 (Human Rights Commission).

Feedmill Development (PTY) LTD and Another v Attorney-General of KwaZulu-Natal 1998 (2) SACR 539 (N).

Foti v Italy (1983) 5 EHRR 313.

Franz and Maria Deisl v Austria Communication No 1060/2002:23/08/2004.

Girjadat Siewpersaud v. Trinidad and Tobago, Communication No. 938/2000, U.N. Doc. CCPR/C/81/D/938/2000 (2004), available at: <http://www1.umn.edu/humanrts/undocs/html/938-2000.html> - accessed on 29 January 2015.

Glenroy Francis v Trinidad and Tobago, Communication No. 899/1999, U.N. Doc. CCPR/C/75/D/899/1999 (2002), paragraph 5.4, available at: <http://www1.umn.edu/humanrts/undocs/899-1999.html> (accessed on 29 January 2015).

Godi v S 2011 (4) ZAWCHC 247.

Hare v. City of Corinth, 135 F.3d 320, 324 (5th Cir. 1998).

Hernández Lima v. Guatemala, Case 11. 297, Inter-American Commission on Human Rights (IACHR), 16 October 1996, available at: <http://www.refworld.org/docid/3ae6b69c24.html> (accessed on 6 January 2015).

Joseph v The State 2007 (1) BCLR 345 (CA).

Klein v Attorney – General, Witwatersrand Local Division and Another 1995 (2) SACR 210 (W).

Lee v Minister of Correctional Services 2013 (2) BCLR 129 (CC).

Leon Rouse v Philippines Communication No 1089/2002:05/08/2005.

McCarthy v Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA).

Minister of Correctional Services v Lee 2012 (3) SA 617 (SCA) (Supreme Court of Appeal Judgment).

Minister of Justice v Hofmeyr 1993 (2) All SA 232 (A).

Moeketsi v Attorney – General, Bophuthatswana and Another 1996 (7) BCLR 947 (B).

Mohamed v. President of the Republic of South Africa 2001 (3) SA 893 (CC).

S v Mokoena 1983 (4) SA 401 (C).

Pagnouille v Cameroon 1997, African Commission on Human and Peoples' Rights, Communication No 39/90.

Paschim Banga khet Mazdoor Samity v State of West Bengal 1996 SOL Case No. 169 (Supreme Court of India).

Peers v Greece (2001) 33 EHRR 51.

Phillips v The Director of Public Prosecutions and Another 2011 (ZAGPJHC) 51 (10 June 2011).

Prinsloo v Nasionale Vervolgingsgesag 2011 (2) SA 214 (GNP).

Prosecutor v Furundzija ICTY (Trial Chamber), judgment of 10 December 1998.

R v Askew (1990) 2 S. C. R. 1199 (Canada).

R v C.S. 1999 CanLII 18948 (NL CA), (1999), 172 Nfld. & P.E.I.R. 175 (N.L.C.A.).

R v Mills (2011) ACTSC 109 (1 July 2011).

R v Morin (1992) 1 SCR 77.

R v Rahey (1987) 1 S. C. R. 588 (Canada).

R v Upton (2005) ACTSC 52.

Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).

Strunk v United States 412 U.S. (1973).

Strydom v Minister of Correctional Services 1999 (3) BCLR 342 (W).

S v Acheson 1991 (2) SA 805 (Nm).

S v Amujekela 1991 NR 303 HC 16.

S v Dzukuda and Others; S v Tshilo 2000 (2) SACR 443 (CC).

S v Jackson & Others 2008 (2) SACR 274 (CC).

S v Makwanyane and Another 1995 (6) BCLR 665.

S v Motsasi 1998 (2) SACR 35 (W).

S v Myburgh (2002) 16 NASC.

S v Naidoo 2012 SACR 126 (WCHC).

S v Ndibe (2012) ZACHC 245.

S v Scholtz and Others 1996 (2) SACR 623 (C).

S v Van Huysteen 2004 (2) SACR 478 (C).

S v Williams 1995 (7) BCLR 861 (CC).

S v Zuma and Others 1995 (2) SA 642 (CC).

The Director of Public Prosecutions and Minister of Justice and Constitutional Development v Phillips (2012) ZASCA 140.

Trop v. Dulles (1958) USSC 55; 356 U.S. 86, 101 (1958).

Whittaker and Morant v Roos and Bateman 1912 AD 92.

Wild and Another v Hoffert NO and Others 1998 (6) BCLR 974 (N).

Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996).

Wynne-Jones and Another v S In re: S v Wynne-Jones and Another (2012) 2 All SA 311 (GSJ).

Zanner v Director of Public Prosecutions 2006 (8) SCA 56 (SCA).

Subject Index

ADMINISTRATION

backlog of cases140-142

APPEAL DELAYS

the *Phillips* case

justifiable reasons for delay149-150

permanent stay 149

BAIL157-159

CHILDREN

conditions of detention118-119

constitutional and legislative guarantees99-102

definition of child 65

detention as last resort64-65

CONSTITUTIONAL PROVISIONS87-99

FOREIGN JURISDICTIONS

Canada32-35

burden of proof for unreasonableness 32

fairness of trial33-34

inquiry into unreasonable delay 32

stay of proceedings 32

United States of America35-37

factors to be considered in unreasonableness inquiry35-37

reasons for delay 37

speedy trial35-37

Australia38-40

permanent stay of prosecution	38
unreasonable delay	38
namibia	40-43
review of jurisprudence	41-42

HUMAN RIGHTS

Ghana	46
South Africa	47-49
conditions of detention	54-55
independent police investigating directorate	52-54
physical abuse	49-54
social welfare of detainees	55-57

INTERNATIONAL LAW

abuse of process	19
African Charter	17
blame for delays	22
effective case flow management	26-29
European convention on civil and political rights	13, 17
human rights instruments	12, 25
international covenant on civil and political rights	12, 14-15
international norms	12, 18-19
norm	18-19
presumption of innocence	19-21, 58-59
pre trial detention	24, 27, 29
Tokyo rules	30-31
48-hour rule	23-24

OVERCROWDING

accommodation	122
bail as reason for overcrowding	128-129

capacity	125-126, 130-131
cost of detention	123
medical problems	131-132
population	129-130
theories of prison violence	132-137

PLEA BARGAINING	160-163
-----------------------	---------

PRISON CONDITIONS

correctional services act 111 of 1998.....	109-111
correctional matters amendment act 5 of 2011	111
maximum period of incarceration	115-117
the <i>Lee</i> case	120

SYSTEMATIC DELAY	33-34, 79, 86, 142-143
------------------------	------------------------

UNREASONABLE DELAYS

factors that constitute unreasonable delay	75-81
fair trial.....	79
prejudice	75-79
type of case	77-78
section 342A	81-84