



**RESEARCH REPORT ON REMAND DETENTION IN SOUTH  
AFRICA: AN OVERVIEW OF THE CURRENT LAW AND  
PROPOSALS FOR REFORM**

**By**

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SOUTH AFRICA

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# RESEARCH REPORT ON REMAND DETENTION IN SOUTH AFRICA: AN OVERVIEW OF THE CURRENT LAW AND PROPOSALS FOR REFORM

By  
*Clare Ballard*<sup>1</sup>

## Introduction

Every day thousands of criminal suspects around the world are denied bail, putting the global average of remand detainees at approximately three million.<sup>2</sup> As is the case with many human rights concerns, the poor, who cannot afford bail or the services of a lawyer, will suffer the worst of the effects of remand detention. Remand detainees may suffer a range of negative effects, such as the loss of his or her employment or home, health problems and disconnection from his or her family and community. In addition, remand detainees face exposure to torture, extortion, disease and are subject to the arbitrary actions of police, corrupt officials and even other detainees.<sup>3</sup>

Although the rate of remand detention in developing countries is comparatively lower than it is in developed nations,<sup>4</sup> the average detention duration and percentage of prisoners who are on remand in developing countries is relatively high.<sup>5</sup> In some countries, for example, over three quarters of all prisoners are remand detainees.<sup>6</sup> Such figures indicate that remand detention is not considered an exceptional measure or seen as a last resort,<sup>7</sup> but used excessively and frequently without sufficient justification.

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<sup>2</sup> D Berry “The Socioeconomic Impact of Pre-trial Detention: A Global Campaign for Pre-trial Justice Report” (2011), Open Society Foundation and United Nations Development Programme) at 15.

<sup>3</sup> Id.

<sup>4</sup> The United States, for example, has the fourth highest rate of pre-trial detention (158 per 100 000, the global average being 44 per 100 000) See above note 2 at 16.

<sup>5</sup> In 2003, the average length of pre-trial detention in 19 of the 25 European Union member states was 167 days. In Nigeria, for example, the figure is 3.7 years. Above note 2 at 15-6 citing Anthony Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 86.

<sup>6</sup> This includes Liberia (where 97% of all prisoners are awaiting trial), Mali (89%), Benin (80%), Haiti (78%), Niger (76%), Bolivia (74%), and Congo-Brazzaville (70%). See Berry above note 2 at 15-6.

<sup>7</sup> The “last resort” principle is enunciated in Article 9, paragraph 3 of the International Covenant on Civil and Political Rights, which states:

On 31 December 2010 the awaiting trial detainee population in South Africa was 46 432,<sup>8</sup> approximately 30% of the total inmate population and almost double the Department of Correctional Services' proposed benchmark figure of 25 000.<sup>9</sup> In some correctional facilities where overcrowding has reached a "critical level,"<sup>10</sup> awaiting trial detainees account for 52% of the inmate population.<sup>11</sup>

On 31 March 2010, 24 305 remand detainees out of 50 511 (48%) had been in custody for longer than three months. Approximately 14% (3403) of these remand detainees had been detained for over 12 months,<sup>12</sup> and 3-4% (972) for over two years.<sup>13</sup> Literally thousands of people in South Africa spend long stretches of their lives in conditions frequently described as "inhumane,"<sup>14</sup> and without access to educational or rehabilitative programs. More than half of those in remand detention will be released due to acquittal or their charges being withdrawn or struck off the roll.<sup>15</sup>

There are two central issues associated with the excessive use of remand detention: overcrowding and the lengthy duration of detention which many remand detainees are forced to endure. The problem of lengthy detainment – itself a liberty concern – is also an important contributing factor to the problem of overcrowding in prisons. The focus of this report is lengthy remand detention in prison. It is

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"It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

<sup>8</sup> Statistics sourced from the Department of Correctional Services Management Information System, <http://www.dcs.gov.za/WebStatistics/> (last accessed on 6 June 2011). See also the Office of the Inspecting Judge (2010) Annual Report of the Judicial Inspectorate for Correctional Services 2009/2010, Cape Town, 13, which reported that in May 2010 there were 49 030 awaiting trial detainees. The 2009/2010 Annual Report for the Department of Correctional Services (DCS), 16, reported the figure to be 50 511 as of 31 March 2010.

<sup>9</sup> Department of Correctional Services Management Information System, available at <http://www.dcs.gov.za/WebStatistics/> (last accessed on 6 June 2011).

<sup>10</sup> Department of Correctional Services Management Information System, available at <http://www.dcs.gov.za/WebStatistics/> (last accessed on 6 June 2011) indicates that correctional facilities are at 135.44% capacity. See also the Office of the Inspecting Judge (2010) Annual Report of the Judicial Inspectorate for Correctional Services 2009/2010, Cape Town, 11, however, which indicates that certain correctional facilities exceed 200% capacity.

<sup>11</sup> Office of the Inspecting Judge (2010) Annual Report of the Judicial Inspectorate for Correctional Services 2009/2010, Cape Town, 13.

<sup>12</sup> The 2009/2010 Annual Report for the Department of Correctional Services, 16.

<sup>13</sup> Justice Crime Prevention and Security Cluster, presentation to Parliament dated 27 October 2010.

<sup>14</sup> See the 2005 UN Working Group on Arbitrary Detention Report, which noted: "South Africa's awaiting trial population is placed in conditions that are often far worse than those convicted and that the lack of adequate facilities is so blatant that they do not meet minimum standards. For those suffering from illnesses, this results in the aggravation of their health problems or even the death of some persons." Document available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/98/PDF/G0516898.pdf?OpenElement> (last accessed on 6 June 2010).

<sup>15</sup> See V Karth "Between a Rock and a Hard Place: Bail decisions in three South African courts." Research paper, Open Society Foundation for South Africa, Cape Town.

important, however, to bear in mind the significant overlap between the two, particularly where conditions of detention are concerned.<sup>16</sup>

Section 12(1)(a) of the Constitution states that a person cannot be deprived of his or her freedom arbitrarily or without just cause.<sup>17</sup> This right, crafted in general terms, is quite obviously at risk in the specific instance of remand detention and the bail process linked to it. Section 35(1)(f) of the Constitution entitles an arrested person to be released on bail “if the interests of justice permit.”<sup>18</sup> Although the various “liberty” interests affected by lengthy periods of detention have been discussed by the courts, they have not yet decided whether a remand detainee should be released on account of having spent a lengthy period of time in custody. Moreover, the law relating to bail proceedings does not stipulate a maximum time period which, once expired, entitles the accused to be released pending trial. Neither does it provide for a process of continuous or intermittent review of bail decisions. Comparatively, and despite the Constitution’s robust protection of the right to liberty, this situation puts South Africa behind other countries faced with similar problems regarding high remand detainee populations and lengthy periods of detainment.

This report provides an overview of the necessary research to develop possible solutions for limiting the amount of time remand detainees spend in custody. Importantly, it is limited to remand detainees who have already been formally charged and are awaiting trial. Thus, issues of wrongful arrest and the lawfulness of detention prior to having been brought before court, fall outside the scope of this report.

Two relevant constitutional protections are discussed: the right to freedom and security of the person,<sup>19</sup> and the right to have one’s trial begin and conclude without unreasonable delay.<sup>20</sup> Although both rights are relevant to the problems associated with lengthy remand detention, the right to liberty supports directly the principles that pre-trial detention should be a last resort, and for the shortest time possible. Section 35(3)(d) is less concerned with the liberty interests of an accused, locating the problem as simply one of the factors to be assessed in the broader question of whether the fairness of the trial will be affected by lengthy pre-trial delays. “Unreasonable delay” jurisprudence is, however,

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<sup>16</sup> This is illustrated well in the recent Western Cape High Court judgment of *Dudley Lee v Minister of Correctional Services* (10416/04, 1 February 2011, as yet unreported) where the plaintiff was detained for four and a half years while on trial, during which time he contracted Tuberculosis. The Court found that the Department, given their apparent awareness of the overcrowded and poorly ventilated conditions in Pollsmoor prison, had failed to take measures to prevent the spread of Tuberculosis.

<sup>17</sup> Section 12(1)(a) of the Constitution states: “Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”

<sup>18</sup> Whether or not the bail provisions in the Act cohere with section 35(1)(f) has been debated quite extensively. See MG Cowling “The incidence and nature of an onus in bail application” (2002) SACJ 176.

<sup>19</sup> Section 12(1)(a) of the Constitution.

<sup>20</sup> Section 35(3)(d) of the Constitution.

an important indicator of how courts will respond to systemic and institutional delays in the criminal justice system as well as a useful commentary on the dangers of lengthy detention and the societal importance of speedy determinations of guilt or innocence

The report discusses, firstly, the bail provisions in the Criminal Procedure Act with regard to the right to liberty and in the broader constitutional notion of proportionality. Second, case law from regional and international bodies dealing with pre-trial release is explored, and third, detention time limits and automatic bail review proceedings are discussed. Fourth, the conceptual distinction between fair trial rights and liberty interests and the South African courts' treatment of "undue delay" cases is described. The report concludes with the recommendation that a constitutional challenge, based on the Criminal Procedure Act's failure to adequately protect the accused's right to liberty, be brought on behalf of South Africa's remand detainees. Such a challenge would be based on the right to liberty and argue that without custody time limits and a regular, automatic review of bail decisions, the law in relation to bail, as it currently stands, is unconstitutional.

## **1. Section 12(1)(a) of the Constitution and Bail**

The majority of bail decisions are made by the courts.<sup>21</sup> Section 60(1)(a) of the Criminal Procedure Act<sup>22</sup> states:

"An accused who is in custody in respect of an offence shall . . . be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."<sup>23</sup>

In *S v Dlamini*,<sup>24</sup> the Constitutional Court considered the relationship between section 60 of the Criminal Procedure Act with section 35(1)(f) of the Constitution. Commenting on the purpose of bail, Kriegler J stated:

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<sup>21</sup> There are provisions in the Criminal Procedure Act, however, which grant the police the authority to grant bail for certain trivial offences. Similarly, prosecutors may grant bail where offences listed in schedule 7 are alleged. Examples of such offences include culpable homicide, arson and public violence.

<sup>22</sup> Act 51 of 1977.

<sup>23</sup> Prior to a 2000 amendment, section 60(1)(a) read: "all accused persons are entitled to be released on bail unless it is in the interests of justice that they be detained." This, as stated by the Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) at paras 13-4 was an "echo of the right contained in section 25(2)(d) of the interim Constitution" and thus the legislature's attempt to "align the principles of bail with constitutional norms." The provision changed when the Final Constitution came into effect. Section 35(1)(f) reads: "Everyone who is arrested for allegedly committing an offence has the right . . . to be released from detention if the interests of justice permit, subject to reasonable considerations." The current wording of section 60(1)(a) now resembles this provision, as opposed to "favour[ing] liberty" as it did prior to its amendment in 2000. (*Dlamini* para 38).

<sup>24</sup> *Dlamini* above note 23.

“Bail serves not only the liberty interests of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already over-crowded correctional system, and by reducing the number of families deprived of a bread winner.”<sup>25</sup>

Section 60(4) of the Criminal Procedure Act lists the grounds on which it would not be in the ‘interests of justice’ to grant an accused bail.<sup>26</sup> Broadly, these are: where there is a likelihood that the accused, if released on bail would 1) endanger the safety of the public or any person or will commit a schedule 1 offence; 2) attempt to evade trial; 3) attempt to influence or intimidate witnesses or to conceal or destroy evidence; 4) undermine or jeopardise the objectives or the proper functioning of the criminal justice system, or, 5) where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security. These do not form an exhaustive list. In *S v Mbele*,<sup>27</sup> the Court stated:

“On general principles, there can be no *numerus clausus* of the grounds which may be sufficient to justify the conclusion that it is in the interests of justice that an accused person should not be released on bail, and the Legislature should not be understood as having established an exhaustive list of grounds.”<sup>28</sup>

The interests set out in section 60(4) of the Criminal Procedure Act must be weighed against the “right of the accused to his or her personal freedom, and in particular, the prejudice he or she is likely to suffer if detained in custody.”<sup>29</sup> The Criminal Procedure Act then sets out the following factors that, where applicable, must be taken into account in deciding whether to grant an accused bail. The subsections are as follows:<sup>30</sup>

- a) the period for which the accused has already been in custody since his or her arrest;
- b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- d) any financial loss which the accused may suffer owing to his or her detention;
- e) any impediment to the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- f) the state of health of the accused; or

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<sup>25</sup> *Dlamini* above note 23 at para 40.

<sup>26</sup> Various amendments to section 60 of the Act have expanded the list of factors to be considered when a decision on bail is made.

<sup>27</sup> *S v Mbele and Another* 1996 (1) SACR 212 (W).

<sup>28</sup> *Id* at 223.

<sup>29</sup> Section 60(9) of the Criminal Procedure Act.

<sup>30</sup> Listed in section 60(9)(a) – (g) of the Criminal Procedure Act.



g) any other factor which in the opinion of the court should be taken into account.

This balancing of interests is, in effect, a proportionality analysis. The Constitutional Court has previously used such analyses in section 12(1)(a) cases. It is therefore necessary to briefly sketch the terrain of section 12(1)(a) of the Constitution.

## 1.1 Section 12(1)(a)

In *De Lange v Smuts*<sup>31</sup> Ackermann J, for the majority of the Constitutional Court, separated the section 12(1)(a) inquiry into two stages. The first stage addresses the matter of whether there was an arbitrary deprivation of liberty. There must be a “rational connection” between the deprivation “and some objectively determinable purpose.” In the absence of such connection, the substantive protection afforded by section 12(1)(a) has been violated. The second stage of the inquiry requires that, in addition to a rational connection, there must be a “just cause” for the deprivation of liberty.

## 1.2 Arbitrariness

The arbitrariness inquiry, also a two-stage process, addresses, firstly, whether the deprivation has a source in law. The second stage concerns the relationship of the deprivation to a legitimate government purpose. For even if deprivation is authorized by law, if it fails to serve a legitimate purpose, it is arbitrary.<sup>32</sup>

The initial denial of bail, if based on the reasons set out in section 60(4) of the Criminal Procedure Act, is, uncontroversially, not an arbitrary deprivation of liberty. Not only is the deprivation of liberty based on a “source in law,” but it serves the legitimate state interests of protecting the public and safeguarding the integrity of the trial process and criminal justice system.

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<sup>31</sup> *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 23.

<sup>32</sup> The Constitutional Court has rejected a number of applications alleging arbitrary detention, finding that the deprivations did serve a legitimate government purpose. See for example *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) (It is not arbitrary to detain at a port of entry a person reasonably suspected of being an illegal immigrant); *De Lange* (above note 28) (Committal of witness to prison during insolvency investigation serves legitimate government purpose) and *S v Thebus & Another* 2003 (6) SA 505 (CC) (The doctrine of common purpose is rationally related to the legitimate government purpose of controlling joint criminal enterprise.)

### 1.3 Just Cause

The parameters of 'just cause' have not been set definitively by the courts.<sup>33</sup> Nevertheless, the Constitutional Court has offered some guidance. In the *Coetzee* case,<sup>34</sup> for example, the Court invalidated provisions of the Magistrates' Courts Act<sup>35</sup> that permitted the detention of civil debtors, finding that they were over-inclusive in their application – including both debtors who were able to pay but chose not to *and* those too poor to pay. The Court held that a 'debtors' prison' was inconsistent with the values of the Constitution and thus an unjustifiable limitation of section 11 of the Interim Constitution (now section 12(1)(a)).<sup>36</sup> Were it decided under section 12(1)(a), the Court would have found that the contested provisions lacked a "just cause."<sup>37</sup>

### 1.4 Just Cause and Proportionality

In the *De Lange* case,<sup>38</sup> the Court considered provisions in the Insolvency Act<sup>39</sup> which provided that if a witness, summoned to appear before a meeting of creditors, refused to produce any document required or answer any question put to him or her, he or she could be committed to prison. The majority judgment held that the contested provisions were unconstitutional only to the extent that it authorised a presiding officer who was *not* a magistrate to commit a witness to prison. In *Nel v Le Roux and Others*<sup>40</sup> the Court considered section 205 of the Criminal Procedure Act, which provides that if a witness refuses to give information without a "just excuse", he or she can be summarily imprisoned. The Court held that the section had to be interpreted in such a way that if answering a question would unjustifiably infringe or threaten to infringe any of the witnesses' rights, this would be a "just excuse" for refusing to answer.<sup>41</sup> Thus interpreted, section 205 was consistent with the Constitution.<sup>42</sup> In *Lawyers for Human Rights* the Court considered section 34 of the Immigration Act and found that it was inconsistent with the Constitution because it did not provide for a court to confirm a detention on a vehicle or vessel if the detention lasted more than 30 days.

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<sup>33</sup> In *De Lange* (above note 31) at para 30, the Court said:

"It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. . . . Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in s 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole."

<sup>34</sup> *Coetzee v Government of the Republic of South Africa, Matisa and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC).

<sup>35</sup> 32 of 1944.

<sup>36</sup> *Id* at paras 16 – 18.

<sup>37</sup> M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, M Bishop and J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40, page 43.

<sup>38</sup> Above note 31.

<sup>39</sup> 24 of 1936.

<sup>40</sup> 1996 (3) SA 562 (CC).

<sup>41</sup> *Id* at para 21.

<sup>42</sup> See also *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC).

The Constitutional Court, without explicitly endorsing proportionality as an element of “just cause,” nevertheless balanced the interests of the state against the liberty interests of the accused. In *Nel* and *De Lange*, it was clear that the coercive measures went no further than was necessary in order to achieve their aim, thereby saving the empowering provisions from being declared unconstitutional. And in *Lawyers for Human Rights*,<sup>43</sup> the law was declared unconstitutional only to the extent that it did not go beyond what was necessary to achieve the purpose of the impugned Immigration Act. Put differently, what the Court was saying in these three cases was that the interests the respective statutes sought to protect could only justify the deprivation of liberty up to a certain point. Once that point was reached, the initial reasons for continued deprivation were insufficient.

There are a few examples in South African case law where courts, in the context of repeated bail applications and postponements, have required from the state reasons additional to those given at the initial bail application in order to demonstrate that the interests of justice are indeed served by the continued detention of the accused. Generally, this has happened in the context of delayed investigations, a factor considered when determining “whether there is a likelihood that the accused will attempt to influence or intimidate witnesses or conceal or destroy evidence” if released.<sup>44</sup> Like the “proportionality” cases discussed above, these courts are saying that reasons given at the initial bail hearing justifying remand detention are only sufficient up to a certain point. Once that point is reached, be that at the second, third or fourth bail application, the state is required to deliver additional reasons justifying an accused’s continued remand detention.

## 1.5 Delays

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),<sup>45</sup> has been considered in several judgments.<sup>46</sup> In *S v Mpofana*<sup>47</sup> the High Court considered an appeal against a magistrate’s refusal to grant bail. The appellant had brought a second bail application in the magistrate’s court alleging that since the court’s first refusal of bail, the police had not yet held an identification parade. The magistrate refused bail for the second time on the basis that the appellant had not set out “new facts” which justified his release. The High Court held that despite the fact that the state is not obliged to lead evidence in bail proceedings, the state ought to have placed evidence before the court explaining

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<sup>43</sup> Above note 32 at para 45.

<sup>44</sup> Section 60(4)(c) of the Criminal Procedure Act.

<sup>45</sup> Section 60(7)(c), a factor to be considered when determining whether “there is a likelihood that the accused, if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence” (section 60(4)(c)) states: “whether the investigation against the accused has already been completed.”

<sup>46</sup> See for example *S v Yanta* 2000 (1) SACR 237 (Tk) 248h.

<sup>47</sup> 1998 (1) SACR 40 (Tk).

why no identification parade had been held, and to enlighten the court about progress in the investigation.<sup>48</sup> The magistrate's failure to then obtain "relevant information" about the state's failure to proceed with the investigation was reason enough for the High Court to overturn the decision not to grant bail. In *S v Kok*<sup>49</sup> the Supreme Court of Appeal held that an "ongoing investigation" was not sufficient reason to refuse bail. In commenting on the adjudication of bail proceedings under section 60(11)(a) of the Criminal Procedure Act, the Court said:

"the strength of the State's case has been held to be relevant to the existence of 'exceptional circumstances' . . . There is no doubt that that strength (or weakness) must be given similar consideration in determining where the interests of justice lie for the purpose of s 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt."<sup>50</sup>

The court, however, upheld the magistrate's refusal of bail on the grounds that the prosecution had strengthened its case through further investigation by the time the second bail application had been lodged.

In the Zimbabwean case of *S v Hitschmann*,<sup>51</sup> the accused had been denied bail, but then brought a second bail application on the basis of "changed circumstances" before the Zimbabwe High Court. The doctrine of "changed circumstances" had been articulated previously in the case of *S v Stouyannides*,<sup>52</sup> where the court stated that:

"the amount of time which had elapsed had to be considered together with the crucial factor of the lack of progress in the investigations in this case. The Attorney-General acts at his peril if he fails to put before the court specific facts which show that the State's case has been strengthened after a long time."<sup>53</sup>

The *Hitschmann* Court accordingly found that, generally, the "passage of some considerable time without progress in investigations" amounts to a "change in circumstances" warranting the granting of bail.<sup>54</sup> However, on the facts of *Hitschmann*, the state had "strengthened its case by completing its

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<sup>48</sup> Id at para 46.

<sup>49</sup> 2003 (2) SACR 5 (SCA).

<sup>50</sup> Id at para 15. The Court also cited the cases of *S v Botha en 'n Ander* 2002(1) SACR 222 (SCA) and *S v Viljoen* 2002(2) SACR 550 (SCA).

<sup>51</sup> 2007 (2) SACR 110 (ZH).

<sup>52</sup> 1992 (2) ZLR 126 (SC).

<sup>53</sup> Id at 127.

<sup>54</sup> Id at 113.

investigations and setting down the matter for trial within a reasonable time.”<sup>55</sup> Accordingly, the bail application was refused.

If denied bail initially, or aggrieved by certain conditions attached to the bail, an accused is entitled to appeal the decision.<sup>56</sup> In addition, and as section 60(1) suggests, an accused is entitled to bring a fresh application for bail provided he or she is able to show that new, relevant facts have arisen since the court’s refusal. In *S v Vermaas*<sup>57</sup> Van Dijkhorst J stated:

“Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a *non sequitur* to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old and on the totality come to a conclusion. It follows that I will not myopically concentrate on the new facts alleged.”

The *Kok*, *Mpofana* and *Hitschmann* courts quite clearly welcomed the notion that, absent a showing from the state that the case against the accused was being diligently prosecuted, a sufficient, substantive reason for the continued deprivation of the accused’s liberty no longer existed. In the language of the Constitution, there was no longer a ‘just cause’ behind the accused’s detention.

Given the wide range of less restrictive options available to courts aimed not only at securing the attendance of the accused at trial, but preventing the accused from engaging in the activities listed in section 60(4) of the Criminal Procedure Act, courts are in a position to interrogate vigorously whether the reasons given by the state justifying continued remand detention are sufficient.<sup>58</sup> Indeed, courts may impose any conditions on the release of an accused, which, in its opinion are “in the interests of

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<sup>55</sup> Id at 114.

<sup>56</sup> Section 65(1)(a) of the Criminal Procedure Act reads:

“An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

<sup>57</sup> 1996 (1) SACR 528 (T) at para 56.

<sup>58</sup> It is also important to note that in the event an accused is unable to afford a certain bail amount, a court is required under section 60(2B)(b)(i) and (ii) of the Criminal Procedure Act to consider setting appropriate conditions that do not include an amount of money or set an amount which “is appropriate in the circumstances.” A court is also obliged to release detained suspects in terms of section 63A of the Criminal Procedure Act, in terms of which a “Head of Prison” may apply to a court for the release of an accused if “satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused...”

justice”<sup>59</sup> Moreover, in terms of section 62 of the Criminal Procedure Act, it is able to add further conditions of bail at “any stage of the proceedings,” with regard to the following, listed in section 62(a) – (f):

- a) the reporting in person by the accused at any specified time and place to any specified person or authority;
- b) any place to which the accused is forbidden to go;
- c) the prohibition of or control over communication by the accused with witnesses for the prosecution;
- d) the place at which any document may be served on him
- e) ensuring that the proper administration of justice is not placed in jeopardy by the release of the accused; and
- f) whether the accused should be placed under the supervision of a probation officer or a correctional official.

The question whether or not an accused should be granted bail is not an “all or nothing” process. There are a range of measures, some very restrictive, some less so, which enable a court to impose an outcome commensurate with the needs of the state weighed against the liberty interests of an accused. Importantly, however, where a court has ordered that an accused be detained on remand, the reasons justifying such an order must correspond to the accused’s continued detention. As time passes, the greater and more burdensome becomes the deprivation of liberty. Accordingly, so too must the duty on the state to continue to justify such detention increase. This means that reasons initially justifying remand detention will no longer be sufficient after the passing of time. For example, where the state seeks the continued detention of a suspect on the grounds that he or she will intimidate witnesses or tamper with evidence, the state must show that since the initial refusal to release the accused, there are good reasons, supported by factual evidence, that the accused continues to pose such a threat. Or, where the state seeks a postponement of an accused’s trial on the grounds that the case against him or her is still being investigated, the state must demonstrate that the matter is being diligently and expeditiously investigated.

## **2. International and Regional Jurisprudence**

This section deals with international and regional case law and its treatment of a remand detainee’s right to liberty. Section 39(1)(b) and (c) of the Constitution states that “when interpreting the Bill of Rights, a court....must consider international law, and may consider foreign law.”

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<sup>59</sup> Section 60(12) of the Act states: “The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interests of justice.”

## 2.1 European Court of Human Rights Cases

The European Court of Human Rights (ECHR) has considered many complaints alleging violations of article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (the Convention). Article 5.3 states:

“Everyone arrested or detained in accordance with . . . this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

It is important to mention at this stage that the right not to be arbitrarily deprived of liberty is contained in article 5(1) of the Convention and the general right to a fair trial is contained in article 6. The right to liberty, however, is combined with the rights of detained and arrested persons, leaving article 6 to deal only with fair trial rights.<sup>60</sup>

The ECHR has developed a robust enquiry, based largely on proportionality, to evaluate continued remand detention ordered by domestic authorities. The importance of the accused’s right to liberty has been emphasised by the ECHR repeatedly, particularly in its findings that only in exceptional circumstances should an accused be detained, and thus deprived of this right.

In *Labita v Italy*<sup>61</sup> the defendant was detained for two years and seven months before being brought to trial. During this period the defendant had brought three applications for release, all of which were denied. In finding a violation of article 5(3) the ECHR made the following observations:<sup>62</sup>

- It is incumbent on the national judicial authorities to ensure that “the pre-trial detention of an accused person does not exceed a reasonable time.”
- To this end, they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release.

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<sup>60</sup> South Africa’s conceptual distinction and treatment of the two sets of rights is discussed below. It is worth mentioning that, generally, complaints brought before the ECHR in terms of articles 5 are done so in combination with article 6 as well as article 3 of the Convention, which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>61</sup> (2008) 46 E.H.R.R. 50.

<sup>62</sup> Id at paras 152 – 3.

- The persistence of a reasonable suspicion that the person arrested has committed an offence is a necessary condition for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices.
- Rather, it must be established whether the other grounds continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings.<sup>63</sup>

In refusing to release the defendant, the Italian authorities had invoked the “risk of evidence being tampered with, the fact that the accused was dangerous, the complexity of the case and the needs of the investigation, including the need to conduct highly complex banking inquiries.”<sup>64</sup> In particular, they based their repeated refusals on the “reliable” evidence initially used to charge the defendant. Such evidence, the ECHR held, “necessarily [became] less relevant with the passage of time, especially where no further evidence [was] uncovered during the course of the investigation.” The defendant’s lengthy detention was therefore based on reasons which did not meet the “relevant and sufficient” standard.

In *Bykov v. Russia*,<sup>65</sup> the defendant, detained for one year and eight months, had brought ten applications for release. However, his pre-trial detention was extended every time based on the gravity of the charges against him and the risk that he might abscond and bring pressure to bear on the witnesses. The ECHR found that those grounds had not been substantiated sufficiently by the courts concerned, particularly during the initial stages of the proceedings. It noted too, that with “the passing of time the courts’ reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings.”<sup>66</sup> It found therefore that there had been a violation of article 5(3) of the European Convention.

Similar findings have since been made by the ECHR. In *Patsuria v Georgia*<sup>67</sup> the applicant’s detention on remand had been upheld on appeal and extended respectively during the course of nine months and twelve days. The ECHR found that although the length of delay had not been unreasonable,<sup>68</sup> the grounds for the detention were neither “relevant” nor “sufficient”. The ECHR held that the Georgian authorities had relied almost exclusively on the gravity of the charges against the applicant thereby

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<sup>63</sup> The Court also cited its previous decisions of *Contrada v Italy* (24 August, 1998) and *IA v France* (23 September, 1998).

<sup>64</sup> *Id.*

<sup>65</sup> ECHR Application no. 4378/02, 10.

<sup>66</sup> *Id.* at 65.

<sup>67</sup> ECHR Application no. 30779/04, 6 November 2007.

<sup>68</sup> *Id.* at para 62.



failing to address the specific circumstances of the case and alternatives to pre-trial incarceration. The ECHR expressed particular concern over the order of extension of the applicant's remand detention which it described as "standard template . . . with pre-printed reasoning."<sup>69</sup> The ECHR stated:

"Instead of showing an even higher degree of "special diligence" in the face of the detention which had already lasted more than seven months... the District Court issued a standard, template decision. Rather than fulfilling its duty to establish convincing grounds justifying the continued detention, it relied on a pre-printed form and its abstract terms. The Court finds the decision... to be a particularly serious restriction of the applicant's rights guaranteed by Article 5 § 3 of the Convention."<sup>70</sup>

In *Kalashnikov v Russia*,<sup>71</sup> the applicant had been detained for four years and one month during which he had brought many applications for release, all of which were turned down. The ECHR noted that the Russian authorities had justified the applicant's extended detention on the basis that there was a strong suspicion in favour of his involvement in the alleged offences and a danger that he would obstruct the examination of the case. The ECHR found that the former ground, although relevant, "could not alone justify a long period of pre-trial detention".<sup>72</sup> Regarding the latter reason, the ECHR found that the authorities had not mentioned any factual circumstances underpinning its conclusion (which had been identical in three of its decisions) and there had been no reference to any factors capable of showing that the applicant continued to be a threat to the examination of the case.<sup>73</sup> Accordingly, the reasons relied on by the Russian authorities, "although relevant and sufficient initially, lost this character as time passed."<sup>74</sup> The ECHR also noted that the delays in the matter could not be attributed to the complexity of the case or the conduct of the prisoner. Accordingly, the ECHR held that the continued detention "in order to secure the process of obtaining evidence presence at trial" could not be justified for this reason and held that the Russian authorities had not acted with the "all due expedition" or the required "special diligence."<sup>75</sup>

In *G.K. v Poland*,<sup>76</sup> the applicant was detained for three years and 17 days. His continued detention was justified by the Polish authorities on the basis that the "proper conduct" of proceedings needed to be "secured" and that the "severity of the anticipated penalty" and the risk that he might abscond.<sup>77</sup> The ECHR held that although these reasons would justify the applicant's initial detention, "with the

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<sup>69</sup> Id at para 77.

<sup>70</sup> Id at para 74.

<sup>71</sup> ECHR Application no. 47095/99, 15 July 2002.

<sup>72</sup> Id at para 116.

<sup>73</sup> Id.

<sup>74</sup> Id at para 118.

<sup>75</sup> Id.

<sup>76</sup> ECHR Application no. 38816/97, 20 January 2004.

<sup>77</sup> Id at para 83-6.

passage of time those grounds inevitably became less and less relevant.” In particular, it noted that in the “absence of any other further attempt on the part of the applicant to obstruct the proceedings” it was difficult to accept the single fact that he was arrested following a search could justify detention based on the risk that he might still abscond.<sup>78</sup> Rather, the Polish authorities needed to show other factors capable of showing that such a risk still actually existed. The ECHR also observed that the authorities had not considered the possibility of imposing bail or police supervision on the applicant at any stage during his detention and reiterated that article 5(3) requires that authorities consider alternative measures of ensuring a defendant’s appearance at trial.

In the recent case of *Bakmutskiy v Russia*,<sup>79</sup> the defendant was detained for three years and eleven months during which he brought eight applications for release. The ECHR found that the domestic authorities had “persistently used a stereotyped summary formula to justify the extension of the applicant’s detention” as opposed to an “analysis of all the pertinent facts.”<sup>80</sup> It stated:

“The presumption is in favour of release. As [this] Court has consistently held . . . article 5(3) does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continued detention ceases to be reasonable.”<sup>81</sup>

The ECHR’s jurisprudence on remand detention has evolved into a robust inquiry requiring domestic authorities to actively gauge the extent to which prosecuting authorities are diligently and expeditiously carrying out their investigations. There is a clear rejection of passive reliance on standard, pre-formulated reasons justifying detention, particularly when a suspect has been detained for a long time. Thus, what might be a relevant and sufficient concern at a suspect’s first bail hearing, fails to be so as time passes and in the absence of additional factual information justifying detention. The ECHR therefore seeks to avoid a preventative measure which does not correspond to the seriousness of the perceived need for it. The driving principles behind this proportionality analysis are detention as a last resort and the presumption of innocence.

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<sup>78</sup> *Id.*

<sup>79</sup> *Bakmutskiy v. Russia*, (ECHR Application no. 36932/02, 25 June 2009)

<sup>80</sup> *Id.* at 141.

<sup>81</sup> The court cited the following authorities: *Castravet v. Moldova* (23393/05) 13 March 2007; *McKay v. the United Kingdom* (543/03) 2006 *Jablonski v. Poland* (33492/96) 2000.

## 2.2 ICCPR and the Human Rights Committee

Section 9(3) of the International Covenant on Civil and Political Rights (ICCPR) states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

In General Comment No. 8, adopted in 1982, the Human Rights Committee stated that “pre-trial detention should be an exception and as short as possible.”

The Committee has consistently affirmed this standpoint in a number of communications that have come before it. In *Medjnoune v Algeria*<sup>82</sup> the applicant had been detained for more than five years,<sup>83</sup> during which time he had requested provisional release from the Algerian indictments division. These requests were repeatedly denied. The Committee held that “in the absence of satisfactory explanations from the State party or any other justification” the pre-trial detention constituted a violation of article 9(3) of the ICCPR.

In *Hill v Spain*<sup>84</sup> the applicants, citizens of the United Kingdom, were detained in Spain for three years before being granted bail after numerous applications for release. The Spanish authorities had denied the applicants bail on the basis that there was a real concern that they would leave Spanish territory if released on bail. The Committee found that although bail need not be granted “where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party,” in this matter, the authorities had not provided any factual information to substantiate this claim or “why it could not be addressed by setting an appropriate sum of bail and other conditions of release.”<sup>85</sup> The Committee also found that “the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.”<sup>86</sup>

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<sup>82</sup> 1297/2004

<sup>83</sup> This was a clear violation of article 25 of the Algerian Penal Code which provides that detention without trial may not exceed 16 months.

<sup>84</sup> 526/1993

<sup>85</sup> *Id* at para 13.

<sup>86</sup> *Id*.

In *Aleksander Smantser v. Belarus*<sup>87</sup> the applicant had been in custody for a total of 22 months before he was convicted, his repeated requests for release pending trial having been denied on the basis that the applicant might “obstruct investigations and abscond if released”. The committee reaffirmed that pre-trial detention “should remain the exception and that bail should be granted except in situations where there was a likelihood that the accused would abscond or tamper with evidence, influence witnesses or flee...”<sup>88</sup> It found that the State party had provided no information on what particular elements this concern was based and why it could not be addressed by fixing an appropriate amount of bail and other conditions of release. It stated too that the “mere assumption by the State party that the author would interfere with investigations or abscond if released on bail, does not justify an exception to the rule in article 9, paragraph 3...”<sup>89</sup>

The Human Rights Committee has developed a similar jurisprudence to the ECHR. Again, domestic authorities are required to interrogate whether less restrictive measures, such as bail and conditions attached to release, can adequately secure the attendance of the accused at trial. Remand detention must be satisfactorily explained and supported by factual information. Vague and unsubstantiated assertions are simply not sufficient. Moreover, a state cannot simply assume that an accused will abscond, tamper with evidence obstruct the examination of the case based on passive reasons, such as the foreign nationality of the accused. Any risks associated with releasing an accused on bail must be investigated fully by the state.

### **3. Custody Time Limits and Automatic Review**

The use of custody time limits and the automatic review of bail decisions are legal procedures used extensively in foreign jurisdictions. These mechanisms, along with an evaluation of their purported success, are discussed below.

#### **3.1 South Africa**

Although the current legal and jurisprudential framework encourages courts to demand greater justification from the state before ordering an accused’s continued detention, it seems that either

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<sup>87</sup> 1178/2003

<sup>88</sup> Id at para 10.3

<sup>89</sup> Id. See also *Taright v Algeria* 1196/2003; *Girjadat Siewpersaud, Deolal Sukhram, and Jainarine Persaud v. Trinidad and Tobago* 938/2000; *Glenroy Francis, Neville Glaude and Keith George v. Trinidad and Tobago* 899/1999; *Xavier Evans v. Trinidad and Tobago* 908/2000

repeated bail applications are not being brought frequently enough to be of benefit to the remand population or that magistrate's court are simply refusing to release bail applicants.<sup>90</sup>

Research findings from a study conducted in courts in Johannesburg, Mitchell's Plain and Durban during 2007, indicated that 65% of all accused remained in custody until the conclusion of their cases,<sup>91</sup> the overwhelming majority of which were facing charges for serious offences.<sup>92</sup> The same 2007 study indicates that 54% of cases were withdrawn or struck off the roll, and only one out of 16 cases resulted in the accused's conviction.<sup>93</sup> Bail was granted to only 3% of accused on or before the first court appearance. Unsurprisingly, the offenses with which these accused were charged are those which, under the Criminal Procedure Act, police or prosecutor bail is permissible, even though 3% represented only three quarters of those charged with such crimes.<sup>94</sup>

Besides the above findings, little else has been collected on bail processes in South Africa. It is therefore difficult to predict the precise reasons behind the lengthy detainment of so many suspects. What is clear, perhaps, is that to the extent that repeated bail applications are being made, issues such as whether the reasons justifying the initial refusal of release continue to be relevant and sufficient and whether the state is diligently prosecuting the case against the accused, are either not being raised by the accused or interrogated by the courts. Although the Criminal Procedure Act entitles an accused to bring an application for release at any stage preceding his or her conviction, there is no mechanism through which the review of bail decisions are routinely brought to courts thereby compelling magistrates to interrogate whether remand detainees continue to be held in custody on relevant and sufficient grounds. Currently, the onus is on the accused to bring such matters before the court. This seems unfair given that much of the information required (i.e. whether the state is diligently investigating and prosecuting a case) is not readily in the hands of the accused, particularly since he or she has been in remand detention.<sup>95</sup>

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<sup>90</sup> There is little research on bail decisions – the most recent of which was published in 2007 (See V Karth above note 15).

<sup>91</sup> Karth above note 15 at 28.

<sup>92</sup> For example, 90% of rape and robbery accused were remanded in custody until the conclusion of their cases, (Karth above note 15 at 31). Karth also points out that despite the increased proportion of releases on warning, this was accompanied by a higher proportion of cases culminating in warrants being issued for failure to appear.

<sup>93</sup> Although sentences involving a term of imprisonment were imposed 25 times more frequently than alternative sentencing options, most of these were fully suspended. Karth above note 15 at 17.

<sup>94</sup> These figures differ substantially from those of a similar study conducted in 1997, where 50% to 80% of accused were released on or by their first appearance. Karth argues that the most likely reason for the increase in detained accused awaiting trial is legislative amendments made post 1997: The amendments included the introduction of 'reverse onus provisions.' These will be discussed below.

<sup>95</sup> The importance of a remand detainee's access to legal advice and representation during this stage cannot be overlooked. Section 17(1) and (4) of the Correctional Services Act 111 of 1998 state:

- (1) Every inmate is entitled to consult on any legal matter with a legal practitioner of his or her own choice at his or her own expense;
- (4) Persons awaiting trial or sentence must be provided with the opportunities and facilities to prepare their defence.

Certain jurisdictions seem successfully to have curbed the problem of lengthy detainments, through the imposition of two processes: custody time limits and mandatory review procedures.

### 3.2 Custody Time Limits

In England and Wales, a person cannot be held for longer than 70 days between his first appearance in the magistrates' court and the summary trial. If the matter is transferred to the Crown Court,<sup>96</sup> the trial must start within 112 days.<sup>97</sup> This means that the time a suspect may spend in pre-trial detention before the Crown Court trial must commence is limited to 182 days, which, once expired, gives the defendant an absolute right to bail.<sup>98</sup> Other countries within the European Union have similar provisions. In Scotland, for example, if the accused is remanded in custody, the trial must begin within 110 days of the accused being committed for trial. For solemn cases<sup>99</sup> in the High Court of Justiciary, the time limit is 140 days.<sup>100</sup> If the time limits are breached, the accused must be set free and no further proceedings may be brought in respect of the relevant charges. In The Netherlands, detention on remand is limited to 104 days and permitted for only those offences which attract sentences of four years or more imprisonment. Within the 104 days the case must be brought before a trial-judge for a first hearing.<sup>101</sup> The German Criminal Code requires that the normal duration of pre-trial detention may not exceed six months. The CCP does permit longer periods of pre-trial detention if "the particular difficulty or the unusual extent of the investigation or another important reason do not yet admit the pronouncement of judgment and justify continuation of remand detention." Importantly, however, the principle of proportionality, used extensively in German law, requires that the individual right to personal liberty gains more weight the longer the procedure (and the pre-trial detention) lasts.<sup>102</sup>

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<sup>96</sup> The time limits are set out in the Prosecution of Offences Regulations 1987.

<sup>97</sup> The time limit is reduced to 56 days if the decision for summary trial is taken within 56 days.

<sup>98</sup> However, prolongation is possible when the prosecution applies orally or in writing for extension of the time-limit.

<sup>99</sup> "Solemn" cases are those in which there is an indictable (i.e. serious) offence being alleged and are, generally, tried by jury.

<sup>100</sup> Pre-trial procedure in Scotland is governed by the Criminal Procedure (Scotland) Act 1995). Time periods may be extended by the court upon the request of either the prosecutor or the accused.

<sup>101</sup> The Netherlands Criminal Procedure is based on the Code of Criminal Procedure (1926). (104 comprises of an initial 14 day period which is ordered by an "investigating judge" and a 90 day maximum period ordered by a court).

<sup>102</sup> Frieder Dunkel and Dieter Rossner in Dunkel and Dirk Van Zyl Smit (ed) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* (Martin Nijhoff, The Netherlands, 2001) 24.

Most countries within the Latin American region have time limits on custody.<sup>103</sup> Venezuelan law<sup>104</sup> 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. In Guatemala, pursuant to various reforms which began in 1994, detention may not last for more than one year, or for a period exceeding the punishment for the alleged offence.<sup>105</sup> The criminal code of Bolivia fixes the maximum custody period at 18 months.<sup>106</sup> Similar provisions exist in Costa Rica,<sup>107</sup> Ecuador,<sup>108</sup> El Salvador,<sup>109</sup> Honduras<sup>110</sup> and Peru.<sup>111</sup>

While a capping is no doubt a helpful way of ensuring that investigations are processed within a certain time, it is not a guaranteed solution to the problem of unjustified lengthy detention. Generally, maximum time periods are lengthy in themselves.<sup>112</sup> It is thus foreseeable that a detainee could be held in custody longer than it would necessarily take to prosecute a certain (usually, less serious) offence but for a period less than the prescribed maximum. The Correctional Matters Amendment Bill<sup>113</sup> proposes a maximum period of two years. While this is a commendable movement towards preventing lengthy detentions, two years a very long time to wait, especially if the case against the accused is a relatively simple one.

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<sup>103</sup> The introduction of time limits was part of the greater criminal justice reform in the region which has taken place in the last decade.

<sup>104</sup> Venezuela, Criminal Procedure Statute of 1998 (Codigo Processal Penal).

<sup>105</sup> Decree No. 51-92

<sup>106</sup> Law No. 1.970

<sup>107</sup> Detention cannot exceed 12 months (Law No. 7.594).

<sup>108</sup> Pretrial detention may not exceed six months one year in the case of crimes punishable by incarceration (Law No. 000. RO/Sup 360)

<sup>109</sup> Detention cannot exceed the maximum sentence provided for in the law or 12 months (in less serious crimes) or 24 months (serious offences).

<sup>110</sup> The general rule is one year unless the crime is punishable with more than six years in prison, in which case the maximum is two years.

<sup>111</sup> Pretrial detention may not last more than nine months. In complex cases, pretrial custody shall not exceed 18 months. (Decree No. 005-2003-JUS)

<sup>112</sup> See, however, the Ugandan case *Foundation for Human Rights Initiatives v Attorney General* (2008) AHRLR 235 (UgCC 2008). Here, the Ugandan Constitutional Court declared legislation providing for a maximum period of 480 days detention for charges punishable by death, and 240 days detention in respect of any other offence, inconsistent with the Constitution. Section 23(6) of the Constitution states:

Where a person is arrested in respect of a criminal offence-

- b) in the case of an offense which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offense before trial for one hundred and twenty days;
- c) in the case of an offense which is triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offense before trial for three hundred and sixty days before the case is committed to the high court.

<sup>113</sup> Bill 41 of 2010.

### 3.3 Mandatory Review

A system of mandatory review is a check on unnecessary delays and reduces, to some extent, the burden on the accused of finding “new facts” with which to present a fresh bail application. The intricacies and reasons for delays in the prosecution of cases is not the kind of knowledge a detained accused can ascertain easily. Moreover, it is unlikely that an accused would be familiar with liberty jurisprudence to the extent that he or she will be able to argue in favour of the state demonstrating reasons beyond those given at the initial bail hearing justifying his or her continued detention. If, however, such facts *must* be brought before a court at specified intervals, the chance of the accused being detained further simply because he or she cannot get hold of information, will be reduced significantly. This, it is argued, accords better with section 35(1)(f) of the Constitution and the objectives “traditionally ascribed to the institution of bail, namely, to maximise personal liberty.”<sup>114</sup> It is also in accordance with the Constitution’s founding values of accountability, responsiveness and openness. As the ECHR has made clear, a prosecuting authority cannot simply rely on formulaic reasons to justify the continued detention of a suspect. The actions of the state must be transparent and additional reasons must be supplied to the court should the state seek to argue in favour of continued detention.

Latin American jurisdictions serve as good examples of where the automatic review of bail decisions has been built into the respective current criminal codes. In Costa Rica,<sup>115</sup> El Salvador,<sup>116</sup> Paraguay,<sup>117</sup> Dominican Republic<sup>118</sup> and Venezuela,<sup>119</sup> bail applications are reviewed every three months. For most countries in this region, this particular reform was one of many to be implemented as part of a greater movement towards criminal justice reform, in particular, the reduction of pre-trial detention numbers.<sup>120</sup> Although the percentage of prisoners awaiting trial remains high,<sup>121</sup> it has decreased significantly since the implementation of the reforms.<sup>122</sup>

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<sup>114</sup> *Dlamini* above note 23.

<sup>115</sup> Art 253.

<sup>116</sup> Art 307

<sup>117</sup> Law No. 1286.

<sup>118</sup> Art 239

<sup>119</sup> Art. 273.

<sup>120</sup> This is discussed in detail in M Duce, Fuentes and Riego “The Impact of Criminal Procedure Reform on the use of Pretrial Detention in Latin America.”

<sup>121</sup> The most recent statistics from the International Centre for Prison Studies indicate the following percentages of total prison population. Costa Rica 25.9%, El Salvador 33.8%, Paraguay 71.2%, Dominican Republic 64.7%, Venezuela 66.9%.

<sup>122</sup> Duce et. al (above note 119) tabulate the percentage of remand detainee numbers before reform and “two or three years after the introduction of reform” at 22. Given the most recent statistics (see above note 107), it appears that in the cases of Dominican Republic and Venezuela the remand detention numbers went down and then up again, although the numbers are still lower than they were prior to “reform.”



## 4. Onus

Although the issue of onus in bail proceedings is not necessarily directly relevant to the issue of lengthy periods of remand detention, it is important to set out why the “reverse onus” provisions in the Criminal Procedure Act, although problematic in their own right, are not necessarily the reason behind the high remand numbers. Effort is better spent incorporating mandatory oversight processes and custody time limits.

Based on the same 2007 findings referred to above, Karth suggests that legislative amendments made post-1997, in particular, section 60(11)(a) and (b) (“reverse onus provisions”), are the most likely reason for the increase in remand detainee numbers. Research in other jurisdictions suggests, however, that the introduction of more onerous bail provisions is, perhaps, largely symbolic.<sup>123</sup> Legislative introductions such as these often occur in the wake of an increasing crime rate or a widely publicised offence committed whilst an offender was released on bail.

The question of whether the accused or the state bears the onus in bail applications has been debated extensively in the courts.<sup>124</sup> It is generally accepted, however, that when an “ordinary class of crime” is alleged, the onus falls on the state to demonstrate what the interests of justice are “with reference to the facts of each case.”<sup>125</sup> However, the onus falls on the accused to show that “exceptional circumstances exist which in the interests of justice permit his or her release” if a crime in schedule 6 is alleged, and that “the interests of justice” permit his or her release if a schedule five offence is alleged.<sup>126</sup> It is therefore more difficult to secure bail when charged with more serious offences.

<i>Country</i>	<i>Percentage of Awaiting Trial numbers prior to Introduction of reform</i>	<i>Percentage of Awaiting Trial numbers two or three years after reform</i>
Costa Rica	1995 – 28%	2000 – 30%
El Salvador	1998 – 72%	2002 – 48%
Paraguay	1996 – 95%	2002 – 75%
Dominican Republic	2002 – 67.4%	2006 – 57.5%
Venezuela	1997 – 69%	2000 – 57.%

<sup>123</sup> A Hucklesby “Keeping the Lid on Prison Remand Population: the Experience in England and Wales” (2009-2010) 3 Current Issues in Criminal Justice.

<sup>124</sup> See MG Cowling “The incidence and nature of an onus in bail application” 2002 SACJ 176.

<sup>125</sup> *S v Schietekat* 1999 (2) BCLR 204 (c) at 247.

<sup>126</sup> Section 60(11) states:

- Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—
- a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
  - b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable

These ‘reverse onus’ provisions were introduced into the Criminal Procedure Act in 1997, but were challenged shortly thereafter as violations of section 35(1)(f) of the Constitution.<sup>127</sup> In *S v Dlamini*<sup>128</sup> the Constitutional Court, while acknowledging that the “limitation imposed by section 60(11)(a) [was] an unusual one . . . more invasive than [other jurisdictions],”<sup>129</sup> given the country’s uniquely high levels of crime, the limitation on section 35(1)(f) was a justifiable limitation of an accused’s right to be released from detention. Courts, however, have since grappled with the application of section 60(11)(a).<sup>130</sup>

Although there was a surge in remand numbers between 1994 and 2000, the numbers have (despite rising slightly in 2004/2005), remained relatively stable since 2001.<sup>131</sup> Other common law jurisdictions have experienced a similar trend towards the incorporation of ‘reverse onus’ provisions where serious charges are involved.<sup>132</sup> In England and Wales, a series of incremental changes to the Bail Act of 1976 reduced significantly the courts’ discretion to grant bail. The exceptions to the “general right to bail”<sup>133</sup> contained in the original version of the Act,<sup>134</sup> were expanded to include cases involving allegations of homicide, rape and offences allegedly committed whilst on bail.<sup>135</sup> In Canada, when the current set of bail laws was implemented in 1972, the prosecutor was obliged to show cause as to why the person should not be released.<sup>136</sup> This ‘default position’ has gradually been

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opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

<sup>127</sup> Such challenge was unsurprising given the courts approach to bail proceedings prior to the amendments introducing these provisions. Courts tended to lean towards the granting of bail unless there was a likelihood that the interests of justice would be prejudiced. See for example *S v Hlongwa* 1979 (4) SA 112 (O) and *S v Hlopane* 1990 (1) SA 329 (O).

<sup>128</sup> *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

<sup>129</sup> Id at para 73. By way of example Kriegler J referred to the United States’ Federal Bail Reform Act which provides that a federal judge “shall order the detention” of a person accused of a federal crime if he or she finds that “no conditions or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person . . . before trial.”

<sup>130</sup> See for example *S v Porthen* 2004 (2) SACR 242 (C)

<sup>131</sup> The 2009/2010 Annual Report for the Department of Correctional Services (DCS), 68.

<sup>132</sup> For example, the United States Federal Bail Reform Act provides that a federal judge “shall order the detention” of a person accused of a federal crime if he or she finds that “no conditions or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person . . . before trial.”

<sup>133</sup> Section 4 of the Bail Act refers to the “General right to bail of accused persons and others.”

<sup>134</sup> If an accused was facing serious charges for which imprisonment was a potential sentence, the Bail Act stipulated that bail “need not be granted” if the court was satisfied that there were “substantial grounds for believing that the defendant, if released on bail, would “fail to surrender to custody, commit an offence, or interfere with witnesses or otherwise obstruct the course of justice...”

<sup>135</sup> Introduced by amendment in 1995.

<sup>136</sup> Section 515(1) and (2) of the Canadian criminal code state”

- (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other

eroded.<sup>137</sup> By 2009, the list of ‘reverse onus’ provisions had grown considerably and included offences involving terrorism, organized crime and certain crimes committed with firearms.<sup>138</sup> Australia and New Zealand have also travelled a similar path.<sup>139</sup>

In Canada, Australia and New Zealand, moves to restrict the granting of bail have coincided with rising remand populations. Unexpectedly, the remand prison population in England and Wales has remained stable.<sup>140</sup> In an effort to explain this apparent anomaly, Hucklesby argues that legislative amendments of this nature are often simply “symbolic.”<sup>141</sup> Rather, a combination of factors and political efforts as well as the political and policy “climate” are as, if not more, important than the legal rules which govern the decision making process.<sup>142</sup> Importantly, Hucklesby also suggests that curbing the time spent on remand is an important factor in reducing the remand population.<sup>143</sup> It is interesting then, that the time spent awaiting trial in Canada provides a contrast to the picture in

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provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

- (2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released.

The general exceptions to this are in section 515(10), which stated that the detention of an accused in custody is justified only on one or more of the following grounds:

- a) where the detention is necessary to ensure his or her attendance in court in order to according to law;
- b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- c) if the detention is necessary to maintain confidence in the administration of justice...”

Amendments to section 515(6) made in the late 70’s required that in the following circumstances an accused was required to show why his detention was not necessary: where the current charges relate to behaviour alleged to have taken place while awaiting trial; the accused was charged with trafficking in or importing drugs, the accused was not a resident of Canada, the accused was charged with failing to comply with another court order (See sections 515(6)(i) and (ii).

<sup>137</sup> CM Webster, A Doob and N Meyers “The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada” (2009-2010) 21 *Current Issues in Criminal Justice* 79 at 99.

<sup>138</sup> Section 515(6) of the Canadian Criminal Code.

<sup>139</sup> The Australian Bail Act provides a rebuttable presumption in favour of bail for certain offences. However, this presumption is reversed in the case of particular drug offences where there is a “presumption against granting bail”. The Act further outlines an extensive list of offences involving violence, including conspiracy to murder, aggravated sexual assault, sexual intercourse with a child under 16 and kidnapping, which are excluded from this favourable presumption.

<sup>140</sup> A Hucklesby “Keeping the Lid on Prison Remand Population: the Experience in England and Wales” (2009-2010) 3 *Current Issues in Criminal Justice* at 4. In both Australia and Canada the remand population constitutes an increasing proportion of the prison population, accounting for 23% of the Australian prison population (in 2008) and 32% of the Canadian prison population (2008). Given the general hardening of attitudes against the granting of bail and the tightening of the law in all three countries, the experiences of Australia and Canada are more in line with expectations. New Zealand statistics can be found at New Zealand Cabinet Office 2009 at <http://www.dPMC.govt.nz/>

<sup>141</sup> *Id* at 2.

<sup>142</sup> *Id* at 18. She suggests that the introduction of alternative forms of bail conditions (e.g. electronically monitored curfews, the channelling of drug users into treatment centres) and the national Bail Accommodation Support Scheme (an accommodation scheme used primarily for offenders who do not have a suitable bail address) and efforts to fast-track outdated court processes all contributed towards lowering the remand population in the face of harsher bail provisions.

<sup>143</sup> *Id* at 16.

England and Wales. The average time for case processing in Canadian courts increased from 160 days in 1996 to 217 days in 2006. In England and Wales, between 2004 and 2007 the average case processing time for cases in magistrate's courts reduced from 55 days to 47 days for indictable offences and from 26 to 24 days for summary offences. In Crown courts, the period increased from 10.1 weeks to 14 weeks between 2004 and 2006. In 2007, this dropped to 12.0 weeks.

## **5. Section 35(3)(d) of the Constitution**

Thus far this report has been concerned with the section 12(1)(a) right not to be detained arbitrarily. It now turns to consider a closely related right: the section 35(3)(d)<sup>144</sup> right to a trial within a reasonable time. Although it is not as directly relevant to the situation of remand detainees, it provides useful guidance and support for the section 12(1)(a) argument.

The discussion that follows concerns the South African courts' treatment of "unreasonable delay" cases. Although not directly concerned with the liberty interests of the accused, the courts have nevertheless incorporated certain liberty interests into the analysis as to whether a delay has been unreasonably long. The Canadian and United States approach to "unreasonable delay" cases are also explored since they provide useful commentary on and suggestions about how a South African court might deal with the problem of systemic delays.

### **5.1 The South African approach**

The South African Constitutional Court has not adopted the conceptual framework suggested here. Rather, the Court, at the beginning stages of its jurisprudence, created what Le Roux and Snyckers term a "conceptual wall" between the right not be detained arbitrarily and the rights of detained, arrested and accused persons.<sup>145</sup> The implications of this conceptual distinction are such that the specific subset of rights in section 35 are limited in their application to arrested, accused and detained persons, and the general right to liberty does not impact on section 35 rights.

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<sup>144</sup> Section 35(3)(d) of the Constitution states: "Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay."

<sup>145</sup> *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC); *Nel v Le Roux and Others* 1996 (3) SA 562 (CC) and *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC).

Courts have failed, however, to maintain the conceptual distinction between the two sets of rights, finding ‘liberty interests’ to be affected by various fair trial right violations. The *Moeketsi* case is exemplary of this tendency.<sup>146</sup> There, the Court found that a delay in the conclusion of criminal proceedings might, amongst other things, seriously interfere with the “liberty of the accused, disrupt his or employment, drain his or her financial resources, curtail his or her association, and be the cause of anxiety and subjection to public obloquy.” Similar reasoning informed the Constitutional Court’s interpretation of section 35(3)(d) in two subsequent cases: *Sanderson v Attorney-General* and *Wild and Another v Hoffert*.<sup>147</sup>

It is important to remember that a remand detainee’s lengthy detention is only one of several factors to be considered in a section 35(3)(d) analysis. 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. Moreover, it is a “liberty” concern and thus outside of the traditional parameters initially laid down by the Constitutional Court.

What emerges from the following breakdown of the case law is that courts dealing with “unreasonable delay” challenges are concerned, primarily, with trial-related interests. This is hardly surprising, especially in the lower courts, since the Criminal Procedure Act separates quite neatly the liberty interests (reflected in the bail provisions) from the fairness issues reflected in section 342A of the Criminal Procedure Act. Section 342A(1) states:

“A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.”

Section 342A(2)(a) – (i) sets out the factors to be taken into account in making such a determination. Some of the relevant factors include:

- the duration of the delay;
- the reasons advanced for the delay;
- whether any person can be blamed for the delay;
- the effect of the delay on the personal circumstances of the accused and witnesses;
- the seriousness, extent or complexity of the charge or charges;
- actual or potential prejudice caused to the state or the defense by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability

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<sup>146</sup> *Moeketsi v Attorney-General, Bophuthatswana & Another* 1996 (1) SACR 675 (B). There are many other cases in which section 12 ‘liberty interests’ have informed the interpretation of section 35 rights. For the purposes of this report however, cases dealing with section 35(3)(d) only will be discussed.

<sup>147</sup> *NO and Others* 1998 (3) SA 695 (CC). Both cases will be discussed in depth below.

of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

- the effect of the delay on the administration of justice; and
- the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued.

These factors are a succinct exposition of trial-related interests. It is interesting 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.<sup>148</sup> Rather, and as will be detailed below, it is the courts that have been instrumental in merging the liberty interest of the accused into the “unreasonable delay” enquiry.

In *Sanderson v Attorney-General, Eastern Cape*,<sup>149</sup> Justice Kriegler, writing for a unanimous Constitutional Court, drew the distinction between “fair trial” prejudice (e.g. the death or disappearance of witnesses) and “general delay-prejudice” which would not necessarily affect the fairness of the trial itself. The latter, according to him, falls into two categories: (1) the prejudice related to the loss of personal liberty (e.g. pre-trial detention, restrictive bail conditions), and (2) the range of disadvantages inherent in the public nature of the criminal justice system (e.g. social ostracism, loss of income). He found that despite the provision being “both textually and contextually focuse[d] on the fairness of the supervening criminal trial,” its relevance goes beyond that of trial related interests and “embraces liberty and security interests”. The reason for this, Kriegler states, is the presumption of innocence.<sup>150</sup>

“In principle, the [criminal justice] system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the

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<sup>148</sup> Interestingly, neither does the section detailing remedies for undue delay include the provisional release of the accused, if incarcerated. Section 342A(3) of the Act states:

“If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-

- a) refusing further postponement of the proceedings;
- b) granting a postponement subject to any conditions as the court may determine;
- c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney general;
- d) where the accused has pleaded to the charge and the State of the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence has been closed....”
- e) that
  - i) the state shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the state;
  - ii) the accused or his or her legal adviser shall pay the state the wasted costs incurred by the state as a result of an unreasonable delay caused by the accused or his or her legal adviser; or
- f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

<sup>149</sup> 1998 (2) 38 (CC).

<sup>150</sup> Id at para 23.

accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial. The profound difficulty with which we are confronted in this case, is that an accused person despite being presumptively innocent, is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system . . . this kind of prejudice resembles even more closely the kind of punishment that ought only to be imposed on convicted persons.”

For Kriegl, the relevant considerations to determine whether a delay has been “unreasonable,” are, firstly, time, and its effect on liberty, security and trial-related interests and second, the nature of the prejudice suffered by the accused. Kriegl states that the more serious the prejudice (on a continuum from imprisonment through restrictive bail conditions to mild forms of anxiety) the shorter the period within which the accused should be tried. Importantly, that “awaiting trial prisoners must be the beneficiaries of the right” to a speedy trial.<sup>151</sup> In sum, the following passage illustrates well the approach courts, in general, should take:

“Those cases involving pre-trial incarceration, or serious occupational disruption or social stigma, or the likelihood of prejudice to the accused’s defence, or – in general – cases that are already delayed or involved prejudice, should be expedited by the state. If it fails to do this it runs the risk of infringing section [35(3)(d)].”<sup>152</sup>

## 5.2 Remedy

The *Sanderson* court made it clear that given the wide remedial powers given to courts in constitutional matters,<sup>153</sup> remedies for the violation of the right to be tried within a reasonable time would be varied.<sup>154</sup> *Kriegl* stated:

“Release from custody is appropriate relief for an awaiting trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.”<sup>155</sup>

The Constitutional Court in *Wild v Hoffert* considered in detail the issue of whether a stay of prosecution would be an appropriate remedy. The accused in that matter had waited several years

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<sup>151</sup> Now section 35(3)(d) of the Final Constitution

<sup>152</sup> *Sanderson* above note 149 at para 31.

<sup>153</sup> Section 172(b) of the Constitution states:

“When deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable . . . “

<sup>154</sup> See above note 149 at para 27.

<sup>155</sup> *Id* at para 41.

before his trial eventually proceeded to court. He had not been detained during this time, however. The Court held that in the absence of any “trial related” prejudice, a permanent stay of prosecution was inappropriate even though the delay had been “unreasonably long”.<sup>156</sup> The application was therefore dismissed. Kriegler J suggested, however, that the appropriate remedy in such circumstances would be the trial court’s refusal of postponement.<sup>157</sup>

### 5.3 Systemic delays

In 2003, subsection (7) was incorporated by amendment into section 342A of the Criminal Procedure Act. This provision requires that the National Director of Public Prosecutions must, every six months, 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 the 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 indicate the extent to which court processes are being delayed.

Commenting on systemic delays in criminal proceedings, Kriegler J in *Sanderson* stated:

“Under the heading [of systemic delay] I would place resource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion. Systemic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic 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 that 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 systemic factors justify a delay, as one must at the present, they can only do so for a certain period of time. It would be legitimate, for instance, for an accused to bring evidence showing that the average systemic delay for a particular

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<sup>156</sup> Id at para 27. Similar findings were made in the case of *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA); *Director of Public Prosecutions KZN Regional Magistrate, Durban & another 2001 (1) SACR 463* and *Naidoo & Others v National Director of Public Prosecutions* [2003] 4 All SA 380 (c).

<sup>157</sup> Section 168 of the Criminal Procedure Act states:

“A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.”



jurisdiction had been exceeded. In the absence of such evidence, courts may find it difficult to determine how much systemic delay to tolerate.”<sup>158</sup>

In *S v Maredi*<sup>159</sup> the accused had been kept in custody for 17 months before the charge was put to him. Thereafter, the case was concluded after a further period of six months. In review proceedings, the High Court, indicating its dissatisfaction with the conduct of the prosecutors and magistrates, ordered that the judgment be sent to the Director of Public Prosecutions and the Magistrates “to enable them to institute such steps as are deemed fit.” The Court stated:

“The state of affairs is indeed shocking. Section 35(3)(d) ...provides that every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay. It seems...that the right of the accused was ignored blatantly by not only the prosecutors who were involved in this matter but also by the magistrates who presided over the court from time to time and who granted postponements of the case without enquiring whether or not the requests were reasonable and justified....Every magistrate 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 remand of the case and that a postponement of the case is not to be granted merely because the prosecutor asks therefor.”

In *S v Jackson*<sup>160</sup> Moosa J included in his judgment a table setting out the average amount of days it took to reach various pre-trial and trial stages, which he then used as a benchmark to determine whether the delays in the case before him were ‘unreasonable.’ He concluded that they were not, given that they did not exceed the reported average. Notably, he indicated, however, that “trial related prejudice can assume greater significance [than liberty interests]” but this was to be remedied by section 342A of the Act.<sup>161</sup>

## 5.4 Some conceptual problems

As stated above, the problem of lengthy periods of detention prior to trial raises, potentially, two kinds of constitutional protections: the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause,<sup>162</sup> and the right of “every accused

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<sup>158</sup> *Sanderson* above note 149 at 35.

<sup>159</sup> 2000 (1) SACR 611 (T)

<sup>160</sup> 2008 (2) SACR 274 (C).

<sup>161</sup> *Id* at para 33.

<sup>162</sup> Section 12(1)(a) of the Constitution.

person to a fair trial, which includes the right to have their trial being and conclude without unreasonable delay”.<sup>163</sup>

The structure of the Bill of Rights suggests that section 12 of the Constitution, a broad prohibition on the deprivation of freedom, should inform the interpretation of the rights contained in section 35. Put differently, the rights enumerated in section 35 should be manifestations of “specific instance[s]” of the right to freedom and security.<sup>164</sup>

The Canadian Charter, like the South African Constitution, has a general “fair trial” provision<sup>165</sup> as well as the right to “life, liberty, and the security of the person.”<sup>166</sup> Canadian courts, however, have described and dealt with the latter as a broad, residual provision informing the interpretation of the specifically enumerated procedure rights in sections 10 and 11 of the Charter.<sup>167</sup> In other words, and as described by Le Roux and Snyckers, “the Canadian equivalent to section 12(1)(a) of the Constitution is allowed to operate as a general due process provision, with residual operation in the sphere of fair trial rights.”<sup>168</sup> Accordingly, and for the sake of conceptual clarity, the right to life, liberty and security operates in the criminal context only where these interests are at stake, i.e. where imprisonment is a competent verdict, leaving the general fair trial rights to operate in other criminal cases. The cases discussed below are, therefore, concerned with the delay in bringing an accused to trial, independent of whether he was granted bail or not.

In the Canadian case of *R v Askov*,<sup>169</sup> the appellants had been in custody for six months before being released on bail. The trial date was postponed for a further two and a half years, however. The Justices of the Canadian Supreme Court agreed that the specific guarantees of section 11 of the Charter ought to be understood primarily as supporting the ‘liberty’ provision, section 7. The majority of the Court stated:

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<sup>163</sup> Section 35(3)(d) of the Constitution.

<sup>164</sup> J Le Roux and F Snyckers in ‘Criminal Procedure’ in S Woolman, M Bishop and J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51, at 51.1.

<sup>165</sup> Section 10 of the Canadian Charter (the Charter) states:

“Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Section 11(d) of the Canadian Charter states:

“Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

<sup>166</sup> Section 7 of the Canadian Charter.

<sup>167</sup> See Le Roux and Snyckers above note 163 and *In Re BC Motor Vehicle Act* 1985 2 SCR 486

<sup>168</sup> *Id.*

<sup>169</sup> [1990] 2 S.C.R. 1199.

“Section 11(b) of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right to be tried within a reasonable time, explicitly focuses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this subsection is concerned primarily with an aspect of fundamental justice guaranteed by s. 7 of the Charter.”

The factors to be taken into account in determining whether there has been an infringement of the right to be tried within a reasonable time, according to the Canadian Supreme Court, are:

- i) the length of the delay;
- ii) the explanation for the delay;
- iii) waiver; and
- iv) prejudice to the accused.<sup>170</sup>

In balancing these factors, the Court stated:

“[t]he longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason. Delays attributable to the action of the Crown will weigh in favour of the accused. Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.”

In addition, “systemic” and “institutional” delays, caused by resource shortages will weigh against the state, but must, the Court said, “be considered in light of a comparative test.” Thus, the question of how long a delay should be in order to trigger the protection of the Charter “may be resolved by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction in the country.” Moreover, the onus of showing institutional delays will be on the state.

In *R v Morin*<sup>171</sup> the Canadian Supreme Court created a set of ‘guidelines’, stating:

“The appropriate guideline for a period of institutional delay in provincial court is between 8 to 10 months. The guideline for institutional delay after committal for trial should remain in the range of 6 to 8 months . . . These suggested time periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and will need to be adjusted

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<sup>170</sup> These had initially been discussed in *R. v. Mills*, [1986] 1 S.C.R. 863 and, *R. v. Rahey*, [1987] 1 S.C.R. 588

<sup>171</sup> [1992] 1 S.C.R. 771.

from time to time reflecting changed circumstances. The Court of Appeal in each province will play a supervisory role subject to the review by the Supreme Court.”<sup>172</sup>

In the more recent case of *R v Godin*, the Canadian Supreme Court held that in addition to the fact that the delay had exceeded the *Morin* guidelines (30 months), such delay was unreasonable due to the following:

- i) the case was a straightforward one with few complexities and requiring very modest amounts of court time;
- ii) the delay had been attributable to the Crown who had failed to explain the reasons for the delay; and
- iii) defence counsel had attempted, unsuccessfully, to move the case ahead faster.

The United States, like Canada, has a residual “due process” right which informs the interpretation of the rights pertaining to the criminal process.<sup>173</sup> The sixth amendment guarantees the right of the accused to a “speedy trial.” In *Barker v Wingo*<sup>174</sup> the US Supreme Court held that relevant factors in determining whether the right to a speedy trial has been infringed include: the length of delay, the reason for the delay, the time and manner in which the defendant has asserted his right, and the degree of prejudice to the defendant which the delay has caused. On the latter point, the Court stipulated three interests which the speedy trial right was designed to protect: i) oppressive pre-trial incarceration, ii) minimizing anxiety and concern of the accused, and iii) limiting the possibility that the defence will be impaired. In this matter the accused had been incarcerated for ten months before being released on bail. The trial, however, only began approximately five years after his arrest. The Court held that the defendant’s right to a speedy trial had not been violated as the nature of the prejudice suffered had not been severe. In making such a finding, the Court commented on the individual as well as societal interest in courts dealing swiftly with criminal cases:

“If an accused cannot make bail, he is generally confined, as was [the defendant] for ten months, in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions ‘has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.’ At times the result may even be violent rioting. [Lengthy] pre-trial detention is costly. The cost of maintaining a prisoner in jail varies from \$3 to \$9 per day, and this amounts to millions across the Nation. In addition, society loses

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<sup>172</sup> The defendant in this matter (who had not been held in custody), the Court found, had not suffered the degree of prejudice necessary to constitute a violation of the right to a speedy trial.

<sup>173</sup> The fourth, fifth, sixth and eighth amendments to the United States Constitution.

<sup>174</sup> 407 U.S. 514 (1972). See also *Strunk v. U.S.* 412 U.S. 434 (1973).

wages which might have been earned, and it must often support families of incarcerated breadwinners.”<sup>175</sup>

The Court also commented on the effects of pre-trial detention:

“The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.”

The liberty interests of the accused have a clearly defined role in United States and Canadian “unreasonable delay” jurisprudence. They remain, however, just one of the many factors to be considered by a court in determining whether or not a delay has been unreasonable. The Canadian approach to systemic delays in the criminal justice system is perhaps similar to the South African one: While such delays are inevitable and important indication of which delays will be reasonable, there is nevertheless an aspirational quality to the problem. The justice administration must aim to reduce pre-trial delays. Regarding the effects of remand detention, the United States cases described above serve as important reminders of not only the fact that it is a wasteful and degrading experience for the accused, but comes at a great cost to an accused’s family and society at large, both of which suffer the loss of a breadwinner.

## **6. Conclusion**

Although less directly concerned with the protection of an accused’s liberty interests, “unreasonable delay” cases nevertheless support, in part, the notions explored by the ECHR and Human Rights Committee. Firstly, it is made clear that while it may be realistic to accept that systemic factors “justify a delay,” this can only be so for a certain period of time. Thus, while helpful for an accused to demonstrate that he or she has endured a delay for a period longer than the average in a particular jurisdiction, it is ultimately constitutional norms that should govern the question of whether or not a

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<sup>175</sup> Id at para 74.

delay is reasonable, and not the “average” benchmark.<sup>176</sup> Second, in making it clear that release from custody is the appropriate relief for an accused who has been “held too long,” the *Sanderson* court is perhaps suggesting that after a certain period of time, the continued detention of a suspect can no longer be justified by the reasons that did so when initially denied bail, for, over time, these reasons diminish in weight. Third, the *Maredi* court echoes the notion that postponements should not be granted simply on the say-so of prosecutors, to do so would be an abdication of the courts’ responsibility to consider the position of the accused and whether his or her further detention is justified by substantiated factual averments.

“Unreasonable delay” cases have also touched on the problem of conditions of detention. In addition to the experience of being “locked up”<sup>177</sup> and hindered in his or her efforts to gather evidence, locate witnesses and prepare a defence, the conditions of detention are generally deplorable. In South Africa, remand facilities are overcrowded, poorly resourced and unhealthy. Kriegler J in *Sanderson*<sup>178</sup> reminds us that the purpose of imprisonment is to punish a person whose guilt has been established. Indeed, section 36 of the Correctional Services Act<sup>179</sup> states:

“With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future”

A remand detainee, presumed innocent, is effectively enduring what is intended to be punishment for a sentenced offender and often in far worse conditions than those experienced by sentenced prisoners, who are at least able to access rehabilitative programmes.

As suggested, procedures best suited to the protection of the liberty interests of an accused are custody time limits and mandatory automatic oversight of bail decisions. These mechanisms, arguably, maximise the potential of courts to interrogate whether there is sufficient justification to continue the detention of the accused. As the infringement of an accused’s right to liberty becomes increasingly burdened with the passing of time, so too must the state’s obligation to justify it. The right not to be arbitrarily detained requires that the reasons for the detention of an accused on remand be continuously interrogated so as to ensure that such reasons remain relevant and sufficient as time passes. Detention for a period in excess of that which is justified by the reasons given, is no longer done in the name of a “just cause.”

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<sup>176</sup> The Human Rights Committee has stated that “where delays are caused by lack of resources and chronic underfunding, to the extent possible supplementary budgetary should be allocated for the administration of justice.” Concluding Observations, *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006) at para 21.

<sup>177</sup> See *Stunk* above note 174 at para 74 where pre-trial detention is described as “dead time.”

<sup>178</sup> *Sanderson* above note 149 at para 23.

<sup>179</sup> 111 of 1998.

## 7. Recommendations

The recommendations here focus on litigation. In this regard, the options are twofold: approaching courts on a case-by-case basis in which a series of individual cases would be argued with the aim of establishing jurisprudence capable of adequately protecting an accused's right not to be deprived of liberty arbitrarily, or an action brought in the public interest with the aim of establishing one global outcome. The former is time-consuming, messy and not well suited to the aim of establishing a quantifiable minimum standard of constitutional protection. The latter approach is better suited to an argument in favour of the ultimate enactment of legislation.

The remedy sought here would be an order directing that Parliament remedy its failure to adequately protect the rights of remand detainees within a certain time through the enactment of legislation. Put differently, a suspended declaration of invalidity. The most recent example of this is *Glenister v The President of the Republic of South Africa*<sup>180</sup> in which it was argued that certain legislation was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the Directorate of Priority Crimes.

An argument in favour of legislative reform aimed at the protection of the liberty interests of an accused could be based on section 7(2) of the Constitution.<sup>181</sup> Alternatively, one could argue that the current statutory framework is a violation of an accused's right to liberty. The latter argument would have to show that the Criminal Procedure Act, without certain mechanisms (such as custody time limits and mandatory oversight of bail decisions), is a violation of the right to liberty. In particular, it would have to be demonstrated why the consequences of the current system are inconsistent with the requirements of liberty.<sup>182</sup>

An argument based on section 7(2) of the Constitution would have to demonstrate that in order to fully protect the rights of remand detainees, additional legislative reforms need to be enacted. Such an obligation, it would be argued, is sourced in the Constitution's right to liberty, and binding international law.<sup>183</sup>

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<sup>180</sup> (CCT/48/10) [2011] ZACC 6 (17 March 2011).

<sup>181</sup> Section 7(2) states:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

<sup>182</sup> This argument would require a great deal more research on bail decisions in lower courts than what is currently available. Conditions of detention, although concerned with a different set of legal obligations on the part of the state, should perhaps also form part this argument, however. Information on the current state of South African prisons could be used, persuasively, to show why lengthy periods in remand detention are also a violation of a person's right to be detained in “conditions of dignity” (section 35(2)(e) of the Constitution).

<sup>183</sup> Importantly, South Africa has signed and ratified the International Covenant on Civil and Political Rights. The HRC's general comment on article Section 9(3) states that detention should be a last resort and for the shortest possible time.