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Prisoners on Remand: Too Many, Too Long

“Everyone has a right to freedom and security of the person, which includes right not to be deprived of freedom arbitrarily or without just cause [and] not to be detained without trial...”

“Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without reasonable delay.”

Sections 12(1) and 35(3)(d) of the Bill of Rights

1. Introduction¹

According to some estimates, up to one in 13 of all South African men aged between 18 and 65 are arrested annually – what happens to them, and to the much smaller number of women and juveniles arrested every year, should be of major concern to us all.² Legal scholars estimate that 60 percent of those arrested are incarcerated on remand for months or even years while awaiting trial or sentencing, often because they are denied bail, or cannot afford to pay it.³ South Africa not only hosts Africa’s largest total prisoner population, but also Africa’s largest remand population. Constituting 27.1% of the total 160 280 inmate population, 43 799 prisoners were unsentenced as of March 2017. Although we must consider how detention affects the particularly vulnerable 110 unconvicted children, and 1 195 unconvicted females caught in the system, the remand detainee population is overwhelmingly adult and male.⁴

Jacqueline Hoorn, of the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), emphasises that “so much harm can be wrought in such a short time [in prison].”⁵ Excessive and extended remand detention often violates the human rights to liberty, health, family, education, work, and even freedom from torture and ill-treatment. Not only is the presumption of innocence inherent in everyone’s right to a fair trial, but more than half of those in remand detention will never be found guilty of the crime for which they were originally arrested. ⁶ The wrongfully accused may, however, resort to

criminal activity as a method of self-preservation within prison or as a response to unemployment outside of prison. Fr Mathai Babychan, of the Prison Care and Support Network, points out that many other innocent detainees plead guilty in order to reduce the length of their incarceration.⁷

While the collateral consequences of incarceration are numerous for the detainees, they are compounded in the lives of their families and communities. This is particularly true for socio-economically deprived communities that bear the burden of arrests as well as remand detention. It is estimated that 11 500 unsentenced South Africans are currently in prison simply because they cannot afford the bail granted for their release, which is arguably a violation of the right to equality before the law. Remand detention causes a rapid and substantial loss of income to families, and often aggravates and entrenches poverty. Since families also incur costs to provide detainees with basic necessities which the state ought to provide, Lukas Muntingh of the Africa Criminal Justice Reform asserts that “it is in fact the poor who are subsidising the prison system in Africa.”⁸

2. Living Conditions

The Correctional Services Act 111 of 1998 empowers judges to visit prisons at any time, while the 2009 Prison Visits Programme requires annual visits and reports by Constitutional Court judges. In April 2015, Constitutional Court Justice

Edwin Cameron released a report describing the conditions of the cells in the remand section of Cape Town's Pollsmoor Prison. The judge and his administrators found that the remand facilities were "extremely overcrowded; at over 300% capacity it had 4 198 inmates. There is no question that each of the five centres is overcrowded. But the remand detention centre's overcrowding problem is extreme." They described the cells as filthy and cramped. Some detainees shared single mattresses while others slept on the floor: "in one of the cells, we noted 60 inmates with 24 beds." The report states that the extent of "overcrowding, unsanitary conditions, sickness, emaciated physical appearance of the detainees, and overall deplorable living conditions were profoundly disturbing."⁹

Although many share the general impression that overcrowding has lessened following the Sonke Gender Justice Case of December 2016 and the subsequent relocation of over half Pollsmoor's remand population, this report provides a clear picture of the inhumane facilities remand detainees are subjected to. As Jacqueline Hoorn of NICRO emphasised, these conditions are "not just a Pollsmoor problem, [but] rather a systemic problem."¹⁰

Systemically, remand detainees also lack access to many of the services available to sentenced inmates. Infectious diseases like HIV/AIDS, hepatitis, and tuberculosis are common in remand detention facilities while proper healthcare services are not. Remand detainees are often unable to access legal assistance services to make bail applications or appeals, much less to access the oversight necessary to protect their rights. Educational and rehabilitative resources like library books, study materials, regular visits with social workers and psychologists, and even basic recreational items like soccer balls, are off limits. This is because, in theory, pre-trial detention should be used as a last resort for such a minimal time that additional services would prove unnecessary.

3. South Africa's Remand System

Not only does Section 12(1)(b) of the Constitution state that a person cannot be detained without trial, Section 35 also provides every accused person with the right to a fair trial without unreasonable delay, and gives every detainee the right to conditions of detention that are consistent with human dignity, including access to exercise,

adequate accommodation, nutrition, reading material, and medical treatment. The Criminal Procedure Act 51 of 1977 governs court practices, while the Correctional Services Act governs prison conditions.

Recent efforts have provided a special framework for the processing and treatment of unsentenced prisoners as distinct from sentenced prisoners. The March 2014 White Paper on Remand Detention Management in South Africa builds upon previous policies mandating alternatives to bail, separate remand sections in prisons, and special assistance to vulnerable populations. In addition, "overcrowding is now being addressed through a multi-pronged strategy, including the strengthening of diversion programmes, additional bed spaces and alternative sentencing", with the July 2018 adoption of the Nelson Mandela Rules for the Treatment of Prisoners.¹¹ These rules also require a standardised prisoner file management system, including court dates and legal representation.

Nevertheless, there are many cases of the state's non-compliance with the legislative and policy framework. Although there is currently no limit on a trial's total duration, Section 49G of the Correctional Services Act "mandates that no remand detainee may be detained for a period exceeding two years...without the matter being brought to the attention of the court."¹² It fails, however, to compel courts to act on this information, made worse by the fact that it was not inserted into the Criminal Procedure Act which governs them. This places an unfair burden on accused persons to argue for an inquiry into delays, for their release, or for restitution for human rights abuses against them. With neither the courts nor the prisons forced to take responsibility for excessive and extended periods of detention, no one is held to account when innocent people spend years locked away.

4. Catholic Social Teaching

The Catholic Social Teaching principles of the preferential option for the poor, human dignity, and the common good, have much to say about remand detention. Not only does remand detention disproportionately affect the economically poor, but their unjust incarceration further deteriorates their and their families' physical, mental, emotional, and financial well-being.

In order to guarantee the rights of the innocent, “the juridical principle by which punishment cannot be inflicted if a crime has not first been proven must be borne in mind.”¹³ In his 2000 address to the Italian National Association of Magistrates on the Contemporary Role of the Judiciary, Pope John Paul II was explicit in declaring “respect for a person’s rights rules out the use of detention for the sole purpose of trying to obtain significant information for the trial” and requires swift trials.¹⁴

That same year, the United States’ Conference of Catholic Bishops (USCCB) identified three primary purposes of criminal punishment: the preservation or protection of the common good of society, the restoration of public order, and the restoration or conversion of the offender. Except in extreme circumstances, remand detention fails on all three counts. Drawing on the Catechism’s response to the death penalty, punishment that respects the dignity of the human person must be limited to the minimal sufficient means to defend and protect the common good.¹⁵ Therefore, the USCCB “call[s] upon government to redirect the vast amount of public resources away from building more and more prisons and toward better and more effective programs aimed at crime prevention, rehabilitation, education efforts, substance abuse treatment, and programs of probation, parole, and reintegration.” One such innovation is ‘drug courts,’ where substance abusers are diverted from traditional criminal courts into treatment programs.¹⁶

5. Alternative Practices

As in many African countries, South Africa’s prisons lack adequate resources due to their relative lack of political priority. Even though there are current plans to replace dilapidated prisons with new facilities, they cannot become a reality until funding becomes available. Suggestions that prison expansion and crime prevention will relieve the overcrowding problem fail, however, to address the unfair detention of persons awaiting sentencing. With detention costing the state a daily average of R350 per inmate, diversion programs and alternatives to detention can save the state money that can then be invested in ensuring better prison conditions as well as health, housing, and educational services that promote crime reduction. South Africa can learn from other countries that have implemented methods to reduce the backlog experienced by remand detainees lingering in the prison system

whilst their criminal accusation is being investigated.

5.1. Pre-booking diversion options

We need creative, humane and efficient ways of dealing with petty criminals and first-time offenders; ideally, they should be kept out of the prison system entirely. Pre-booking diversion can occur through co-ordination between the police and the community, ultimately conserving costly jail beds, saving time for officers, and prioritising public safety concerns. Participants in the CPLO roundtable discussion repeatedly expressed a deep need for building the capacity of social networks and community responsibility. In general, South Africa appears to lack many family and community-based interventions for the proper rehabilitation of their members both in and out of prison.

Community courts are one intervention that can implement restorative justice practices to meet the needs of victims, hold offenders accountable to community service reparations, and address underlying problems. In terms of offenders with behavioural health issues, police could refer cases to civil society organisations or a Mobile Crisis Unit to provide treatment instead of prosecution. For these purposes, the Justice, Correctional Services, Health, and Social Development departments would need to work together.

5.2. Pre-sentencing release options

At its best, the judicial system balances the need to presume the accused’s innocence with the need to protect the community from harm. On a fundamental level, it is sometimes necessary to remind police, prosecutors and judicial officials about the primary objectives of bail. Like all release options, the bail system seeks to ensure the defendant’s appearance at future court hearings. Not only do most remand detainees pose no threat to society, but the Manhattan Bail Project of 1961 showed that many people accused of committing a crime can be relied on to appear in court without having to post bail or be held until trial or sentencing.¹⁷ It would be beneficial for a similar study to be conducted here.

To more effectively and humanely serve the purpose of bail, instruments such as a pre-trial risk assessment and a continuum of alternatives to detention could be developed and implemented. Bail amounts, and thus detention, are currently patterned mainly according to the nature of the

offence, rather than the accused's economic status. Tailoring release conditions to a defendant's circumstances both facilitates release and increases success during the trial period.

In accordance with the International Covenant on Civil and Political Rights, which rejects detention as a general rule for persons awaiting trial, the UN Human Rights Court holds pre-trial detention to be the exception. Furthermore, the European Court of Human Rights has determined that, beyond the initial post-arrest stage, the obligation shifts to the state to justify continued detention as a last resort.¹⁸ Alternatives to bail and detention could include release on recognisance, reminder notifications, curfew, house arrest with electronic monitoring, and programmatic supervision. With so many less invasive measures, detention can be realistically dispensed with for offences that do not pose a threat to the public.

For example, Brazil prohibits pretrial detention for persons charged with an offence for which the potential maximum sentence is four years of imprisonment or less, provided such a person is not charged with a crime involving domestic or family violence committed against a vulnerable person, and has not previously been convicted of a serious crime.¹⁹ The Nigerian Legal Aid & Pre-trial Detention Project seeks to address the abuses faced by vulnerable remand detainees and to assist them in securing their rights. The Project emphasizes inter-agency co-operation, capacity development and institutional innovation. These examples show how collaboration between the agencies administering criminal justice may enable an immediate reduction of the numbers of persons awaiting trial as a proportion of the prison population, while at the same time building the attitudes, skills and organizational capacities of the concerned agencies for better management of remand detention.²⁰

5.3. Fair-trial practices

Although South African law requires a first court appearance within 48 hours of arrest, it fails to ensure the regular review of detention time-limits and alternative release measures. Currently, accused persons who are unable to pay bail can approach the court to reduce their bail, according to the Criminal Procedure Act; lawyers can also challenge extended detention on the basis of Section 35(3) of the Constitution, the right to trial without unreasonable delay.

Remand detention can sometimes be attributed to arrests without substantial evidence or to poor or incomplete case preparation; cases are regularly postponed for 'further investigation' while the accused languishes in pre-trial detention. Therefore, the provision of quality legal aid and assistance as soon as possible after arrest could have a significant impact in the number of individuals denied release. There is a need for more trained paralegals to provide assistance to accused persons. Paralegals in Sierra Leone, for instance, refer remand inmates with multiple court adjournments to the NGO Timap for Justice,²¹ which explains and assists with a new bail applications, while the Paralegal Advisory Service provides assistance to remand detainees in Malawi.²²

6. Conclusion

Catholic Social Teaching urges us to hold our penal system to account for its proper ends of appropriate punishment and effective rehabilitation. The detention of persons awaiting sentencing was not originally intended as a method of punishment, and it cannot currently be defended as a method of rehabilitation. Instead, the appropriateness and effectiveness of remand detention must be reconsidered in the light of disproportionate harm it causes to detainees and affected households.

On a wider scale, excessive and extended remand detention neglects basic minimum standards, endangers public health, wastes public resources, and stunts socio-economic development. Remand detention is a problem of international concern, so much so that the proportion of remand detainees to the overall prison population has even been identified in the UN Sustainable Development Goals of 2015-2030 as an indicator of its 16th goal – to promote the rule of law and ensure equal access to justice for all.

There is a clear need to reconsider a system that experiences backlogs in terms of which tens of thousands of individuals are kept in prison facilities for months or years prior to conviction. By making remand detention fairer, less harmful, and more humane, we can better serve justice, protect basic human rights and build safer communities.

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¹ On the 25th July 2018, The Catholic Parliamentary Liaison Office hosted a Roundtable Discussion on 'Remand Detainees.' The Roundtable was addressed by Prof Lukas Muntingh of the Africa Criminal Justice Reform (ACJR), Ms Jacqueline Hoorn of the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), Mr Andries Esterhuizen, Deputy-Director of the Regional Department of Prisons, and Fr Mathai Babychan of the Prison Care and Support Network. This Briefing Paper owes much to the presentations given at this roundtable and the discussion that followed.

² Presentation by Prof Lukas Muntingh of ACJR at the CPLO Roundtable Discussion on 'Prisoners on Remand,' 25th July 2018

³ <https://www.state.gov/documents/organization/220371.pdf>

⁴ http://www.dcs.gov.za/wp-content/uploads/2017/12/DCS-AR-2016_17-.pdf

⁵ Presentation by Ms Jacqueline Hoorn of NICRO at the CPLO Roundtable Discussion on 'Prisoners on Remand,' 25th July 2018

⁶ <https://acjr.org.za/resource-centre/Remand%20detention%20in%20South%20Africa.pdf>

⁷ Presentation by Fr Mathai Babychan of the Prison Care and Support Network at the CPLO Roundtable Discussion on 'Prisoners on Remand,' 25th July 2018

⁸ <https://acjr.org.za/resource-centre/socio-economic-impact-web-lowres.pdf>

⁹ http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160824Pollsmoor_report.pdf

¹⁰ Presentation by Ms Jacqueline Hoorn of NICRO at the CPLO Roundtable Discussion on 'Prisoners on Remand,' 25th July 2018

¹¹ <https://www.thesouthafrican.com/government-launch-mandela-rules-prisoners/>

¹² <https://www.dailymaverick.co.za/article/2016-09-26-remanded-and-forgotten-the-fate-of-south-africas-prisoners-who-have-not-yet-been-tried/#.WxkN4CC-nIU>

¹³ Compendium of the Social Doctrine of the Church, Article 404

¹⁴ https://w2.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000331_magistrati.html

¹⁵ Catechism of the Catholic Church, Article 2267

¹⁶ <http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm>

¹⁷ <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>

¹⁸ <https://acjr.org.za/resource-centre/Arrested%20in%20Africa%202.pdf>

¹⁹ <https://reinventingtherules.com/2014/10/14/global-strategies-to-reduce-pretrial-detention/>

²⁰ https://www.opensocietyfoundations.org/sites/default/files/nigeria_20041216%2520%25281%2529.pdf

²¹ <http://www.timapforjustice.org>

²² <https://www.opensocietyfoundations.org/voices/how-malawi-put-access-justice-un-s-agenda>

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