PROMOTING PRE-TRIAL JUSTICE IN AFRICA

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In this Issue

Insight into pre-trial detention in Mozambique
Maputo's prisons are "tired"

Pre-trial detention and Zimbabwe's draft Constitution
Enough protection against abuse of pre-trial process?

South African Constitutional Court finds state liable for pre-trial detainee getting tuberculosis in prison
A victory for rights but decision creates uncertainty in the law of delict

Events

53rd Session of the African Commission on Human and People's Rights
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Editorial

"A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments."

This quote is from the South African case of *Lee v Department of Correctional Services,* which is discussed by Clare Ballard and Jean Redpath below. The case resonates across Africa because many persons are detained in Africa under conditions exposing them unreasonably to disease and which sometimes cause their illness and death. The case confirms that there is a duty on the state, where it has deprived a person of their liberty, to take reasonable measures to ensure prisoners' physical welfare. Where the state fails to do so, it could be liable for damages.

In relation to tuberculosis (TB), which is an infectious disease, reasonable measures includes separating persons with the active infection from other detainees, reducing overcrowding, and providing appropriate treatment. In finding the state liable, the Constitutional Court said it was enough that the failure to take reasonable measures increased the risk that the plaintiff would contract TB, to find that the state had "caused" the applicant to contract TB and thus satisfy the element of causation necessary for the claim to succeed.

Particularly noteworthy in this case was that the applicant was a pre-trial detainee. To quote the court: *"The applicant was incarcerated in the admission section at the maximum security prison at Pollsmoor Prison from 1999 to 2004, but was released on bail for a period of approximately two months in 2000. He attended court on no fewer than 70 occasions. When inmates were transported for court attendance, they were stuffed into vans like sardines. At court they were placed into cells which were jam-packed."*

The length of time for which he was detained, and the numerous postponements his case occasioned, raises the question of whether the prosecution has a duty to deal with cases involving detainees with expedition, because an extended length of time in detention certainly increase the risk of a range of conditions. Could the prosecution be liable for similar damages suffered in detention by accused persons when their case progresses unreasonably slowly?

Slow case progression is a complaint among pre-trial detainees across Africa, and some insight on this in Mozambique can be obtained from Tina Lorizzo's article, based on her interviews with pre-trial detainees in Maputo below. Maputo houses around a third of all pre-trial detainees in Mozambique.

Poor conditions of detention and slow prosecution are key problems of pre-trial detention, but in Zimbabwe this has been compounded by the deliberate subversion of the criminal justice system and in particular pre-trial detention for

political ends. As part of Zimbabwe's slow transformation, a draft Constitution for Zimbabwe has been finalised which containes some protection against these abuses, discussed below. Constitutions are, however, only as strong as the institutions supporting them. Transitional provisions in the draft Constitution relating to the judiciary, which appear to entrench the "old guard", are thus cause for concern.

Jean Redpath
PPJA Researcher

Insights into pre-trial detention in Mozambique

During 2013 *Universidade Eduardo Mondlane (UEM), Centro de Direitos Humanos* (The Human Rights Centre at the University Eduardo Mondlane, Faculty of Law) and the CSPRI will conduct a comprehensive audit of prison conditions and time spent in pre-trial detention across Mozambique for the Open Society Institute of Southern African (OSISA) (the 2013 audit). This article describes a qualitative study conducted by Tina Lorizzo during 2012 which provides some key insights ahead of this work.

There are 184 centres of detention in Mozambique, which the Mozambican National Prison Services (*Serviços Nacional das Prisões*, SNAPRI), says had an estimated 16 881 prisoners in June 2012, which implies an incarceration rate of around 70 per 100 000 population.This is considerably lower than, for example, South Africa and Botswana.

The pre-trial prison population of Mozambique has remained at approximately 6400 since 2000. However, because arrested persons are also housed in court cells and at police stations, the total number of pre-trial detainees in Mozambique is not known.

During 2012 twenty pre-trial detainees were interviewed by Tina Lorizzo at the 'Central' and 'Civil' Prisons of Maputo. These two prisons accommodate 35% (2257 people) of Mozambique's pre-trial detainees held in prisons. The detainees were interviewed regarding their conditions of detention, the right to be charged within a reasonable time, compliance with custody time limits, access to legal representation, and the protection of vulnerable groups.

Conditions of detention
Both prisons are characterised by ageing and dilapidated infrastructure and one detainee said of the building: '*As paredes estâo cansadas*' [The walls are tired]. There were not enough beds for all the prisoners and many detainees slept on the floor between or under the beds, and in the spaces between the bunk beds. In the Central Prison, overcrowding created the necessity to open the cells from 07h00 to 17h00.

Three meals are served per day in the Civil Prison, but in the Central Prison detainees receive only breakfast in the morning and a 'reinforced lunch' (*almoço reforçado*) at 13h00. The diet consists of a combination of porridge for breakfast, and rice, maize, beans or peanut sauce for lunch or dinner. Female detainees at the Civil Prison said that they had sugar and hot water for breakfast.

In the Central Prison there was only one toilet, shared by between fifty and eighty prisoners. Access to drinking water in the Central Prison has improved following the sinking of two wells enabling access to water during the day. For the night, buckets, bottles and 200 litre tanks are filled.

Compliance with right to be charged within a reasonable time
Article 64 of Criminal Procedure Code (CPC) requires that a person has the right to be brought before the Instructing Judge and to be charged or to be informed of the reason for the detention not later than 48 hours after the arrest. This term can be extended to a maximum of five days in case of *flagrante delicto* (where the person is arrested during the commission of an offence), failing which, the person must be released.

Obtaining accurate data on the criminal justice process was not easy and five interviewees could not remember the time period between arrest and charge, while one had not yet been charged after being held for one year. For six detainees the time period was in excess of a week, while the remaining five said it took between 48 hours and five days to be charged. In other words none of the interviewees could confirm that the requirement to be charged within 48 hours had been observed in their case.

Compliance with custody time limits
Article 308 of the CPC establishes different terms after which a detainee must be released. An arrested person can be detained for 20 days upon the commission of a criminal offence punishable with one year imprisonment; 40 days of detention is provided for crimes punishable with imprisonment for longer than one year; and 90 days of detention for crimes whose preliminary investigation (*fase de instrução*) is within the competence of the Criminal Investigation Police (*Policia de Investigação Criminal*, PIC) or the Director of the Prosecutor Office (*Procurador Geral da República*).

All interviewees had been detained for longer than allowed by law. Six detainees had been in prison for more than one

year and one had been detained for around three years.

Access to Legal Representation
Article 62 of the 2004 Constitution of Mozambique guarantees legal assistance to accused persons. The Institute for Legal Assistance (Instituto de Patrocínio e Assistência Jurídica, IPAJ), a government institution, was created by Law 6/1994, under the supervision of the Ministry of Justice, to provide legal and judicial assistance to Mozambican citizens.
Half of the detainees interviewed said they had not received any legal counsel since their arrest; six persons said that they had paid personal lawyers, and four had recently received assistance from IPAJ.

With only 38 lawyers and 85 paralegals in 2011, IPAJ data shows they provided assistance in 53 184 cases, implying that each lawyer or paralegal provided assistance in more than 400 cases. There is however a great deal of disillusionment about IPAJ among detainees:

“Here there is only a lot of talking because the chance of a lawyer appearing and helping people is very low. Sometimes they pass by but not with the interest to work. If they would really work, they would be here every week. Legal assistance works like this: you need to know someone.”

Protection of vulnerable groups
Females were held at the Civil Prison and were separated from males at all times and supervised only by female officers. Female detainees complained that their food was worse than that of their male counterparts.

Persons younger than 18 were detained with adult prisoners in the Central Prison, while they were detained in separate cells at the Civil Prison. Although juveniles were present in both establishments, the directors said that prisons could no longer accept persons younger than 16 years. Since June 2011 persons between the ages of 16 and 21 years old have been detained at the rehabilitation centre of Boane, forty kilometres from Maputo. The centre is the first juvenile establishment in Mozambique and holds 200 people.

Reform
In 2009 the Ministry of Justice welcomed a UNDP (UN Development Programme) project aimed at strengthening national capacity and supporting legal reform in the prison sector to bring the legislative framework of the prison system in line with the Constitution and with universally accepted principles regarding the treatment of prisoners.The project also aimed to reduce prison overcrowding and social rehabilitation by introducing alternatives to imprisonment. Mozambican prison law is currently in the process of being revised and new legislation on alternatives to imprisonment has been approved by the Council of Ministers. The 2013 audit will thus provide a useful baseline from which to measure the impact of reform in Mozambique.

Tina Lorizzo with Jean Redpath
This article is based on an article by Tina Lorizzo which appeared in SA Crime Quarterly 42 of December 2012.

Top of page

Pre-trial detention and Zimbabwe's draft constitution

Key among the problems in the Zimbabwe criminal justice system has been the abuse of the pre-trial phase of the criminal process. Persons are arrested on spurious charges for political ends, and held for extensive periods “awaiting trial”. A draft Constitution, which includes provisions seeking to prevent such abuses, has been drafted and is awaiting approval.

In 2009 political negotiations toward a power-sharing government in Zimbabwe were completed. In terms of the resultant Global Political Agreement (GPA), a consultative process for the creation of new Constitution for Zimbabwe was mandated.

A technical draft Constitution was finalized in July 2012. This was tabled for review at a second All Stakeholders Conference, which took place in mid-January 2013. This draft will be submitted for debate in Parliament, and the final version will be subject to a referendum. If the referendum approves the Constitution, it will be referred to Parliament for enactment. South African constitutional provisions have been influential in the drafting process; this makes comparison with South Africa pertinent.

Rights of arrested and detained persons
The July 2012 technical draft contains a number of key provisions which are highly relevant to pretrial justice. Most notable amongst these is the requirement that ***arrested persons awaiting trial must be released on bond or bail unless there are “compelling reasons” justifying their continued detention***, contained in clause 4.7 which deals with the rights of arrested and detained persons. "Compelling reasons" are not defined and this will be subject to interpretation. The clause also affirms an ***entitlement to compensation for illegal arrest or illegal detention.***

Further, the clause stipulates **the right of an arrested person to contact a person of their choice at the expense of the state**. This means the state must pay for the phone call or other means of contacting the person the arrested person wishes to contact. Implementing this provision will require all places of detention to have working telephones paid for by the state available to arrested persons for this purpose. This is not currently the situation in Zimbabwe.

Also notable in clause 4.7 is the requirement that an arrested person ***not be detained longer than 48 hours without his or her detention being extended by a competent court, whether or not the expiration of 48 hours ends on a public holiday or weekend.*** This is in contrast to the current situation where weekends and public holidays are not included in the calculation of the 48 hour period. Persons arrested later in the week, specifically from Wednesday to Sunday, may legally be held for up to 112 hours in detention. If this provision is approved, practical measures will have to be implemented to cater for after-hours bail applications. These may include an after-hours duty roster for prosecutors and magistrates. It is important that this provision explicitly refers to the after-hours situation: in South Africa, the legislature has been able to legislate away any common law entitlement to after-hours bail applications.

The clause also provides that arrested persons have the ***right to consult a doctor or lawyer of their choice*** at their own expense. In other words the state is not obliged to pay for these services. However persons being tried have the ***right to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result.*** This is similar to the formulation for the right to the provision at state expense of legal aid, which was adopted in South Africa.

Rights of children
In terms of children, Clause 4.38 provides that children (persons under the age of 18 years) have the right not to be detained except as a measure of last resort and, if detained, to be detained for the shortest appropriate period; to be kept separately from detained persons over the age of 18 years; and to be treated in a manner, and kept in conditions, that take account of the child's age.

Limitations
The general and emergency limitations clauses (clauses 4.43 and 4.44) – which circumscribe the extent to which these rights may be limited – are formulated in a similar manner to the comparable provisions in the South African Constitution.

National Security Council
Of some concern is Clause 11.4 which provides for a "National Security Council" (NSC) consisting of the President, Ministers and members of the security services. The NSC determines security policy and may be assigned "any other functions that may be prescribed in an Act of Parliament." This is ominously broad.

Oversight
With reference to independent oversight of the police, Clause 11.5 provides that "An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services." Given the recent history of Zimbabwe and the role of the police, clause 11.3 also provides that "Neither the security services nor any of their members may, in the exercise of their functions— act in a partisan manner; further the interests of any political party or cause; prejudice the lawful interests of any political party or cause; or violate the fundamental rights and freedoms of any person."

Are these provisions sufficient to prevent the abuses of the pre-trial process which have become commonplace in Zimbabwe? A Constitution is only as strong as the institutions supporting and enforcing it, in particular, an independent judiciary.

Although the draft Constitution provides for a new Constitutional Court that will ultimately be responsible for interpreting the Constitution, the transitional provisions in the draft stipulate that for the first seven years after the Constitution comes into effect, the Constitutional Court is to be composed of the current Chief Justice and Deputy Chief Justice, the four most senior judges of the Supreme Court, and three other judges appointed by the President on the recommendation of a Judicial Service Commission. The implication is that judges who have presided during Zimbabwe's most difficult times – and have arguably failed to hold the executive to account for abuse of process– will continue to comprise the majority of the Constitutional Court for seven years. This will have an important impact on the emerging jurisprudence.

Jean Redpath

Top of page

South African Constitutional Court finds state liable for pre-trial detainee getting tuberculosis in prison

Former pre-trial detainee Dudley Lee contracted TB while awaiting trial over several years. After more than 70 postponements he was acquitted and released, and he successfully sued the Department of Correctional Services in the High Court for his having contracted TB in prison. The Supreme Court of Appeal agreed that there was a duty on the Department of Correctional Services "to take reasonable measures" to prevent the spread of TB amongst detainees, and that they had failed to do so, but overturned the High Court judgment on the legal issue of "causation", because their omissions could not be said to have "caused" his TB. The Constitutional Court however found that there was "a probable chain of causation" between their failure to take reasonable measures and Mr Lee contracting TB, which rendered the Department liable. While the judgment is a victory for prisoners' rights, its reasoning creates uncertainty in the common law.

Mr Lee's case was originally heard in the Cape High Court, which found in his favour. The state challenged the High Court judgment in the Supreme Court of Appeal (SCA). The SCA agreed that there was a duty on the Department of Correctional Services (the Department) to take reasonable measures to prevent the spread of TB and that they had indeed negligently failed to do so. However Mr Lee had failed to prove the legal element of causation required for a claim in the law of delict to succeed. For this element to be proved, the SCA said, Mr Lee had to show that the existence of such reasonable measures would have completely eliminated the risk of his contracting TB.

This is known as the "but for" test. The case of *Minister of Police v Skosana 1977 (1) SA 31 A* demonstrates how this test is applied in the case of omissions. In that matter, the plaintiff had been involved in a serious car accident and had been arrested and detained on suspicion of driving under the influence of alcohol. The next morning he was found in his cell complaining of severe abdominal pain and asked to be taken to a doctor. The police officers delayed in obtaining medical attention for him – this was the so-called "omission". The plaintiff died shortly after eventually receiving medical attention, some hours later than he would have had the police acted timeously. In short, if it was not for their omission, he would have survived his injuries.

In *Skosana* the court carefully considered the chain of evidence. The medical evidence indicated that had the police officers, who were under a duty of care as a result of their special relationship as warders of a prisoner, obtained medical care for him before 11.30am, which would have occurred if they had acted timeously on finding him in pain before 9am, he would not have died. This omission to act timeously rendered the state liable under the law of delict for a damages claim. By contrast, the SCA in Mr Lee's case found that because of the pernicious nature of TB, that even if the Department had taken reasonable measures, Mr Lee might still have contracted TB. Because of this, the SCA said, the Department could not be said to have "caused" the Mr Lee to contract TB through their omission to take reasonable measures.

The majority of the Constitutional Court held that the SCA, in applying the test for causation, had adopted a "rigid deductive" logic which, given the impossibility of Mr Lee ever being able to prove the exact source of the infection, meant that neither he, nor similarly situated applicants, could ever be successful in such a claim. Rather, the majority judgment stated, South African law has always recognised that the test for causation should not be applied in an inflexible manner. Accordingly, Mr Lee had, in fact, proved his claim when gauged in terms of the "probable chain of causation," and that the systemic omissions on the part of the Department increased the risk that Mr Lee would contract TB, and that this was sufficient to render the Department liable.

The minority judgment of Cameron J, in finding that the SCA had applied the test for causation correctly, held that it was simply impossible to conclude on the basis of such a test that the negligence of the Department had "probably" caused Mr Lee to contract TB. Accordingly, given the resultant injustice of such a test, the Constitutional Court was required to develop the common law. However, this was not possible for the Constitutional Court to do based on the record before it. The minority judgment would therefore have remitted the matter back to the High Court for consideration of such development.

In any event, the case must go back to the High Court for determination of the issue of "quantum" – quantifying exactly how much the Department must pay for the damage caused to Mr Lee.

The element of causation is no doubt necessary in ensuring that the net of liability is not cast too wide. However, in attempting to overcome the rigidity of the strict "but for" test, the majority of the court, unfortunately, unwittingly, perhaps, crafts an approach that entails that factual causation be inferred from "any increase in risk." This is because, in the words of the minority judgment "[the approach] leaves no room for assessment of the amount of risk exposure that occurred, how much of it was attributable to the negligence of the defendant, and what level of risk exposure should lead to recovery of compensation."

Put differently, the notion of the "probable chain of causation" introduced the language of statistics and the mathematics of probability into the law, without having closely considered any actually calculated increase in the risk of disease caused by the omissions. Indeed, the Constitutional Court refused to admit before it a transmission modelling analysis of TB in prisons as evidence. Although the majority judgment does not purport to change the test for causation, it does in fact do so, with the unfortunate result that it fails to grapple sufficiently with how the test for causation should be developed, nor with the same vigour with which the American and United Kingdom courts have tackled the issue. Ultimately, the Constitutional Court did not go into detail as to exactly what was meant by "probable chain of causation".

It will be interesting to see how the High Court deals with the question of damages. After determining the overall amount of harm suffered by Mr. Lee, the question may arise as to whether the Department should pay for all the harm or only part of the harm. After all, the Constitutional Court based their determination of liability on the incremental increase in risk caused by the omissions. This raises the question of whether the defendants should they pay the full amount of damages, even though their omissions only incrementally increased the risk.

Mr. Lee's case, albeit indirectly, also raises the problem of the lengthy periods of time many awaiting trial detainees are forced to suffer – many of whom, like Mr Lee, are ultimately acquitted. In theory, had the National Prosecuting Authority (NPA) dealt timeously with Mr Lee's case – which it could be argued, they are under a duty to do when the accused is being held in detention – he would not have spent so long in detention, thereby increasing his exposure to TB and consequently his risk of contracting the disease. On the Constitutional Court's "probable chain of causation" test, the NPA would certainly run the risk of liability.

Clare Ballard and Jean Redpath

Top of page

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