

# LESSONS FROM THE PAST

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## Remand detention and pre-trial services

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*A 1997 project established by the Vera Institute of Justice, a New York-based non-government organisation, aimed to alleviate overcrowding in South African prisons by assisting magistrates in bail proceedings and thereby decreasing the number of admissions into awaiting trial facilities. Understanding the context in which the project operated leads to the important observation that efforts to launch and sustain discrete experiments in justice innovation will necessarily come under strain when faced with aggressively adverse macro circumstances, like the ones that faced Vera's pre-trial project. However, the legal and social milieu has changed over the last twelve years. It is perhaps time to once again explore how innovations in criminal justice administration (a much-needed initiative) might best work in the various criminal justice management areas, given the discrete circumstances of each.*

In 1997, in response to the problem of overcrowding in South African prisons, the Vera Institute of Justice (Vera), a New York-based NGO, established a demonstration pre-trial services project aimed to reduce the number of admissions into remand detention. The project, based at various court centres in the country, sought to provide magistrates with independently verified information about defendants at arraignment, which, it was hoped, would make the bail process more efficient, equitable and informed.<sup>1</sup> Although portions of the pilot project did survive, discretely, in a spinoff court project in Port Elizabeth,<sup>2</sup> Vera's pre-trial services project was not adopted nationally. In this article we firstly discuss Vera's pre-trial project, its purpose and its results. Secondly, we sketch the social and politico-legal context in which the project operated, for it is clear

that public concern about crime and public safety in general, and the subsequent legislative and judicial responses in particular, played some role in the project's ultimate demise. We suggest, finally, that what might not have worked a decade ago, is possibly worth revisiting today, in South Africa's current social and political climate. Incremental shifts in the legislative terrain and policy indicate a growing concern around the excessive use of remand detention and the conditions to which remand detainees are exposed. Coupled with such shifts are more recent efforts on the part of government to deal with the problems in the criminal justice system, in particular the backlogs in South Africa's criminal courts.

### THE VERA PRE-TRIAL PROJECT

During the late 1990s South African prisons experienced an unprecedented growth in the remand detainee population.<sup>3</sup> Unsurprisingly, this period of South African history is characterised as one in which public anxiety about crime and public safety

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issues was at an all-time high.<sup>4</sup> Part of this anxiety stemmed from a prevailing misconception amongst the public that the right to bail was to blame for the high levels of violent crime, and it was partly fuelled<sup>5</sup> by a number of highly publicised cases in which crimes were committed by offenders who had been released on bail.<sup>6</sup> Public outrage put pressure on government to ensure judicial accountability in matters of bail, particularly in high stake cases.

In 1997, Vera, at the invitation by the then South African Minister of Justice, Dullah Omar, established the Bureau of Justice Assistance (BJA) in Cape Town, South Africa. It was envisioned that the BJA – a joint venture between Vera and the South African Department of Justice and Constitutional Development (DJCD) – would spearhead the design and implementation of various projects aimed at improving local capacities for innovations in justice administration and justice delivery in South Africa.<sup>7</sup> The first such project was the Pre-Trial Services project (PTS), whose purpose was to assist magistrates in making more equitable bail decisions by providing them with independently verified information about defendants at their first appearance.<sup>8</sup> The provision of such a report firstly aimed to ensure that serious or repeat offenders were not released on bail, and secondly that petty offenders were released on affordable bail or on non-financial supervisory conditions.<sup>9</sup> The report was also meant to provide a fuller picture of a defendant's overall financial means so as to mitigate the chance of bail amounts being set too high, and to prevent the economic injustice of remanding defendants who pose no threat to public safety into custody simply for not being able to afford bail thresholds.

The PTS project – piloted in three of the country's busiest magistrate's courts – produced mixed results. For example, whilst there was some success in increasing bail, and in reducing bail amounts in Mitchell's Plain, Durban and Johannesburg, bail amounts remained stubbornly high, and, interestingly, there was a *significant increase in bail being denied* at those courts. Furthermore, at the end of the pilot phase, despite the median bail amount having decreased in Mitchell's Plain from

R500 to R300, 63% of accused persons in Mitchell's Plain could still not afford to pay the R300, and were duly sent back to Pollsmoor Prison to await trial.<sup>10</sup>

In the end, the project itself had little effect on the size of the remand detainee population still languishing in prison; and despite its initial intentions to do so, the PTS project was not rolled out nationally by the DJCD after the pilot phase. What happened? For a number of reasons, the PTS project suffered from a few key practical shortcomings that partially explain why the project never moved beyond the pilot phase.<sup>11</sup> For instance, interdepartmental communication and collaboration was weak and resulted in the project being promoted and perceived as primarily a DJCD initiative, despite the necessity of sustained cooperation and coordination with other agencies such as the police and the Departments of Safety and Security and Correctional Services. Also, much of the project's funding relied on donor funds raising doubts about the project's long-term sustainability and posing serious questions regarding the extent to which the national budget could be truly said to address policy commitments made regarding criminal justice. Once BJA handed over the project, full funding from the national government became uncertain, and although some money was allocated to the project in the national budget, none evidently trickled down to the provinces. Existing sites could draw from core provincial budgets in order to continue delivering pre-trial services, or to roll it out to other court centres. Given an operational environment characterised by widespread resource scarcity it is unsurprising that there was a gradual administrative abandonment of the PTS project across the country.<sup>12</sup>

Tellingly, after BJA handed over the project to the DJCD, no structures or supporting guidelines were put into place to ensure the continued support and participation of partner agencies critical to implementation.<sup>13</sup> Indeed, a key criticism suggested that the project's success depended too much on its one high profile champion, Minister Dullah Omar, and others within agency leadership, while not enough had been done to recruit the support,

cooperation and trust of key operational staff within the various partner organisations to ensure successful roll out.<sup>14</sup>

It should also be noted that the project's primary currency – the pre-trial report – was not properly incorporated into the new Integrated Justice System (IJS) technology subsequently rolled out by the IJS board. The IJS board did, however, include some of the key departments and agencies that had been involved in the PTS project, including the DJCD, the Department of Correctional Services, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS). This was indicative, perhaps, of the crippling misalignment of strategic objectives *within and between* erstwhile partner agencies, pointing to a weakness in intersectoral relationships and the transient nature of policy commitments made across government departments at the time.<sup>15</sup>

But technical and logistical considerations do not fully answer why the project faltered as it did. To continue answering the question 'why', it may be useful to take an analytical step backwards. An appreciation for the political and social climate in South Africa during this time, particularly in relation to crime and associated public perceptions, fears and reactions, is particularly helpful both in understanding the context in which the PTS project was conceived and implemented and the external challenges it faced, and why remand detention in general remains a problem in South Africa.

## THE SOCIAL AND LEGAL MILIEU

### Crime statistics and the fear of crime

Throughout the 1990s there was a persistent upward trend in overall levels of crime throughout the country. By the late 1990s, crime had become a serious concern for South Africans. In 1998, for example, the SAPS reported crime figures included 88 319 instances of aggravated robbery, 24 875 murders, 49 754 rapes, 256 434 assaults with intent to inflict grievous bodily harm, and 360 919 burglaries.<sup>16</sup> Faced with these numbers, it is

unsurprising that public anxiety regarding crime and public safety during this time was high.

The country's criminal justice system did little to alleviate the public perception that government was not doing enough to combat rising levels of crime. In 2000, of the 2,6 million crimes recorded by the SAPS, only 610 000 cases had been referred to the courts.<sup>17</sup> The NPA only took on 271 000 cases, resulting in approximately 210 000 convictions. Whilst the NPA were able to get convictions for most of the cases they prosecuted, only eight per cent of recorded crimes resulted in convictions.<sup>18</sup>

Because of the pervasive belief that the state could no longer be considered a capable guardian of public safety and security, there was a concomitant rise in 'community policing' (vigilante or otherwise) among poorer communities and a wholesale movement towards a reliance on the private security sector amongst the middle classes.<sup>19</sup> As communities turned inwards for solutions to remedy the problem of crime, government's ineffective handling of crime became the object of people's scepticism and derision. Interestingly, according to the Independent Complaints Directorate, an independent police oversight body, there was a 'growing, popular perception that constitutional rights for criminals [were] being protected above those of their victims.'<sup>20</sup>

As the tempo of criticism against government grew over its (mis)handling of the crime issue, a concerted effort was made to reassert the presence (and relevance) of the state by broad moves to bring itself in line with public opinion. For one, there was a sudden militarisation of crime control discourse emanating from government circles. A speech delivered in 1999 by the then Minister of Safety and Security, Steve Tshwete, is an example of such rhetoric:

The criminals have obviously declared war against the South African public. What is required now is ruthless implementation of the NCPS [National Crime Prevention Strategy] as a matter of urgency. We are ready more than ever before, not just to send the message to the

criminals out there about our intentions, but more importantly to make them feel that the *tyd vir speletjies is nou verby* [the time for games is over]. We are posed to rise with vigour proportional to the enormity and vastness of the aim to be achieved. We dare not disappoint our people in this regard.<sup>21</sup>

And indeed, government spoke of ‘hitting the criminals where it hurts’ and warned that ‘there will be no place to hide.’<sup>22</sup> Battle cries for law and order, the war against crime,<sup>23</sup> and zero tolerance<sup>24</sup> gave inspiration to clampdowns, as well as saturation policing in which areas were sealed off, people and property were searched and hundreds of people detained.<sup>25</sup> In one such operation dubbed ‘Sword and Shield,’ more than 300 000 suspects were arrested during 1996 and 1997.<sup>26</sup> Unfortunately, efforts to equip the courts and remand facilities were glaringly absent in the face of the inevitable rise in the number of people arrested and detained. The consequence, of course, was the flooding of an already over-burdened court system and poorly equipped prisons.

The gloves were clearly off. But the tough talk and increasingly aggressive police tactics were not merely symbolic, nor were they tin-pot public spectacles aimed at regaining political legitimacy. Public concerns about safety can, and do, exert considerable influence on the making of legislative policy, and as a result, alongside the tough-on-crime rhetoric and policing tactics, a raft of new legislation was speedily introduced.

## The legal and judicial response

Bail laws in South Africa changed radically in the latter part of the 1990s. As suggested above, the rise in incidents of violent crime and the resultant public fear during this time were, without controversy, a significant driving force behind the enactment of increasingly harsher bail provisions.<sup>27</sup>

Historically, South African courts, recognising that bail is an expression of the presumption of innocence, tended to lean ‘in favour of the liberty of the accused.’<sup>28</sup> In 1995, the Criminal Procedure Act<sup>29</sup> was amended and a controversial ‘reverse

onus’ provision was introduced. Section 60(11) stipulated that, when charged with certain offences,<sup>30</sup> the accused was required to satisfy the court that the ‘interests of justice’ did *not* require his or her remand detention.<sup>31</sup>

Despite the 1995 overhaul of the bail regime, it was, and remains, widely accepted that ‘members of the South African public remained convinced that the right to bail was to blame for the perceived increase in crime’<sup>32</sup> in the years that followed. The response from government was to once again amend the Act in 1997. The 1997 amendments created an even more burdensome onus on the accused.<sup>33</sup> Persons suspected of having committed schedule six offences<sup>34</sup> were to be denied bail unless ‘exceptional circumstances,’ which satisfied the court that it was in the interests of justice to release them, existed.<sup>35</sup> Soon thereafter, a number of the bail provisions were challenged before the Constitutional Court in the *Dlamini*<sup>36</sup> case as being infringements of the right to be released from detention if the interests of justice permit. The more controversial provisions up for challenge included the ‘reverse onus’ provisions. The Court found that ‘to the extent... that the test for bail established [by the Act] is more rigorous than that contemplated by section 35(1)(f)...it limits the constitutional right.’<sup>37</sup> Despite this, it held, curiously, that such limitations were nevertheless justified.<sup>38</sup> In doing so, the Court placed much emphasis on the ‘grim reality’ of crime.<sup>39</sup>

The *Dlamini* judgment sparked much criticism for having surrendered to the general ‘panic and hysteria’ that existed about crime in South Africa<sup>40</sup> and failing to protect the fundamental right to liberty. This ‘surrender’ is all the more interesting when comparing *Dlamini* to the Court’s previous decision in *S v Makwanyane*.<sup>41</sup> There, too, the Court was faced with the purported ‘effectiveness’ of the death penalty in the face of overwhelming concerns about violent crime and a large retentionist movement.<sup>42</sup> The *Dlamini* judgment remains a stand-out example of apologist sentiment from the Constitutional Court that has since become renowned for having adopted an ‘official position’ of interpretation, in which public opinion would be of ‘little relevance in matters pertaining to the interpretation of the Bill of Rights.’<sup>43</sup> The *Dlamini* judgment did not, however, change the

text of the legislation, and thus, as Axam makes clear, the significant legislative discretion enjoyed by bail courts remains intact.<sup>44</sup> Bail courts should therefore apply the reverse onus provision in a flexible manner that seeks to avoid the arbitrary detention of suspected offenders.

## Remand detention today

Although crime in general has decreased over the last decade, the question whether South Africans are more or less fearful of crime has become, to some extent, a less critical factor today than it was in the late 1990s. This may be because enough time has elapsed for the public to 'evaluate' government efforts to date. What is clear, however, is that government's responses in the late 1990s made little headway in substantially reducing crime levels, and this has, ironically, made people more receptive to new ideas. Moreover, there are good reasons to believe that the current legal and political climate has become more encouraging of efforts to improve the situation of remand detainees. This does not mean that 'tough on crime' rhetoric or actions are necessarily on the decline.<sup>45</sup> Nor does it mean that a more encouraging climate has been translated into tangible efforts to alleviate the problems associated with remand detention on the part of the state. Rather, incremental changes to certain legislation and policy indicate a general shift (prompted by the enactment of the final Constitution) towards the protection of prisoners' rights<sup>46</sup> and an awareness of conditions of detention.

## Legislative and policy shifts

The Correctional Services Act 8 of 1959 was amended in 1997 and again in 1998. The Correctional Services Act of 1998 is a 'complete departure from its predecessor' in how it details the rights of prisoners and places the duty of their protection and fulfilment firmly on the state. Put differently, the new legislation, taking its cue from the Constitution's requirement that conditions of detention be 'consistent with human dignity',<sup>48</sup> created a legal framework mindful of the minimum degree of care and protection to which detainees were entitled.

Another (perhaps overlooked) feature of the 1998 amendment to the Act was the establishment of the Office of the Judicial Inspectorate for Correctional Services (JICS), the object of which is to 'facilitate the inspection of correctional centres . . . [and] report on the treatment of inmates in correctional centres and on conditions in correctional centres.'<sup>49</sup> The yearly reporting and critical evaluation by the JICS of issues such as prison population trends and prison conditions in general, means that important information about remand detention has entered the public domain. In fact, a standard feature of every annual report to date has been the cautioning that remand numbers are simply too high and should be reduced.<sup>50</sup>

Recent amendments<sup>51</sup> to the 1998 Act incorporate an additional objective into the current legislative framework, namely, 'the management of remand detainees.'<sup>52</sup> This particular inclusion has important symbolic value, given that South African legislation has never formally acknowledged the care and administration of remand detainees as a 'purpose' of the 'correctional system.'<sup>53</sup> Another notable inclusion is the maximum incarceration period, which cannot exceed two years 'from the initial date of admission...without such matter having been brought to the attention of the court.'<sup>54</sup> In addition, the amending legislation also requires that the head of the prison report to the National Prosecuting Authority at six-monthly intervals on cases involving remand detainees who have been held for successive six-month periods.<sup>55</sup> If such detention continues, the head of centre must take such cases to court on an annual basis.<sup>56</sup>

It is worth mentioning at this stage, that although a mechanism such as a custody time limit is certainly a step in the right direction, especially in light of the excessive periods of detention that South Africa's remand detainees are frequently forced to suffer, there is the risk that it will be used, simply, as a benchmark for the maximum time it should take to conclude a case. And two years is a very long time to wait, especially if the case is a relatively simple one. This brings to light the point that, without tangible efforts, provisions like these do not make much headway in solving the actual problems behind high remand numbers.<sup>57</sup> They

remain, simply, indicators of a greater awareness of the problem of remand detention. Recently, during April 2013, the White Paper on Remand Detention, destined to fill the 'policy gap' between the provisions on remand detainees in the amending legislation and their implementation, was published by DCS. The White Paper successfully contextualises remand detention in domestic statutes and international law, and outlines the rights and various oversight instruments applicable to remand detainees. In relation to backlog and overcrowding, the White Paper simply refers to the ATD Guidelines and lists a 'strategy' through which to manage overcrowding. Curiously, it emphasises the use of non-custodial and rehabilitative-type initiatives in the sentencing phase. Perhaps this is, in part, understandable, since DCS has little control over the number of remand detainees denied bail by the courts. Nevertheless, the White Paper is an important policy document indicative of the purported commitment of DCS to the problem of remand detention.

There have, however, been some noticeable state efforts to reduce delays in the processing of cases in the courts<sup>58</sup> over the years, an indication that 'the long held concerns around the conditions of those awaiting trial [have] finally started to make it onto the government's radar.'<sup>59</sup> In 2005 the NPA published a set of guidelines (ATD Guidelines) intended to 'sensitise prosecutors as to the various options available to try to reduce the number of awaiting-trial detainees.'<sup>60</sup> The ATD Guidelines are, for the most part, a condensed version of the statutory bail provisions. They do, however, offer a couple of meaningful recommendations to prosecutors, such as reconsidering bail if an accused has been in custody for longer than six months, and making sure that the investigations and presentation of the state's evidence are fast-tracked in such matters.<sup>61</sup> But even as early as 1999 to 2000 the NPA was making a concerted effort to combat case backlogs. Such efforts included the institution of Saturday courts and the deployment of more experienced magistrates and court officials to the busier court centres in the country.<sup>62</sup>

In fact, in the seven-year period between 2001 and 2008, 'the reduction of backlogs was a major focus

of the criminal justice system' and received a significant amount of funding.<sup>63</sup> The Justice, Crime Prevention and Security Cluster (JCPS), comprised of a number of relevant governmental sub-committees, established the Case Backlog Reduction Project in 2006 with the objective of assisting court centres in identifying priority areas 'that require...additional capacity.' This has resulted in the overall expansion of court capacity at approximately 84 regional 'backlog courts' through the appointment of acting magistrates as well as additional interpreters, clerks, prosecutors and legal aid defence lawyers, so as to ensure that cases are disposed of more speedily.<sup>64</sup> Furthermore, the JCPS Cluster has established a Remand Detainees Task Team that now requests the DCS to provide it, on a monthly basis, with lists of long outstanding cases regarding persons still in detention. The intention is that, once identified, such cases can be independently investigated, and where possible, fast-tracked to a speedier solution.<sup>65</sup>

## Moving forward

Despite government's efforts and purported 'success-es,' remand detainee numbers remain alarmingly high,<sup>66</sup> an indication that, perhaps, government efforts are simply insufficient, or, are the wrong *type* of efforts. This begs the question, what is it that government is failing to do, or, what is it that government is doing wrong? This question is extraordinarily difficult to answer given that there has been little independent evaluation of the above-mentioned initiatives. It may be that, like the PTS project, which sought to remedy the problem of remand detention through a discrete experiment that targeted bail hearings at first appearance, government's efforts to date have failed to establish a broader and more coordinated strategy of reforms that engage the *whole* criminal justice continuum and, concurrently, at each criminal justice entry or exit point. Perhaps part of the answer lies in the Public Service Commission's 2011 findings, that it is the 'lack of coordination and cooperation of the wide array of institutional role players involved in the delivery of judicial services' that creates systemic challenges which are major contributors to the backlog cases.<sup>67</sup>

With this in mind, there are perhaps a few lessons that can be drawn from the success of the Port Elizabeth IJS Court Centre Project (IJSCCP). As mentioned above, portions of the PTS pilot project were adopted and amended in Port Elizabeth through the IJSCCP. The IJSCCP, like the PTS Project, aimed to reduce the amount of time spent in prison by prisoners awaiting trial; but unlike the PTS project, the pre-trial element was, and remains, one of many components. For example, court processing and persistent court backlogs were immediately identified as a contributing factor to lengthy remand detention in Port Elizabeth's court system. Thus, to streamline court processing, the IJSCCP established a channelisation court as well as a periodical court at St Albans Prison – the main feeder of prisoners to the Port Elizabeth Magistrates Court – to deal exclusively with non-trial matters, such as remands, bail applications, and pleas. In addition, the Port Elizabeth Court Centre prioritises cases involving remand detainees. These cases are identified and reviewed, and through this process, frivolous charges, or cases with insufficient evidence, are withdrawn and the detainee is released.<sup>68</sup> The project is therefore notable for its integrated approach and remaining responsive to the localised needs of the particular criminal justice system and community in Port Elizabeth.

The IJSCCP, in a broad sense, sought to identify and resolve blockages throughout the various points in the criminal justice system. This required a coordinated strategy to tackling the problem, making close collaboration between the DJCD, the DCS, and SAPS critically important. Based on admittedly not so recent data, the project yielded 'promising results':<sup>69</sup> a reduction in the time taken to prepare a docket for trial, facilitated bail applications and improved docket quality, all of which resulted in a reduction in the number of remand detainees.<sup>70</sup> Furthermore, support for a localised and integrated approach can also be assumed from 2007 research data where it is clear that the reasons behind court backlogs vary significantly between court centres. For example, it was found that reasons driving postponements in Durban were trial-related,<sup>71</sup> while postponements in Mitchell's Plain were due to delays in

investigations.<sup>72</sup> This kind of information suggests that *meaningful* reforms aimed at reducing the length of time that suspects remain in remand detention in Durban would necessarily include a court processing component. By contrast, in Mitchell's Plain, such reforms would need to include efficiencies within SAPS investigatory strategies, and perhaps an integrated investigatory approach that involved prosecutors to a greater degree.

Certainly, it seems, the political will to improve remand detention is no longer lacking. This is a key factor when it comes to the sustainability of any pre-trial services endeavour. And given what we know about the Port Elizabeth project, an important part of its success has been its longevity. This is where the extent to which the project was *localised* becomes so important. A blanket national policy cannot be effective unless it is responsive to the needs of each particular court centre, which may entail additional resources to services not traditionally ascribed to 'courts' as such. For example, the problem of backlogs caused by 'the accused not appearing in court' (indicated in the 2007 findings on reasons for postponements in the Durban courts) could be alleviated by a very simple transport service from various points in the community to court, or to a police station.

What we don't know about the current government Court Backlog Project is to what extent it is responding to the needs of each court centre. This would entail, of course, a certain amount of research into how each court functions. But given the extent to which it has been shown that court centres operate differently from one another, such research would be invaluable.

## CONCLUSION

Seventeen years into our constitutional democracy, the political and legislative playing field in South Africa is very different to what it was in the late 1990s. A justiciable Bill of Rights has influenced not only the content of new legislation, but also an awareness of the rights of vulnerable and marginalised groups. When it comes to remand detainees, however, the problems that existed back

then, remain, albeit to a slightly lesser degree. And, as is the case with many human rights concerns, the poor, who cannot afford bail or the services of a lawyer, suffer the worst of the effects of remand detention.<sup>74</sup> The excessive reliance on remand detention also comes at a great cost to the citizenry: the government spends approximately R2,2 million per day incarcerating people who have been granted bail but are unable to afford it.<sup>75</sup>

The problem of remand detention seems even more urgent when one considers that most remand detainees *should not be in detention*.<sup>76</sup> As Berry describes, '[t]hey post no threat to society and are not at risk of absconding.' Why then, when South Africa has an environment so conducive to change, is the remand detainee population still as high as it is? The answer, of course, is not contained as a single solution, but it is not very difficult. The entire criminal justice sector, which, in this context, includes the DJCD, SAPS, the NPA and perhaps even the Departments of Transport and Social Development, is over-burdened, under-resourced and, perhaps, disorganised. And a national blanket policy designed to alleviate this burden that fails to take into account the particular processes of each court centre, will not be nearly as efficient as a policy that does.

While we can only speculate about the specifics of the current Court Backlog Project, we *do* know, based on the Vera PTS project and 2007 research data, that the particularities of each court centre vary considerably. This has obvious implications when it comes to designing a backlog reduction model for court centres, and energy is perhaps better spent on investigating these differences before attempting to address the problem head on. The seemingly simple task of designing a model based on the actualities of a court centre that is sufficiently flexible so as to respond to the changing demands of a particular community, may well be the tangible bridging between the somewhat abstract notions of the Bill of Rights and the reality experienced by remand detainees in South Africa.



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## NOTES

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2. See generally, M Schönteich, Making Courts Work: A Review of the IJS Court Centre Project in Port Elizabeth, *Institute of Security Studies Monograph*, 75, October 2002.
3. Between 1995 and 2000 the remand detainee increased by 64%, from 24 265 in January 1995 to 63 964 in April 2000. Since then, the population has remained somewhat stable, though still high, at 49 695 as of 28 February 2011. Currently, remand detainees constitute 30% of the total inmate population. Statistics are drawn from the Annual Reports of the Judicial Inspectorate of Correctional Services. All Annual Reports are available on the Office of the Judicial Inspectorate's website: <http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp>. See also the Department of Correctional Services Management Information System (MIS) available at <http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx>. See also C Ballard, A Statute of Liberty, *South African Journal of Criminal Justice*, 25(1) (2012), 24.
4. Idasa, Is Crime Dividing the Rainbow Nation? Afro-barometer Briefing Paper No. 96: November 2010; See also I Matthews, Government Responses in South Africa: Policy and Implementation and E van der Spuy, Crime and its Discontent: Recent South African Responses and Policies, *Crime and Policing in Transitional Societies*, 30 August – 1 September 2000, Jan Smuts House, Wits, Johannesburg: [http://www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf?4865\\_2.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf?4865_2.pdf)
5. L Ehlers, Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa, *Justice Initiatives: Pretrial Detention*, Open Society Justice Initiative, 2006, 123.
6. T Amupadhi, Mamokgethi: and justice for all? *Weekly Mail & Guardian*, 31 July 1998.
7. The other demonstration projects included the Thuthuzela Care Centres, as part of a prosecution-led anti-rape strategy, a prosecution task-force on carjacking, and a project that aimed to help two justice centres implement plea-bargaining legislation.
8. A 1998 survey indicated that more than 60% of respondents felt unsafe walking alone in their own area after dark. Similarly, in 1997, 80% of whites and Indians, 60% of coloureds and 40% of blacks were concerned for their own personal safety. See Benjamin Roberts, Fear Factor: Perceptions of Safety, in B Roberts and M Kivulu et al (eds), *South African Social Attitudes: 2nd Report: Reflections on the Age of Hope*, HSRC Press 2010, 250, 254.
9. Ehlers, Frustrated Potential, 125.
10. Paschke, *supra* note 3, at 35.
11. Ehlers, Frustrated Potential, 128-134.
12. *Ibid.*
13. *Ibid.*, 132.
14. *Ibid.*, 134.



15. Ibid, 130-1.
16. Crime Statistics 1994-2003, Institute for Security Studies, <http://www.iss.org.za/CJM/stats0903/index.htm>
17. M Schönteich, Criminal Justice Policy and Human Rights in the New South Africa, *Queensland University of Technology Law and Justice Journal*, (2003) 333, 334. See also R Paschke, Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas, South African Law Commission, Research Paper No. 18, Project No. 82.
18. M Schönteich, Criminal Justice Policy and Human Rights in the New South Africa, 21. A more recent study of three magistrate's courts found that approximately 54% of charges were ultimately withdrawn or struck off the roll in 2007. This suggests that deep deficits in police investigatory capacities, as well as prosecutorial ability to convict, remain challenges to be tackled by today's government. See V Karth, M O'Donovan and J Redpath, *Between a Rock and a Hard Place: Bail Decisions in Three South Africa Courts*, Open Society Foundation for SA, 2008.
19. Sekhonyane and Louw discuss in detail the history of South African vigilantism and, in particular, its rise in the post-1994 period as a response to 'poor poor delivery of services associated with safety'. M Sekhonyane and A Louw, Violent Justice, Vigilantism and the State's Response, ISS Monograph 72, 2002, <http://www.issafrica.org/publications/monographs/monograph-72-violent-justice-vigilantism-and-the-states-response-makubetse-sekhonyane-and-antoinette-louw>; Van der Spuy, Crime and its Discontent, 171.
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24. Ibid. See also B Dixon, Zero Tolerance: The Hard Edge of Community Policing, *African Security Review*, 9(3) (2000), 73-78.
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28. Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 296.
29. 51 of 1997. The amending law was Criminal Procedure Second Amendment Act 75 of 1995.
30. Section 60(11) referred to 'schedule 5' offences, typically more serious crimes such as murder and rape.
31. These amendments incorporated a preventative dimension to the bail enquiry, i.e. someone who *might* commit a further crime could be detained on remand, as opposed to someone who might evade trial or posed a threat to witnesses or the trial process.
32. Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 297. The authors refer to 1997 case in which a six-year-old girl, Mamokgethi Malebane, was raped and murdered by suspected offenders who had been released on bail. See also, Tangeni Amupadhi, Mamokgethi: and justice for all? *Weekly Mail & Guardian*, 31 July 1998.
33. Criminal Procedure Second Amendment 1997 (Act 85 of 1997).
34. Schedule six offences include crimes such as premeditated murder and gang rape.
35. Notably, Sarkin et al in The Constitutional Court's bail decision: Individual Liberty in Crisis, 297, make the point that, in their view, this section is 'more onerous than the bail laws under apartheid applicable to the same (non-political) crimes and that the only provision "more draconian were those relating to detention without trial of people accused of political offences.'
36. *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).
37. *S v Dlamini* at para 65.
38. Section 36 of the Constitution permits the limitation of a right in the Bill of Rights 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'
39. *S v Dlamini* at para 66. At para 55 the Court stated: 'The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.'
40. See generally, Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 297.
41. *S v Makwanyane* 1995 (3) SA 391 (CC).
42. The difference in approach is best captured in the following dicta (*S v Makwanyane*, para 88): 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.'
43. M Du Plessis, Between Apology and Utopia – the Constitutional Court and Public Opinion, *South African Journal of Human Rights* (18) (2002), 1, 2.
44. H Axam, If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail, *South African Journal of Human Rights*, 17 (2001), 320 and 339.
45. For example, Police Minister, Nathi Mthethwa, on 24 May 2011, was reported saying that government was looking into amending the bail legislation so as to curb the repeated granting of bail to serial offenders. SAPA, *News24*, 10 May 2011, <http://www.news24.com/South>

- Africa/Politics/Bail-legislation-ripe-for-change-Mthethwa-20110510 (accessed on 19 April 2013).
46. The 1998 Act refers to 'inmates', which is defined in section 1 of the 1998 Act as 'any person *whether convicted or not*, who is detained in custody in any correctional centre or who is being transferred in custody or is en route from one correctional centre to another correctional centre.'
  47. See Chapter Three of the Correctional Services Act (1998), 'Custody of Inmates Under Conditions of Human Dignity'.
  48. Section 35(2)(e) of the Constitution, 1996.
  49. Section 85(1) of the Correctional Services Act 1998.
  50. All Annual Reports are available on the Office of the Judicial Inspectorate's website: <http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp>. See also, On the record: Interview with Judge Deon van Zyl, *South African Crime Quarterly*, 30 (2009), 45, 46.
  51. The amending legislation is the Correctional Matters Amendment Act 2011 (Act 5 of 2011).
  52. Section 2(d) of the Correctional Services Act 1998.
  53. Prior to the Correctional Matters Amendment Act 2011, Section 2 of the Correctional Services Act 1998 read:  
The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe custody by enforcing sentences of the courts in the manner prescribed by this Act; detaining all inmates in safe custody whilst ensuring their human dignity; and promoting the social responsibility and human development of all sentenced offenders.'
  54. Section 49G(1) of the Correctional Matters Amendment Act 2011.
  55. Sections 49G(2) – (5) of the Correctional Matters Amendment Act 2011.
  56. The reporting procedure, while a step in the right direction, remains weak: the amendment sets out the procedure to bring an accused before a court, it does not, however, explain what the court must do. The court may indeed end up postponing a case for a further six months without interrogating the reasons for the delay, as provided for in section 342A of the Criminal Procedure Act 1977.
  57. The problem of creating aspirational targets or benchmarks from sources unintended to be so is illustrated well in *S v Jackson*. 2008 (2) SACR 274 (C). In this case, Mr Justice Moosa 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.
  58. Courts themselves have also exhibited frustration with the extent to which institutional and systemic delays affect the accused person's right to 'have their trial begin and conclude without unreasonable delay' (section 35(3)(d) of the Constitution) and the right 'not to be deprived of freedom arbitrarily or without just cause'. (Section 12(1)(a) of the Constitution). See for example *S v Maredi* 2000 (1) SACR 611 (T) where the accused had been kept in custody for 17 months before the charge was put to him.
  59. Excerpt from T Ramagaga, The conditions of Awaiting Trial Prisoners look set to improve in South Africa, Institute for Security Studies, News on ISS Africa, 7 March 2011.
  60. Awaiting Trial Detainee Guidelines <http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20%283c%29%20doc%20final.pdf> (accessed on 12 May 2013).
  61. ATD Guidelines, 19-20.
  62. I Matthews, The National Prosecuting Authority in C Gould (ed), *Criminal (in)justice in South Africa: a civil society perspective*, Institute for Security Studies, 2009.
  63. Ibid.
  64. Since its inception, 32 650 cases have been finalised as a result. See [http://www.justice.gov.za/newsletter/JT/JT2009\\_Vol5.pdf](http://www.justice.gov.za/newsletter/JT/JT2009_Vol5.pdf) See also South African Government Information, <http://www.info.gov.za/aboutgovt/justice/system.htm> (accessed 12 May 2013).
  65. Parliamentary Question, Court Backlogs, DefenceWeb, [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=14215:parliamentary-question-doj-court-backlocks&catid=86:parliamentary-questions&Itemid=187](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=14215:parliamentary-question-doj-court-backlocks&catid=86:parliamentary-questions&Itemid=187) (accessed on 19 April 2013).
  66. Department of Correctional Services Management Information System, <http://www.dcs.gov.za/WebStatistics/> (last accessed on 6 June 2011). With a remand detainee population of 46 432, this is still almost double the Department of Correctional Services' proposed benchmark figure of 25 000. As mentioned above, remand detainees constitute about 30% of the total prison population. When compared to the population ratios of other African countries, this is not a particularly large number (See International Centre for Prison Studies, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_pretrial](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pretrial).) However, in at least two thirds of the country's most overcrowded prisons, the occupancy rates of which range from 200-250%, the remand detainee population are the obvious driving factor behind such overcrowding. See The Judicial Inspectorate for Correctional Services 2010/2011, Annual Report, 13.
  67. Public Service Commission, Report on Inspections of Regional Courts: Department of Justice and Constitutional Development, 2011, <http://www.psc.gov.za/documents/2013/FINAL%20REPORT%20DOJCS%20NATIONAL%20%28C%2926%20JAN%20%202012%20docx.pdf> (accessed on 12 May 2013).
  68. M Schöenteich, Criminal Justice Policy and Human Rights in the New South Africa.
  69. V Karth et al, *Between a Rock and a Hard Place: Bail Decisions in Three South Africa Courts*, 12.
  70. Ibid.
  71. Karth et al, *Between a Rock and a Hard Place*, 28.
  72. Karth et al, *Between a Rock and a Hard Place*, 26.
  73. Karth et al, *Between a Rock and a Hard Place*, 27.
  74. The wide range of effects of remand detention are described in D Berry, *The Socioeconomic Impact of Pre-trial Detention: A Global Campaign for Pre-trial Justice Report*, Open Society Foundation and United Nations Development Programme, 2011.
  75. D Berry, *The Socioeconomic Impact of Pre-trial Detention*, 40.
  76. Ibid.