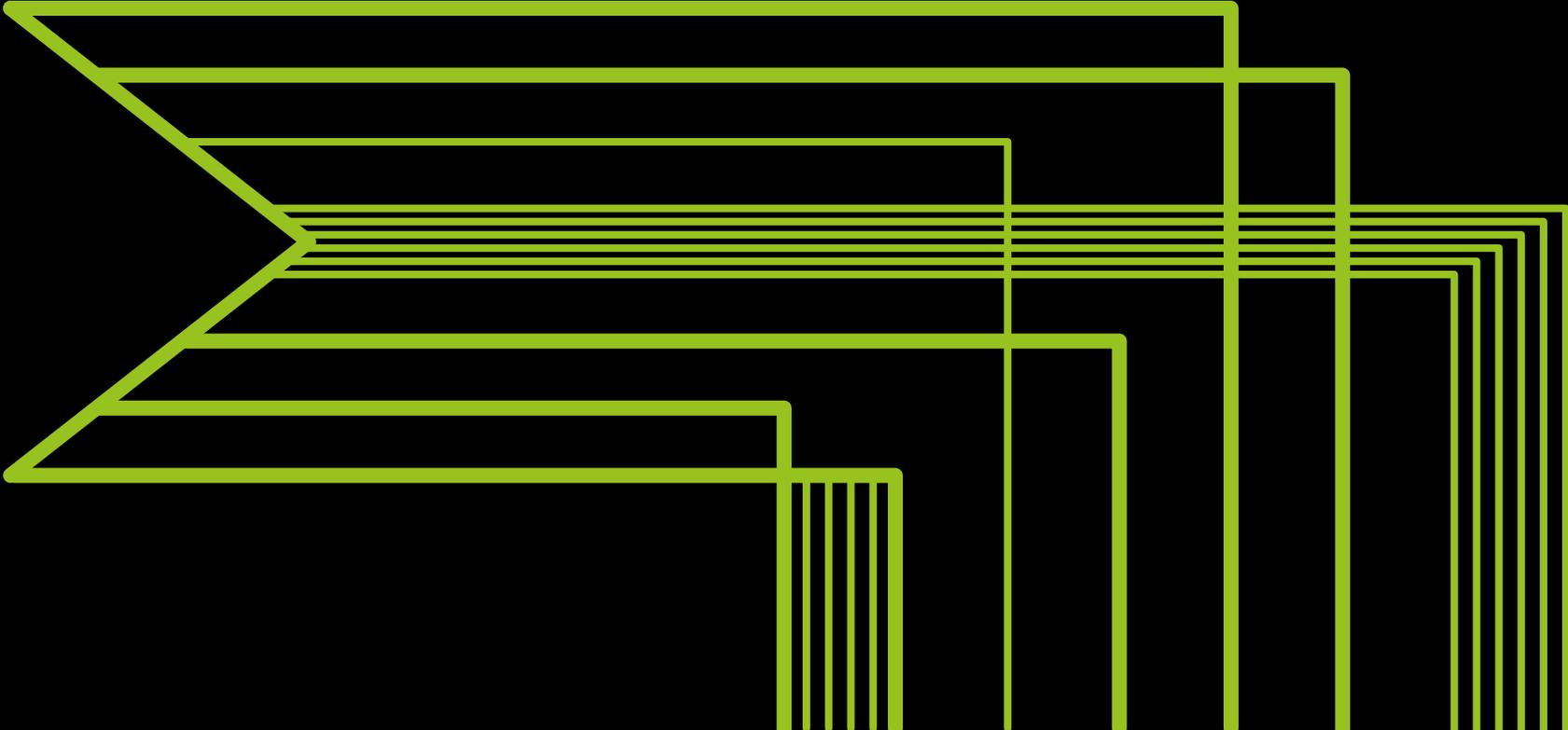


PRE-TRIAL
DETENTION
IN ZIMBABWE

Analysis of the
Criminal Justice system
and conditions of
pre-trial detention

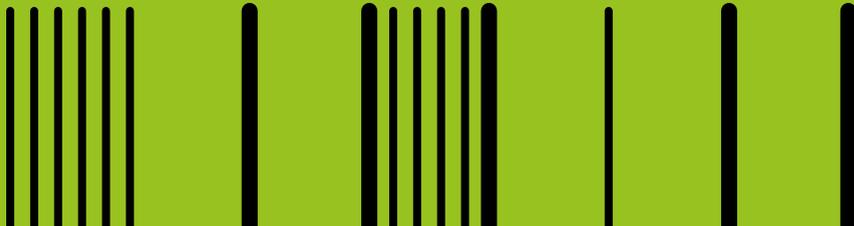


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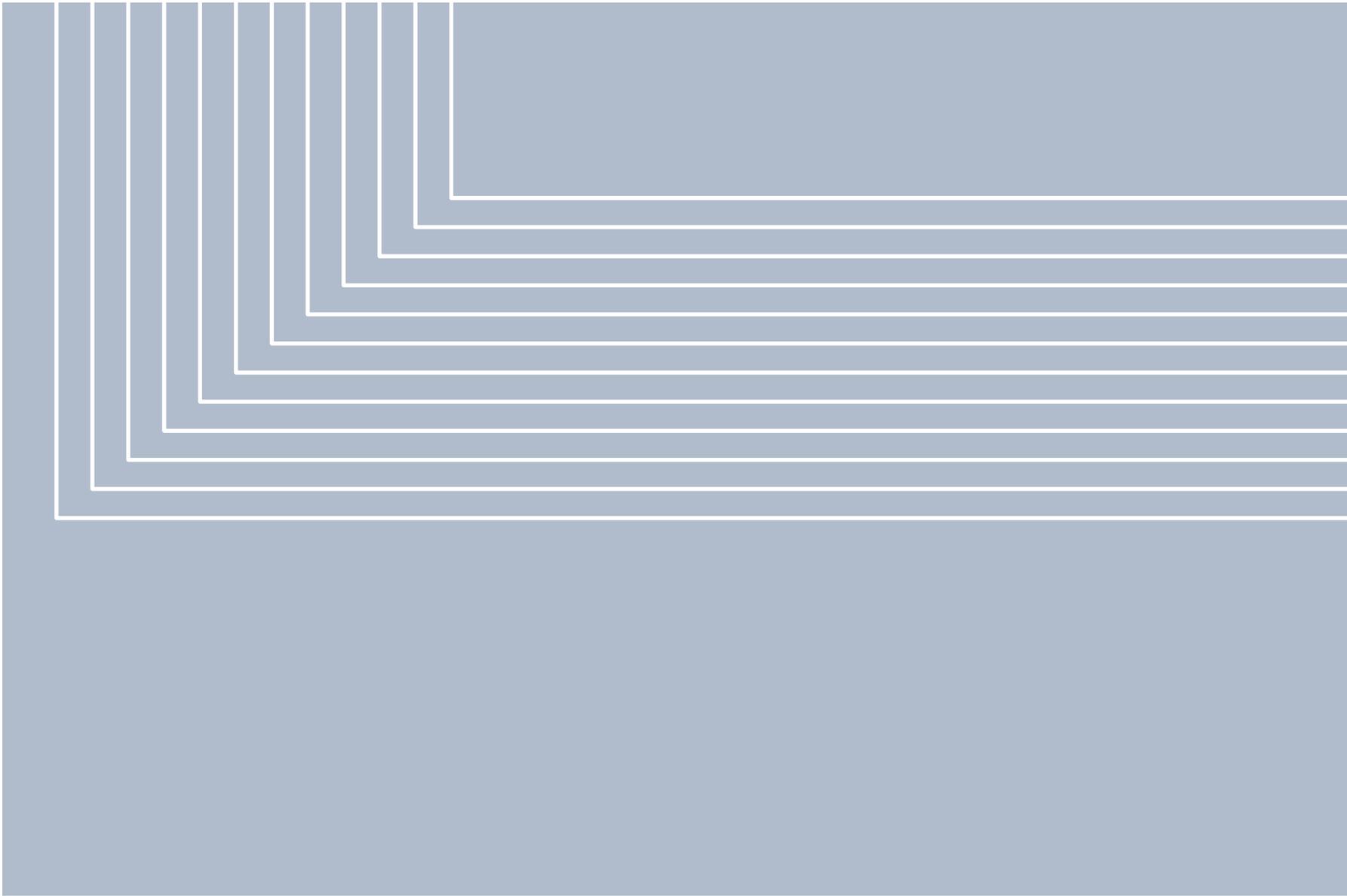
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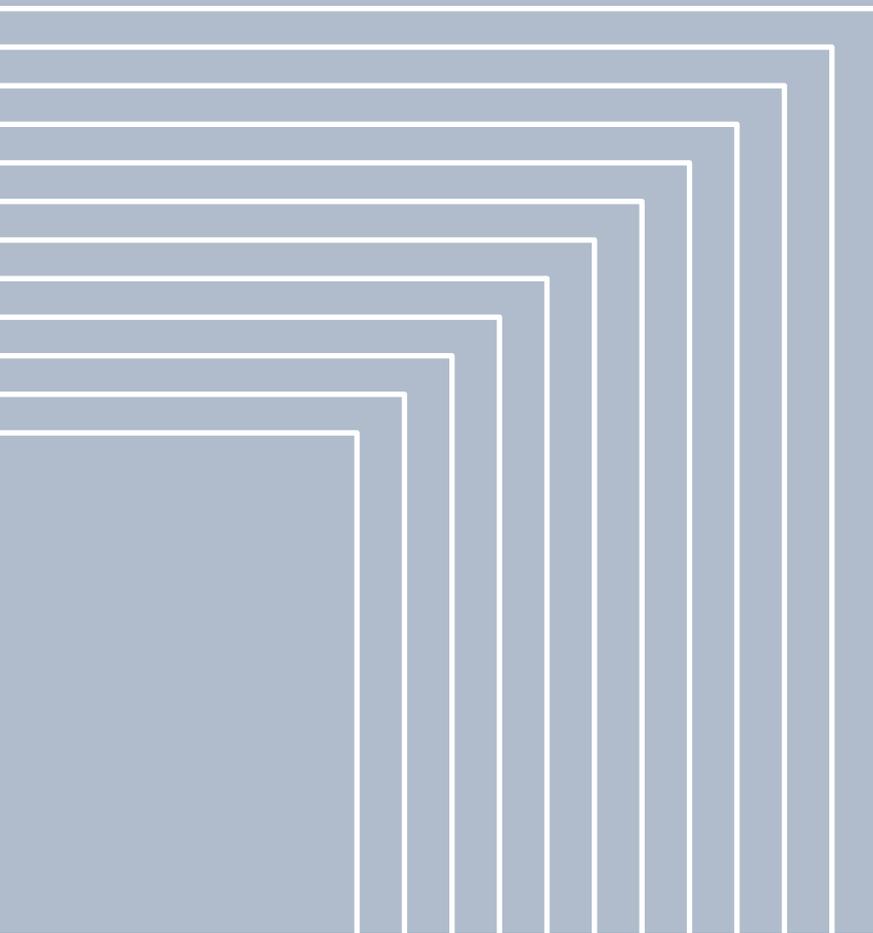


CONTENTS

01	Acronyms
03	Executive Summary
05	1. Background and Introduction
08	2. Study Methodology
10	3. Basic Facts and Structural Description of the Criminal Justice System
10	3.1 Zimbabwe Republic Police (ZRP)
12	3.2 Zimbabwe Prison Services (ZPS)
13	3.3 Attorney General's Office
15	3.4 National Prosecution Authority (NPA)
15	3.5 Legal Aid Directorate
16	3.6 Judiciary
18	4. The Legislative Framework for Pre-trial Detention in Zimbabwe
19	4.1 General Rights of Pre-Trial Detainees
25	4.2 Juvenile Justice
27	4.3 Zimbabwe's International Obligations on Rights of Detainees
29	5. Case Studies on Pre-trial Detention Conditions in Zimbabwe Facilities
36	6. Research on Conditions of Detention in the Zimbabwe's Prisons
45	7. Discussion of Findings
45	7.1 Nexus between Detention Conditions and Socio-economic and Political Challenges
46	7.2 Rehabilitation of Young Offenders
46	7.3 Plight of Women Detainees and 'Incarcerated' Children
46	7.4 Scope for Strengthening Operations of Justice Delivery System institutions
47	7.5 Important Role of CSOs in Improving Conditions in Detention Centres
47	7.6 Scope for an Integrated Caseload Management System
48	8. Conclusions and Recommendations
50	9. Bibliography
52	10. Endnotes



ACRONYMS



ACHPR	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
AG	Attorney General
AIDS	Acquired Immuno Deficiency Syndrome
ART	Anti-Retroviral Treatment
CID	Criminal Investigation Department
GCPJ	Global Campaign on Pre-trial Justice
HIV	Human Immuno-deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
LAD	Legal Aid Directorate
MDC	Movement for Democratic Change
NGO	Non Governmental Organisation
NPA	National Prosecution Authority
PFI	Prisons Fellowship International
PFZ	Prisons Fellowship Zimbabwe
POSA	Public Order and Security Act
PTDs	Pre Trial Detainees
SADC	Southern African Development Community
UN	United Nations
ZACRO	Zimbabwe Association of Crime Rehabilitation
ZANU PF	Zimbabwe African National Union Patriotic Front
ZimRights	Zimbabwe Human Rights Association
ZDHR	Zimbabwe Doctors for Human Rights
ZLHR	Zimbabwe Lawyers for Human Rights
ZPS	Zimbabwe Prisons Services
ZRP	Zimbabwe Republic Police
ZWLA	Zimbabwe Women's Lawyers Association



ANGOLA

ZAMBIA

MALAWI

MOZAMBIQUE

ZIMBABWE

NAMIBIA

BOTSWANA

SWAZILAND

SOUTH AFRICA

LESOTHO

Executive Summary

According to the Open Society Justice Initiative,¹ there are global concerns about pre-trial detainees (PTDs). In a single year, it is estimated that:

- Over 9 million people are held in pre-trial detention;
- One out of every three people in detention are awaiting trial;
- In some countries, over three quarters of all prisoners are pre-trial detainees; and
- The average time spent in pre-trial detention in the European Union is 167 days but the situation in Africa is even worse – for example, PTDs in Nigeria spend an average of 3.7 years in detention.

In many countries, there are real concerns about the abuse of the rights of pre-trial detainees, with a high chance that they will face:

- Being deprived of liberty through prolonged incarceration;
- Losing their livelihood due to incarceration;
- Social stigmatization;
- Exposure to prison violence; and
- Ill-treatment and, in some instances, torture by prison officials to induce confessions.²

This has resulted in campaigns for the protection of the rights of PTDs, with the key arguments being that excessive and arbitrary use of pre-trial

excessive and arbitrary use of pre-trial detention not only undermines the presumption of innocence, but also contributes to chronic, costly and counterproductive overcrowding in detention facilities.

detention not only undermines the presumption of innocence, but also contributes to chronic, costly and counterproductive overcrowding in detention facilities.³

This study was informed by the need to understand the variance between the policy and legislative frameworks that govern pre-trial detention and the conditions in detention facilities in Zimbabwe, and to provide concrete recommendations to improve the situation. It was undertaken in the context of a country emerging from over a decade of socio-economic collapse, aspects of which had negatively affected the justice delivery system.

Through document review and interviews, this study established the continued prevalence of some of the above-mentioned difficulties owing to the slow pace of socio-economic and political recovery in the country.

The number of pre-trial detainees was found to be high – approximately 30 percent of the total prison population – due to inefficiencies in the country's justice delivery system. Direct and indirect political control of the criminal justice system has also meant that the independence and neutrality of key institutions – such as the police, Attorney-General's office and the judiciary – has often been hindered. Severe underfunding, capacity constraints and poor conditions of service among institutions within the justice delivery system have also contributed to increasing inefficiency in caseload management, which has resulted in unnecessarily prolonged stays for many PTDs. This excessive detention undoubtedly violates inmates' rights to freedom, dignity and a fair and speedy trial as enshrined in the constitution as well as in other national, regional and international statutes. The situation of human rights defenders and detainees held for political

reasons was found to be worse, with political vendettas seemingly taking pre-eminence over the execution of justice.

The conditions in pre-trial detention were found to be despicable and inhumane, and amounted to violations of the detainees' rights. The report also highlights the plight of female inmates, children incarcerated alongside their mothers and juvenile offenders, as well as other concerns, such as overcrowding in prisons, run-down infrastructure and the shortage of basic services, nutritious food and adequate clothing.

The study concludes that, while the country has an apparently adequate legislative framework to enable the realisation of the rights of pre-trial detainees, the implementation of these legislative provisions remains the major obstacle – due primarily to funding shortages, institutional capacity constraints, and the slow recovery in the country's socio-political and economic fortunes.

The report concludes with a number of key recommendations, including the establishment of an integrated caseload management system to enable more rapid processing of cases; more effective implementation of the parole system; an increase in government funding to upgrade the infrastructure at detention facilities, and provide adequate nutrition and clothing; and an improvement in social amenities so as to meet humane standards of treatment for detainees.

The report also argues that improved conditions of service for employees within various institutions in the criminal justice system – such as the police, prison services, Attorney-General's office and judiciary – would complement efforts to improve professionalism and efficiency in the country's justice delivery system. However, there is also an overarching need for socio-economic and political stability in Zimbabwe to pave the way for the creation of an environment that allows for the optimal functioning of the criminal justice system.

1.

BACKGROUND AND INTRODUCTION

The excessive and irrational use of pre-trial detention wastes public resources, undermines the rule of law, disrupts families and communities, and endangers public health.⁴

Defining pre-trial detention (PTD)

Rule 84 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners states that: persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, [are] referred to as ‘untried prisoners’. This is a state of incarceration commonly referred to as pre-trial detention, with people being detained because bail could not be posted or because release was denied.⁵ In simple terms, pre-trial detention defines the time between one’s arrest and a definitive conviction or judgment against which an appeal is no longer possible.⁶

In this particular chapter, pre-trial detainees will be categorized as:

- Detainees who have been formally charged and are awaiting the commencement of their trial;
- Detainees who have not been formally charged, and are waiting to be charged for the commencement of their trial;
- Detainees whose trial has begun but has yet to come to a conclusion whereby the court makes a finding of guilt or innocence; and
- Detainees who have been convicted but not sentenced.⁷

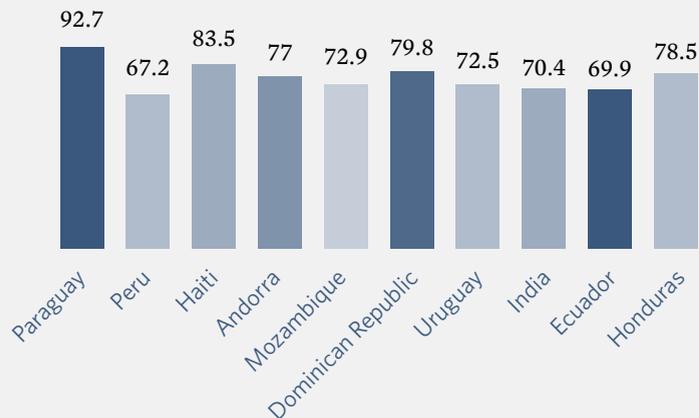
Pre-Trial Detention - A Global Phenomenon

According to the Open Society Justice Initiative, there are global concerns about pre-trial detainees (PTDs). In a single year, it is estimated that over 9 million people will be held in pre-trial detention and that a third of all the people in detention would be awaiting trial. In some countries, over two thirds of all prisoners are pre-trial detainees:

African prison systems, in particular, face a host of serious problems, including poor conditions of detention; torture and ill treatment; dilapidated and inadequate infrastructure; overcrowding; no or limited services; antiquated legislation; poorly trained staff; and, a lack of oversight. These problems are widely acknowledged and several declarations by African stakeholders have demonstrated their concerns about the continent's poor prison conditions.⁹

PTDs and human rights concerns

Over the years, there has been a growing concern across many countries about the potential abuse of the rights of pre-trial detainees, who face losing their liberty and their livelihoods through prolonged incarceration, as well as exposure to social stigmatisation, prison violence, ill-treatment and, in some instances, torture by prison officials to induce confessions.¹⁰ This has resulted in campaigns for the realisation of the rights for PTDs, with the key arguments being that the excessive and arbitrary



PDT % OF TOTAL INMATE POPULATION BY COUNTRY

Source: www.nationmaster.com⁸

use of pre-trial detention not only undermines the presumption of innocence, but also contributes to chronic, costly and counterproductive overcrowding in detention facilities.

International standards generally dictate that pre-trial detention may be ordered only if there are reasonable grounds to believe that the person in question has been involved in committing the alleged offence(s), and if there is a danger of the person absconding, committing further serious offenses or interfering with the course of justice if they are released.^{11,12,13} Unfortunately, there are

still gaps in many countries with regards to the realisation of PTDs rights, in spite of provisions in their constitutions and legislation.

The Zimbabwean context

Over the past 14 years, persons accused of committing criminal acts in Zimbabwe have been subjected to an inefficient criminal justice system, which has lost its capacity to ensure that accused persons are guaranteed their basic rights during pre-trial detention. In 2006, the then Judge President of the High Court of Zimbabwe,

Justice Rita Makarau, expressed concern over the conditions of pre-trial detainees who were being held at one of Zimbabwe's largest remand prisons – Harare Central Prison. During a visit to the prison, Justice Makarau met a number of pre-trial detainees, including at least ten who had been held on remand for ten years without trial. She described their plight as “embarrassing and disturbing” and stressed that the courts had “no excuse for this delay. It is imperative prisoners who deserve to be released should not stay here.”¹⁴

The Constitution of Zimbabwe includes a Declaration of Rights, which guarantees fundamental rights to all persons, including those accused of committing criminal offences and awaiting trial.¹⁵ Rights specific to pre-trial detainees include the right to liberty and the right to the protection of the law, which includes the right to a fair trial within a reasonable period and the right to innocence until proven guilty as well as freedom from torture or cruel, inhuman or degrading treatment or punishment.

Despite these constitutional guarantees, Zimbabwe continues to face challenges in ensuring the enjoyment of rights by pre-trial detainees, even though these rights are bestowed on them the moment they are arrested and detained. Zimbabwe's Criminal Procedure and Evidence Act further guarantees accused persons' basic rights while in police custody, regulating the conduct of the police to ensure that they do not violate due legal process. Unfortunately,

Zimbabwe's primary law enforcement institution – the Zimbabwe Republic Police – has often been accused of, and found liable for, disregarding the rights of accused persons, including engaging in acts of torture, disregard for the rule of law, partisan application of the law, and failing to investigate cases in preparation for trial, leading to extended periods of pre-trial incarceration.

The country's economic recession between 1999-2009 deprived state institutions, including law enforcement institutions, of the necessary resources to maintain an efficient and effective criminal justice system. As will be detailed in subsequent sections, the operations of key institutions – such as the Attorney-General's office, the police, the prisons services and the magistrates courts among others – have been hampered by poor conditions of service for employees and generally inadequate funding. These challenges have all contributed directly or indirectly to the delayed determination of criminal cases and the prolonged incarceration of pre-trial detainees, which have violated the rights of accused persons. The economically depressed situation also had the effect of impoverishing many Zimbabweans, depriving them of access not only to their basic daily needs but also to essential legal representation since legal fees were unaffordable and there was limited provision of legal aid. Juvenile offenders seem to have been the most affected by this situation. In many cases they had to go through the court process alone since their impoverished families were usually

unable to attend to court hearings, which were often held far away from their homes.¹⁶

Rationale for the study

Given the relative socio-economic and political stability after the formation of the Government of National Unity (GNU) in Zimbabwe in 2009,¹⁷ an opportunity arose to undertake an in-depth study to assess the condition of pre-trial detainees and the state of detention facilities across the country. The aim of the study was to investigate the extent to which the country was complying with local, regional and international statutes regarding the rights of pre-trial detainees. Recommendations would then be made based on identified gaps and shortcomings so that future policy reform and development in Zimbabwe would be based on firm evidence.

Along with this overall objective, the study set out to:

- Undertake an in-depth review of the current legislative framework governing PTD in Zimbabwe;
- Conduct an assessment of the actual detention conditions and management of detained populations in Zimbabwean facilities;
- Review caseload management in the Zimbabwean criminal justice system in as far as it relates to PTDs; and
- Recommend possible reforms and policy improvements based on identified gaps and shortcomings.

2.

STUDY METHODOLOGY

Partners and institutional arrangements

The project was a result of an agreement between Zimbabwe Lawyers for Human Rights (ZLHR), the Law Society of Zimbabwe (LSZ) and the Open Society Initiative for Southern Africa (OSISA). ZLHR and LSZ were responsible for both the literature research and the fieldwork interviews. The Community Law Centre (CLC) of the University of the Western Cape, South Africa, conducted a scoping exercise and provided a report outlining recommended methodology to conduct research on court caseload management and pre-trial detention in Zimbabwe. The CLC analysed police and court data and assisted with the preparation of this report. The project is indebted to Doctor Charlton Tsodzo for the extensive research carried out and the assistance rendered in putting the report together.

Scope of the Study

The study focuses on a structural description of the criminal justice system, prison law and conditions of detention in general. It also covers issues such as the training of personnel in the justice system, unjustified arrests, torture, the legislative framework for pre-trial detention, conditions of detention in police cells and in prisons, and caseload management in Zimbabwe.

Methods of Data Collection

(i) Literature Review

Various documented sources were used in the compilation of this study, including both the country's Lancaster House Constitution as well as the newly adopted Constitution of 2013.

efforts were made to ensure that the study's findings remained valid in spite of the challenges.

A number of pieces of legislation – including the Prisons Act, the Police Act, the Criminal Procedure and Evidence Act, Children's Act and the Criminal Law (Codification and Reform) Act among others – were also used in this study. Case law was mined for indications of time periods relating to pre-trial detention and publicly available data from institutions such as the Zimbabwe national statistics agency (Zimstats) was collated and analysed for any insights into the operation of the criminal justice system. There were also other sources, including past evaluations, reports, speeches and reviews from various organisations working in the same field. Physical and electronic sources were examined.

(ii) In-depth Interviews

In-depth interviews were held with practitioners and experts in the different sections of the criminal justice system. In addition, several organisations working with inmates and other stakeholders in the criminal justice system gave their inputs. Interviews were also conducted with former detainees who had had recent experience of police and prison cells.

Report writing and review

A draft report was submitted to the project partners for peer review and validation, which resulted in a number of suggestions, amendments and additions.

Study Limitations

Owing to the political sensitivity around research into pre-trial detention and conditions of incarceration in Zimbabwe, there were limitations regarding the quality of data accessed, both at primary and secondary level. However, efforts were made to ensure that the study's findings remained valid in spite of the challenges.

3.

BASIC FACTS AND STRUCTURAL DESCRIPTION OF THE CRIMINAL JUSTICE SYSTEM

It is mandated to preserve internal security and maintain law and order, protect life and property, preserve peace, prevent and detect crime, apprehend offenders and suppress civil unrest.

3.1

Zimbabwe Republic Police (ZRP)

The Zimbabwe Republic Police (ZRP) is established under s207 of the Constitution of Zimbabwe. It is mandated to preserve internal security and maintain law and order, protect life and property, preserve peace, prevent and detect crime, apprehend offenders and suppress civil unrest. The ZRP falls under of the Ministry of Home Affairs and is under the command of a Commissioner-General, who is appointed by the President after consultations with the Minister responsible for the police.¹⁸ The force consists of at least 40,000 officers,¹⁹ with its headquarters in Harare. The force is organised by province and comprises a Regular Force, the Police Constabulary and ancillary members, as provided for under Section 4 of the Police Act [Chapter 11:10].²⁰

The ZRP plays an integral part in the criminal law justice delivery service, as it is the entry point for any matter concerning the criminal law justice delivery system. The ZRP receives statements from complainants, investigates the matters, apprehends the suspects, compiles the dockets and presents the suspects to court. This process chain is important as it has a bearing on whether or not a matter makes it to court.²¹

Indeed, the ZRP is a key organisation in the delivery of justice since the police have the mandate to present well documented dockets with well-presented facts and sufficient evidence to enable the court to come up with a proper verdict within a reasonable time. They also have the duty to present the accused before the court for initial remand. The ZRP officers are also seconded to the courts as public

prosecutors in order to assist in clearing backlogs and there have been efforts to strengthen police officers' capacity in this regard through the introduction of courses for police prosecutors at the Police Staff College.²²

The police have also adopted some quasi-judicial roles, even though these duties are supposed to be performed by the courts, including:

- Assessment of bail for minor cases by any police officer with the rank of assistant inspector or above, or a police officer of whatever rank in charge of a police station;²³
- Accepting admission of guilt fines on behalf of the courts;²⁴
- Warning accused persons for minor cases;²⁵ and
- Summoning witnesses for court.²⁶

Police Service Commission

In Zimbabwe's new Constitution, the Police Service Commission is provided for, and mandated in, section 223(1)(d) to ensure that members of the police comply with section 208 of the 2013 Constitution. Section 208 is a wholly new section, which states that members of the security services must uphold the Constitution and may not in the exercise of their functions act in a partisan manner, nor further the interests of any political party or cause, nor prejudice the lawful interests of any political party, nor violate the fundamental rights and freedoms of any person. Members of the security services must

also not be active members or office-bearers of any political party or organisation, and must not be employed or engaged in civilian institutions except in periods of public emergency.

This makes the composition of the Police Service Commission important. The 2013 Constitution, like its 1980 predecessor, provides for members to be chosen for their knowledge or experience in the maintenance of law and order, administration, their professional qualifications or their general suitability for appointment. Unlike the 1980 Constitution, the 2013 Constitution states that at least half the members must be persons who are not and have not been members of the Police Service. Like the 1980 Constitution, the 2013 Constitution requires at least one of them to have held a senior rank in the Police Service for one or more periods amounting to at least five years. Section 222 provides for a Police Service Commission consisting of a chairperson, who must be the chairperson of the Civil Service Commission, and between two and six other members appointed by the president. By contrast, the equivalent Police Service Commission provisions in the 1980 Constitution provided for a maximum of seven such members.

Additional functions of the Police Service Commission include appointing qualified and competent people to hold posts or ranks in the Police Service; fixing and regulating conditions of service, including salaries, allowances and other benefits, of members of the Police

Service; ensuring the general well-being and administration of the Police Service and its maintenance in a high state of efficiency; fostering harmony and understanding between the Police Service and civilians; advising the President and the Minister on any matter relating to the Police Service; and exercising any other function conferred or imposed on the Commission by the Constitution or an Act of Parliament.

With the approval of the Minister responsible for the Police Service, the Commission may make regulations for any of these functions (section 223(2)). In fixing the salaries, allowances and other benefits of members of the Police Service, the Commission must act with the approval of the President given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the Police Service (Section 223(3)).

Role of police under the Protocol on the Multi-sectoral Management of Sexual Abuse

The ZRP, alongside other state department and various NGOs collaborated to develop the Protocol on the Multi-sectoral Management of Sexual Abuse in Zimbabwe in 2003. The protocol states the roles and responsibilities of stakeholders in the Victim Friendly System in order to provide psycho-social, medical, legal and referral services to victims of sexual abuse. The Victim Friendly System includes

Victim Friendly Police Units, Victim Friendly Courts, Victim Friendly Health Services, the Department of Social Welfare and the Victim Friendly Referral System. Police officers in Victim Friendly Police Units are supposed to have been trained to handle all cases seriously, obtain forensic reports, help victims get medical care and explain the judicial process to them. The ZRP is also expected to deploy women officers to collect the reports of women victims of rape so they do not have to reveal intimate details of the rape to male police officers. The Victim Friendly Courts are also supposed to have a separate room for victims to testify away from the alleged perpetrators. Prosecutors, probation officers and magistrates also require training to treat victims sensitively, handle cases quickly and refer victims to post-trial support services. Victim Friendly Health Services are meant to be available at primary health care clinics and district hospitals. If fully functional, they offer immediate and long-term psycho-social support and health care. Nurses and doctors can collect evidence for criminal investigations and prepare medical affidavits. The Department of Social Welfare should offer safe shelter to survivors before and after the case is heard in court and counselling to the victims and their families. In the Victim Friendly Referral System, regional sub-committees at all regional magistrates' courts hold multi-sectoral meetings to discuss violence against women, as part of a referral system that also includes civil society organisations dealing with issues of sexual abuse²⁷.

However, underfunding and lack of technical resources have hindered the effective implementation of the victim friendly system and most of its structures do not function as a result.

Challenges faced by the Zimbabwe Republic Police

Shortage of resources and lack of skills

The study noted a general shortage of resources within the police department, including transportation to ferry witness to the courts. A shortage of human resources and equipment were also reported, with key programmers – such as the Victim Friendly initiatives – suffering as a result. There were also calls to strengthen the capacity of officers' investigative skills so as to help them to deal with criminal cases more effectively and professionally. It was reported that there was virtually no budgetary allocation to feed accused persons while they are in police custody or witnesses. In addition, there is a shortage of suitable accommodation for witnesses as the infrastructure was reportedly dilapidated.²⁸

Poor conditions of service for officers

The study noted challenges related to poor conditions of service among police officers, with the low salaries making officers susceptible to corruption. It was established from interviews that supplementing lowly incomes by soliciting

for bribes was a common practice among police officers and were related to traffic offences, custom and excise offences, and more complex cases involving more senior officials (e.g. trading in precious minerals). According to a news report quoting a 2012 survey by Transparency International Zimbabwe, 53 percent of Zimbabweans said they had paid a bribe to police officers.²⁹ It is difficult to see how corruption within the police service could be curbed unless salaries are improved. At the time of the study, salaries of ZRP officials reportedly amounted to an average of US\$320, while US\$600 was necessary to support a family of six.³⁰

Regarding accommodation, a senior officer in the police force interviewed during the study said lack of accommodation for police officers had resulted in officers seeking accommodation within the community and this made it difficult for them to operate when they were called to take action within the communities where they lived.

3.2 Zimbabwe Prison Services (ZPS)

Section 227 of the Constitution of Zimbabwe establishes the Zimbabwe Prison Services to:

- Protect society from criminals through the incarceration and rehabilitation of convicted persons and others who are

The Attorney General's office faces many challenges, including a high staff turnover and scarcity of resources to operate effectively.

lawfully required to be detained, and their re-integration into society; and

- Administer prisons and correctional facilities in the country.

The Prisons Act provides for the organisation, structure, management, regulation, discipline and other conditions of service for officers as stipulated under Section 227 (3) of the Constitution. Headquartered in Harare, the Zimbabwe Prison Service is headed by a Commissioner, who is appointed by the President as stipulated under Section 229 (1) of the Constitution. The ZPS falls under the Ministry of Justice, Legal and Parliamentary Affairs.

Policy issues are passed from the national headquarters to prisons around the country

through four regional headquarters – Mashonaland, Matabeleland, Midlands/Masvingo and Manicaland. The ZPS headquarters are divided into two main sections, namely administration and personnel. The administration section oversees all matters relating to prisoners, finance, religion, healthcare, rehabilitation, transport and planning, while the personnel section is responsible for conditions of service for staff, career planning, security, training and operations.

The key challenges being faced by the ZPS include funding limitations and capacity constraints.

3.3 Attorney General's Office

Section 114 of the Constitution provides for the appointment of an Attorney General, who is chosen by the President and assumes office upon taking an oath of loyalty as set out in the Third Schedule. The Attorney General is a non-voting member of the Cabinet and the National Assembly and Senate³¹ and is the principal legal advisor to the government as well as being a member of the Judicial Service Commission.^{32 33} The Attorney General's roles, as laid out in the Section 114 (4) (a-e) of the Constitution include:

- Acting as the principal legal adviser to the government;
- Representing the government in civil and constitutional proceedings;

- Drafting legislation on behalf of the government; and
- Promoting, protecting and upholding the rule of law and defending the public interest.

The Attorney General is assisted by a Deputy Attorney General and falls under the Ministry of Justice and Legal and Parliamentary Affairs. The Attorney General is endowed with the authority to prosecute criminal offences and to institute criminal proceedings against any person; and take over, continue or discontinue any prosecution commenced by any other person and at any stage of the proceedings provided the judgment had not been delivered with or without the consent of the party that initiated the prosecution.³⁴ There are four divisions in the Attorney General's office, namely Legal Advice, Legal Drafting, Civil Division and Criminal Division (Public Prosecutions).³⁵

Challenges faced by the Office of the Attorney General

The Attorney General's office faces many challenges, including a high staff turnover and scarcity of resources to operate effectively. Challenges related to the pressure of political interference were also highlighted, particularly with the cumbersome burden of prosecuting trumped-up political charges against independent journalists, human rights defenders and opposition political activists. The study also highlights the burdensome and ever-increasing number of cases in which Section 33

of the Criminal Law (Codification and Reform) Act was arbitrarily applied to individuals who were charged with allegedly insulting or undermining the authority of the President. Other cumbersome cases include those based on Section 31 of the same act (spreading falsehoods), Section 46 (criminal nuisance) and Section 96 (criminal defamation) as well as other cases stemming from laws such as the Access to Information and Protection of Privacy Act (AIPPA) and the Public Order and Security Act (POSA). Most of these cases also resulted in unwarranted detentions, which increased the pressure on the carrying capacity of remand facilities and other pre-trial detention facilities in the country.

Concern was also raised regarding Section 121 of the Criminal Procedure and Evidence Act (CPEA), which is a provision that the Attorney General can currently invoke following the granting of bail by a magistrate or a judge. Once the invocation is made, the accused person must, by law, continue to be held in custody despite the bail order for a further seven days to allow the Attorney General time to file leave to appeal or an appeal (depending on the rules of the specific court). The Attorney General does not, in terms of the current law, have to provide reasons for his decision to invoke. Effectively, therefore, such a provision and its invocation render the judicial officer and his findings irrelevant and it is an assault on, and an affront to, the independence of the judiciary.

Such a dangerous provision, which should be used most sparingly and with the utmost consideration ... has been invoked by countless prosecutors and law officers on behalf of the State.

It is a provision that finds its roots in colonial-era legislation and has been retained in post-independence Zimbabwe. It began to be abused following the March 2008 elections, which saw the ruling ZANU-PF presidential candidate beaten by the opposition MDC-T candidate. Since then, its use and abuse has become more prevalent. The provision is clearly being abused since in the vast majority of cases the Attorney General's office has failed to file leave to appeal or an appeal, and the person/s affected have been released following the expiry of the additional seven-day statutory period. It, therefore, punishes a detained person by forcing them to endure the harsh conditions in detention for a further seven days, without reasons being provided, before ultimately being released.

Such a dangerous provision, which should be used most sparingly and with the utmost consideration (and arguably only by the

Attorney General himself) has been invoked by countless prosecutors and law officers on behalf of the State. A number of cases in which section 121 was invoked have been referred to the Supreme Court for a determination of its constitutionality. However, the Supreme Court has not considered a single one of these numerous challenges. This delay has allowed the Attorney General and his officers to continue invoking the provision arbitrarily, without justification, and with impunity, which suggests at least some measure of complicity and/or responsibility by members of the bench in its continued abuse.³⁶

It was also noted that the prosecution relied on other institutions within the criminal justice system to function effectively. Therefore, the ineffectiveness and inefficiencies of other bodies within the justice delivery system also impacted on the work of the Attorney General's office.

3.4 National Prosecution Authority (NPA)

Section 258 of the country's new Constitution provides for the establishment of the National Prosecuting Authority (NPA), which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions. As provided for in s259 of the Constitution, the NPA is headed by a Prosecutor General, who is appointed by the president on the advice of the Judicial Service Commission following the procedure for the appointment of a judge. The Prosecutor General should be qualified for appointment as a judge of the Supreme Court and will take an oath of office for a 6-year term that will be renewable for one further such term. The Prosecutor General is independent and is not subject to the direction or control of anyone and must exercise his or her functions impartially and without fear, favour, prejudice or bias.³⁷

3.5 Legal Aid Directorate

The Legal Aid Directorate is part of the Ministry of Justice and Legal Affairs whose responsibility is the provision of legal aid to persons who are eligible for such aid in connection with any criminal, civil or other related matters.³⁸ The Constitution of Zimbabwe provides in Section 70(1)(d) that an accused person shall be

permitted to choose a legal practitioner at their own expense and to be represented by that legal practitioner. This led to enactment of the Legal Aid Act [Chapter 7:16] by the government for the granting of legal aid to those who could not afford to exercise that right.³⁹ The Legal Aid Act states in the preamble that it is 'An act to provide for the granting of legal aid to indigent persons; to provide for the establishment and functions of a Legal Aid Directorate and a Legal Aid Fund'.⁴⁰

The Legal Aid Act stipulates that the functions of the Legal Aid Directorate should include:

- The provision of legal aid to persons who are eligible for such aid in connection with any criminal, civil or other related matter; and
- Undertaking all things necessary to promote the provision of legal aid under the Act.⁴¹

Section 14 of the Legal Aid Act provides for the setting up of the Legal Aid Fund, which consists of the following;

- Monies appropriated for legal aid by Parliament;
- Any contributions made by the aided person;
- Any deductions made from damages that have been awarded to an aided person; and
- Any other monies that may accrue to the Legal Aid Fund.⁴²

The legal aid system in Zimbabwe is categorised into three departments – namely civil court

aid, criminal court legal aid and legal aid from private institutions.

Civil court aid

Order 5 Rule 1-5 of the Magistrate Court Rules (1980) provides for the application of legal aid by indigent persons, stating that 'a person desiring to sue or defend as a pauper may apply for legal aid'. The High Court Rules have a similar provision, stating that 'a person wishing to bring or defend proceedings in forma pauperis may apply to the Registrar of the High Court'. The means of the indigent client are evaluated and then the court can grant legal aid.

Criminal court legal aid

The Legal Aid act covers criminal matters as it entitles any person to apply for legal aid (section 7) and eligibility is determined by: (i) insufficient means; (ii) reasonable grounds for success in the case in court; and (iii) need for the services provided by the Act. Legal aid may also be obtained at the Attorney General's office or a criminal court. The main form of legal aid involves providing a legal practitioner or law officer to represent the indigent person.

Legal aid by private institutions

Some private institutions provide legal aid, including Zimbabwe Lawyers for Human Rights, the Legal Resources Foundation, Catholic

local prisons often end up being populated with inmates who might not have committed the crimes they were accused of

Commission for Justice and Peace, Zimbabwe Council of Churches (Justice and Peace Department) and the Msasa Project. These organisations have provided support mainly in civil and human rights related cases.

Challenges faced by the Legal Aid Directorate

While it is commendable that the government has created a Legal Aid Directorate to provide legal advice to the poor, indigent and marginalised, it is regrettably manned by just 15 lawyers, who mostly work in the capital and who primarily take civil cases. These limitations mean that in reality a lot of accused persons fail to secure any legal representation upon arrest. This is particularly pronounced in areas outside Harare, where there are no provisions for free legal services for those who cannot afford legal representation.⁴³

According to the Legal Aid Act, Part III, Section 7.2 (a) (ii), the Director of the Legal Aid Directorate will only grant legal aid to the applicant if he is satisfied that the resources of the directorate and legal aid fund will be sufficient to provide the legal aid required. Due to the fact that government institutions are financially constrained, legal aid cannot, unfortunately, be made available to all that require it.

Indeed this study established the existence of serious challenges pertaining to the lack of legal aid assistance in the country, with the majority of accused persons not being able to afford private legal representation. As argued by some interviewees, local prisons often end up being populated with inmates who might not have committed the crimes they were accused of or who received custodial sentences longer than necessary because they had no legal representative to support them in arguing their cases. Consequently, this added to the population pressure in detention facilities in the country.

3.6 Judiciary

The legal system in Zimbabwe is based on Roman-Dutch law as modified by customary law.⁴⁴ As provided for in the country's constitution, the judiciary consists of:

- The Chief Justice, the Deputy Chief Justice and the other judges of the Constitutional Court;

- The Judges of the Supreme Court;
- The Judge President of the High Court and the other Judges of that court;
- The Judge President of the Labour Court and the other Judges of that court;
- The Judge President of the Administrative Court and the other Judges of the court; and
- Persons presiding over magistrate's courts, customary law courts and other courts established by an Act of Parliament.

The Chief Justice is head of the judiciary and is in charge of the Constitutional Court and the Supreme Court. The Judge Presidents of the High Court, Labour Court, and Administrative Court are in charge of their respective courts.⁴⁵ The judiciary includes all these courts, the system for the administration of the courts, the office of the Attorney General and associated public prosecutors, and the legal profession. The judiciary provides checks and balances in relation to the exercise of power by the other two arms of the State – the executive and legislature.⁴⁶

Judicial Service Commission

Section 90 of the 2013 Constitution provides that the Judicial Service Commission:

- The Judicial Service Commission may tender advice to the Government on any matter relating to the judiciary or the administration of justice, and the Government must pay due regard to any such advice;

- The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose;
- The Judicial Service Commission, with the approval of the Minister responsible for justice, may make regulations for any purpose set out in this section; and
- An Act of Parliament may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts.

Challenges and problem areas in the Judiciary

One of the key challenges faced by the judiciary over the last decade has been the issue of its politicization, whereby some rulings appear to have been influenced by political factors. This has particularly been so in cases involving land appropriation disputes, and the detention and incarceration of human rights defenders. The following case demonstrates the challenge of undue interference:

[The magistrate] said he had been disturbed by police officers who approached his office to probe the trial proceedings.

“I would not be manipulated or intimidated by police who misdirected themselves by approaching my offices in connection with the case. If the police was conducting itself professionally regarding the case proceedings, it should have approached the public prosecutors’ offices, not the trial magistrate. Today I will give judgement without fear or favour

*Extract from ‘Magistrate stands up to cops’,
The Zimbabwean, 10/10/12*

Poor conditions of service have also increased the brain drain within the judiciary, with highly experienced magistrates and judges looking for better opportunities in the region and internationally, much to the detriment of the local system. Owing to capacity challenges and lack of mentorship, especially in the lower courts, it was reported that some cases, which warranted non-custodial sentences, ended up being adjudicated to be worthy of custodial sentences. For example, a 16 year-old offender was arrested for stealing 2 buckets of maize and was given a custodial sentence of 6 years with restitution, which was subsequently reviewed and reduced to 6 months with restitution.

Corruption in the justice delivery system

The existence of corruption within the justice delivery system is cause for real concern and is related primarily to the government’s inability to adequately address working conditions within the system.

As Chief Justice Chidyausiku remarked on the opening of the 2013 judicial year:

“There is serious corruption within the justice delivery system. You will find there is corruption in the police, the judiciary, the prosecution department and the prison department and all this is attributable to poor remuneration.”⁴⁷

Reports suggested that some prison officers were advising prisoners to engage the services of corrupt lawyers, who they knew had links with corrupt court officials so that their cases could be favourably dealt with. Other reports highlighted the ‘disappearance’ of court records and the ‘loss’ of key pieces of evidence along with other misdemeanours, which could be attributed to corrupt malpractices by officers in the judicial system.

The situation was not helped by a weak system of record-keeping in the Registry Department, which was characterised by the manual recording of cases – exposing records to physical damage as well as to tampering by unscrupulous elements in the judiciary system. However, it was noted with relief that the Judicial Service Commission has now introduced an electronic system, where all pleadings are scanned and files are electronically maintained.

4.

LEGISLATIVE FRAMEWORK FOR PRE-TRIAL DETENTION INTRODUCTION

*all persons, including pre-trial
detainees, are entitled to
their human rights*

Introduction

Rule 84 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners states that: persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, [are] referred to as ‘untried prisoners’. This state of incarceration is commonly referred to as pre-trial detention, with the detainees being held because the established bail could not be posted or because release was denied.⁴⁸ In simple terms, pre-trial detention defines the time between one’s arrest and a definitive conviction or judgment against which an appeal is no longer possible.⁴⁹

In this chapter, pre-trial detainees will be categorized as:

- Detainees who have been formally charged and are awaiting the commencement of their trial;
- Detainees whose trial has begun but has yet to come to a conclusion whereby the court makes a finding of guilt or innocence;
- Detainees who have been convicted but not sentenced; and
- Detainees who have not been formally charged, and are waiting to be charged and for the commencement of their trial.⁵⁰

4.1 General rights of pre-trial detainees

The Constitution of Zimbabwe contains a Declaration of Rights applicable to all persons in Zimbabwe.⁵¹ As the supreme law of the country, the Constitution makes provision for various human rights, a number of which are specifically applicable to pre-trial detainees. In the case of *Woods & Others v Min. Justice & Others* 1994 (2) ZLR 195 (SC), the Supreme Court made it clear that all persons, including pre-trial detainees, are entitled to their human rights, stating that:

“The view no longer holds firm in this jurisdiction, and in many others, that by reason of his crime a prisoner sheds all basic rights at the prison gate. Rather, he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system.”

In the case of *Blanchard & Others v Minister of Justice* 1999 (2) ZLR 24 (S), three awaiting trial prisoners were held to have rights irrespective of the fact that they were facing serious security-related charges. The Supreme Court held that:

“Insofar as awaiting trial prisoners are concerned, it must never be overlooked that they are unconvicted and, accordingly, presumed to be innocent of any wrongdoing. The purpose of their detention is merely to bring them to trial...Punishment, deterrence or retribution in such a context is out of harmony with the presumption of innocence.”

At the mercy of the state and its criminal justice system, accused persons must, from the moment of arrest, immediately invoke the right to protection of the law and the right to liberty.⁵² An accused person must assert his rights once he is brought before the criminal justice system to ensure that the courts guarantee such rights.⁵³

Among the essential rights that a pre-trial detainee must assert is the right to secure protection of the law, which is guaranteed under section 69 of the Constitution of Zimbabwe. Section 69 (1) provides that:

“Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.”

The right to protection of the law – with regard to a pre-trial detainee being brought before an independent and impartial court – is further guaranteed by Section 164 of the Constitution. This section requires that members of the judiciary shall not – in the exercise of their judicial authority – be subject to the direction or control of any person or authority. It is the judiciary that interprets the law and makes determinations on whether pre-trial detainees will be granted their liberty while awaiting trial and presides over the whole court process before which pre-trial detainees make their defense.

In *Martin v Attorney-General & Another* 1993 (1) ZLR 153 (S), the magistrate had denied the

applicant’s request for his claim – that his right to protection of the law had been violated – to be referred to the Supreme Court. However, the Supreme Court held that: “It is the entitlement of every individual to challenge the power and right of the State to place him on remand. This he does upon a submission that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion of his having committed, or being about to commit, a criminal offence, thereby justifying the deprivation of his personal liberty under s 13(2) (e) of the Constitution.”⁵⁴

The right to secure the protection of the law entails various aspects, namely:

- State agents/public officers must apply the rule of law when dealing with pre-trial detainees;⁵⁵
- An accused person is innocent until proven guilty;
- An accused person is to be informed as soon as reasonably practicable of the nature of the offence charged;
- An accused person shall be given adequate time and facilities for the preparation of his defense; and
- An accused person shall be permitted to seek a lawyer of his choice.

Another important right for accused persons is the right to liberty under Section 49(1) of the Constitution, which states that *“every person has the right to personal liberty, which includes the right*

not to be detained without trial and not to be deprived of their liberty arbitrarily or without just cause.”

The right to liberty guarantees further that:

“Any person who is arrested or detained for the purpose of bringing him or her before a court or for an alleged offence and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday. Any person who is not brought to court within the forty-eight hour period...must be released immediately unless their detention has earlier been extended by a competent court.”⁵⁶

Sections 50 and 70 of the Constitution guarantee pre-trial detainees certain ‘procedural’ rights from the moment of arrest, during detention and while their trials are underway before a court of law. These procedural rights include:

- Reasonable suspicion and the right to liberty;
- The right to innocence until proven guilty;
- The right to legal representation;
- The right to trial within a reasonable period;
- The right to be heard by a competent court; and
- The right to bail.

Reasonable suspicion and the right to liberty

The right to liberty is directly affected following arrest and detention by law enforcement officers.

Sections 25 and 33 of the CPEA allow for arrest with or without a warrant. Arrests and detention are only lawful – and an acceptable derogation of a person’s right to liberty – where there is reasonable suspicion that the accused person has committed, or is about to commit, a criminal offence. The police cannot arrest and detain a person without reasonable suspicion that he/she has committed, or is about to commit, a criminal offence. Indeed, the police are not obliged to always effect an arrest but can exercise their discretion whether to arrest or not. In *Muzondo v Minister of Home Affairs & Another* 1993 (1) ZLR 92 (S), it was held that although the police officer was authorised to arrest, he had the discretion as to whether to do so or not. The power of arrest is not intended always, or even ordinarily, to be exercised.

Upon being brought before a court of law for the first time, an accused person will not be placed on remand where there is no reasonable suspicion that he committed any criminal offence. In the case of *Attorney-General v Blumears & Another* 1991 (1) ZLR 118 (S), where the accused persons opposed being placed on remand, the Supreme Court held that the “test at the stage of remand is whether or not the State has established facts or grounds from which the magistrate can objectively determine whether or not a reasonable suspicion exists that the accused person committed the offence alleged against him.”

The Supreme Court in *Martin v Attorney-General & Another* 1993 (1) ZLR 153 (S) held

that it is the entitlement of every individual to challenge the power and right of the State to place him on remand by submitting that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion, thereby justifying the deprivation of his personal liberty. The *Martin* case goes on to outline that in order to challenge the existence of reasonable suspicion:

- The accused person may adduce evidence designed to weaken the facts alleged by the State; and
- The test to be applied to determine reasonable suspicion does not require the firm resolution of conflicting evidence that guilt beyond a reasonable doubt demands, nor even a preponderance of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact.

Ultimately, an accused person must – from his very first appearance before a court of law – assert his liberty, questioning whether the arresting and detaining law enforcement officers had the requisite reasonable suspicion that a crime had been, or was about to be, committed.

Right of innocence until proven guilty

An accused person must be viewed and treated as innocent until he has been proven guilty by a competent court of law. Section 70 (1) (a) of the Constitution guarantees every person

An accused must be granted the best opportunity to challenge his arrest, detention and the charges brought against him through his ability to prepare and argue his defense.

who is charged with a criminal offence the presumption of innocence until he is proved or has pleaded guilty.

The presumption of innocence places the onus on the State to put its case against the accused person. In *State v Chogugudza* 1996 (1) ZLR 28 (H) the court held that any presumption of innocence must not place the entire onus on the accused; there is always an onus on the State to bring him within the general framework of an enactment before any onus may be placed on him to prove his defense.

Right to adequately prepare a defense and to legal representation

An accused must be granted the best opportunity to challenge his arrest, detention and the charges brought against him through his ability to prepare and argue his defense. Section 69 (4) states that any person who is arrested or detained 'has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum'. Section 70 (1) (c) (d) of the Constitution reinforces a pre-trial detainee's right to prepare adequately for his defense and his right to choose and obtain a legal representative to make his defense.

A lawyer is essential to ensuring that an accused person has a better chance to defend his liberty. In many situations, accused persons are unaware of criminal procedures, such as understanding

the nature of a criminal offence, the consequence of pleading guilty or not guilty, or the grounds for a bail application. Therefore, in a case of an unrepresented accused person the magistrate must explain to the accused about his rights before the courts.⁵⁷ In *Wheeler & Others v Attorney-General* 1998 (2) ZLR 305 (S), where accused persons had been denied postponement of their trial to allow their lawyer to prepare, the Supreme Court held that the prosecutor had acted unreasonably in refusing the postponement and that the magistrate's consequent order that the trial was to proceed denied the accused persons adequate time to instruct their chosen legal representative in contravention of s 18(3) (c).⁵⁸ However, the Supreme Court stated that s 18(3) (c)⁵⁹ obliged the magistrate to permit, rather than ensure, legal representation given that legal representation is not an absolute right.

While it is clearly up to the accused person to request a legal practitioner to represent him, the courts have a duty to ensure that this right is not usurped. In *State V Mushayandebvu* 1992 (2) ZLR 62 (S), a woman had pleaded guilty to a criminal charge despite having engaged a lawyer who was unavailable on the day of the trial. While the woman had failed to tell the court about the lawyer, the prosecutor knew that she had engaged a lawyer who was unavailable for the trial but did not inform the court about this. The prosecutor also failed to disclose to the court certain facts favourable to the woman that he was also aware of. The Supreme Court

found in favour of the woman's rights to prepare a defense and to legal representation under section 18(3) (c) & (d)⁶⁰ stating that:

- The appellant's constitutional right to be represented by a lawyer at her own expense had been breached, as the prosecutor should have told the court that she had engaged a lawyer who was unavailable on the day of the trial; it was unfair to expect an unsophisticated accused to realize that she could bring to the court's attention this matter.
- The prosecutor had acted improperly in withholding certain evidence from the court which was favourable to the appellant and which would have precluded the magistrate from accepting the guilty plea.

Right to be brought before court without undue delay

Section 50 (2) provides that following arrest and detention, a person who is not released "shall be brought before a court as soon as possible".⁶¹ In *State v Makwakwa* 1997 (2) ZLR 298 (H), the constitutional obligation to bring an arrested person before a court without undue delay was held to be a guiding principle in determining what power the police may have to detain a person before his first appearance in court. In *Allan v Min of Home Affairs* 1985 (1) ZLR 339 (H), the court held that any person entrusted with the signal power of arrest must recognise, and keep constantly in the forefront of his mind, the

concept that this power should be exercised only in cases of urgency or real necessity.

Section 32(2) of the CPEA requires that an accused person be detained for up to 48 hours, which period may be extended to not more than 96 hours, depending on when the arrest took place and when the initial period of 48 hours expires. The detention of the arrested person may also be extended if a warrant for his further detention is obtained. In *R v Sambo* 1964 RLR 565, it was remarked that it was wrong of the police to hold a suspect on a minor statutory offence where the real purpose was to investigate a much more serious offence. This device, referred to as a holding charge, is obviously an exercise in bad faith and provides no justification for the deprivation of liberty.

In the *Mukwakwa Case*, where a suspect escaped from police cell after more than 60 hours of detention, the presiding judge stated:

"In my judgment, therefore, it cannot be said that the custody from which the accused escaped was lawful. He escaped after almost 60 hours of detention had elapsed. During those 60 hours two court days had passed. There was no reason why the man could not be taken to court. There was no reason given why he should be held a full 48 hours. There was no reason given why the 48 hours should be extended. The prolonged detention was in addition accompanied by inhuman and degrading treatment. This was unlawful. The escape was not unlawful."

Right to be heard by a competent court

The Constitution requires that in exercising judicial authority, members of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.⁶² It is, thus, the obligation of the court to adjudicate a criminal case, assessing the facts and interpreting the law to reach an independent decision on the allegations levelled against the pre-trial detainee. Ultimately, the judiciary is the guarantor of the rights of pre-trial detainees, safeguarding them from violation by the state and the law enforcement agents administering the criminal justice system.

Section 69 (1) of the Constitution provides that "every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court" established by law. Where a judicial officer is not impartial the law allows an accused person to seek the officer's recusal or removal from the case. In *Standard Chartered Finance Zimbabwe v Georgias & Another* 1998 (2) ZLR 547, the High Court formulated an appropriate test in determining whether a court was biased:

"... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial

capacity...The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he does sit, his decision cannot stand; ... Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other."

In *Masedza & Others v Magistrate, Rusape & Another* 1998 (1) ZLR 36 (H), the impartiality of a magistrate came into question, with the accused persons seeking an order to stay the criminal proceedings in the Magistrates Court. The High Court held that where there is a reasonable apprehension of bias then justice will have failed and it might not be attained by other means. Ultimately, in a politically polarized environment such as is Zimbabwe, many pre-trial detainees, who have been charged with criminal offences associated with political activity, have a reasonable apprehension of the bias of the Judiciary, which has suffered direct interference with its independence from the executive.

Right to bail

Upon being presented before the courts for initial remand, the accused person must assert his right

to liberty by applying for bail. The law recognises innocence until proven guilty, entitling that person to his liberty by seeking bail at any time. Section 117 (1) of the CPEA provides that:

"An accused person may at any time apply verbally or in writing to the judge or magistrate before whom he is appearing to be admitted to bail immediately or may make such application in writing to a judge or magistrate."

Bail may only be denied when the state has established that there are clear grounds for justifying the refusal of bail and when the state shows that the accused's further detention is necessary for the proper administration of justice. In the case of *Kuruneru* HH-111-04, the High Court held that the basis for securing bail was the constitutional right to liberty, stating that:

"Section 13 (4) of the Constitution of Zimbabwe⁶³ requires that any person who is arrested or detained should be tried within a reasonable time, failing which he or she should be released from custody. In other words the discretionary power of a magistrate to deny bail may not be exercised in violation of the accused's constitutional right to be brought to trial within a reasonable time or be freed from custody... It is because of the presumption of innocence that the courts are expected, and indeed required, to lean in favour of the liberty of the accused."⁶⁴

In terms of section 116 (7) of the CPEA, a magistrate or judge may refuse to grant bail

to an accused if he considers it likely that the person would, if given bail, (a) not turn up for his trial or not appear to undergo preparatory examination or to receive sentence; (b) interfere with the evidence against him; or (c) commit an offence. The magistrate or judge can also refuse bail for any other reason which seems good and sufficient.

Right to trial within a reasonable period

Section 50 (3) of the Constitution states that any person who has been arrested and detained and is not tried within a reasonable time shall, without prejudice to any further proceedings that may be brought against him, be released either unconditionally or upon reasonable conditions. Section 69 (1) also provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Justice Gubbay, in *Re Mlambo* 1991 (2) ZLR 339 (S) at 344B-C, outlined the purpose of the right to a trial within a reasonable period as being:

"To minimize the adverse effect on the person charged flowing from the pending disposition of a still to be determined criminal charge. The right, therefore, recognizes that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma

and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonizing for accused persons and their immediate family. I believe there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bring him to trial."

The reality for pre-trial detainees, which the Constitution in section 69 (1-4) seeks to safeguard them from, is that detention can have a major impact on their social, economic, civil and political lives – by isolating them from their families and communities.

Calculating an unreasonable delay

In *Fikilini v Attorney General* 1990 (1) ZLR 105 (S), the court stated that: "In order to constitute undue delay in terms of subs (4) of s 13,⁶⁵ there must be an extraordinary delay for one reason or another in the prosecution of an accused's case. The delay must deprive an accused of his personal liberty in violation of s 13(1)⁶⁶ of the Constitution."

The court went further to state that where questions are raised about whether a pre-trial detainee's right to a trial within a reasonable period is being violated, the following factors must be taken into account:

- Whether in all the circumstances the length of the detention has been unreasonably

long. The nature of the charge and the investigation process required to investigate that charge should be examined. Is the charge a complex one that demands lengthy and painstaking investigations? Or is it a simple and straight forward one that should have been disposed of speedily if the police had been efficient? Are there vital witnesses whom the state is still trying to locate?

- The state should be required to advance reasons for the delays which have occurred in bringing the matter to trial. A proper reason, such as difficulties in locating a vital witness, will justify an appropriate delay. But if it turns out that the state is improperly delaying bringing the case to trial in order, for instance, to hamper the defense, this will weigh heavily against the state.
- Whether the accused asserted his right to have the case brought to trial within a reasonable time. If he has asserted his right this is evidence that he is being deprived of this right. But if he has not done so this may be indicative that his right is not being breached.
- The prejudice which may be occasioned to the detainee by the delay. Will the preparation of the defense be impaired by the delay? Will it cause oppressive pre-trial incarceration? Will it lead to disproportionate anxiety and mental suffering?

In *State v Kusangaya* 1998 (2) ZLR 10 (H), the court reasserted considerations of (i) the length of the delay; (ii) the reason for the delay; (iii) whether the affected person has asserted his right; and (iv) prejudice to that person in

determining a reasonable period within which a trial is finalised.

The seriousness of the case may also have a bearing on the determination of whether there has been unreasonable delay. In *State v Bourne* 1997 (1) ZLR 514 (S), an accused person facing a traffic offence charge arising in March 1990 was only summoned to appear in court in December 1995. The matter was postponed indefinitely due to non-attendance of witnesses and the accused was only summoned again in February 1996, only for the matter to be postponed again until December 1996 when witnesses finally showed up. The Supreme Court held that there was prejudice to the applicant both because the case was one where everything depended on credibility, which would be very hard to assess after 7 years, and because the case involved not wickedness or dolus, but mere negligence or culpa.

In *Re Masendeke* 1992 (2) ZLR 5 (S), there had been seven years of delay in a case involving a policeman, who was accused of two simple charges of taking bribes, and where the evidence was simple. In this case, the Supreme Court argued that there was no possible justification for such a delay, especially as the accused was not to blame for the delay, and ruled that the proceedings against the accused be permanently stayed.

In the *State v Kusangaya* case, the High Court held that, while it had taken as much as six years for

a trial to be concluded and that the state should shoulder some of the blame for the delay, the accused had failed to assert his rights and thus could not successfully appeal against a violation of section 18 (2) of the Constitution.⁶⁷ What is clear is that a pre-trial detainee whose case is not determined within a reasonable period of time must assert his rights under what is now under s 69 (1) (2) of the country's new Constitution.

Meanwhile, in the case of State v Tau 1997 (1) ZLR 93 (H), the High Court found that a delay of five years in finalising a trial was due to the state's administrative inertia and incompetence, and could not be attributed to the accused person. The court also found that, as the accused was uneducated, the fact that he had not complained about the delays could not be regarded as constituting a waiver of his rights to be tried within a reasonable period. The court went on to highlight an essential element in guaranteeing section 18 (2)⁶⁸ – that there had been a serious irregularity in the proceedings as the magistrate had failed to explain the accused's rights to him, including those guaranteed under section 18 (2).⁶⁹

In many cases, the right to a trial within reasonable period has been violated by the state constantly seeking the remand of pre-trial detainees. An example of the adverse effect of such remands was highlighted in 2006, when the then Judge President Rita Makarau came across as many as ten people

who had been incarcerated in remand prison for ten years without trial. In the case of State v Tau highlighted above, the court held against continuous remands and for the accused person's entitlement to the protection of the court, stating that:

"...the magistrate should have scrupulously scrutinized the applications by the State for remand after remand. A Magistrate should not have to be asked to refuse further remands where they are insupportable; he should do so mero motu. As to when a Magistrate should start questioning the State on application for remands, in all cases this should be done after delays approaching a year, but in some cases even that delay may well be unreasonable and oppressive."

Staying proceedings against an accused person following extreme delays in a trial

Should a pre-trial detainee be subjected to an unreasonable period of time awaiting trial, the courts have the discretion to order a stay of any further execution against the detainee. Long and extreme delays in finalising trials, especially in the case of a pre-trial detainee, amounts to subjecting him to a prison sentence despite his being innocent until proven guilty.

In State v Chakwinya 1997 (1) 109 (H), where an accused person spent almost four years awaiting finalisation of his trial and another two years awaiting sentence, the delay was held to be extreme and inexcusable, more so given the fact

that had he been convicted and sentenced when he should have been, he would more than likely have been released long before. The delay was attributed to the state, including losing the record of the trial due to 'administrative incompetence'. The High Court permanently stayed the passing of any sentence and any further proceedings against the accused, stating that: "Where an infringement of the right to a speedy disposition of a trial has occurred, the minimum remedy must be a stay of further proceedings."

4.2 Juvenile Justice

Legislation

There are two main statutes that are used to deal with cases of young offenders in the country – the Criminal Procedure and Evidence Act (Chapter 57) and the Children's Act (chapter 33). There are also two main institutions catering for juvenile offenders – the Juvenile Courts and the Magistrate's Courts – which administer the Children's Act and the Criminal Procedure and Evidence Act respectively. When a juvenile is alleged to have committed an offence the law requires that the matter be referred to a probation officer, who then prepares a social inquiry report highlighting the socio-economic circumstances of the juvenile. These special circumstances are supposed to be taken into consideration during the disposal process in an effort to achieve juvenile justice.⁷⁰

Pre-trial diversion programme

In May 2013, the Zimbabwean government, through support from partners such as Save the Children and UNICEF among others, launched the pre-trial diversion programme aimed at finding better ways of dealing with cases of juvenile delinquency (among other crimes not considered serious) outside the formal criminal justice system. The pre-trial diversion programme for juveniles will see that offenders receive rehabilitative, educative and restorative support through training so as to reintegrate them into society without the stigma of a criminal record. The country's international obligation to implement the pre-trial diversion programme is based on two instruments that the government has ratified – the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Implementation of the pre-trial diversion programme is in line with the Constitution, the Criminal Procedure and Evidence Act (Chapter 9:07) (CP& E Act), the Criminal Law (Codification and Reform) Act (Chapter 9:23) and the Children's Act (Chapter 5:06).⁷¹

When a young offender is already appearing in Court and it comes to the attention of the Attorney General or his representative that the young offender meets the requirements for diversion, charges will be withdrawn before plea and the matter will be referred to the pre-trial

diversion officer. When an accused has been arrested by the police and the alleged young offender meets the requirements for diversion, the police will press charges against the young offender and a docket will be opened but no prosecution will take place. The police will continue to give police cautions in terms of their rules and regulations. Section 351 of the CP& E Act provides for the manner in which young offenders will be dealt with and provides that a young offender may be committed to a training institute or a reform school.⁷²

Protection from torture

Although no person in Zimbabwe shall be subjected to torture or inhuman or degrading punishment or other such treatment,⁷³ the provision is severely curtailed by the retrogressive application of corporal punishment executed – pursuant to a court order – on males below the age of 21.⁷⁴ This amendment followed a constitutional court judgment in the case of *S v A Juvenile*⁷⁵ declaring the use of corporal punishment to be equivalent to inhuman and degrading treatment, and effectively reversed the decision of the highest court.⁷⁶ This position is buttressed by the Criminal Procedure and Evidence Act, which state that in cases of corporal punishment it must be administered in private.⁷⁷ The Children's Act also allows for the use of corporal punishment in cases when children defy its orders.⁷⁸

Separation from adults

A juvenile who is suspected of committing an offence must not be detained in a police cell or prison unless the detention is necessary and there is no suitable remand home available.⁷⁹ The CPEA also empowers the magistrate, judge or police officer to release on free bail a child who is not facing charges of treason, murder or rape.⁸⁰ Release of a juvenile is also permitted in cases when the child is not accompanied by an adult; the child has to be warned to appear in court at a future date. When accompanied by an adult, the juvenile is released into the custody of the adult who is warned to bring the child to court.⁸¹ Alternatively a child can be placed in a place of safety as stipulated in the Children's Act. The Prisons Act⁸² does not necessarily set up special detention places for children, but when children are detained in the same prison complex with adults, they must be kept in separate holding cells from adults.⁸³

Minimum age of capacity

Children are regarded as having the capacity to commit offences depending on their age group in Zimbabwe.⁸⁴ All children above the age of 14 are presumed capable of committing criminal offences.⁸⁵ Children between 7-14 may be deemed to be criminal liable and the Attorney General has the discretion to authorise their prosecution.⁸⁶

Presumption of innocence

There is a generic presumption of innocence for everyone who is accused of having committed an offence in the Constitution.⁸⁷

Legal assistance

There is no law that makes it mandatory for legal assistance to be provided to children, although every accused person has the right to legal representation.⁸⁸ Provision of legal aid is recognised by the government, but legislation regulating the same is limited to covering administrative aspects of the operation of the Legal Aid Directorate.⁸⁹

There is no mention of preference in giving legal assistance to children who are in conflict with the law. The Constitution does not guarantee the right to legal assistance for children accused of crimes.

Speedy determination

The Constitution⁹⁰ guarantees the right to a hearing within a reasonable time. However, the CPEA does not have any special procedure to facilitate the speedy determination of cases involving juveniles. There is an obligation to provide information in detail about the nature of the offence charged, as soon as reasonably practicable and in language understood, to all persons accused of committing criminal offences.⁹¹

The Constitution does not guarantee the right to legal assistance for children accused of crimes.

Privacy during proceedings

Privacy of proceedings is governed by the Courts and Adjudicating Authorities (Publicity Restriction) Act,⁹² which stipulates that proceedings in a matter involving someone who is below the age of 18 years can be protected from public disclosure by the judicial officer if it is in the interest of the welfare of the child.⁹³ Publication of information, such as the identity of persons standing trial who are below the age of 18, is not legal. Penal sanctions are prescribed for violation of this rule, except in cases that are regarded as being in the public interest and when the Minister or Judicial Officer has given authority for such information to be revealed.

4.3

Zimbabwe's International Obligations on Rights of Detainees

International Covenant on Civil and Political Rights (ICCPR)

Zimbabwe is a state party to the ICCPR, which guarantees fundamental rights. Specific provisions relating to pre-trial detainees include:

- Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Article 9: The right to liberty and security of person. Protection from arbitrary arrest

or detention. Upon arrest to be informed, at the time of arrest, of the reasons for his arrest and to be promptly informed of any charges against him; to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to trial within a reasonable time or to be released.

Detention not mandatory, release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings.

- Article 10: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- Article 14: Equality before the courts and tribunals; entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law; the right to be presumed innocent until proved guilty according to law.

In determining a criminal charge, everyone shall be entitled to minimum guarantees, namely to be:

- Informed promptly and in detail of the nature and cause of the charge against him in a language he understands;
- Given adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
- Tried without undue delay; and
- Tried in his presence, and to defend himself in person or through legal assistance.

African Charter on Human and Peoples' Rights (ACHPR)

Zimbabwe is also a state party to the ACHPR, which guarantees the rights of pre-trial detainees as follows:

- Article 6: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
- Article 7: Every individual shall have the right to have his cause heard. This comprises:
 - a. The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
 - b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. The right to a defense, including the right to be defended by counsel of his choice; and
 - d. The right to be tried within a reasonable time by an impartial court or tribunal.

Gaps in compliance

While the country remains a state party to these international instruments, gaps continue to exist with regards to compliance. The following case study is a clear demonstration of such shortcomings:

The African Commission on Human and Peoples' Rights has found the Zimbabwe government responsible for the torture and ill-treatment of Gabriel Shumba, a well-known human rights advocate and lawyer from Zimbabwe... Mr Shumba brought a complaint before the African Commission in 2004. In its decision, the African Commission considered that Mr Shumba had submitted "more than adequate evidence" to support his allegation of torture and ill-treatment, including being subjected to prolonged electric shocks on the mouth, genitals, fingers, toes and other parts of the body. It said Zimbabwe failed to open an official investigation and that it should do so and bring those responsible to justice. The decision also alluded to the impunity with which torture is being committed in Zimbabwe, which made it impossible for Mr Shumba to seek justice before Zimbabwean courts. In particular, it acknowledges that he would have undergone great risks had he returned to Zimbabwe to seek justice, stating that "there was no guarantee that he would not have been arrested or subjected to the same treatment he had been subjected to the previous time."

The Commission also made it clear that remedies in Zimbabwe are "inadequate, ineffective and unavailable" and ordered Zimbabwe to pay Mr Shumba adequate compensation for the torture and trauma caused to him.

Source: www.zimexilesforum.org 10/08/13

5.

CASE STUDIES OF PRE-TRIAL DETENTION CONDITIONS IN ZIMBABWE FACILITIES

The Constitution of Zimbabwe clearly provides for the protection of the human rights of pre-trial detainees. These rights lay a foundation for due process to be guaranteed to pre-trial detainees. The right to protection of the law, which underlies all other rights of pre-trial detainees, requires that detainees must be afforded due process. Due process includes: (i) innocence until proven otherwise; (ii) to be represented by a legal practitioners of the detainee's choice; (iii) to be brought before the courts within forty-eight hours of arrest; (iv) to have his liberty secured, including the granting of bail; (v) to a trial within a reasonable period of time; and (vi) to a trial before a competent and impartial court. Criminal procedure – as set out in the CPEA – has generally been consistent with these constitutional provisions. Instead, the challenge in Zimbabwe has been the administration of the criminal procedure by the country's law enforcement institutions and agents and the judiciary, which has in many cases resulted in prejudice against pre-trial detainees and the violation of their rights. Many pre-trial detainees have faced

prolonged pre-trial incarceration due to the failure of the criminal justice system.

The lack of respect for the rule of law in Zimbabwe has remained a serious challenge to the administration of the criminal justice system since laws are applied in a partisan manner and court decisions protecting the rights of pre-trial detainees are sometimes ignored at the expense of the liberty and rights of accused persons. The malicious application of certain provisions, such as Section 121 of the CPEA, has extended the detention of pre-trial detainees, as they are incarcerated for a further seven days before a final determination of their application for bail. Overarching some of these travesties has been the political crisis in the country that has seen 'political' pre-trial detainees, including human rights activists, being treated inhumanely in detention centres. The lack of adequate resources within the judiciary and prison services has also contributed to the problems faced by pre-trial detainees. The following cases studies give an indication of conditions of pre-trial detention in the country:

CASE STUDY 1

Constitutional application regarding conditions in police holding cells

The first and second Applicants, Kachingwe and Chibebe, were arrested by the police. The first

Applicant (Kachingwe) was detained in a police cell overnight at Highlands Police Station. The second Applicant (Chibebe) was detained for two days at Matapi Police Station.

THE TOILET WAS OVERFLOWING, COULD NOT BE FLUSHED FROM THE INSIDE, WAS NOT SEPARATED FROM THE REMAINDER OF THE CELL AND COULD NOT BE USED EXCEPT IN FULL VIEW OF THE OTHER DETAINEES.

The police cells that the Applicants were held in did not have either artificial or natural lighting, ventilation, running water, a wash basin, shower, soap, bedding, seating, heating or toilet paper. The toilet was overflowing, could not be flushed from the inside, was not separated from the remainder of the cell and could not be used except in full view of the other detainees. Up to seven detainees were placed in each cell, and the cells contained litter and human excrement. The Applicants were also not provided with food, blankets, or access to medical treatment, and were required to

wear only one layer of clothing and go barefoot, despite the cold and unsanitary conditions in the cells. There was evidence that these conditions prevailed in prison holding cells throughout Zimbabwe.

The Applicants alleged that the conditions under which they were detained constituted inhuman and degrading treatment in violation of their rights conferred in section 15 (1) of the Constitution, which provides that: “No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.”

They sought an order for the improvement of the conditions in all police holding cells in Zimbabwe before the Supreme Court. The Respondents challenged Kachingwe’s standing as a non-citizen, whether the Applicants had standing for the remedy of detention reform at large, and the merits of their claim.

Kachingwe and Others v Minister of Home Affairs and Another SC 145/04

CASE STUDY 2

Letter from Chikurubi Prison

Incarceration has helped me to witness the pathetic and sorry conditions under which Zimbabwean prisoners live, where most of the prisoners are youth offenders. Their crimes are inclusive of robbery, stock theft, fraud, aggravated assault and murder, burglary, motor vehicle theft, and rape among others. The majority of these crimes are a result of the economic meltdown of the past 12 years. The criminal justice system in this country is a complete mess and a disservice to the citizens. The sentences range from 10 to 250 years.

Overcrowding is the order of the day in all Zimbabwe's prisons, punctuated by poor diet, poor clothing and poor health delivery to inmates. There is no rehabilitation going on, and what little facilities that are used – and were left by the colonial regime in 1980 – are now obsolete.

People are imprisoned without parole or amnesty; they serve long prison sentences for petty crimes and live under harsh conditions. There is no psychological counselling or systematic skills training to empower and rehabilitate offenders. The justice system is not swift and some prisoners spend years before the State is ready to prosecute. There are incidents where a number of offenders die before they complete their sentences..."

Extract from Solomon Madzore's⁹⁴ letter from Chikurubi Prison

CASE STUDY 3

HIV positive man demands access to ARVs and better conditions

The full Supreme Court bench reserved judgment in the case in which an HIV positive man is seeking an order allowing prisoners on anti-retroviral treatment to access medication according to their doctors' prescriptions and to be accorded prison conditions that do not worsen their health.

The man, part of the 45 people arrested on treason related charges in February 2011, said he was denied access to anti-retroviral drugs while in police cells at Harare Central Police Station as well as at the Harare Remand Prison. He argues that he was only allowed to take tablets once a day instead of twice daily and that he was not allowed to bring his own tablets to prison.

It was his evidence that he was later given some tablets when he was at Harare Remand Prison that were different from the ones he was taking at home. The man wants the Constitutional Court to direct the prison authorities and the police to ensure HIV positive inmates are given adequate access to ARV medication in the manner prescribed by their doctors.

The Herald: Zimbabwe-Supreme Court Complies with Constitution (by Daniel Nemukuyu, 24 May 2013)

CASE STUDY 4

Nine months of hell inside Chikurubi prison

At one time, Yvonne Musarurwa and her colleague Rebecca Mafukeni thought they were Zimbabwe's 'most isolated women' after they were held in an extreme form of solitary confinement under a 'no human contact' order for months. The two only got 20 minutes a day for laundry, bathing and exercise.

"During the first few weeks, we couldn't cope with living in prison. Rebecca and I broke down completely. We thought we were going to die. But slowly, when we realized there were people who have been there many years before us, the condemned prisoners, we thought okay, we might make it as well," she said.

Yvonne and Rebecca were part of the Glen View 7 who were granted bail last week Friday by the Supreme Court, after spending 9 months in remand prison, "for a crime I did not commit."

32 The more the group spent time with the law and order officers, instead of homicide who investigate murders, the more they realized police were struggling to build a case against them. "This was a murder case but we were being interrogated by officers from the Law and Order section and this looked weird," Yvonne said.

I'VE NEVER FELT SO MUCH
PAIN IN MY LIFE BEFORE.

The group was denied bail on several occasions by the High Court, as the judges claimed they were a flight risk.

..."The first weeks in police custody were the toughest. We were being interrogated, beaten and tortured. I've never felt so much pain in my life before. I sustained a broken hand; lacerations all over the body and the only thing I got for all that were a few tablets of paracetamol." Yvonne said.

"They said we were MDC and that there was every chance we would influence the other prisoners and clash with others from ZANU PF. This is why they kept us in solitary confinement. The conditions were very bad. We stayed in cells that had raw sewage passing through and we cleaned that up using our bare hands. That was the most difficult part and I told myself the day Zimbabwe is free from tyranny, I will personally go to the Minister of Justice and those in charge of prisons to tell them exactly what needs to be done."

SW Radio Africa News: 9 months of hell inside Chikurubi Prison: <http://www.swradioafrica.com/2012/02/22/9-months-of-hell-inside-chikurubi-prison/> 12 June 2013

CASE STUDY 5

Zimbabwe judges tour police cells

Zimbabwe's top judges visited a notorious Harare jail on Thursday after receiving complaints that it is filthy, ill-equipped and uninhabitable, but a rights activist and reporters who joined the tour said the cells had apparently been cleaned up just in time for the jurists' arrival. The five Supreme Court judges toured the main Harare police station cells and said they will rule later on whether to close down the cells because conditions are inhumane in a suit brought by members of Women of Zimbabwe Arise, a group founded to champion women's issues. The group's members have been arrested after demonstrations that featured rattling pots and pans to call attention to food shortages, or handing out red roses on Valentine's Day to protest domestic and political violence. Jenni Williams, a founder of the group who has been arrested more than 40 times over a decade of activism, joined the tour Thursday, and afterward described it as a sham. "These are not the conditions we were detained in," Williams said. The judges inspected only three, dimly lit cells with six concrete beds and no mattresses. Dozens more cells remained locked. Reporters with the judges say the usually overcrowded cells were empty and appeared to have been cleaned. They detected a strong smell of floor polish and detergent. Williams said she and three other activists who filed the suit were once detained in a cell "filled with pools of urine and littered with faeces and condoms." She said they were given frayed, foul-

smelling blankets that were inadequate on cold stone floors. Fresh water was unavailable. Jail authorities provided no food for prisoners, who relied on supplies from relatives.

"It was hell on earth, it was torture — all because we were demanding our rights," Williams said.

Williams said that while in jail women were asked to remove their undergarments and were denied access to menstrual pads and toilet paper. She alleges the police told them they should use their hands to clean themselves. State attorney Ray Goba said the activists' allegations were an "exaggeration and a distortion."

"Some of the worst people in our society pass through these cells," he added. Supreme Court Judge Rita Makarau, questioning Goba, said even hardened criminals deserve humane treatment in jail. Most prisoners held in the police jail are awaiting trial and have not been convicted. Goba said if the Supreme Court ruled conditions at the Harare jail warranted shutting it down, "we would be forced to close most cells in Zimbabwe."

Gillian Gotora: Zimbabwe judges tour police cells after complaints <http://www.necn.com> June 14, 2012

CASE STUDY 6

Magistrates under fire

It is now almost given that bail applications with political implications that find themselves at the Magistrates Court are often dismissed, sometimes on flimsy excuses, leaving

the High Court to do justice on the matters. Of late, the High Court has been criticising such conduct. The denial of bail to human rights lawyer Beatrice Mtetwa, who was facing obstruction of justice charges and to Temba Mliswa,

an aspiring ZANU-PF lawmaker facing violence charges, saw them spending unnecessarily longer periods incarcerated, before High Court judges quashed rulings by the lower courts which they criticised. Prime Minister Morgan Tsvangirai's four aides - Thabani Mpofu, Felix Matsinde, former councillor Warship Dumba and Mehluli Tshuma - were the latest to be granted bail by Justice Chinembiri Bhunu, who said magistrate Marehwanazvo Gofa had erred in denying them bail resulting in them spending 11 nights behind bars.

In granting them bail, Justice Bhunu said: "Judicial officers are duty bound to meticulously observe laid down judicial safeguards propounded through the cases so as to avoid straying into the wilderness of injustice. A casual perusal of the magistrate's handling of (the subject matters) betrays scant regard to the guiding principles laid down by the Supreme Court and this (High) Court."

In the case of Mliswa, another judge, Joseph Musakwa said Chinhoyi magistrate Felix Mawadze had based his decision to deny the former bail merely on speculation when he ruled that the accused would commit violence when released. "It is apparent that the court a quo speculated on the likelihood of undermining the public peace and security if the appellants are admitted on bail. It held that there was tension in the community without hearing such evidence," said Justice Musakwa.

"A court cannot just surmise that due to an allegation that public violence has been committed then there is likelihood of further undermining of peace and security, this particularly so in the present case where there are no cogent facts linking the appellants to the alleged offence. It is even worse in respect of the first appellant (Mliswa) who was not placed at the scene of the crime. There was therefore misdirection on the part of the court a quo." The same judge also set Mtetwa free on bail and disputed the fact that the top lawyer had obstructed the course of justice, even though the magistrate had denied her bail.

"Being a woman surely the three officers could have easily contained her and so the allegations are weak. How also did she bring traffic to a halt? All these allegations needed to be substantiated by the state," the judge said.

Financial Gazette: Magistrates Under Fire, 11 Apr 2013

"JUDICIAL OFFICERS ARE DUTY BOUND
TO METICULOUSLY OBSERVE LAID DOWN
JUDICIAL SAFEGUARDS ..."

CASE STUDY 7

Beatrice Mtetwa in Rhodesville police cell

At Rhodesville (police station), I was thrown in a cell...I was denied the basic rights that one is entitled to...In the morning, I asked if I could be allowed to get a bucket to get water to bath. I was told 'No'. On the first day, my friends and family were allowed to give me food in the morning. But from lunchtime, Law and Order Section officers had blocked that access. From that time onwards, I was not allowed access to the lawyers. They said if I had lawyers, I must mention one, yet I had quite a number representing me. My relatives were told they were not allowed to see me. On the second night, we had two visitors coming at night to visit the cell. They were male and there were two of us (female) in the cell and they

wanted to take our blankets saying there were other persons at the charge office who wanted to use them. We said female officers must come, and they (male officers) got in and grabbed the blankets. Naturally, at that hour of night, you say 'oh my God, two male officers and there are only two of us in the cell; we are going to be raped'. We made noise so that the male cell occupants would know that somebody had come into our cell. I shouted "why are male officers coming into our cell at night?" That was scary.

Extract from Beatrice Mtetwa Interview with Legal Monitor, 1 April 2013

CASE STUDY 8

Abuse of female prisoners

"As women here we suffer the most at the hands of police. So many of us who are arrested on flimsy charges are physically and sexually abused...There have been cases where women have been severely beaten in custody and given

lengthy detentions so that they heal while in custody. On the final day of going to court, the police officers resort to intimidation and threaten female suspects against complaining about the treatment before a magistrate."

Testimony from a female former pre-trial detainee, Midlands Province

CASE STUDY 9

Experiences of juvenile detainees in police custody

- (i) "I was always beaten up in the evening, the police officer would come and make us do the alphabet and if you failed to do it then wairohwa [you would get beaten up], unotadza [you would fail] not because you can't do it but because you will be afraid so much."
- (ii) "Eish! I was beaten so hard by those police and I ended up saying things I had not done."
- (iii) "Luckily, I was not beaten but the police ask questions in a confusing manner, it's as if they want you to be guilty chete [just plead guilty]."
- (iv) "The CID took me kumapuranga where people are disciplined unotoona ropa pasi [you would see blood on the floor] and they beat me up so hard thank God they did not use bridge [a form of painful torture] on me."

6.

RESEARCH ON CONDITIONS OF DETENTION IN ZIMBABWE'S PRISONS

“Any person who is detained, including a sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment.”

Section 50(5) (d) of the Constitution states that: “Any person who is detained, including a sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment.” The following section will review existing conditions in prisons with regards to this constitutional provision.

Overview of prison statistics

TABLE 1:
STATISTICAL OVERVIEW OF PRISON
POPULATION IN ZIMBABWE

Source: *International Centre for Prison Studies (2013)*

PRISON POPULATION TOTAL <i>(including pre-trial detainees/remand prisoners)</i>	16,902 <i>at February 2013 (national prison administration)</i>
Prison population rate <i>(per 100,000 of national population)</i>	129 <i>based on an estimated national population of 13.1 million at February 2013</i>
Pre-trial detainees/remand prisoners <i>(percentage of prison population)</i>	c.30% <i>(October 2010)</i>
Female prisoners <i>(percentage of prison population)</i>	3.5% <i>(February 2013)</i>
Juveniles/minors/ young prisoners <i>(percentage of prison population)</i>	0.7% <i>(February 2013 - under 18)</i>
Foreign prisoners <i>(percentage of prison population)</i>	0.7% <i>(December 2008)</i>
Number of establishments/institutions	72 <i>(2012 - 46 main prisons, 26 satellite prisons)</i>
Official capacity of prison system	17,000 <i>(February 2013)</i>
Occupancy level <i>(based on official capacity)</i>	99.4% <i>(February 2013)</i>

Infrastructure in prisons

There are 72 prisons in Zimbabwe, of which 46 are fully fledged and 26 are satellites. Khami is the most modern prison in terms of infrastructure, followed by Chikurubi and then Chipinge. Kadoma has also been improved as well as Mazoe. But the rest are reportedly in bad shape.

Most of the prison facilities in the country were established around 1910, when the Rhodesian settler regime was becoming fully established. The oldest prison is Grey Street – a remand prison in Bulawayo – which was built in 1897. Under the UN Standard Minimum Rules, there should be enough light for the inmates to read but this is reportedly not the case in these old jails. Even the minimum standards vis-a-vis habitability were reportedly not being met by most of the old prison facilities, save for those built after independence. In addition, most of the prisons were built with virtually no infrastructure for female inmates.

The infrastructure in most of the jails is poor and lice can be found in large quantities in the prisons. Although cells should be fumigated, this was reportedly not a priority in the prisons. As it is a challenge to access toiletries within most of the prisons, inmates were reportedly resorting to using pieces of blankets as toilet paper or sanitary pads, which they would then throw into the toilets, thus causing blockages. The kitchens were reportedly dilapidated. At first, steam pots were used for cooking in prisons. Due to maintenance

problems and underfunding, this could not be maintained and cooking using firewood then took over. Although there was apparent overcrowding, prisons could not refuse to take new inmates, leaving most cells crammed. Without doubt the current state of most prisons in the country does not meet the UN Standard Minimum Rules in terms of human rights. However, it was noted that the ZPS was in the process of re-designing cells and improving ablution facilities.

Overcrowding

As part of the study, a review of reports on conditions in detention centres was undertaken. Data was available for eight prisons.

Remand prisons were reportedly experiencing overcrowding as a result of delays in the finalisation of cases by courts. Some of the inmates had been detained for more than a year on remand due to delays in the completion of their cases. Indeed, there were some cases of prisoners remaining in prison for more than twelve months without appearing before a magistrate or the High Court because of the lack of any transport to ferry them to the courts.

In 2003, a Chief Magistrate pointed out that some remandees were spending up to four years awaiting trial.⁹⁵ Three years later, a High Court judge described Zimbabwe's prison conditions as "embarrassing and disturbing" after visiting Harare Central Prison.⁹⁶ But as this study shows,

This competition among inmates for resources often escalated the risk of aggression and violence.

TABLE 2:
STATISTICS IN PROFILED PRISONS IN ZIMBABWE

Source: ZACRO (2012)

PRISON	CARRYING CAPACITY	ACTUAL CAPACITY	NUMBER OF REMANDEES	LONGEST REMAND SERVED	WOMEN	CHILDREN
Beitbridge	585	336	65		Yes	Yes
Grey Street Bulawayo	455	468	95	6 months	Yes	Yes
Hwange	210		100		Yes	Yes
Khami	630	698	139	11 years	Yes	
Lupane	100	16	4	2 months		
Mulondolozhi	596	306		14 months	Yes (women only)	Yes
Murehwa	175	175			Yes	Yes
Mutoko	145	175			Yes	Yes

at least 5 years later the problem of overcrowding had still not abated, especially in the major prisons. The study found that 30 percent of the estimated 17,000 prison inmates were awaiting trial, including juveniles. An organisation that works to improve conditions for prison inmates also pointed out during an interview that the majority of Zimbabwean prisoners were very poor and could not afford legal representation. This meant that they had to wait their turn for legal aid, which can result in them having to stay in jail for close to two years as the need for legal representation is overwhelming. The population of inmates awaiting trial in most prisons was rising at alarming speed. Even though absolute figures for the number of remand inmates could not be determined (due to limitations in data access), general reasons were given to explain the high numbers of remand inmates per region. For instance, the Tsholotsho, Victoria Falls, Beitbridge and Plumtree prisons in Matabeleland had high numbers of remand inmates for a long time because of high bail amounts and because many people were being imprisoned for petty cases that were treated as serious ones. The Masvingo remand, Gokwe and Kwekwe prisons in the mid-Masvingo Region also had high numbers of remand inmates – as well as high overall incarceration rates – due to people being imprisoned for petty offences that could have been dealt with using non-custodial sentences.

In Mashonaland, the prisons in Harare as well as Kariba, Chinhoyi and Karoi prisons had very high

numbers of remand inmates who stayed for long periods awaiting trial for a number of reasons. One of the most important was the shortage of judges to hear their cases. In some instances, judges had retired from the bench with cases still pending. Other reasons included delays in concluding investigations by the police and arrests of prohibited immigrants. It was also established that there was a worrying trend of new magistrates trying to ‘prove’ themselves by sentencing minor offenders to jail even though fines could actually have sufficed. This inevitably culminated in prisons being crammed beyond capacity.

In Manicaland, as reported in interviews with senior officials from organisations working in the prisons, Mutare remand, Chipinge and Murehwa prisons also had high numbers of remand inmates and high incarceration rates because of petty crimes as well as the arrest and detention of prohibited immigrants by the Immigration department.

It was also reported that the High Court going on circuit from Harare and Bulawayo meant that detainees would spend long periods awaiting trial when the judges were making their rounds. For instance, there were reportedly 825 cases requiring attention in Manicaland alone in 2011, meaning that even if they were brought to Harare, they would still have to wait long periods before being tried.

Due to delayed justice and prolonged periods in detention centres in the country, inmates often

ended up scrambling for the limited resources available, such as space to relax or sleep at night. One former inmate recalled the conditions he was subjected to when he was remanded in custody. “Bed time yakapenga [is the most difficult period]...we were so many that we slept facing one side and had to turn on the other side at once during the night.”⁹⁷

This competition among inmates for resources often escalated the risk of aggression and violence. There were also concerns regarding inmates suffering from acute respiratory problems due to the overcrowding. Cases of TB-related morbidity and mortality were also reported, with the spread of the disease being worsened without doubt by the overcrowding. There have also been allegations of sexual abuse of prisoners in the cramped spaces inmates occupy. Unfortunately, this issue does not seem to be talked about that much given the laws regarding sodomy and the general denial regarding the subject matter.

Plight of women prisoners

Mlondolozhi, Shurugwi and Chikurubi are the only fully fledged female prisons in Zimbabwe. All the other prisons have a section that has been set aside for women and the conditions are not favourable to female inmates. In particular, pregnant inmates are treated like any other female prisoner, without due recognition of their needs. After giving birth at public health facilities, they are returned to jail with their

newly born babies – sometimes as young as a day or two old. Unfortunately, prison facilities are not designed to support the post-natal care of either the mothers or the babies. The plight of older children incarcerated alongside their mothers is also serious since there are no proper facilities to cater for their early childhood development needs because the ZPS does not have a budget line for such support.

One former inmate witnessed the plight of children incarcerated alongside their mothers: “The saddest bit is there are children in prison between the ages of four and six whom I saw. They ought to be in school yet they have been in jail for up to two years. They are there because their mothers are said to have transgressed some immigration law. Surely, surely we can do better than that. Our laws should take into account that kids should not be punished for the transgressions of their parents.”⁹⁸

Fortunately, support from charitable organisations was helping to alleviate the problems with reports of food, clothing and other items, such as toys, being donated to the children. For example, an organisation called Miracle Missions established an early childhood development facility (kindergarten) at Chikurubi prison so that the children of incarcerated females could have another place to play instead of being in the cells with their mothers all the time.

Other challenges related to accessing healthcare for female patients in penitentiaries without fully fledged sections to support female inmates’ health needs.

Health services

The study established that each of the ZPS regions had a qualified medical doctor who roved around the region seeing any inmates who were referred by resident nurses. A referral system to major hospitals was also in place in case there was no capacity in terms of medication, equipment or specialists to attend to special medical cases. Some prisons, for example the Khambi maximum security prison, do have a hospital that has qualified doctors and nurses to attend to the needs of the prisoners. At that particular hospital, services were also provided for patients with HIV and AIDS related illnesses.

However, overcrowding has made prisons a health hazard as the increase in the number of the prisoners created conditions favourable to the spread of communicable diseases. Indeed, more than 100 prisoners died in Zimbabwe’s prisons in 2013 due to nutrition-related illnesses and natural causes.⁹⁹

There are no modern facilities or adequate medical equipment in most prisons so initial health screening is difficult as most of the work has to be done physically by nurses. Challenges were also noted in some prisons whereby

medical examinations of newly admitted inmates were not being administered. Due to prolonged detention without trial, inmates were predisposed to the risk of developing hypertension and stress. There were also reports of prisoners developing skin rashes, which were being contracted from shared clothing and blankets as a consequence of overcrowding.

The study noted significant shortages of sanitary ware among female inmates. This resulted in some female prisoners making use of pieces of cloth or blankets as sanitary pads – unconventional methods that resulted in blocked sewers as the used materials were disposed of in the toilets.

Toilets and bathing facilities

Challenges were noted regarding water and sanitation in prisons. Owing to the overcrowding and restrictive space in the prisons, there were serious concerns about the spread of diseases due to undisposed sewage. It was reported that inmates often had to resort to buckets due to the absence of adequate toilet facilities in most cells. In cells that had toilets, the facilities were overburdened and also considered dehumanizing as they were not secluded so there was no privacy. Furthermore, the flushing system for most of the toilets would regularly break down (but the toilets would continue to be used nevertheless) thereby exposing inmates to disease.

Here is one former female inmate's recollection: "I think it is inhuman and completely degrading for 17 women to be packed into a cell that does not even have a toilet. Particularly because by 4pm you are already locked up in the cell and it will only be opened in the morning between 6 and 7am. I think it is particularly inhuman to force those women to relieve themselves in little containers that they have each cut around. That is totally, totally, unacceptable."¹⁰⁰

Quality and quantity of food

The study found that prisoners in many of the detention centres were not being provided with food that constituted a balanced diet. The diet was mainly composed of the staple sadza (maize), cabbage and beans. The prisoners were complaining about the lack of meat in their diet, over and above the fact that there were generally not adequate quantities of food. As one young offender said: "The food in prison is bad and inoshata [tasteless]. Have you ever eaten cabbages with no cooking oil and porridge with no sugar? And not eating that food can get you in trouble, zvinorovesa [one can get beaten up as a result]."¹⁰¹

Prisoners would predominantly receive better quality food, including fruit, from relatives and friends who visited them, since the prisons could not afford to maintain healthy diets for them owing to budgetary constraints. Concerns were raised about the poor diet, particularly in relation

to sick and pregnant prisoners. At one point the situation was reported to have been so bad that visitation rights were relaxed so that the relatives and friends who could afford to bring food to the prisoners could do so on a daily basis.

The lack of adequate nutritious food without doubt pre-disposed inmates to illnesses such as kwashiorkor and pellagra. However, organisations such as the International Committee of the Red Cross (ICRC) and other faith-based organisations have been donating food stuffs to supplement the prison supplies, which improved access to food in prisons.

Juvenile offenders

There is only one prison for young offenders in Zimbabwe – Hwahwa in Midlands Province – where the vast majority (an estimated 90% of the 400 young offenders) are incarcerated for rape. Unfortunately, not all young offenders can be accommodated there so some have to be imprisoned with adults, which increases the risk of them experiencing both physical and sexual abuse. "We were more than 70 people in a cell and I was sent to D class cell where there are adults, some of them had committed murder, rape, robbery haa maveteran chaiwo [they were veteran criminals]," said one young offender.¹⁰²

"The day I got released on bail was my happiest day in life I had just been threatened by some two guys that after coming back from court I could

visitation rights were relaxed so that the relatives and friends who could afford to bring food to the prisoners could do so on a daily basis.

become their girlfriend," said another young male offender highlighting the risk of sexual violence and abuse.¹⁰³

However, the ZPS continued to make concrete efforts to ensure that juvenile detainees were kept separate from adults by establishing juvenile sections in the respective prison facilities. But notwithstanding the efforts that the prison authorities were putting into providing humane conditions for juvenile offenders, challenges such as poor basic services, poor access to water and sanitation facilities, and poor nutrition that were prevalent in adult facilities were also prevalent in juvenile facilities. In addition, the psychosocial needs of young offenders were reportedly not being fully met, as demonstrated in the

CASE STUDY 10

Trauma of incarceration

Simon Dube (not his real name), 15, has just been released from jail after serving a three-month sentence for theft. After his arrest he was detained for two days in a holding cell in Harare, where he alleged that police assaulted him to extract a confession that he stole goods from his neighbour's home. Dube's mother said that after her son's return from jail he had become withdrawn, had frequent temper tantrums, as well as a persistent cough and symptoms of scurvy. "He suffers frequent nightmares and often wakes up crying. He doesn't tell us much about his experiences in jail but it is easy to see that he went through a tough time," she said. Dube was remanded in custody for seven weeks prior to his trial.

IRIN News Agency, 11 April 2011

the legal system usually did not provide free legal services to those juveniles whose parents or guardians could not afford a lawyer, which put them at a severe disadvantage.

following case study, which illustrates the trauma experienced by young detainees. The study also found that there were challenges regarding legal representation in many of the juvenile cases. Indeed, the legal system usually did not provide free legal services to those juveniles whose parents or guardians could not afford a lawyer, which put them at a severe disadvantage. Young offenders were also reportedly appearing in court for minor offences, often in the absence of probation officers. Below are some of the views of juvenile offenders regarding their fear of attending court and the important role that legal representation could play when their cases were being heard:

"Kucourt kunotyisa [it's scary in court], I was really afraid to go there and ended up being arrested again because I did not go."

"A lawyer helped my mind to think better, it was not rushing anymore, those prosecutors made me feel very uncomfortable and they confuse."

However, the inception of a pre-trial diversion scheme in which the government collaborated with non-state partners was regarded as presenting a great opportunity to deal with juveniles accused of minor offences. In accordance with the CRC's stipulations covering juvenile offenders, Zimbabwe initiated the pre-trial diversion scheme under the CPAA so that juvenile offenders charged with petty crimes would be diverted from the formal criminal justice system. Their cases would be heard in a closed court and sentences imposed along rehabilitative lines. In spite of its potential, the initiative suffered from resource

limitations on the ground. Challenges were also reported with regards to dealing with juveniles who committed what were deemed to be 'adult' crimes, such as rape and murder, as these offenders still got the same treatment as adult offenders.

Gaps in rehabilitation – Shortcomings of the Prisons Act

The Prisons Act is silent on issues to do with rehabilitation, the disabled and children living with their incarcerated mothers and this hinders the improvement of these conditions in country's prisons. The Act does not include rehabilitation as a core business of the Prison Service where an inmate is expected to come out of prison with a skill that he or she can then use to reintegrate back into society. Indeed, being idle in prison was one of the reasons why a lot of inmates had mental health challenges. Unfortunately, rehabilitation is difficult for prisons to achieve due to lack of resources, and a lack of counselling and rehabilitation skills, and knowledge by the majority of prison officials, whose attitude towards prisoners is punitive.

The study contends that rehabilitation should be extended to all inmates so that they can be successfully reintegrated back into society. However, all rehabilitation programmes need funding to be successful. For example, inmates who need to be trade tested or to write Ordinary

and Advanced Level examinations need money to be able to register but most of the time the ZPS does not have the money. Workshops where inmates are taught different trades have archaic machinery that is no longer functional thus making learning difficult. Rehabilitation programmes do not get any meaningful funding because the ZPS is channelling most of its resources into the upkeep of inmates – a substantial number of whom are remandees. Convicted inmates are therefore deprived of the opportunity to benefit from rehabilitation initiatives – and so many of them end up becoming recidivists.

Lack of uniforms

Prison facilities have in the past been notorious for their failure to provide uniforms for inmates, with reports of prisoners receiving torn and tattered uniforms that compromised their dignity. There have even been reports of prisoners sharing and take turns to wear uniforms as a result of the severe shortage. The study also found that priority for good uniforms was given to suspects in remand prison who would be attending court. This is despite the fact that the statutory requirement for prisoners' uniforms is at least 2 uniforms per person.¹⁰⁴

In response to a question about the availability of certain items of clothing in prison (jerseys in particular), a prominent human rights activist,

who was once incarcerated, said, "Prisons do not have jerseys. You buy your own jersey...If you have a relative in prison without that jersey then they are really going to face the cold this winter."¹⁰⁵ Fortunately, humanitarian agencies play a significant role in helping to support the provision of uniform for inmates.

Abuse of prisoners

This study established that prisoners were experiencing a variety of other abuses. There were instances where prisoners were being abused by working on private farms of senior officials outside their official obligatory labour hours. The time allocated for visits to see prisoners was another area of concern as it is not clear in the Prisons Act and the time allowed often does not take into consideration visitors from far away. The study found that prison officers, like the majority of the country's civil servants, were earning low salaries, thus making it difficult for them to carry out their duties efficiently and earnestly. It was reported that when donations were made by organisations intended to benefit inmates, prison officers would often take some of the goods home – a phenomenon commonly known as the appropriation of zviwanikwa (donated gifts).

Recidivism

In Zimbabwe, a significant proportion of current prison inmates are recidivists.¹⁰⁶ In discussions with prison officials and organisations working

with offenders, it emerged that some inmates predicted that they would return to prison upon being released and that they felt a stronger sense of belonging in prison than outside. It was also reported that some of the 'veteran' prisoners, who are often recidivists, had turned themselves into pseudo-legal experts and they would use their 'knowledge' to influence remandees about what to say during their trials. In some cases, remandees have changed their pleas and legal arguments after undue influence from other inmates, and this reportedly delayed the completion of cases.

The time it takes to deliver justice to remand inmates inculcates a sense of belonging to the institution housing them and gives them time to be corrupted so that they often reoffend when they are released – causing more harm to society and ending up back in detention.

Role of civil society organisations in strengthening the criminal justice system

44 A number of civil society organisations have been undertaking initiatives aimed at improving – both directly and indirectly – conditions for pre-trial detainees and incarcerated individuals. Direct assistance came in the form of food, medicines, clothing and bedding from organisations like the ICRC and faith-based institutions, such as Prison Fellowship. Other organisations, such as

In some cases, remandees have changed their pleas and legal arguments after undue influence from other inmates, and this reportedly delayed the completion of cases.

Zimbabwe Lawyers for Human Rights, provided legal assistance to detainees, especially those whose cases involved human rights' violations. Indirect support came in the form of training and capacity building initiatives for the police and prison services in the belief that these initiatives would help to improve the way that pre- and post-trial detainees were handled. Some of the training initiatives included:

- Workshops on Overcrowding - Sharing experiences and challenges, and recommendations to reduce overcrowding in detention centres; and

- Human Rights Training for Officers – Sensitizing officers, including top management, about the human rights of detainees.

Organisations such as the Zimbabwe Association of Crime Prevention and Rehabilitation of the Offender and the Legal Resources Foundation among others spearheaded these trainings.

7.

DISCUSSION OF FINDINGS

Sadly, the prevailing conditions are a manifestation of many years of socio-economic and political challenges in Zimbabwe

7.1

Nexus between detention conditions and socio-economic and political challenges

It is clear from this study that the current conditions of pre- and post-trial detention do not meet standards set in local, regional and international statutes. As can be deduced from the case studies, the rights of detained people are being violated – for instance under Sections 49 on the right to liberty, 50 on the rights of arrested and detained persons, 51 on human dignity, 53 on freedom from torture or cruel, inhuman or degrading treatment, 69 on the right to fair hearing and Section 70 on the rights of accused persons. The conditions for pre- and post-trial detainees also abrogate rights regarding humane treatment and liberty detailed in regional and international statutes, such as the African Charter on Human and Peoples' Rights and

the International Covenant on Civil and Political Rights. Sadly, the prevailing conditions are a manifestation of many years of socio-economic and political challenges in Zimbabwe, making it imperative that these challenges be resolved, mostly at the political level. Again tied to the political situation is the wanton arrest and detention of human rights defenders, whose conditions of incarceration, as reported in this study, also violate their rights. The continued existence of laws such as AIPPA, POSA and certain sections of the Criminal Law (Codification and Reform) Act also makes the situation worse as it enables the wanton arrest and detention discussed above.

Indeed, it is of utmost concern when arrest and detention are used as tools of repression rather than as steps preceding an accused person's trial and conviction for genuine criminal violations. Instead, prosecutors are frequently faced with the task of prosecuting human rights defenders on trumped-up charges without any evidence. Unfortunately, this contributes to overcrowding in detention centres and to overwhelming the justice delivery system. It is imperative that such anomalies dealt with.

7.2 Rehabilitation of young offenders

It is commendable that the government and its partners have embarked on a diversion programme for juvenile offenders. This could go a long way towards ensuring that young offenders have an opportunity for rehabilitation away from the conventional criminal justice system. However, it is critical that the state takes ownership of this initiative and does not leave the donors and NGOs to lead it, as it can only be sustained with its inclusion into government programmes and financial planning. For those juveniles accused of more serious offences that are not catered for in the diversion programme, justice can only be realised if they are allowed to exercise their inalienable right to legal representation in court. Therefore, it is imperative that the scope of initiatives such as Legal Aid be broadened so that all juveniles, including those whose families are unable to

afford lawyers' fees, can benefit from legal representation in court.

It is also important to realise that some parents or guardians lack adequate parenting skills and might actually be contributing to the delinquent behaviour of their children. While the primary focus must be on the juvenile offender, the parents or guardians must also be actively involved in the rehabilitation process to ensure complimentary of action between social workers and parents. Parents and guardians must be empowered to take personal responsibility for the welfare of their children and must be assisted to develop and consolidate good parenting skills.

7.3 Plight of women detainees and 'incarcerated' children

The plight of women detainees is a major concern, considering the lack of capacity in the prisons to adequately provide for them in terms of infrastructure and particularly their reproductive health needs. The susceptibility of women offenders to sexual abuse even at the hands of law enforcement officers underscores the need to give special attention to the current conditions for women in detention centres.

Tied to this is the issue of children who are incarcerated with their mothers. These innocent

children unfortunately also serve sentences and the conditions are not at all conducive for early childhood development. While there is clearly a dilemma about how to encourage communities to provide a safety net for children whose mothers are incarcerated, one wonders why the government and its partners cannot make adequate provision for these children in order to enable their early childhood development. Provision of kindergarten facilities in the prisons might be one way of helping to ensure that these children do not lose out entirely while incarcerated with their mothers. Miracle Missions' work to establish a kindergarten facility for children at Chikurubi prison is therefore noteworthy and similar initiative should be supported in other facilities with female sections so that 'incarcerated' children have another place to play and spend their time rather than always being in the cells with their mothers.

7.4 Scope for strengthening the operations of justice delivery system institutions

It goes without saying that if institutions such as the judiciary, police service, the Attorney General's office and the prison service do not operate effectively in their individual capacities, this will have a negative impact on the justice delivery system as a whole. For instance, owing to poor conditions of service and capacity constraints, if the police do not execute investigations well and

the accused are brought to court without sufficient evidence, it will hamper the work of the prosecutors as they base their work on the information they receive from the police. Similarly, if there is undue influence on judges and magistrates (whether political or otherwise), the delivery of justice in the courts becomes compromised. Furthermore, with insufficient budgetary allocations and poor conditions of service, institutions such as the prisons will not be able to effectively deliver key services, such as the rehabilitation of offenders. Therefore, there is a need for a holistic approach to solving challenges in the justice delivery system, as limitations in one institution will have a knock-on effect on the other institutions.

7.5

Important role of civil society organisations in improving conditions in detention centres

The important role that is being played by civil society organisations in strengthening the criminal justice system as well as improving conditions in detention centres cannot be overemphasised. Non-governmental organisations (NGOs) have worked hand in hand with the Zimbabwe Prison Services to improve the conditions of detention in the country's prisons and also to support the prison authorities and structures. Efforts aimed at improving the nutritional situation, food supply and cooking capacity in prisons, and providing clothing, blankets and other hygiene items deserve credit. The same

also goes for their efforts to improve water and sanitation conditions and to boost preparedness for cholera outbreaks. However, it needs to be reiterated that it is the role of the state to provide humane conditions in incarceration centres; hence the need for continued efforts by the state to ensure it takes a pro-active lead role in ensuring that these conditions exist. Meanwhile, the state could also support the role that civil society organisations are playing in improving conditions in detention centres by creating a more enabling environment for them to operate in.

7.6

Scope for an integrated caseflow management system

In Zimbabwe, there are no clear guidelines on caseflow management. Challenges related to caseflow management include:

- Unnecessary postponements of cases;
- Protracted investigations;
- Delays in delivering judgments by judicial officers (judges and magistrates);
- Delays in finalising review cases;
- Lack of funding and delays in providing Legal Aid assistance to indigent persons;
- Failure by court registrars and clerks, in some instances, to issue amended and warrants of release resulting in inmates spending unnecessary time in prison; and
- Lack of all-inclusive planning and strategy by

with insufficient budgetary allocations and poor conditions of service, institutions such as the prisons will not be able to effectively deliver key services, such as the rehabilitation of offenders.

stakeholders involved in the integrated justice system to achieve caseflow management.

The lack of clear caseflow management guidelines is regarded as one of the main reasons why the prisons are overcrowded, primarily due to delays in the movement of cases from filing to closure. Therefore, there is scope for the establishment of an integrated caseflow management system, enabled by effective ICT, which would allow for an automated and quicker flow of cases using an electronic filing system. This would help to improve accountability, data sharing, and evaluation as well as assist with information and document security.

8.

CONCLUSIONS AND RECOMMENDATIONS

the study found that despite a strong legislative framework ... there were a number of challenges at the implementation level.

In conclusion, the study found that despite a strong legislative framework – ranging from the constitution to various acts of parliament and also regional and international statutes mandating rights for pre- and post-trial detainees – there were a number of challenges at the implementation level. Among the key challenges was the poor administration of criminal procedure by law enforcement institutions and agents and the judiciary, which in many cases resulted in prejudice against pre-trial detainees and the violation of their rights.

Many pre-trial detainees had faced prolonged pre-trial incarceration due to the failure by the police to fully investigate their cases, so that their cases were tossed back and forth between the police and the Attorney General's

Office, and they were tossed back and forth between the courts and remand prison. Meanwhile, the lack of adequate resources within the judiciary and prison services resulted in inefficiency in dealing with trials and ensuring the pre-trial detainees spent the least amount of time possible awaiting trial.

There are also serious concerns about the condition of detention centres, including overcrowding, dilapidated infrastructure, and inadequate food and clothing for inmates. Unfortunately, owing to many years of neglect and underfunding, there seemed to be no sustainable solutions to these problems, despite the fact that non-state actors, such as NGOs, were working hard to try and improve conditions.

RECOMMENDATIONS

Rights of pre-trial detainees

To better safeguard the rights of pre-trial detainees, there is a need for:

- Increased awareness and implementation of the Constitutional provisions guaranteeing pre-trial detainees their rights while they are incarcerated by all key state institutions;
- Increased use of non-custodial measures such as diversion, particularly for young offenders;
- Increased cooperation between criminal justice institutions to ensure the efficient flow of cases from the moment of arrest until finalisation of a trial; and
- Firm judicial control over every stage of criminal proceedings.

Improving conditions of service for government employees

- The government must improve conditions of services for all state institutions in the justice delivery system, which would help to minimise institutional lethargy, motivate employees, promote greater effectiveness and efficiency, and reduce corruption.

Improving coordination between 'sentencing' and 'custodian' authorities

- A liaison committee should be established to

improve coordination between the ZPS and the judiciary to help alleviate overcrowding in prisons since there is reportedly no consultation or coordination at all between the 'sentencing authority' and the 'custodian authority', which cannot refuse to accept new inmates.

- Strengthening caseflow management
- The government and its partners should develop and implement an integrated caseflow management system, enabled by effective ICT, which will result in an automated and quicker flow of cases using an electronic filing system.
- A Caseflow Management Committee should also be established to ensure that cases in the Magistrates, High and Supreme Courts are dealt with expeditiously and that in future no-one spends months or years in remand prison.
- The operation of the parole system, which allows prisoners serving long sentences to be eligible for release with specific conditions before the expiry of their sentences, needs to be enhanced.
- Judges and magistrates should consider travelling to prisons to hold court hearings since this would reduce congestion in the courts and consequentially the number of remand prisoners.

Improving prisoners' welfare

- The government should immediately fund the repair of prison infrastructure across the country, and should engage other partners, such as donor organisations and the private sector, to assist.

- The involvement of volunteers, community groups and NGOs should be increased to provide meaningful programmes for prisoners since these improve morale and reduce inmate idleness.
- The government – through the Department of Social welfare and with support from non-state partners – should boost funding of the Zimbabwe Prison Services so that it can adequately care for pregnant women as well as infants and children who are incarcerated with their mothers and who need play areas, bedding, clothing and food for their growth, health and developmental needs.
- Prison officers need to be trained to assist pregnant prisoners by learning how to assess risk and about their extra requirements in terms of diet, nutrition, and general prenatal care.
- The rehabilitation aspect within the country's prisons – particularly the thrust towards providing inmates with sustainable social, technical and economic skills so that they can reintegrate more effectively into communities upon release – needs to be strengthened. The government should also enhance collaboration with NGOs to promote better community reintegration of offenders.
- Inmates should be trained on preventative health care, including basic sanitation, food preparation and personal hygiene.
- Prison officers should be trained to communicate with prisoners with hearing and speech impairments.

9.

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Zimbabwe Lawyers for Human Rights

Zimbabwe Lawyers for Human Rights (ZLHR) is a law based not for profit organization whose core objective is to foster a culture of human rights in Zimbabwe as well as encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the rule of law. It contributes towards the promotion, protection and respect of human rights through litigation, advocacy and research. ZLHR holds observer status with the African Commission on Human and People's Rights (ACHPR) and provides secretarial services to the Human Rights Committee of the SADC Lawyers Association and has affiliate status with the International Commission of Jurists (ICJ).



The Law Society of Zimbabwe

The Law Society of Zimbabwe was formed in 1981 to replace the previous bar association. The membership is drawn from all registered legal practitioners residing in Zimbabwe whether in private practice, in commerce or in civil service. It is a statutory body regulating the practice of law by registered legal practitioners in Zimbabwe. It is autonomous and has among its strategic objectives the creation of a human rights culture in Zimbabwe and a strong commitment to rule of law and independence of the legal profession.

Pre-trial detention in Zimbabwe:

Analysis of the Criminal Justice system and conditions of pre-trial detention

This study was conducted in order to develop a better understanding of the variance between the policy and legislative frameworks that govern pre-trial detention and the conditions in detention facilities in Zimbabwe, and to provide concrete recommendations to improve the situation.

The study found that the number of pre-trial detainees (PTDs) was high – approximately 30 percent of the total prison population – due to inefficiencies in the country's justice delivery system. Direct and indirect political control of the criminal justice system, severe underfunding, capacity constraints and poor conditions of service among institutions within the justice delivery system have also contributed to increasing inefficiency in caseload management, which has resulted in unnecessarily prolonged stays for many PTDs.

This excessive detention undoubtedly violates inmates' rights to freedom, dignity and a fair and speedy trial as enshrined in the constitution as well as in other national, regional and international statutes. The conditions in pre-trial detention were also found to be inhumane, with overcrowded prisons, run-down infrastructure and a shortage of basic services, nutritious food and adequate clothing, which also amounts to violations of the detainees' rights.

The study concludes that, while the country has an apparently adequate legislative framework to enable the realisation of the rights of pre-trial detainees, the implementation of these legislative provisions remains the major obstacle – due primarily to funding shortages, institutional capacity constraints, and the slow recovery in the country's socio-political and economic fortunes.

The report recommends a number of critical steps to improve the situation, including the establishment of an integrated caseload management system to enable more rapid processing of cases; more effective implementation of the parole system; an increase in government funding to upgrade the infrastructure at detention facilities, and provide adequate nutrition and clothing; and an improvement in social amenities so as to meet humane standards of treatment for detainees.

The report also argues that improved conditions of service for employees within various institutions in the criminal justice system – such as the police, prison services, Attorney-General's office and judiciary – would complement efforts to improve professionalism and efficiency in the country's justice delivery system.