

A wall once divided this courtyard in two. Awaiting-trial prisoners were held in the section closest to the administration block.

A measure of last resort

Research report on Remand Detention in South Africa

by the Centre for Applied Legal Studies

January 2013

This publication was supported by a grant from the Open Society Foundation for South Africa (OSF-SA)



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Legal Studies

Acknowledgements

The Centre for Applied Legal Studies (CALs) wishes to thank the following organisations and individuals for their valued contribution to the work outlined in this research report:

Funders:

- ❑ Open Society Foundation for South Africa (OSF-SA)

Partners:

- ❑ Wits Justice Project

Colleagues from CALs and the Wits School of Law:

- ❑ Kathleen Hardy (CALs)
- ❑ Lisa Chamberlain (CALs)
- ❑ Professor Bonita Meyersfeld (CALs)
- ❑ David Houze (Law School)
- ❑ Keamogetswe Thobakgale (CALs)
- ❑ Manson Gwanyanya (Law School)
- ❑ Lucy Geddes (CALs)
- ❑ Professor Raylene Keightley (CALs, 2009 – 2011)

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Acronyms

CALS	Centre for Applied Legal Studies
CBO	Community Based Organisations
CJS	Criminal Justice System
CPA	Criminal Procedure Act
CPF	Community Policing Forum
CSA	Correctional Services Act
DCS	Department of Correctional Services
DHA	Department of Home Affairs
DJF	Detention Justice Forum
DOD	Department of Defence
DoJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
HIV / AIDS	Human Immuno-deficiency Virus / Acquired Immuno-deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
IJS	Integrated Justice Sector
JCPS	Justice Crime Prevention and Security Cluster
LASA	Legal Aid South Africa
NCOP	National Council of Provinces
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
ORCJS	Office of the Review of the Criminal Justice System
RCJS	Review of the Criminal Justice System
SABC	South African Broadcasting Corporation
SAPS	South African Police Services
SCA	Supreme Court of Appeal
TAC	Treatment Action Campaign
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
WJP	Wits Justice Project

Executive summary

It should not be the general rule that persons awaiting trial shall be detained in custody.¹

The incarceration of accused persons, while awaiting trial, should be the exception rather than the norm. Practice in South Africa reflects the reverse, an exploitation of the use of remand often over a number of years. Increasingly, remand detainees are exposed to overcrowding and the associated problems of gang rape, the spread of communicable disease such as TB, HIV/AIDS and hepatitis, lack of access to medical care, lack of reading material and exercise, and lengthy periods of detention.² These conditions fly in the face of the principle that a person charged with a crime should be considered innocent until proven guilty and should be detained in conditions consonant with principles of human dignity. The State is under a legal obligation to provide facilities for remand detainees that allow for the minimal limitation of an individual's rights, while ensuring secure and safe custody. There is considerable evidence that South Africa is failing to live up to the aspirations of its own legal framework as well as international principles and practice.³

Remand detention is inextricably linked to the Criminal Justice System (CJS). In determining workable solutions to remedy the current conditions in remand detention facilities, this complex relationship will need to be properly considered. A combination of strategies including research, advocacy and strategic litigation must be used in conjunction with one another, to protect the fundamental rights of remand detainees. This is not only relevant to working methodologies but is also relevant to forming partnerships.

¹ Art. 9 ICCPR.

² Raphaely "Prisoners of the system" Saturday Star available at <http://www.iol.co.za/saturday-star/prisoners-of-the-system-1.1115118> (accessed on 16 January 2013).

³ See Fuzier "South African Prison System: An Indicator of a Country's Attitude" available at <http://www.capechameleon.co.za/printed-version/issue-7/human-rights2/> (accessed on 16 January 2013) and Rawoot "Report shows sorry state of South Africa's prisons" Mail & Guardian available at <http://www.mg.co.za/article/2012-10-14-report-shows-sorry-state-of-sa-prisons> (accessed 16 January 2013).

Introduction

In July 2011 the Centre for Applied Legal Studies (CALS) formed the CALS Remand Detainees Project (Remand Detainees Project) in its Rule of Law Programme. The aim of the Remand Detainees Project is to protect, through strategic litigation, the fundamental and constitutional rights of remand detainees in South African prisons.

The specific project objectives are as follows:

- i. To challenge the constitutionality of the lengthy detention of remand detainees who:
 - a) cannot post bail; and
 - b) are detained in conditions that violate their constitutional rights.
- ii. To contribute to the jurisprudence on sections 9, 10, 12 and 35 of the Constitution of the Republic of South Africa, 1996 (the Constitution), insofar as they apply to remand detainees.
- iii. To craft specific relief for remedying the current fundamental and constitutional defects regarding remand detainees to:
 - a) establish a mechanism to facilitate the release of remand detainees who cannot post bail; and
 - b) ensure that the conditions of detention do not violate their fundamental constitutional rights.
- iv. To make additional recommendations for remedying the current fundamental and constitutional defects regarding remand detainees.
- v. To engender collaboration amongst a broad spectrum of entities involved in or that have an interest in the remand detention legal process.

In the fulfilment of the objectives of the Remand Detainees Project, CALS has undertaken research on remand detention in South Africa and has engaged with stakeholders in the field of remand detention. This research report outlines the research and engagement process of CALS since July 2011. It provides an overview of remand detention in South Africa and identifies deficiencies in the system with a view to providing short and longer-term solutions to some of the difficulties identified.

It is hoped that this research report will be utilised, across all levels, by those working in and those who have an impact on the field of remand detention. The content of this research report, its conclusions and recommendations will further inform the continued work of CALS.

The regulatory framework of remand detention in South Africa

Introduction

When it comes to the treatment of prisoners and conditions in our prisons, former President Nelson Mandela famously remarked in *Long Walk to Freedom*, “no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”⁴ Nearly two decades into post-apartheid democracy, the treatment of inmates, including remand detainees, in South African prisons falls far short of the constitutional standards set. Despite South Africa’s vaunted commitment to deepening democracy, remand detainees, especially, have failed to realise the promise of the Republic’s universally hailed progressive Constitution and its concomitant statutory framework.

The term ‘remand detainee’ was adopted in the *Correctional Matters Amendment Act*, 5 of 2011. A remand detainee is defined as “a person detained in a remand detention facility awaiting the finalization of his or her trial, whether by acquittal or sentence, if such person has not commenced serving a sentence or is not already serving a prior sentence; and includes a person contemplated in section 9 of the Extradition Act, 67 of 1962.”⁵ The draft White Paper on Remand Detention Management in South Africa explains the preferred term, remand detainee, to describe an ‘awaiting-trial prisoner’ as being inclusive of all categories of un-sentenced persons in Department of Correctional Services’ (DCS) facilities, and awaiting further action by a court.⁶

According to the 2011/ 2012 Annual Report of the Judicial Inspectorate for Correctional Services, as of 31 March 2012, 30.06% of inmates were classified as remand detainees.⁷ Of these, 2470 remand detainees had already been held for more than two years and as many as 23 546 or 33% of all un-sentenced inmates had already been held for six months.⁸

The legal framework governing the management of remand detainees in South Africa is fundamentally rooted in human rights principles that find expression in domestic and international law. These domestic and international laws embody norms and guidelines that govern the way all inmates are to be treated and the responsibility of government to implement the legal regime implicated in the various branches of law. Accordingly, it is very important to consider domestic and international law relating to the management of remand detainees and the issues that affect them in South African prisons. Below, an analysis of the main provisions is provided.

⁴ Mandela (1994) 201.

⁵ s 1 Correctional Services Act, 111 of 1998.

⁶ “The definition by its nature excludes sentenced offenders (even when returned from parole break) as well as state patients (where a decision by a court has already been made) and persons awaiting deportation.” See Draft White Paper on Remand Detention Management in South Africa, p29 available at [http://www.dcs.gov.za/docs/landing/Draft %20White%20Paper02.pdf](http://www.dcs.gov.za/docs/landing/Draft%20White%20Paper02.pdf) (accessed 26 January 2013).

⁷ Judicial Inspectorate for Correctional Services 2011/ 2012 Annual Report, p27 available at <http://www.pmg.org.za/report/20121011-judicial-inspectorate-correctional-services-20111112-annual-report-anal> (accessed 26 January 2013).

⁸ As above.

1. Domestic legal framework

1.1 The Constitution of the Republic of South Africa, 1996

The founding provisions of the Constitution affirm that South Africa, as one, sovereign, democratic state is founded on, *inter alia*, the supremacy of the Constitution and the rule of law.⁹ As all laws must comply with the values and principles as contained in the Constitution, it is appropriate to first consider the various provisions that relate to the treatment of and conditions in which remand detainees are held. Section 9 of the Constitution, known as the equality clause, provides that everyone is equal before the law and this equality includes full and equal enjoyment of all rights and freedoms.¹⁰ Section 9 further provides for protection against unfair discrimination, whether direct or indirect, by the State or any person.¹¹ The inherent dignity of every person is recognised in section 10 of the Constitution, as is the protection to have that dignity respected and protected.

The right to freedom and security of the person is contained in section 12(1) of the Constitution. This includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way. The Constitution further contains, in section 35, the rights of all arrested, detained and accused persons. Every arrested person has, *inter alia*, the right to be released from detention if the interests of justice permit, subject to reasonable conditions.¹² Every detained person, under section 35(2) of the Constitution, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; as well as communication with, and to be visited by, that persons partner, next of kin, and chosen religious or medical practitioner.¹³ Every accused person, under section 35(3) of the Constitution, has the right to a fair trial, which includes, among others, the right to have their trial begin and conclude without unreasonable delay.¹⁴

The state, under section 7(2) of the Constitution, is under an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.

1.2 Criminal Procedure Act, 51 of 1977

The Criminal Procedure Act (CPA) makes provision for procedures and related matters in criminal proceedings. By the very nature of the subject matter it deals with, many provisions have an impact on remand detainees, who are in various stages of the Criminal Justice System (CJS). Some of the more pertinent provisions relating to remand detainees will be discussed briefly.

Section 50 provides the procedures to be followed once a person has been

⁹ s. 1(c).

¹⁰ s. 9(1) & (2).

¹¹ s. 9(3) & (4).

¹² s. 35(1)(f).

¹³ s. 35(2)(e) & (f).

¹⁴ s. 35(3)(d).

arrested. Sections 54 and 56 provide for alternative methods to secure the attendance of an accused before the magistrate's court by virtue of a summons or a written notice, respectively. The effect of bail is described in section 58 of the CPA as involving when an accused who is in custody is released on payment of, or the furnishing of a guarantee to pay, the sum of money determined and that he or she shall appear at the place, on the date and at the time appointed, for his or her trial or criminal proceedings. The provision of bail before an accused's first appearance in a lower court is provided for in section 59 of the CPA, often referred to as "police bail".¹⁵

When a court considers a bail application, the procedure is regulated by section 60 of the CPA. Where the court is satisfied that the interests of justice permit the release of an accused on bail, and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money.¹⁶ If, after such an inquiry, it is found that the accused is unable to pay the sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused.¹⁷ Conditions of bail may include, *inter alia*, reporting of the accused in person at any specified time and place to any specified person or authority, any place where the accused is forbidden to go, and any condition which in the opinion of the court will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused.¹⁸

Section 63A of the CPA allows for the release of accused persons or for the amendment of their bail conditions on account of prison conditions. The section allows the Head of a Correctional Centre to apply to a court for the release of an accused either on bail or warning, or for an amendment to the accused's bail conditions imposed by the court.¹⁹ The Head of a Correctional Centre may make such an application when satisfied that the prison population is reaching such proportions that it constitutes a threat to the human dignity, physical health or safety of an accused. The category of accused persons to which section 63A finds application is limited to those who are charged with offences falling into the category of offences for which the police can grant bail under section 59 of the CPA; or those offences falling under Schedule 7 of the CPA.²⁰ In addition, the accused person must have been granted bail by any lower court but is unable to pay the amount of bail set, and may not be detained in respect of any other offence falling outside of the mentioned categories for section 63A to be applicable.

The CPA further makes provision for a court to investigate any delay in the completion of the criminal proceedings that appears to be unreasonable and which could cause substantial prejudice to any of the parties, including

¹⁵ s. 59A CPA provides for "prosecutor's bail".

¹⁶ s. 60(2B)(a).

¹⁷ s. 60(2B)(b).

¹⁸ s. 62 CPA allows a court to add further conditions of bail and s. 63 CPA allows the court to amend conditions of bail.

¹⁹ s. 63A(1)(aa) & (bb).

²⁰ Schedule 7 offences include public violence, culpable homicide, arson and malicious injury to property.

witnesses.²¹ The court, in deciding whether there has been an unreasonable delay, will consider various factors, including but not limited to the duration of the delay; the reasons advanced for the delay; the effect of the delay on personal circumstances of the accused and witnesses; and the seriousness of the charge.²² If the court finds that the proceedings have been delayed unreasonably, the court may make an order to eliminate the delay and any prejudice arising from it, including but not limited to an order refusing further postponements; granting a further postponement subject to certain conditions; or where the accused has not yet pleaded to the charge that the case be struck off the roll and that prosecution cannot be instituted again without written instructions of the Director of Public Prosecutions.²³

1.3 Correctional Services Act, 111 of 1998

The Correctional Services Act (CSA) currently serves as the legislative focal point for the management of remand detainees. The CSA provides for, *inter alia*, the establishment, functions and control of the DCS; the rights and obligations of un-sentenced offenders; and the custody of all inmates under conditions of human dignity.²⁴ More recently the Correctional Matters Amendment Act, 5 of 2011 (Amendment Act) was introduced and makes detailed provision for the management, safe custody and well being of remand detainees. The CSA and its regulations together contain important provisions to enforce the rights of remand detainees. Some of these provisions include:

- ❑ Chapter III of the CSA deals with the custody of all inmates under conditions of human dignity and includes, among others, provisions on safe custody, accommodation, nutrition, clothing and bedding, exercise, health care, reading material and contact with community. Part C of Chapter III on security contains provisions on searches, segregation and the use of force.
- ❑ Chapter V of the CSA, as amended by the Amendment Act, makes provision for the management of remand detainees. The Amendment Act extended Chapter V considerably. The starting point of remand detention, as contained in section 46(1) CSA is that remand detainees may be subjected only to those restrictions necessary for the maintenance of security and good order and must, where practicable, be allowed all the amenities to which they have access outside the remand detention facility.²⁵

²¹ s. 342A CPA.

²² s. 342A(2) CPA.

²³ s. 342A(3) CPA.

²⁴ The term "inmate" refers to remand detainees and sentenced offenders.

²⁵ The definition of "remand detention facility" was inserted by the Amendment Act and is found in s. 1 of the CSA. A remand detention facility is defined as "a place established [...] as a place for the reception, detention or confinement of a person liable to detention in custody, and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purposes of detention, protection, treatment or otherwise, and all quarters used by correctional officials in connection with any such remand detention facility, and for the purposes of section 115 and 117 includes every place used as a police cell or lock up." Remand detention facilities were established under section 5 CSA, with effect from 1 March 2012, and published under Government Gazette No 35071, available at <http://www.dcs.gov.za/docs/landing/1-35071%2027-2%20CorServ.pdf> (accessed 26 January 2013).

- ❑ Chapter V, read with the Regulations, makes provision for food and drink for remand detainees, clothing²⁶, the safekeeping of information and records, and makes special provision for pregnant, disabled, aged and mentally ill remand detainees.
- ❑ Section 49E of the CSA allows for the Head of a remand detention facility to apply to the court for the release of a terminally ill or severely incapacitated remand detainee. Such an application may be made in circumstances where a medical practitioner has provided written advice that the remand detainee is suffering from a terminal disease or condition or where the remand detainee is rendered physically incapacitated to the extent that such incapacitation severely limits daily activity or inmate self-care; the remand detention facility cannot provide adequate care required; and there are appropriate arrangements within the community to which the remand detainee will be released for supervision, care and treatment.²⁷
- ❑ Section 49G of the CSA, not yet promulgated, is an important step in ensuring the protection of and respect for the rights of remand detainees.²⁸ The section provides for a maximum incarceration period of two years for a remand detainee. This is an important step that illustrates the inextricable relationship between remand detainees, DCS and the criminal justice system (CJS). When promulgated, the section will mandate that no remand detainee may be detained for a period exceeding two years, from initial date of admission into the remand detention facility, without the matter being brought to the attention of the court.²⁹ The court will, after referral by the Head of the remand detention facility, determine further detention of the person or their release subject to appropriate conditions.³⁰ After such a referral and where the accused is further remanded by the court, the Head of the remand detention facility is obliged to thereafter refer the matter to the court for reconsideration on an annual basis.³¹

1.4 The South African Police Service Act, 68 of 1995

The South African Police Service (SAPS) Act acknowledges the need to provide a police service to ensure the safety and security of all persons and to uphold and safeguard the fundamental rights of every person as guaranteed by the Constitution. The function of the police, as those in primary contact with

²⁶ Remand detainees will be provided with uniforms, as well as other clothing where needed. The section is yet to be promulgated and will be brought into operation when all the uniforms are available.

²⁷ s. 49E came into operation on 1 December 2012 <http://www.dcs.gov.za/Publications/Legislation/Proclamation%20of%20section%209%20of%20the%20Correctional%20Matters%20Amendment%20Act.pdf> (accessed 26 January 2013).

²⁸ For the reasons for delay in promulgation and when it is expected to be promulgated, see Budget Vote Speech of the Deputy Minister of Correctional Services, 16 May 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=70014> (accessed 26 January 2013) and "Guilty or Not-Guilty: Behind bars Anyway" Helen Suzman Foundation Roundtable Series available at <http://witsjusticeproject.com/2012/10/01/helen-suzman-roundtable-booklet-guilty-or-not-guilty-behind-bars-anyway> (accessed 26 January 2013).

²⁹ s. 49G(1).

³⁰ s. 49G(3).

³¹ s. 49G(4).

remand detainees, is important in the system of remand detention. The police are the agents that are continually moving between the system of corrections, including remand detention, and the CJS.

1.5 The Extradition Act, 67 of 1962

The definition of remand detainee includes individuals detained under warrant for the purposes of extradition.³² The Extradition Act is therefore relevant to the system of remand detention and persons detained under the Act are entitled to the same rights and privileges as remand detainees while they are so incarcerated.

1.6 The Child Justice Act, 75 of 2008

The Child Justice Act establishes a criminal justice system for children who are in conflict with the law and are accused of committing offences. Chapter IV of the Act contains detailed provisions regarding the release or detention and placement of a child before sentencing. Where a decision is taken that a child is to remain in detention or is to be detained, the least restrictive option possible is to be given preference.³³ The most restrictive option is detention of a child in prison and should be used as a measure of last resort.³⁴ A presiding officer must consider various factors and all evidence placed before the court before making the decision to remand a child to prison and the child must thereafter be brought before court every 14 days for reconsideration of the order.³⁵

1.7 The Probation Services Act, 116 of 1991

Although probation services are offered in the main to sentenced offenders, there are aspects of the work of probation officers relevant to remand detainees. In fact there may be scope for further use of probation officers in the system of remand detention. Currently the Probation Services Act allows probation officers to investigate the circumstances of an accused with a view to reporting to the court on treatment and committal of the accused to an institution and the rendering of assistance to the family.³⁶ Probation officers further play an important role in the investigation of the circumstances of an accused and in the provision of a pre-trial report that recommends the desirability or otherwise of a prosecution.³⁷ Probation officers also play an important role in the facilitation and completion of diversion programmes.

1.8 Draft White Paper on Remand Detention Management in South Africa

Although currently in draft form, the White Paper on Remand Detention Management in South Africa (Draft White Paper) is a critical addition to the White Paper on Corrections, 2005 as it is intended to communicate the principles that will drive the detention management of remand detainees. The White Paper on Corrections had rehabilitation as a central focus, a concept not relevant to remand detainees. The White Paper on Corrections recognises

³² s. 1 CSA.

³³ s. 26(1) Child Justice Act.

³⁴ Only children 14 years and older may be detained in a prison s. 30(1) Child Justice Act.

³⁵ s. 30(3) & (4).

³⁶ s. 4(1)(a) Probation Services Act.

³⁷ s. 4(1)(j) Probation Services Act.

the difficulties created by the apartheid prison system that are still felt today, the importance of the promotion of healthy family relations and societal responsibility for safety and well-being and thus remains an important policy document. However, in the White Paper on Corrections, the DCS describes having been “saddled” with the responsibility of keeping remand detainees and that such a perception cannot be sustained. Many issues and challenges that arise in relation to the system of remand detention are described in the White Paper on Corrections, as is the recognition of the policy gap in relation to the responsibility for “awaiting trial detainees.” The Draft White Paper provides necessary clarity about the management of remand detainees as a new branch established within DCS.

The primary basis of the Draft White Paper is the right to be presumed innocent until proven guilty and thus the concomitant principle applies – a very limited restriction on remand detainees, that while the right to movement is curtailed by the warrant that empowers their detention, continuity of their basic human rights is obligatory.³⁸ The principles that will drive detention management of remand detainees are as follows:³⁹

- *Remand detention should never be used to penalize or punish any person or as a punitive centre;*
- *Remand detention occurs as a result of an order of a court of law;*
- *Remand detention should be managed in accordance with the highest possible ethical and professional standards;*
- *Remand detainees should be informed of their rights, obligations and any censures attending a breach of the code of conduct;*
- *Remand detainees should be separated from sentenced inmates;*
- *Remand detention requires greater levels of effectiveness and integration in the CJS; and*
- *Remand detention institutions should be subject to multi-facets of oversight and control, including by the Judiciary, the Executive and the legislature.*

The Draft White Paper is divided into 10 chapters covering all aspects of the management of remand detention and includes, the legal and operational framework of remand detention; governance; the rights and privileges of remand detainees; services and programmes; orderly, safe and secure remand detention; the use of integrated systems; overcrowding; and oversight and control.

1.9 Directives for Operation and Maintenance of Detention Facilities, B-Order, Sub-Order 2: Safety and Security (B-Orders)

The B-Orders provide further detail to the CSA Regulations on the day-to-day management and administration of a detention facility and ensure consistency across the DCS and its various correctional centres and remand detention facilities. The B-Orders are extensive and include measures on various aspects of management, including the safe custody of prisoners; accommodation and separation of prisoners; entrance control; searching and the use of force.

³⁸ Draft White Paper 9.

³⁹ As above.

1.10 National Prosecuting Authority's Awaiting Trial Detainee Guidelines

The National Prosecuting Authority (NPA) as a key role player in the CJS published Awaiting Trial Detainee Guidelines (NPA Guidelines) to “sensitize prosecutors as to the various options available to try to reduce the number of awaiting trial detainees.”⁴⁰ The NPA Guidelines recognise that prosecutors can and must play a vital role in ensuring that:⁴¹

- Accused persons are arrested for justifiable reasons;
- Further incarceration of an accused person on an on-going basis is justified as the only viable option;
- Necessary instructions for further investigations are issued as soon as possible and are monitored thereafter;
- All remands are both necessary and justifiable; and
- Maximum use is made of each court appearance to advance the case towards finalisation.

Although in the form of guidelines,⁴² it is a useful consolidated document that contains pro forma court notices; important and useful contact details; measures to reduce the number of awaiting trial detainees both prior to and at the first appearance; methods to fast track certain awaiting trial detainee cases; information relative to cases of juveniles and information on management tools and role players.

2. **International legal framework**

2.1 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) adopted in response to the grave human rights violations committed during the Second World War, guarantees the right not to be subjected to arbitrary arrest, detention or exile.⁴³ Article 11 further stipulates that every person charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial.

2.2 The International Covenant on Civil and Political Rights, 1966

South Africa ratified the International Covenant on Civil and Political Rights (ICCPR) on 10 December 1998. The ICCPR provides that:

- *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*⁴⁴
- *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge [...] and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subjected to guarantees to appear for trial, at any other stage of the*

⁴⁰ NPA Guidelines 6.

⁴¹ As above.

⁴² It is within the discretion of the respective Director of Public Prosecutions to determine which sections to implement.

⁴³ Art. 9.

⁴⁴ Art. 9(1).

*judicial proceedings, and, should occasion arise for execution of the judgment.*⁴⁵

- *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*⁴⁶
- *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.*⁴⁷

In addition to the above named rights, the ICCPR recognises the right of an accused person to be tried without undue delay.⁴⁸

2.3 The African Charter on Human and Peoples' Rights, 1981

South Africa ratified the African Charter on Human and Peoples' Rights (African Charter) on 9 July 1996. The right of every person to respect for life and integrity of person is recognised in article 4 of the African Charter. Article 5 provides "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." The right to liberty and security of the person and the right not to be arbitrarily detained is recognised in article 6, while article 7 provides for the right to be presumed innocent until proven guilty as well as the right to be tried within a reasonable time.⁴⁹

The African Charter places the obligation on the State to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the Charter.⁵⁰ State parties have the further duty to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.⁵¹

In addition to the international and regional human rights treaties, the international regime has a number of standards and guidelines relevant to remand detention in South Africa. These will be discussed in brief in the sections to follow.

2.4 The United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 and 1977

The United Nations Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules) represent the "general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."⁵² While the

⁴⁵ Art. 9(3).

⁴⁶ Art. 10.

⁴⁷ Art. 10(2)(a).

⁴⁸ Art. 14(c).

⁴⁹ Art. 7(1)(b) & (d).

⁵⁰ Art. 25.

⁵¹ Art. 26.

⁵² Preliminary Observations, UN Standard Minimum Rules.

Rules recognise that they may not be capable of application in all places and at all times, they should create a constant endeavour on the part of the State to overcome practical difficulties in achieving these minimum standards, in the knowledge that they represent the minimum conditions which are accepted as suitable by the United Nations.⁵³

The UN Standard Minimum Rules are divided into two parts, Part I covers the general management of institutions and is applicable to all categories of prisoners. It contains detailed provisions on aspects including but not limited to accommodation, information provided to detainees, clothing, food, physical exercise, medical services, and discipline and punishment. Part II contains rules relevant to special categories of prisoners and Part C contains the provisions relevant to prisoners under arrest or awaiting trial. Part C contains provisions that affirm the rights of remand detainees, such as the right to be presumed innocent until proven guilty; to be kept separate from convicted prisoners; to be allowed to wear their own clothing or dress that differs from convicted prisoners; and the ability to procure books, newspapers, writing materials and other means of occupation as are compatible with the interest of the administration of justice.⁵⁴

2.5 The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988

The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Body of Principles) are principles that apply for the protection of persons under any form of detention. The Body of Principles recognise that a person under any form of detention must be treated in a humane way and with respect for their inherent dignity.⁵⁵ It further provides, among others, for the protection afforded to remand detainees to be treated in a manner that accords to their unconvicted status and the right to communicate with and receive visits from family members.⁵⁶

2.6 The Kampala Declaration on Prison Conditions in Africa, 1996

The Kampala Declaration on Prison Conditions in Africa (Kampala Declaration) recognised the challenges faced by prisons all over the continent in respect of overcrowding of prisons reaching inhumane levels; lack of hygiene; insufficient or poor food sources; difficult access to medical care; a lack of physical activities or education; and the inability to maintain family ties. With the challenges faced by so many African prisons in mind, it was recommended, *inter alia*, that prisoners retain all rights not expressly taken away by virtue of their detention; that prisoners have living conditions compatible with human dignity; and the detrimental effects of imprisonment should be minimized so that prisoners do not lose their self-respect and sense of personal responsibility.

The Kampala Declaration further acknowledges the challenge of remand detention in African prisoners, that a majority of prisoners are often awaiting

⁵³ As above.

⁵⁴ Part C Art. 84 – 93.

⁵⁵ Principle 1.

⁵⁶ Principles 8 & 19.

trial and in many instances for several years. It is recommended that the police, prosecuting authority, and the judiciary be aware of the problems caused by prison overcrowding and join the prison administration in seeking solutions to overcome this. Further recommendations include that judicial investigations and proceedings ensure that remand detainees are kept in detention for the shortest possible period and that there should be a system for regular review of the time detainees spend on remand. Important recommendations are also made in respect to alternative sentencing as a means to reduce prison overcrowding and that the African Commission on Human and Peoples' Rights (African Commission) co-operate with non-governmental organisations and other qualified institutions to ensure that the recommendations made are implemented in all Member States.

2.7 The Arusha Declaration on Good Prison Practice in Africa, 1999

The Arusha Declaration on Good Prison Practice in Africa (Arusha Declaration) noting that the conditions in a majority of African prisons fall short of minimum standards, allows the prison services in Central, Eastern, and Southern Africa to agree, among others, to:

- Promote and implement good prison practice, in conformity with international standards and to adjust national laws to meet these standards;⁵⁷
- Enhance the professionalism of prison staff and improve their working and living conditions;⁵⁸
- Provide training programmes to prison staff that incorporate human rights standards in a meaningful and relevant way;⁵⁹
- Establish a criminal justice mechanism comprising all components in the CJS to co-ordinate activities and co-operate in the solution of common problems;⁶⁰ and
- Invite civil society groups into the prisons to work in partnership with the prison service to improve conditions of prisons and the working environment of prisons.⁶¹

2.8 The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, 2002

The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (Ouagadougou Declaration) while commending the measures taken across Africa to improve prison conditions, still recognizing that there are considerable shortcomings in the treatment of prisoners, aggravated by shortages of facilities and resources. A number of recommendations are made to alleviate these challenges and a plan of action is put into place to implement the Ouagadougou Declaration as a source of inspiration for concrete action.

⁵⁷ Clause 1.

⁵⁸ Clause 3.

⁵⁹ Clause 5.

⁶⁰ Clause 6.

⁶¹ Clause 7.

The plan of action includes the following measures:

- *Reducing the prison population:* Through the use of alternatives to penal prosecution, such as diversion; recognition of restorative justice approaches; the decriminalisation of offences found to be rogue and outdated; and more cooperation between the police, prison services and courts to ensure trials are speedily processed and reduce the delays of remand detention as well as greater use of paralegals in the criminal process.
- *Making African prisons more self-sufficient:* Through the development of appropriate technology to reduce costs; the promotion of transparent management of prisons; and encourage training course and study visits for staff on best practices in prison management.
- *Promoting the reintegration into society of alleged and convicted offenders:* By ensuring that un-sentenced prisoners have access to development programmes; by promoting vocational training programmes certified to national standards; promoting contact with the family and community; and through extension of the use of open prisons.
- *Applying the rule of law to prison administration:* By ensuring that prisons are governed by rules that are publicised and made known to staff and prisoners; encouraging independent inspection mechanisms, including the national media and civil society; and ensuring that staff are adequately trained in the application of laws, principles and rules applicable to the prison.
- *Encouraging best practice:* Through the development and promotion of models for replication throughout the continent; and emphasising primary health care and linking the health care of prisoners with the Ministry of Health.
- *Promoting regional and international Charter's on Prisoners' Rights.*

The principles and guidelines discussed above are by no means a closed list and the international and regional framework on remand detention and the rights of detained persons is extensive.⁶²

⁶² Further instruments include the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment, 1984; the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment, 2002; the Robben Island Guidelines, 2002; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985; Resolutions of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990; United Nations Rules for the Protection of Juveniles deprived of their Liberty, 1990; and United Nations Measures Standard Minimum Rules for Non-custodial Measures (Tokyo Rules).

An analysis of the regulatory framework in practice

Introduction

When one considers the South African regulatory framework against the recent outbreak of violence in prisons across the country⁶³, it leaves an important question unanswered – where is the gap that the regulatory framework seems to be falling through?

With a few exceptions, the South African framework on a whole provides for the adequate protection and promotion of the rights of remand detainees. Why then, do we have the high levels of overcrowding, violence, corruption, crime, HIV/AIDS and TB transmission within our prison population, to name a few?

At first glance it would seem that the difficulty lies in the implementation of the regulatory framework. While this is true, it too is a loaded statement - the implementation of which provision and where? Remand detention brings a range of systems and stakeholders together making it complicated terrain to traverse.

Testimony of a remand detainee

I am not the same person, mentally and emotionally (referencing the delay in his criminal trial).

There are on average 70 - 75 persons in a cell designed for 20 with 1 urinal, 1 toilet that doesn't flush, 2 basins and a double shower with blocked drains. There is a smell from burst pipes, blocked drains and toilets that do not flush (referencing the living conditions).

⁶³ Since the start of 2013 there have been violent outbreaks in St. Albans Prison, Eastern Cape, Groenpunt Prison in the Free State and Pollsmoor Prison in the Western Cape. The underlying reasons for the violent outbreaks include prison conditions, such as overcrowding, quality of food and dissatisfaction with prison administration. In Pollsmoor the violence was gang related. These serve as current examples of the severity of the effects that poor prison conditions have on those detained. In this regard see *Third Prisoner dies following St. Albans gang violence* Times Live SAPA 19 January 2013 at <http://www.timeslive.co.za/local/2013/01/19/third-prisoner-dies-following-st-albans-gang-violence> (accessed 29 January 2013) and *Correctional Services Aims to prevent Pollsmoor Prison fights* 26 January 2013 at <http://www.sabc.co.za/wps/portal/news/main/tag?tag=Pollsmoor%20Prison> (accessed 29 January 2013).

1. Identification and analysis of causes of prolonged continued remand detention

It is impossible to undertake an analysis of remand detention in South Africa without, at the same time investigating relevant parts of the process of the CJS. In this sense, the CJS includes the process from an arrest by the SAPS through to the pre-trial and trial stages as well as sentencing procedure. The Draft White Paper recognises CJS matters as one of the challenges of remand detainee management.⁶⁴ There are various role-players involved in the CJS from time of arrest to conviction and sentence or acquittal. In practice, this has transformed what should be a straightforward process into a complex, separate yet intertwined administrative challenge. The CJS consists of five core departments, namely the SAPS; the Department of Justice and Constitutional Development (DoJCD); the NPA; the DCS; and the Department of Social Development (DSD).⁶⁵ The Justice Crime Prevention and Security (JCPS) Cluster further includes the Department of Defence (DOD) and the Department of Home Affairs (DHA).⁶⁶ In addition to these core departments, there are various other stakeholders that impact on the CJS, including Legal Aid South Africa (LASA), members of the Law Society of South Africa (LSSA) as private practitioners; probation officers and social workers; and private bodies rendering services to the CJS, such as providing court transcripts.

While efforts have been made towards achieving an Integrated Justice System (IJS) and resolving challenges in the CJS, these efforts have not yet been felt by those directly affected by the CJS. One of these initiatives is the Review of the CJS (RCJS), which has resulted in the establishment of the Office of the Criminal Justice System Review (OCJSR). The OCJSR will drive the implementation of the seven-point plan, as approved by Parliament, and resulting from the RCJS. This plan must be “adopted and implemented in an integrated and holistic manner to achieve a new dynamic and coordinated CJS.”⁶⁷ The seven-points are as follows:

- *Adoption of a single vision and mission leading to a single set of objectives, priorities and performance measurement targets for the CJS by the JCPS cluster;*
- *Establishment through legislation or by protocol a new and realigned single CJS coordinating and management structure;*
- *Making substantial changes to the present court processes in criminal matters through practical, short and medium term proposals to improve the performance of the courts, especially and initially the Regional Courts;*
- *Implementation of key priorities identified for the component parts of the CJS, which are part of or impact upon the new court process, especially as it pertains to improving capacity;*
- *Establishment of an integrated and seamless national CJS IT database/ system containing all information relevant to the CJS and review and*

⁶⁴ Draft White Paper, 10.

⁶⁵ Draft White Paper, 33.

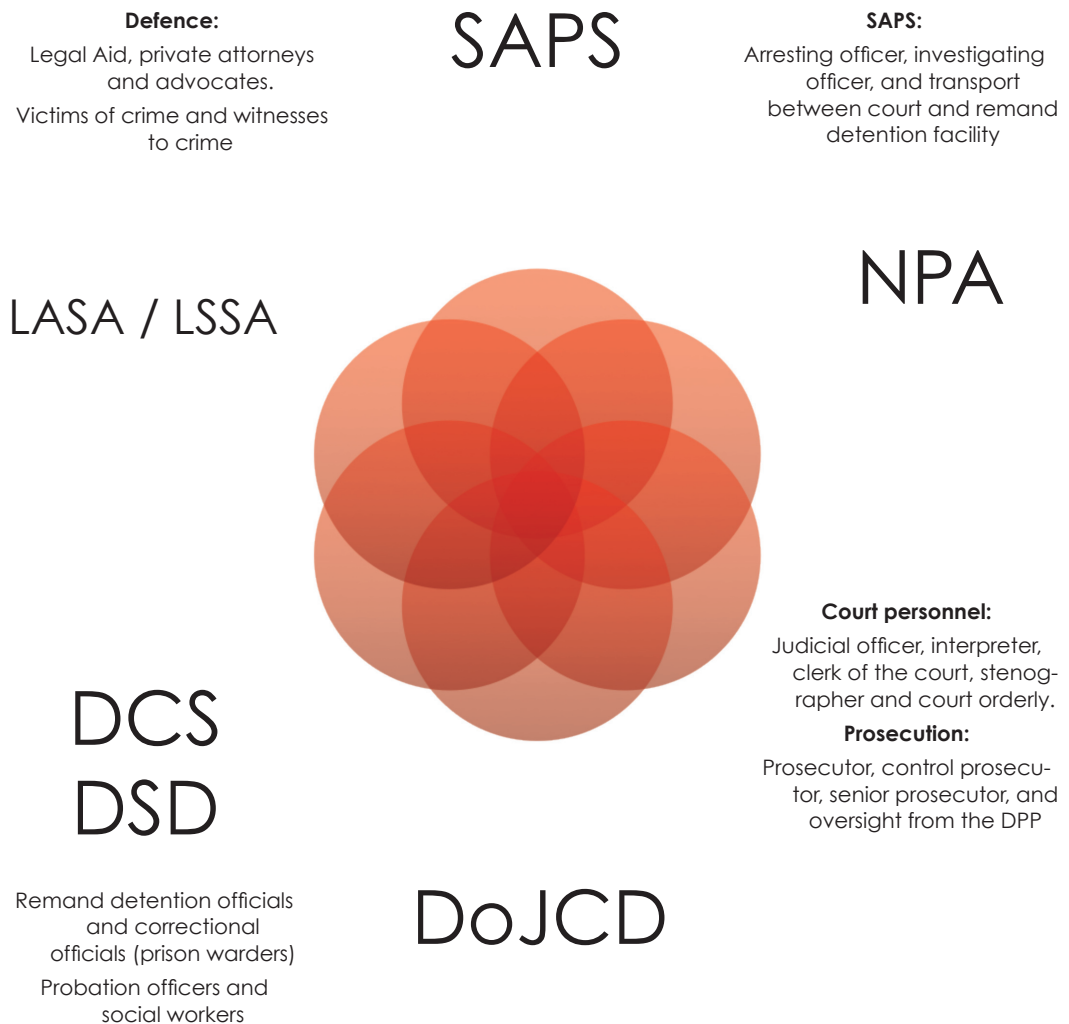
⁶⁶ As above.

⁶⁷ Draft White Paper, 40.



- harmonise the template for gathering information relating to the CJS;
- Modernization of all aspects of the systems and equipment of the CJS, including the fast tracking of the implementation of the present projects; and
- Involvement of the population at large in the fight against crime by introducing changes to the Community Policing Forum (CPF) regime, including expanding the role to deal with all matters in the CJS for example policing and parole boards as well as the provision of financial and administrative infrastructure to give it "teeth".

Diagram illustrating the various role players in the CJS



CALS has, from the inception of the Remand Detainees Project, engaged with various role players in the CJS. Importantly, CALS has had the opportunity to engage directly with remand detainees currently in the CJS and remand detainees who have previous experience of the CJS.⁶⁸ This has provided an invaluable insight into the day-to-day struggles of remand detainees in enforcing their rights as guaranteed under the Constitution. It has further allowed critical analysis of the regulatory framework, based on first hand, accurate accounts of the CJS.

1.1 Remand detention and bail

“Bail serves not only the liberty interest of the accused, but the public interest by reducing the number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner.”⁶⁹ The Constitution guarantees that every arrested person has the right to be released from detention if the interests of justice permit and subject to reasonable conditions.⁷⁰ It is well recognised that detention while awaiting trial should be the exception rather than the norm. If this is the accepted starting point, we should determine why bail is often seen as a challenge in the CJS and a contributing factor to the high levels of remand detention.

In a recent research project on *Bail and Remand Detention, Entry Points into Evaluating Gauteng’s Court Stakeholders*⁷¹ the following challenges were identified in the administration of bail in Gauteng’s criminal courts:

- The process to verify the address and the identity of an accused person, often resulting in further delays and postponements while the accused is remanded in custody;
- Insufficient investigations into the amount of bail to be set by the courts and the non-application of non-financial bail conditions by the courts;
- The reverse onus for Schedule 5 and Schedule 6 offences;⁷²
- Early arrests by police and lack of training of police;
- Poor administrative work by prosecutors and failure to consider the NPA guidelines;
- Lack of court infrastructure and equipment;
- Saturated court rolls;
- Poor training across the CJS and poor implementation of learning and knowledge; and

⁶⁸ This engagement has resulted from written correspondence to CALS from remand detainees as well as through civil-society partnerships.

⁶⁹ *S v Dlamini, S v Dladla & Others, S v Joubert, S v Schietekat* 1999 (7) BCLR 771 per Kriegler J at [101].

⁷⁰ s. 35(1)(f).

⁷¹ Leslie (2012).

⁷² Where an accused is charged with a Schedule 5 offence (such as treason, murder or rape), the accused person has to, in terms of s. 60(1)(b) CPA, prove that the interest of justice permit their release on bail. Similarly, s. 60(1)(a) CPA provides that an accused charged with a Schedule 6 offence (premeditated murder or rape when committed in circumstances where the victim was raped more than once) has to prove that exceptional circumstances exist which in the interest of justice permit their release on bail. The constitutionality of the “reverse onus” provision was challenged in *S v Dlamini, S v Dladla & Others, S v Joubert, S v Schietekat* 1999 (7) BCLR 771 and was found to be constitutional.

- Failure of case-flow management.

The experience of stakeholders in the CJS was thus found to be a combination of the disjuncture between theory and practice, poor relationships among the stakeholders and issues of human resources.⁷³

While the experience of the CJS by remand detainees differs considerably on some levels from that of the stakeholders, the challenges remain the same. There are high numbers of remand detainees who are denied bail on the basis of their alleged commission of Schedule 5 or 6 offences who are unable to prove the reverse onus. From interactions with this category of remand detainees it is apparent that there is improper consultation with the accused by their legal representation before a formal bail application before the court. Many of the remand detainees do not understand why bail was refused and are not provided with reasons for the refusal. Although this category of alleged offenders constitutes a large percentage of the remand detainee population, there too are large numbers of accused persons who are detained unnecessarily due to poor administration in the courts. There are also a large number of remand detainees who are held pending verification of their address and / or identity by the SAPS or the DHA. Of the gravest concern is the category of remand detainees who are detained despite having been granted bail. This is a serious challenge in our CJS that needs to be addressed urgently. It is also a challenge that has been denied by certain stakeholders or dismissed due to the alleged small number of individuals detained under these circumstances. Even if the allegation is correct and this category of remand detainees comprises only a small percentage of the remand detention population at a given time, the amount of individuals who pass through remand detention facilities for short periods of time under these circumstances should be determined. This is likely unconstitutional, entirely unnecessary and will have a definite impact on the living conditions in the facilities. The practice of inquiring into the ability of the accused to pay bail and the appropriate amount is fraught with inconsistencies⁷⁴ and an infringement on the right to equality of indigent persons.

1.2 Remand detention and access to legal assistance

Access to legal representation forms an important part of the broader concept of access to justice.⁷⁵ The right to access to justice is guaranteed under sections 34 and 35 of the Constitution.⁷⁶ South Africa has made considerable progress in the provision of legal assistance to the poor and indigent in our society since our new constitutional era. As commendable as the efforts to ensure equal access to justice are, our society remains deeply divided and unequal along the line of financial means. Thirteen years later, the situation as described by McQuoid-Mason remains the same: “[t]he main vehicle for the delivery of

73 Leslie 31.

74 Leslie 14.

75 Speech by Minister Jeff Radebe, at the University of Cape Town, on the challenges facing access to justice in SA 16 October 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=31523&fid=87425> (accessed on 30 January 2013).

76 s. 34 provides for the right to have any dispute that can be resolved by the application of law decided in a fair public hearing and s. 35 provides for the right to a fair trial.

access to justice for the poor in South Africa is the Legal Aid Board.”⁷⁷ In the period from 1 April 2011 to 31 March 2012, LASA took on 382 125 new criminal matters alone.⁷⁸

Despite this, one of the most common complaints of remand detainees is the inability to access legal representation or the dissatisfaction with their legal representation. These complaints are directed at private representation as well as LASA. In interactions with remand detainees, CALS is often informed that legal representatives do not consult with the remand detainees outside of their court appearances; legal representatives fail to properly explain the court process to remand detainees, leaving them confused and frustrated; and at times agree to further remands without first consulting with and explaining the reasons to their client. The role played by the accused's legal representative in the CJS is important and imperative to the process and timely conclusion of the case.

1.3 Remand detention and court administration

Another area identified as problematic and contributing to the increased and prolonged remand of many detainees is general court administration. This relates to management of court files, records, transcripts, systems used to capture court data, equipment, and resources available to court personnel. Stakeholders in the CJS generally concur that challenges in court administration make their jobs difficult which results in delays in the criminal justice process. The impact of poor court administration filters to remand detainees and results, at times, in extended periods of delay. Lost transcripts, in both hard and soft copy, occur frequently. Once a remand detainee has been through the tedious process of either securing the money to pay for the transcripts or bringing a successful application to court for the State to cover the cost thereof, it is often found that the records are missing. A transcript is required when lodging an appeal and often in instances where there has been a change in legal representation after a trial has already commenced. CALS is aware of instances where the case is remanded continually for periods extending beyond six months while trying to locate the missing transcript. There is no centralised electronic system in place. The diligence or otherwise of individual court personnel is relied upon to ensure that proper records are kept and maintained.

Trials are often delayed due to lack of infrastructure. In CALS' experience, leaking roofs resulting in flooding, broken air-conditioning units, faulty recording equipment, and fire damage result in further delays sometimes for weeks at a time. Experience has also shown a trend in many courts where tardiness of all court personnel is condoned and accepted as normal practice. Often times a court will start after 10:00 and will sit until teatime, usually around 11:15. The court will adjourn for tea and resume again often over a half hour later. The court will then adjourn for over an hour's lunch and will sit until 15:30. That is approximately three and a half hours of court sitting. If more effort were made, court personnel were held to account, and barriers to the court sitting were

⁷⁷ McQuoid-Mason (1999) 17 Windsor Y.B. Access Just. 230 4.

⁷⁸ LASA Annual Report 2011 / 2012, 57 available at <http://www.legal-aid.co.za/wp-content/uploads/2012/12/Legal-Aid-SA-Annual-Report-2012.pdf> (accessed 30 January 2013).

addressed with a view to removing them as far as possible, it would alleviate the number of cases on the roll and further would reduce the prolonged continued detention of many individuals.

Testimony of a remand detainee

After my co-accused changed legal representation, the new legal representative had to obtain the transcript to enable him to proceed with the trial.

The transcript was lost.

My co-accused refused to accept the notes taken by the Magistrate. My trial has been delayed for months as a result and I don't know what to do.

1.4 Remand detention and investigation

The concept of "arrest first, investigate later" has been flagged as one of the reasons for the overburdened court roll and high levels of remand detention.⁷⁹ In a National Instruction to all SAPS members, issued by the then National Commissioner of Police, all members of the SAPS were notified that the practice relating to the arrest and detention of suspects was "totally unacceptable" and members were instructed to "stop with immediate effect."⁸⁰ Instructions to arrest individuals in circumstances where setting of targets requires members to effect a certain number of arrests within a certain period of time; instructions requiring members to arrest persons for shoplifting simply because the shop owner or security official assists on the arrest; and instructions requiring members to detain arrested suspects for a full period of 48 hours and thereafter to take them to court, were cited as instructions that had to cease with immediate effect.⁸¹ Reference was made to the judgment of *Louw & Another v Minister of Safety and Security & Others* where it was held that:

[t]he police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are less invasive options to bring the suspect before the Court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in Court is obtained, then it is constitutionally untenable to exercise the power to arrest.⁸²

Despite the attempts made to minimise the practice of the over utilisation of arrest by the police, it still occurs frequently across South Africa. This increases numbers of remand detainees unnecessarily and overburdens

⁷⁹ Leslie 24. See also NPA Guidelines 5.

⁸⁰ NPA Guidelines 65.

⁸¹ NPA Guidelines 66.

⁸² NPA Guidelines 68. Take note the judgment of the Supreme Court of Appeal (SCA) in *Minister of Safety and Security v Sekhoto and Others* 2010 ZASCA 141 where the SCA differed with the High Court's reasoning in *Louw*.

the CJS. Remand is often granted to allow for further investigations. This includes all forensic and ballistic analysis. These already overburdened systems cause further delay in the criminal process, impacting on the management of remand detention.

The complexity of the CJS creates a number of delays within the CJS and thus impacts on remand detention in South Africa. It is clear that considered solutions, which can be applied across the CJS and have an impact on the various and key stakeholders, need to be implemented. Some of these solutions are discussed in the final chapter of this report.

Testimony of a remand detainee

"Seeing other suspects coming and going is painful experience as I remain in prison for reasons unknown to me. I became a person I never was. I became moody, aggressive, overwhelmed by the unfair treatment I received from the Magistrates Court. I am traumatised, humiliated, embarrassed left with a broken spirit. Its like I am lost and confused, empty, scared and abused. I am now attending a session with social workers, drinking medication for stress related problems and seeing a psychologist for my mental wellbeing." (detained 4 years, 6 months)

2. The effect of prolonged continued remand detention

The regulatory framework on remand detention in South Africa does not translate into anything more than an ideal for those who experience the lived reality of remand detention. The framework is founded on human rights principles contained in the Constitution. It is largely in accordance with international principles and best practices. However, like many rights in the Constitution, for a majority of persons in South Africa these guarantees are not implemented in practice. While much can be said of the effect of prolonged detention on an individual, from psychological, sociological, philosophical and medical perspectives this work aims to provide an overview of select examples of the non-implementation of the regulatory framework and how this manifests in practice.

One of the biggest challenges of remand detention impacting on conditions of detention is overcrowding. Overcrowding in South African prisons is not a new phenomenon. It is acknowledged by all stakeholders, from DCS to the Judicial Inspectorate and civil society, as a serious factor that needs to be addressed.⁸³ The problem of overcrowding is largely caused by the use of remand detention and the trend of serious crime.⁸⁴ Overcrowding has knock-on effects within the remand detention facility that impact almost every amenity available to remand detainees, resulting in the infringement of fundamental human rights

⁸³ The level of overcrowding of inmates in the DCS increased from 16.9% in 1995 to 34.5% in 2011. Draft White Paper 70.

⁸⁴ Draft White Paper 70.

of the individual. The DCS has developed a strategy for the management of overcrowding, relevant to remand detainees, as follows:

- The management of levels of remand detainees through the IJS Case Management Task Team and the Inter-Sectoral Committee on Child Justice;
- Ensuring progress with DCS capital works programme to upgrade facilities and to build new correctional centres; and
- Encouraging improvement of first and second levels of correction in family and social institutions and social and economic sector government departments to decrease the rate of entry into the CJS.⁸⁵

The DCS recognises section 63A and section 49G (when promulgated) as a means to manage the levels of remand detainees in its facilities.

While the regulatory framework makes the provision that amenities or privileges may be limited in certain instances and provided sufficient reasons exist for such limitation, rights may not be limited.⁸⁶ Further, remand detainees may only be subjected to those restrictions necessary for the maintenance of security and good order.⁸⁷ While the levels of overcrowding severely impact on the management of remand detainees, it is not a reason to derogate from, among others, the:

- Right to be held in cells which meet the requirements prescribed by regulation or policy in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions;
- Right to be provided with an adequate diet to promote good health;
- Provision of clean drinking water and sufficient clothing and bedding;
- Right to at least one hour of exercise everyday;
- Right to adequate medical treatment;
- Provided with the opportunity of making complaints or requests, on a daily basis;
- Protection against the use of excessive force.⁸⁸

The definition of amenities as contained in the CSA means recreational and other activities or privileges granted to inmates in addition to what they are entitled to as of right and includes exercise, contact with the community, reading material, recreation and incentive schemes.⁸⁹ In practice, overcrowding results in severe restrictions, and often the complete disallowance, of these amenities. From CALS' work in the field of remand detention and engagement with remand detainees, the current practice in many remand detention facilities limits not only amenities but rights as well. This is *prima facie* unlawful. To illustrate this, the CSA provides in section 8(5) that food must be served at intervals of not less than four and a half hours and not more than six and a half hours, except where there may be an interval of not more than 14 hours between the evening meal and breakfast. We are aware of correctional centres, where

⁸⁵ Draft White Paper 72.

⁸⁶ Draft White Paper 45.

⁸⁷ Draft White Paper 48.

⁸⁸ Draft White Paper 45.

⁸⁹ s. 1 CSA.

this practice is not followed and the remand detainees are provided with breakfast around 09:00 and are provided a second meal, meant to serve as lunch and dinner combined, at approximately 12:30. The cells are generally shut and locked down from 16:00 for the night until the following day. Those remand detainees who are due in court are woken up around 04:00 and given breakfast. They are then transported to court, generally have to stay at court until all the matters of all remand detainees have been called and only then are transported back to the remand detention facility. Provision of adequate food for the duration of the court visit is often not provided. The Draft White Paper further states that the rate of overcrowding has a negative effect and creates security risks because officials are often engaged in “long drawn out tasks” such as feeding, while critical tasks are overlooked (searching and testing of bars).⁹⁰ The right to exercise for an hour once a day thus becomes non-existent in facilities that experience high rates of overcrowding.

In addition to the challenges mentioned, remand detainees have been excluded from services and programmes and there is currently an inadequate provision of programmes to remand detainees in DCS facilities due to the perceived short-term stay of these detainees.⁹¹ The living conditions of these remand detainees include cells overcrowded by 200 percent, with no bed space and persons sleeping on the floor, inadequate sanitary facilities, little ventilation due to the overcrowding and no provision made for smoking. The result of the failure to provide remand detainees with access to programmes is a reality that involves a cell containing on average of 75 men who are hungry, frustrated, with no exercise and nothing to do, on average for 23 hours a day for the duration of their criminal trial, often surpassing the one, two and even four year mark.

90 Draft White Paper 11.

91 As above.

The experience of the Centre for Applied Legal Studies

Introduction

Since the inception of the Remand Detainees Project, CALS has been engaged in research, advocacy and litigation to strategically realise the aim and objectives of the Project. CALS has contributed to the jurisprudence of sections 27, 34 and 35 of the Constitution, established partnerships and collaborative relationships with many organisations and individuals in the system of correctional services and the CJS, and conducted research on remand detention to enable the formulation of recommendations and the crafting of specific relief to remedy some of the current defects.

Below an overview is provided of some of the highlights of CALS' engagement within the field.

1. Advocacy

1.1 Government advocacy

In September 2012, CALS made written⁹² and verbal submissions to the Portfolio Committee on Justice and Constitutional Development (Portfolio Committee) on the Prevention and Combating of Torture against Persons Bill (Prevention of Torture Bill).⁹³ These submissions were made under the Remand Detention Project, and were based on the high level of "assaults" committed in South African prisons, especially by correctional officers or warders on inmates. In light of the United Nations Human Rights Committee's findings against the South African Government in the matter of *McCallum v South Africa*⁹⁴ CALS was of the view that it was imperative that the Bill be prioritised and promulgated into law, while also being aware that the Bill should, at a minimum, be in line with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984 (UNCAT). CALS submissions were well received by the Portfolio Committee and certain amendments were made to the Bill after the public hearings on the Prevention of Torture Bill. The Bill is currently before the National Council of Provinces (NCOP) and CALS, as part of a broader civil society network, will continue to monitor the progress and status of the Prevention of Torture Bill, with a view to try and better the provisions of the Bill in protecting all persons, especially vulnerable individuals like remand detainees, against torture and inhuman treatment.

CALS has further engaged with members of the Portfolio Committee on Correctional Services, on an informal basis, regarding legislative reform including on the promulgation of section 49G of the Correctional Matters Amendment Act.⁹⁵

⁹² CALS submissions on the Prevention and Combating of Torture Against Persons Bill, September 2012 available at http://www.wits.ac.za/files/9a2qr_580034001343749127.pdf (accessed 31 January 2013).

⁹³ B21 of 2012.

⁹⁴ CCPR/C/100/D1818/2008.

⁹⁵ See in this regard "Guilty or Not-Guilty: Behind bars Anyway" Helen Suzman Foundation Roundtable Series available at <http://witsjusticeproject.com/2012/10/01/helen-suzman-roundtable-booklet-guilty-or-not-guilty-behind-bars-anyway> (accessed 26 January 2013).

1.2 Civil society advocacy

The Wits Justice Project (WJP), formed in 2008 and housed in the School of Journalism at the University of the Witwatersrand, aims to be the leading authority on issues of the criminal justice system in South Africa; creatively and effectively combine the use of journalism, advocacy, law and education to achieve its mission; contribute towards the improvement of the criminal justice system in South Africa and its conformity with the Constitution and international law; and assist individuals who are affected by miscarriages of justice. CALS and the WJP have collaborated in areas of common interest in relation to remand detention and the CJS and have formed a successful partnership, linking journalism and the law as well as research and advocacy. Linking CALS and the WJP's specialised skill sets, the combination of journalism and law has proven to be a powerful tool to effect the change necessary in the field of remand detention and the CJS. South African society is generally unsympathetic to the plight of remand detainees, largely based on the high levels of violent crime in our society. As a part of the strategy adopted, CALS and the WJP aim to create awareness within society of the core issues of remand detention and to dispel incorrect assumptions of guilt and retribution towards these individuals. Further, the WJP retains a legal intern and a journalism intern on an annual basis. In line with our common objectives and collaboration, the legal intern is seconded to CALS for a decided number of days per week. This assists in the development of the intern, as a young professional, while simultaneously providing an important link between the two organisations.

CALS is a member of civil society coalitions working in the field of correctional services or related fields. One of these coalitions is the UNCAT Campaign, which consists of civil society organisations committed to ensuring that South Africa fully incorporate the UNCAT into domestic law, as a priority. The Campaign also monitors South Africa's compliance under the Convention and is working towards ensuring South Africa's ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). CALS is also a member of the Detention Justice Forum (DJF), a civil society coalition, comprising of non-governmental organisations (NGO) and community based organisations (CBO) which seek to ensure that the rights and well-being of those that are detained are respected and upheld, as enshrined under the Constitution, laws and human rights principles. The combination of skills is powerful and change is often affected through collaborative effort when the organisations speak with one voice. An example of collective action in this regard is when, on 17 October 2012, the DJF called upon the Hawks spokesperson, Mcintosh Polela, to retract his statement made over twitter regarding the conviction of a well-known celebrity as being irresponsible and disturbing, considering the position Mr. Polela held in the public realm.⁹⁶ The statement was reported in the media and in early November 2012 Mr. Polela was suspended pending an internal investigation into the statement made.⁹⁷

⁹⁶ See http://www.wits.ac.za/files/1gtb4_746194001350838659.pdf (accessed 31 January 2013).

⁹⁷ See <http://www.iol.co.za/news/crime-courts/hawks-spokesman-suspended-after-tweet-1.1419505#.UQruOjzDHg> (accessed 31 January 2013).

CALS has also engaged with LASA and civil society organisations from the Southern African Development Community (SADC), lead by the SADC Lawyers Association, on regional issues of prisons and human rights with a view to establishing sub-regional principles and coordination between respective organisations across the region.

1.3 Media advocacy

Through partnership with the WJP, CALS has and will continue to advise on the legal content of various media pieces that create awareness on the plight of remand detainees as well as aspects of the CJS.⁹⁸ In addition, CALS has a media strategy to create awareness on the Remand Detention Project to garner the necessary support from within society and other sectors. Various forms of media are utilised in carrying out this objective. A powerful form of this media is the publication of opinion editorials, targeted at appropriate print or online newspapers or magazines. One of these opinion editorials in the Remand Detention Programme is included herein.⁹⁹ This was published to create awareness and to garner public support for the case of Dudley Lee, a former remand detainee, in his fight to vindicate his rights.

CALS often engages other forms of media and regularly issues press statements on matters relevant to and of importance in the Remand Detention Project. A number of radio interviews have also been conducted on remand detention, prison conditions and the CJS. This includes CALS staff appearing on radio talk shows to discuss a topic relevant to the Remand Detention Project, including VOW FM and Radio 786. Other radio appearances include interviews for news broadcasts, such as SAFM, Kaya FM, and SABC Radio, among others. Newspapers also frequently contact CALS to ask for our views pertaining to remand detention of the CJS. In addition to this, CALS received broad media coverage after our submissions to the Portfolio Committee on the Prevention of Torture Bill, of which a section was broadcast across SABC television news as well as being uploaded on their website and You Tube.¹⁰⁰ Creating awareness within society on the conditions behind the high walls of prisons in this country is an important part of the Remand Detention Project to bring about the change necessary in our system to protect this vulnerable group's fundamental rights.

2. Litigious interventions

It is indeed so that “[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations”, and that “a civilized and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation ... inherent in the right ... to ‘conditions of detention that are consistent with human dignity’”. I thus agree that “there is every

⁹⁸ The WJP has published extensive pieces in the media creating awareness on remand detention and the CJS. See in this regard (2012) “Investigating the system: Legal journalist of the year 2011 and 2012, A collection of award-winning articles by the Wits Justice Project”.

⁹⁹ See Annexure A Hardy “Who is really prejudiced by prison TB case?” Business Day July 2012.

¹⁰⁰ See <http://www.youtube.com/watch?v=2fLmJMMT-9w> (accessed 1 February 2013).

reason why the law should recognise a claim for damages to vindicate [the prisoners'] rights". To suggest otherwise in circumstances where a legal duty exists to protect Mr. Lee and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition and medical treatment. I stress that on the approach adopted by the Supreme Court of Appeal it is unlikely that any inmate will ever be able to overcome the hurdle of causation, and further, no effective alternative remedy will be available to a person in the position of the applicant.¹⁰¹

CALS, WJP and the Treatment Action Campaign (TAC), represented by SECTION27, entered as *amici curiae* in the case of *Dudley Lee v Minister for Correctional Services*¹⁰² heard by the Constitutional Court on 28 August 2012. Lee, who took the decision of the SCA on appeal to the Constitutional Court, had successfully claimed damages from the Minister for Correctional Services (the Minister) in the Western Cape High Court (High Court), a decision that was overturned by the SCA, on appeal. The High Court had declared the Minister liable for delictual damages suffered by Lee as a result of contracting TB while in detention. The SCA, however, rejected Lee's claim on a narrow factual point on the test for causation and upheld the Minister's appeal. "Primarily, the case concerns whether the [Minister's] detention and the systemic failure to take preventative and precautionary measures by the Correctional Services authorities caused [Lee] to be infected with TB while in detention."¹⁰³ The question before the Constitutional Court and on which CALS, the WJP and TAC made submission on, was whether the causation aspect of the common law test for delictual liability was established and, if not, whether there was a need to develop the common law to prevent an unjust outcome.

As *amici* we provided the court with comparative foreign case law to assist the Court in considering the application and development of the common law on causation. Our submissions before the Court were, first that the SCA had erred in its application of the test for factual causation, the 'but for' test. It was our submission that the SCA had erred by creating a higher standard of proof for factual causation than ordinarily required and by failing to take into account the minimum standards as contained in the Standing Orders. Second, that if the Court were to find that the SCA applied the accepted standard of proof required, that the common law had to be developed to harmonise it with the spirit, purport and objects

¹⁰¹ *Lee v Minister for Correctional Services (TAC, WJP & CALS as amici)* 2012 ZACC 30 at [65] per Nkabinde J.

¹⁰² As above.

¹⁰³ *Lee v Minister for Correctional Services (TAC, WJP & CALS as amici)* 2012 ZACC 30 at [2] per Nkabinde J.

of the Bill of Rights. In overturning the SCA ruling, the Constitutional Court said the test for causation had been applied too rigidly by the SCA and that Lee had, in fact, sufficiently proven that he contracted TB as a result of the DCS's negligence. The Court ordered that the matter be remitted to the High Court for a determination on quantum.¹⁰⁴ The judgment is a major step in ensuring that prisoners' rights to healthcare and human dignity are respected and protected.

CALS looks forward to fostering new relationships across all sectors involved in remand detention and the CJS, as well as continuing to work with current partner organisations in the fight to effect the systemic change necessary, so that the remand detainees rights are upheld and the rule of law respected.

¹⁰⁴ The minority judgment of the Constitutional Court (per Cameron J; Mogoeng CJ, Khampepe J and Skweyiya J concurring) held that the SCA's logic on the existing but-for test was not at fault. The minority held that the case should be remitted to the High Court to develop the common law of causation.

Lessons learnt and the way forward

Conclusion

There is no quick fix or single solution to solving some of the challenges identified in the management of remand detention or in the CJS. There are, however, definite measures to effect change. Through a combination of research, advocacy and strategic litigation, this change can be brought about. South Africa's rights-based framework allows us to utilise the law to make a positive impact on the lives of remand detainees, where their rights are not being upheld. CALS will continue, individually and in partnership with other civil society organisations, to work towards achieving our aim of protecting the fundamental constitutional rights of remand detainees in South African prisons.

The research in the course of CALS' Remand Detainees Project has shown that the State, particularly the DCS, is in contravention of a number of provisions regulating the management of remand detention. Daily, the rights of thousands of men and women, presumed innocent, are infringed while awaiting the finalisation of criminal proceedings. This is not difficult to see. Our prisons may not be accessible but our courts are. If you were to spend a day in any criminal court across the country, the complexities of the CJS and the sheer number of persons detained while awaiting trial will become apparent. The violation of rights may be apparent - it is the complexities of the system that require a combination of strategies and organisations to advance the rights of remand detainees in South Africa. While much work has been done, much work remains to be done. Strategic litigation, combined with continuous and up to date research as well as efforts to engage with all stakeholders and the public, as part of a broader strategy that links civil society with similar objectives, will bring about the impetus to change conditions of prisons in South Africa and to transform the CJS.¹⁰⁵

It is with this broader strategy in mind, that we make the following preliminary recommendations.

Recommendations

Research

- Obtain up-to-date statistics from all relevant stakeholders in the CJS to inform further research and advocacy initiatives.
- Undertake an analysis of the effectiveness or otherwise of section 49G of the Correctional Matters Amendment Act,¹⁰⁶ once promulgated.
- Methods to improve court administration.
- The practice of the police in relation to arrests and investigation of alleged offences.
- Budgetary allocations and spending of resources of all stakeholders.
- Measures to align the law, regulations, policy, directives and practices of the different stakeholders.
- The imposition of time limits in the CJS for matters to be prosecuted to finalisation as well as for verdict, judgment and sentence to be handed down.

¹⁰⁵ For similar conclusions, see De Vos (2003) "Prisoner's rights litigation in South Africa since 1994: A critical evaluation" CSPRI Research Paper No. 3 at 4.

¹⁰⁶ Act 5 of 2011.

- Accountability mechanisms in the CJS and the option of one office of oversight / ombudsman to monitor all role-players in the CJS.
- Evaluation of training of police officers and the DCS officials and whether components of human rights are included in the training of these officials.
- The impact of current conditions on the overall state of health for a remand detainee and the after-effects of having to endure these conditions for an extended period of time.
- The use of trained paralegals to provide assistance to accused persons and potentially alleviate the burden on the CJS.

Advocacy

- Continual engagement with Parliamentary Committees on legislative change needed to better protect and uphold the rights of remand detainees.
- Create opportunities to educate both the public and officials on the purpose of remand detention and bail.
- Apply continued pressure for the promulgation and full implementation of section 49G of the Correctional Matters Amendment Act.¹⁰⁷
- Engage with stakeholders in the criminal justice system on methods to reduce the number of remand detainees; for instance, on the use of diversion for less serious offences and first time offenders, the use of alternative methods to secure the attendance of an accused person before the court, and creating more awareness of internal policies and directives that contain measures to reduce the number of remand detainees and unburden the CJS.
- A 'glass-prison' campaign aimed at creating transparency within the DCS with a view to moving towards full access to our prisons for civil society and national media.
- Continued dialogue with the DCS to illustrate our intention to work together and provide some of the needed assistance in our prisons.
- The creation of one national IT database that can be used by all stakeholders in the CJS.

Litigation

- Hold the State to account in cases of non-compliance with the legislative and policy framework.
- Co-ordinate efforts between civil society groups, as in the *amici curiae*'s intervention in *Dudley Lee*, to avoid unnecessary duplication and ensure that the best case is brought before the courts.

¹⁰⁷ As above.

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- The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988
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- The Kampala Declaration on Prison Conditions in Africa, 1996
- The Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment, 2002
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"Third Prisoner dies following St. Albans gang violence" Times Live (SAPA) 19 January 2013

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A wall once divided this courtyard in two.

Awaiting-trial prisoners were held in the section closest to the administration block.

