



## **Towards Trial of the Forgotten: An Enquiry into the Constitutional Right to a Speedy Trial for Remand Prisoners in Zimbabwe**

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## Dedications

This thesis is dedicated to, first and foremost, the Almighty God, who is the Author and Finisher of my faith. Your amazing grace has brought that which you began in me to completion. I simple learn to bow.

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## **List of Acronyms**

ACHPR- African Charter on Human and People's Rights  
AG- Attorney General  
HC- High Court  
H-H- High court Harare  
HRBA- Human Rights Based Approach  
ICCPR- International Covenant on Civil and Political Rights  
ICESCR- International Covenant on Economic Social and Cultural Rights  
ICJ- International Commission of Jurists  
JSC- Judicial Service Commission  
MDC- Movement for Democratic Change  
PSC- Public Service Commission  
SC- Supreme Court  
UN- United Nations  
UNGA- United Nations General Assembly  
ZANU-PF- Zimbabwe African National Union – Patriotic Front  
ZLR- Zimbabwe Law Reports  
ZLHR- Zimbabwe Lawyers for Human Rights  
ZPS- Zimbabwe Prison Services  
ZRP- Zimbabwe Republic Police

## **Abstract**

The administration of criminal law in Zimbabwe has been taking a downward trend over the years with prisoners on remand experiencing lengthy pre-trial periods. This has caused overcrowding in prisons and detriment to the suspects whose presumption of innocence is compromised by the prolonged incarceration without their guilt being established. My quest for answers as to why the problem seems to be getting worse rather than better has prompted this research. This study enquires into the causes for the delays in obtaining a speedy trial for prisoners in custodial remand in Zimbabwe.

This paper, enquires into the causes of the delays from the perspectives of various stakeholders and to analyse the role of the state organ responsible for the administration of justice; the judiciary, in realising the right to a speedy trial. I will also look at the role of the related institutions such as the Zimbabwe Republic Police (ZRP), the Zimbabwe Prison Services (ZPS), the lawyers in private practice as well as the significance of the judicial precedents on the right to a speedy trial that have been established through case law. The essential elements of the Human Rights Based Approach (HRBA), such as accountability, participation and the interdependence of rights will be formulated into a methodology, identifying the gaps in the current practices of the judiciary and its related institutions as well as revealing the importance of adopting a HRBA to the claiming and realizing of the right to a speedy trial in Zimbabwe. In the end, some policy advice will be given, which can be adopted by the judicial policy makers in devising better strategies for the achievement of criminal justice.

## **Relevance to Development Studies**

The right to a speedy trial is a fundamental right to the preservation of human dignity and this is interlinked to the central goal of Development which is the promotion of human well-being.

## **Keywords**

Human Rights, Right to a Speedy Trial, Remand Prisoners, The Judiciary, Lengthy-pre-trial periods, Zimbabwe

‘... I must express the concern of this court at the cavalier way in which the applicant has been treated. To call an accused person to court time after time and on each occasion to send her away .... The matter is made worse because there is mere the possibility, however remote, of a prison sentence. How can a person get on with his or her life with the possibility of a prison sentence looming and receding every fortnight?’

*Justice Nicholas McNally JA in State v Morrisby (Supreme Court of Zimbabwe 1995).*

# Chapter 1

## Introduction

### 1.1 Introduction and the Problem Statement

This paper enquires into the causes of prolonged custodial remand for arrested persons in Zimbabwe. There is a large number of prisoners in Zimbabwe who have not appeared in court since their arrest or who have appeared just once since being arrested years ago. This research explores why there is a long pre-trial period for remand prisoners in Zimbabwe. The thesis analyzes the problem in order to expose its depth and extent with a view to coming up with a conclusion that will be useful for the judicial policy makers and for the administration in achieving criminal justice in Zimbabwe as far as the right to a speedy trial is concerned.

The Constitution of Zimbabwe section 18(2) under the Bill of Rights spells out that, if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time. Failure to try accused persons on time has been on the rise. One of the most disheartening cases revealing the slowness of the Zimbabwean judicial process was the case of Wilson Mutimumwe, a soldier who was arrested in August 1985 on charges of murder and assault with intent to cause grievous bodily harm. Mutimumwe eventually died in March of 2006 without ever having been tried and his guilt never being established (Dankwa as in Sarkin 2008:86). This is an extreme case of how the system sometimes forgets prisoners on remand, disregarding their plight to be heard within a reasonable time and consequently causing them irretrievable prejudice.

Over the last decade, prisoners have been languishing in custodial remand for more than a reasonable time. This has frayed the well-knit fabric of the justice system and the high regard the citizens once had for it. Some accused have spent up to five years in remand prison, for example, the case of a father and his four sons who were arrested in 2006 on suspicion of murder. The trial court proceedings had been started through circuit court in 2008. After the adjournment of the case in 2008 until the time it was reported in 2011, the accused had not appeared again for the continuation of their trial and continued to be kept in custody. Legal counsel acting pro deo for the accused rightly stated that this was a case of forgotten prisoners (Newsday 2011).

Zimbabwe Lawyers for Human Rights (ZLHR) in the December 2011 edition of their publication Legal Monitor, reported that two Movement for Democratic Change (MDC) councilors for Banket, Emmanuel Chinanzavava and Fani Tembo and a co-accused were released from remand on 5 December 2011. The two councilors were among a group of activists abducted, held and tortured by state security agents at the height of Zimbabwe's political turmoil during October and December 2008, on charges of plotting to topple the previous administration of Robert Mugabe. 'The court noted with concern that the three had spent 22 months coming to court and were remanded 29 times without the setting of a trial date', their ZLHR lawyer Tawanda Zhuwarara said (Promoting Pre-trial Justice in Africa 2011). This is another instance in which

the problem of delays in the administration of criminal justice in Zimbabwe is revealed.

In 2006, Justice Rita Makarau, the then Judge President in the High Court described Zimbabwe's prison conditions as 'embarrassing and disturbing' because she had visited Harare Central Prison and met ten people who had been incarcerated for up to ten years without trial. She quite rightly said: 'We have no excuse for this delay, it is imperative that prisoners who deserve to be released should not stay here' (Sokwanele 2006).

In the next year (2007), in her maiden speech to mark the official opening of the 2007 High Court legal year, Justice Makarau expressed disquiet at the dearth of financial resources in the police force, the prison services and the courts, which she said was seriously compromising efficiency and impartiality (Makarau 2007). For instance, she said that for the first time in history, the High Court in Harare could not travel to one of Zimbabwe's Provincial capitals, Masvingo, on circuit in the third term to hear criminal cases that had been awaiting trial in that province for the past two years and in the last count Masvingo had 104 murder cases waiting to be tried. She went further to state that, if the problem of lack of resources were not rectified, the judiciary would continue to operate without computers and without adequate stationery which will only end up being detrimental to accused persons.

The International Bridges to Justice (IBJ), an international non-governmental organization with an office in Zimbabwe, described on their website report ([www.ibj.org/where-we-work/africa/zimbabwe](http://www.ibj.org/where-we-work/africa/zimbabwe)) that the justice system has been adversely affected the prison conditions which are rife with overcrowding with an average of approximately 22,500 detainees being held at any given time. 30% percent of this prison population is awaiting trial and many detainees have remained in pre-trial detention for up to 10 years. Lack of food, insufficient access to medical care, absence of clothing and lack of legal assistance are common realities in Zimbabwe's prisons. These conditions can be partly avoided if prisoners are not subjected to lengthy pre-trial periods. There would be a smaller number for which the prison resources have to be shared rather than the current overcrowding contributed to by delayed trials of remand prisoners which makes equal distribution of resources difficult.

The problem of prolonged pre-trial detentions evolved over a long period of time, and became worse at the turn of the 21<sup>st</sup> century, when the country faced many problems. The socio-economic and political problems that crippled state institutions may to a large extent have contributed to the growth of this problem. Inefficiency in the administration and operations of the Zimbabwean Prison Services authority, for example the lack of transportation as will be explained further in Chapter 3, delays the detainees from appearing in court. In May 2009, Zimbabwe's Prison Services revealed that all four trucks used to move suspects to and from courts and hospitals broke down, and that hundreds of pre-trial prisoners were being held unnecessarily in one of the country's 55 detention centers (IBJ website, *ibid*). The backlog and failure to realize the prisoners' right to a timely trial may also have been a result of the economic crisis that made financially unsatisfied state prosecutors and other justice ministry civil servants leave their jobs for greener pastures, causing an accumulation of work in the courts for those who remained (Chetsanga 2008). Conse-

quently, the backlog of work and pending cases grew during this period from 2000-2008.

The service delivery of several government institutions improved following the signing of the Global Political Agreement (GPA) in 2008, which was a result of the concrete negotiations for an inclusive government between the then ruling party ZANU PF and the former opposition party, MDC. However, the record of the Ministry of Justice, Legal and Parliamentary Affairs, through the Judicial Service Commission, in ensuring the prisoners' right to a speedy trial as well as a host of other rights of prisoners have not improved (Sokwanele 2009), hence the purpose of the research.

When a case is delayed, and the right to a fair trial within a reasonable time is denied, more people are kept in custody than are released. The consequent congestion within the prisons creates a habitat for gross human rights violations, particularly in the case of detainees that are actually innocent of any wrongdoing as the courts eventually declare by an acquittal. Observing the right to a speedy trial can act as a preventive measure against the human rights violations that detainees are prone to when they are in overcrowded cells. This further brings into question, examination and evaluation the actual capabilities of the Zimbabwean prison system as designated correctional facilities that can bring rehabilitation to convicted criminals to enable total reintegration into society. The harm that is caused on the part of the arrested person cannot be overemphasized. Obviously, a remand prisoner is not abrogated of all human rights and dignity. In retaining their civil rights, prisoners should therefore not be denied their right to a fair trial which is inclusive of the right to a speedy trial when having been arrested.

Dankwa (2008:84) described the undesirability of overcrowding vividly as dehumanizing prisoners, encouraging the spread of communicable diseases, impeding the categorization of prisoners (which creates a platform for transfer of criminal skills), encouraging the spread of diseases such as HIV/AIDS, exacerbating the outbreaks of violence and most importantly, rendering unattainable the international standards relating to hygiene, sanitation, sufficient food and accommodation.

A high percentage of people are awaiting trial in Zimbabwe. The latest report I had access to, dating back to 1997 stated that out of the total prison population of 16,000 people, 4,500 of them were on remand (ACHPR 1997a:10) and they constituted more than a quarter of the total number of convicts (28%). The fact that there is only old data from as far back as 1997 can be seen as an explicit expression of the lack of priority of this problem on the side of the government and other relevant authorities in the administration of criminal justice, particularly concerning the plight of remand prisoners and the pre-conviction stage. It is estimated that, exactly fifteen years later, the above mentioned percentage may have escalated to an even larger number because of the increase in crime rate and brain drain that occurred between 1997 and the turn of the 21<sup>st</sup> century (United States of America Human Rights Report on Zimbabwe 2010). During my field work, I could not obtain any reports or statistical data to substantiate, let alone explain the escalation of the percentages after 1997 and therefore only rely on estimates from my own observations of the remand prisons and the information from remand prison officers.

A potential solution for seeking redress for the violation of human rights involved in the problem raised lie within the Supreme Court of Zimbabwe as provided for under section 24(1) of the Constitution. However, this constitutional redress and solution is within the very same judicial system that is flawed with a congestion of cases and backlog. Therefore, any form of redress sought by the prisoners is likely to be a failed attempt as it may still take years before their redress is heard. This research hopes to come up with more workable, practical and sustainable policy advice after having exposed the depth of the problem.

## 1.2 Background

Zimbabwe's justice system at independence in 1980 was a reliable system for accessing justice and the country was widely regarded as a model African democracy (Diplomats Handbook, accessed 2012). Feltoe (2005) clearly outlined the criminal court structure in Zimbabwe since the inception of the Ministry. According to Feltoe,

Criminal cases are tried in either the Magistrate Courts or the High Court. The local and community courts have no power to deal with any criminal cases. The High Court deals with the most serious criminal cases, such as murder and large-scale frauds. Only the High Court has the power to impose the most drastic penalty available, namely the death penalty. The lower ranking Magistrates Courts deal with less serious cases such as assaults and thefts but the highest ranking Magistrates Courts, the Regional Courts, deal with more serious cases such as rape. A magistrate's sentencing powers will depend on his seniority. An ordinary magistrate has the lowest jurisdiction and a regional magistrate has the highest jurisdiction. Feltoe (2005:8).

The magistrates in Zimbabwe are appointed on the basis of the qualification of a Law Degree or having graduated from the Judicial Service College. The judges in the High Court and Supreme Court are appointed by the President on the recommendation of the Judicial Service Commission. The appointment of judges is provided for in the Constitution of Zimbabwe section 84 (1).

The President also appoints the Attorney-General (AG) (section 76(2)) who is 'the principal legal adviser to the Government' (section (1)). These appointments of the most important positions in the judicial system by the President have often been regarded as highly political and strategic in protecting and fulfilling the interests of the ZANU-PF, which is the ruling<sup>1</sup> political party (Madhuku 2010:92) in the coalition government. This will be explained further in Chapter four when we evaluate the extent to which judicial interventions from politically appointed judicial officers have been instrumental in contributing to or reducing the problem of lengthy pre-trial detentions.

The role of the judiciary in Zimbabwe in realizing the right to a speedy trial is crucial. The following extract from the Judges' Handbook (2012:16) gives

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<sup>1</sup> I refer to it as ruling part in this context even though there is now a coalition government because the President of Zimbabwe is the leader of the ZANU-PF

clear background information in this regard and is relevant in understanding why they were targeted as key informants for this research:

The court has the primary responsibility for the protection of the right of the unrepresented accused to a speedy trial because an unrepresented accused that is unfamiliar with the criminal process will be likely to be unaware of his or her rights to be tried within a reasonable period. The court before whom the unrepresented accused is brought must take the initiative to ensure that the constitutional right of X (accused) to a speedy trial is not violated. It should not wait for X to raise a complaint of a violation of his or her constitutional right and to ask the court to deny any further remands. The court should probe the reasons for any apparently undue delays and, where no satisfactory explanations are forthcoming, it should take appropriate action. At the very least, it would be expected that the court would inform X of his or her rights. But the informing of such an accused of his or her rights should not be seen as being a sufficient safeguarding of X's rights. Even after being given such information, he or she may still be ignorant about what remedies he or she has and how he or she should go about raising this issue. The undefended accused may still lack the ability to assert those rights. He or she may be inarticulate, nervous and overawed when he or she appears in court. If he or she is in custody, he or she may be worried about the consequences of raising complaints about undue delays in bringing the case to trial. The court has the power to require explanations for the delays from the prosecutor which X has not. The remand court, therefore, should not go on granting requests for further remands when an unreasonably long period of time has elapsed since X was first charged. It should seek to ensure that the State proceeds to trial within a reasonable period of time.

The Constitution of Zimbabwe empowers the Supreme Court to, 'make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of declaration of rights'. Furthermore, section 18(2), which formulates the right to a speedy trial, also provides that 'where upon balancing the various factors it is decided that an accused person's right to a fair hearing within a reasonable time has been contravened, a stay of proceedings must be the minimum remedy available'. The aggrieved person may also make a direct application to the Supreme Court to permanently stay the proceedings on the basis of a violation of their constitutional right Feltoe G (1997:13).

The court's responsibility worked efficiently during what the judicial experts in Zimbabwe called the golden era of human rights litigation (1985-2001) (de Bourbon 2003:23). The country's socio-economic and political status was flourishing and there was an endeavor to observe rules and regulations and judicial precedents that had been set through case law in the administration of justice. At the turn of the 21<sup>st</sup> century, disorder and corruption hit the institution and the socio-economic and political instabilities that had begun earlier matured at this stage contributing to even more poor service delivery (Mlambo and Raftopoulos:1: 2010). These formed the background to what has now become a heightening problem of lengthy pre-trial periods as described in the problem statement.

### 1.3 Relevance and Justification

This thesis will document the rights of remand prisoners in Zimbabwe and their state of realization. Most academic work on the right to a timely trial in Zimbabwe falls short of a detailed enquiry into the problem. There is little existing literature on the problem anyway and policy advice is hardly available in it.

Respect for human rights, and their protection and fulfillment are global concerns. Thus, it has become fairly common to regard the fulfillment of basic human rights as part and parcel of the development process (Smith and van den Anker 2005: 88). This research emphasizes the importance of the position that prisons are institutions which nurture a person for social civilization and development of post-prison life.

The provision of the right to a timely trial in the Constitution of Zimbabwe and the presumption of innocence together with the concept of due process are meant to legitimate order in the administration of justice for accused persons, both in theory and in practice. When suspects are in an environment that is law abiding and there is a strict culture of protecting and respecting human rights, this fosters a habit of observing discipline and law, and greater consciousness of the need to perform one's legal obligations and determination to start a new life and make a meaningful contribution to society (Jian 2004).

Due to lengthy pre-trial periods, prisons become congested, which results in dehumanizing prisoners and creates an environment for the spread of communicable diseases (Dankwa as in Sarkin 2008:84). This justifies my focus on the right to a timely trial in the research, moreso because a speedy trial would prevent exposure to inhumane and degrading treatment that detainees are prone to during prolonged incarceration and attaches them to a presumption of guilt rather than a presumption of innocence before trial.

### Motivation

My personal interest for law has stirred me into doing this research. As a member of the Zimbabwean legal fraternity, it is my endeavor to make a meaningful contribution to the efficiency of the justice delivery system. Having done my internship at the Harare Criminal Magistrates' Court during my undergraduate studies in Law in 2007, I discovered that there was a huge backlog of cases that were not finalized for prisoners remanded into custody. Some of these cases dated back as far as 1997 and only a small percentage of the persons involved overall (no accurate quantification had been done) had been released on bail. This was also alluded to in one of my interviews (27 July 2012, Norton) with a Zimbabwe Prisons Officer who has been employed with the authority for many years.

The protection of human rights and the respect for the dignity of all humanity, prisoners included is at the core of my heart. Moreso, I was particularly motivated to conduct a study on this topic because this is an area within my profession and I wanted to take this opportunity to contribute towards the improvement of service delivery through research, advocacy and lobbying for a better and well-structured system with excellent service delivery.

## 1.4 Research Objective

This research paper's main objective is to explore the underlying causes for the delays in prisoners accessing justice and being tried within a reasonable time in Zimbabwe, with a view to exposing the seriousness of the violations being done to the right to speedy trial. Policy advice that can improve the service delivery will also be generated. An increasing number of detainees are subjected to lengthy pre-trial detention and investigation of the justice system's failure to conduct hearings of accused persons speedily was done through engagement with various judges and law officers (comprising of prosecutor, clerks of court and magistrates) in the Judicial Service Commission (JSC), Legal Practitioners in private practice, members of the Civic society organizations , the Zimbabwe Prison Services (ZPS) and the Zimbabwe Republic Police (ZRP).

### 1.4.1 *The research sub-objectives:*

- to explore the causes of lengthy pre-trial periods for detainees in remand custody through research in relevant offices and authorities involved in the administration of criminal justice;
- To asses and evaluate relevant current practice through field work in Zimbabwe and to come up with some recommendations and policy advice for the justice policy framework.

### 1.4.2 *Research questions:*

#### **Main research question:**

What factors contribute to the practice of lengthy pre-trial detentions in Zimbabwe and how might the situation be improved through policy and/or implementation measures?

#### **Subsidiary research questions:**

- What causes the delays for prisoners remanded into custody from accessing justice and being tried within a reasonable time in Zimbabwe?
- What measures have been taken to date to mitigate the crisis of detainees being kept for long pre-trial periods, even without bail?
- What are possible remedies for the realization of the right to a speedy trial in Zimbabwe in the future?

## 1.5 Research Method and Sources

This paper is based on both qualitative and quantitative sources of data. The method employed in obtaining the primary research findings was qualitative with a combination of formal and informal interviews with different stakeholders in the government, civil society, Judicial Service Commission and the legal fraternity comprising of magistrates, prosecutors, police officers, clerks of court and legal practitioners. I also used international and national statutory laws as primary sources of data. Secondary data from a wide range of literature on the right to a fair trial within a reasonable time from journals, media articles,

government articles, NGO reports as well library and internet resources were used.

The methods employed for this research were most suitable because, for example the interviews, allowed for one on one discussion in private with informants. This created a favorable atmosphere for informants to express freely their views without fear or intimidation as the topic under research is highly sensitive and may be regarded as being of a political nature. This is so because it exposes the failures in governance and neglect in the Judicial Services Commission that is comprised of the former ruling party members of the ZANU-PF at the top ranks.

This research was also regarded as highly sensitive because it also exposes the neglect in the institutions in Zimbabwe that are related to the administration of justice, specifically, the Ministry of Justice Legal and Parliamentary Affairs, Zimbabwe Republic Police and the Zimbabwe Prison Services. These institutions are governed by the ZANU-PF members as well through political appointments of the institutions' top ranks. Therefore, any revelations about their lack of success in governance<sup>2</sup> would be a justified cause for concern by the respondents to request anonymity to avoid any possible hostility from the officials. The researcher, when conducting the fieldwork was not allowed access to law officers in the JSC upon making a formal application to conduct the research. The only person I was allowed to interview in his official capacity was the Chief Magistrate (political appointee) who insisted that he would answer any questions I would have for prosecutors, magistrates, judges and all other clerical administrators.

In this interview with him, there seemed to have been a lot of 'image protection' on his part in the responses he gave, particularly concerning questions based on reports in the press. For example, I asked him what his comments were to the expressions made by the then Judge President Rita Makarau when she visited the Harare Central Prison, as alluded to in the problem statement: 'We have no excuse for this delay, it is imperative that prisoners who deserve to be released should not stay here' (Sokwanele 2006). Chief Magistrate, M. Guvamombe responded by saying that this statement was made during the time when the country was facing serious economic problems and should not be taken seriously. I then went further with the discussion and stated that even though Justice Makarau had made this comment in the wake of an economic crisis, she expressed dismay over the prisoners on remand for the last ten years, and back then the country was not in an economic crisis. Accordingly, there was no connection to the economic crisis in my view. It is at this point that the conversation was cut short and I was told to leave as the Chief Magistrate had other meetings to attend to.

Despite the refusal by the authorities of permission to interview anyone but the Chief Magistrate, I managed to interview some people informally and the very interesting findings I got through these channels which will be ex-

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<sup>2</sup> The party promised the nation in its 2008 election manifesto to 'equip our nation for the developmental tasks and programmes ... in all our sectors' (Zanu-PF Communist Manifesto, 2008). They therefore protect their image by hiding information that could disfavor them and detrimental to the image of their political party.

plained in detail in chapter three may very well explain why I was not allowed access to these informants in the first place because they show serious neglect in the administration of justice as far as the right to a speedy trial is concerned. These interviews, it is believed, gave reliable information from reliable persons who work inside the system and are also hopeful that the system may improve by pointing out the gaps causing the problem.

### ***1.5.1 Ethical Considerations and Limitations***

The people who gave me very relevant information preferred to remain anonymous in order to protect their identities mainly because the interviews exposed the prison and judicial authorities' failures. The area under research was regarded as highly sensitive hence some of the key informants chose not to be known. In order to confirm the truth of the given views as well as to make sure that I was getting reliable information, I paid particular attention to the consistency and similarity of views from the respondents. I would make comparisons of the responses given by people in similar offices, such as prosecutors or human rights activists. If the same aspect was repeated by various respondents even from different institutions, I would regard it as a critical and reliable response. I relied on this mechanism because there is hardly any information available to the public from the judicial authorities on the topic being researched so comparing the consistency of given views played an important role in determining its accuracy.

Midway through my fieldwork, I could not continue with my interviews to obtain information after the sudden passing on of my youngest brother at the beginning of August. During this period of grieving, I missed a lot of meetings and did not manage to reschedule the meetings before returning to The Hague on the 28<sup>th</sup> of August. Where I made an effort to reschedule the meetings, the informants were no longer available because of other work commitments in the country and abroad. However, I made continued efforts to obtain information from various stakeholders after my return from the fieldwork and their information contributed immensely to the finalization of this paper.

### ***1.5.2 Key Informants***

Interviews were held with the following:

- Judicial officers in the Judicial Service Commission; Prosecutors, Clerks of Court, Magistrates, Judges, the Attorney General
- Officers in the Zimbabwe Prison Services
- Civil society organizations
- Lawyers in Private Litigation
- Learned colleagues in the Advocacy Chambers
- Lecturers in the Faculty of Law
- Accused detainees subjected to unacceptably long pre-trial detention periods.

I mainly targeted the above interviewees because of their affiliation to the administration of justice. I also chose informants from the justice related institutions such as the ZPS and ZRP and also members of civil society either by

employment or by their engagement and involvement in human rights activism and advocacy work on achieving criminal justice in Zimbabwe. I went to as many law officers as I found available and willing to volunteer information freely.

## **1.6 Methodology**

This research adopted a Human Rights Based Approach (HRBA) to evaluate the underlying causes of the lengthy pre-trial periods for remanded prisoners. Key HRBA elements will be the main feature used in examining the findings and judicial interventions. This will be further explained and operationalized in the second chapter of this paper as part of the theoretical framework.

## **1.7 Area and Scope**

The study was based on the Harare remand prisons in Highlands and the Central Police Station. These are the two remand prisons that have the largest number of custodial remanded prisoners from across the country with those accused of serious offenses being transported to either of these two prisons in Harare for trial in the High Court. Other serious offenders are tried in the Bulawayo High Court if they were arrested near Bulawayo and the offense occurred there or within that territory as well. Cases of focus are ordinary criminal cases with a few political ones mentioned to emphasize the politically sensitive environment in which the justice system operates. The time frames covered approximately the last five to eight years (2004-2012) because it is during this period that some of the current prisoners on remand were arrested and still await trial while in custody to date. The time frame for this primary research was from the 12 July to 6 August 2012.

## **1.8 Structure of the Paper**

The paper is structured into 5 chapters. The first chapter gives a background of Zimbabwe's justice system since independence to date. The chapter also presents the problem statement, research objectives and research questions. Chapter two will provide a theoretical framework of the right to a speedy trial. It will also present the normative framework of national, regional and international instruments. Thereafter, it will introduce the Human Rights Based Approach and its elements which will be formulated into a methodology for this research. Chapter three will outline and analyze the primary research findings on what has caused the problem of lengthy pre-trial delays for those in detention and why the number is soaring, particularly over the last decade in Zimbabwe. The results will be assessed based on the theoretical framework, particularly the elements of HRBA. Chapter four will focus on a review of the judicial interventions to this problem from a HRBA. This chapter will be based on a set of ordinary criminal cases in which the issue of the right to a speedy trial arose. It will show the judicial precedents set on the right to a speedy trial and the reasons for the decisions made. Judicial interventions will be assessed in as far as their setting of precedent has been of any value to improving the problem practically as well as whether the judicial authorities made their decisions from

a HRBA. In addition to this, an assessment of judicial interventions on the right to a speedy trial will also be analyzed pertaining to political cases to conclude on the position of impartiality and independence of judicial officers. Chapter five will conclude the enquiry of the research and give recommendations that are possibly meaningful policy advice, to on the long term ensure, or at least improve, the protection of the remand detainees' right to a speedy trial.

## Chapter 2

### Theoretical Framework

#### 2.1 Human Rights Law on Timely Trial

The right to a speedy trial is a basic principle of procedural human rights law and of criminal law and the judiciary has the duty of implementing the constitutional safeguards that protect individual rights. In the case of an arrest, the suspect should be afforded a fair hearing within a reasonable time. The test for what exactly is reasonable time may vary according to a number of factors. The International Commission of Jurist's (ICJ) Trial Observation Manual for Criminal Proceedings (2009: 56) for example states that 'when examining the proportionality, necessity and reasonableness of pre-trial detention, the seriousness of the offence, the complexity of the case, severity of possible penalties, risk of accused to abscond or destroy evidence or reoffend' must be taken into consideration.

All states, including Zimbabwe, have three types of correlative obligations: 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived' in all human rights treaties (Sepulveda 2004: 16). Shue (1980, as in Sepulveda 2004:16) proposed the 'tripartite typology' with state obligations to 'respect, protect and fulfill' the fundamental rights of all citizens. This tripartite typology is a component part of the international human rights law obligations on states that have codified the international law treaties to which Zimbabwe is a state party. For example the preamble of the ICCPR emphasizes the recognition that rights are inalienable to all members of the human family. The contents of this preamble therefore require that there be an adherence to fundamental rights through respect, protection and fulfilment. Anyone that has been deprived of their liberty should have the right and access to an effective remedy and obtain reparation and compensation (ICJ Manual 2009: 58) Hence the justice institutions in a social system ought to treat persons in a morally appropriate and even-handed way (Pogge as in Marks 2005:29)

In exercising its obligation to fulfill, the state is challenged to come up with a workable and long term solution to ensure that the right to a timely trial for arrested persons in remand custody is observed. The state must take appropriate action and work together with the Judicial Service Commission in ensuring that the length of time a suspect is kept in remand is not unreasonably prolonged before their case has been tried. This will minimize the disadvantage on the part of the accused from punishment, especially if he is eventually acquitted.

Freeman (2002) correctly asserted how rights legitimate challenges to social order when there is an injustice. Rights of an accused person are constitutionally protected in the bill of rights because they are crucial in conferring upon the state the duties with which the failure or success of their performance in their institutional duties is measured. Furthermore, the protection of this right assures and creates an enabling environment in which people's dignity and worth can be guaranteed for their social progress (Marks 2005) and enhancement of capabilities and larger freedoms (Sen 1999) in the post-prison life of the accused. These factors that are used in examining the reasonableness of

pre-trial detention are provided in the Constitution of Zimbabwe (s18) and in regional and international human rights instruments as will be elaborated further below in the normative framework section.

The normative level of the rights formulation involved will now be presented. That is, norms and standards that have been set by the national legislature through codes and enactments focusing specifically on those that address the right to a speedy trial for prisoners. The section will also explore the regional and international human rights framework on the right to a speedy trial that Zimbabwe is legally obliged to respect and fulfill.

### ***2.1.1 National Legislation:***

The Legislature in Zimbabwe has made efforts to provide for the protection of prisoners' rights through enactment of various laws. These statutes only provide for the criminal jurisdiction of the Magistrates Court, the High Court and Supreme Court of Zimbabwe and the procedure to be followed during a criminal trial. The Criminal Procedure and Evidence Act [Chapter 9:07] (CPEA), Criminal Law (Codification and Reform) Act [Chapter 9:23] (CLCA), Magistrates Court Act [Chapter 7:10] (MCA), High Court Act [Chapter 7:06] (HCA) and the Supreme Court Act [Chapter 7:13] (SCA). Each of these Acts is accompanied by a set of rules on the court procedures (Magistrates' Court Rules, High Court Rules and Supreme Court Rules). The right to a speedy trial is found in the Bill of Rights section in the current Constitution of Zimbabwe. There are various sections that provide for this right as follows,

Section 13 (4) provides that:

...if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Section 18(2) thereof provides:

...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.

Furthermore, section 18(1a) of the Constitution imposes a duty on all public officers (these include police officers, judicial officers and state counsel) a duty to carry out their functions rightly. It states that:

Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.

This provision includes public officers employed in prisons and prison related institutions. Thus this provision gives them a constitutional obligation to ensure the respect, protection and fulfillment of prisoners' rights to a speedy trial.

Section 18 (9) of the Constitution also provides as follows;

Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.

The Criminal Procedure and Evidence Act (CPEA), section 32(2) mandates a police officer who has arrested a citizen to bring the latter before a judicial officer within 48 hours after the arrest. The rationale is that an arrest deprives one of his liberty so the court should deal with the case of an arrested person without delay. This would also ensure that the accused person's right to a speedy trial is not violated.

Section 160 (1) and (2) CPEA provides that if an accused person is not brought to trial after the expiry of six months from the date of his or her committal for trial, his or her case shall be 'dismissed'. Such 'dismissal' does not amount to an acquittal, nor does it relate to prescription. It relates to the committal and the effects or consequences or implications thereof. The sub-section is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period, as well as to ensure that the Attorney-General ensures that trials of accused persons committed for trial are expeditiously conducted (Zimbabwe Judges' Handbook, 2012: 13).

Therefore, before remanding an accused person, particularly those in custody, judicial officers should always remember to ask the prosecutor seeking such remand why the accused is being remanded and why the case has not yet been set down for trial (*ibid*). This ought to be done especially where the accused person has been remanded on a number of previous occasions.

### ***2.1.2 Regional Framework***

Zimbabwe is a party to the regional instruments that protect the right to speedy trial. It has ratified the African Charter on Human and People's Rights (ACHPR) which provides for the rights of prisoners to a trial within a reasonable time. According to its Article 7 (1) (d)

Every individual shall have the right to have his cause heard. This comprises:  
(d) the right to be tried within a reasonable time by an impartial court or tribunal.

This section can be read together with other sections of the Charter, which are, Article 3 on equality before the law, Article 4 on respect for life and integrity of a person, Article 5 on recognition of legal status and prohibition of inhuman and degrading treatment, Article 6 on the right to liberty and Article 17(c) which provides that every individual has the right to have his cause heard within a reasonable time. Thus, Zimbabwe has made binding international commitments to which it must adhere in the protection of fundamental human rights.

### ***2.1.3 International Framework***

Zimbabwe has also ratified the ICCPR. Its Article 14 provides for the protection of prisoners' rights and gives an elaborate outline of what constitutes a right to a fair trial, Section 3 (c):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (c) To be tried without undue delay.

Article 26 provides for equal protection before the law to all persons without any discrimination. These are sufficient clauses to secure the rights of prisoners, accord them a right to a timely trial and not to discriminate them from the protection of their constitutional and civil right based on a discriminatory stigma that is attached to suspects.

In addition to this, there are international legal guiding principles for the protection of all persons under any form of detention that Zimbabwe as a member state of the United Nations is encouraged to support. In the body of these principles, as adopted by the UNGA in UN Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment 1988, Principle 11 (1) states that:

A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.

Furthermore, Principle 39 of the same body of principles protects the liberty of arrested persons requiring states to release a person detained on a criminal charge pending trial subject to the conditions that may be imposed in accordance with the law. This principle, in essence, recommends the release of arrested persons as a way of guaranteeing the protection of an individual's human rights despite arrest because of the substantive law principle on the presumption of innocence as provided for under Principle 36.

## **2.2 A Human Rights Based Approach (HRBA) to Claiming and Realizing the Right to a Speedy Trial**

Human rights-based approaches are linked to initiatives for more inclusive forms of 'citizenship' practices, and notions of mobilization for greater 'social justice' (Pettit and Wheeler 2005 in Cornwall and Nyamu-Musembi 2006). Cornwall and Nyamu-Musembi (2006:4) emphasized that 'perhaps the most important source of value added in the human rights approach is the emphasis it places on the accountability of policy-makers and other actors whose actions have an impact on the rights of people' because rights imply duties, and consequently, duties demand accountability.

The human rights based approach was adopted for this research essentially as a yardstick for evaluating the underlying reasons why there are long delays in remand prisoners being heard. The reason is that, in my opinion, HRBA has essential elements (which will be elaborated further below) that bring into perspective the obligations and requirements that all duty-holders ought to abide by and be held accountable for their conduct in relation to the national and international human rights norms. The HRBA approach offers an explicit normative framework through international human rights norms that are compelling for the formulation of national policies, empower prisoners to claim and exercise their right to a speedy trial and, therefore, also obliging the responsible authorities to fulfill their duties (*ibid*). Furthermore, HRBA gives a good platform for using normative frameworks that the Government of Zim-

babwe decided to submit itself to through the national laws and international human rights treaties.

The duty to respect requires the Judicial Service Commission and all other duty bearers not to breach directly or indirectly the enjoyment of the right to a speedy trial. The duty to protect requires the duty-bearer to take measures that prevent third parties from abusing the right and the duty to fulfill requires the duty-bearer to adopt appropriate legislative, administrative and other measures towards the full realization of this human right (UNHCHR 2002). These obligations are a result of the Zimbabwean government's submission to international law and not imposed obligations through foreign intervention. All government and related institutions (Government, ZPS, JSC, and ZRP) ought to determine for themselves which mechanisms of accountability are most appropriate to ensure the realization of the right to a timely trial. Zimbabwe needs to work towards achieving more accessible, transparent and effective mechanisms for the realization of the right to a speedy trial.

The most crucial features of the HRBA that can aid in assessing the findings of the problem under research are the notions of accountability, universality, non-discrimination and equality, participation, liberty and the recognition of the interdependence of rights (UNAIDS 2004:3). These essential characteristics will form the methodology of the research.

## 2.3 Adopting a HRBA Methodology

The HRBA will form the methodological framework through the adoption of its key elements in assessing and analyzing the extent to which respect for, protection and fulfillment of the right to a speedy trial for remanded prisoners has been successful in Zimbabwe. Moser and Norton (2001) as in Farrington, (2001:3) also listed the following as means to pursue a HRBA Training for officials responsible for service delivery to ensure equity of treatment:

- Reform of laws and policies
- Legal representation to enable people to claim their rights;
- Monitoring by civil society organizations of the performance of public institutions and the budget process (i.e. enhancing downward accountability); and
- Strengthening the capabilities of police and the courts

In order to understand the application of these elements in further chapters, it is important to explain briefly few chosen principles and how they fit into the HRBA.

### *Accountability*

Rights and obligations demand accountability. Accordingly, the human rights approach emphasizes obligations and requires that all duty-holders, including States and intergovernmental organizations, be held to account for their conduct in relation to international human rights. 'While duty-holders must determine for themselves which mechanisms of accountability are most appropriate in their particular case, all mechanisms must be accessible, transparent and effective' (UNHCHR 2002:5). In this regard, they have to comply with the legal norms and standards as enshrined in human rights instruments as rights imply

duties and duties demand accountability (Cornwall and Nyamu-Musembi 2004).

#### *Participation*

This is a crucial and complex human right that is inextricably linked to fundamental democratic principles. A democratic social order based on constitutionalism is an essential prerequisite for enjoyment of this right. Effective participation also requires, beyond democracy, those specific mechanisms (such as legal literacy programmes) and detailed arrangements at all levels the administration of justice help to overcome the impediments that the prisoners face in playing an effective part in participation (UNHCHR 2002). As will be seen in Chapter three, one of the reasons for prolonged detention is the absence of legal counsel for the accused. Channels for complaints and redress that can be applied internally to the problem should be in place and accessible to the accused with a view to developing platforms and networks for promoting claims of rights-holders (Boesen and Martin 2007).

#### *Non-Discrimination and Equality*

It follows that the international human rights normative framework has a particular preoccupation with individuals and groups who are vulnerable and disadvantaged (*ibid*). Thus, the human rights approach to prisoners' rights requires that the laws and the relevant authorities that perpetrate discrimination, in this instance, through what is called 'pre-trial punishment'<sup>3</sup> against political prisoners who are denied equality before the law through depriving them from access to a speedy trial, be made accountable. The principle of non-discrimination therefore is a basic criterion for measuring success of the judicial system in recognizing their legal obligation to be impartial and independent, particularly in cases involving political activists (Hamm 2001). Judges should be impartial in the criminal procedure without being influenced, for instance, by political affiliation of the accused as this would amount to discrimination based on political opinions

#### *Interdependence of Rights*

HRBA recognizes the fact that the enjoyment of some rights may be dependent on or contribute to the enjoyment of other rights as well. The realization of one right usually depends, wholly or in part, upon the realization of other rights (UN 2003). In this case the right to a speedy trial is interdependent with a host of other fundamental rights enshrined in the bill of rights of the constitution of Zimbabwe (Annex 1)

From Annex 1, it is clear that no form of discrimination ought to be practiced in any institution in Zimbabwe. However, as was mentioned in the case of the two Banket MDC Councilors and as will be seen in Chapter three, the justice system has been subject to some political influences from the ZANU-

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<sup>3</sup> See e.g. the case of the Sv28 MDC members presented in Chapter 3, a case were all 28 are being accused of killing a police officer who was drinking at a nearby pub from where the MDC members were having their meeting. The 28 accused have been further remanded into custody for more than a year now since May 2011.

PF<sup>4</sup> that have caused grave injustices to members of the main opposition party (MDC) who have been arrested on unfounded charges and suffer pre-trial punishment as they are deliberately delayed from going for trial.

#### *Universality*

An extract from the article by Nyamu-Musembi (2005) clearly explained the principle of universality as follows:

universalists' arguments make a normative claim that human rights should provide a universal standard because rights inhere in every human person by virtue of simply being human. Rights flow from the inherent dignity of every human person. Rights are not given by the sovereign and therefore the sovereign cannot take them away. Nor are rights pegged to social status or stratification based on age, gender, or caste. Since rights flow from the inherent dignity of the human person, they are therefore not contingent on particularities such as political, social, economic or cultural context.(Nyamu-Musembi 2005:42-43).

This extract highlights the importance of a strict adherence to the preservation of human rights that the Human Rights Based Approach adopts. The universality of human rights not only refers to their universal applicability but also demands universal conditions under which the human rights can be realized (Hamm 2001) If universal application of the law is practiced in respect to the right to a speedy trial, everyone arrested will be treated with dignity and protected by the law from infringement of other correlated rights without political or other forms of discrimination.

As explained in the above paragraphs, the HRBA with all its various elements will be a useful tool in assessing and evaluating the findings for policy advice. HRBA encompasses the critical aspects in reviewing the state and related prison institutional organs obligations and functions and the extent to which they have been operating within the confines of the right to a speedy trial. In Chapters three and four, as the primary research findings are discussed and the review of cases is done, the elements of the HRBA outlined in the present chapter will be applied to indicate the gaps in the realization of the right to a timely trial and how adoption and application of these elements can be an effective aid in fulfilling the right to a speedy trial. By indicating the gaps, the

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<sup>4</sup> Various civil society actors who preferred to remain anonymous also highlighted this influence (July 2012) as stemming from the ruling party because the President appoints all judges on the recommendation of the Judicial Service Commission. Note, on recommendation, thus, the President can decide to appoint anyone else who has not been recommended or decline to appoint anyone who has been recommended. A case example of his unchallenged power is the swift move (May 2010) he made in removing High Court Judge President, Rita Makarau moving her to the Supreme Court and immediately appointing Justice George Chiweshe to replace her office in the High court. The President did this without making any consultations with the opposition party (MDC) executive members with whom his party is in a coalition government with (GPA) hence such judicial appointments are therefore regarded as strategic and of a political nature to safeguard and control the administration of justice, particularly pertaining to political arrests (Guma:2010)

<http://www.swradioafrica.com/news210510/judgeinpocket210510.htm>

essential elements of HRBA will be addressing the reasons why suspects are not enjoying the right to a speedy trial. Operationalizing HRBA will integrate the wider context of achieving justice for remand prisoners, aiming as well, at addressing obstacles lying outside of the legislative framework on the administration of justice.

# **Chapter 3**

## **The Institutional Discord: Exploring the Causes for Delayed justice**

### **3.1 Introduction: Who is Responsible?**

Various insightful responses were given for the causes of the delays in accused persons obtaining a speedy trial. Some of the causes revealed reflected upon the somewhat deliberate neglect of the authorities in honoring their duties in office with due diligence. The causes of the problem were mainly identified to be from the judicial system. More answers revealed that it is not only the judicial system that has failed, but rather, that the breakdown and neglect of related institutions has also contributed immensely to the increasing problem of lengthy custodial remands without trial.

### **3.2 A Series of Neglect and Breakdown in the ZRP**

The main response given by the lawyers, prosecutors and civic society human rights activists that were interviewed in the context of this study had to do with the office of the ZRP. I was duly informed by various stakeholders that usually the problem begins at the Police Station as will be seen in more detail below. When a person is arrested, this occurs on a reasonable suspicion of having committed an offence and they are then put in remand prison. During this time, a docket is compiled by the arresting officer(s) and the matter only goes to trial upon the completion of a docket which is a record with all the evidence and information required by the state to prosecute the accused. Without the docket, the state cannot prosecute. It is during this period that remanded prisoners often face delays in appearing for trial.

The responses from the various stakeholders in the civil society were similar as they all saw most of the problem emanating from the police station. According to the Law Society of Zimbabwe President (LSZ), Tinoziva Bere, investigating police officers do not conduct a proper and thorough investigation on time and this is due to them being inadequately trained to conduct a criminal investigation. This incompetency explains why the collection of evidence and compiling a docket for serious offenses, such as murder, may take them up to 5 years to complete, as happened in several cases, at the detriment of the accused who languishes in remand for a prolonged period. Ordinarily, a remanded prisoner for serious offenses like murder ought to be held in remand for no more than 2 years while evidence is being compiled for the docket. Furthermore, it was expressed that the police officers, owing to their insufficient skill and training also think that opposing bail is a sign of competency of service (*ibid*).

Zimbabwe Lawyers for Human Rights (ZLHR) representatives, Jeremiah Bamu and Belinda Chinowawa pointed out that the police cause the delays for accused persons to obtain a speedy trial by prolonging the production of a docket. A defense counsel for an accused, Tendai Mberi stated that investigating police officers demand bribes from the defense counsel for their case to be

‘speeded up’. This, it implies that some of the delays by the officers are on purpose and intentional and have a motive behind them, that is, to withhold the docket from the court or drag collection of evidence until their demand for a bribe is met.

From a HRBA, it is evident that there is lacking a channel in the ZRP that requires investigating officers to account for their work, or if the channel is already present, it is not effective. The investigating officers are aware of their responsibility and obligation to compile a docket and that the courts, the defense counsel of the accused and the accused themselves all rely on their competency for a case to proceed to trial. Although some of the reasons given as to why they delay in compiling a docket are a result of a resource-constrained institution, there is clearly some deliberate neglect of their responsibility to ensure the timely compilation of a docket through their request for bribes. In the presence of an effective and transparent channel (and all other material and financial resources being available) to which the investigating officers report and account for the progress made in compiling dockets for the cases under investigation while an accused is in custody, they are less likely to abuse their office requesting for bribes and making deliberate delays until their demands have been met.

### **3.3 An Ailing Judicial System**

Another reason for the prolonged detention of remand prisoners without appearing for a trial is inherent in the administration of justice itself. The keeping and managing of records in court cases is still manual with court record files kept in one big room that is overseen by the clerk of court (Annex 2, Respondent 3). This manual system of record keeping is not sustainable considering the number of records that have to be kept. This has resulted in some court records going missing, some records having incomplete information and critical documents from the dockets sometimes getting lost further which contributes to the delay in the accused having their matter finalized (Annex 2, Respondent 4). What aggravates the situation is that the National Archives Institute that keeps all important state records no longer comes to collect the court records of closed cases. Thus, all of the files, of pending and finalized matters are all scattered in the records room (*ibid*).

From a HRBA, the issue of disorder in the record keeping system is also a matter of improper administration and ineffective channels to monitor and make accountable the clerks responsible for maintaining court records. Clerks of Court who are responsible for keeping all records in an orderly and coherent manual filing system, which worked well before, seem to be blaming it all on the need to computerize the record keeping system. While it may be difficult to ensure the safer record keeping manually, it is not entirely impossible. There seems to be a willful and deliberate disregard of ensuring that records are in order from the clerks who always blame their lack of responsibility to the system.

A magistrate (Annex 2, Respondent 12) who has been on the bench for more than five years now highlighted a very serious problem within the court administration. Police officers are now coming to stand in as prosecutors. They have zero experience on how a trial ought to be conducted and this drags cases

in reaching finalization in trial court. In addition to this, the same police officers coming to prosecute are also investigating officers, thus there is a double role of investigating and prosecuting. This double role consequently divides their attention to carrying out investigations full time hence an accused has to wait a longer time than he ought to until the docket is complete

It was also interesting to discover that some civil claims, for example, debt claims are now being converted to criminal cases to speed up the process of payment by the debtor. The person is arrested for 'fraud', usually after bribing the arresting officer to arrest him and the accused languishes in remand until the pay of the debt through someone outside. Thus, it can be deduced that the issue of corruption has also contributed to the lengthy pretrial periods (Annex 2, Respondent 13).

Respondent 12 (Annex 2) reported that foreigners that have been arrested were also reported to experience prolonged periods in remand because of the unavailability of an interpreter for their particular language. The time spent trying to find an interpreter who speaks the same language especially if it is an unfamiliar dialect outside the well-known languages, to go for trial may be delayed, hence causing a longer pre-trial period for them until an interpreter is found, sometimes, even up to two months longer.

A magistrate in Harare (Annex 2, Respondent 10) gave another reason for the delays as being the shortage of expert medical staff in the justice sector. Some murder cases require that the accused goes for psychological assessment and evaluation if they are any signs of mental instability. There are two doctors throughout the country that do psychological assessments and this makes the wait long until the turn for each one of the murder suspects comes to get assessed, and if approved, stand for trial. This not only infringes on their right to a speedy trial but also on the detainees' right to health as provided for in Article 12 of the ICESCR which Zimbabwe is a state party.

The issue of short staffing has affected the administration of justice in the small towns, some with only three magistrates. This delays trials for accused persons because there are lesser magistrates than there is work for them to do. The situation would worsen when a magistrate has to go for sick leave or compassionate leave. In light of this problem, the Chief Magistrate repeatedly emphasized that the situation is currently being rectified with several law officers being recruited and dispatched to different towns where there are under staffed to conduct proper administration of justice as far as so that cases can be cleared (Chief Magistrate).

In recent years, accused persons voice out their grievances when the magistrates and judges have regular their visits at prisons to assess. For example, it was during a prison visit in 2006 at the Harare Central Prison that the then Judge President Rita Makarau learnt from some detainees that they had been on remand for more than ten years (Sokwanele: March: 2006).

Adopting the HRBA, this is a channel that enables the prisoners to participate in claiming their right to a speedy trial. It seems, however that this channel is not as effective as it ought to be in ensuring the participation of remand prisoners in claiming their right to a timely trial. If it was an effective channel, there would not have been prisoners who have been on remand for up to ten years as the Judge President witnessed. Effective participation requires the availability of detailed and consistent arrangements at all levels in the admin-

istration of justice that help overcome the impediments that the prisoners face in realizing their right to a speedy trial.

A judge in the High Court (Annex 2, Respondent 7) stated that another reason why some cases are delayed from trials and accused persons face lengthy pre-trial periods is that there are a few judges over a widespread geographical location. There are two High Courts in Zimbabwe, one in the capital, Harare and one in the second capital, Bulawayo. These two High Courts comprise of; Harare 21 judges and Bulawayo, 4 judges assisted by one acting judge. This therefore makes the task for them to clear all cases as they come overwhelming and impossible. This is so especially considering that the High court is a court of appeal for all cases coming from the Magistrates Criminal Court and also a court of first instance for a category of serious offenses. It is my submission that even if the judges ought to be held accountable for the backlog in cases, sometimes the system fails to make their work easier. Thus, in as much as they are accountable for the backlog, blame should not always be put on them because of their small number.

At the same occasion, another judge (Annex 2, Respondent 15) mentioned that delays in trying criminal matters are at times caused by the assessors' absences, who deliberately absent themselves, claiming that they are not being fairly remunerated, hence causing some cases to be postponed, and consequently thereby violating the accused's right to a speedy trial.

### **3.4 Witnesses, Defense Counsel and the Quest for Legal Aid**

The appearance of witnesses has also been pointed out as a cause for further delays in accused obtaining a speedy trial. One prosecutor (Annex 2, Respondent 5) reiterated that sometimes, when the state is ready to prosecute and the docket has been compiled, what causes further remand for a longer period is that the witnesses may not be ready to appear or are unavailable on the particular day that has been set down for trial. In addition to this, there are some key witnesses who have to come from the remote areas that are far from the court they ought to appear before. Owing to economic hardships, some witnesses fail to turn up on the trial day thereby having the matter postponed. This is highly detrimental to the detainee who then has to wait longer for trial until witness(s) becomes available and is therefore remanded twice, in remand court and in trial court.

Some accused persons that I had a discussion with briefly (Annex 2, Respondents 8 and 9) who were there for an application for bail expressed dismay and anger against the defense counsel assigned to them by the state. One prisoner, an armed robbery suspect who has been on remand for the last 2 years said that his lawyer had let him down and not acted with due diligence in moving the matter and that this was causing great mental distress. He was always unavailable.

Upon further and deeper enquiries with a prosecutor at the criminal court (Annex 2, Respondent 10) it was brought to my attention that some of the lawyers that are assigned pro deo cases simply take them for granted because they are not financially rewarding for their efforts. Rather, they prioritize those cases that have paying clients than those assigned to them by the state to repre-

sent accused persons that cannot afford lawyers. This also adds to the reasons why many remanded prisoners are delayed from trial. The senior lawyers then assign the pro deo cases to junior lawyers who usually do not have experience with serious offenses and the representation is also compromised.

There is an ironic revelation of how the defenders of justice are perpetrating injustice. Legal counsel who do not prioritize pro deo cases that require their expertise and skill, rather than that of a junior lawyer, have failed to defend the defenseless. From a HRBA, they also fail to realize the interdependence of the right to a speedy trial with the right to health. As the accused stated, the fact that his defense counsel has let him down causing him to overstay in remand prison has caused him great mental anguish. Pro-longed incarceration has violated the right to a speedy trial as well as the right to good health.

The issue of legal representation has also aggravated the period that remanded prisoners stay without facing trial. An administrator in the Legal Aid directorate (Annex 2, Respondent 6) stated that free legal advice is no longer 'free'. Accused persons who cannot afford legal counsel are now being required to pay a certain amount for legal aid services. This has prolonged trial periods for those who cannot afford to pay the supposedly free legal services as with serious cases, an accused has to have a defense counsel provided for them.

If 'free' legal aid is no longer free, the accused who cannot afford a lawyer should be given a platform through which they can participate in claiming and realizing their right to a speedy trial. Still on the issue of lack of financial resources for the accused, the prosecutors mentioned as well that sometimes an accused is granted bail but sometimes the accused cannot afford the bail amount hence they therefore endure prolonged incarceration for this reason until they pay the full amount or have to wait in custody until their case has been tried.

Assessing these causes from a HRBA perspective, such delays are also a form of mental torture for the accused who sees no way out. Because rights are interdependent, it is not only the right to a speedy trial that is violated, but also the right to health and well-being.

### **3.5 Politics at Play?**

Accused are also subjected to prolonged detentions before trial because of purely political reasons (Annex 2, Respondents 11). Various civic society human rights activists brought to my attention the currently pending case of the State against the 29 MDC (Movement for Democratic Change) activists, the ruling political party's main opposition. These accused were arrested in May 2011 for the murder of a police officer at a place where they were having their meeting. Since the time of their arrest, now almost a year and a half past, the accused are still being further remanded into custody without any hope of the matter being brought to finality anytime soon.

A journalist, Godwin Mangudya argued that the reason for this further remand is not that a docket is not yet complete to proceed to trial. The reason behind the delay, as the journalist summarized, is because as political prisoners, they are ought to serve their sentence while in custodial remand because at the end of the trial, there is highly likely to be an acquittal. The time that they spend on

remand is actually a sentence for them because it is unreasonable to think that 29 people could have killed one police officer together, who in this case was not even at the place where the 29 were gathered for their meeting when the murder occurred.

Rights are universal and inhere in every person (Nyamu-Musembi 2005) The right to a speedy trial flows from the inherent dignity of the human person, and is not based on political affiliation. The selective application of the right to a speedy trial in cases involving ZANU-PF opposition political party members diminishes the confidence that Zimbabwean citizens have in the impartiality and independence of the judiciary in the administration of justice.

### **3.6 A Case of Troubled Related Institutions**

A ZPS (Zimbabwe Prison Services) Officer (Annex 2, Respondent 14) from Norton (a small town 45 kilometers outside Harare) reported that some prisoners may be ready for trial court but there are two vehicles carrying accused from the remand cells to the Magistrates criminal court or High Court in Harare. This same problem of shortage in transport was also highlighted by a Constable in the Norton Police Station (Annex 2, Respondent 15). The criteria used for selecting who goes and who stays, in case there are more accused to appear than the vehicles can carry was not clear but it reflected on why some prisoners end up having to face delays in obtaining a speedy trial. Thus, the problem here lies with the service delivery provided by the prison services. The capabilities of the prisons service can be strengthened best by building their resource capacity to improve on their service delivery.

The magistrates (Annex 2, Respondents 12 and 13) from the criminal court division also stated that the core of the problem with delays in remanded prisoners' obtaining a speedy trial begins at the police station owing to the lack of resources. They explained that the investigating officers are not well resourced to facilitate an investigation timeously. There is an acute shortage of resource requirements, for example, when part of the evidence is in another location out of town, they may be willing to go and make their investigations but find themselves grounded by shortage of vehicles and fuel to travel to the that location.

They further stated that the depletion of resources has compromised the effectiveness of the police in responding to criminal activity quickly. Consequently, instances have occurred when the evidence then falls away or is destroyed because of delayed action. A case example of evidence falling away is when there is urgent need for the collection of forensic evidence and there is no expert skilled to do that available at the time their services are required. This results in prolonged pre-trial detentions for remanded prisoners as investigating officers make attempts to find and exhaust all other possible leads to the evidence needed to make the docket complete. In addition to this, the police seem to forget once they hand in a person for detention in custodial remand because they may be overwhelmed with duties.

### 3.7 What Has Been Done?

In my consultation with the Chief Magistrate, Mishrod Guvamombe he mentioned various strategies that have been employed to improve the administration of justice in Zimbabwe by the Judicial Service Commission this far. It seems that the authorities, while realizing that there is a problem, have not introduced remedies that rectify the whole problem but just improvements that mitigate part of the problem. In searching for answers as to why there is prolonged detention for remand prisoners without trial, the Chief Magistrate gave the following examples of the JSC current interventions to improve the system:

- The recruitment of more law officers who will be assigned to work in the small towns where there is a major shortage of staff. When I went to interview the chief magistrate at the Law Development Commission, I witnessed that recruitment interviews were actually in progress. This will ease the burden on the sitting magistrates countrywide and enable the hearing of more cases at a time, thus clearing the backlog.
- Since the beginning of the year 2012, every month, magistrates from courts in all the Provinces must provide a statistical report of the cases they had on record, the cases that they heard and finalized, those that are pending and the progress they have made from the previous month. The report also states the administrative challenges that they faced and recommendations to overcome those challenges. This monthly reporting to the Chief Magistrate makes the staff more responsible as they are accountable for any continued backlog and malfunctioning.
- One of the most important changes made was institutional. Magistrates in the country now fall under the Judicial Service Commission. This move was set to put all judicial operations under one structure, with the hope of making the administration more efficient and manageable. The enabling Act came operational on June 18, 2012 and is called the Judicial Service Act.
- Once a person has been on remand for more than a year and the investigating police officers are not forthcoming or making progress with compiling a docket, the Magistrate, using reasonable discretion may remove the suspect on remand and set them free and then proceed by way of summons when the docket is ready for the matter to go to trial. This is done in order to protect the accused's liberty and the presumption of innocence.

In closing this chapter, from a HRBA perspective, it is evident that lawyers, together with the other stakeholders contribute to the violation of the right to a speedy trial. Accountability is a crucial aspect of the HRBA and the requirement that the duty holders account for their operations through report writing as implemented by the JSC recently is appropriate for monitoring the performance of law officers in fulfilling the right to a speedy trial for accused detainees. Furthermore, while the JSC improvements listed above are appreciated, it is my submission that they only solve just part of the problem. This is so because these institutional changes are not in any way coordinated with the improvement of the related institutions particularly the Zimbabwe Republic Police and the Zimbabwe Prison Services, which also need to be engaged and

incorporated into the strategies to ensure the full realization of the right to a speedy trial. The last chapter will elaborate more on how best the JSC and its related institutions can be improved in order to realize timely trials for the accused.

# Chapter 4

## Review of Judicial Interventions

### 4.1 Introduction

This Chapter will look at the interventions made by the JSC to address the right to a speedy trial as far as remand prisoners are concerned. This will be done through an analysis of selected case law that has been set to ensure the right to a speedy trial. I will look at various examples of case law that set a judicial precedent in the High Court and Supreme Court in observing the Constitutional right to a fair trial (including the aspect of speedy trial), what the magistrates and judges have done in the past when an accused was in custodial remand for more than a reasonable time.

The chapter will discuss the reasons for the decisions made and how far these judicial interventions reflected on the duties to respect, protect and fulfill the right to. The chapter also looks at the other ways in which the judiciary has intervened in cases of prolonged incarceration without trial. An evaluation of the extent to which these cases have been useful in ensuring that the right to a speedy trial is fulfilled will be done from the perspective of a human rights based approach.

It is important to have this chapter in order to evaluate the role of the judiciary in contributing or reducing the problem of the lengthy pre-trial detentions. This is so because of the procedure of their appointments to be judges. As explained earlier in the background to the problem, the judiciary are appointed by the President in terms of section 84 (1) of the Constitution. This role of the President has made the judges to be seen as partial and lacking judicial independence, particularly in cases that are of a political nature or involving the ruling party ZANU-PF opposition party members of the MDC (USA Human Rights Report, 2010:2).

The 2010 USA Human Rights Report also described that 'Legal experts said that defendants in politically sensitive cases were more likely to receive a fair hearing in magistrates' lower courts than in higher courts, where justices were more likely to make political decisions' (ibid:19). The report further stated that in the 2008 Presidential elections, when many cases were opened against the opposition party, 'some urban based junior magistrates demonstrated a greater degree of independence and granted MDC and civil society activists bail against the government's wishes' (ibid).

On the contrary, the current Attorney-General, Johannes Tomana, has displayed some political bias in the conduct of his work compared to the magistrates. This is perhaps due to the fact that, while his office is a Presidential appointment (and thus political), magistrates are appointed on the basis of their qualification. In 2008, when Tomana was deputy director, he announced that the AG's office would 'deny bail to all suspects arrested on charges of either committing or inciting political violence' (ibid:19). These arrested persons were then kept detained for weeks and some for months (ibid). Thus the AG can make orders outside the law arbitrarily and this contributes to the problem of some of the cases of lengthy pre-trial periods. It is important therefore to

look at the role of the judiciary at large through case reviews to evaluate their impartiality and independence in ensuring that the right to a speedy trial is observed.

## 4.2 The Right To A Speedy Trial Through Case Law

This section will present and review selected case law concerning the right to a speedy trial in Zimbabwe. I considered these cases below the best and most authoritative for the subject under research because they clearly and exhaustively bring out the long standing judicial position on the right to a speedy trial. It is for this reason that these cases (excluding those cases of a political nature) have continued to be used as authoritative judicial precedents in the courts of law when a case of prolonged detention for an accused arises. The cases are in chronological order of year. The chronological order of presentation also gives an idea of the changing approaches of some of the judges over the years owing to their political influences, particularly on the cases regarded to be of a political nature as alluded to in the background in Chapter 1.

### ***Bull v Minister of Home Affairs 1986(1) ZLR 202 (S)***

This case was heard in the Supreme Court of Zimbabwe. It was held that the responsibility of the court to prevent unreasonable delays is a continuing one. At each further remand the progress of the investigations in compiling a docket ought to be checked. For instance, this is required at the last remand where the State has asked for additional time and applies for a further remand of the suspect because the police still needs to locate missing witnesses or conduct further investigations. If this reason is the same as the reason advanced previously, therefore, the court should thoroughly check and enquire into the matter and ensure that the police are vigorously attempting to deal with the matter (Feltoe G, 2009, 31).

From this case, it is evident that the court made reasonable efforts to realize the right to a speedy trial for remand prisoners and their right to liberty. In exercising its duty to decline to grant requests for further remands from the State when an accused has been incarcerated for an unreasonably long time, the state institution adopted a human rights based approach. This reflects on the good governance of this judicial actor and its adherence to the principles of international human rights law on the universality of human rights. Furthermore, the checks and enquiries made by the court into a matter when the same reasons requesting for further remand of an accused are advanced will ensure proper accountability by the investigating officers who must make an account of the progress made in a particular case giving valid reasons for any possible delays.

### ***In Fikilini v Attorney- General 1990 (1) ZLR 105 (S)***

This case is landmark cases in the determination of a matter were an accused had been subjected to a lengthy pre-trial detention. The court set out a number of issues that ought to be taken into consideration in determining whether a person's detention pending trial becomes unlawful because of failure to bring him or her to trial within a reasonable time. The Supreme Court held that:

- the nature of the charge in the investigation and the process required to investigate the charge, the complexity or straightforwardness of the case, the gathering of evidence, for example if part of the evidence required is outside the country and if there are vital witnesses that the state still has to locate;
- an enquiry by the presiding magistrate or judge is needed into the reasons advanced for the delay by the prosecution. A good reason, for example, the complexities in accessing a critical witness will be justification for the delay or else any insufficient reason or unjustified reasons will weigh heavily against the prosecution;
- the court will also assess the evidence of deprivation of the accused's right to a speedy trial and the accused's efforts to have the matter be brought to trial. In making this assessment, due consideration must be given to the undefended accused who may fail to assert his right because of legal illiteracy.

This case shows the extent to which the judiciary, decades ago (1990) has been actively engaged in ensuring that prisoners' rights are not violated or taken for granted. These guidelines have set a judicial precedent that continues to be useful today in determining matters of prolonged incarceration without a trial. For example in the next year after this precedent was set, in 1991 in the case of *In re Mlambo* (1991 (2) ZLR 339 (SC)) the court used the guidelines of the Fikilini case to decide the matter of prolonged incarceration. In this case, the Chief Justice at that time, Justice Gubbay, held that the factors to consider in determination of whether the accused has been afforded a fair hearing within a reasonable time include the reason for the delay, the assertion of his rights by the accused person, prejudice arising from the delay and the conduct of the prosecutor and of the accused person in regard to the delay. From a Human Rights Based perspective, this case by also looking at the accused's efforts have the matter brought to trial employs the principle of participation by the accused in claiming and realizing their right to a speedy trial. Participation of the accused is especially critical were it is possible that the prisoner has been 'forgotten'.

### ***State v Chilimanzi 1990 (1) ZLR 150 (HC)***

The appellant was convicted of fraud and sentenced to 22 months imprisonment. The appellant was convicted just over a year after his arrest and his appeal against sentence was heard some two and a half years after sentence was imposed. Justice Smith held that even if such delay in bringing an accused to trial is not unusual the further delay in the preparation of the record and setting down the appeal is unfair to the accused. It was further held that it would not be just to send the appellant to prison after so long a delay even though the offence justified a custodial sentence. Delays of this nature cause suffering and mental anguish to the accused and are incompatible with justice or the provisions of s18 of the constitution.

The sensitivity displayed in this case by the presiding judge is a clear reflection of the judiciary's endeavor to protect prisoners' rights and also shows their awareness to the fact that a violation of this right has a ripple effect and also causes violation of the victim's other human rights such as the right to health which is prone to infringement also when a person has been on remand for a long time and suffers mental anguish as well as exposure to communicable dis-

eases that spread in overcrowded prisons (Dankwa as in Sarkin 2008:84) as is the case in most of Zimbabwe's remand prisons (Alexander 2009)

### ***S v Nemutenzi 1992 (2) ZLR 233 (H)***

It took 4 years and eleven months to bring the accused, charged with culpable homicide to trial. At page 240, the court said, 'the precept justice delayed is justice denied can be said to be an apt description of what transpired in the present case'. The inordinate delay, according to the court was in no way attributable to the conduct of the accused but was entirely attributable to the inefficiency of the state machinery. From a HRBA, the state machinery is lacking an effective channel that monitors and accounts for remand population regularly with a view to assessing and alerting the judicial authorities as to which prisoners have been incarcerated for an unreasonably prolonged period without going for trial.

### ***State v Musindo 1997 (1) ZLR 395(H)***

The High Court said that magistrates could have conducted a monthly check of criminal record books in order to ensure that matters outstanding did not escape attention. Thus the right to a speedy trial would then be monitored effectively. This approach taken by the courts in making decisions reflects on the importance of ensuring that the right a speedy trial is protected. It is a form of judicial activism that can help to realize the right to a fair trial. The requirement that the magistrates check criminal record books is an effective way of making them also accountable for the proper administration of justice.

### ***State v Matapo and 6 others 2011 ZLR (HC)***

Justice Yunus Omerjee of the High Court ordered the release of the accused facing charges of treason. Some of them, former army officers had been languishing in prison since 2007 despite several attempts by their lawyers to have them released. The judge held that it is apparent that the accused should not have been committed to custody. A declaratory order was issued to that effect. Emmanuel Marara, who was relieved at the order, recounted the horrors he faced while in incarceration, revealing that he had been warned by one of his alleged torturers that he would spend a 'very long time in jail for refusing to implicate some senior army officers he did not know'. It is for this highly political reason that he spent four grueling years in remand prison without trial along with his six other co-accused (Africa Pretrial Justice Monitor 2011:4).

This is a vivid case of how pre-trial punishment manifests as explained by the African director for the International Commission of Jurists, Arnold Tsunga, in an interview<sup>5</sup>. The order given by the judge is a clear reflection of how some judges are not politically influenced or politically manipulated to keep accused persons in prison for no reason. The HRBA core principle of the universality of human rights is clearly being respected and fulfilled by the court.

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<sup>5</sup> Mr. Tsunga made these remarks at the International Institute of Social Studies at a conference on 'The Politics of Justice' for the Hague Academic Coalition on 13/10/2012.

Thus, this case is one of the many cases showing that the judiciary at most times does not accept abuse of power that threatens a person's liberty.

### ***State v 29 MDC-T Members 2011 HC (pending)***

The accused in this currently ongoing case are facing murder charges of a police officer in May 2011. This case has assumed a political dimension because the accused are supporters of the main opposition party in Zimbabwe. The accused have been languishing in remand prison for over a year and have been denied bail to date by the High Court Judge Chinembiri Bhunu.

During my research in Zimbabwe, legal officers kept referring to this case as one of the worst case scenarios of how the justice system can be used as a play ground to communicate a political message to opposition party supporters (Annex, Respondents 5). This case shows how the Presidential judicial appointments can be strategic in protecting political interests and how the principle on the universality of human rights can be infringed. When the right to a speedy trial is selectively applied and denied people of a different political interest deliberately, the system fails to meet its international law obligation to ensure the uniform and universal application of the law to all human beings.

From the case summaries above, it can be concluded that the judiciary has done some remarkable work through setting judicial precedent that protects the right to a speedy trial making authorities accountable for any unreasonable delays. While there are political influences that continue to compromise the overall proper administration (independent and impartial administration) of justice through obvious procedural irregularities and anomalies, the judicial interventions to realizing the right to a speedy trial has generally been observed. This is so because, the case law on the preservation of this right to a speedy trial that was set in the 1990s continues to be successfully used in the courts of law. For example, the guidelines for stay of prosecution as outlined above in the *Fikilini case* have been used in recent cases, such as the case of *S v Matapo and six others* as an authority to argue for the stay of proceedings because of the failure to realize the right to a speedy trial for the accused.

# Chapter 5

## What Can Be Done? Mapping a Way Forward Through Policy Advice

This chapter will conclude the enquiry and present the overall conclusions of this research, accompanied by concrete recommendations on how meaningful and long term solutions could be pursued to ensure the protection of the remand detainees' right to a speedy trial.

### 5.1 Conclusions

There is a huge gap between what the law is in the books and what it is in practice in Zimbabwe. There are serious violations of the right to a speedy trial and there seems to be some deliberate neglect over the respect, protection and fulfillment of the right. This is evident from the fact that authorities in charge of realizing the rights to a speedy trial are sometimes influenced by political forces that compromise on their official duty to protect the rights of prisoners. Thus, it can be concluded that the failure to uphold the right to a speedy trial is not only a result of institutional breakdown but also a result of the willful disregard of the right by some key persons in the judiciary.

The problem is not only stemming from one specific institution only (the judiciary), but from various related institutions that also need to be engaged in order to ensure the full realization of this right. A lot of detainees are losing their lives being detained for more than they ought to be without their guilt being established. This has had a ripple effect on the preservation of their other fundamental rights. The presumption of innocence of accused persons is taken for granted and there is a need to establish a policy framework for the administration of criminal justice. A HRBA ought to form the core of this policy framework. Adopting a HRBA to the realization of the right to a speedy trial would contribute to a more sustainable and proactive system.

### 5.2 Recommendations

Various strategies can be employed by the judiciary and all related institutions to solve, or at least improve on the problem. Implementing stronger mechanisms for investigation, adding more skilled staff to process prisoners for trial, providing vehicles to transport detainees to court and ensuring efficient, fair and just prosecutions would certainly aid the justice sector in Zimbabwe to achieve shorter remand periods for accused persons (Dankwa as in Sarkin 2008: 86).

#### 5.2.1 *The Court System and its Structure*

It is recommended that the Ministry of Justice and Legal and Parliamentary Affairs, as the relevant authority for the protection of rights will work in conjunction with the Judicial Service Commission to increase the number of courts that preside over criminal cases. It is recommended that a High Court

be established in every province, as is the case in Zimbabwe's neighbouring country, South Africa. This would work better than the current circuit courts. If a High Court is located in every province backlog in the current two High Courts will reduce.

### ***5.2.2 Judicial Personnel***

There is a serious shortage of judges, magistrates and prosecutors, a problem which always continues because the current law officers always leave the JSC for greener pastures, such as private practice. It is recommended that the JSC addresses this problem by continuously or regularly filling in the gaps that become vacant. Increasing the number of judicial personnel will ensure that matters are tackled more easily and faster, with lesser chances of there having to be a backlog created by a law officer's post that would have been vacant for more than a year. The President and the JSC ought to appoint more judges to hear and determine criminal cases. At present there are few judges in both the Harare and Bulawayo High Court, hence there is a disproportion between their number and the influx of cases they have to hear.

It is also recommended that the JSC remunerates adequately all its personnel. This should improve staff morale and should ensure employer job satisfaction resulting in the prompt dealing with cases and consequently the realization of the right to a speedy trial.

There should be a clear distinction of roles between the JSC and the ZRP. Investigating police officers should not be given a platform to prosecute while at the same time carrying out investigations. These two roles should not be intertwined as this only causes further delays since the investigating officers have to put on hold that duty while they take on the other one of prosecuting. More prosecutors can be recruited into the JSC rather than having police do double work for two independent (ZRP and JSC) but related institutions at the same time.

### ***5.2.3 Computerisation of Court Records***

Zimbabwe still relies on a manual system of record keeping. This system is not sustainable considering the number of records of accused and convicted persons that the court has to keep through the manual filing system. As was highlighted in Chapter 3, this system is defective and has in fact compounded the problem of delays, mostly because dockets are misplaced or crucial documents needed for proceeding to trial get lost from the file.

There is a need to computerise the record keeping system and ensure that this system is kept up to date at all times. A database of cases should be easily accessible to the presiding magistrates, judges as well as prosecutors, who through this means, without difficulty, can follow up on pending cases as well as monitor the progress of the investigating officers in compiling dockets. This is also an efficient tool for maintaining checks over the period for which an accused has been on custodial remand.

### ***5.2.4 Discipline of Offices***

More stern measures should be put in place in order to deal with anyone who contributes further to the problem of delays. For example, the unethical con-

duct of legal practitioners who do not prioritise pro deo cases should be monitored through the Law Society of Zimbabwe, the main authority on the conduct and operations of lawyers in private litigation. If there are stern measures to punish errant practitioners, they will not request postponement of cases unnecessarily and therefore criminal cases will urgently be dealt with. Apart from this, corrupt police officers ought to be disciplined and also equipped with the relevant skills on ethical working standards and the importance of timely investigations for accused prisoners on remand. If officers are well-equipped and trained regularly in investigating techniques, they are accountable for being negligent if they delay investigations.

While on the discipline of offices, a transparent and effective mechanism ought to be devised to ensure that no civil claims are translated into fraud claims through the manipulation of the justice system by corrupt police or judicial officers. Fraud cases should be thoroughly assessed before the accused is further remanded by the courts in order to make sure that they are not unfounded allegations.

The JSC needs to have a readily available network that provides them with interpreters of any foreign language. This would ensure that the arrested foreigners who cannot appear for trial due to the unavailability of interpreters are not prejudiced by prolonged incarceration while the state looks for an interpreter.

### ***5.2.5 Institutional Resource Capacitation***

The Zimbabwe Prison Services will continuously fail to meet their standard of service delivery until they are provided with the basic material resources they need for being efficient. Provision of more vehicles for transporting suspects to court and the secure and permanent supply of fuel will enable them to operate efficiently. If this requirement is met, suspects will be brought to court at the time they ought to be rather than at the time transport is made available.

Depletion of material resources reduces the effectiveness of the Zimbabwe Republic Police in responding to criminal activities. Therefore, resources also need to be made available to them. For instance, a separate budget set aside for investigating authorities would mean that the productive factors required to carry out investigations timely are readily available. These include vehicles and fuel as well as money to ensure that identified witnesses who cannot afford to travel to court are covered. The Law Society of Zimbabwe President also recommended that an honorary award scheme should be introduced for police officers who carry out effective and timely investigations in the ZRP. This would be an incentive to motivate the officers to conduct investigations rigorously. Therefore, funds for this scheme ought to be included in the ZRP annual budget.

The judiciary also needs to be provided resources, for instance to increase the number of psychological assessors. With more attractive salaries for this post, many more doctors would be willing to take it on. In addition to this, the judiciary should be well resourced, financially and materially. For instance, the judges in the High Court should be able to conduct circuit courts outside Harare and Bulawayo without any financial constraints. The judiciary should also be well equipped to conduct periodic training workshops for members of the judiciary.

### ***5.2.6 Participation and Accountability***

Because magistrates and judges are only able to do prison rounds periodically rather than regularly, there is a need for a permanent office within the prisons that enables prison participation in asserting their rights. This channel would be efficient for the ‘forgotten ones’ who can bring to the attention of the authorities their plight of prolonged detention. Consequently it would also prompt for the immediate provision of legal counsel by the state to claim and realise the accused’s right to a speedy trial or the granting of release anyway when it is clear that the accused cannot afford the required bail fee and has no other means to obtain it.

Furthermore, officers in charge of monitoring regularly the prison population should also be held accountable for negligent prolonged incarceration of accused persons as they are responsible for maintaining checks on the population of prisoners on remand. They ought to be aware of any form of unusual prolonged detention and alert the JSC authorities to the violation against the detainee(s). This would prompt the justice authorities to take action for the immediate realisation of the right to a speedy trial or a relief to the accused by a grant of stay of prosecution or proceedings against him.

Clerks of court should also be held accountable for the disorder and careless keeping of records until the records maintenance system has been computerised. They have a responsibility to ensure that all court records are kept safe and secure in a coherent filing system.

### ***5.2.7 Political Interferences***

The executive organ of the state should not interfere with the judicial organ of the state. This would eliminate any political biases and procedural irregularities in some cases that are of a political nature. The pursuit of political interests should not interfere with the rights of individuals and denial of basic rights should not be used as a tool for communicating a political message (UNHCHR 2002).

While these recommendations are not exhaustive, it is hoped that they at least form the basis for creating better and more sustainable policies for the realisation of the right to a speedy trial. This right is universal and flows from the inherent dignity of the human being. There must be no contingent on particularities in the application of the right to a speedy trial.

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Supreme Court Rules Zimbabwe  
Zimbabwe Prison Services Regulations  
Magistrates Court Act (Chapter 7:10 )  
Criminal Procedure and Evidence Act (Chapter 8:07 )  
Criminal Law Codification and Reform Act (Chapter 9:23)

TABLE OF INTERNATIONAL LAW INSTRUMENTS:

African Charter on Human and People’s Rights  
Convention Against Torture  
International Covenant on Civil and Political Rights  
International Covenant on Economic, Social and Cultural Rights

UN Principles for the Protection of all Persons Under Any Form of Detention or  
Imprisonment

## Annex 1 :Interdependence of Rights

- The right to life, section 12(1): No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. This section is also inclusive of the right to live a life of dignity and freedom free from prolonged incarceration or detention without a trial.
- The right to liberty, section 13: This right is directly interfered with when a prisoner is subjected to a lengthy pre-trial period in custody without having an opportunity to be heard. The longer the period of waiting before trial, the greater the violation on a person's freedom. The constitution further elaborates on this by specifically providing for the protection of prisoners as follows under section 13(4):

Any person who is arrested or detained, and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

- Protection from inhuman treatment, section 15: The Constitution of Zimbabwe prohibits the subjection to torture or inhuman and degrading treatment of any person. This right is also violated when prisoners are subjected to prolonged incarceration because they are kept in crowded cells with poor sanitary and ventilation conditions as described in online articles of Zimbabwe's leading online newspapers, (<http://www.newzimbabwe.com>) and <http://www.sokwanele.com> which reported the greasy details of the prison conditions.
- Protection of the Law, section 18: Prolonging the hearing of cases for remand prisoners for up to ten years (ibid) clearly reflects the state's failure to protect its citizens as well as respecting and fulfilling their rights in line with our mandate to the nation. Section 18(2) states:

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" Therefore, any violation of this provision is bigger picture of failure of the law to protect whom is ought to serve.

- Protection from Discrimination, section 23: All persons are equal before the law. The section prohibits political discrimination by stating as follows 23(2)(1))

...a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, **political**

**opinions**, color, creed , sex, gender, marital status or physical disability are prejudiced.

## Annex 2 :Interview Respondents

\*All the Interviews were held in Harare.

Name (or the title used for referencing)	Gender	Date of Interview (2012)	Type of Interview
Tinoziva Bere- Law Society of Zimbabwe President	Male	13 July	In-depth
Tendai Mberi Defense Lawyer	Female	11 July	Informal Interview
Godwin Mangudya- Journalist	Male	19 July	Informal interview
Jeremiah Bamu- Senior projects Lawyer, ZLHR	Male	16 July	In-depth
Belinda Chinowawa- Projects Lawyer, ZLHR	Female	16 July	Informal Conversation
Respondent 1- Regional Magistrate, Rotten Row Criminal Court	Male	18 July	In-depth
Respondent 2- Magistrate Civil Court	Female	18 July	In-depth
Respondent 3- Law Officer, Attorney General's office	Male	23 July	Informal conversation
Respondent 4-Clerk of Court, Criminal Court	Female	11 July	In-depth
Respondent 5- Public Prosecutor, Magistrates Criminal Court	Female	25 July	Informal interview
Respondent 6- Administrator in the Legal Aid Directorate, Law Development Commission	Female	12 July	Informal interview
Respondent 7- High Court Judge	Female	27 July	In-depth Interview
Respondents 8 and 9, Accused in custodial remand awaiting trial	Male	19 July	Informal conversation
Respondent 10- Prosecutor, Criminal Court	Female	19 July	In-depth Interview
Respondent 11- Civic society Human rights activists	Male	24 July	Informal interview
Respondent 12 Magistrate Harare Criminal Court	Male	1 August	In-depth

Respondent 13 – Magistrate, Civil Court	Female	11 July	Informal Conversation
Respondent 14- ZPS officer, Norton	Male	3 August	Informal Conversation
Respondent 15- Norton Police Consta- ble	Male	27 July	Informal Interview
Respondent 16-High Court Judge, Criminal Division	Male	27 July	In-depth Interview
Chief Magistrate Guvamombe	Male	22 August	In-depth Interview