PROMOTING PRE-TRIAL JUSTICE IN AFRICA

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Editorial

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- An explanation of the implications of sections of criminal procedural law affecting pre-trial detention being found unconstitutional in Mozambique
- A preview of a soon-to-be released PPJA report on detention oversight through visiting mechanisms in Africa.

Prison authorities are seldom able to provide detailed information on the length of pre-trial detention. The best most can do is provide information on how many months or days those currently in detention have been in detention. Researchers can also seek to find the answers by random sampling of register entries to record the dates of entry and exit, to calculate the length of detention for each person in the sample, and finally to calculate means (averages), medians and modes. This can be fieldwork-intensive and time-consuming. Jean Redpath explains an easy method of obtaining a ball-park figure for the duration of pre-trial detention.

Mozambique's Human Rights League, known as *Liga*, collected 2000 signatures in order to bring a case on pre-trial detention rights to the Constitutional Council. The challenge succeeded and has affected the legal framework around pre-trial detention profoundly. Tina Lorizzo and Jean Redpath explain the implications of the provisions found unconstitutional

People held in places of detention are at risk of suffering violations of human rights. Domestic and international human rights laws prescribe the procedures through which and conditions under which people may be held in detention. The function of detention oversight institutions is to ensure that state institutions comply and are held accountable for any non-compliance. Marilize Ackermann has compiled a comprehensive report on visiting mechanisms in Africa, and provides a pre-view of her report in this issue.

Jean Redpath
PPJA Researcher

Estimating the duration of pre-trial detention

Measuring "pre-trial detention" and understanding what these measurements suggest is very important for those with an interest in protecting the right to liberty and ultimately "promoting pre-trial justice". Long periods in pre-trial detention have negative social consequences and undermine the right to the presumption of innocence. This article attempts to explain a back-of-the-envelope way of estimating the average duration of pre-trial detention.

Prisons are exceptionally good at counting the number of people in their care on any particular day, but less good at providing details on for how long people are detained in their care. Consequently available data, for both countries and individual prisons, can usually give the number of people held in prisons pre-trial (e.g. “7000 remand prisoners as at 31 March 2012 ”), but little more. What is remarkable is that in many countries this number is relatively stable. In other words the occupation level on any particular day is close to the occupation level throughout the year and previous or subsequent years.

Sometimes the number of people admitted during a year is also known, but if not, this number is not difficult to count in prisons which keep good admissions registers. In prisons which only make one admission entry in the register per person – in other words, they do not make a new entry whenever the same person returns from court, but only one entry per person – it is possible to count the number of individual admissions by simply counting the number of entries in the year in prison admission registers.

Admission registers in Malawi and Zambia are good examples of registers which record one entry per person in relation to pre-trial detainees. Obviously in larger prisons counting all the admissions in a year may be a time consuming exercise, but it is not a difficult exercise.

The exercise may be worth doing, because with these two values known (usual occupation level and number of admissions in a year), the average duration of detention may be estimated, without any need for complicated drawing of samples or sophisticated computer software. This is because the number of pre-trial detainees in a prison on any particular day is a function of two factors – the number previously admitted and the duration of their detention.

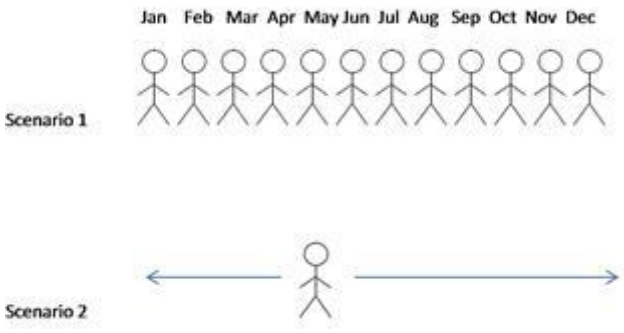
The first factor is the number of people admitted to pre-trial detention. This factor may be influenced by a range of variables, including arrest policies and practices, political will, state resources available for policing, and the tendency to apply or not apply procedural safeguards protecting the right to liberty.

For example, a country like Zimbabwe, records a very high number of crimes.

The Zimbabwe National Statistics Agency indicated in its first Quarterly Digest of 2013 that over 1 million crimes were recorded by the Zimbabwe Police in 2012. While not all of these would have resulted in arrests, around 850 000 of these were crimes which are referred to by analysts as “crimes dependent on police action” – such as statutory crimes and road traffic offences. Crimes reliant on police action for detection are highly likely to result in arrest.

If it is assumed that half of crimes resulted in arrests, then around 500 000 people might have been arrested in Zimbabwe in 2012. Given such extremely high numbers of arrest, would this not suggest a very high rate of pre-trial detention in Zimbabwe? Surprisingly, Zimbabwe does not have a very high number of people held pre-trial in prison on any particular day (only around 5000). While this is partly because some of those arrested are released before going to prison on remand (and so admissions to prison are far fewer than 500 000), it is also a result of the second factor which influences the number of pre-trial detainees held on a particular day. This is the duration (time spent) in pre-trial detention by each person admitted to pre-trial detention.

To see the impact of the duration of detention, consider that 12 persons held consecutively for a month each is equivalent to one person admitted to pre-trial detention and subsequently held for a year. The figure below illustrates the two situations.



The end result is, that at any particular time, in both scenarios, there is only one person in detention. In July, for example, in the first scenario, there will be one person in detention (who has been in detention for less than a month).

In the second scenario, there will also be only one person in detention (but that person will have been there almost seven months). This insight helps in making rough estimates of the average time spent in pre-trial detention, if the only information available is the usual occupation level and number of admissions in a year.

This is because the “average” of anything is by definition the number obtained by adding all the values (in this case, all the various lengths of detention) and dividing by the number of people (the number of people who spend time in detention). So it is that if the number of people is known, and the number admitted is known, then the average duration can be calculated.

In the Zimbabwe example, it is was guessed that there are 500 000 arrests per year. However, it is known that only around 18 000 cases go to court each year. So let’s say of those cases going to court, which tend to be serious offences, around half (9000) involve pre-trial detention in prison. In other words, let’s assume there are 9000 admissions in a year and there are usually around 5 000 people in pre-trial detention. With these figures the average duration of detention can be estimated.

- First, work out how many people per day would be admitted if admissions were spread out evenly over the year – that is, if the same number were admitted every day. To do this, divide the number of people admitted in the year by the number of days in the year. (Using the example data, 9 000 detainees admitted / 365 days = 25 detainees admitted per day). This gives you how many people would be in detention if each remained for only one day in detention.
- Then, work out how long each would have to remain in detention to reach the actual number in detention each day. To do this, divide the number usually in pre-trial detention by the number of admissions per day calculated above (e.g. 5000 detainees / 25 detainees admitted per day = 200 days).

What the above calculations provide is a model of pre-trial detention flow, in which on the first day of the year, 25 people are admitted who stay 200 days. On day 2, another 25 people are admitted who stay 200 days. This carries on to day 200, on which we have 200 sets of 25 people (5000 people) who are still in detention – our “usual occupancy” level. But does this mean until day 200, there are fewer than 25 people? No, because there will be people from the tail-end of previous years who are still spending their 200 days in detention. It is only from day 200 onwards that all people who are in detention, were admitted during the current year and not previous years.

These calculations provide a rough estimate that the average duration of detention in Zimbabwe is likely to be around 200 days in pretrial detention, if admissions number 9000 and usual occupation is 5000. The combined formula for the calculation above is as follows:

Unfortunately the average duration of detention is often not a particularly meaningful value – if by average is understood “what usually happens”. Contexts where the average is not useful include those where there is a great deal of variation in the duration of detention.

This is why the median (middle value) or mode (most common value) are often better indicators of “what usually happens” in terms of duration of detention. However, there is no easy method means of estimating the median or mode with these easily available figures.

In contexts where there is little variation in duration, however, the average, median and mode are likely to be very similar values and this method consequently provides an easy method of estimating the average duration of detention, which is in turn informative of what “usually” happens.

Whatever the context, these simple arithmetical calculations at least provide a “ball-park” figure of the duration of detention to check against other sources. Knowing the average duration of detention can be extremely useful. For example, many countries are experimenting with custody time limits, that is, legislated time periods beyond which people may not be detained before trial. Knowing the current average duration of detention can help in the setting of reasonable, achievable time limits, rather than setting time limits in a knowledge vacuum. Knowing the average duration can also be useful for prison planning purposes. Finally, changes in duration can be tracked to monitor the effect of any interventions designed to reduce the duration of pre-trial detention.

Jean Redpath
This article draws on a forthcoming PPJA report on indicator development and measurement of pre-trial detention.

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Provisions of Mozambique's Criminal Procedure Code declared unconstitutional

The Human Rights League (Liga) initiated a process to collect two thousand signatures across Mozambique, to meet the requirements for the filing of an action of unconstitutionality before the Constitutional Council. The four successful challenges in Mozambican criminal procedural law represent a revolution in the pre-trial detention legislative framework.

Mozambique's Constitution has provisions protecting persons in the criminal justice process. These include the right to liberty and security, which encompasses the presumption of innocence (article 59), rights of arrested persons (article 64), principles of criminal proceedings (article 65), and the right to habeas corpus (article 66).

The Human Rights League brought to the attention of the Attorney-General's office that some provisions of Mozambique' Criminal Procedure Code (CPC) may violate Constitutional protections relating to pre-trial detention.
Although the Attorney-General's office has the power to bring an action for unconstitutionality under article 245 of the Constitution, no action was taken by the Attorney-General's office on the matters of per-trial detention raised by the Human Rights League.

Instead, the Attorney-General's office brought before the Constitutional Council an action of unconstitutionality in relation to an entirely different matter, which relates to provisions around the investigation of misconduct allegedly committed by judges and prosecutors. The conferral of the jurisdiction of these processes to the judges of the Court of Appeal and of the Supreme Court is argued to violate article 236 of the Constitution, which gives prosecutors the power to investigate criminal cases.

So the Human Rights League initiated a process to collect two thousand signatures across Mozambique, to meet the requirements for their filing of an action of unconstitutionality before the Constitutional Council. The action was filed on 5 March 2013.

The first challenge related to who has the power to order pre-trial detention. In Mozambican criminal procedure, which follows the civil tradition, there are different processes depending on whether or not the accused person was "caught in the act" (in flagrante delicto). Flagrant cases usually begin with arrest and the person must be brought to court as soon as possible. In cases where the person is not caught *in flagrante*, there is an inquiry by the prosecutor after a report of a crime, which may lead to an indictment of a person and preventive detention.

The Constitution in Article 64(2) provides that it is the judiciary which has the power to deprive a person of their freedom, yet paragraphs 1 , 2 and 3 of Article 293 of the CPC, amended by Law No. 2/93 and Article 43 of the Organic Law of Prosecutors, provided that administrative authorities and prosecutors could order a person to be held in pre-trial detention. These were declared unconstitutional, because the Constitution provides that only the judiciary may order pre-trial detention.

This is very significant for Mozambique, as the police's control of the criminal justice process has led to abuses. Police detained citizens without complying with the procedural prerequisites required, sometimes in order to investigate, but on other occasions to pursue illegal purposes. Several citizens, including advocates of social and civic causes have been held in pre-trial detention under police authority. Police Inspectors, sometimes at the behest of "political power" have ordered the arrest of people who lead social and civic movements, such as George Rice from the Medical Association, Herminio dos Santos and Jossias Matsena from the Forum of War Veterans (Fórum de desmobilizados de Guerra), among others, who were held through police powers, although they had not committed any crime.

The Constitutional Council also found that preventive detention cannot simply be applied because the accused is facing a charge on an offence punishable by a sentence of imprisonment, as provided in Article 291 of the Code, but that it is necessary to assess whether the prosecution has a concrete evidential foundation and whether there is a risk the accused will flee, interfere with the investigation or commit further crimes. This finding was based on paragraph 2 of Article 59 of the Constitution, which provides for the presumption of innocence.

This is considered to be a major change in approach of the criminal procedural law, as it confirms preventive detention has procedural purposes only and does not constitute anticipation of punishment, as many police, prosecutors and judges tend to understand it.

Article 311 of the CPC which provides for incommunicado detention of an accused person before their first interrogation was also found to be unconstitutional, as it contradicts paragraph 4 of Article 63 of the Constitution, which provides that the lawyer of an accused person may communicate with the accused at any time.

Finally the Constitution prohibits penalties and security measures of indefinite or unlimited duration, in paragraph 1 of Article 61. Paragraph 3 of Article 308 and paragraph 1 of Article 311 of the CPC, which permit indefinite remand detention, were consequently also found unconstitutional by the Constitutional Council. The problem of prolonged detention periods had become an increasing cause for concern, and the CPC provision, now revoked, which permitted detainees to be held in custody for indeterminate periods, was one of the causes of prolonged detention. The 7-month remand detention rule should now be the maximum in all cases.

These four changes in Mozambican criminal procedural law represent a revolution in the pre-trial detention legislative framework. The obligation now rests on the Ministry of Interior and the General Command of Police and Attorney General's Office to make known to its agents these decisions of the Constitutional Council.

The Human Rights League, the students of St. Thomas University of Mozambique, the Centre for Human Rights and

Legal Practice and the Paralegals League, worked together with the Human Rights League to collect the 2000 required signatures across Mozambique to bring this action.

Tina Lorizzo and Jean Redpath
This article is based on a press release issued by the Human Rights League.

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The importance of independent visiting mechanisms

People in places of detention are at particular risk of suffering violations of their human rights. This is because places of detention are not open institutions, and detainees are entirely dependent on detention officials for their well-being. Domestic and international laws prescribe the procedures through which and conditions under which people may be held in detention. The function of detention oversight institutions is to ensure that state institutions comply with these human rights laws and are held accountable for any non-compliance.

Because of the particular risks posed by places of detention, traditional Parliamentary oversight has in many democratic countries been supplemented by additional institutions conducting visits to places of detention as a form of oversight. Some of these have arisen from international law while others have arisen from domestic laws.

The Optional Protocol to the UN Convention against Torture (OPCAT) created the Subcommittee on Prevention of Torture (SPT), which has a mandate to visit places where persons are deprived of their liberty in the states which are party to OPCAT. In addition, OPCAT requires states party to OPCAT to designate or establish an independent "national preventive mechanism" (NPM) for the prevention of torture at the domestic level.

National Preventive Mechanisms (NPMs) need not consist of a single institution, but must have the mandate to inspect places of detention, monitor the treatment of and conditions for detainees and make recommendations regarding the prevention of ill-treatment. NPMs must also publish an annual report.

Some African states which are party to OPCAT have designated existing National Human Rights Institutions (NHRIs) as their NPM. The term "National Human Rights Institution" refers to independent state-funded institutions which promote and monitor the effective implementation of international human rights standards at the national level and which comply with the Paris Principles. The Paris Principles do not explicitly require NHRI's to have a mandate to visit places of detention; however the designation of an NHRI as a state's NPM would require the NHRI to have such a mandate.

In Africa regionally, a supra-national African oversight institution in the form of the Special Rapporteur on Prisons and Conditions of Detention in Africa has arisen, which has the mandate to visits places of detention. The Committee for the Prevention of Torture in Africa, another regional body, is not strictly a visiting mechanism but promotes the regular visit to places of detention by independent persons or bodies, as recommended by the Robben Island Guidelines.

In some African countries there exist designated detention visiting mechanisms such as South Africa's Judicial Inspectorate for Correctional Services. There also exist rights institutions which have broad mandates, such as NHRI's and Public Protectors (or Ombudsmen), whose mandates may include responsibility for visiting places of detention. Broader mandates still, such as those of Parliament and the judiciary, may also include obligations to visit places of detention.

Monitoring places of detention through regular announced and unannounced visits is the most effective measure to prevent torture and other ill treatment and this lies at the heart of OPCAT. Other methods may include compulsory reporting systems (for example, on deaths or punishments in custody), and complaints receiving systems. Associated oversight powers accorded to oversight institutions may include the power to make public reports, to conduct investigations, to make recommendations, to impose disciplinary proceedings, and to refer for prosecution.

The extent to which oversight institutions in Africa are independent of the state and of the institutions over which they seek to exert oversight varies, as do the mechanisms of oversight and accountability with which they are empowered.

A PPJA report currently being finalised seeks to describe a range of visiting mechanisms as examples of good and promising practises of detention oversight in Africa.

The report draws on examples from Botswana, Ethiopia, Lesotho, Namibia, Malawi, Mauritius, Senegal, Sierra Leone, South Africa, and Zambia.

The report will be available on the PPJA website in November 2013.

Marilize Ackermann
This article draws on a forthcoming PPJA report on detention visiting mechanisms in Africa.

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for future topics for the PPJA newsletter.
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