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OF LESOTHO

REALISATION OF THE HUMAN RIGHTS OF DETAINEESAWAITING TRIAL IN LESOTHO

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DECLARATION

I, **'MAAKILA SEKHESA,** declare that this is my own work and it has not previously been submitted for any degree in any institution or published in any journal, textbook or media.

Signed: ___M.Sekhesa_____

26 July 2022

This mini-dissertation has been approved by the Supervisor of the National University of Lesotho.

Signature:_____

Supervisor

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It would not be easy to recall all the people who contributed in this work. The reason is that some are visible but there are those invisible hands that cannot be noticed and yet supported me with their prayers. It is therefore right and just to thank them in the name of the Almighty God who gave me life and wisdom.

Least does not mean last, I pass my sincerest gratitude to my supervisor Dr Carol Chi Ngang who was very patient with me throughout this research and guided me to the completion of this work.

ABSTRACT

Lesotho like many countries globally, adopted state Constitutions in an endeavour to safeguard and promote the rights of all citizens. The 1993 Constitution stands as a promissory note through which the country affirmed their declaration to protect the citizens. However, violations of human rights are happening at a worrying magnitude despite the Constitution. These violations are rife in detentions centres where this research work shall find that detainees succumb to interrogation fatigue and worst forms of treatment. The real issue of the rampant violations of human rights is that the perpetrators get away with their conduct. There seems to be leniency on the part of responsible institutions in the country to bring to book such perpetrators.

The leniency manifests itself in a rather seemingly non holding of these perpetrators personally liable for their conduct. This research finds amongst others that no time has been this urgent to try bringing hope to the victims of such abuse of power through concerted efforts in holding perpetrators of such acts personally liable. Equally important this research work finds that another issue is the Lesotho legislation that seems to downplay the standard of conduct that amounts to torture meted against detainees who must ordinarily be treated through the lens of an innocent citizen.

ABBREVIATIONS AND ACRONYMS

OAU	Organization of African Unity
UN	United Nation
UDHR	United Nations Declaration of Human Rights
ICCPR	International Convention on Civil and Political Rights
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OAU	Organization of African Unity

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Background

The topic pertaining to fundamental rights and freedoms of detainees awaiting trial has captured global attention:

> Pre-trial detention has been under the spotlight during the last few years, with various empirical projects being conducted in Europe and globally. All these studies point to a problematic (over)use, which impacts negatively on a variety of individual and procedural rights, e.g. right to liberty, presumption of innocence, privilege of non-self-incrimination and access to legal advice; reportedly, lengthy detentions have far-reaching consequences regarding the economic fate and stability of families, the state and criminal justice system.[1]

When the Independence Order of 1966 was proclaimed, a new era characterised by the rule of law and enjoyment of fundamental rights and freedoms was established for the Kingdom of Lesotho. Chapter II of the 1993 Constitution reflected *inter alia*, those rights *in rem* that are fundamental to preserving human dignity and freedoms, including the right to life,[2] the right to personal liberty,[3] freedom of movement,[4] freedom from torture,[5] freedom from slavery and forced labour,[6] freedom from arbitrary search or entry,[7] the right to respect for private and family life,[8] the right to fair trial,[9] freedom of conscience,[10] freedom from discrimination,[11] the right to equality before the law and equal protection of the law.[12] In this way, "independence and Constitution have conspired to introduce into the mainstream of Basotho society

[1] A Martufi and C Peristeridon, "The Purposes of Pre-Trial Detention and the Quest for Alternatives" (2020) European Journal of Crime, Criminal Law and Criminal Justice 153-174 https://brill.com/view/journals/eccl/28/2/article-p153_153.xml?language=en accessed on 12 November 2021.
[2] Constitution of Lesotho section 5.
[3] Constitution of Lesotho section 6.
[4] Constitution of Lesotho section 7.
[5] Constitution of Lesotho section 8.
[6] Constitution of Lesotho section 9.
[7] Constitution of Lesotho section 10.
[8] Constitution of Lesotho section 11.
[9] Constitution of Lesotho section 12.
[10] Constitution of Lesotho Section 13.
[11] Constitution of Lesotho Section 18.
[12] Constitution Section 19.

radical principles that seem unheralded and unforged by the historical forces permitted to clash in 98 years of colonial rule."[13]

However, the 1966 Order was vehemently emasculated by draconian laws and rule of self-imposed hegemony and military junta.[14] Maqakachane notes that "The authoritarian and military rule was characterised by political intolerance, suspension of constitutions, insurgencies, sporadic violence and brutality, the introduction of draconian legislation and denial and violations of basic human rights."[15] This created a situation whereby police officers took the law into their hands by arresting and cruelly treating suspects in custody.

To ameliorate this situation, the 1993 Constitution ushered in a new epoch, mirroring the same constitutional framework of the old regime. As if it would be better, history reminds us that law enforcing agencies continued to violate the rights of detainees. These violations against inmates awaiting trial are an attack to their right to dignity. Such violations are inimical to the presumption of innocence guaranteed by the Constitution. They are inimical to fair trial, freedom from discrimination and the right to equality as well as other rights which every person in a democratic society is entitled to enjoy.

1.2 Statement of the Research Problem

The problem that has been identified for this study is that despite a comprehensive international legal framework to which Lesotho is a party, violations in the form of torture, unreasonably long detention and deplorably dehumanizing custody conditions to name a few, continue to be prevalent within the security institutions in Lesotho. Detainees awaiting trial are stripped of their basic rights from the custody gates and any little recognition of these rights if at all any is given, is plagued with hindrances.

This is despite the position adopted in the case of *August and Another v Electoral Commission and Others*:[16]

[13] VV Palmer and SM Poulter, *The Legal System of Lesotho* (The Michie Company 1972) 318.
[14] IM Shale, "Domestic Implementation of International Human Rights Standards against Torture in Lesotho" (unpublished doctoral thesis, University of Pretoria, 2017) 143.
[15] TS Maqakachane, "Towards Constitutionalisation of Lesotho's Private Law through Horizontal Application of the Bill of Rights and Judicial Subsidiarity" (unpublished master's dissertation University of the Free State, 2016) 1.
[16] *August and Another v Electoral Commission and Others* 1999 4 BCLR 363 (CC) at p 372-373.

> Detainees awaiting trial are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. Of course, the inroads which incarceration necessarily makes upon detainees awaiting trial, personal rights and their liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of custody life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in custody. Nevertheless, there is substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.[17]

Detainees awaiting trial continue to languish in custody for many years without due regard of their fundamental rights. Conditions in many detention facilities in Lesotho are so appalling as to constitute cruel, inhumane or degrading treatment, violating article 7 of the International Covenant on Civil and Political Rights. The shortcomings of these places of custody are better elucidated under the provisions of the United Nations Standard Minimum Rules for the Treatment of Detainees awaiting trial, which across the international board are called, a set of custody standards. The Standard Minimum Rules describe the minimum conditions that are accepted by the United Nations as suitable.

Although, at face value, the Standard Minimum Rules may be seen as having been incorporated into the custody laws and regulations of Lesotho, put under the scrutiny of a watchful eye, only a few if any custody institutions at all, observe any of the standards set out in the Standard Minimum Rules.

1.3 Research Questions

The main question that this research paper investigates is whether the rights of detainees awaiting trial in Lesotho are observed and realised in line with international norms and standards? This question is responded to by investigating the standards that human rights law impose on states with regard to the protection of prisoners. The study further examines the institutional framework of detention facilities with regard to the recognition of the rights of detainees and what issues occasion the lack

[17] Ibid.

of recognition of the rights of detainees awaiting trial. The means to be adopted for concrete recognition of the rights of detainees are discussed in conclusion.

1.4 Objectives

The aim of this research paper is to examine the government of Lesotho's compliance with its human rights obligations to respect, protect and promote human rights in the country in accordance with customary international law as well as human rights instruments to which Lesotho is a state party. It interrogates the extent to which the laws of Lesotho provide for the protection and realisation of human rights of detainees awaiting trial.

The study also intends to highlight through the analysis of international human rights instruments, the extent to which the rights of prisoners awaiting trial in Lesotho are realised and observed. It further highlights the discrepancies between existing laws in Lesotho and international law and practice. Lastly, a conclusion is drawn and recommendations made as to how Lesotho could attain better recognition, protection and promotion of the rights of detainees awaiting trial.

1.5 Hypothesis

The rights and freedoms on liberty, movement, prohibition from cruel and inhumane treatment as well as slavery enshrined in the Constitution of Lesotho are in line with international human rights law, comparable to other jurisdictions. However, the number of cases that have come before the courts may suggest that Correctional Institution in Lesotho is not fully functional. Despite the Lesotho's international human rights obligations, violations still occur in Correctional facilities in Lesotho.

It can be inferred that Lesotho lacks framework that would serve to guard against violation perpetrated against detainees awaiting trial.

1.6 Significance of the Research

The study is intended to assert that inmates who are awaiting trial still enjoy their civil and political rights. Even though, the right to movement is curtailed and inmates, confined in a detention facility, they remain innocent till proven guilty. In the *Blanchard* case, the Court made it clear that:

> Insofar as awaiting trial prisoners are concerned it must never be overlooked that they are not convicted and, accordingly, presumed to be innocent of any wrongdoing.

> The purpose of their detention is merely to bring them to trial. Sufficient security must assure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff. Punishment, deterrence or retribution in such a context are out of harmony with the presumption of innocence.[18]

1.7 Scope and Purpose of the Study

The scope of the study is limited to the rights of detainees awaiting trial and does not cover the many other inmates, including those who have been convicted. I intend to look at those rights from the international human rights law point of view, taking into consideration the instruments and protocols which Lesotho has signed and ratified.

In light of the brief summary of this study and the problem outlined above, the central argument of this research is that the failure to implement international human rights standards on the protection of the rights of inmates is a factor mainly attributable to the custody administrators being ill-equipped to deal with some issues relating to the upkeep and order within custody.[19] Mainly, the preservation of internal order and discipline with utmost regard being paid to the protection of inmates awaiting trial whose constitutional right to presumption of innocence must always be jealously guarded.

1.8 Methodology

The study was conducted principally through desktop research with the use of materials available in the library. There is already extensive scholarly literature and a myriad of international human rights instruments that set the standards and norms relating to the recognition and protection of the rights of detainees awaiting trial, which I explored. Due to hurdles of inaccessibility of some information on places of custody in Lesotho, the Amnesty International reports among others, which contain extensive information on rights of inmates, were consulted.

1.9 Review of the Literature

Since the main concern of this study pertains to detainees awaiting trial, there is a *Handbook of International Standards relating to Pre-trial Detention* published by the

[18] *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another* 1979(2) SA 204.
[19] *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at 60.

United Nations.[20] This book contains the norms and standards governing the rights of detained persons. It is deeply rooted in the jurisprudence of the human rights system. It catalogues relevant international conventions and instruments on human rights, which constitutes a useful resource material in as far as the norms and standards for the protection of detainees are concerned.

Section 6(5) of the Constitution of Lesotho provides that:

> If any person is arrested or detained upon 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.

The Criminal Procedure and Evidence Act of 1981, section 141(1) provides that:

> Subject to this Act, every person committed for trial or sentence whom the Director of Public Prosecutions (DPP) has decided to prosecute before the High Court shall:
>
> *(a)* be brought to trial at the first session of the court for the trial of criminal cases held after the date of commitment; or
>
> *(b)* be admitted to bail, if 31 days have elapsed between the date of commitment and the time of holding such sessions;

Section 279(1) provides that "The High Court shall, at the close of each of its criminal sessions, discharge from custody all such accused persons as are then in custody and are then entitled to be discharged by law."

Furthermore, section 4 of the Speedy Courts Trial Act of 2002 provides that "A person shall not be remanded into custody for a period exceeding 60 days unless there are compelling reasons to the contrary and such reasons shall be recorded in writing."

The above provisions form part of the edifice upon which the research is situated. Palmer and Poulter, in the *Legal System of Lesotho*,[21] discuss the fundamental rights in the context of the Constitution of Lesotho. Their discussion on civil and

[20] *Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention* (United Nations: New York and Geneva, 1994).
[21] Palmer & Poulter, supra note 13.

political rights is however, too general. For that reason, it does not specifically talk about pre-trial detainees' rights. In discussing the fundamental human rights and freedoms, they say that: "Others are more immediately concerned with human *dignity*, e.g., section 8 (freedom from inhuman treatment), section 9 (freedom from slavery and forced labour), section 11 (right to respect for private and family life), and freedom from discrimination)."[22] What is salient here is the inclusion of the word "dignity" that does not appear in the Constitution but implied by the aforementioned sections.

It is possible to review all the materials talking about the rights of detainees awaiting trial here in Lesotho. What I desire to talk about is the focus on detainees awaiting trial and not the many other inmates, including those who have been convicted.

1.10 Summary of Chapters

This study is structured into five chapters. The first chapter provides an overview of the entire dissertation. The background highlights the origins and history of custody and the rights of detainees awaiting trial. The chapter also outlines the statement of the research problem, the research questions and objectives as well as the significance and purpose of the study. It further indicates the methodology employed in conducting the study and a review of relevant literature.

Chapter two deals with international norms and standards as articulated by the United Nations and other human rights treaty bodies that promote and protect the rights of detainees awaiting trial. The chapter provides clarity on the question of custody and detainees awaiting trial, which are defined and classified. The conventions and other instruments that Lesotho has ratified are explored. General comments, state party reports and jurisprudence of human rights treaty bodies with regard to the rights of detainees awaiting trial are also explored.

Chapter three provides a detailed discussion of the rights of detainees awaiting trial as provided for under chapter two of the Constitution of the Kingdom of Lesotho (1993). The discussion is enhanced and reinforced with case law, illustrating the approach taken by the courts in interpreting and applying the law with respect to the said rights. Other constitutional rights relevant to persons awaiting trial are also discussed together with pertinent case law. It is then concluded that the introduction

[22] Ibid 324.

of a Bill of Rights in the Constitution has brought a new dimension and challenge to the protection and realisation of the rights of detainees awaiting trial in Lesotho. It is also concluded that the courts, especially the Constitutional Court, have risen to the challenge in attempting to give some effect and meaning to the rights of detainees awaiting trial brought about by the new constitutional order.

In an effort to place Lesotho in a regional context, chapter four adopts a comparative approach. The rights of detainees awaiting trial in various African countries are discussed. The countries include South Africa, Zimbabwe, Eswatini and Kenya. The rights of detainees awaiting trial under the constitutions of each of these countries are first outlined. This is followed by a discussion of the approaches taken by the courts in interpreting those rights and then the views of observers regarding the protection of detainees awaiting trial in those countries. The conclusion is that at least on paper, and in terms of judicial practice, the rights of detainees awaiting trial in Lesotho enjoy more constitutional protection than in other African countries.

The last chapter draws to the conclusion that the constitutional rights of detainees awaiting trial in Lesotho are, in practice, not sufficiently protected and implemented. This and other conclusions and recommendations are set out in chapter five. The thrust of the conclusions and recommendations is that something has to be done regarding police brutality, custody conditions and overcrowding, juvenile offenders, mentally ill detainees awaiting trial, ratification and incorporation of relevant international human rights instruments and access to courts. Suggestions on how to address these issues are made. Other recommendations include abolishing the privilege system in custody, increasing the role of non-governmental organisations, provision of education and public awareness, privatization of custody and legislative intervention.

CHAPTER 2

INTERNATIONAL TREATIES AND NORMS BY THE UNITED NATIONS AND REGIONAL INSTRUMENTS THAT PROTECT DETAINEES AWAITING TRIAL

2.1 Introduction

This chapter outlines the existing treaties at international law that protect the rights of detainees awaiting trial. In doing so, the chapter highlights and explains the institutional conduct against persons awaiting trial; the same conduct which the international legal principles address. Such conduct shall include but not necessarily limited to the deprivation of liberty against persons awaiting trial or detainees, long time to resolve cases, ill-treatment of detainees while in detention centres or prison *et cetera.* The treatment of all categories of detainees and prisoners has remained a global challenge in the fight for the respect of human rights, more so in the advent of a plethora of international human rights instruments that seek to protect all humanity from any form of inhumane treatment.

Generally, a person who is arrested, in pre-detention or serving a prison sentence is left very vulnerable or in a place of weakness and in most cases at the mercy of the police or prisons officials. Of all these categories, the stakes are truly high for detainees awaiting trial, whose constitutional rights are trampled upon even when they have not yet been found guilty of any offence and or sentenced against the mantra “innocent until proven guilty”. For all intends and purposes, this is to say that a person who is detained is to a greater extent, entitled to enjoy their constitutional rights like any other person who is not detained, but for the fact that their freedom of liberty is curtailed.

This research is undertaken especially, with regards to the phenomenon of a deeply concerning practice by the police force in the Kingdom of Lesotho where, when called in to investigate, people suspected of committing certain offences, rather cause them to suffer under cruel and inhumane treatment or die while in detention cells or in custody because of what they consider interrogation fatigue, referred to in the Sesotho mantra as “*ho khathalla lipotsong*”. This practice is unlawful as the *modus operandi* of the police force seemingly and automatically assumes “guilt” on

the part of the suspects or detainees, against the constitutional principle of innocent until proven guilty by a competent court of law. This practice is antithetical to policing in a democratic society and is reminiscent of police behaviour in the bygone era of dictatorial government when they enforced the notorious internal security legislation. In that era the police arrested and detained persons and hold them in custody for weeks, months and even years for purposes of investigation and extraction of admissions and confessions for commission of offences by methods of violence and solitary confinement without access by family members, lawyers and doctors. These concerns have been echoed strongly in cases such as the ***Sello v Commssioner of Police and Another***[23] and ***Moloi v Commissioner of Police***.[24] It is in this light that the new democratic dispensation has adhered to a new policing culture of respect for human rights and freedoms and corresponding accountability for violation of those rights and freedoms. It is for this reason that Section 8 of the Lesotho Constitution outlaws in absolute terms the culture of torture and inhumane or degrading punishment or treatment.

International law does have strict rules on the treatment and protection of persons awaiting trial that are applicable in most cases. States have also ratified and signed specific treaties that protect persons awaiting trial and as such, it is imperative upon the state parties to those treaties to take appropriate measures and put in place mechanisms to protect persons awaiting trial. Put differently, states are under a duty to take legislative and other practical measures in protecting detainees. For instance, judges are under a duty to ensure that detainees or persons awaiting trial are made aware of their rights during trial and that the matters are disposed off as swiftly as possible. Prosecutors are also under a duty to ensure that suspects are prosecuted timely and that lawyers defend suspects diligently. Prison officials are also under a duty to always adhere to the most basic rights of persons under their authority who are awaiting trial and that the police has a peremptory duty to see to it that their investigation of cases do not supersede or override the rights of persons awaiting trial.

[23] *Sello v Commissioner of Police and Another* 1980 (1) LLR 158 (HC).
[24] *Moloi v Commissioner of Police* 1982-1984 LLR 58 (HC).

2.2 Definition of Terms

For the purposes of this chapter and the entirety of this dissertation, the term detainee shall be understood to refer to or mean a person held in custody awaiting trial and the same shall be used inter-changeably with “persons awaiting trial” or shall mean any person deprived of personal liberty except as a result of a conviction for an offence. Arrest shall mean the act of apprehending a person for the commission of an alleged crime or of an offence. Detention means the condition of detained persons as defined while imprisonment shall mean the condition of imprisoned persons. Prison officials shall mean those with authority over detained persons.

Out of the plethora of international human rights instruments that protect rights and freedoms amongst others, which apply to persons awaiting trial or detainees, this Chapter limits its focus on the UDHR, ICCPR, UNCAT, ACHPR and briefly make a reflection on the constitutional standing of the Kingdom of Lesotho and how it’s Constitution strives to protect the rights of all (inclusive the rights and freedoms of detainees). These instruments are explored on the basis that Lesotho has ratified or adheres to them or put differently, Lesotho is bound by them.

Lesotho has however, not ratified the Convention Against Torture (UNCAT) and as such, this research endeavours to ascertain whether Lesotho is doing enough in the protection of persons awaiting trial as most of the acts committed against them in prison cells amount to torture in many respects. Coupled with the fact that Lesotho has not ratified the UNCAT, the country is bound at the domestic level by the Penal Code Act of 2010, which looking at the modus operandi of how detained persons are treated in detention facilities, lowers the standard for acts that would meet the threshold of torture. In a nutshell this research is conceived to explore the appropriate measures that Lesotho could take in ensuring the realisation, respect, protection and promotion of the human rights of detainees or persons awaiting trial as well as accountability measures against those who contravene the constitutional and basic human rights of detainees awaiting trial.

2.3 International Human Rights Treaties that Protect the Rights of Detainees Awaiting Trial

2.3.1 United Nations Human Rights Instruments

The UDHR recognises the rights of persons detained and awaiting trial in articles 3 and 9.[25] The preamble to the UDHR states that whereas member states have pledged themselves to achieve, in cooperation with the united nations, the promotion of universal respect for and observance of human rights and fundamental freedoms now therefore the General Assembly proclaims this instrument as a common standard of achievement for all peoples and all nations to the end that every individual and every organ of society, keeping this declaration constantly in kind, keeping by teaching and education to promote respect for these rights and freedom. In essence, the UDHR maintains that it is imperative upon all states to promote respect for human rights as a bedrock for the promotion of peace and security of persons in line with the preamble of the United Nations Charter that "membership to the Charter shall be open to all peace-loving states. This is to ensure that the criminal justice system of states is one that teaches, protects and promotes the human rights inherent in all of humanity as reflected in states' domestic constitutions.

Substantively and amongst others, it provides that everyone has a right to life, liberty and security of person.[26] It further provides that no one shall be subjected to torture or to cruel, inhumane or degrading punishment.[27] As regards speedy and effective trials, this international instrument states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[28] The right to fair trial is reiterated in article 10 which reads, everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charges against him.[29]

Article 2(1) of the CAT provides that: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." With this, the Convention makes it imperative upon

[25] *Universal Declaration of Human Rights 1948*.
[26] *Article 2, Universal Declaration of Human Rights*, 1948.
[27] *Article 5, Universal Declaration of Human Rights*, 1948.
[28] *Article 8, Universal Declaration of Human Rights*, 1948.
[29] *Article 10, Universal Declaration of Human Rights*, 1948.

state parties to ensure that either in detention or police cell and even in prison cells, governance measures have been taken to ensure that the human rights of people are treated with respect. The issue then still remains in the context of Lesotho which has not ratified the Convention against Torture to ensure that against the agonizingly painful police brutality, such acts are treated as torture and not mere grievous bodily harm as it appears in the Penal Code Act of 2010. The standards for acts of torture in the Kingdom of Lesotho have unnecessarily been lowered, and in most instances, making people awaiting trial susceptible to torture and cruel and inhumane treatment in the course of investigations in interrogatory cells.[30] People die in detention cells are a result of the "interrogation fatigue" phenomenon wherein, they are subjected to severe beating with the aim to extract confessions and admissions from them. Whereas, everyone is guaranteed to enjoy the right to be assumed rightfully to have the same status as with everyone else that have not been arrested or convicted.

Importantly, where an act of police brutality for instance or of the prison officials during the period of detention fails to meet one or more of these criteria and does not rise to the threshold level of torture, it may nevertheless amount to other cruel, inhumane or degrading treatment as was held in the matter between ***Prosecutor v Delalic***.[31] This refers to all other acts of the police which, though not constituting torture, amount to an excessive use of force by the police and or prison officials.[32] This includes acts which are aimed at humiliating the victim even where severe pain has not been inflicted.[33] Article 16 of the UNCAT places an obligation on state parties to "prevent other acts of cruel, inhumane or degrading treatment "even if such acts do not amount to torture.[34] In the same vein, the European Court of Human Rights held in ***Ireland v United Kingdom***[35] that although acts like wall-standing, hooding, subjection to noise, reduced diet and deprivation of sleep did not amount to torture, they constituted inhumane and degrading treatment.

The ICCPR expressly prohibits torture and other cruel, inhumane or degrading treatment or punishment. Article 7 of the ICCPR provides that; No one shall be

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31 *Prosecutor v Delalic International Criminal Tribunal for the former Yugoslavia,* IT-96-21-Abis 468.

32 M Nowak and E McAuthur, "The distinction between torture and cruel, inhuman or degrading treatment" (2006) 146.

33 *Report of the special Rapporteur on the question of torture*, 23 *December* 20005, UN Doc E/CN4/2006/6, 12.

34 Nowak and McAuthor, The distinction between torture and degrading treatment, 148.

35 *Ireland v United Kingdom* (1979-80) 2 ECHR 25167-168.

subjected to torture or to cruel, inhumane or degrading punishment. The Committee on Civil and Political Rights has stated that the aim of Article 7 of the ICCPR is to protect both the dignity and the physical and mental integrity of the individual.[36] Thus, any act that violates a person's dignity and or his physical and mental integrity will, generally speaking, constitute a breach of international law against torture or other cruel, inhumane or degrading treatment.

It is also recognised in international human rights law that it is important to state from the onset that there are no precise categories of what acts constitute torture or other cruel, inhumane or degrading treatment or punishment. The facts of each case can be used to determine whether the acts or collective acts would satisfy the threshold or the standard of acts that amount to torture. The Human Rights Committee in assessing whether the acts would constitute torture made reference to the manner and the duration of the treatment, its physical or mental illness as well as the sex, age and health of the suspect.

In 1988, the United Nations General Assembly adopted a body of principles for the treatment of amongst others, persons detained.[37] These principles apply for the protection of detained persons and those who are imprisoned. This chapter focuses on the former. Amongst others, principle 1 to principle 6 speak about the protection of the human rights of detainees and the treatment which they should at all material times, receive. Such treatment is the one that recognises their inherent fundamental human rights as follows;

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

[36] *ICCPR General Comment No 20; Article* 7 *(prohibition against torture, or other cruel, inhuman or Degrading Treatment or Punishment*, 10 March 1992.
[37] *United Nations General Assembly Resolution* 43/1988 of 9 December 1988.

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any state pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1) These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
2) Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles; aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

It is in the spirit of the above principles that, at all times the human rights of detained persons be safeguarded by prison officials who have authority over the detainees. And as has been reflected in the introductory remarks of this chapter, the respect to human rights of detainees is one mounting trouble for detainees as they many at times, confronted with degrading punishment and inhumane treatment amongst others. In this light principle 7 to principle 10 has made it a point and obligated prison

authorities and officials to follow due process and diligence in ensuring that they adhere to the above principles as reflected in this body of principles as follows;

Principle 7

1. State should prohibit by law, any act which is contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
2. Officials who have reason to believe that a violation of this body of principles has occurred or is about to occur shall report the matter to their superior authorities, and where necessary to other appropriate authorities or organs vested with reviewing or remedial powers.
3. Any other person who has grounds to believe that a violation of this body of principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly they shall, wherever possible be kept separate from the imprisoned persons.

Principle 9

The authorities who arrest a person, keep him under detention and investigate shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of the charges against him.

In the spirit of the above principles, it is imperative upon prison officials to ensure that detained persons are at all times informed of the reasons for their arrest. The principle equally echoes the fact that detainees should also be kept separate from convicted persons and the reasons for this are very sound; it is to ensure that people who the law has not declared guilty of any offence may be acquitted and therefore,

do not have to be mixed with those who have been convicted in light of the Sesotho mantra *"tapole e le nngoe e bolisa tse ling".* This loosely translates into how something that is not pure or unwell may awfully and negatively affect others. More so, when the principles are clear that detainees must enjoy the status that a person who is neither detained nor convicted enjoys.

2.3.2 African Regional Human Rights Instruments

The African Charter on Human and Peoples' Rights (ACHPR) is a regional human rights instrument that seeks to safeguard the rights of all Africans within the parameters of this continent. Of all the people that the ACHPR seeks to protect, detainees or persons awaiting trial are not left behind, as reflected in its Article 5 that states:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Moreover, the African Charter also prohibits torture and other forms of inhumane treatment. The Charter is enforced by the African Commission on Human and People's Rights.[38] This is evident in the decision of the ***Commission Nationale des Droits de l'Homme et des Libertes v Chad***,[39] where the Commission held that the failure of the Chadian government to protect its citizens from torture constituted a breach of the state's obligation under Article 5 of the ACHPR. One of the options that the Charter expressly provides for as a measure to be taken by states is the enactment of domestic laws, prohibiting and criminalisation of torture and other forms of inhumane treatment.[40] The Commission, in expounding on this provision has made it clear that the mere existence of domestic legislation will suffice; states must ensure that any incidents of torture and other inhumane treatment are investigated and prosecuted.[41] The Commission also interpreted the state obligation

[38] *Article 30, African Charter on Human and People's Rights*, 1520 UNTS 217.
[39] *Commission Nationale des Droits de L'Homme et des Libertes, ACHPR, Comm* No 74/1992, Activity Report 1995, *Purohit and Moore v The Gambia* (Communication No 241/2001) [2003] ACHPR 49.
[40] Article 1 and 5, *African Court on Human and People's Rights.*
[41] *Zimbabwe Human Rights NGO Forum v Zimbabwe, African Commission on Human and Peoples' Rights, Comm* No 245/2002, 21 Activity Report (2006) 159; *Amnesty International and Others v Sudan, African Commission on Human and People's Rights, Comm Nos*, 48/1990, 50/1991,52/1991,89/1993,13 *Activity Report* (1999) 53.

under article 1 of the ACHPR to include an obligation to compensate the victims of abuses. In ***Zimbabwe Human Rights NGO Forum v Zimbabwe***,[42] the Commission held that the obligation to respect and to protect means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. The right to compensation is not affected by the existence or absence of a prosecution in the said case.[43]

2.4 Conclusion

This chapter has highlighted various international and African regional human rights instruments, especially those that Lesotho has signed and ratified. The chapter has also highlighted conduct in detention cells against detainees which conduct is prohibited by the same instruments despite a challenge to the proper implementation of such provisions. Notably, rights such as dignity, liberty, presumption of innocence, right against self-incrimination, freedom from inhuman treatment are found in those instruments. The conduct found to be instigated against detainees is the inhumane beating and failure to try them for their alleged offences et cetera.

[42] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication No 245/ 2002) [2006] ACHPR 73.
[43] *Association for the prosecution of Torture, Guidelines and the measures for the prohibition and prevention of torture, cruel, inhuman or degrading punishment in Africa*, 2008, Article 50.

CHAPTER 3

THE RIGHTS OF DETAINEES IN THE LEGAL SYSTEM OF LESOTHO

3.1 Introduction

In this Chapter, I provide a detailed analysis on how the rights of detainees or persons awaiting trial are protected and safeguarded by the Constitution of the Kingdom of Lesotho. Based on the Constitutional protection of these rights, I then proceed to analyse how the Courts in Lesotho, through case law and precedent, have attempted to interpret these rights. The Constitution of Lesotho is the basic law governing the country. It is a law to which all other laws gain their legitimacy and should any law be inconsistent or run contrary to the dictates of the Constitution, such law shall be invalid to the extent of its inconsistency.[44]

The Constitution provides a legal framework for the structure of the government and lays out the rights guaranteed to citizens. The Constitution was adopted in 1993. It distributes power among three branches of government, while preserving the power of the monarch. Hence, Lesotho unlike other states such as Eswatini remains a Constitutional Monarch. Since 1993, the Constitution of Lesotho has been amended eleventh times, with its eleventh amendment known as the eleventh amendment to the Constitutional Bill, 2022.

3.2 Constitutional Revolution

The Kingdom of Lesotho gained independence from the British on 4 October 1966 and inherited a Westminster type constitutional model of government. The 1966 Constitution made provision for a prime minister, who as leader of the majority party, was mandated to exercise executive powers as the head of government.[45] Similar to the Swaziland Kings' usurpation of powers in 1973,[46] Lesotho's then ruling majority party, the Basotho National Party (BNP) declared the Kingdom as a one party state. Chief Lebua Jonathan, the then leader of the BNP refused to accept the party's defeat by the opposition, the Basutoland Congress Party (BCP) at elections and this led to almost 15 years of one party rule characterised by brute force to ensure

[44] Constitution of Lesotho, Section 2.
[45] KM "The 1993 Elections in Lesotho and the Nature of the BCP Victory" (1997) African Journal of Political Science 140-151.
[46] Ibid.

compliance. The BCP joined forces with the Lesotho Liberations Army and ousted Jonathan's government in 1986.[47]

On 16 March 1993, the Lesotho Constitution Commencement Order (Commencement Order) was published and a new Constitution came into force on the 2nd of April 1993. The Constitution did not make sweeping amendments to the existing governmental set up. It provided for the Constitution in office of the person holding the office of the King, as provided for under the office of the King Order of 1990.[48] The emergence of the 1993 Constitution introduced a number of notable changes to governance in Lesotho.

1. The strong central government that ensured compliance with its orders through harsh and violent means was replaced with a system of governance that would have democratic elections. Significant powers were equally devolved to the local government.
2. The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A bill of rights was put in place comprising of the fundamental rights enshrined in Chapter two of the Constitution, which is intended to protect, promote and safeguard human rights and thus, bringing to an end the era of state sanctioned abuse and people clinging onto power and abusing the same. In accordance with sections of the Constitution, courts have been created and empowered to declare laws and conduct inconsistent with the Bill of rights and the Constitution invalid to the extent of their inconsistency.[49]

3.3 Fundamental Principles Underlying Lesotho's Constitutional Regime

To understand the foundations of the constitutional and democratic dispensation post the 1993 Constitution, I focus in this part on the fundamental principles and features that underlie the Lesotho constitutional dispensation. These are the principles that I strongly believe are shared by the constitutional systems of other constitutional systems on the African continent other than Lesotho. These principles are reflected in the book by the prominent Constitutional law scholars; Johan De Waal, Iain Curie and Gerhard Erasmus[50] as constitutionalism, the rule of law,

[47] A Dube, "The Law and Legal Research in Lesotho" (Global Lex, 6 February 2008) <https://www.nyulawglobal.org/globalex/Lesotho.html> accessed 10 June 2022.
[48] Ibid.
[49] Constitution of Lesotho, Section 2.
[50] I Curie and Others, *The Bill of Rights Hand Book*, (4th edn, Juta 2013).

separation of powers and checks and balances, co-operative government and devolution of powers.

Some of the basic principles are expressly entrenched in the text of the Constitution, while others such as separation of powers and constitutionalism are implicit in the new Constitutional order.[51] As much as the bill of rights has been written following the model of the 1996 Constitution of the Republic of South Africa, it is with respect to the Lesotho realities that some of the constitutional principles are express in the text of the 1993 Constitution. For instance, the rule of law is reflected in the constitutional provision on the right to equal protection of the law.[52] For the purpose of this research, I will endeavour to focus on only the rule of constitutionalism as the bedrock of a state that protects the fundamental rights of all, including the rights of persons awaiting trial and detainees.

The principles nevertheless, are all justifiable in the sense that any law or conduct inconsistent with them may be declared invalid. But the basic principles do more work than this. They tie the provisions of the Constitution together and shape them into a framework that defines the new constitutional order. The basic principles therefore, have a broader effect in that they influence the interpretation of many other provisions of the Constitution, including the chapter two provisions on fundamental rights.

The Constitution in turn, shapes the ordinary law and must inform the way legislation is drafted and interpreted and the way courts develop the common law.[53] The spirit of this is that the legislature in the enactment of laws; must do so in cognizant of the protective role the law must play in ensuring that in their interpretation and application, the rule of law and constitutionalism are achievable as end goals. Any law that has been enacted and does anything that runs contrary to the rule of constitutionalism is not the kind that resonates with the spirit of the constitutional order.

The pertinent enquiry to ponder upon is whether the laws in Lesotho that seek to or ought to protect and promote the rights of detainees or persons awaiting trial are backed by the rule of law or constitutionalism as well as their application and

[51] Ibid.
[52] Constitution of Lesotho, Section 4.
[53] Ibid.

interpretation by the courts of law. In what follows below, I briefly dwell on the ideology of the rule of law and constitutionalism.

3.4 Rule of Law

The concept of the rule of law reared its head in amongst others, the matter of ***Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council***[54] to the effect that;

> It seems central to the conception of our Constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

What is underscored in the above principle is that the rule of law is only achievable where it is exercised with due regard to the parameters of the law. This is to say holding people in detention cells more than is allowed is not in rhythm with the spirit of the rule of law. Beating detainees with batons to extract confessions or admission statements is not a conduct sanctioned by the law. Denying detainees' access to their lawyers and families and their cases taking a lengthy timeframe to be decided fails to resonate with the dictates of the rule of law.

Equally, in the matter of the ***New National Party v Government of the Republic of South Africa***,[55] the concept of the rule of law was raised to a new level. The case involved a challenge to the provisions of the electoral Act 73 of 1998, which provided that voters could only register on the voters' roll and subsequently vote if they have produced a South African bar-coded identity document issued after 1986, or a temporary identity certificate. The essence of the challenge was that the practical effect of these requirements would be a violation of the right to vote of millions of people who did not have the proper documentation.

A majority of the South African Constitutional Court dismissed the challenge. According to the Court, parliament is empowered by the Constitution to require

[54] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[55] *New National Party v The Government of the Republic of South* Africa 1999 (3) SA 191 (CC).

potential voters to identify themselves. This is in order to comply with the Constitution's insistence on a national common voters' roll and free and fair elections. Two constitutional constraints are imposed on parliament in the exercise of its power. The first is that there must be a rational relationship between the scheme by which it cannot act capriciously or arbitrarily[56] AV Dicey, an American Constitutional Lawyer writes that the purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.[57]

Put in its simplest form, the rule of law requires state institutions to act in accordance with the law. The first is that the branches of the state (no less than anyone else in the country) must obey the law. The second is that the state cannot exercise power over anyone unless the law permits it to do so. This means that there must be a law authorising everything the state does.[58] If it acts without legal authority it is acting lawlessly, something which a Constitutional democracy cannot permit.[59]

3.5 Constitutionalism

Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution. The fundamental problem that is addressed by the writing of a constitution is to establish a government with enough powers to govern but where that power is structured and controlled in such a way as to prevent the state from using it oppressively.[60] Two things emanate from the above; first, it is that the concept of constitutionalism is only achievable in a society or community where the government exercise its powers and control from the dictates of a constitution.

This is to say even if agents of the state or government exercise power from Acts of parliament or legislation other than the constitution, it remains clear that any law that is repugnant to the constitution, the same shall be invalid to the extent of its inconsistency.[61] For instance, the police may on the one hand, be exercising the

[56] Ibid.
[57] AV Dicey, *An Introduction to the Study of Laws of the Constitution* (3rd edn, Oxford) 1889.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

right to interrogate and/or to investigate and the other hand, the constitution provides for the right to dignity and freedom from inhumane treatment. If the police, in exercising the right to interrogate or to investigate, subject detainees or persons awaiting trail to any forms of torture or beating, that is repugnant to the relevant constitutional provisions and in turn, against the spirit of constitutionalism. In the ***Executive Council of the Western Cape Legislature v President of the Republic of South Africa***,[62] the Court was of the opinion that the first principle, constitutional supremacy, dictates that the rules of the constitution are binding on all branches of the government and have priority over any other rules made by the government. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons will therefore, not have the force of law.

3.5.1 Constitutional provisions that safeguard the rights of detainees

a) Protection of the fundamental rights of detainees awaiting trial

The fundamental rights of detainees awaiting trial is enshrined in Section 4(1) (b) in the bill of rights in chapter two of the 1993 Constitution of Lesotho. It reads as follows:

> Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following
>
> (a)……..
>
> (b) the right to personal liberty:
>
> …….
>
> The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

In a nutshell, the constitutional message conveyed is that the listed right to personal liberty is subject to limitations stated in the subsequent section of the Constitution

[62] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 62.

that elaborates on it. It therefore, means that the Constitution does not have a general limitation clause. Each right and freedom has its own *sui generis* limitation clause. Consequently, the right to personal liberty has to be given a meaning that resonates and reasons with the contours of the limitation clause that relates to it.

In the context of the bill of rights as reflected in the Lesotho Constitution, the right to personal liberty must be construed as referring to freedom from physical constraint and protection of physical integrity. The courts are enjoined to protect persons against any governmental action or conduct that cannot be justified by reference to any law that is constitutionally compliant.

b) Presumption of innocence

The Constitution of Lesotho provides in section 12 (2) that:

> Every person who is charged with a criminal offence;
>
> a) Shall be presumed to be innocent until he is proved or has pleaded guilty;

3.5.2 Interpretation by the courts (Lesotho courts) of the laws that protect the rights of detainees awaiting trial

The following analysis and discussion directly flows from the interpretation of the above mentioned principles. Reference here is made to cases decided by the courts in Lesotho. These cases are the ones in which the rights of the detainees or person awaiting trial were at stake. I therefore, engage in a deep rooted analysis of the cases to determine how our courts interpreted the same.

In the Constitutional Court matter of ***Ramakatsa v Commissioner of Policeand Others***,[63] with the introductory remarks of Sakoane P. Sakoane in ***Spano v New York***[64] (currently the Chief Justice of the Kingdom of Lesotho) that the police must obey the law while enforcing it, in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. These introductory remarks are not just put here in the vacuum, it becomes a constant reminder that the reality of the criminal justice system of Lesotho is, that demeaning methods are used to convict amongst others people that are thought to be criminals from the real criminals.

[63] *Ramakatsa v Commissioner of Police and Others* (Constitutional Case No 22/2018) [2019] LSHCONST 1 (16 April 2019).
[64] *Spano v New York* 360 US 315 (1959) at p 320-321.

This highlights the key fact that detainees are not protected especially, in the instance where they are faced with police interrogation, that the methods used are the once that assume automatic "criminality" status of persons awaiting trial, against the bedrock of a constitutional democracy; guilty until proven so by a competent court of law.

As the court itself affirmed, the above interpretation that:

> the above dictum captures the dispute presented by this case. It is a matter in which the police arrested criminal suspects and detained them in their custody for upwards of 14 days. During all these days, the suspects were not taken to court either for their extension of the Constitutional and statutory Forty Eight (48) hour period of detention or for remand on any charge. The result is that there was no judicial oversight over their detention and no access by their families and lawyers.[65]

What surfaces in the above is that the Constitution Court has highlighted the predicaments faced by criminal suspects (detainees) during the stages of interrogation by the police. These are constitutional misconducts by the police in the investigation of detainees. Amongst others, they are denied access to lawyers and families and held in detention cells for more than the statutory time limits allowed among others.

In the *Ramakatsa* case when the matter first came before Court on the 21st August 2018, the Court was informed by Counsel for the suspects that the latter has since appeared in Court and remanded in custody at the Maseru Central Correctional Facility on a charge of robbery and that the application was that of ***habea scorpus*** requesting the accused release from police custody. In interpreting and applying the above, starting with the right to personal liberty, the Court opined that in assessing whether there has been deprivation of liberty, regard may be had to the specific context and circumstances surrounding the type of restriction other than the paradigm of confinement in a cell.

An element of compulsion or coercion is indicative of a loss of liberty irrespective of the length of period or purpose of confinement. Making reference to the scholarly writing of Steytler in Constitutional Procedure[66] and Harris, O'Boyle and Warbrick,[67]

[65] *Ramakatsa and Another v Commissioner of Police and Others* page 8, para 1.
[66] Steytler, *Constitutional Criminal Procedure* (Butterworths 1998) 48-49.

the Constitutional Court in this same case held that apart from physical restraint, psychological compulsion is included in the concept of restriction of liberty. This is so where, for example, there is a reasonable perception of suspension of freedom of choice arising from involuntary police control over the movement of a person by a demand, direction or order whose disobedience might be visited with penal liability or legal consequences.

The above dictum shows a clear cut out case of psychological and mental issues that are involved when a detainee is subjected to physical constraints in detention cells. Not only is their physical liberty prejudiced, equally their psychological faculties are affected very negatively. The stakes are much worse in the Lesotho setting where even the right to mental health owing to detention and conduct of the police against the use of force is not considered or there aren't enough mechanisms in place to assist the mental faculties of detainees due to the trauma in detention cells. There have been notable cases of people being arrested and charged of crimes they have not committed yet the treatment they received in the detention cells was one tantamount to indirectly saying such a suspect is a criminal.

The Court further applied its mind to the detainees being arrested without a warrant of arrest which is a phenomenon that prevails in Lesotho and was of the opinion that the requirement of a reasonable suspicion as a *sine qua non* for arrest and detention does not require the police to obtain all the evidence before laying charges. In the matter of ***Solicitor General v Mapetla***[68] the Lesotho Court of Appeal held that:

> A suspicion is of course not to be equated with prima facie proof; but the suspicion must be reasonable, that is to say, it must be such that a reasonable man in the possession of the facts would agree that there was a reasonable ground to suspect that the person involved was concerned in subversive active… it is this requirement of reasonableness which is the safeguard given against Capricious arrests.

With the above and for instance, in the Ramakatsa case referred to above, the Appeal Court is aware of the reality that Lesotho is in; that people are arrested arbitrarily and put in detention cells where even innocent people are subjected to all forms inhumane treatment. Detainees go through the worst forms of trauma owing to

[67] D Harris and Others*, The Law of the European Convention on Human Rights* (3rd edn, Oxford 2014) 292-293.
[68] *Solicitor General v Mapetla LAC* (1985-89) 125 at 127 B-C.

capricious arrest and where their right to personal liberty is put at stake. Equally, in ***Maseko v Attorney General***,[69] the Lesotho Court of Appeal held that

> When a police man arrests without a warrant, he must in ordinary circumstances, inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized, but that when the circumstances under which he is arrested are such that he must know the general nature of the alleged offence for which he is detained, the person informing him need not inform him thereof.

In a nutshell, it is imperative upon officers effecting arrest to at all material times, inform those arrested of the reasons of their arrest and need not withhold such information where the right to personal liberty of the detainees becomes endangered.

3.5.3 Interpretation and application of the principle of presumption of innocence

The Court also interpreted and applied the presumption of innocence principle in the *Ramakatsa* case, where it held that the forensic test at the pre-trial stage for legality of arrest and detention is proof of the existence of a jurisdictional fact of a reasonable suspicion as a justification for limiting the liberty of a suspect. The pre-trial stage is not the moment to enquire into the guilt by calling for a court to have moral certainty about the guilt of the accused through proper application of the rules of evidence within the precepts of the Bill of rights.[70] In the same vein, the Court made reference to the same holding as itself held in the South African Appeal Court case of ***S v Mavinini***.[71]

Professor Schwikkard P.J[72] writes that another reason for viewing the presumption of innocence as having an exclusive identity is to allow greater coherence in establishing its normative value. The separate rights necessary to uphold the right to a fair trial have different rationales (albeit there is some degree of overlap).For example, whilst the breach of the presumption of innocence principle as the foundation of a policy directive might be justified in denying bail applications, this

[69] *Maseko v Attorney General LAC* (1990-94) 13 at 27 D-F.
[70] Pp 33 at para 39.
[71] *S v Mavinini* 2009 (2) ALL SA 277 (SCA) para 26.
[72] PJ Schwikkard, *Presumption of Innocence* (1st edn, Juta) 38-39.

should not be allowed to undermine the normative value of the presumption of innocence as a rule of regulating the burden of proof.

3.6 The rights of detainees in police custody

3.6.1 Judges' Rules

Apparently the questioning of suspects has been imprinted in legislation. There have been operative common law principles that have been reiterated when judges' rules were made and equally adopted by English courts at the beginning of the 20th Century: The Practice Note (Judges' Rules) 1964 (1) WLR. 152, which begins amongst others with the following:

a) Citizens have a duty to help a police officer to discover and apprehend offenders.
b) That police officers, otherwise than by arrest, cannot compel any person against his well to come to or remain in any police station.
c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.
d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence.[73]

In a nutshell, the above rules still resonate to the spirit of Constitutionalism and the Rule of Law in that those effecting the arrest must ensure that their arrest is lawful and that the suspect who is to be detained and remanded in custody is fully informed of the nature of the charge against them. It adds that the detainee must be allowed access to legal representation and the latter must be able to consult with the former. Equally important, the judges' rules make it a point that the detained person if charged must be swiftly prosecuted for whatever charge levelled against them.

3.6.2 Access to legal advice and the privilege against self-incrimination

The above judges' rules over time, evolved and solidified into a binding police code of conduct for the protection of the right of access to legal advice and the privilege against self-incrimination and the same was opined in Lesotho Court of Appeal

[73] Practice note, Judges' Rules (1964) 1 WLR 153.

decision in ***Commander of The Lesotho Defence Force and Others v Rantuba and Others***[74] and in the Constitutional case decision of ***Metsing v Director General, Directorate and Corruption and Economic Offences and Others***.[75]

The public outcry against the police conduct as it concerns detained persons is rife as ever. One aspect that exacerbates the issue is the vicarious responsibility of the Commissioner of Police and the Attorney General for the conduct of the police force. In the majority of cases, the perpetrators of the despicable conduct against detained persons are seldom sued in their personal capacity and made personally liable for the damages against the victims. It is always the state bearing the liability. One of the factors for this is that the identity of the perpetrators is not known even after the attempts to know such identity. This is the indication of the reluctance on the part of Station Commanders to combat the brutality by their subordinates' behaviour. In cases where the same are known, they are seldom made to personally account for their acts of brutality, which may send a message to the police to cease with such conduct if they are made personally liable for their actions.

3.7 Conclusion

In a nutshell, in this chapter I have engaged with Lesotho's legal framework and the precedence on the protection of persons awaiting trial. There is a 1993 Constitution in place as Lesotho's supreme law. Chapter 4 of the Constitution enshrines provisions that form part of the bill of rights, such as freedom from inhumane treatment and the right to be presumed innocent until proven to the contrary. The courts in Lesotho have also affirmed these rights through case law such as the *Ramakatsa* judgment that I have made reference to above. The underlying values are that persons awaiting trial are considered innocent as any other citizen in the eyes of the law as they have not yet been stripped of such innocence by a competent court of law.

[74] *Commander of the Lesotho Defence Force and Others v Rantuba and Others LAC* (1995-1999) 687.
[75] *Metsing v Director General, Directorate on Corruption and Economic Offences and Others* Constitutional Case No 11 of 2014 (25 February 2015).

CHAPTER 4

A REVIEW OF DIFFERENT LAWS AND APPROACHES RELATING TO THE RIGHTS OF DETAINEES AWAITING TRIAL ADOPTED BY OTHER AFRICAN COUNTRIES

4.1 Introduction

This Chapter undertakes a comparative study and analysis on how different African states have endeavoured to protect the rights of persons awaiting trial or detainees. The selected states are three in the Southern African region, being the Republic of South Africa, Zimbabwe and Botswana and one in East Africa, being Kenya.

4.2 Republic of South Africa

The Republic of South Africa (RSA) was for decades ruled by the unjust apartheid government that benefited the white minority at the expense of native black South Africans. Mahomed DP in ***AZAPO v President of the Republic of South Africa***[76] description best captures the South African pre-constitutional era and echoes that:

> For decades, South African history has been dominated by a deep conflict between the minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist the domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict depended with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissention and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among the expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country

[76] *AZAPO v The President of the Republic of South Africa* 1996 (4) SA 671 (CC).

> haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.[77]

The above extract gives a vivid description of what prompted the 1996 Constitutional order that would heal South Africa of the scars of the ugly governance during the apartheid regime. Consequently, the interim Constitution of the Republic of South Africa came into force on the 27th April 1994, this is the piece of law that is supreme in South Africa and across many jurisdictions globally and where other laws within the same get their efficacy and legitimacy. The interim Constitution became a shield amongst others, of the rights of detainees awaiting trial.

Chapter III of the interim Constitution of South Africa enshrined a comprehensive bill of rights. There are notable Constitutional principles inherent in the new constitutional order, including but not limited to constitutionalism, the rule of law, democracy and accountability. The Constitution of South Africa provides amongst others, the right to human dignity. Scholars writing in the South African context maintain the view that human dignity is a central value of the objective, normative value system established by the Constitution, perhaps the pre-eminent value. According to section 1, the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. This was affirmed in the case of ***Carmichile v Minister of Safety and Security***.[78]

In the case of ***S v Makwanyane and Others***,[79] the Constitutional Court had to decide an issue that constitutional negotiators (unlike their counterparts in Mozambique and Namibia) shunned; that is whether the use of the death penalty was constitutional? All members of the court unanimously decided that it was not. Their lordships observed that the death penalty was a cruel and inhumane punishment, and an invasion of human dignity. A few days later, the same Constitutional Court was faced with another question regarding the rights of inmates: whether corporal punishment by organs of state was constitutional or not.

To date this is the South African precedent that abolished the death penalty as the Court decided that the death penalty is against the dictates of human dignity. In

[77] *AZAPO v The President of the Republic of South Africa* 1996 (4) SA 671 (CC).
[78] *Carmichile v Minister of Safety and Security* 2001 (4) SA (CC) para 56.
[79] *S v Makwanyane and Others* 1995 (6) BCLR 665 (CC).

answering the same question, in the case of ***S v Williams and Others***[80] where, in a unanimous decision, the court said it was not constitutional. Twenty two South African prisoners (sentenced and awaiting trial) also fought for their right to vote in general and local government elections, and subsequently won it in the Constitutional Court in the case of ***August and Another v Electoral Commission and Others***.[81] Justice Sach, whose judgment all members of the court concurred to, observed that universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The vote of each and every citizen is a badge of dignity and of personhood.

In the ***National Coalition for Gay and Lesbian Equality v Minister of Justice***,[82] it was held that the common law criminalisation of sodomy was a violation of the right to dignity. At its least, the Court held it is clear that the Constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. Punishing a form of sexual conduct which is identified by the broader society with homosexuals is inconsistent with human dignity:

> Its symbolic effect is to state that in the eyes of our legal system all gay men are criminal. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of human being. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the constitution.[83]

In the case of ***Van Biljon v Minister of Correctional Services***,[84] four prison inmates diagnosed as HIV/AIDS positive, asked the High Court to intervene in their demands for the right to access to medical care, including special medication like

[80] *S v Williams* 1995 (3) SA.
[81] *August and Another v Independent Electoral Commission* 1999 (4) BCLR 363 (CC) page 4 372.
[82] *National Coalition for Gay and Lesbian v Minister of Justice* CCT 11/98 para 28.
[83] Ibid para 28.
[84] *Van Biljon v Minister of Correctional Services* 1997 SACR 50.

AZT, ddI, 3tC or ddC treatment, and that the cost for that be borne by the state. The Department of Correctional Services argued that prisoners should have access to health care equal to that available to any other patient attending a provincial hospital. In such hospitals, it was argued, AZT was only available to patients whose conditions had developed to full-blown AIDS. In the case in question, the prisoners' conditions were only at a symptomatic stage of the disease. In effect, the department relied on the defence of budgetary constraint.

The court considered whether prisoners were constitutionally entitled to special medication, in this case AZT, and whether the state was obliged to pay for such treatment. Put differently, the question was whether the rights of prisoners were stronger than the rights of people outside prison? Mr Justice Brand looked at article 35(2)(e) of the Constitution of 1996, which provides that "Everyone who is detained, including a sentenced prisoner, has a right … the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".[85]The Judge decided in favour of the inmates. In the course of the judgement he commented that prison conditions were more likely to give rise to infections, therefore, placing a heavier responsibility on prison authorities.

Mr Justice Brand's decision has been characterised by commentators as brave. None of them, however, found the decision to be faulty. This case highlights important aspects of the inmates and this also extends to persons awaiting trial; that access to proper sanitation and good medical facilities is their Constitutional right and if a state fails to provide such, then it is failing in its Constitutional obligations towards its people. In the light of dwindling resources, the nature of the problem of HIV/AIDS pandemic and current levels of prison overcrowding, this decision will have grave implications to prison authorities.

4.3 Zimbabwe

As has been the view throughout this study, the rights of persons deprived of their liberty are both explicitly and implicitly provided for in various international and regional instruments.[86] Of the various regional and international treaties, Zimbabwe has signed, ratified or acceded to, are the ICCPR, Convention on the Elimination of all Forms Discrimination Against Women, International Covenant Economic Social

[85] Section 35 of the Constitution of the Republic of South Africa, 1996.
[86] United Nations General Assembly, A/RES/70/175.

and Cultural Rights, Convention on the Rights of the Child, Convection on the Rights of Persons with Disabilities and the African Charter on the Rights and Welfare of the Child. Therefore, it means that the provisions of the instruments that Zimbabwe has ratified or acceded to are legally binding on the state, which has an obligation to domesticate the provisions into national law. Zimbabwe has endeavoured to domesticate the provisions of the instruments through the likes of its Constitution, the Criminal Procedure and Evidence Act, its Prison Act among others.

The main Principles, Minimum Rules and Declarations that provide a comprehensive outline of safeguards and the rights of persons deprived of their liberty are the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);[87] the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[88] and the Basic Principles for the Treatment of Prisoners.[89] These declarations are *per se* not legally binding on Zimbabwe as they merely constitute soft law that are barely persuasive under public international law. As such they remain guidelines that Zimbabwe observes in the treatment of persons in detention.

The 2013 Constitution of Zimbabwe (the Constitution) also contains provisions that protect persons that have been deprived of their liberty. Zimbabwe observes the Robben Island Guidelines on the treatment of detainees and its paragraph 23 is to the effect that pre-trial detention may be permissible where it is undertaken in accordance with the procedures of the law in a place of detention that has been authorised.[90] It has also been observed that such detention must also not be arbitrary.[91] The right to be presumed innocent until proven guilty suggests that convicted detainees should be treated in a manner that is different to the treatment given to convicted criminals.

It suggests that Zimbabwe, like many other jurisdictions globally has undertaken to safeguard the rights of those not proven guilty by a competent court of law and as such, it maintains the right of individuals to be presumed innocent until the contrary

[87] United Nations General Assembly, Body of Principles for the treatment of Prisoners Resolution; Resolution Adopted by the General Assembly on the 28th March 1991.
[88] Ibid.
[89] Ibid.
[90] The Robben Island Guidelines, paragraph 23.
[91] Article 11 of the United Nations Declaration of Human Rights, Article 7 of the ACHPR, Rule 111(2) of the Nelson Mandela Rules and Principle 36(1) of the Body of Principles.

has competently been proven. This right is provided for in several international human rights instruments and the Zimbabwean Constitution.[92] In terms of the Zimbabwean Constitution, further detention may only be permissible upon written order of the competent authority.[93] These rights are meant to promote every accused person's right to a fair, speedy and public trial within a reasonable time before an independent and impartial court established by law as required by the Constitution.

International instruments signed and ratified by Zimbabwe require that detained persons be brought promptly before judges or other officer authorised by law to exercise judicial power and be tried within a reasonable period of time.[94] Further, they require that untried prisoners be informed of the reasons for their detention and the charges against them.[95] At the municipal level, the Zimbabwean Constitution make provision to the effect that following an arrest and/or detention, a person who is not released shall be brought before a court as soon as possible and in any event, not more than 48 hours after the arrest or detention began.[96]

In ***S v Mukwakwa***,[97] where a suspect escaped from a police cell after more than 60 hours of detention, the court stated that the custody from which the accused had escaped was not lawful because he had been detained beyond the48 hours stipulated by the law. However, the detention of the arrested person may also be extended if a warrant for his further detention is obtained from a court of law. The State should be required to advance reasons for the delays in bringing the matter to trial.[98] A proper reason such as difficulties in locating a vital witness normally justifies an appropriate delay but again the delay should not be very long.

Equally in the matter between ***R v Sambo***[99] and ***Re Mlambo***[100] it was held by the Court that a person detained must be held within statutory time provided for by law in a detention cell, and any other detention that exceeds the time limit, would consequently be unlawful. Where further detention is sought, the court must then

[92] Section 70 (1) (a) of the Zimbabwean Constitution.
[93] Section 70 (1) (b) of the Zimbabwean Constitution and Article 37 of the Body of Principles.
[94] Article 9(3) of the ICCPR, Principles 37 and 38, Rule 84(2) of the Standard Minimum Rules and Rule 6(1) of the Tokyo Rules.
[95] Robben Island Guidelines, paragraph 25 and 26.
[96] Section 50(2)(b) of the Zimbabwean Constitution.
[97] *S v Mukwakwa 1997* (2) ZLR.
[98] *Fikilini v Attorney General* 1990 (1) ZLR 105 (S).
[99] *R v* Sambo 1964 (2) ZLR 565.
[100] *Re Mlambo* 1991 (2) ZLR 339 (S) @ 344 B-C.

intervene to provide such when a sufficient case has been laid out warranting such a further detention.

The Zimbabwean Constitution grants every person inherent dignity in both their private and public life; as well as the right to have their dignity respected and protected. In the context of detention, the Constitution provides that "any person who is arrested or detained…has the right to conditions of detention that are consistent with human dignity, including…the provision at State expense of adequate accommodation, ablution facilities, personal hygiene".[101] The right to dignity requires that the state ensures the provision of these and other minimum conditions of detention.

In Zimbabwe, the right to dignity of detainees amongst others embodies good and proper sanitation and the conditions in detention cells. The right to dignity goes beyond inhumane treatment to ensuring that the detention cells for the persons awaiting trial and prisoners alike are kept in good sanitation. For in Part III of the Prison Act, it is an offence for any prisoner to refuse clothing and keep it untidy.[102]Accordingly, the constitutional rights of universal application such as the right to dignity and to have that dignity protected should be read broadly to require the state to provide enough to citizens incarcerated in its jails.

In terms of the Prisons Act, the right to receive and the duty to diligently use bedding can be derived from provisions that make it a criminal offence to refuse to wear or keep clothing given to the prisoner in question. This right has been held to apply also to persons awaiting trial to ensure that to keep their dignity intact, they must be provided with adequate clothing and bedding.[103]

4.4 Botswana

Botswana has been a multiparty democracy since independence in 1996. Despite the rights afforded for by the Botswana Constitution on dignity and the security of persons. Botswana remains the only Southern African country that still implements the death penalty. The reasons for maintaining the death penalty is found in the case discussed below. Owing to this, Botswana maintains a very low crime rate generally yet, there is still a challenge on the treatment of persons awaiting trial in its prisons.

[101] Constitution of Zimbabwe, Section 50 (5) (d).
[102] Prison Act of Zimbabwe, Part II.
[103] Prison Act, Zimbabwe, Part II.

The Botswana Constitution has however, endeavoured to protect and promote their rights as illustrated below.

The constitutionality of the death penalty in Botswana came before the courts in ***Patrick Ntesang v The State 1995 4 BCLR 426*** (Botswana Court of Appeal). The five justices of appeal who constituted the Court considered sections 4and 7 of the Constitution, which provides as follows: Section 4(1) states that "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted". Section 7(1) says, "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment". Section 4 (2) provides that "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution."

The Court concluded that the death penalty was legally provided for in the Constitution, and there was nothing that could be done about it. The following observation was made by Aguda JA, who wrote the judgment to which all members agreed, is informative:

> …despite that the death penalty may be considered, as apparently has been elsewhere, to be torture, inhuman or degrading punishment or treatment, that form of punishment is preserved by sub-section (2) of section 7 of the Constitution. I have no doubt in my mind that the Court has no power to rewrite the Constitution, in order to give effect to what the appellant has described as progressive movements all over the world, and to give effect to the resolution of the United Nations as to the abolition of the death penalty. I however express the hope that before long the matter will engage the attention of that arm of the Government which has responsibility of affecting changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world.

In ***Patrick Ntesang v The State***,[104] the Privy Council was criticised, for not providing adequate protection to death row prisoners. The Court of Appeal in Botswana was grappling with the plight of death row prisoners in that country in the case of ***Catholic Commission for Justice and Peace v Attorney General 1993 4 SA 239***

[104] *Patrick Ntesang v The State* 1995 4 BCLR 426 at p 435.

(ZS). As it turned out, the case became famous both in Botswana and beyond. Prisoners, who had been on the death row for a long time, contested the constitutionality of their indefinite detention, as death row prisoners, without any clear indication as to when their death penalty was to be implemented. Taken together with the prison conditions, in which those death row prisoners were held, the court found sufficient reasons to set aside the death penalty and substitute it with life imprisonment.

4.5 Kenya

Kenya is one of the African countries that has domesticated almost all the key international conventions on human rights. Ratification of the ICCPR in 1972 represents a crucial step in the harmonization process of Kenyan law to international standards, established eventually with the new Constitution in2010. Concerning specifically, the human rights of persons in detention facilities, the Kenyan government committed to the United Nations Standard Minimum Rules for the Treatment of Prisoners and also to their revised version, known as the Mandela Rule.[105]

Like in Zimbabwean, these rules and guidelines constitute soft law to which Kenya receives its persuasion in the protection and promotion of the human rights of detainees. Despite the existence of a comprehensive legislative framework and a political will to improve the system and align it with international standards – since the beginning of a reform's process back in the first years of 2000 – the situation of human rights violations in Kenya needs further efforts for the actual implementation of laws and standards and for providing the legislation with the appropriate structures.

Overcrowding is a major problem in prison management and the cause of deteriorating basic conditions in correctional facilities in Kenya, which leads to degrading living conditions for inmates (in terms of service provision and access, and in terms of higher risks of inmates becoming victims of various forms of abuse by fellow inmates and by prison officials) and to harsh working conditions for prison officers, who often found themselves living in inadequate housing, with inadequate pay and within a tough working environment.

[105] Standard Minimum Rules for the Treatment of Prisoners

One of the main root causes of overcrowding in detention facilities lies in the lack of guaranteed access to fair justice; excessive length of trials, scarce use of alternative measures to pre-trial custody and detention while poverty and illiteracy remain main criminogenic factors that affect people's ability to pay fines and adequately own the process, and also lack of legal representation for children and serious offenders.[106]

Kenya is a signatory to and has ratified most of the international and regional conventions relating to human rights and to children rights listed above, which have been domesticated through several instruments in the Kenyan legislation, covering human rights and children rights in general and more specifically regulating the administration of justice and the life of people deprived of their liberty. The core legal instrument is the Revised Constitution of Kenya (2010)[107] and the enshrined bill of rights, which constitutes an integral part of the Constitution and envisages – among the others –the fundamental rights of people in the administration of justice and those held in custody. Notably, most if not all the provisions of the ICCPR form part of the Kenyan Constitution.

Interestingly, the Kenyan government has been working on the domestication of the Nelson Mandela Rules and Guidelines and the most recent one being the Persons Deprived of Liberty Bill,[108] which gathers the principles and standards guaranteed to people held in custody and deprived of their liberty, very much referring to other already existent Kenyan Laws, including the Constitution and the Prisons Act.

The Constitution of Kenya provides for a plethora of rights that protect persons detained and awaiting trial.[109] The main principles that regulate a trial in Kenya are that a suspect is considered innocent until proven guilty in a trial proceeding conducted publicly, even though the privacy of the victim shall be ensured and protected. A person cannot be tried twice for the same offence, unless the consequences of the offence amount to another act or some acts from the offence are constitutive of another offence.[110]

[106] Human rights and deprivation of liberty in Kenya.
[107] 2010 Revised Kenyan Constitution.
[108] Persons Deprived of Liberty Bill, issued in 2014.
[109] Constitution of Kenya Section 51
[110] *Muruatetu & Another v Republic; Katiba Institute & 4 Others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).

It is provided for in the Constitution of Kenya that everyone has a right to freedom and the security of the person, which includes the right to not be deprived of freedom arbitrarily or without just cause,[111] detained without trial, except during a state of emergency,[112] subjected to torture in any manner, whether physical or psychological,[113] subject to corporal punishment, punished or treated in a cruel, inhumane or degrading manner.[114] It is provided in Article 48 that everyone has a right to fair trial.[115]

It is further provided that a person who is detained, held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the bill of rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned. To give effect to the above constitutional provisions, the Persons Deprived of their Liberty Bill is in place to ensure that fundamental human rights of people that have been deprived of their liberty through amongst others detention, are attainable. Moreover, Kenya has a Legal Aid Bill that provides that a person who unlawfully obstructs a person held in custody from applying for legal aid commits an offence.[116] This is to say, officials holding a person in custody or in detention have a legal duty to not stand in a detainee's right of seeking legal redress.

In ***Peter Ooko Otieno v Republic***,[117] a criminal appeal by the appellant against the judgment of the Kenyan Magistrate Court where the defendant had been charged of robbery amongst others and the Court pronouncing the rights of persons detained was of the view that one can be in detention for a specified statutory time and be informed of the reasons of his being detained.

4.6 Conclusion

This chapter has analysed the extent to which the rights of persons awaiting trial or detainees are safeguarded in different southern African and an east African country. Observations garnered indicate that all of the countries examined have adopted domestic constitutions as their supreme laws, containing comprehensive bills of

[111] Article 29(a) of the Kenyan Constitution.
[112] Article 29 (b) of the Kenyan Constitution.
[113] Article 29 (c) of the Kenyan Constitution.
[114] Article 29 (d) of the Kenyan Constitution.
[115] Kenyan Constitution.
[116] Kenyan Legal Aid Bill, 2016.
[117] *Peter Ooko Otieno v Republic Criminal Appeal* 26 of 2013.

rights. Research has also indicated that these countries are state parties to major international human rights instruments such as the ICCPR, UDHR and the ACHPR which expressly prohibit acts of torture among other cruel acts committed against persons awaiting trial.

Countries like Zimbabwe and Kenya have progressed a lot in terms of extending or broadening the protection of persons awaiting trial by adhering both to hard law and soft law, including but not limited to the Nelson Mandela Guidelines and Principles and the Robben Island Guidelines among others. For instance Kenya not only observes these, it has gone further to endeavouring to promulgate the same into law through the drafting of the Persons Deprived of Liberty Bill of 2014.

CHAPTER 5

FINAL ANALYSIS OF THE LAWS RELATING TO PROTECTION OF RIGHTS OF DETAINEES AWAITING TRIAL

5.1 Introduction

This is the concluding chapter of this research. It embodies concluding observations and proffers recommendations on how protection of the human rights of persons awaiting trial may be strengthened.

5.2 Conclusion

It is evident through this research that the protection and promotion of the human rights of detainees is not a Lesotho concern alone, but also extends globally. While there are laws, policies and guidelines in place to protect the rights of detainees or persons awaiting trial against contravention, implantation of the same remains a concern. The research has indicated and or highlighted a number of rights of the persons awaiting trial; the right to life, presumption of innocence, the right to dignity, proper sanitation, speedy trial (in light of the maxim justice delayed is justice denied), access to family and access to legal representation (lawyers).[118] Of significant is the right to be presumed innocent at all material times, what is underscored by this right is that even the treatment that persons awaiting trial must receive is one that should be different from the convicted prisoners.

This right seems to get corroded by the conduct that detainees receive while in detention. Consequently, their dignity and fundamental rights get tempered with and in worst case scenarios, they die while in detention. The illustrations provided in this study suggests that much progress still needs to be made in holding officials who commit acts of cruelty and inhumane treatment accountable and well as to ensure that interrogation rooms do not become criminality rooms. In other instances, detainees are coerced into signing confession forms. The medieval practice of forcing people to incriminate themselves should be relegated to dust piles of history.

It is evident from the research conducted that there are mechanisms in place that seek to protect persons awaiting trial in Lesotho; from the Constitution, case law,

[118] See *Ramakatsa* judgment in Chapter 3.

common law as well as international conventions that Lesotho is a state party to.[119] However, there is still much that Lesotho has to engage in terms of implementation of the laws, policies and principles relating to the protection of detainees awaiting trial. There is still rampant and reckless treatment of persons awaiting trial in Lesotho; this can be equated to lack of accountability against the perpetrators of the same.

For instance, people may be called in for questioning, during their detention, they become victims to ill treatment and Lesotho is witness to the normalised conduct of "interrogation fatigue", which in some instances reduce detainees into casualties while in detention. This conduct has not been dealt with sufficiently since in most cases, perpetrators of the same are seldom held personally liable for their actions while their superiors are rather sued, being the commanding officers or the Attorney General with command responsibility over the perpetrators. As much as the commanding officers have substantial interest, to only sue the authorities provides a shield for actual perpetrators to escape liability for either wrongful acts.

Compared to other states such as Zimbabwe and especially Kenya, this research finds that Lesotho is still lagging behind in terms of efforts to provide full protection to persons awaiting trial. For instance, Kenya is making impressive efforts in terms of giving relevant soft law binding force notably, the Persons Deprived of Liberty Bill of 2014.[120] This has been Kenya's effort to ensure not only that their observation of soft law becomes persuasive but also binding when the Bill is eventually passed into law. Kenya also has made so much progress with more legislation that seek to protect the rights of persons awaiting trial. Zimbabwe has equally ensured that while in detention, health is maintained for instance, by making it an offence for detainees and prisoners not to keep their clothing in clean conditions, this is of course dependant on the provision of adequate facilities for keeping the same in good conditions.

It has also been observed through this research that Lesotho also downplays torture meted on persons awaiting trial. Detainees are also at the receiving end of the brutalities perpetrated by prisons officials or authorities. The Penal Code Act of 2010

[119] See discussions in Chapter 2 above
[120] See discussions in Chapter 4 above

provides amongst others for the treatment against grievous bodily harm.[121] However, the Penal Code reduces the standard for acts that primarily amount to torture.

5.3 Recommendations

Lesotho should seriously consider a more concerted effort towards full investigation of perpetrators of the awful conduct against persons awaiting trial. Commanding officers should ensure that investigations are conducted to ensure that their subordinates who actually commit the offences against detainees are brought to book. Investigations amongst others could be made through references to duty registers of authorities, identification parades and other means to ensure that victims get redress against those depriving them of their rights. Personal liability of the real culprits must be considered, only then can we progress in terms of combating acts of cruelty and inhumane treatment against detainees. Subjecting only the commanding officers or the Attorney General to account for offences committed by their subordinates seems a slow and ineffective process of accountability. This is to say it should be considered to amend section 76(1) of the Police Service Act to also include personal liability of police officials.

There is a need for technological advancements in our police service to ensure that the truthfulness of the version of detainees' stories during interrogation is ascertained not through violent means. It is recommended that such could be the use of lie detector devices as it could be a lesser evil in extracting the truth from detainees. We have lived an era where painful and unlawful measures have been explored to extract the same against detainees, such must cease.

Efforts must also be taken to ensure profound human rights lectures and seminars amongst the correctional and police services. The lectures and seminars could be undertaken by human rights scholars, lawyers, judges and civil society organisations among others to ensure that stakeholders during the detention processes are well vested with the rights and obligations they owe to each other.

Moreover, Lesotho may strengthen its legislation designed to primarily deal with the conduct of prison or detention officials with reference to the likes of the Nelson Mandela Guidelines and the Robben Island Guidelines and other principles that may inform the promulgation of related legislation. Specifically, like Kenya, Lesotho may

[121] Penal Code Section 30

embark on drafting a Persons Deprived of Liberty Bill. This will not only seek to protect, but will go over and beyond to emphasising the importance of the right to liberty especially for detainees awaiting trial.

Lesotho should also fully sign and ratify the UNCAT and ensure its domestication. This means that the modification and amendment of the Penal Code Act of 2010 provisions maybe considered ensuring that the standard of acts that should necessarily amount to torture is not lowered. This will also stand to show a genuine adherence to the instruments such as the ACHPR, which explicitly prohibits inhumane treatment perpetrated on detainees awaiting trial in detention cells.

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