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## **5.6 Concluding recommendations**

It has been shown that there may be many models of the right to be presumed innocent. However, there are only a few that truly protect the rights of the individual, including the right to be presumed innocent. The concern to remain in power by governments, which is often referred to as a security concern, motivates states to infringe human rights. In the apartheid era, invasive legislative measures had been justified by a fight against terrorism. At present, justification for these legislative measures is based on a fight against crime.

The Nigerian and Botswana models of the right to be presumed innocent are more favourable to the protection of the presumption of innocence and other rights than the Namibian and South African models. Both models illustrate that a constitutional guarantee of the right to be presumed innocent is only the beginning, and that it may not have any lasting significance, unless it is accompanied by a serious commitment to uphold the right to a fair trial. The Nigerian model has illustrated that a fair trial begins at the time of arrest. It uses the time of arrest as a measure of its fair trial provisions. The first appearance in court contributes to giving respect to the presumption of innocence. The Nigerian model is structured in such a way that the first appearance of a person in court has

the same deadline as the giving of the information about the arrest. And it is worked out from the time of arrest. It is the shortest deadline of all the models which were evaluated, namely, a 24-hour period after arrest. Other models have a 48-hour period.

Detention without bail cannot contribute to the right to be presumed innocent. The refusal of bail makes an assumption that the justice system is perfect, and persons who are held in custody on allegations of committing offences will be charged within a reasonable time.<sup>142</sup> The Nigerian and Botswana models recognise that the state might not be able to prosecute within a reasonable time. Nigeria allows only two months to prosecute people who are in custody and three for those who are out on bail. In Botswana, the case may not be remanded for more than a month where a person is on bail, and not more than 15 days where the person is in custody. The significance of this is that an individual is not unjustly inconvenienced by delays with investigations. These delays have the effect that people who are presumed innocent are kept in custody.

Most models have provisions that allow for interventions in court proceedings. It has been shown that where the presumption of innocent is upheld, these are kept at a minimum.

The Namibian, Botswana and Nigerian models are excellent models from which to learn. They show that the new South African dispensation is on the right track. The concerns about the violations of the right to be presumed innocent showed

that the policymakers overstepped the borders between protection of human rights and the fight against crime.

There are positive and negative lessons to be learnt from all the models. The negative lessons come from the South African model. It failed to make a clear break from its apartheid past. The democratic dispensation finds legislative means to interfere in court proceedings in the same way that the past legislature interfered with the judiciary. It is conceded that the legislature has to make laws to regulate all sectors of society. However, it should not overstep its powers. The bail laws are an indication of where the policy-makers have done so. The result is that there seems to be a disrespect for the separation of powers, a distrust of the judiciary and a lack of respect for the Bill of Rights, in particular the right to be presumed innocent. The South African model may be used as a positive lesson for Namibia. The policy-makers in Namibia will have to steer the bail laws in a manner which would uphold the right to be presumed innocent.

The Botswana and Nigerian models have contributed to a more equitable and fair treatment of the right to be presumed innocent. This has been achieved by discouraging a culture of custodial remand.

The model of presumption of innocence in South Africa is inconsistent. At one point legislation which infringed on the presumption of innocence was outlawed. And at the other such legislation was upheld as consistent with the

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<sup>142</sup> Amoo (2008: 1).



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