



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
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COVID-19 restrictions & the impact on criminal justice & human rights

Kenya

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Introduction

- The spread of COVID-19 and governments response to the virus had significant consequences for citizens, various institutions of the state - and in particular criminal justice systems (CJS) around the world.
- The restrictions placed CJS on hold for periods of time and affected the rights of victims and due process rights of arrested and detained persons.
- It was therefore important to understand how COVID-19 measures restrictions impacted the CJS and human rights/oversight institutions and what can be done to strengthen the situation in the future.

Overview of presentation

- Presentation briefly highlights three areas of the report on Kenya:
 1. The impact of COVID-19 measures on the CJS (courts and detention facilities)
 2. The impact of COVID-19 measures on detention monitoring and oversight.
 3. Good initiatives undertaken in the CJS during COVID-19.

The impact of COVID-19 on the CJS: Courts

- COVID-19 measures created a number of challenges in the criminal justice system directly impacting on the rights of arrested and detained persons.
- **Suspension of court operations**
- When the pandemic hit the country, courts immediately ceased operations for almost 3 weeks and as a result, the justice sector was brought to a halt.
- The normal functioning of the courts in the country were disrupted as a result of restrictions on gatherings.
- Criminal trials could not be heard and normal court operations and execution of services could not take place.

The impact of COVID-19 on the CJS: Courts

- This created a number of challenges. i.e. case backlogs; people seeking redress, were temporarily denied of it; accused persons' right to a speedy and fair trial was undermined; overcrowding in detention.
- In April 2020 the National Council on the Administration of Justice (NCAJ) issued Practice Directions outlining measures aimed at adjusting the operations of the judiciary to minimize infections.
- The measures were also put in place to address the case backlog in courts and ease congestion at detention facilities.
- Amongst others, the measures included the **prioritisation of urgent criminal and civil matters** and the hosting of **virtual hearings**.

The impact of COVID-19 on the CJS: Courts

- **Measures prioritising “urgent matters”**
- The NCAJ Directions provided that the Office of the DPP remains open and that one officer is put in charge of every regional office to process files for plea-taking and other urgent matters.
- The urgent matters heard in the High Court were, amongst others, bail applications, revisions from the lower courts and murder cases.
- Magistrates' courts were also prioritising ‘urgent cases,’ but what was considered to be urgent depended on the circumstances of each case and this was at the judicial officers' discretion.

The impact of COVID-19 on the CJS: Courts

- The directives lacked guidelines on how they ought to be implemented, leading to judicial officers using their discretion on what they considered to be appropriate in the circumstances.
- This was a challenge (especially for awaiting trial detainees), as cases that were not considered as 'urgent' or where they did not want to enter a plea, were postponed and they were therefore held in detention for a longer period than expected. (*similar challenge in SA, Malawi, Zambia*)
- This impacted right to a speedy and fair trial; overcrowding in detention facilities.

The impact of COVID-19 on the CJS: Courts

- **Virtual hearings**
- Virtual hearings had advantages and disadvantages.
- Judicial officers were able to adjudicate and process more cases, but this created a backlog with drafting judgments, particularly in civil matters.
- At the beginning of the pandemic not all prisons were equipped with technology such as laptops and electronic screens needed to enable virtual proceedings. This was especially a problem at smaller prisons which are often neglected and lack resources.

The impact of COVID-19 on the CJS: Police

- **Police cells became de facto remand facilities**
- Later in the pandemic, prisons refused to admit remandees who had not been tested for COVID-19 and these individuals were consequently remanded to police stations waiting to be tested on top of the 14-day incubation.
- This resulted in some people remaining in police holding cells for up to three months; adding to congestion at police station cells and thereby increasing the risk of infection.
- The Karen police station in Nairobi was singled out in this regard.

The impact of COVID-19 on the CJS: Prisons

- **Measures suspending visits to detention facilities**
- In March 2020 the government announced a temporary 30-day ban on visits to all prisons to curb the spread of the virus.
- This had a negative impact on prisoners who rely on food, medication and other supplies brought by family, visitors and organisations. This also had an impact on emotional wellbeing of detainees and impacted their right to consult with their legal practitioner.
- The Prison Service made an effort to secure extra phones to enable detainees to communicate with their families and lawyers in the absence of in-person visits.

The impact of COVID-19 on the CJS: Prisons

- The Human Rights Commission found that while some prisons allowed lawyers to consult with detainees, others did not. This resulted in some lawyers not being able to consult with their clients and preparing for their cases, resulting in their court cases being deferred.
- The restriction on prison visits lasted four months and was lifted in July 2020.
- Some participants noted that it appeared as if detainees' wellbeing and protection against the virus was being neglected, as the focus was primarily on supplying personal protective equipment to members of the public.

The operation of oversight institutions during COVID-19

- The two main human rights oversight bodies - Kenya National Commission on Human Rights (KNCHR) and the Independent Police Oversight Authority (IPOA).
- The police Internal Affairs Unit (IAU) which is not a constitutional body, but an internal administrative oversight unit of the police also plays an important oversight role. The IAU works closely with IPOA in investigating police officers for misconduct and crime, and referring such cases for prosecution.
- **Were they operational during COVID-19, were they permitted to function during the pandemic?**

The operation of oversight institutions during COVID-19

- **IPOA**

- IPOA independently verifies that the internal police system deals with complaints against officers fairly and effectively.
- The first set of restrictions were promulgated in March 2020, the police were classified as essential workers but IPOA, lawyers and paralegals were not recognised as such.
- In April 2020, the Kenyan High Court ordered the Interior Cabinet Secretary to include IPOA officials and lawyers among essential services after a petition was filed by the Law Society of Kenya.

The operation of oversight institutions during COVID-19

- IPOA experienced a scaling down of operations, however staff continued to work at the Head Office and regional offices.
- The public was encouraged to contact IPOA through a toll-free number and digital means rather than physically going to the offices, although social distancing measures were in place.
- **KNCHR**
- The KNCHR announced a down-scaling of its operations. While the Complaints and Investigation Division and the Commission's toll-free lines and SMS platforms (which deals with concerns raised by members of the public) continued to function on a full-time basis, other divisions adopted a work-from-home approach.

The operation of oversight institutions during COVID-19

- The KNCHR was very active during the pandemic.
- Three main activities of the Commission at the start of the pandemic.
- Primarily, the Commission undertook monitoring visits to 75 of the country's 130 prisons to observe how these facilities were managing the spread of COVID-19. In addition to the visits, a socio-economic survey was undertaken in prisons across the country to gauge the impact of the pandemic.

The operation of oversight institutions during COVID-19

- Secondly, the Commission held engagements and wrote a number of memoranda to various state departments including the Ministry of Education, Ministry of Labour, Consumer Protection Agency, the Inspectorate General of Prisons as well as the Judiciary. A number of issues were addressed, including the management of COVID-19 cases, the brutal enforcement of COVID-19 regulations by police as well as concerns regarding price gauging.
- Thirdly, the Commission produced at least 3 reports highlighting issues such as the country's overall COVID-19 preparedness, the inadequate supply of sanitisation products, the state of places of detention and human rights violations during the COVID-19 pandemic.

Good practice initiatives in CJS for the future

- At the start of the pandemic, there was a concerted effort from criminal justice agencies under the NCAJ to implement various initiatives (in the form of Directions) in the justice sector to decongest prisons and police cells.
- In April 2020 low-risk prisoners' sentences were reduced, resulting in some 4800 releases. The Directions noted that the files of petty offenders who were in prison for less than six months and others who had less than six months to complete of their sentence were presented to the High Court for sentence review and this led to the release of detainees.

Good practice initiatives in CJS for the future

- Directions allowed for either cash bail or free bond for persons unable to pay cash bail and who had remained in cells for a long time.
- Directions noted that petty offenders should never be held at police stations for more than 24 hours and they should be released on either cash bail or free police bond.
- Fundamentally, the Directions emphasised that officers in charge of police stations were under strict instructions to implement these directions.
- Introduction of virtual courts during the pandemic resulted in lawyers and clients not needing to travel and ensured that courts continued to operate.

Good practice initiatives in CJS for the future

- Special courts were also created in Kasarani and other counties to prosecute cases of COVID-19 violations and this allowed for swift and efficient justice.
- Virtual justice centres and gender-based violence desks were set up during the pandemic and this allowed people to contact a toll-free call centre to lodge complaints.
- The system of electronic filing of cases (e-filing system) introduced during the pandemic is a good practice as it prevented people from physically filing or registering cases.

Good practice initiatives in CJS for the future

- The Judiciary also engaged the police service to advise them, where possible, to handle minor family disputes through alternative dispute resolution methods instead of arresting people. This has seen the rise of the Alternative Justice System Jurisprudence in Kenya, which has now been mainstreamed and is a recognised dispute resolution mechanism.
- There has also been increased efforts by the government to digitalise the criminal justice system since the onset of COVID-19.

Concluding remarks and recommendations

- COVID-19 lock-downs presented a unique opportunity to investigate and analyze criminal justice systems and their performance under unusual circumstances. Through hosting these consultations, we identified some problems, some good initiatives and lessons can be learnt from them to strengthen institutions and in particular the CJS.
- NCAJ did a remarkable job in issuing guidelines. Drawing from some of the challenges during COVID-19, there is a need to improve pandemic response time in the CJS. A delay in accessing justice, even under uncertainty, can have serious ramifications for people.
- Consider implementing crisis management multi sectoral and inter-sectoral task teams in the CJS, to ensure pandemic preparedness and to deal with response times.

Concluding remarks and recommendations

- It is important that COVID-19 measures implemented during crisis situations be clear, and protect due process and fair trial rights of accused and protect the right of victims to recourse.
- Overcrowding in detention facilities should be addressed beyond the pandemic. The release of offenders for petty offences, the review of sentences of petty offenders, enhancing access to free bail and bond to address overcrowding should not only be prioritised during crisis periods. There should be a concerted effort amongst criminal justice actors to implement alternatives.
- Moratoriums placed on prison visits must be as a last resort, for the shortest period of time and detainees should also be provided with basic needs such as food and medicine.

Concluding remarks and recommendations

- Digitisation of the CJS can be good and bad. Digitisation process can better assist the CJS with pandemic preparedness. It is important to develop guidelines to strengthened the system and to avoid manipulation.
- CSOs in Kenya should be commended for their efforts during the pandemic. Despite the challenges, CSOs played a remarkable role by providing the necessary guidance on the protection and promotion of human rights and urging governments to fulfil their human rights obligations and providing services.

Thank you

