PROMOTING PRE-TRIAL JUSTICE IN AFRICA

Promoting Pre-trial Justice in Africa *Newsletter 8* **28 August 2014**

The Promoting Pre-trial Justice in Africa Newsletter (PPJA) is published
by the Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape
with the support of the Open Society Foundations Rights Initiative Global Criminal Justice Fund

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Editorial

CSPRI-PPJA's work in Lusophone Africa continues, most recently at a workshop to understand the implications of the recently adopted African Commission *Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa* for Angola and Mozambique, building on PPJA's prior work in these countries. Two articles in this edition cover this work. An occasional paper by PPJA consultant Tina Lorizzo, looking at the implications of the Guidelines for Angola and Mozambique, has been published by PPJA, as well as an unofficial translation of the guidelines.

Since inception PPJA has campaigned for the decriminalisation of outdated or trivial offences, many of which were inherited from colonial eras and many more of which are being invented anew in African countries. In this edition we feature a report on how nuisance offences are policed in Kenyan municipal courts, leading to arrests and infringements of rights.

PPJA researchers gave evidence at the *Khayelitsha Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between the South African Police Service (SAPS) and the Community in Khayelitsha*. The final report of this Commission was released in late August 2014. In this edition we consider key findings and recommendations of the Commission relating to pre-trial detention.

Jean Redpath
PPJA Researcher

The right to legal representation in Angola and Mozambique

both
Both Angola and Mozambique, countries which have emerged from colonial administration followed by civil war, have enacted in their national Constitutions provisions which provide for the right of access to legal representation, in line with international law. Mozambique appears however to have made greater progress in realising that right than the wealthier Angola.

Many states aspire to ensure that persons facing criminal proceedings have access to legal representation, even those persons who cannot afford to pay, and Angola and Mozambique are no different. Article 62(2) of the Mozambique Constitution of 2004 provides that accused persons have the right to choose their defence counsel to assist them in all stages of proceedings, and that adequate legal assistance and aid must be given to accused persons who for economic reasons are unable to engage their own lawyer.

Article 29(2) of the Angolan Constitution of 2010 states that “Everyone has the right, under the law, to legal information

and consultation, to legal aid and to be accompanied by a lawyer before any authority " while Article 67 provides that no one may be detained, arrested or brought to trial if not under the law, being guaranteed to all defendants the right to defence, appeal and legal representation, and that defendants or prisoners who may not have lawyers, for economic reasons should be ensured, under the law, adequate legal assistance.

Ensuring these rights are achieved is affected by the availability of lawyers and the availability of state funds to pay lawyers to represent those who cannot afford their own legal representation. There are approximately 1000 lawyers in Mozambique, according to Bar Association data, and 700 in Angola, according to the UNODC. According to the International Centre for Prison Studies, the Angola prison population, which is under the responsibility of the Ministry of Interior, was estimated to be 21 634 (June 2013) with 10 319 in pre-trial detention (November 2011). Mozambique has a prison population of 15 663 with 5106 pre-trial detainees (September 2013).

Although the number of lawyers is similar in both countries, there are substantial differences in the laws providing for legal assistance to indigent persons, and in what actually happens in relation to pre-trial detention.

In Mozambique the state institution assisting indigent persons is the Institute of Legal Aid (*Instituto Patrocínio Assistência Jurídica*, IPAJ), created by Law 6/94 to provide judicial and legal assistance. In 2011, there were 38 lawyers and 85 paralegals working for IPAJ. IPAJ assists vast numbers of people annually and in 2010 it was operating in 114 municipalities and assisted indigent persons in 53184 cases (both civil and criminal matters). This equates to eight matters per week per paralegal or lawyer.

Although IPAJ faces significant challenges (such as the insufficient number of lawyers and other human resources; inadequate salaries and lack of sufficient partnerships with other institutions), IPAJ covers almost all municipalities in the country and the institute is increasing the number of paralegals with whom it works through the partnership with university-based legal aid clinics and a new legal framework will soon be in place to further more strengthen its role, as provincial and district delegations of IPAJ have been approved. Legal assistance is guaranteed to all people that provide an affidavit of poverty (*Atestado de Pobreza)* which is issued by municipality authorities and certify the poverty of the person. The Certificate of Poverty is released by the Chief of the Block or the District in which the person lives. It costs between US$1.5 and $3 (50 and 100 Meticais).

By contrast in Angola, although the Angolan Constitution is clear regarding the right to legal representation and this right is supported by Decree-Law 15/95 which created the Law of Judicial Assistance, there is no real access to legal aid in Angola. Angola has not created an institution responsible for rendering legal aid to any person, including indigent persons, nor has it provided financial resources to private lawyers willing to represent indigent persons. Private lawyers may assist citizens who cannot afford to pay lawyers on a pro bono basis.

In the event that such pro bono lawyers are not available indigent persons have to turn to non-governmental organisations for legal assistance. *Maõs Livres* is such an organisation and employs lawyers and journalists. Its main activity is to assist people who cannot afford legal representation. In 2012, *Maõs Livres* employed two senior lawyers, 18 trainee lawyers, two journalists and 25 paralegals. Since 2000 it has assisted between 10 000 and 15 000 people per year and operates in nine provinces, being Luanda, Huambo, Kwanza Sul, Benguela, Muchico, Huila, Cunene, Cabinda and Lunda Sul.

However the current situation is not sustainable, and nor does it give effect to the constitutional right to legal representation and the right to a fair trial.

Tina Lorizzo with Jean Redpath
This article draws on a PPJA Occasional Paper by Tina Lorizzo, entitled The African Commission's Guidelines on Pre-trial Detention – Implications for Angola and Mozambique .

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Municipal (in)justice: by-law enforcement in Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and Transparency International Kenya have investigated city and municipal courts in Nairobi, Mombasa and Eldoret. They found a range of problems with the operation of these courts, including the nature of the offences prosecuted and procedural issues such as group pleadings.

The research report entitled *Justice at City Hall* found that most by-law offences heard in these courts are nuisance related. While in other countries nuisance offences may result in spot-fines issued by police, in Kenya they result in arrest. Many offences relate to income-generating activities e.g. touting, operating without a licence, hawking or offences related to operating a boda-boda. Answering a telephone while crossing the street is an offence. Police cruise the streets making arrests on such offences.

Most arrests are of young men with low levels of education. Complaints against police recorded in the research in relation to such arrests include assault; mistreatment; insults; excessive force used during arrest (justified on the grounds of resisting arrest); persons not being informed of their rights during arrest; police officers not showing identification, some of whom may be in plain clothes; and extortion in some cases.

The presiding magistrates in these courts are members of the national judiciary seconded to hear criminal trials relating to the violation of by-laws.The research found that that most offenders are arraigned within the 24-hour constitutional threshold. However a large proportion of people plead guilty, in order to pay a fine and leave immediately. Pleading guilty enables people to return to their businesses and recoup some of their losses. By contrast, pleading not guilty is expensive in terms of time and money.

Persons facing similar charges are sometimes required to plead as a group (mass pleading). In such circumstances, most people plead guilty. Few cases proceed to trial because accused persons are likely to plead guilty for reasons described above. The court does not sit to hear city or municipal cases at a regular time – the magistrate has discretion when to hear these cases. Accused persons are not advised about their right of appeal and are seldom represented.

The report also found that sentencing is inconsistent – different fines may be imposed for the same offence, and some people may even be imprisoned. Sentences are often disproportionate to offences. Courts are seen to be fine collection centres. The risk of having to pay a large fine acts as an incentive to bribe an arresting officer, because the cost of a bribe is generally lower than the cost of a fine.

A related ICJ Kenya report, *The Implementation of Enforcement of County Bylaws Report* will be launched at The Panafric Hotel, Nairobi, on 5 September 2014.

Jean Redpath
This article draws from a presentation made by Victor Kapiyo of ICJ Kenya in Johannesburg in June 2014, as well as the original report available here.

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Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa: Implications for Lusophone Africa

On 8 May 2014, in Luanda, Angola, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Guidelines). The Guidelines represent an important milestone in addressing three of the most vulnerable phases of the criminal justice process faced in African countries: arrest, police custody and pretrial detention.

The Guidelines add to the body of regional soft law (e.g. the Robben Island Guidelines) and guide states on the rights of arrested and detained persons. In this regard African states face significant challenges in its implementation.

Shortly after the adoption of the Guidelines, PPJA co-hosted on 21-22 May 2014 a workshop in partnership with the Mozambican Institute of Legal Aid (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ), in Maputo, taking the opportunity to begin a debate on the implementation of the Guidelines in Mozambique and Angola. Among the Mozambicans present were judges, prosecutors, as well as representatives of the Academy of Police Sciences (*Academia Ciências Policiais*, ACIPOL); members of the Human Rights League (*Liga dos Direitos Humanos*, LDH), the Center of Applied Psychology (*Centro de Psicologia e Exames Aplicados*, CEPEAP) and of the Service of Legal Medicine (*Serviço de Medicina Legal*). The Italian NGO Mlal (who works in Mozambique) and a number of members of IPAJ also attended the workshop. Among the Angolans, there were members of the organization Maõs Livres, the Association Justice, Peace and Democracy, as well as a representative from the Open Society Initiative for Southern Africa (OSISA).

Lusophone African countries are often excluded from the Anglophone- and Francophone- dominated human rights discourse and the workshop was thus an attempt to address this situation. Symptomatic of this exclusion is the fact that a Portuguese version of the draft Guidelines were not available when they were tabled for adoption at the ACHPR session in May 2014 in Luanda. PPJA made an unofficial Portuguese translation available to the 26 workshop participants and the workshop therefore presented an opportunity to review the Guidelines within the context of these two countries.

Emanating from these discussion, PPJA consultant Tina Lorizzo has produced a paper highlighting some of the issues discussed during the workshop and notes some of the similarities and differences between Angola and Mozambique with regard to arrest, police custody and pre-trial detention. The first part of her paper looks at arrest and police custody, considering available data, the rights of an arrested person, safeguards and access to justice regarding arrest and police custody. The second part of the her paper focuses on pre-trial detention, illustrating the similarities between the Angolan and Mozambican law and the difference that a recent legal development has brought to Mozambique on the issue. The paper reviews the conditions of detention in police custody and pre-trial detention and procedures to be followed when there are grounds to believe that serious human rights violations had occurred during detention. Finally, the report recommends that a comprehensive national policy should be drafted in respect of these international standards and national characteristics, in both countries.

Tina Lorizzo
This article is based on an Occasional Paper by Tina Lorizzo.

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South African Commission of Inquiry calls for improved oversight

The Report of the 'Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between the South African Police Service (SAPS) and the Community in Khayelitsha' was released on 25 August 2014, with findings and recommendations relevant to pre-trial detention.

The report was finalised after two years and a number of court cases attempting to prevent the commission from proceeding, on the basis that the provincial government was acting beyond its powers in instituting the Commission. The Constitutional Court unanimously found in favour of the Commission proceeding , with Moseneke J holding that although a provincial executive does not control the police service, “it has a legitimate interest that its residents are shielded from crime and that they enjoy the protection of effective, efficient and visible policing”.

The Commission accordingly carried on with its work, which included two phases of public hearings over 40 days with more than 100 witnesses, as well as location inspections and perusals of documents and statements.

Among the Commission’s findings are that suspects are often detained in breach of the 48-hour rule at the three police stations covering Khayelitsha. Arrests are also made without reasonable suspicion that the person arrested has committed a crime, and persons are detained and then released without charge. Further, the SAPS has no strategy in place to deal with vigilante or vengeance attacks which are common to the area, nor does it have a visible policing strategy applicable to informal settlements. These were findings which contributed to the overall finding of a breakdown of relations between the SAPS and the community.

The Commission made 20 key recommendations, in line with the approach it adopted to its constitutional mandate, which was to serve as 'a mechanism of accountability and oversight' and so to provide those responsible for the SAPS with information on key aspects of the functioning of the SAPS in Khayelitsha so that those responsible can take the necessary steps to address the situation.

The Commission accordingly recommended that SAPS adopt a procedural model of justice which acknowledges that the manner in which policing occurs is important to building trust with the community, and take steps to ensure that every interaction between a member of the SAPS and the public is respectful of rights. The Commission also called for the establishment of an oversight and monitoring team, comprising police, provincial oversight and an independent expert, to ensure identified inefficiencies are eradicated.

A review of the procedures by which complaints against members of the police are dealt with by both the SAPS and the Independent Policing Investigative Directorate (IPID), particularly so that complaints are not investigated by fellow police officers from the same police station but rather by officers at cluster level, was particularly recommended. The development of strategies and guidelines around the policing of vigilante attacks, and around informal settlements, was also recommended.

The report concludes that “All inhabitants of South Africa are entitled to a police service that will protect and secure them. The task may be hard, but the obligation is clear.”

Jean Redpath
This article is based on the summary contained in the Commission Report, which is available here.

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