PROMOTING PRE-TRIAL JUSTICE IN AFRICA

Promoting Pre-trial Justice in Africa *Newsletter 9* **24 April 2015**

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

In this Issue

Editorial

Indicators are useful not only to measure change but to galvanise action. The eight UN Millennium Development Goals have succeeded in ensuring unprecedented efforts toward meeting the needs of the world's poorest. The UN is now working with governments, civil society and other partners to build on the momentum generated by the MDGs and carry on with an ambitious post-2015 development agenda. While it is unlikely that detailed criminal justice indicators will be incorporated in the post-2015 agenda, the first article below makes the point that it is worth considering the role indicators might play toward pre-trial detention reform, including which indicators might be useful in the African context.

CSPRI-PPJA continues its advocacy and capacity-building work in Mozambique. In this edition of the PPJA newsletter, the second article below considers the trends relating to pre-trial justice in Beira and reports on a workshop where recent reforms relevant to pre-trial justice in Mozambique were discussed.

Finally it has long been claimed that pre-trial detention is counter-developmental, especially in the manner in which it is applied in developing contexts. Recent research by CSPRI-PPJA supports the notion that there is a socio-economic impact of pre-trial detention, which is often exacerbated where fair trial rights are infringed. In the third article below it is argued that states must ensure that criminal procedural laws and practises are designed and implemented in such a way as to ensure that the impact on socio-economic rights is minimised, by ensuring that detention of an accused only occurs when absolutely necessary and for the shortest possible duration.

Jean Redpath
PPJA Researcher

Toward indicators for measuring pre-trial detention in Africa

both

For most development issues, indicators are adopted both to measure progress and to galvanise action. For example, the eight Millennium Development Goals (MDGs) – which ranged from halving extreme poverty rates to providing universal primary education by the target date of 2015 – formed a blueprint which was agreed to by all the world's countries and all the world's leading development institutions, and succeeded in galvanising unprecedented efforts toward meeting the needs of the world's poorest.

Criminal justice is a controversial area and it is unlikely that criminal justice indicators will be incorporated in measuring progress towards the goal of "access to justice for all" as part of the emerging post-2015 MDG governance agenda, not least because there is unlikely to consensus on what is desirable change in relation to criminal justice. Yet achieving effective and rights-based law enforcement forms part of development.

Consider what might be achieved if the post-2015 MDG process were to include an indicator target to "halve the proportion of adults in the general population held in pre-trial detention"? While it is unlikely the the UN would adopt such

an indicator soon, this does not mean that countries, regions, or organisations cannot adopt similar indicator targets. The MDG process aside, it is worth considering the role indicators might play toward pre-trial detention reform, including which indicators might be useful in the African context.

To be effective, indicators must be relevant, in that they show us something about the system that we need to know or which is important. They must be easy to understand, even by people who are not experts. They must be reliable in that we can trust the information that the indicator is providing; and they are based on accessible data, so that the information is available or can be gathered while there is still time to act on the findings.

Aspects particular to the African context affect the way indicators might be constructed on pre-trial justice for Africa, as indicators used in developed countries may not be appropriate. For example, at the level of data collection, detailed population data regarding prisoners and detainees is seldom available in Africa, and states are often characterised by low levels of state investment in record management in the criminal justice system. Furthermore, states tend to concentrate on managing records for their own purposes rather than on creating data or doing research. The unsuitability of electronic record-keeping in many countries due to electricity supply and information technology challenges, especially maintenance, means most records are in paper form.

The varying quality and completeness of paper records within and among countries also poses challenges. Lack of population data about whole prison or detainee populations means that sample data must often be used. Samples can be drawn from people in prison as at a date (“snapshot” data), from admissions to prisons, or from releases from prisons ("exit sample"). Yet political repression often prevents useful access to official records.

Other practical considerations also apply. For example, measuring pre-trial detention populations only in prisons makes no sense in countries where people are held in the pre-trial phase for extended periods in police cells and not in prisons. This is often the case in Africa.

Indicators which use a per 100 000 rates of incarceration may also not be appropriate in Africa where the indicator is highly influenced by the demographic age-profile of the country. Countries with younger demographics where most people are children are likely to appear to have lower rates of incarceration than countries where most people are adults.

Indicators which try to measure overcrowding should take into account the amount of time people spend locked up in cells, as in some African countries being held inside only occurs in the night hours, significantly ameliorating the overall impact of overcrowding. In other countries people are let out of the cells for only an hour.

Indicators and targets need not only be used at the country level. At the level of the individual pre-trial justice intervention, indicators and targets can also be useful. Measuring the duration of different parts of criminal justice processes – and measuring the impact of interventions designed to reduce these – can ultimately lead to country impacts.The design of such indicators – both at country level and at the level of the organisation – will form part of discussions to be held by PPJA with partner organisations in May 2015. The workshop will seek to help organisations demonstrate their impact and measure progress in their countries more broadly.

Jean Redpath

Top of page

Pre-trial reforms take a step forward in Beira

PPJA in partnership with the Mozambican Institute of Legal Aid (Instituto Patrocínio Assistência Jurídica, IPAJ) held a workshop on 15 April 2015 to discuss international and national developments and challenges relating to pre-trial detention with local officials and stakeholders. This was the first time that PPJA has held a workshop in Beira, the capital of the Central Province of Sofala.

Beira was selected because of some findings of concern in the audit of pre-trial detention in Mozambique, which had found that 10% of those entering and exiting prison over the 5 years (2008-2012) in relation to which data was collected, had spent more than 2 years in detention before being released from pre-trial detention. (Some 5160 detainees entered the prison over those five years).

For those 6% who entered prison at Beira (Provincial Penitentiary Centre of Sofala) over2008-2012 but had not yet been released from pre-trial detention at the time of data collection in late 2012, the time already spent in detention ranged from 584 days (1 year and 7 months) to 1543 days (4 years and 3 months), median 1103 days (just over 3 years). These findings suggest that a significant minority spend very long periods in pre-trial detention in Beira. It is likely that without concerted effort toward reform, these trends would continue to pertain.

In attendance at the workshop were the Provincial Director of the Attorney General’s Office; judges from the district and provincial courts; the Director of the Provincial Penitentiary Centre of Sofala; members of IPAJ and non-governmental organisations attended the workshop. The absence of the members of the police was noted as of concern. The workshop

discussed the adoption of the *Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa*, (the Pre-trial Guidelines) on 8 May 2014 in Luanda and the proclamation of the Judgment 4/CC/2013 of the Mozambican Constitutional Council (Conselho Constitucional), as well as the results of the audit of pre-trial detention in Mozambique, in particular the results relating to Beira.

The keynote address was given by Miss Berta Nhambire, Justice Director of Sofala Province. PPJA researcher Tina Lorizzo gave a presentation discussing the recent regional and national legal reforms.

Additional presentations were given by the Beira Prosecutor, Mr. Miguel Bachir; the judge of the 6° Section of the Provincial Court, Mr. Alberto Assane; the Sofala Director of IPAJ; and by Mr. Tuarique Abdala and the Director of the Provincial Penitentiary Centre of Sofala, Mr. Fernando Meliço.

The workshop particularly welcomed Judgment 4/CC/2013, in which the court held that administrative authorities and prosecutors cannot order a person to be held in pre-trial detention; only courts may do so. Further, pre-trial detention cannot simply be applied because the accused is facing a charge on an offence punishable by a sentence of imprisonment, but that it is necessary to assess whether the prosecution has a concrete evidential foundation and whether there is a risk the accused will flee, interfere with the investigation or commit further crimes. Incommunicado detention, provided for in the Mozambican Criminal Procedure Code, was also found unconstitutional. Finally, as the Constitution prohibits penalties and security measures of indefinite or unlimited duration, the Criminal Procedure Code provision which permitted detainees to be held in custody for indeterminate periods, was revoked. As a result, the 7-month pre-trial detention rule should now be the maximum in all cases.

The workshop noted that inadequate dissemination of these legal developments lead to inadequate technical preparation of the various stakeholders that deal with people on pre-trial detention. It was also noted that the lack of co-operation between institutions working within the criminal justice system worsens the situation.

While these are common challenges, magistrates pointed out that it is difficult to judge 600-700 cases each per year while sharing the same courtroom with one or two other magistrates. The inadequate number of magistrates and infrastructure are major constraints that affect the development of processes, often also the processes of *sumário-crime* that *per lei* (by law) should be immediately judged.

The prosecutors said that while improvements have been achieved within the Attorney General's Office recently, through the opening of a 24 hour telephonic line (*Linha Aberta da Procuradoria)* and the monitoring of people arrested and brought to the police stations, a lot could still to be done.

The dual subordination of the Criminal Investigative Police (Policia de Investigação Criminal, PIC), which reports partly to the Police of the Mozambican Republic and partly to the Attorney General's Office, remains a problem.

While the performance of IPAJ has improved, the main remaining criticism is the absence of the IPAJ paralegals in following cases from the beginning to their end as well as the bribes that members of IPAJ have allegedly been asking of their clients, as their service is supposed to be free (in the socio-economic study discussed below, 3% of detainees said they were asked for a bribe from IPAJ).

The Director of the Provincial Penitentiary Centre said that the prison, which has a capacity of 600, is overpopulated with 1400 prisoners, of which 500 (36%) are pre-trial detainees. While the children are separated from adults, the separation of the sentenced persons from pre-trial detainees is yet to happen.

Participants expressed their gratitude at the workshop being held in Beira, which does not often experience this kind of intervention.

Tina Lorizzo with Jean Redpath

Top of page

Evidence for the socio-economic impact of pre-trial detention and implications for rights and states

It is frequently theorised that it is predominantly the poor and marginalised who are imprisoned awaiting trial, and that imprisonment awaiting trial has significant negative consequences for the families and households of those imprisoned. A research report managed and written by PPJA researchers Lukas Muntingh and Jean Redpath sought to provide evidence for and quantify the socio-economic impact of pre-trial detention on detainees and affected households in Kenya, Mozambique and Zambia.

The research was carried out by partner organisation in the three countries, who interviewed detainees and member of affected households. Preliminary findings of the report, currently being peer-reviewed, suggest that the decision to detain an accused person before trial almost invariably interferes with the resources of individuals, including individuals other than those being detained. The impact is felt by families and households in which the detainee lives or which he or she supports, and where the detainee is female, impact on children was frequently found to be severe. Impact is generally immediate, but may have enduring negative consequences from which a household struggles to recover.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges states to respect, protect and promote socio-economic rights. The primary obligation for states in relation to socio-economic rights is a negative one, that is, to not interfere with the resources of individuals, their freedom to find employment, nor their freedom to take necessary action and to use their resources to satisfy needs.

In each of the three countries, infringements of both fair trial and socio-economic rights were identified. There is evidence to suggest that the failure to adhere to fair trial rights is exacerbating the socio-economic impact of pre-trial detention. Thus lengthy periods of detention running to years in Zambia for a significant minority of detainees infringes the right to a fair trial without unreasonable delay; unaffordable bail in Kenya infringes the right to equality before the law; in Mozambique, not being taken to court to apply for bail infringes the right to challenge one' s detention.

In each situation the fair trial infringement may have led to a detainee remaining in detention longer than they may otherwise have been done, thus increasing the socio-economic impact felt by families and associated households.

While respect for fair trial rights may ameliorate the socio-economic impact of pre-trial detention, there is a need to recognise that even when fair trial rights are respected, there may be an additional need to take into account socio-economic impacts, in the ways in which laws are made and implemented. Whether or not a country is signatory to the ICESCR, states should be aware of the ways in which state policies and practises may be aggravating and entrenching poverty and thus be counter-developmental.

Respect for socio-economic rights by states in this context requires that criminal procedural laws and practises are designed and implemented in such a way as to ensure that the impact of interference with socio-economic rights on all persons is minimised, by ensuring that detention of an accused only occurs when absolutely necessary and for the shortest possible duration.

The report, with detailed findings for each of the three countries, is expected to become available later in 2015.

Lukas Muntingh and Jean Redpath

Top of page

Fair Use Notice

Promoting Pretrial Justice in Africa contains copyrighted material, the use of which has not always been specifically authorised by the copyright owner. The material is being made available for purposes of education and discussion in order to better understand prison and related issues in Africa. We believe this constitutes a "fair use" of any such copyrighted material as provided for in relevant national laws. The material is made accessible without profit for research and educational purposes to subscribers or readers. If you wish to use copyrighted material from this newsletter for purposes of your own that go beyond "fair use", you must obtain permission from the copyright owner. CSPRI cannot guarantee that the information contained in this newsletter is complete and correct nor be liable for any loss incurred as a result of its use. Nor can the CSPRI be held responsible for any subsequent use of the material.

CSPRI and PPJA welcome your suggestions or comments
for future topics for the PPJA newsletter.
ppja@communitylawcentre.org.za

If this email was forwarded to you and you would like to receive these newsletters in the future, please click here to subscribe.