

## FEATURE

# Socio-economic Rights and Pre-Trial Detention during Covid-19

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## Introduction

*Detaining people interferes with their socio-economic rights. Therefore, states must take into account the impact on socio-economic rights when devising criminal laws and procedures. During the Covid-19 pandemic, lockdown restrictions in many African contexts, including South Africa, were enforced using criminal law. The evidence in the Western Cape suggests that during the height of the pandemic, remand and imprisonment centres recorded their highest number of prisoners in recent years, well over the approved capacity. This is inimical not only to rights but also to the professed goal of the restrictions, namely preventing Covid-19 transmissions. Enforcement of lockdown restrictions via remand detention is arguably an unjustifiable limitation of rights.*

In a 2017 paper (Muntingh & Redpath 2017), Lukas Muntingh and I argue that the interests of both the ‘rule of law’ and ‘development’ require that the ‘rule of law’ be delinked from simple conceptions of ‘law and order’ and imbued with a human rights approach. This builds on the views of Amartya Sen (Sen 1999), who argues that human rights enhance the capability of individuals to become agents of their own development, and that freedom is both an end in itself and a means to development. While ‘law and order’ may seem virtuous, and is frequently supported by ‘zero tolerance’ rhetoric from politicians, our 2017 paper presented evidence that the situation is complex, particularly in developing countries. States have a duty to take into account socio-economic rights rather than simply adhering to fair-trial rights when decisions around the circumstances in which people can be arrested and detained are taken.

The 2017 paper provides evidence from three African developing countries – Mozambique, Kenya and Zambia – to support the contention 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 re-

search found that detained persons are very likely to be breadwinners, and it is often their income-earning activity which brings them into conflict with the law. In the African context, a significant proportion of alleged offences are not criminal activities as usually understood, but activities which are deemed to be illegal, including unlicensed hawking, touting, selling liquor outside of the law, or selling charcoal.



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The impact of a detention is felt by families and households associated with the detainee. In these countries, there is often more than one household affected: one in the city and one in the village. The impact is generally immediate, but may have enduring negative consequences from which households struggle to recover, particularly when the detention continues indefinitely.

The severity of the impact of detention is determined by pre-existing socio-economic circumstances and the extent of compliance by the state with fair-trial rights, such as rules regarding appearing in court within 48 hours. The impact depends on the pre-existing precariousness of the position of the detainee and affected households, in particular on their level of poverty. Any failure of the state to adhere to fair-trial rights further exacerbates the socio-economic impact.



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A similar study in the Western Cape found much the same effects for households living under similar conditions as those in the countries above. In all of these countries, the affected households not only suffered from the loss of the income and support of the detained person, sometimes leading to the absence of sufficient food, but also in effect subsidised the prison system through the provision of food and other essentials to the detained person. These essentials had to be provided either because the state does not provide them in prison, or because of the social dynamic within prisons. In addition, households lost income through time invested in visiting. The studies found that job and asset losses to households caused by detention were sometimes permanent, and that detention had health consequences. The care of children was also frequently affected, with some children missing school or having to move home.

Consequently, it can be argued that the duty to respect socio-economic rights – which, as per the International Covenant on Economic, Social and Cultural Rights (ICESCR) include the right to work, to have an adequate standard of living, and to protect one’s family – intersects with fair-trial rights when states make and enforce criminal procedures and laws. The decision to detain a person to enforce a law almost invariably in-

terferes with the resources of individuals, including individuals other than those being detained. The impact of arrest and detention is not limited to an individual, but has adverse socio-economic consequences affecting a network of people.

The 2017 paper therefore argues that the state, inasmuch as it has an obligation to socio-economic development, must enact laws and take other measures to prevent, or at least limit, the adverse socio-economic consequences of the enforcement of laws. Civil and political rights, in particular fair-trial rights, are thus interdependent with socio-economic rights. Ultimately, respect and protection of socio-economic rights by states mean that laws and practices must be designed and implemented in such a way as to ensure that the impact of interference with socio-economic rights on all persons is minimised. This requires ensuring that deprivation of liberty through detention occurs only when absolutely necessary and for the shortest possible duration. This implies, inter alia, using criminal rather than administrative sanctions only when absolutely necessary or, where criminal processes are indicated, to ensure that these are applied sparingly and with a range of alternatives to detention, such as dealing with the matter immediately, or granting bail or otherwise releasing the person ahead of trial.

In relation to Covid-19, in Africa lockdown and other restrictions were implemented using ‘law and order’ approaches rather than the ‘public education’ approach. In their harshest form, over the first five weeks from 26 March, the lockdown restrictions in South Africa permitted only those providing essential services to work, thus ruling out any other form of work that could not be conducted at home. In addition, criminal sanctions applied to the failure to comply. In no time in recent memory has the link between freedom and the ability of individuals to be agents of their own development been more apparent than in countries in which such restrictions on freedom, designed to prevent the spread of Covid-19, were implemented. This had devastating impacts on the ability of poorer persons to feed themselves and their families. In South Africa, the NIDS-CRAM survey found that 47 per cent of adults interviewed reported that their homes had run out of

money to buy food in April (Van der Berg et al. 2020). In Malawi, the courts took the drastic step of ruling against such restrictions on the basis that the state had no capacity or plan to feed or support its people; consequently, the restrictions would inevitably condemn people to hunger and starvation (the Kathumba cases). In South Africa, the situation was less straightforward because the state attempted to ameliorate the economic impact of the limitations of rights through various forms of economic support. However, not only were there problems and delays with the practicalities of distributing the support, but many of the poorest of the poor were not qualified for support or unable to navigate the necessary bureaucracy in order to obtain it; research has found that only 12 per cent of South Africa adults were able to access support (Van der Berg 2020).

Compounding the situation, however, was the fact that many were detained and their rights further restricted, as will be seen below. Here it is necessary to pause to consider the nature of socio-economic rights and their justifiable limitation in more detail. Socio-economic rights are set out in the ICESCR. This convention requires signatory states to take legislative and other measures ‘with a view to achieving progressively the full realisation of the rights recognised in the present Covenant’. The nature of the obligations on states set out by the ICESCR is not that states must ensure that every person has employment, social security, and the like, but rather that states should ‘respect’, ‘protect’ and ‘fulfil’ these socio-economic rights. The duty to ‘respect’ entails an obligation not to interfere with the resources of individuals, their freedom to find a job, or their freedom to take necessary action and to use their resources to satisfy needs.

Clearly, the Covid-19 lockdown restrictions infringed on these rights, in addition to infringing on classic civil

rights such as freedom of movement. States across the world nevertheless sought to justify these limitations on the basis, inter alia, of their ICESCR article 12(2)(c) obligation to prevent, treat and control epidemics and diseases, combined with the application of the relevant limitation principles (most notably the Siracusa Principles), as the right to health alone is not a straightforward justification. In the general comment dating from 2000, the Committee on ESC Rights noted that the right to health contained in article 12 is closely related to and dependent upon the realisation of other human rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. Thus states imposing restrictions would have been obliged to take this dependency into account.

Furthermore, in a general comment on article 12(2)(c) in particular, law-and-order approaches to dealing with epidemics and disease are notably absent from what is envisaged. The committee is at pains to note that ‘issues of public health are sometimes used by states as grounds for limiting the exercise of other fundamental rights. The committee wishes to emphasise that the Covenant’s limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States’. Indeed, the Siracusa Principles, adopted by the UN Economic and Social Council in 1984, specifically state that restrictions on rights should, at a minimum, be

- provided for and carried out in accordance with the law;
- directed toward a legitimate objective of general interest;
- strictly necessary in a democratic society to achieve the objective;

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- the least intrusive and restrictive available to reach the objective;
- based on scientific evidence and neither arbitrary nor discriminatory in application; and
- of limited duration, respectful of human dignity, and subject to review.

In a statement in April 2020, the ESCR Committee affirmed this as the general approach that should be adopted to Covid-19 restrictions on rights. Consequently, whether Covid-19 lockdown restrictions themselves are justifiable or not depends on a range of factors and on the nature of the restrictions.

Here, however, it is argued that the manner of implementation or enforcement of the restrictions must also be considered. The justifiability of restrictions is inter-linked with the nature of enforcement. Arrests on the grounds of restrictions which are not directed toward legitimate objectives, or are not strictly necessary, may be viewed as not justifiable. Furthermore, there is an argument that restrictions which can be implemented only via law-and-order approaches of arrest and detention, with their attendant impact on rights both civil-political and socio-economic, must require far greater justification.

For example, it is one thing for a state to impose restrictions on a business's operations and fine it administratively if it fails to comply. It is another thing to arrest and detain the proprietor for failing to comply with the said restrictions. In South Africa, for example, police arrested a shopkeeper and shut down his small grocery shop in Lakeside, Cape Town, for trading without a permit during the lockdown, despite the fact that grocery shops were considered essential services and he did in fact have a permit, which was not printed but electronic.

In South Africa, the state took an explicitly law-enforcement rather than a public-education approach to the measures adopted. In other words, physical force and the use of the state's coercive power to effect an arrest were employed in enforcing the restrictions. Not only were 11 people killed and many others roughly handled by police in adopting this approach and enforcing the provisions, but some 300,000 people were deprived of

their liberty through lockdown arrests, according to the Minister of Police (ENCA 2020). Again according to the Minister, most of those arrested during lockdown were arrested for breaking the curfew, gathering in groups, or selling or transporting alcohol and cigarettes while these were banned. These, on the face of it, are all activities linked to socio-economic activity.



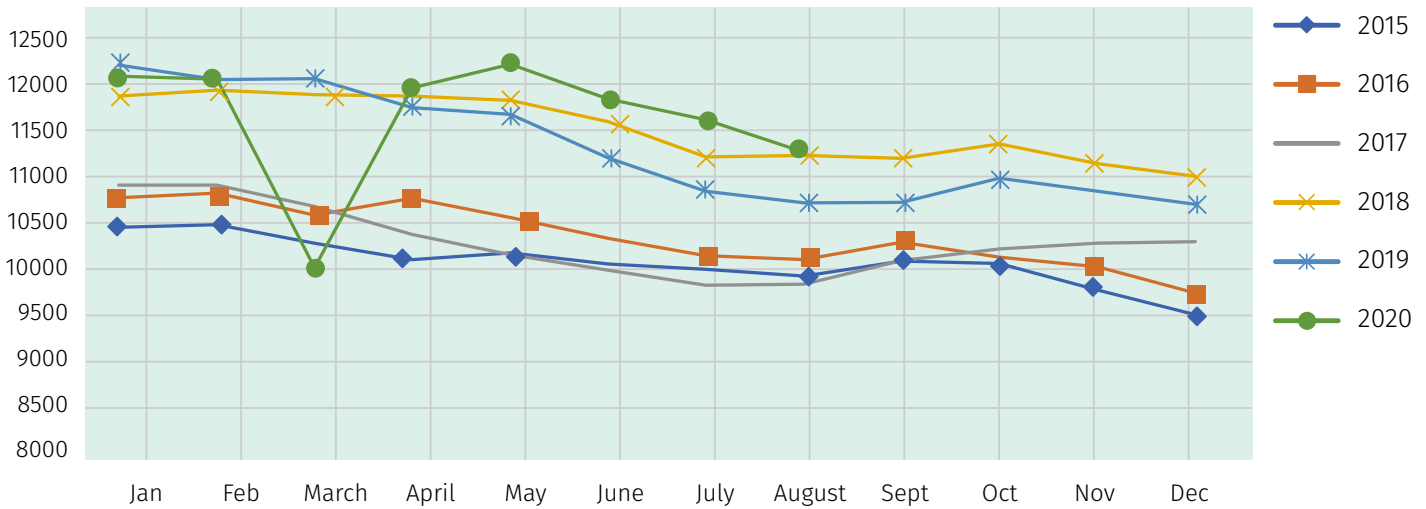
**The emphasis was on releasing sentenced persons via special parole. Ironically, South Africa's most crowded facilities are remand centres, holding those awaiting trial.**

Arrest – necessarily involving deprivation of liberty in the company of other persons, frequently in close confinement – is arguably not (1) directed toward the objective of reducing the spread of the virus; (2) strictly necessary to achieve the objective; or (3) the least restrictive and intrusive measure. Consider the example of two persons detained for months for lockdown infringements. Justice Shabangu and George Mphotse could not obtain government food parcels, so they ventured out to make some money to support themselves through waste-picking in early April 2020. They were arrested and detained, and in June they were still in prison. Consider too the lockdown arrest of Sikhumbuso Mabaso, who was arrested while out grocery shopping; police demanded bail of R1,500, which he was unable to pay, and his son was left alone in their home overnight.

The extent to which this kind of detention (of persons seeking to survive being detained on remand for allegedly infringing lockdown restrictions) may have occurred more generally is not clear but is suggested by the data. At the start of South Africa's lockdown, prisoners were released, as per international recommendations, in a bid to reduce the transmission of the Covid-19 virus within prisons. The emphasis was on re-

leasing sentenced persons via special parole. Ironically, South Africa’s most crowded facilities are remand centres, holding those awaiting trial. The law-and-order approach to curbing the epidemic inevitably had the

potential to result in remand centres becoming more crowded than before, if arrest and detention were to be used. Up-to-date data is available only for the Western Cape.



Source: Correctional Services Western Cape Statistics 21 September 2020

This data shows that remand numbers dropped markedly in March just before the commencement of the restrictions. Subsequently, from the beginning of April, remand figures rose, with the total exceeding the numbers recorded in the past five years in the same months. Given the widely publicised reduction in serious violent crime in April and May during hard lockdown, frequently commented on by the Minister, a decrease in remand admissions would have been anticipated for April and May, as the increase cannot be ascribed to an unusually large number of arrests for serious crime over this time. (There was an unusually low incidence of crime over this time.)

The rise in remand appears to coincide with the period of hard lockdown during April and May, when, inter alia, alcohol and cigarette sales – a legitimate form of economic activity outside of Covid-19 restrictions – were prohibited. Although this is data for one region, justice and corrections are a national government function, and the restrictions applied nationwide, so the same drivers are likely to be evident nationally; the Western Cape holds about 15 per cent of all inmates in South Africa.

New admissions must then have related to arrests for less serious crime, including infringement of lockdown regulations. It was widely assumed that most people would pay fines, or be released pending their court date. But the incident of the waste-pickers referred to above shows this was not always the case. Could these remand numbers include people denied bail, or whose bail applications were postponed? It is also clearly the case that those arrested and remanded for all crimes are being held longer than usual, as the courts operate in a slower fashion. A court official, when asked for comment, said the difficulty lies with hearing bail applications, with the absence of legal practitioners and prosecutors who have tested positive and the closure of courts and prisons due to positive results being part of the problem. The socio-economic impact on persons detained and their families will be exacerbated by these delays.

In addition, there are health consequences of such detention for both the individual and the community. Some 25 prisons in this region hold both remand and sentenced persons, and as at 20 July 2020, after the most limiting restrictions were no longer in place, these facilities were at 154 per cent of approved ac-

commodation. In other words, there was on average of about one extra person for every two beds already occupied. The most crowded facility was at 270 per cent, that is, with more than three extra people for every two beds already occupied. This is contrary to the goal of preventing Covid-19 transmissions, as this famously requires avoidance of crowds and maintenance of social distance.

Furthermore, remand is characterised by persons being held and then released to court and from there into the community. More than 10 per cent of correctional officials have tested positive; the fact that almost double the number of officials in correctional centres have tested positive compared to inmates, despite inmates' outnumbering officials by four to one, would suggest that testing of officials has been more thorough and that many infected remand prisoners are likely to have been released back into their communities.

Even in instances where a detained person is held only in a police van and then in police cells, but avoids prison remand, in the current situation the socio-economic and health risks are high. During hard lockdown, while conducting human rights monitoring, I observed police vans in a township area. I was informed by residents that people not complying with restrictions were loaded into the van and taken to the police station, processed there, and later released, with those released having to walk home. Again, the goal of reducing the spread of transmission does not appear to be served by this approach.

Deprivation of liberty by the state in the attempt to maintain 'law and order' has a clear and measurable socio-economic impact on individuals and their dependents, one which is frequently disproportionate to the alleged offence. During this pandemic, deprivation of liberty and detention on remand in the name of enforcing

lockdown restrictions is not only contrary to the ultimate goal of reducing transmission of the virus, but also constitutes an infringement of political and socio-economic rights. This is difficult to justify.

During a pandemic, one might have expected that the state would adopt measures which would seek to reduce the extent to which remand detention is used. International human rights law clearly places an obligation on states to decriminalise trivial offences. Petty matters should be resolved immediately where possible; alternative methods of securing attendance at trial should be available and used where appropriate and trial is necessary, to ensure that individuals are tried within a reasonable time. Beyond simple compliance with fair-trial rights, it is necessary to reconsider the appropriateness of pre-trial detention in a range of contexts because of its inevitable and severe impact, which causes disproportionate harm to detainees and affected households. Finally, it has public health consequences during an epidemic.

In conclusion, deprivation of liberty by the state has a clear and measurable socio-economic impact on individuals and their dependents which is frequently disproportionate to the offence. In the time of Covid-19, it also has implications for the containment of transmission of the virus. Use of prolonged detention for lockdown infringements and minor offences is counter-developmental and counter to public health goals; its use to enforce lockdown restrictions unjustifiably limits rights even if the restrictions themselves are justifiable.

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