PROMOTING PRE-TRIAL JUSTICE IN AFRICA

Promoting Pre-trial Justice in Africa *Quarterly Newsletter 3* **22 August 2012**

The Promoting Pre-trial Justice in Africa Newsletter (PPJA) is published quarterly
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

Progress on human rights monitoring in Mozambique
Prison oversight reforms augur well.

Outdated offences, the criminalisation of poverty and legal reform in Mozambique
A PPJA seminar in Maputo looks at the paths to reform of the 1886 Penal Code in Mozambique.

Pre-trial justice in Burundi explored
Burundi emerges from conflict with a new police force, new Penal Code and new prison law - but problems remain.

Political killings in Burundi
Hasty justice for Gatumba killings questioned.

'Frais de Bougie'
An abusive practice in Francophone prisons described.

Punished for being poor: Outdated offences in the DRC
19th century colonial law requires reform.

Proposals to improve implementation of custody time limit law in Malawi
Proposals tested in local research

Editorial

The PPJA project aims to understand and promote improvements in the operation of criminal justice systems, in particular pre-trial detention, in the African context. PPJA collects news, research, information, policy and law on pre-trial detention from across Africa, and seeks to participate in research and forums across the continent to promote the realisation of just pre-trial detention systems.

In this third PPJA newsletter we report on matters related to pre-trial detention in Mozambique, Burundi, Rwanda, Malawi and the Democratic Republic of the Congo, covering issues such as oversight and monitoring of places of detention, outdated offences resulting in detention, custody time limits on pre-trial detention, and abusive practices associated with poverty in African prisons.

Mozambique

PPJA held a seminar in Maputo on 4 July on outdated offences, a current PPJA campaign. During the seminar there was some reflection on the progress in human rights monitoring of prisons which has occurred in Mozambique. Civil society plays a key role alongside statutory bodies. Tina Lorizzo discusses this progress. Tina Lorizzo also considers Mozambique's 126-year-old Penal Code and the Parliamentary process for legal reform of outdated offences.

Burundi

PPJA researchers travelled to Bujumbura, Burundi, to explore pre-trial justice in Burundi. Gwénaëlle Dereymaeker takes us through some of the broader issues of pretrial detention in Burundi. Burundi has a new police force and a lack of prisons in some provinces; the problems of pre-trial justice are largely those often experienced in developing countries. She also covers concern over a spate of political killings in Burundi.

Rwanda

The practice of "frais de bougie" in prisons in Rwanda and Burundi is described through the experience of a Rwandan refugee by Morgan Mitchell. Candle costs imposed on prisoners are a tool of abuse in many prisons across Africa.

Democratic Republic of Congo

Dignité Bwiza looks at outdated and unjust offences in the Democratic Republic of Congo. She has considered the issue in some detail in paper available on the the PPJA website.

Malawi

Malawi has legislated custody time limits but struggles to implement them. A study has attempted to identify practical measures to implement custody time limits in the criminal justice system. The proposals of the study were endorsed by criminal justice practitioners at a seminar held from 8-9 August 2012.

PPJA News

endorsed by seminar participants.

Events

2nd African Correctional Services Association Biennial Conference

Kampala, Uganda, 2-5 October, 2012

52nd Session of the African Commission on Human and People's Rights

Fondation Felix Houphouet Boigny, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012,

PPJA will be participating in the 2nd African Correctional Services Association Biennial Conference to be held on Kampala, Uganda, from 2-5 October, as well as the 52nd session of the African Commission on Human and People's Rights to be held in Yamoussoukro, Côte d'Ivoire, from 9-22 October 2012.

Finally PPJA is pleased to announce that Jean Redpath, a researcher with extensive experience in criminal justice, has been appointed as a full-time researcher to the PPJA project. While the entire CSPRI team contributes to the PPJA project, Jean will be working on PPJA full-time. Jean is both a scientist and a lawyer and her specialty is understanding the impact of law and policy as measured in data, particularly on issues of criminal justice in Africa.

You can contact Jean on ppja@communitylawcentre.org.za for news and information to contribute to the PPJA project.

Jean Redpath and the PPJA team

Progress on human rights monitoring of places of detention in Mozambique

In recent years Mozambique has experienced a range of improvements in monitoring the observance of human rights in places of detention. At a PPJA seminar hosted by *Liga dos Direitos Humanos* (LDH) (Human Rights League) in Maputo on 4 July 2012, there was some reflection on human rights monitoring achievements, as well as the challenges which remain. The achievements include the signing of a memorandum of understanding ensuring the monitoring by civil society of human rights conditions in prisons, the appointment of independent statutory human rights commissioners, and the appointment of an Ombud.

Mozambique became independent from Portugal in 1975 after ten years of a war of independence, lead by the Front for the Liberation of Mozambique (Frelimo). Civil war followed between Frelimo and the Mozambique National Resistance (Renamo). After Frelimo abandoned marxism in 1989, a peace agreement was reached in 1992. President Joaquim Chissano of Frelimo stepped down in 2004 after 18 years in office.

Among the improvements in the monitoring of observance of human rights in places of detention since 2004 has been the signing of a memorandum of understanding between government and LDH to have full access to prisons to monitor the human rights situation in prisons. With the prison occupancy level at 253 per cent (June 2012), overcrowding remains one of the biggest challenges in prisons, exacerbating the generally poor conditions of detention. Access to food, clean water and sanitation represent ongoing challenges together with the lack of prisoner rehabilitation projects.

The President of LDH, Mrs Alice Mabote (pictured left), raised concern about the difficulty encountered in establishing a similar memorandum of understanding with the Ministry of the Interior so that LDH can access places of detention in police stations and monitor places of detention.

A further important milestone in Mozambique has been the appointment of a statutory independent Human Rights Commission. The adoption of Law 33/2009 on 22 December 2009, created the *Comissão Nacional dos Direitos Humanos (CNDH)* with a mandate to:

- Promote and protect human rights in Mozambique
- Be the leading agency in conducting human rights awareness campaigns
- Cooperate with competent authorities to promote respect of human rights
- Interact with citizens by collecting their complaints and investigating them.

The CNDH will be an autonomous institution reporting on an annual basis to the President of the Republic and the National Assembly on the situation of human rights in Mozambique. The law entered into force in April 2010 and the Ministry of Justice was mandated to work on establishing the CNDH. All 11 CNDH commissioners have been selected through public consultation. Three members are from the Government, three from Parliament, four form civil society and one member from the bar association. Only three members appear to have a human rights education; one member is from Renamo, and one from the Muslim community.

The challenge the CNDH commissioners will face from the outset is the lack of a clear statute and lack of a clear mandate for the CNDH. The nascent human rights culture in Mozambique may tend to interpret its role in a limited way, as an institution with neither judicial nor legislative powers. The commissioners are expected to take the oath in late July 2012. With the Commissioners in place the new Institution should be able, in theory, to start implementing its mandate from September-October 2012. It remains to be seen how broadly the commissioners interpret their mandate.

Also at the PPJA seminar Dr Luis Bitone, of the Centre for Human Rights at the University Eduardo Mondlane, made a detailed presentation on arbitrary detention in Mozambique in which he noted that while the law was clear on the various institutions and provisions regulating detention, these laws were frequently not followed. Non-compliance by law enforcement officials with legal prescripts pointed to the urgent need for their training and for oversight to be exercised by institutions such as the CNDH to ensure compliance with law.

The appointment by Parliament of an Ombud, Dr. José Abudo, the former Minister of Justice, in May 2012, may also be seen as an important milestone for human rights. The post of Ombud was envisaged in the constitution of 2004, and a law on the office of the Ombud was passed in 2006, but no Ombud was elected because a two-thirds majority was required and the ruling party did not then hold a large enough majority. At the time, Renamo insisted that the law be amended to provide for two assistant ombudsmen – one chosen by Frelimo and one by Renamo. This politicisation of the office was unacceptable to Frelimo, and no ombud was elected. The Renamo vote in the 2009 general elections collapsed, and Frelimo now holds a majority, of over 75 per cent in the Assembly.

The Law on the Office of Ombud states that the Ombud should “make recommendations to the relevant bodies with a view to correcting illegal or unjust acts or omissions of the public powers or to improve their respective services”. The ombudsman may also note defects in the law and suggest amending or revoking legislation. Thus the Ombud may be a potential route toward the repeal of outdated offences in Mozambique, the subject of the seminar (see Outdated offences, the criminalisation of poverty and legal reform in Mozambique below).

Tina Lorizzo

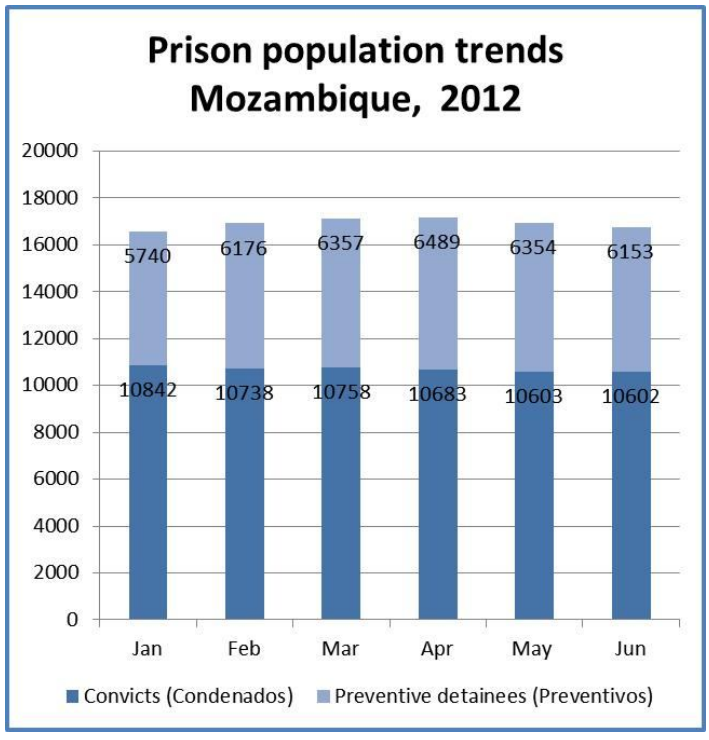
Top of page

Outdated offences, the criminalisation of poverty and legal reform in Mozambique

A PPJA seminar on outdated offences in Mozambique investigated the impact and possibilities for reform of outdated offences contained in the colonial Penal Code. Public hearings to be held in six provinces durng 2012 offer an opportunity for submissions on this issue.

Mozambique has a mixed legal system of Portuguese civil law, Islamic law, and customary law. Article 71 of the Penal Code, which dates from 1886, criminalises certain acts which may be considered to be "outdated", such as being a rogue and vagabond, mendicancy (begging), prostitution and touting. As PPJA has argued elsewhere, many of these offences amount to no more than the penalisation of poverty.

The Mozambican prison population amounted to over 16 000 people in June 2012, of which 38 per cent of inmates were held in preventive (pre-trial) detention; however it is not clear how many were detained in relation to outdated offences.



Tina Lorizzo, of the Civil Society Prison Reform Initiative (CSPRI) of which PPJA is a project, pointed out in her presentation that the poor are disproportionately affected by the enforcement of such offences.

The desirability of the decriminalisation of such offences has been recognised by the African Commission on Human and People’s Rights in 2003 in the Ouagadougou Declaration and the Plan of Action for the Reform of Prisons.

In 2011 the UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepulveda Carmona, underlined in her report presented at the 66th Session of the UN General Assembly, the severe consequences that ‘measures of penalization’ used by governments cause to vulnerable populations worldwide. Carmona pointed out that states are increasingly implementing laws, policies and regulations that punish, segregate and control the freedom of persons living in poverty and the arbitrary use of detention and incarceration is targeting persons living in poverty with

disproportionate frequency.

Ana Rita Sithole, Member of Parliament and of the Committee on Constitutional Affairs, Human Rights and Legality, in her presentation at the PPJA seminar focused on the role of Parliament in the abolition of outdated offences and in the promotion of a human rights culture in Mozambique. The review and amendment of an existing law is the responsibility of Parliament and is conducted in the form of projects that need to be presented to the President of Parliament and to a competent Committee. The project must contain the justification and analysis of its terms of reference, the legal framework in which it is inserted and its possible implications (financial and other). Once the Committee has discussed and approved the project, this is sent to the plenary for a final vote by Parliament.

At present with regard to possible reform of outdated offences, citizens are invited to present proposals regarding the review of Mozambique's 1886 Penal Code (1886). The review process started in 2010 and has been approved by the Committee on Constitutional Affairs, Human Rights and Legality. The public hearings will be held in six provinces and will provide an opportunity to address outdated offences and have certain acts decriminalised.

Tina Lorizzo

Top of page

Pre-trial justice in Burundi explored

CSPRI researchers travelled to Bujumbura in June 2012 to embark on understanding pre-trial detention in Burundi, and to promote the PPJA among stakeholders. Burundi has only recently emerged from conflict, and many of the problems of pre-trial detention stem from this conflict.

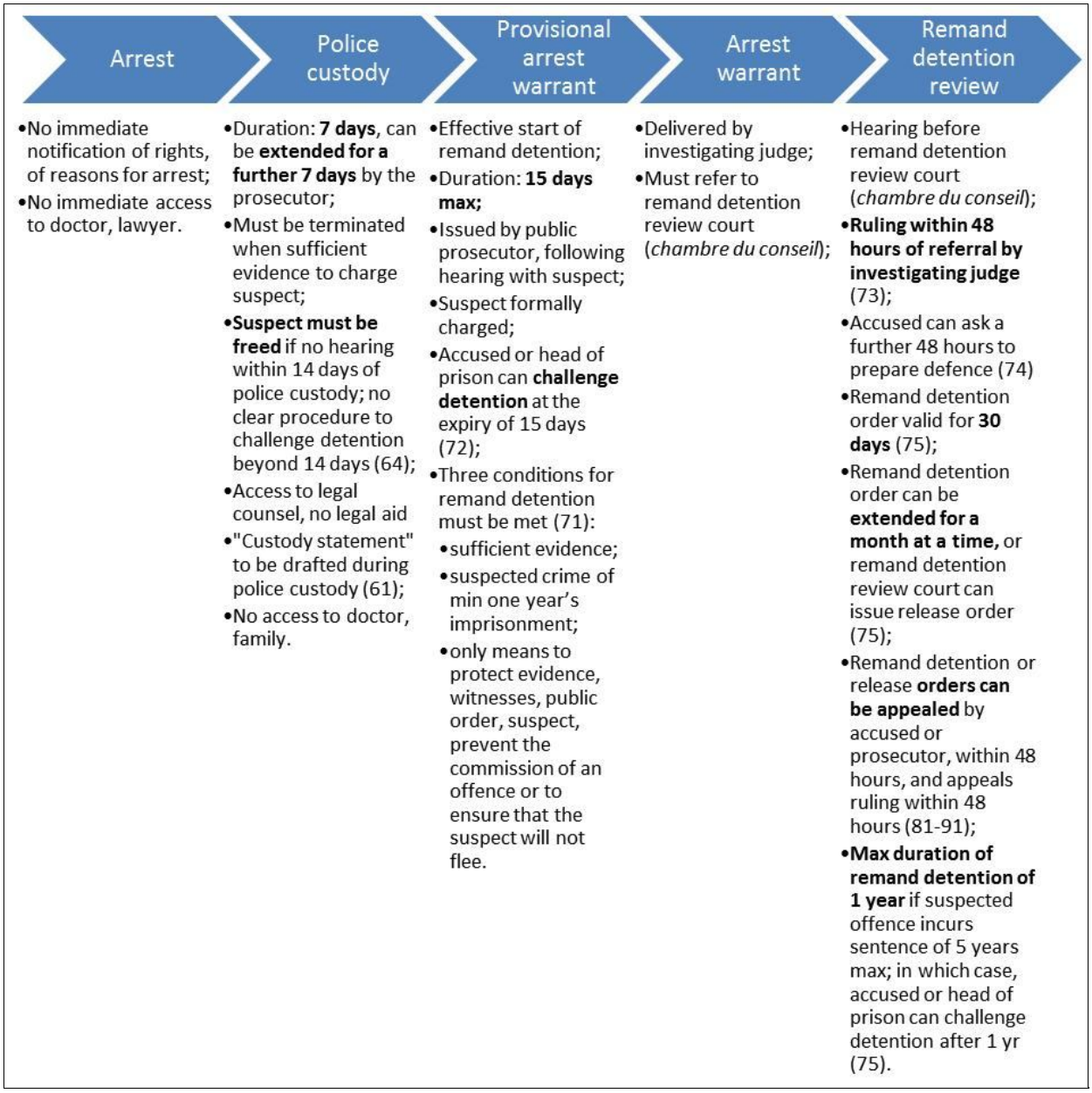
More than 200,000 Burundians died during Hutu-Tutsi conflict after a presidential assassination in 1993, and hundreds of thousands of Burundians were displaced. A power-sharing agreement in 2003 paved the way for a transition process that led to an integrated defence force, established a new constitution in 2005, and an elected government in 2005. The new government under Pierre Nkurunziza signed a ceasefire with the country's last rebel group in September 2006. Nkurunziza was re-elected in 2010 after his party faced no challengers at the ballot box, as the main opposition parties formed a coalition and boycotted the vote, alleging intimidation and electoral fraud.

The problems of pretrial detention in Burundi are related both to the recovery from conflict and associated resource constraints of the criminal justice system. Burundi’s police force is barely seven years old, while seven provinces of Burundi do not have prisons; the entire country has only eleven prisons with a capacity of 3500, although it is thought the number held is in the region of 10 000, which for a country of only 8.5 million people implies an incarceration rate of around 117 per 100 000, excluding people held in police custody.

There is a bottle neck from the early hours of arrest, and prisoners often remain in police custody for long periods of time. Some cases of arbitrary arrests and detention, including for non-existing offences, have been reported. Accused persons formally charged may remain in police custody, because they cannot be brought to prison, sometimes because neither prison or police officials can afford to put petrol in the transportation vans. In such cases, the accused remains in a police cell but is the responsibility of the Ministry of Justice. This is not ideal, as it creates confusion as to who is in charge of the detainee or which legislation applies to the detainee, in particular which rights apply.

Overcrowding occurs in both police detention and in prisons; however it is thought that abuses are more common in police cells than in prison. It is possible that this is because there is a great deal of oversight over prisons. The Commission Nationale Indépendante des Droits de l’Homme (CNIDH), public prosecutors and judges all visit prisons. The latter two (prosecutors and judges) have the power to release detainees on the spot when there is non-compliance with criminal procedure legislation, such as the time limits which apply at various stages (see chart below for key aspects of Burundi criminal procedure).

Figure 1: Burundi Criminal Procedure



The CNIDH also has a specific mandate to conduct prison visits, which are conducted along a UN model. When the CNIDH observes that the Criminal Procedure Code is not being complied with, they refer the matter to the relevant authorities. The UN Office in Burundi (BNUB), which has a mandate to support the Burundi government and institutions, also conducts prison visits.

Although the Criminal Code was revised in 2009, it still contains a range of outdated offences. Burundi has a mixed legal system of Belgian civil law, which resembles the French civil law system, and customary law. However, the revision of the Criminal Code brought the criminalisation of torture and other ill-treatment. The definition of torture contained in the Burundian criminal code matches that of the UN Convention against Torture. Furthermore, the Burundian Parliament adopted a new law on prisons in 2003.

However, there are problems with implementation of the new prison law. This may be because "prisoners run the prisons and the involvement of officials is minimal"', according to one stakeholder. Some civil society organisations have engaged with prosecution authorities in relation to allegations of abuse and torture committed at the hands of some public officials, and these efforts have brought the prosecution authorities to prosecute some of those officials. Judgments are expected to be delivered in the coming months. Overall, one major problem is the lack of training on newly adopted legislation. Parliament is also currently considering a new law on Legal Aid.

Gwénaëlle Dereymaeker

Top of page

Political killings in Burundi

An ongoing spate of political killings in Burundi has lead to the President establishing an investigative commission.

An issue of great concern in Burundi is the on-going spate of political killings. In May 2012 Human Rights Watch (HRW) released an 81-page report, documenting scores of killings by state agents and rebel groups. Although the majority of political killings documented by HRW targeted the opposition, members of the ruling party have also been assassinated in "tit-for-tat" attacks. The most deadly of the killings was a massacre in the town of Gatumba, where 37 died in September 2011.

As many as 21 people accused of being involved in the Gatumba attack were brought to trial in November 2011, which, despite the large number of defendants, concluded so quickly it drew critical statements from both the Bujumbura Bar Association and the European Union, which both cited procedural irregularities and a neglect to call key witnesses.

The President recently created a broadly mandated investigative commission on political killings. Some stakeholders are of the view these killings are symptomatic of high-level conflicts between political factions within the newly-created police. Furthermore, some stakeholders are of the view that there is a limited willingness on the part of the State to investigate these killings, and to effectively engage with the recommendations of the investigative commission, if and when its report published.

Gwénaëlle Dereymaeker

Top of page

'Frais de bougie' - an abusive practice in Francophone prisons

During the PPJA visit to Burundi, the issue of 'candle costs' in places of detention was raised. 'Frais de bougie' is a common practice in Francophone African countries, such as Burundi, Rwanda and the DRC. The practice is closely related to abuse of detainees.

In Burundi, the practice of frais de bougie' appears to involve prisoners collecting money and food to sustain themselves from each other. This collection is often done by force and amounts to a form of extortion.

A trauma counsellor, who counsels Rwandan refugees, has heard testimony of how the practice played out in Rwanda for a Rwandan refugee. According to this, almost all privileges in the prison in which the former prisoner was incarcerated depended on guards receiving 'candle money'. Before being able to raise these funds, the prisoner was regularly beaten by a fellow prisoner. The prisoner was also not permitted to lie down anywhere within the cell and was not allowed on any outside work excursions. The prisoner's food rations were also cut and other prisoners were permitted to take what food was given should they so wish.

Once the funds had been raised by friends on the outside, however, the prisoner was no longer beaten, was allowed to take turns sitting and lying down within the cell, received full rations of food, and was allowed out of the cell. The price given for "candles" was several thousands in Rwandan Franc.

Morgan Mitchell and Gwénaëlle Dereymaeker

Top of page

Punished for being poor: outdated offences in the DRC

Being a vagabond and a beggar in the Democratic Republic of Congo (DRC) is an offence criminalised by a decree issued by the King Sovereign of Belgium in 1896. In a country where poverty prevails at high rates, 59% of the national population lives on less than US$ 1.25 a day and 54% are deprived of basic services such as safe water, food, and education, the number of persons likely to be subject to the offences of vagrancy and begging is not insignificant.

During the colonial era, the laws against poverty were exported to Africa and used for racial and discriminatory purposes. They were aimed at regulating the movements and conduct of the non-white population, giving police the power to punish any behaviour defined as detrimental to law and order by removing any "undesirable" person from the public sphere.

Created in the European bourgeois epoch of the 15th century, offences such as vagrancy, begging, loitering and prostitution were aimed at maintaining law and order and at removing poverty and the effects of economic dislocation, out of public sight. Critics contend these laws tend to target marginalised groups such as migrant labourers, the poor, the homeless, beggars, and street children. People are consequently punished for who they are, rather than for any specific acts.

Offences such as vagrancy and loitering remain on the statute books of many African countries, despite the obvious contradistinction with realities of the contemporary world and universal human rights. Often, these laws are enforced in a manner that results in violation of human rights, and exacerbates existing overcrowding in African prisons and police cells.

According to 2010 data an estimated 30 000 to 50 000 children live in a permanent state of vagrancy on the streets of DRC cities and towns, relying on, amongst others, begging as a way to survive. The Decree of 1950 on Juvenile Delinquency pays special attention to the vagrancy of minors. It stipulates that any minor living in a state of vagrancy or begging, must either be handed back to her or his parents with an injunction to the parents to better control the child, or be placed under the custody of another person or organisation, or detained in a specialised governmental institution until she or he is 21st years of age.

More recently, the Law on the Protection of the Child of 2009 provides that “any child who, by his/her misconduct, gives trouble to his/her parents or guardian” is considered by the law as a child in difficult situation, and is subject to a punishment not exceeding a six-months placement in a governmental social institution. This provision is not consistent with contemporary human rights norms and standards.

Exacerbating the the effect of these laws, the Ordinance on the Detention Regime of 1965 provides that only the Minister of Justice has the authority to decide on the conditional release of persons convicted of vagrancy and begging. The decision to release is taken on the basis of written recommendations made by the prison authorities, stating that the condemned convicted person will not return to vagrancy or begging once released. No information about such a decision by the Minister of Justice of the DRC emerged during the last decade. This requirement poses a significant stands as an obstacle to the release of persons convicted for vagrancy and begging

The Decree on Vagrancy is not strictly enforced in the DRC. This is however no comfort to the poor, as it reinforces the discretionary nature of the application of the offences in an environment of corruption. Members of the judiciary are notoriously corrupt,while the police often arbitrarily arrest and detain persons without filing charges. Suspects can remain in custody for the duration of their pre-trial detention period, sometimes for years.

Dignité K. Bwiza

This is an abbreviated version of a fully-referenced article soon to be available on www.ppja.org/countries/dr-congo.

Top of page

Proposals to improve implementation of custody time limit law in Malawi

Malawi is ahead of some of its neighbours in having laws which limit how long a person can be held on remand awaiting trial. Yet a study carried out over 2009-2011 confirmed what paralegals see in their work every day – people not being released awaiting trial even though their trial has not started and the custody time limit in law has been exceeded.

The impact on people and their families of being held awaiting trial indefinitely can be severe. Many fall ill or lose their jobs. The Malawi Parliament recognised this by passing a law requiring accused persons to be released on bail after a certain time if the state is still not ready to prosecute. Such release does not mean that the person won't be prosecuted, if the state has a case. It just means the person cannot be held indefinitely, waiting for the state to be ready to prosecute.

The paralegal consortium (consisting of the Paralegal Advisory Services Institute (PASI), Centre for Human Rights Education, Advice and Assistance (CHREAA), Catholic Commission for Justice and Peace (CCJP) and Centre for Human Rights and Rehabilitation (CHRR)) conducted a further study in 2012, with the support of the Open Society Initiative for Southern Africa to find out what other countries do about implementing custody time limits, and to test various proposals in local research around what might work in Malawi.

The local research identified various practical measures suitable for Malawi. For example, there is a need for ways of easily working out how long people have been in custody. For this to be done easily requires practical measures such as recording dates on files and registers in prison and court in a systematic and uniform way. Many courts do not have standard printed case folders or registers and these have to be drawn up manually. One of the proposals was thus to develop a new standard of information to be kept on case folders and in registers, which would include information necessary to establish how long a person may lawfully be held in custody.

This criminal justice system practitioner participants of a seminar (pictured left) held over 8-9 August endorsed all the proposals of the study, including a call for greater public awareness, so that people on remand are aware of the law and can ask to be released on bail. The study found that not all officials have access to the law, so another recommendation was to distribute pocket guides summarising and explaining the law.

A standard bail application for people on remand, whose custody time limits have been exceeded, was a further proposal

endorsed by the seminar participants. Making more sessions for bail applications through Malawi's Court User Committees, and developing prosecutorial policy with targets and incentives for the conclusion of cases with custody time limits was also recommended.

Adapted from a Paralegal Advisory Services Institute (PASI) press release

Top of page

---

cspri
Promoting
Pre-trial Justice
in Africa

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