PROMOTING PRE-TRIAL JUSTICE IN AFRICA

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Editorial

Many low-income countries struggle with basis issues such as proper record-keeping in the criminal justice system. This in turn affects the ability of the system to manage the progression of cases through the system. In this issue of we look at new case management materials developed for Malawi which have the potential to revolutionise the way in which cases are managed in the system. In particular it is hoped that they will help in the implementation of Malawi's progressive time limits introduced in 2010.

Arrest is a deprivation of liberty which states should use sparingly. Unfortunately many states retain a range of petty offences supporting arrest which are used as a form of social control. Research supporting a project which is seeking to work towards decriminalising such offences so that they are not used to justify the deprivation of liberty was presented at the African Commission NGO Forum in early November this year.

Finally indicators are highly topical as the discussion continues around measurement of the UN sustainable development goals. In relation to pre-trial detention in Africa, there are particular pitfalls of measurement. We report of a seminar where a process of designing indicators for pre-trial interventions in Africa was followed, leading to a draft set of indicators for further consultation.

Jean Redpath
PPJA Researcher

Toward better case management in Malawi

New forms of record-keeping in Malawi have the potential to revolutionise the way in which the criminal justice system works, ensuring that no-one becomes "lost" in the system and that all cases are tracked properly.

In Malawi's pre-trial audit published in July 2011, it was found that accused persons often spend excessively long on remand. Furthermore, it was found that there was no standardised system of record-keeping in the Malawi criminal justice system in order to track the length of detention of accused persons. There was also no compliance with Malawi's legislated custody time limits, which were introduced in 2010. These time limits provide that if trial has not commenced within 30 days in the subordinate court, then the accused is entitled to bail. They also require a charge to be brought within a year of the complaint, and the case to be resolved within a year of the charge, whether or not the accused is in custody.

This lead to further research in 2012 in order to establish the reasons for lack of compliance with custody time limits and to understand how other countries with custody time limits ensure compliance. The research found that among the reasons included a lack of knowledge about the laws relating to time limits, a lack of sympathy among officials for pre-trial detainees, and a lack of a documentation system to track the progress of cases through the various stages of criminal procedure. Indeed there is no system in place ensuring cases appear on the court roll when they are supposed to and that pre-trial detainees are only detained on valid remand warrants.

During 2013 and 2014 a series of consultations with officials and policy makers in the Malawi criminal justice system lead

to the development of new case folders, registers (for court and prison) and a court diary, which are intended to assist courts in ensuring that cases are placed on the court roll so that time limits are met. In addition, a set of public education posters and a pocket guide to arrest and detention were developed and finalised. In July 2015 mobile training unit members, who comprise paralegals as well as court, prison and police officials, participated in a train-the-trainer workshop to assist them in distributing the new official documents as well as the public education materials across Malawi. This distribution has been ongoing. The project is under the auspices of the Malawi Ministry of Justice, and funded through the EU Democratic Governance Programme. The research informing the project and the development of the various materials was funded by the Open Society Foundations.

The public education materials highlight the constitutional and legislative time limits in Malawi law; the rights relevant to detention contained in the Malawi Constitution; the law relating to arrest and possible release at the police station; and the law relating to possible release after appearing in court. The law of arrest and pre-trial release is also covered in detail in a pocket guide to arrest and detention developed for officials and paralegals.

The public education materials highlight the constitutional and legislative time limits in Malawi law. They also explain rights relevant to detention contained in the Malawi Constitution. The law relating to arrest and possible release at the police station is covered, as is the law relating to possible release after appearing in court. The law of arrest and pre-trial release is also covered in detail in a pocket guide to arrest and detention developed for officials and paralegals.

The workshop in July 2015 highlighted the fact that currently there is no system in place in Malawi to ensure compliance with the 48-hour rule, with custody time limits relating to the commencement of trial, and with remand warrant renewal requirements. The new materials have the potential to revolutionise the way in which Malawi's criminal justice system works. Currently there is reliance only on the police prosecutor to move cases forward and paralegals have many tales of pre-trial detainees simply becoming "lost" in the system. Now, the courts will have more control over case flow and prisons too will be more aware of time people have spent in detention.

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Toward decriminalisation of petty offences

PPJA-CSPRI presented preliminary findings of its continental socio-legal research on the legality of petty offence laws in Africa at the African Commission on Human and Peoples' Rights' NGO Forum. The broader project linked to this research is being led by the Pan African Lawyers Union (PALU) and also involves the partnership of several other civil society organisations.

The project explores misconceptions regarding the use and enforcement of petty offences legislation and promotes arguments for the decriminalisation of such offences. Petty offences are frequently used to arrest and detain poor and marginalised population groups across the continent. For example, loitering offences are used as a basis to arrest sex workers in countries where sex work is not illegal, and vagrancy offences are often used to arrest and detain street children and persons with psycho-social and intellectual disabilities. These arrests are often arbitrary, unlawful and applied discriminatorily. The continued policing of such offences contributes to high rates of pre-trial detention, and exposes detainees to abuse, corruption and conditions of detention that amount to ill-treatment in violation of the African Charter on Human and Peoples' Rights.

PPJA-CSPRI and partners participated in a panel discussion at the Forum on the Participation of NGOs in the Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR), known as the 'NGOs Forum, from 31 October – 5 November 2015. The NGO forum is organised twice a year, preceding the Ordinary Session of the ACHPR, to table and discuss human rights issues in Africa and seek possible remedies. The panel discussion on 31 October 2015 sought to engage with the preliminary findings of the PALU-led project to promote declassification and decriminalisation of petty offences in Africa, and propose further action that could be taken by the ACHPR on this issue to promote freedom from arbitrary arrest and detention. CSPRI and partners seeks to raise awareness of the disproportionate and negative impact of these laws on the poor and vulnerable persons in Africa.

This work builds on work done by PPJA-CSPRI for the 51st session of the African Commission in 2012, which sought to highlight the issue of "outdated" offences. An example of an outdated offence, is the offence of being a "rogue and vagabond". Rogue and vagabond offences across Africa have their roots in England's Vagrancy Act of 1824. The offence criminalises various "nuisance" behaviours. For example, the Malawi Penal Code, like many others, provides that the following are rogues and vagabonds:

- 'every 'suspected or reputed thief who has no visible means of assistance and cannot give a good account of himself'
- 'any person found on a road or at a public place 'at such time and under such circumstances as to lead to the

conclusion that such person is there for an illegal or disorderly purpose'.

Offences such as these give licence to police to arrest someone who is homeless or poor or is assumed to be a thief who has not caused harm to anyone, and is often abused by police. The PPJA outdated offences campaign in turn found its roots in the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, which endorsed recommendations calling for reducing the size of prison populations in Africa. The Plan of Action, dating from 2003, recommended "decriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents" as a strategy to reduce the prison population. Many of the offences identified in the Ouagadougou Declaration as ripe for repeal amount to nothing more than the criminalisation of poverty, homelessness, unemployment, or previously having committed an offence.

The work also ties in closely with PPJA's work on arrest in Africa, which has seen the recent publication of a report on the issue. The current project considers petty offences more generally and is not confined to those offence with colonial or historic roots. PPJA's research on the issue should be available in early 2016. African partners working on this issue comprise the African Policing Civilian Oversight Forum (APCOF); Centre for Citizens' Participation on the African Union (CCPAU); Civil Society Prison Reform Initiative (CSPRI); Pan African Lawyers Union (PALU); and Southern Africa Litigation Centre (SALC).

Kristen Petersen and Jean Redpath

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Toward indicators for pre-trial justice in Africa

The issue of measuring progress toward the sustainable development goals (SDGs) has highlighted the importance of indicators in development work. On 20-22 May 2015 CSPRI hosted a workshop with partners from across Africa to discuss indicators for pre-trial justice in Africa. Further consultations are planned.

A PPJA discussion paper entitled "Pre-trial indicators in Africa: problems and proposals" discusses the ways in which the indicators currently employed by states and organisations relating to pre-trial detention have a range of shortcomings in the African context. The paper argues that indicators should be adjusted, and additional indicators should be incorporated into data collection practise in order to provide a more complete and accurate picture of pre-trial detention in Africa. The paper was intended as a starting point for a broader discussion of the pitfalls and possibilities for the development of indicators in relation to pre-trial detention in Africa.

In May 2015, PPJA hosted a workshop with partners from across Africa to discuss possible appropriate indicators for measuring change in pre-trial justice in Africa. The workshop considered both ways of measuring the impact of organisations which work in the pre-trial justice sector, as well as overall measures of pre-trial justice appropriate for Africa as a whole. A draft set of indicators was proposed for further consultation and discussion.

The workshop spent some time exploring what a indicators are and how they are used. Participants discussed how an indicator measures progress toward a goal, with a goal describing a desirable future condition. An indicator is a numeric measure providing information in relation to the goal, and goals and indicators should be developed together. Indicators are tools for specific audiences, so different indicators may be appropriate for different audiences.

Participants discussed what indicators are used for, in particular, that they are used for raising awareness, engaging stakeholders, informing decisions, as well as measuring progress or demonstrating the effectiveness of an intervention. Participants gave presentations on the work of their organisations, and how their activities seek to address problems in the criminal justice system. They also suggested possible ways of measuring their impact on those problems. The workshop then turned to the broader question of what would be appropriate indicators for measuring change in pre-trial justice in Africa, and proposed a draft set of indicators.

The process used to identify the proposed indicators began with first identifying the problems, and the associated desired situation. For example, in relation to the problem of arbitrary arrests, the desired situation is that only purposeful arrests occur. Proposals for measuring progress toward the desired situation included measuring the proportion of arrests which actually result in a prosecution. A rise in this proportion could suggest a decrease in the tendency of the state to detain frivolously or without sufficient evidence to pursue a prosecution.

Another example of a problem of pre-trial justice which is particularly pertinent in Africa, is the high volumes of arrests, particularly arrests on outdated offences and offences targeting the poor. The desired situation is that there are few arrests for non-serious offences. This could be measured by the proportion of arrests which relate to serious crimes. A full list of proposed draft indicators is available on the PPJA website.

A further series of consultations is planned to further consult on and refine these draft indicators. Organisations wishing to become involved in the consultation process are welcome to email PPJA at ppja@communitylawcentre.org.za.

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