



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África

The role of the Court in dealing with petty offences

Alternatives to arrest and detention

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Background

The African Commission on Peoples' and Human Rights recently issued the Principles on the Decriminalisation of Petty Offences in Africa (ACHPR Principles) requesting states to decriminalise certain petty offences that violate fundamental principles of legality and non-discrimination under the African Charter.¹ It also calls upon African states to deal with other petty offences that meet the fundamental principles in an alternative way than criminalisation. This factsheet provides an overview of ways in which the courts can deal with petty offences² that are not decriminalised under the ACHPR Principles in an alternative way that steers away from criminalisation. It highlights warnings and fines encompassing other restorative justice approaches as appropriate for minor contraventions of the law. These alternatives will eliminate the associated socio-economic consequences of arrest and detention and will ensure that the intervention of the criminal justice system for minor offences is kept to the minimum amount needed to protect society and the sanction chosen is the least intrusive.

Arrest and detention may have a severe impact on individuals, especially if it was for a violation of a petty offence law. It is therefore important that arrest and detention of individuals should be used as a measure of last resort or where there is a real risk that the suspect will evade trial, interfere with witnesses or evidence or undermine the interests of justice.³ In many African countries, the contravention of minor offences attract disproportionate criminal sanctions and individuals receive a criminal record, making it difficult for them to find employment. When people are detained it may hold severe socio-economic consequences for their and their families' wellbeing. Research conducted on the socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia has shown that 'when people are detained the impact is felt by families and other households associated with the detainee, and where the detainee is female, the impact on children in particular, can be severe.'⁴ The contravention of petty offence laws does not necessitate arrest and detention as many of these offences can easily be declassified into non-arrestable offences or even decriminalised, but requires the political will of states to do so.

The ACHPR Principles call upon states to provide alternatives to arrest and detention for minor offences that are not decriminalised under the Principles, including the declaration of certain offences as non-arrestable offences.⁵ The ACHPR Principles call for the ‘diversion of cases involving petty offences away from the criminal justice system and making use of community service, community-based treatment programmes, alternative dispute resolution mechanisms, such as mediation and other alternatives respecting regional and international human rights standards.’⁶

The UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) also promote the use of alternative ways to deal with offences and empowers the police and prosecution service to discharge an offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.⁷ According to the Tokyo Rules, consideration must be given to dealing with offenders in the community and avoiding as far as possible resorting to prosecution and formal sanctioning.⁸ This is in accordance with the principles of minimum intervention, depenalisation and decriminalization.⁹ The Tokyo Rules emphasise that criminal justice system interventions should be kept to the minimum amount needed to protect society and the sanction chosen in all circumstances should be the least intrusive one available.¹⁰ Furthermore, the use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.¹¹

In line with the ACHPR Principles and other soft law instruments,¹² petty offence laws criminalising the status of a person or their appearance or performing life-sustaining activities in public places have no place in our society and should be decriminalised.¹³ Such petty offence laws criminalise poverty, homelessness and unemployment, as these laws target persons whose only crime is that they are without an income or means of subsistence. Below are alternatives to conviction sentencing aimed at courts.

What alternative sanctions can a court impose?

There are various alternative sanctions that a court can impose on petty offenders. Such sanctions can be handed down in the form of a diversion (i.e. there is no conviction) or it can be a sentence with some conditions attached to it. The alternative sanctions to imprisonment provided below involve various diversion options (See Fact sheet #20), encompassing economic, social and restorative justice responses in line with human rights soft law principles.¹⁴ Moreover, in some of the alternatives provided below, the court has the option of postponing the sentence until the offender complies with the diversion option or therapeutic sanction and withdraw the case against the offender or the court can sanction the offender and withdraw the criminal sanction after compliance. In this way an accused can be prevented from having a criminal record. Nevertheless, even if the court does not opt to do away with a criminal sanction, all the sanctions listed below prevent an offender from being detained for a petty offence.

Warnings or caution

Warnings serve as an alternative to detention for certain minor offences. The court may dispose of cases by imposing a verbal sanction, such as an admonition, reprimand and warning. A warning is the admonishment or reprimand of wrong doing by the judicial officer and an instruction not to repeat the conduct, failing which could bear more serious consequences. In some countries, verbal sanctions such as admonition or reprimand is frequently used for young persons, enabling them to realize that they have done wrong without being stigmatized as a result of a conviction.¹⁵ Such alternative sanctioning can also be utilized against adult individuals especially for a non-violent, victimless infraction of the law. The court has the discretion to issue a warning as part of a diversion order thereby imposing no criminal conviction against the suspect. A warning can also be imposed by the court as a formal sanction whereby the offender receives a criminal record. Warnings by a court can also be conditional, upon the offender participating in a social or rehabilitation programme or imposing some other form of restorative justice condition. In such instances, the court may also decide to discharge the criminal record against the offender once he or she complies with the condition.¹⁶

Community service

As part of diverting matters out of the formal criminal justice process, a court may withdraw charges against a suspect on condition that he or she undertake community service. The court can also impose community service as a formal sanction against the offender, which will result in a criminal conviction.

Serving the community is an opportunity for an offender to account for his or her offence by serving his or her community without pay for a prescribed number of hours.¹⁷ This kind of sanction is often used for first time offenders or young offenders. The aim is to divert these offenders away from the punitive criminal justice system.¹⁸ Examples of community service tasks include providing services in a community programme to remove graffiti from public property, providing maintenance at cemetery plots or working with community based organizations to remedy a need in the community.¹⁹ In the Netherlands, community service is usually done for volunteer organizations as the service must be seen as benefiting the community.²⁰ Countries such as Kenya, Zambia, Zimbabwe, South Africa and Uganda have made use of community service orders with varying results.²¹ Ultimately this option reduces the stigma attached to offenders as they are able to do work which is useful and not demeaning within a reasonable amount of hours.

Fine or monetary penalty

Monetary penalties such as fines are widely used as alternative sanctions to detention. Instead of prosecuting individuals for minor contraventions of the law, offenders can be given the option of paying a fine. The advantages of the fine as a sanction is that it is punitive and it is relatively inexpensive to administer.²² Monetary penalties can also be coupled with other non-custodial sanctions. The imposition of fines should be done with caution, specifically with reference to the person's ability to pay a fine. It is important that the threshold amount set for monetary penalties take into account the circumstances of the individuals and that it does not exceed the financial capacities of the

individual. Penalty systems should thus be mindful of this and provide for a day fine or a deferred payment system. Day-fines can solve the problem of offenders with little money having difficulties in paying them by linking the amount to be paid to the offender's level of disposable income.²³ A deferred payment system allows individuals who cannot pay a fine immediately an opportunity to pay the fine at a later date or in instalments. Otherwise, where it is evident that persons contravening petty laws have absolutely no financial means to pay the fine, courts should be provided the discretion to explore other less intrusive alternatives such as conditionally suspending the fine or imposing community service on an offender.

Referral to social or rehabilitation programme

A court can also order that an offender be referred to community-based organisations to participate in educational, mental health care, substance abuse treatment, job training, counselling, and mentoring programmes as an alternative to arrest.²⁴ The court can order the referral to a social or rehabilitation programme as a formal sanction which will result in a criminal conviction and a criminal record against the accused or the court can decide to impose the referral as a diversion order and withdraw the charges against the accused once he or she has complied with the programme. Through these programmes, qualified social workers and professionals are able to assess the needs of offenders and structure interventions aimed at addressing problematic underlying issues. In cases where offenders have addiction problems (i.e. drugs, alcohol, gambling, etc.), a court can also refer the offender to rehabilitation facilities (drug or alcohol

rehabilitation centres).²⁵ In the case of drug addiction for instance, it is essential that the drug addicted offender is treated for this problematic behaviour, failure to do so results in a missed opportunity to improve public health as well as ensuring public safety.²⁶ As such, the referral to a social or rehabilitation programme is important as this offers offenders an opportunity to deal with underlying issues.²⁷

Victim-Offender Mediation

A court can order an offender to attend Victim-Offender Mediation (VOM) as part of diverting matters out of the formal criminal justice process and withdraw the charges after the accused has complied with the VOM. The court also has the option of ordering VOM as a formal sanction, for which the accused will receive a criminal conviction. This alternative process involves a neutral third person (usually a qualified mediator) to facilitate discussions between an offender and a victim with the view to resolve a dispute.²⁸ The advantage of this option for the victim is that it provides the opportunity for the victim to get closure after the offence.²⁹ For the offender, through the VOM process, there is an opportunity to understand the consequences of the offence committed and to gain the necessary forgiveness needed for internal closure.³⁰ Furthermore, VOM is an alternative that is less costly and is beneficial in handling cases where first-time offenders are concerned.³¹ VOM has been undertaken in numerous jurisdictions throughout Europe, North America and Africa.

A Canadian study assessing the impact of four VOM programmes focussed on satisfaction levels of victims and offenders with the mediation process, the level at

which victims and offenders felt that the outcome of the mediation process was fair; and finally, whether or not the fear of re-victimization was reduced for victims.³² The study revealed that the average for all four programmes showed that there was overall satisfaction with the outcome of the mediation session with 89% of victims and with 91% of offenders being satisfied.³³ Regarding perceptions of fairness in the mediation process, 80% of victims and 80% of offenders who participated in the mediation process felt that there were fairly treated by the justice system compared to 43% of victims and 56% of offenders who were referred to mediation but did not participate in it.³⁴ Thirdly, the study also showed that regarding the fear of being re-victimized by the same offender, for victims who participated in the mediation process, 11% felt less fearful as opposed to 31% who did not participate and felt more fearful about being re-victimized.³⁵

In South Africa, the mediation process comprises of four main stages. In the preliminary stage of the mediation process, once a referral to mediation has been made, the case information is gathered, and if it meets the set requirements necessitating mediation, then a mediator is assigned to a particular case.³⁶ In the second stage, the assigned mediator sets separate individual preliminary meetings with the victim and the offender. The purpose of these initial meetings is to listen to the versions of both parties and to get the agreement and commitment from both parties to the mediation process.³⁷ The voluntary basis of the process is emphasized so that both parties are aware that they are able to pull out at any moment. The third phase of the mediation process is the holding of the meeting between the victim and the offender. In this phase, the

victim is given the first opportunity to express his or her sentiments regarding the crime committed.³⁸ This is followed by the offender's response to the victim's sense of loss. The mediator facilitates the discussions by leading the offender to understand the issue of contention which will hopefully lead to an apology and a restitution agreement on how to repair the damage that has been done.³⁹ The final phase of the process is the reporting, monitoring and follow-up phase whereby the mediator documents the entire process and uses it as a tool for follow-up to ensure that the points agreed upon are followed through by both parties.⁴⁰

Good behaviour orders

Another option that courts can use to divert minor crimes is the use of good behaviour orders. Good behaviour orders offer a rehabilitation opportunity to offenders to avoid the criminal justice system by signing a bond agreement known as 'recognisance' which is a commitment by the offender to be on 'good' behaviour for a set period of time.⁴¹ This is a form of conditional discharge and provides a good alternative for detention for minor crimes because compliance to the agreement will not lead to conviction or a criminal record.⁴² In addition, the offender continues to live and work unsupervised within the community without the stigma associated with having committed an offence.⁴³

Life skills

A court may withdraw charges against an offender on condition that the person participates in a life skills programme as part of diverting matters out of the formal criminal justice process. Diversion through referral to life skills programmes are often used in processes involving young petty offenders. The court

can also impose it as a formal sanction against offenders. Research has shown that many young offenders often commit offences because of impoverished socio-economic conditions.⁴⁴ In South Africa, a specific life-skills programme was introduced by the National Institute for Crime Prevention (NICRO) to teach young offenders pertinent life skills regarding crime awareness assertiveness and decision making which is intended to shape young people to live according to societal standards.⁴⁵

A study on the rehabilitation of prisoners using basic life skills programmes in one adult male prison in the United Kingdom revealed that basic life skills play an important role in developing greater self-awareness, problem solving, critical thinking, and interpersonal skills within offenders.⁴⁶ It is believed that through developing time management, self-management, and organisational skills, this will bring about changes in behaviour, which may lead to changes in offender's worldviews.⁴⁷ In general, although research is inconclusive about whether life skills programme reduce recidivism, it has been found that they do have a positive effect in the life of offenders.⁴⁸ Such programmes have the potential of curtailing future petty offences as they focus on building positive self-esteem and empowering offenders to consciously make better decisions by allowing them the opportunity to understanding the consequences of their behaviour.⁴⁹

Family group conferences

Especially when dealing with children and young people, a court may also order a suspect to participate in Family Group Conferences that is embedded within the restorative justice framework.⁵⁰ The charges may be

withdrawn against the suspect upon participation and completion of the process. A court may also order the participation of individuals in a family group conference as part of a formal sanction; however, in most cases it is used as a diversion option as it is used mostly in cases involving young offenders and premised on the concept of diversion and restorative justice.

This alternative originated in New Zealand and has been adapted in numerous jurisdictions with the aim of uniting young offenders, their families as well as victims of crime to a discussion on avenues to correct the wrongs that were caused on both the victim and the community.⁵¹ This option is entrenched in the notion that communities and families can come up with solutions to deal with offending behaviour through active engagement. There are three key phases to this approach which include the preparation phase (a critical phase wherein all members of the conference are thoroughly prepared, the facilitation phase (the family group conference), and the monitoring phase (which deals with progress and reporting on the agreed outcomes).⁵² The monitoring phase is the most important phase of Family Group Conferences as it is in this stage that plans that have been put in place are monitored.⁵³ The use of conferences instead of detention can play a role in reducing recidivism in petty offences due to the active on-going monitoring that takes place.

Conclusion

Detention is not the appropriate sanction for the contravention of petty laws. This fact sheet provides an overview of non-custodial sanctions or orders a court can impose against petty offenders instead of

detention. The non-custodial sanctions meted out can either be in the form of a diversion order, where the accused receives no criminal conviction or record, or it can be a formal non-custodial sanction, which involves the accused receiving a criminal conviction or record. There are a number of alternatives including fines, warnings, social and rehabilitation orders, VOM, family group conferencing and good behaviour orders, which can be used to address problem behaviour without resorting to detention. Invoking restorative justice mechanisms can, in other words, relieve over-burdened courts from the backlog of minor cases, and reduce the number of detained offenders. Moreover, such options may avoid the stigma and socio-economic burdens associated with prosecution and detention.

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¹ African Commission on Human and Peoples' Rights, Principles on the Decriminalization of Petty Offences in Africa, ACHPR/Res. 366 (EXT.OS/XX1), 2017. (ACHPR Principles)

² Petty offences are defined under the ACHPR Principles as 'offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine.

³ South African Criminal Procedure Act 51 of 1977, Section 60 (4) (a) – (e).

⁴ Muntingh, L. and Redpath, J. (2015) *The Socio-Economic Impact of Pre-trial Detention in Kenya, Mozambique and Zambia*, ACJR Research Report, Bellville: Dullah Omar Institute for Constitutional Law, Governance and Human Rights.

⁵ Article 14.2.2, ACHPR Principles.

⁶ Article 14.2.2, ACHPR Principles.

⁷ Article 2 (5), UN General Assembly, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/110.

⁸ Article 2 (5), Tokyo Rules.

⁹ Article 2 (6), Tokyo Rules.

¹⁰ Article 2 (6), Tokyo Rules.

¹¹ Article 2 (7), Tokyo Rules.

¹² The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa of 2003 also recommended the decriminalisation of some offences as a strategy to reduce the prison population. The Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa ('the Luanda Guidelines') also calls on States to divert minor cases away from the criminal justice system and to use alternatives.

¹³ Article 14.1. ACHPR Principles.

¹⁴ ACHPR Principles; Tokyo Rules.

¹⁵ Youth Criminal Justice Act, Canada, Department of Justice, Available at: <https://laws-lois.justice.gc.ca/eng/acts/Y-1.5/page-2.html#h-4>; 'Youth Law Australia: Warnings' Available at: <https://yla.org.au/act/topics/courts-police-and-the-law/the-youth-justice-system/warnings/>.

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¹⁷ Harris, R.J. and Lo, T.W. (2002) Community Service: It's Use in Criminal Justice. *International Journal of Offender Therapy and Comparative Criminology*, Vol. 46 No.4, p.439.

¹⁸ Muntingh, L.M. (1993) Victim Offender Mediation. In Muntingh, L and Shapiro, R., (eds), *NICRO Diversion Options*, p.29.

- ¹⁹ Harris, R.J. and Lo, T.W. (2002), p.436.
- ²⁰ Harris, R.J. and Lo, T.W. (2002), p.432.
- ²¹ Muntingh, L. (2008) Alternative Sentencing in Africa, In Sarkin, J. (ed), *Human Rights in African Prisons*, Cape Town: Human Sciences Research Council Press, p.181.
- ²² Hillsman, S. (1990) Fines and Day Fines, *The University of Chicago Press Crime and Justice Journal*, Vol. 12, p.50.
- ²³ McDonald, D., Greene, J., and Worzella, C. (1992) *Day Fines in American Courts: The Staten Island and Milwaukee Experiment*, U.S. Department of Justice National Institute of Justice, p.51, p.77. Day- fine systems in West Germany and Sweden illustrate how these fining systems reconcile the potentially conflicting principles of proportionality and equity in sentencing by use of a two-stage decision process to set the amount of the fine. First, the number of day-fine units to which the offender is sentenced is determined with regard to the gravity of the offense, but without regard to the means of the offender. The monetary value of the fine unit is then determined, setting it explicitly in relation to what the offender can afford to pay, given his financial means and responsibilities. Thus, the degree of punishment resulting from the day fine is in proportion to the seriousness of the offense and should cause an equivalent level of hardship for defendants of differing means; it should also be enforceable without excessive reliance on imprisonment for default.
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- ²⁵ Chandler, R., Fletcher, B., and Volkow, N. (2009) Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety, *Journal of the American Medical Association*, Vol. 30 No.2, p.183.
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- ⁴⁰ Muntingh, L.M. (1993), p.37.
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