



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 police in dealing with petty offences

Alternatives to arrest and detention

SEPTEMBER 2019

Background

The African Commission on Human and Peoples' 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 police (or law enforcement), 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 at law enforcement (arrest) level. 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 decriminalisation.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 depenalisation and decriminalisation 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 arrest and detention for petty offences aimed at law enforcement officials, such as the police.

Warnings

Instead of arresting and prosecuting persons for minor offences, it is more appropriate to issue a warning to individuals to refrain from problematic behaviour. In some jurisdictions, certain minor crimes are deemed non-arrestable, thus providing law enforcement officials the discretion to issue warnings for contraventions instead of detention.¹⁴ The issuance of warnings can serve as an alternative to arrest, detention and prosecution for certain minor offences, especially if the offending behaviour does not involve a victim and does not cause harm to anyone.¹⁵

Informal vs. formal warnings

Warnings can be informal or formal. An informal warning involves a mere verbal admonishment of wrongdoing or a warning from law enforcement officials not to repeat the conduct and in most cases have no consequences. However, a formal warning involves some form of consequence, but excludes arrest, detention and prosecution. In some jurisdictions, law enforcement officials can issue one formal warning for

first time offenders, depending on the crime. In these jurisdictions, prior warnings issued to offenders are thus registered and although not a criminal conviction, depending on the nature of the offence, it could be used as evidence of poor character if the person has to go to court for another offence.¹⁶ For example, in England and Wales simple cautions are given to persons for minor crimes and first-time offenders as long as there is an acknowledgement of guilt and the individual agree to be cautioned.¹⁷ The caution is not a criminal conviction, but in some instances can be used as evidence of poor character if the person is charged with another offence.¹⁸

Conditional warnings

Conditional warnings are accompanied by certain rules, conditions or restrictions as part of the caution.¹⁹ Examples of conditions set by the police may include attending a course aimed at targeting offending behaviour (i.e. going for treatment for drug abuse) or fixing damaged property.²⁰ If the individual does not comply with the conditions, he or she may be charged with the appropriate crime.²¹ This alternative method to arrest can combine various other restorative justice practices that will provide individuals an opportunity to address the underlying problems associated with their problematic behaviour.

Legislators would need to identify the offences they would like to declassify or reclassify into crimes that warrants a mere verbal admonishment versus a warning with formal consequences. Ideally, warnings or cautions should not have any consequences that will adversely affect the individual's employability or access to better educational and recreational activities. Where there are

formal consequences involved, such as records reflecting warnings and fines issued against individuals that has the ability to affect the character of persons, it is important that limited time periods be imposed for which such records are kept in order to safeguard individuals against associated negative consequences.

Fines or administrative penalties

The issuing of fines or penalties are also referred to as 'on the spot fines' or 'penalty notice' or 'administrative penalty' and serve as an alternative sanction to dealing with minor contraventions of the law. Instead of arresting and prosecuting individuals for certain minor contraventions of the law, individuals can be given the option of paying a fine. However, this should be done with caution, specifically with reference to the person's ability to pay a fine.

Fines

In certain jurisdictions law enforcement officials can issue fines to people for certain offences like shoplifting and possessing cannabis in public, instead of arrest and prosecution.²² If the fine is accepted, the penalty must be paid or it can be contested in court. The payment of a fine does not require an admission of guilt and will not result in a criminal record but a record of the penalty notice will be kept, and that information may be used to decide if you are eligible to receive another penalty notice in the future.²³ However, in jurisdictions such as England, Wales and Scotland a record of a 'penalty notice' (fine) will be kept, and that information may be used to decide if the offender is eligible to receive another penalty notice in the future.²⁴ Also, in these instances fines are issued as an opportunity for first time

and non-habitual offenders to avoid criminal proceedings and a possible criminal record.²⁵

It is important to be mindful in crafting such legislation that there are no criminal consequences for the acceptance of fines. For example, in South Africa, for some offences (such as the possession of a small quantity of drugs, common assault and *crimen injuria*) individuals have the option of paying an admission of guilt fine.²⁶ The offender can opt to pay the fine or refuse to pay it and contest the fine in court. If the accused pays the fine, it will be reflected as a criminal conviction.²⁷ A recent judgement in the Western Cape High Court in South Africa highlighted the police's failure to inform individuals in such cases that they will receive a criminal record if they paid admission of guilt fines.²⁸ The decision overturned the appellant's conviction.

Administrative fine or penalty

There are other offences involving minor infractions of environmental laws, traffic laws and municipal by-laws or ordinances whereby a criminal sanction is applicable. Many of these offences involve persons fulfilling life sustaining activities in public and are 'regulatory' or 'administrative' offences. Examples of such offences include amongst others the removal of forest produce, riding in a dangerous position, selling alcohol without licence, possession of homemade liquor, trading without a license, illegal possession of farm produce, depositing refuse, destroying plants on land, and hemp offences.²⁹

Individuals need not need be arrested, detained and prosecuted for crimes that are considered to be regulatory or administrative offences. Monetary

penalties can be imposed as a form of an 'administrative sanction.' This purely administrative penalty should not be confused with a hybrid penalty, which is a cross between administrative and criminal sanctions.³⁰ Monetary penalties serves as a better deterrent in promoting compliance with regulatory laws and policies than criminal prosecution for low-level offending, particularly environmental contraventions.³¹

It must be emphasised that fines should not be abused by states as a form of income generation. In many countries, the amount of a monetary penalty is determined according to a schedule adopted by law and or the designated regulating authority.³² But these are often not updated.

Governments need to impose appropriate monetary penalties, taking into account the nature and seriousness of the contravention, the circumstances of the offender and its enforcement should be consistent and transparent. It is important that the threshold amount set for monetary penalties do not exceed the financial abilities of the person. Penalty systems should also provide for a deferred payment system to allow persons an opportunity to pay the fine at a later date or in instalments or conditionally suspend the fine. Where it is evident that persons contravening petty laws have absolutely no financial means to pay the fine, law enforcement officials should be provided the discretion to explore other less intrusive alternatives such as imposing community service on an offender.

Conclusion

Petty offences are generally minor, non-violent and victimless. Interventions by the criminal justice system

should always be kept to the minimum level needed to protect society. Moreover, the sanction chosen for a petty offence in all circumstances should be the least intrusive available one. Instead of arresting and detaining people for petty offences, governments should consider declassifying certain minor offences to non-arrestable offences for which a warning or fine becomes applicable. Most African countries' criminal justice systems and prisons are struggling to cope with limited resources. Strictly enforcing laws dealing with petty offences is a waste of important police, prosecutorial and judicial time and resources and deflects from dealing with serious crimes.

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¹ African Commission on Human and Peoples' Rights, Principles on the Decriminalisation 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 England, Wales, Scotland, Australia. 'Police cautions, warnings and penalty notices', United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>; 'Police Cautions: What Are They and How Do They Work?', Webster's Lawyers Barristers and Solicitors, Available at: <https://websterslawyers.com.au/criminal-law/police-cautions-description/>; Youth Criminal Justice Act (S.C. 2002, c. 1); "Extrajudicial Measures". 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/>

¹⁵ 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning->

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¹⁶ England, Wales and Scotland. 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>; 'Alternative to Prosecution, Crown Office and Procurator Fiscal Service,' Scotland's Prosecution Service, Available at: <https://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/297-alternative-to-prosecution>.

¹⁷ 'Simple Cautions for Adult Offenders,' UK Ministry of Justice, effective from 13 April 2015. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708595/cautions-guidance-2015.pdf; 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>.

¹⁸ Known as the Standard and enhanced Disclosure and Barring Service (DBS). 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>.

¹⁹ 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>.

²⁰ 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>.

²¹ 'Police cautions, warnings and penalty notices,' United Kingdom, Available at: <https://www.gov.uk/caution-warning-penalty>.

²² England, Wales and Scotland. 'Police-issued penalty notices,' United Kingdom, Available at: <https://www.nidirect.gov.uk/articles/police-issued-penalty-notices>; 'Alternative to Prosecution, Crown Office and Procurator Fiscal Service,' Scotland's Prosecution Service, Available at: <https://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/297-alternative-to-prosecution>.

²³ England, Wales and Scotland. Police-issued penalty notices, United Kingdom, Available at: <https://www.nidirect.gov.uk/articles/police-issued-penalty-notices>.

²⁴ Penalty notices are recorded on the police computer system and may be disclosed as part of an enhanced disclosure.

²⁵ Penalty notices are not available to someone who repeatedly offends. 'Police-issued penalty notices', United Kingdom, Available at:

<https://www.nidirect.gov.uk/articles/police-issued-penalty-notices>; 'Alternative to Prosecution, Crown Office and Procurator Fiscal Service,' Scotland's Prosecution Service, Available at: <https://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/297-alternative-to-prosecution>

²⁶ 'Thousands may lose stigma of criminal record' *IOL News*, 21 March 201, Available at: <https://www.iol.co.za/news/thousands-may-lose-stigma-of-criminal-record-1835332>.

²⁷ 'Thousands may lose stigma of criminal record' *IOL News*, 21 March 201, Available at: <https://www.iol.co.za/news/thousands-may-lose-stigma-of-criminal-record-1835332>.

²⁸ 'Thousands may lose stigma of criminal record' *IOL News*, 21 March 201, Available at: <https://www.iol.co.za/news/thousands-may-lose-stigma-of-criminal-record-1835332>.

²⁹ Muntingh, L. and Petersen, K. (2015) *Punished for Being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences*, ACJR Research Report, Bellville: Dullah Omar Institute for Constitutional Law, Governance and Human Rights. p. 52-55.

³⁰ Brown, M. (1992) 'Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation' *Osgoode Hall Law Journal* Vol. 30 No. 3, p.693, Available at: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1721&context=ohlj>.

³¹ Brown, M. (1992) p.723; Fourie, M. (2011) 'How civil and administrative penalties can change the face of environmental compliance in South Africa,' Available at: <https://cer.org.za/wp-content/uploads/2011/11/Fourie-M-SAJELP-Paper-June-2009-Final.pdf>

³² In respect of road traffic offences, fixed penalty tickets/notices may be issued. If paid, the offence is discharged and the offence doesn't form part of the criminal record. Brown, M. (1992), p.695; 'Police-issued penalty notices', United Kingdom, Available at: <https://www.nidirect.gov.uk/articles/police-issued-penalty-notices>; 'Alternative to Prosecution, Crown Office and Procurator Fiscal Service,' Scotland's Prosecution Service, Available at: <https://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/297-alternative-to-prosecution>.