



Africa Criminal Justice Reform
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The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia

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Introduction

- The purpose is to describe key concepts and the overall framework of analysis



Key concepts

- **Human rights and development**

- The state must enforce the law but it comes with consequences - This approach sees the role of the coercive power of the state in controlling crime and violence and establishing order as a necessary condition for development.
- The human-rights based approach to development argues that human rights can give development goals a moral and legal basis and greater legitimacy, holding duty-bearers accountable for the failure to discharge their human rights obligations.
- We argue that the use of the coercive power of formal criminal justice institutions exercised through the deprivation of individual liberty has a serious social and economic impact. While the deprivation of liberty is necessary and justifiable in some instances, we argue that it is used too often and frequently results in excessively long duration of pre-trial detention.

- **Socio-economic rights**

- ICESCR requires States parties to take legislative and other measures 'with a view to achieving progressively the full realization of the rights recognised in the present Covenant'.



Key concepts

- 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.
- The deprivation of individual liberty interferes with the ability of those individuals to be agents of their own development. Deprivation of liberty by the state in the application of criminal law and procedure infringes on the socio-economic rights of individuals and their dependents. States can justify such infringement of socio-economic rights only if their coercive power is used within the ambit of democratic and rights-respecting laws, and in compliance with human rights standards. This does, however, not mean that because the detention was lawful that there is no socio-economic infringement.
- The rights (ICESCR): The equal right of men and women to pursue economic, social and cultural rights (art 3)
- The right to work and the duty of the state to take measures to enable people to access gainful employment (art 6)
- The right to just conditions of employment (art 7)
- The duty of the state to provide the widest possible protection to the family (art 10)
- The right to an adequate standard of living and to be free from hunger (art 11)
- The right to the enjoyment of the highest attainable standard of physical and mental health (art 12)
- The right to education (art 13).

Key concepts

- **Civil and Political Rights**

- Arrested or detained persons must be brought promptly before a judicial officer and be entitled to trial within a reasonable time or to release;
- It must not be the general rule that persons awaiting trial are detained in custody, but release may be subject to guarantees to appear for trial;
- There must be a fair and public hearing by an independent and impartial tribunal;
- There must be equality before the courts and tribunals;
- There must not be arbitrary detention;
- There must be restriction of the use of incommunicado detention;
- There is access for lawyers, doctors and family; and
- There is independent internal and external oversight.

- **Intersection**

- Violations of the right to a fair trial are likely to exacerbate the socio-economic impact on detainees and their associated households. While strict adherence to fair trial rights may work to limit the negative socio-economic impact of pre-trial detention, some impact is likely to occur even when fair trial rights have been observed.
- There is thus an argument to be made that there is a duty on states to take into account socio-economic rights beyond adherence to fair trial rights.

Framework on overall findings

- **Overall**

- Common to all three countries there was evidence 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 impact is felt by families and other households associated with the detainee, and where the detainee is female, impact on children in particular can be severe.
 - Impact is generally immediate, but may have enduring negative consequences from which a household struggles to recover, particularly where the detention continues indefinitely.
 - Different households have different levels of resources or access to resources which may also determine how they are able to respond to the problem of detention.
 - The severity of the impact is in turn determined by pre-existing socio-economic circumstances and extent of compliance with fair trial rights. While the phenomenon of pre-trial detention sets out with the same event - a person belonging to a household (or not) is imprisoned for a period of time - the results are extremely varied, flowing from a set of inherent characteristics or conditions, or from external factors.
- The list of factors described below attempts to identify some of the main drivers and relations between different variables and how they affect the socio-economic impact of pre-trial detention.

Framework on overall findings

- A household's vulnerability and resources impacts on how it experiences the impact of detention. The research points to a complex set of factors that interact to either intensify or ameliorate the socio-economic impact of pre-trial detention.
- **Level of poverty**
 - The financial and non-financial means of a household is fundamental to understanding the socio-economic impact of pre-trial detention. In all three countries household incomes of affected households was suggestive of poorer households.
 - Between 64% (Moz) and 95% (Zambia) of households reported a loss of income
 - Households are forced into debt – Kenya 39%; Moz 34%, Zambia 36%
 - Households are forced to sell assets – Zambia 53%; Kenya 22%
- **Reliance on detainee**
 - If the detainee is the main or sole income earner in the household and he or she is imprisoned it follows that the impact will be more severe.
 - The median proportional detainee contribution to total household income in Kenya was 67%, in Mozambique 70%, and in Zambia 100%. Detention results in the loss of such income, which is immediate and severe.

Framework on overall findings

- **Number of dependents and household size**
 - The greater the number of people and the higher the proportion of those who cannot generate income (such as children, the disabled and the aged) who are dependent or partially dependent on the detainee's income, the wider the socio-economic impact is likely to be.
- **Employability of other household members**
 - The extent to which other household members (or persons related to the household) can fill the gap due to detention will be an important factor in mitigating adverse socio-economic consequences of the detention.
 - Important therefore is number of elderly, children and members with disabilities.
- **Gender**
 - Gender is an important variable. While men are the numerical majority in pre-trial detention, the socio-economic impact is frequently felt by wives and mothers, who are more likely to visit and support detainees while attempting to maintain the family income. The majority of visitors to prisons are also female. They bear the burden of providing for the detainees' needs in detention, bringing food and other items at high costs of travel, while maintaining the family income.
 - Women earn less; suffer significant health consequences in prison; take care of children

Framework on overall findings

- **Children**

- Children are extremely vulnerable to negative changes in the socio-economic position of the household.
- We see this in: decreased access to schooling (the household can no longer afford school fees or the child drops out of school to earn money), relocation to relatives or friends, food insecurity, general insecurity, lack of or limited supervision by adults and so forth.
- Older children are removed from school to take care of younger children and to perform the duties previously performed by the detainee. Children are therefore affected by the loss of financial and non-financial support services previously rendered by the detainee and affected by the detention.

- **Other functions in the household**

- Other impacts of the detention will to a large extent be determined by how central or not the detainee was to the household's well-being. If the detainee was an occasional visitor, made a small financial contribution and rendered minimal or no non-financial support services and are rarely visited, it follows that the impact will be less. However, if the detainee was the head of the household, the main income earner, enabled a range of non-financial support services and so forth, the impact will be more severe.

Framework on overall findings

- **The cost of visiting and supporting the detention**
 - The detention of household members brings new, direct and unplanned costs for a household.
 - Visits are associated with costs such as transport for the visit, food, other materials (e.g. soap), clothing, medicine and so forth. Securing private legal aid – or attempting to do so – or assistance from a state institution (e.g. Human Rights Commission) may also result in costs.
 - Gathering cash for bail, borrowing money, using savings or paying a bribe are further costs associated with detention.
 - Time is also spent on visits and not on other productive activities
 - Pre-trial detention is therefore not only about losing financial and non-financial contribution, but also about incurring new and unplanned for expenses. Presumably, the longer detention continues, the higher the total of these expenses will be – until the family is forced to cease incurring these expenses in order to survive.

Framework on overall findings

Item	Value ZK	US\$	Percentage
Household income	700.0	\$ 111.11	100.0
Travel cost	120.0	\$19.05	17.1
Other items	23.5	\$ 3.73	3.4
Food	75.0	\$ 11.90	10.7
Total	218.5	\$ 34.68	31.2
Balance of income	481.5	\$ 76.43	68.8

Framework on overall findings

- **Health**

- Found that while large proportions of detainees were ill at the time of arrest, an increased proportion was ill during detention. While this had adverse consequences for them individually during detention, it may also hold longer term consequences for them and the households they return to upon release as it may impact on their socio-economic potential. In this regard, HIV- positive detainees may suffer more severe consequences under poor conditions of detention and limited medical treatment.
- In Kenya 75% of female detainees were either ill at arrest or became ill in prison or both. Of those who were ill at arrest, 69% developed additional illnesses while in prison. Some 77% of male detainees said they subsequently fell ill while in prison. In Mozambique 37% of detainees said they were or became ill during imprisonment; 47% of female detainees and 28% of male detainees.
- Illnesses mentioned were diarrhoea and vomiting (15%), chest pains and pneumonia (12%), malaria (9%), skin diseases (6%), toothache (6%), weakness and headache (6%), backache (3%), and eye problems (3%).

Framework on overall findings

- **Existence of support structures**

- Having a spouse appears to be an important factor. The extent to which a detainee can call upon support structures during detention will have an important impact on their access to food, cash (and bail), medicine, access to legal representation and emotional support. At the same time it was noted that detention had a negative impact on social, family and spousal relations for a large proportion of households.

- **Social impact of detention**

- The strength and health of relationships that detainees have with family members and friends has a significant influence on how they experience detention as this manifests in, for example, frequency of visits, resources brought to the detainee and general emotional support.

Framework on overall findings

- **Exacerbation of impact through fair trial rights infringement**
 - In each of the three countries, infringements of both fair trial and socio-economic rights could be identified. In the three countries concerned, there is evidence to suggest that the failure to adhere to fair trial rights exacerbates the socio-economic impact.
- **Lengthy durations of custody**
 - Kenya - half of those still detained in prison are likely to have been detained for four months or more, while a quarter will have endured 204 days (almost 7 months) or more.
 - Zambia - there is a high turnover of persons spending a short amount of time of remand in Lusaka Central, while at the same time a significant number spend years on remand. The duration of detention ranged from same day release to 1796 days. There was a range of medians for each of the prisons surveyed, ranging from 11 to 112 days.
 - Mozambique - range of 0 to 655 days (1.8 years) with a median of 66 days (2.2 months).

Framework on overall findings

- **Torture**

- The African Charter for Human and Peoples' Rights prohibits torture in Article 5. Torture is defined in Article 1 of the Convention against Torture.
- Kenya 16% of male and 3% of female detainees reported that they had been assaulted whilst in custody. The overwhelming majority of males who were assaulted (80%) said that they were assaulted by prison officials. Of more concern is the fact that only one in five male detainees reported the assault, and that nothing happened as a result of the report. None of the women reported the assault.
- In Mozambique only 4% of detainees interviewed said they had been assaulted while in detention. This was 5% among men and 3% among women. Most commonly identified as the perpetrators were other detainees, followed by police. It is an encouraging finding that such low levels of assault were reported.

- **Unaffordable bail**

- Kenya - 65% of detainees claimed they could not afford the bail amount set by the court and an assessment of these values does lend credence to a claim that bail is set at disproportionate amounts with the an aim to make it unaffordable.



Framework on overall findings

- Mozambique is sketchy as only 20% of male detainees interviewed had an amount for security recorded, which presumably they were unable to afford and thus remained in detention. The amounts ranged from US\$ 319 to US\$ 8240, with a median of US\$ 3800.
- **Access to legal assistance**
 - Kenya 16%
 - Zambia – 26%
 - Mozambique 54%
 - Cost - Kenya this ranged from US\$ 223 to US\$ 3337, and in Mozambique from US\$ 64 to US\$ 792



Conclusion

- The vast majority of pre-trial detainees are generally similar to most other people in their country, and tend to be integrally involved in supporting their families, whether financially or emotionally or in other ways, and enjoy the respect of society. Their absence has a measurable impact, frequently more than halving incomes, depleting savings, often plunging families into debt, and forcing the sale of assets.
- While some may be guilty of crimes, fair trial rights require that their cases be heard without undue delay, and that they be presumed innocent until they are tried and convicted. The evidence in this study suggests that the criminal procedural system metes out a “punishment” in the form of a socio-economic impact on detainees and their families, before conviction, and regardless of guilt or innocence.
- Deprivation of liberty by the state in the attempt to maintain “law and order” has a clear and measureable socio-economic impact on individuals and their dependents which is frequently disproportionate to the alleged offence. States which seek to maximise development should minimise the conditions under which deprivation of liberty is lawful, and seek to reduce the total number of instances of deprivation of liberty, as well as their duration. Prioritising the “strengthening” of criminal justice institutions towards the maintenance of “law and order” is not an appropriate or desirable development intervention in states which lack the resources to ensure appropriate and rights-respecting use of their coercive power, given the inevitable impact of deprivation of liberty on individuals’ ability to ensure their own development. In such contexts state power exerted by criminal justice institutions has a counter-developmental impact and the exercise of such power should accordingly be minimised.



Thank you

