



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

Prosecutors role 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 prosecutors can deal with petty offences² that are not decriminalised under the ACHPR Principles in an alternative way that steers away from criminalisation. 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. 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 arrest and detention for petty offences aimed at prosecutors.

Restorative Justice

Restorative justice is a criminal justice approach focusing on healing and restoration between offenders, victims and the community at large.¹⁴ This approach is different from the retributive criminal justice approach seeking to exert punishment and vengeance on the offender, whereas the restorative justice approach seeks to bring together parties affected by a crime (victims, offenders, families concerned and community members) to commit to a healing process.¹⁵ The restorative justice approach advocates that the world is interconnected, therefore the impact of crime is not only felt by the victim but by the community as a whole.¹⁶ This approach argues that through dialogue and meaningful exchanges, the offender must acknowledge the act committed and show remorse and regret. In turn, the victim must accept to under-go a process of healing by accepting the apology, and receive compensation if appropriate.¹⁷ Furthermore, restorative justice is seen to be a unifying approach rather than a divisive one as it seeks to bring reconciliation between the offender and the victim.¹⁸

Restitution forms part of the restorative justice approach and involves reinstating something that was lost or taken away from a victim by an offender. In other words, it refers to “the payment by an offender to the victim for the harm caused by the offender's wrongful

acts”.¹⁹ Restitution confronts injustice through a process of interactions between the offender, the victim and the community. There are circumstances under which restitution can be ordered either as a ‘stand-alone’ order or as a condition of probation or as a condition of conditional sentence.²⁰ Through restitution, a matured society can emerge as it goes beyond a mere monetary re-payment from offender to victim, but includes a process whereby an offender is able to show remorse and seek forgiveness for his action by reinstating the owner of property or victim of offence with what is rightfully theirs.²¹

The restorative justice approach is not without criticism. Firstly, questions are raised about how equal and just the outcomes of restorative justice processes truly are. Secondly, criticism of the approach is levied at the gaps between theory and practice.²² Notwithstanding these critiques, although restitution does not erase the fact that an offence has been committed, restitution has a number of advantages, primarily that of repairing damages caused by an offender in order to restore a victim to his or her original position.²³ Furthermore, research has found that through the concerted efforts of the victim, offender and the community, the restorative justice approach is a means through which groups are able to empower so called ‘dysfunctional’ communities,²⁴ reduce crime and prevent future re-offences²⁵ to the satisfaction of all.²⁶ Through diversion options such as community service, social interventions, victim-offender mediation, restorative justice offers reparation as opposed to punishment,²⁷ and is an opportunity to divert from the traditional criminal justice system.

Diversion options

Diversion entails re-directing an offender from formal court procedures towards a more informal constructive and positive solution where they face less harsh sanctions.²⁸ While diversion programmes are not only directed at children and young people, they are often used to prevent them from practicing offending behaviour in the future or in cases where they have already been arrested, avoiding prosecution.²⁹ This option requires that offenders accept responsibility for the part that they played in committing an offence, and take the responsibility for correcting their mistakes so that they are able to move forward within the community. At the core of diversion is the aim of preventing re-offending,³⁰ empowering victims and enhancing the involvement of the community in the process of resolving a dispute or problem. By diverting petty offenders away from arrest and detention, one is able to avoid wasting time and cost implications (cost of pre-trial detention). Ultimately, the diversion route is dependent on specific conditions such as:

- The offence is considered as a minor crime (as opposed to a more serious crime).
- The offender admits to the offence and accepts responsibility.
- The offender agrees to the conditions of diversion.³¹

a. Victim-Offender Mediation

A prosecutor may withdraw charges against a suspect on condition that the person participates in Victim-Offender Mediation (VOM) as part of diverting matters out of the formal criminal justice process. This alternative process involves a neutral third person

(usually a qualified social worker) who mediates discussions between an offender and a victim with the view to resolve the dispute.³² The advantage of this option for the victim is that it provides the opportunity for the victim to get closure after the offence.³³ For the offender there is an opportunity to understand the consequences of the offence committed and to gain the necessary forgiveness needed for internal closure.³⁴ The offender also voids further exposure to the criminal justice system and also a criminal record. Furthermore, VOM is an alternative that is less costly and is beneficial in handling cases where first-time offenders are concerned.³⁵ 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.³⁶ 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 91% of offenders being satisfied.³⁷ 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.³⁸ 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 who felt more fearful about being re-victimized.³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴

b. Life skills programmes

Research has shown that many young petty offenders often commit offences as a result of impoverished socio-economic conditions.⁴⁵ 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.⁴⁶ A study on the rehabilitation of prisoners through the use of 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰

c. Family group conferences

In dealing with children and young people, a prosecutor may withdraw charges against a suspect on condition that the person participate in a Family Group Conference, an intervention embedded within the restorative justice framework.⁵¹ This alternative

originated in New Zealand and has been adapted in numerous jurisdictions with the aim of drawing young offenders, their families as well as victims of crime to a discussion on avenues to correct the wrongs that was caused on both the victim and the community.⁵² This option is entrenched in the notion that communities and families can come up with solutions on how 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).⁵³ 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.⁵⁴ The use of conferences instead of detention can play an important role in reducing re-offending due to the active monitoring.

d. Community service

As part of diverting matters out of the formal criminal justice process, a prosecutor can withdraw charges against a suspect on condition that he or she undertake community service. The prosecutor 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.⁵⁵ 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.⁵⁶ 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 the community.⁵⁷ In the Netherlands, community service is usually done for volunteer organizations as the service must be seen as benefiting the community.⁵⁸ Countries such as Kenya, Zambia, Zimbabwe, South Africa and Uganda have made use of community service orders with varying results.⁵⁹ Community service orders requires high level cooperation between different sectors in order to effectively plan, deliver and monitor the orders,⁶⁰ yet, when used correctly, this alternative is beneficial for those who meet the criteria as it reduces the stigma attached to offenders who are able to do work which is useful and not demeaning within a reasonable amount of hours for the community.

e. Good behaviour orders

Another option to be used by a prosecutor for minor crimes is a “good behaviour order”. Good behaviour orders are ‘orders issued in the prescribed manner, requiring a person to abide by an agreement made between the person and his or her family to comply with certain standards of behaviour’.⁶¹ 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.⁶² In addition, the offender continues to live and work unsupervised within the community without the stigma associated with having committed an offence.⁶³

f. Referral to social or rehabilitation programmes

A prosecutor can withdraw the charges against a suspect on condition that the person participates and completes an educational programme, mental health care, substance abuse treatment, job training, counselling, and mentoring programmes as an alternative to prosecution.⁶⁴ 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 prosecutor can also refer the offender to rehabilitation facilities (drug or alcohol rehabilitation centres).⁶⁵ 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.⁶⁶ As such, the referral to a social or rehabilitation programme is important as this offers offenders an opportunity to deal with underlying issues.

Conclusion

This factsheet highlighted alternative options that a prosecutor can agree to with regard to petty offences. The factsheet advocates that diversion options embedded in the restorative justice approach are well-suited to deal with minor crimes as they allow offenders to take responsibility for their offences without going in deeper into the criminal justice system with the risk of conviction and detention. The restorative justice process also offers victims an opportunity to heal and receive closure from their offenders through options

such as Victim-Offender Mediation and Family Group Conferences.

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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).

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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.

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²¹ Schneider, H. (1991) Restitution instead of punishment – Orientation of crime prevention and criminal justice in the context of development, *Acta Criminologica*, Vol 4 No.2, p.22.

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²⁶ Braithwaite, J. (2003), pp.320, 328, 340.

²⁷ Consedine, J. (2003), p.3.

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