

# Constitutional compliance with international law and the criminal justice process in Africa

A comparative perspective

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## International law, constitutions and criminal justice rights

- Ratification of international human rights instruments in the second half of the 20th century; recognition of criminal justice rights (arrest, trial, detention)
  - UDHR, ICCPR, UNCAT, OPCAT, AChHPR
- Adoption of new constitutions at the end of the 20th century
  - Burundi (2005), Côte d'Ivoire (2016), Kenya (2010), Mozambique (2004), Zambia (1996)
    - Anglophone, Francophone, Lusophone
    - Civil law and common law tradition
      - Monist and dualist
      - Adversarial and inquisitorial approaches to criminal justice



## Constitutional framework

- Examining constitutions only
- How do constitutions reflect international law?
  - How do they regulate the criminal justice process?
- Direct or indirect recognition
- Possible limitations
  - Interpretation clauses
  - Limitation clauses
  - Internal qualifiers



## Legal traditions and their impact on criminal justice rights

- Monism vs dualism
- Different approaches to criminal justice



## Monism vs dualism

- Status of international law following ratification of an international treaty differs
  - Monist countries: Burundi, Côte d'Ivoire, Kenya, Mozambique
  - Dualist country: Zambia
- Which impact here?
- Supremacy of the constitution



## Approaches to criminal justice

- Inquisitorial approach (civil law countries) vs adversarial approach (common law countries)
  - Differences are fading but nevertheless remain present
- Which impact here?



## Arrest

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Prohibition of arbitrary or unlawful arrest	+	+	+	⤴	+	⤴
Prohibition of abuse of force while effecting arrest	+	+	+	+	+	⤴
Right to remain silent and privilege against self-incrimination	-	-	-	+	-	-
Right to be informed of reasons for arrest	+	-	+	+	-	+



## Police custody

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Prohibition of arbitrary or unlawful detention	+	+	+	+	⤴	+
Right to be informed of reasons for police detention	-	-	+	⤴	+	⤴
Right to be promptly brought before a judge (habeas corpus)	+	-	-	+	+	+
Right to safe police custody	+	⤴	+	+	⤴	⤴
Right to communicate with a lawyer	-	-	-	+	+	+
Right to remain silent, presumption of innocence and privilege against self-incrimination	-	-	-	+	-	-



## Trends on arrest and police custody

- Prohibition of arbitrary/unlawful arrest and detention and the prohibition of torture and other ill-treatment almost systematically recognised;
- Weak informational rights;
- Weak protection during police interrogation;
- The short duration of arrest and police custody should not excuse the weak protection of arrestees and of those in police custody.



## Fair trial rights

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
General reference to the right to a fair trial	+	+	+	+	+	+
Principle of legality	+	+	+	+	+	+
Right to the presumption of innocence	+	+	+	+	+	+
Right to be informed of the charge	+	-	-	+	-	+
Protection against double jeopardy	+	-	-	+	+	+
Right to a speedy trial	+	+	+	+	-	+



## Fair trial rights (cont'd)

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Right not to be detained on remand	+	-	-	+	⤴	⤴
Right to legal representation	+	+	+	+	+	+
Right to be tried and sentenced in an open court	+	+	-	+	+	+
Right not to be tried in absentia	+	-	-	+	-	+
Right to an interpreter	+	-	-	+	-	+















## Evidence during trial

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Right to present and challenge evidence	+	-	-	+	-	-
Right to have evidence obtained under torture excluded	+	-	-	+	+	-
Right to remain silent and privilege against self-incrimination	+	-	-	+	-	+



## Sentencing

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Prohibition of the death penalty						
Right to review or appeal one's sentence						



## Trends in relation to trial

- Much wider basis for rights in international law;
- Right generally better upheld in common law countries;
- Several universally upheld rights: fair trial, principle of legality, presumption of innocence, right to legal representation;
- Informational rights remain weak.



## Detention

Right	Intl law	BUR	CdI	KEN	MOZ	ZAM
Prohibition of arbitrary or unlawful detention	+	+	+	+	⤴	+
Informational rights	-	-	+	+	+	+
Right to safe custody	+	⤴	+	+	⤴	⤴
Right to be separated	⤴	-	-	-	-	-



## Trends in relation to prison detention

- Overall, weak international and constitutional protection.
- Even legislation remains problematic in many countries: solitary confinement, hard labour, corporal punishment, no rehabilitation programmes, weak oversight, issues around release at the end of a sentence.





## Overall trends

	ALL RIGHTS	KEN (2010)	INTL LAW	ZAM (1996)	COUNTRY AV.	MOZ (2004)	CdI (2016)	BUR (2005)
Arrest	4	3,5	3	2	2,5	2	3	2
Police custody	6	5,5	3	4	3,6	4	3	1,5
Trial	16	15	15,5	11,5	9,6	8,5	6	7
Detention	4	3	2,5	2,5	2,4	2	3	1,5
<b>Total</b>	<b>30</b>	<b>27</b>	<b>24</b>	<b>20</b>	<b>18,1</b>	<b>16,5</b>	<b>15</b>	<b>12</b>



## Overall trends (cont'd)

- Neither the monist or dualist nature of a legal system could explain its incorporation of international criminal justice rights in its constitution;
- To a certain extent, the inquisitorial or adversarial approach to criminal procedure could explain a country's incorporation of criminal justice rights in its constitution;
  - On average, common law countries uphold more rights
  - Kenya supersedes international law
- Generally, weak rights before first court appearance and weak informational rights;
- Generally, very little judicial activism to uphold these rights, especially in civil law countries.



Thank you

