

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
Total	30	27	24	20	18,1	16,5	15	12



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

