



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



# Criminal justice, human rights and COVID-19 - a comparative study of measures taken in five African countries

The impact on and performance of oversight and monitoring mechanisms

Lukas Muntingh, 13 Oct 2021



UNIVERSITY of the  
WESTERN CAPE



# Introduction

- At the core of prison and detention monitoring lie visits by external persons. People deprived of their liberty, are almost entirely dependent on the administration for their well-being - they are not permitted to leave the prison if one or more of their needs are not met.
- Advancing transparency through monitoring and visits by independent persons has the aim to promote compliance with minimum standards and to deal with challenges and problems in a proactive manner.
- UNSMR guarantees regular visits by family members and friends to prisoners as well as largely unrestricted access to legal representatives. Access to legal representative - ICCPR and ACHPR. The UNSMR also acknowledges that the deprivation of liberty is 'afflictive' and that it should not be made worse:
  - Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
- Distinction can be made between informal and formal monitoring and oversight.
  - informal monitoring through visits by families, friends, religious workers and legal representatives all play an important role. Even if not a formal mandate to monitor and exercise oversight, they are important in communicating what is happening behind the prison walls.
    - Access to telecommunications - landline infrastructure is deteriorating where it exists and being replaced with cellular technology, but mobile phones generally prohibited in prisons.

# Introduction

- Formal monitoring refer to dedicated prison monitoring mechanisms, such as the Judicial Inspectorate for Correctional Services (JICS) in South Africa, the courts and more generally human rights commissions (or National Human Rights Institutions) in the countries surveyed also form an essential part of the criminal justice and human rights landscape.
- Two countries surveyed (Mozambique and South Africa) have OPCAT and designated NPMs
- Focus here on the restrictions placed on formal and informal mechanisms for monitoring prisons and the observations would also apply to other places of detention and questions the long-term suspension of visits to prisoners.
- States responded differently, even though the threat was the same and the guidance from international bodies (e.g., WHO) applied to all.
- COVID-19 pandemic reaffirmed existing and longstanding problems in African prison systems, but also more broadly the administration of criminal justice.
- Important to take lessons forward to present a better response in the future to a similar threat and strike a better balance between competing rights.

# Informal oversight and monitoring

- Visits by families and friends to prisoners form an essential lifeline for the overall well-being of many, if not most, prisoners by providing emotional and physical support and being a route of communication to the outside world. Also food, medicine, toiletries, bedding and clothing to prison to address the shortages where the state is failing.
- Landline telephones are increasingly the exception and mobile phones generally prohibited; In-person visits remain in many regards the mainstay of communication between prisoners and their families.
- Enjoying the support of a family gives a sense of belonging and often a purpose to work towards or hold on to whilst imprisoned. Especially for those awaiting trial, family support plays a critical role at a time of great uncertainty.
- Suspending visits by family members would result in heightened anxiety, frustration and isolation amongst prisoners.
- The suspension of visits by family members due to COVID-19 did result in heightened tensions and in both South Africa and Malawi there was talk of prisoner protests
- Visits by family members and friends are in many instances also the only way how information about what is happening inside prison reaches the outside world and, importantly, reaches the ears of human rights defenders, journalists and politicians.

# Informal oversight and monitoring

- The extent of restrictions on family visits especially for the most part of 2020 ranged from the most severe banning all visits by any external people to prisons (such as in South Africa and Kenya) to
  - restrictions on the number of visitors at a time (e.g., Zambia).
  - Mozambique - family visits were suspended, but family members could leave parcels for prisoners at prisons, but since mid-August 2021 prisoners can receive a visit from one person per month.
  - Zambia, family members could leave items including cash and raw food.
  - Malawi, all visits by family members were suspended and this remains the case at the time of writing (Aug 2021), but visits by lawyers and paralegals continued.
- Suspending visits by family members may have served the purpose of reducing the perceived risk at the time of transmitting the virus to the prison population and this would be a valid objective when assessed against a rights limitations analysis. **BUT**, the impact severity of such a limitation needs to be assessed against the duration of the limitation, the mental and physical effects of the limitation on the prison population as well as the personal characteristics of the affected prisoners (e.g. age, sex, health conditions and so forth).
- A general limitation applicable to all prisoners for a short period of time may pass a limitations test, but the longer in duration the limitation, it would follow the more onerous the obligation becomes on the state to justify such a continued limitation.
- Is the limitation is proportional to the objective it seeks to achieve? Such a justification needs to take into account, for example, if the prisoner is a child or a mother with children, or a person with mental health concerns and so forth. Impact of long-term suspension of family visits has been identified as an important mental health concern for prisoners in Kenya.
- A prolonged blanket restriction should ultimately not survive judicial scrutiny.

# Informal oversight and monitoring

- The argument can, however, be made that given the exceptional circumstances of a restriction on in-person visits that all efforts ought to be made for other means that prisoners can have contact with their families. In developed countries internet access and email can enable this easily, and the availability of mobile phones in Africa would also have enabled it.
- Suspending visits by family members to prisoners also removes an important resource from the hands of prison managers, i.e. disciplinary restrictions.
  - SA: JICS reported a near-doubling in the number of reported cases of use of force by officials in the period April to June 2020 from 123 cases in the preceding quarter to 237 cases thereafter declined
- A meta-analysis of existing research on the topic found that frequent family visits to prisoners have a positive impact on behaviour of prisoners, reduces rule-breaking and may even reduce the risk of reoffending (De Claire & Dixon)
- Two other informal mechanisms exist.
  - NGOs rendering service to prisoners typically provide some type of service to prisoners or the prison as institution e.g. health care, religious services, human rights education, education, training and therapeutic services. Typically, their focus is not per se on monitoring conditions of detention or the treatment of prisoners, but they do receive information from prisoners through their interactions and their staff also observe what is happening in prisons.
  - Lawyers visiting their clients in prison are in a similar position as they may also receive information and make observations, even if they do not have access to the cell areas of the prison.
  - In Mozambique visits by lawyers continued although visits by family members were suspended. This stands in contrast to South Africa where visits by all external parties were suspended, including lawyers. In the case of lawyers, telephonic consultations were permitted, but subject to urgency and the availability of infrastructure with the permission of the Head of Centre.

# Informal oversight and monitoring

- In summary *on informal monitoring and oversight*, it can be concluded that
  - a temporary and clearly defined restriction of a relatively short duration would in all likelihood pass a limitations test.
  - Such a restriction would further be made more acceptable through a careful risk assessment identifying specific risks (e.g., contact versus non-contact visits) and implementing ameliorating measures, such as increased access to telephones.
  - In SA there should never have been any restriction on access to legal representatives since telephonic contact and non-contact visits pose no risk of transmission. Non-contact visits also enable the physical inspection of the person even if it is from a metre or two away.
  - The blanket suspension of all visits (or even only family visits) may have been an over-reaction in hindsight and better risk - assessment, the implementation of ameliorating measures to enable some form of family contact, and adhering to health protocols in a dynamic manner, should be considered for the future.

# Formal oversight

- In mid-March 2020 WHO issued guidelines on dealing with the COVID-19 pandemic and cautioned as follows:
- The COVID-19 outbreak must not be used as a justification for objecting to external inspection of prisons and other places of detention by independent international or national bodies whose mandate is to prevent torture and other cruel, inhuman or degrading treatment or punishment; such bodies include national preventive mechanisms under OPCAT, SPT and ECP.
- SPT issued a public advice emphasising that:
  - even if visits are affected, it does not mean it should stop;
  - the potential exposure to the risk of ill-treatment faced by those in places of detention may be heightened due to public health measures being taken;
  - it must be ensured that effective measures are taken to reduce the risk of detainees suffering ill treatment due to pressures on detention systems.
- Even though the SPT's focus is on states parties to OPCAT, the issues raised are in line with the general obligations to prevent and eradicate torture and other ill treatment provided for in UNCAT (see in particular Articles 2 and 16) and to which the countries surveyed are all states parties to.
- The lockdown measures appear to have had a profound impact on at least three spheres of formal monitoring and oversight in some countries (a) the functioning of the courts; (b) functioning of designated oversight structures (i.e., the NPMs in Mozambique and South Africa), (c) functioning of the legislatures as monitoring and oversight structures.

# Formal oversight

- In respect of the **functioning of the courts**, the most severe restrictions were imposed in SA (Levels 5 and 4 (27 March to 31 May 2020)) - courts would only deal with urgent matters and cases related to COVID-19, and all other matters where accused persons are in custody would be remanded in their absence.
  - CJ left it to judicial officers to determine what priorities are, thus opening the door for varied interpretations.
  - Brought the criminal justice system to a standstill for at least two months, creating a backlog and added to the time suspects remained in custody.
- Mozambique - fewer staff on duty at any one time at the courts presumably to make social distancing easier; no case prioritisation and the reduction in capacity affected all matters; reduced capacity remained in force until further notice (the time of writing (Aug 2021)). Anticipated that the reduced capacity will in time create a backlog.
- Zambia - subordinate courts continued to deal with criminal matters as per usual, but civil matters were affected.
- Malawian - implemented a system of rotation whereby different grades of magistrates would be available at different times. Anticipated that this would have resulted in delays.

# Formal oversight

- Courts are the custodians of the fair trial rights articulated in international law and domestic constitutions.
  - a trial must occur in an open court (unless there are exceptional circumstances), the appearance of the accused in open court serves an important protective function since the presiding officer can engage with the accused and make physical observations as to their well-being and state of health, and also enquire as to his or her treatment and conditions of detention; generally within the court's powers to review continued detention and order the conditional or unconditional release of the accused.
  - It means that courts fulfil a vital monitoring and oversight function over the use and nature of detention, as well as the treatment of those detained.
- In SA, it then appears that these important protective powers of the courts were effectively suspended for at least two months at the stroke of a pen by the Minister responsible through Regulations issued and subsequent directives from the Chief Justice.
- In Malawi, Mozambique and Zambia it seems this protective function was diluted by reducing the number of officials at court and the capacity to deal with criminal matters.

# Formal oversight

- A number of designated oversight structures were identified.
  - Mozambique and South Africa, have ratified OPCAT and designated a NPM (NHRI)
  - SA has JICS which is tasked with inspecting and reporting on the treatment of and conditions of detention of prisoners in the custody of the Department of Correctional Services.
  - JICS was not included in the list of essential services gazetted in March 2020 and effectively then prevented any further monitoring of prisons by JICS until a change was affected some three months later.
  - Other structures under the NPM also failed to implement monitoring activities.
- Kenya police oversight structure in the Independent Policing Oversight Authority (IPOA) which, amongst others, conducts inspections of police premises.
- Malawi, the Inspectorate of Prisons is mandated to monitor and inspect both prisons and police cells, but it is an unfunded mandate and dependent on donor funding, resulting in infrequent activities.
- Mozambique's National Human Rights Commission was also not able to conduct monitoring visits since it is also, as in the case of Malawi, dependent on donor funding for monitoring visits.
- The overarching impression is then that even where designated oversight structures exist, these were either actively prevented for doing their work, or a lack of resources had the same result.

# Formal oversight

- It is the norm that **Members of Parliament** are empowered to visit places of detention but evidence could not be found that MPs stepped in to fill the gap left by the absence of other oversight structures. Resource constraints may also have played a role.

# Conclusion

- States responded differently to limit the spread of COVID-19 to prisons in as far as visits and oversights were concerned - ranged from suspending all visits (and even restricting telephonic communication between lawyers and their imprisoned clients), to permitting visits from lawyers and paralegals. Visits by families to prisoners were restricted in all states and remain so to some degree.
  - There is little doubt that not only have prisoners suffered an additional burden in the absence of family support, but that family visits as a means of informal oversight and a means of communication, suffered great damage and made prisons less transparent.
  - The extent to which this enabled or permitted rights violations is unknown, but it can be assumed that the developments were regressive as measured against commonly accepted principles for transparent and accountable prison administrations.
- Statutory structures established for the very purpose to continue monitoring and oversight did not rise to the occasion.
  - This was a result of either being excluded by law to perform their duties, or being so constrained by resources that they could not perform their functions at a time when it was sorely needed.
- Articles 19 and 20 of OPCAT set out the powers of the NPM, emphasising the power to regularly examine the treatment and conditions of detention of people deprived of their liberty and access to all places of detention.
- The Protocol does not place any limitation on the powers of the NPM in this regard and certainly not that access may be denied by means of a ministerial directive, as happened in South Africa.

# Conclusion

- In respect of the powers of the Sub-Committee for the Prevention of Torture (SPT), Article 14(2) of OPCAT does provide for the following under exceptional circumstances:
  - Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.
  - Articles 19 and 20 contain no such provision in respect of the NPM as Nowak and McArthur conclude as follows on the issue: "The grounds of public safety or natural disaster, as foreseen in Article 14(2) in relation to a visit of the Subcommittee, could certainly not be invoked as a reason for denying a NPM access to a detention facility."
- Not including JICS as part of essential services in South Africa was consequently a serious departure from the State's obligation under OPCAT.
- Exposed old weaknesses and shortcomings of prisons in Africa, leaving prisoners vulnerable to a range of rights violations on a systemic scale.
- Requires a more creative response than just falling back on locking the prison gates and keeping everyone out.
- A rights-based response requires drawing on technology, practical solutions and also addressing the old shortcomings of collapsing infrastructure and underfunded prison mandates.

Thank you

