Routledge Studies on Law in Africa

# CRIMINAL JUSTICE REFORM IN SUB-SAHARAN AFRICA

## BEST PRACTICE FROM SELECTED JURISDICTIONS

Edited by
Adedeji Adekunle, Suzzie Onyeka Oyakhire
and Osatohanmwen Eruaga

# Criminal Justice Reform in Sub-Saharan Africa

This book considers the challenges faced within criminal justice systems across a range of African jurisdictions, identifying recent efforts at reform, and highlighting instances of best practice.

Most African countries continue to experience issues of unlawful pre-trial detention, human rights abuses in prisons, long periods of awaiting trials, and prolonged criminal trials. The presence of these issues mars criminal justice processes and judicial oversight functions, and risks feeding corruption and increasing risks of torture, as well as negatively impacting suspects, their families, and communities. Drawing on insights from African academics, judges, and legal practitioners, this book considers recent criminal justice reforms across Burundi, Congo, Ghana, Kenya, Nigeria, Rwanda, and South Africa. Authors focus on best practice for managing pre-trial detention, implementing effective non-custodial measures, expediting trials, and exploring the role of restorative justice in criminal justice administration.

The comparative insights and best practice for reform implementation highlighted in this book will be useful for legal and criminal justice researchers, as well as legal practitioners and policymakers working on criminal justice reform in sub-Saharan Africa.

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**To all who strive for justice and the rule of law in Africa.**

# Contents

# Preface

Writing on criminal justice reform from a national perspective is itself a demanding task, and extending the discussion across multiple jurisdictions in sub-Saharan Africa is even more so. The chapters in this book originated from presentations at a Conference on the Reform of Criminal Justice Administration in Africa which convened a diverse body of academics, practitioners, judges, and policymakers. The purpose of compiling these chapters is to highlight legislative and judicial developments in the criminal justice systems of selected African countries, while demonstrating their significance to the realisation of sustainable strategies on access to justice and strengthening justice institutions in accordance with the United Nations Sustainable Development Goal 16 (UN-SDG #16-Peace, Justice, and Strong Institutions).

In conceptualising this book, an initial challenge lay in determining the scope and form of the case studies to be included. While it is true that African countries operate diverse systems of both substantive and procedural criminal law, they also share notable similarities in core principles such as the presumption of innocence, pre-trial detention, the admissibility of confessional statements, and ongoing efforts to digitise proceedings and case management systems. The question of what constitutes ‘reform’ was also carefully considered: should the focus of the studies be limited to statutory amendments, many of which remain untested, or should shifts in judicial interpretation and practice also be examined? Ultimately, the chapters represent a valuable mix of both approaches, while also drawing attention to gaps within the frameworks examined.

The editors hope that the insights drawn from these selected jurisdictions will offer meaningful lessons for other African countries faced with the persistent challenges of criminal justice administration and reform. This book is intended not only for scholars of criminal law and justice systems but also for policymakers, practitioners, and civil society actors committed to advancing reform.

The editors take responsibility for any errors or inaccuracies that may be found in the work.

Adedeji Adekunle, *SAN*
Suzzie Onyeka Oyakhire
Osatohanmwen Eruaga
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We extend our sincere thanks to all contributors for their dedication to this project. Their chapters reflect both rigorous scholarship and a shared commitment to advancing reform in criminal justice systems across Africa.

We further wish to acknowledge the reviewers who carefully assessed the book proposal, the abstracts, and book chapters. Their constructive feedback and insightful suggestions greatly enhanced the quality, coherence, and scholarly value of the book.

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We wish to thank our commissioning editor, editorial assistant, and the editorial team at **Routledge** for their guidance, patience, and professionalism throughout the review and publication process.

# Abbreviations

| | |
|---|---|
| ACHRP | African Charter on Human and Peoples’ Rights |
| ACJA | Administration of Criminal Justice Act |
| ACJL | Administration of Criminal Justice Laws |
| ACJMC | Administration of Criminal Justice Monitoring Committee |
| ACJR | African Criminal Justice Reform |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| ADR | Alternative Dispute Resolution |
| ATP | Awaiting Trial Persons |
| AU | African Union |
| CCAS | Court Case Administration System |
| CCP | Code of Criminal Procedure |
| CFRN | Constitution of the Federal Republic of Nigeria |
| CIDT | Cruel, Inhuman and Degrading Treatment |
| CJ | Chief Justice |
| CJA | Child Justice Act |
| CNDH | National Commission on Human Rights (DRC) |
| CPA | Criminal Procedure Act |
| CRA | Child Right Act |
| CRC | Committee on the Rights of the Child |
| CSO | Civil Society Organisations |
| DCC | District Coordination Committee |
| DPP | Director of Public Prosecutions |
| DRC | Democratic Republic of Congo |
| DVA | Domestic Violence Act Ghana |
| ECCM | Effective Criminal Case Management Project |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EFCC | Economic and Financial Crimes Commission |
| EM | Electronic Monitoring |
| FCT | Federal Capital Territory |
| FHRI | Foundation of Human Rights Initiative |
| FIDA | International Federation of Women Lawyers |
| GOU | Government of Uganda |

| | |
|---|---|
| HGS | Home Grown Solutions |
| HRC | Human Rights Council |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPC | Independent Corrupt Practices and Other Related Offences Commission |
| ICTR | International Criminal Tribunal for Rwanda |
| IECMS | Integrated Electronic Case Management System |
| IHDRA | Institute for Human Rights and Development in Africa |
| JAMB | Joint Admission and matriculation Board |
| JCU | Justice Centres Uganda |
| JLOS | Justice Law and Order Sector |
| LACoN | Legal Aid Council of Nigeria |
| LDC | Law Development Centre |
| KPS | Kenya Prisons Service |
| NACA | National Agency for the Control of Aids |
| NCS | Nigerian Correctional Service |
| NDLEA | National Drug Law Enforcement Agency |
| NGO | Non-Governmental Organisation |
| NICRO | National Institute for Crime Prevention and the Reintegration of Offenders |
| NPPA | National Public Prosecution Authority |
| NPS | National Police Service |
| NJC | Nigerian Judicial Council |
| ODPP | Office of the Director of Public Prosecution |
| OSF | Open Society Foundations |
| PALU | Pan African Lawyers Union (PALU) |
| PAT | Persons Awaiting Trial |
| PCPRD | Presidential Committee on Prisons Reforms and Decongestion |
| PRAWA | Persons Awaiting Trial |
| PDSS | Police Duty Solicitor Scheme |
| PMS | Performance Management System |
| RCC | Regional Coordination Committee |
| RCS | Rwanda Correctional Services |
| RIB | Rwanda Investigation Bureau |
| RPF | Rwandese Patriotic Front |
| SBS | State Brief Scheme |
| SDGs | Sustainable Development Goals |
| SGBV | Sexual and Gender-Based Violence |
| ULS | Uganda Law Society |
| UN | United Nations |
| UNCAT | United Nations Convention Against Torture |
| UDHR | Universal Declaration on Human Rights |
| UNDP | United Nations Development Programme |

| | |
|---|---|
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children's Fund |
| UNODC | United Nations Office on Drugs and Crime |
| US | United States |
| VAPPA | Violence Against Persons Prohibition Act |
| VPA | Victim Protection Act (Kenya) |
| WAEC | West African Examination Council |

# Notes on Contributors

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# Introduction

## Re-Shaping Criminal Justice Systems: Going Beyond Legislation

*Adedeji Adekunle, Suzzie Onyeka Oyakhire, and Osatohanmwen Eruaga*

This book explores contemporary reforms in criminal justice administration across selected sub-Saharan African countries, with particular reference to Nigeria, Rwanda, Kenya, South-Africa, and Burundi. Recent legislative developments within these jurisdictions signal a gradual shift from purely retributive models of justice to restorative and rehabilitative approaches aimed at promoting transparency, accountability, and efficiency. The book is organised around three major themes: effective management of pre-trial detention, mechanisms for achieving speedy trials, and the adoption of restorative justice and non-custodial measures. Through comparative analysis and case studies, contributors examine the extent to which these reforms have improved justice delivery and the challenges that continue to impede their implementation. Particular attention is given to the interplay between law, institutional capacity, and resource allocation, as well as to emerging questions surrounding the use of technology in criminal justice processes. Ultimately, the book argues that meaningful reform extends beyond legislative change. It requires sustained institutional commitment, adequate funding, and the reorientation of justice sector stakeholders. By documenting reform experiences across diverse jurisdictions, this book offers valuable insights for policymakers, scholars, and practitioners seeking to strengthen criminal justice systems in Africa.

### Introduction

This book documents current legal developments in criminal justice administration in some sub-Saharan African countries. These countries share a common heritage of a criminal justice system designed by colonialists which has proved inadequate to resolve chronic lapses in the system such as opacity, abuse of discretion, overcrowding of detention and correctional facilities, and the slow pace of trial. Beginning in the last decade, some countries in sub-Saharan Africa such as Nigeria, Rwanda, and Kenya introduced new provisions that signalled important shifts from purely retributive penal systems to a blend of restorative and rehabilitation models.

These provisions sought to address major challenges by reforming the bail system, arrests and detention protocols, and a range of measures designed to decongest court dockets and custodial institutions. Nigeria, for example, repealed the Criminal Procedural Law which had been in operation since its independence in 1960 and introduced an Administration of Criminal justice Act 2015 (ACJA) with more emphasis on restorative criminal justice system. In addition to this, the ACJA introduced timelines for certain pre-trial and trial actions (including remand cases), prohibited stay of proceedings for interlocutory applications, introduced video recording of confessional statements, formalised plea bargain procedures and established a committee of stakeholders to drive and coordinate implementation.

In the case of Rwanda, the Criminal Procedure Law has since 2004, when the post-colonial code of 1963 was repealed, undergone reform twice, i.e., in 2013 and 2019. The 2013 law[1] restricted the Judicial Police to investigation and vested exclusive prosecutorial duties on a National Prosecution Service. It also introduced non-custodial alternatives to imprisonment and tasked the prosecutor with exploring alternatives to prosecution in favour of amicable settlement with the victim in appropriate cases. The 2019 law formally introduced plea bargain, electronic means of service and hearings, as well as specific time limits for taking some procedural steps such as arraignment and remand.[2] Contrastingly, Ghana has retained the 1960 Criminal Procedure Act with minor amendments. However, in 2022 it introduced plea bargaining and other reforms.[3]

Reform measures, however, must be complemented with human and material resources in order to strengthen institutional capacity and processes. A common feature of law making in many countries in sub-Saharan Africa is the scant attention paid to budgetary adjustments that should accompany reform. In Nigeria, for example, resourcing the activities of the Administration of Criminal Justice Monitoring Committees at the federal and state levels has been problematic thus frustrating the objectives of the ACJA. Similarly, overpopulated custodial institutions in many countries and inadequate facilities for inmates raise doubts as to the extent that any meaningful attention is being paid to the rehabilitation of inmates.

Low human capacity and negative perceptions can also affect reform measures. Sensitisation and orientation of practitioners and judges who are users of a newly introduced scheme are important steps for a successful implementation. For example, in countries like Nigeria, lawyers and judges schooled in the adversarial tradition viewed with reservation some of the new measures (such as case management, remand proceedings, and restorative orders) which require that judges should exercise firmer control over pre-trial and trial proceedings or which entrusted magistrates to oversight detention facilities through visits and inspection of such facilities.[4] Notwithstanding these challenges, criminal justice indeed of any branch of law is dynamic and necessary changes will have to be made. One area of growing concern is the extent to which procedural laws accommodate the deployment of technology in the criminal justice system particularly in such key areas like digital evidence, predictive law enforcement, case management, and monitoring and evaluation of rehabilitation or parole. Whatever reformative measures are proposed, legislators and policymakers will find some of the insights and criticisms contained in this book useful.

### *About the Book*

The book examines critical themes that are the hallmarks of reform in the countries discussed. In terms of perspectives on the subject, this book is international and comparative. The book, therefore, provides comparative experience of countries that are going through or have recently undergone some reformative process in their criminal procedure legal framework. The narration and analyses of such experiences contained in this book aimed at enhancing the implementation of newly introduced concepts and measures in the various countries. The chapters explore how different legal systems have modified their laws and progressed with implementation. The chapters mainly focus on a particular jurisdiction as case studies; however, analyses therein are of relevance to other jurisdictions. The book is structured around three main themes that are central to criminal justice systems and comprises 14 chapters. Part 1 is concerned with effective mechanisms for the management of pre-trial detention. Part 2 examines the mechanisms for actualising speedy trials, and Part 3 examines issues around restorative justice, decriminalisation, and the implementation of non-custodial measures. These categorisations address the highlights of the reformative provisions in the criminal justice administration legal framework of most of the countries represented in the book.

### *Part 1: Effective Mechanisms for the Management of Pre-Trial Detention*

Excessive recourse to custodial detention at pre-trial as well as post-conviction stages is one of the undesirable hallmarks of criminal justice systems in sub-Saharan Africa. The lack of reliable mapping or tracking tools makes it highly unlikely that suspects who are arraigned for serious charges, and are on bail, will be present for their trial. Apart from the suspects that have been remanded in custodial facilities pending trial, there are also suspects arrested and detained by the police and other law enforcement agents. The need to moderate police powers of arrest and detention motivated legislative measures in Nigeria which mandated magistrates to visit police cells and other detention facilities and enquire into the status of persons being detained therein. This part will also discuss other strategies employed by other countries like Rwanda, Burundi, and Kenya to curb pre-trial detention powers and safeguard the suspects' right to the presumption of innocence and a fair trial.

In Chapter 1, Francis Enobore Osagiede reviews pre-trial detention powers in Kenya, Congo, and South Africa. It is followed by an assessment by Dr. Germain Ntawuyamara in Chapter 2 of the management of pre-trial detention in Burundi. The two chapters bring home several points – firstly, that on a global scale, persons detained while under investigation or without a remand order conservatively account for one-third of persons awaiting trial. Secondly, in all the countries studied, pre-trial detention is routinely done by the police, and prolonged detention is a function of poor judicial supervision and poor case management. It is of course worrisome that the police should view the detention of suspects while under investigation as routine. More worrisome are the restrictive bail conditions imposed by the courts which in essence render the right to bail illusory.

In Chapter 3, Oluwafunke Adeoye introduces the role of technology in reducing pre-trial detention. Here, emphasis is placed on the use of technology in judicial processes, which is increasingly prevalent in Africa. Drawing on Kenya's example, the chapter highlights how court automation and other digitisation efforts can reduce pre-trial detention. The chapter also acknowledges challenges in digitising Africa's criminal justice processes, such as infrastructural gaps, resource constraints, and limited technical capacity. Chapter 4 concludes the discussion in Part 1. Here, Dr. Dennis Bikesha highlights how Rwanda employed a variant of the traditional system of dispute resolution – *gacaca* – to manage the huge case load of suspects arrested by domestic authorities for genocide and related offences. While observing that as a rule recourse to detention is last resort, Dr. Bikesha also cited the use of habeas corpus as the main arsenal suspects have against unjust detention in Rwanda.

### *Part 2: Mechanisms for Speedy Trials in the Criminal Justice Systems across Sub-Saharan Africa*

Delays in trials have in many countries led to prolonged pre-trial detention, overcrowded prisons, and violation of the right to a fair trial. Often a symptom of judicial corruption and inefficient manpower, countries are striving to devise sustainable strategies on access to justice and strong institutions for justice pursuant to Goal 16 of the United Nations Sustainable Development Goals. By identifying common attributes of the mechanisms discussed by contributors, this publication demonstrates their widespread acceptability and the potential for sustainability and institutionalisation. For example, one of the newer but common threads discernible in the criminal justice framework of many sub-Saharan countries is the increasing role of the judiciary (magistrates) in the supervision of pre-trial detention. Unannounced visits by magistrates to detention facilities were unknown in the common law systems but under Nigerian law this is now required.[5]

The typical solution in many sub-Saharan countries has been to increase the number of judges but as demonstrated in the case of Nigeria, recruiting more judges with adequate infrastructure and skills has not reduced court dockets nor quickened the pace of trial. The contributors of chapters to this part concentrated mainly on timelines prescribed by the law for conducting proceedings or discharging some other administrative tasks like bringing suspects before a court or providing legal opinions on the justification for an arrest. A salutary reminder that delays in trial are not peculiar to Africa is provided in Chapter 8 by Rita Ititim. An examination of trial delays reveals a striking similarity in the underlying causes between a country like the Netherlands and many countries in sub-Saharan Africa. However, the magnitude of these delays is significantly greater in the latter, a disparity that can be attributed, in part, to weaker institutional frameworks and less effective procedural mechanisms for addressing such challenges. The interrelationship between rules and provisions of procedural law and the fundamental human rights of suspects or defendants is explored by Judge Eva Luswata in Chapter 5. Although the author draws from her experience as a judge in Uganda, the challenges are remarkably similar in the sense of the dilemma that trial courts confront when a constitutional breach is raised in the courses of trial. Except in few defined cases trial has proceeded as the court has traditionally distinguished the constitutional issues from issues of criminal liability.

In Chapter 6, Asma'u Muhammad Sulaiman examines the issue of objections to the admissibility of a confession on the grounds that it was involuntarily procured. The Nigerian approach to the issue, which is no more than an interlocutory objection, is that a trial within trial is sacrosanct to determining the voluntariness or otherwise of a confession. Any trial conducted and concluded without a trial within trial when voluntariness of a confessional statement is in issue is a nullity and the same will be set aside by the appellate courts. The trial within trial procedure is usually a veritable source of delay as it involves stopping the main trial and commencing a mini trial (including the calling of witnesses) to determine the voluntariness or otherwise of a confession. The author compares the law in Nigeria with the laws of other sub-Saharan African countries such as South Africa, Botswana, Kenya, and Uganda and concluded that with the passing of the 2015 ACJA in Nigeria, the procedure is ineffective and should be stopped. Chapters 5 and 6 concentrated on the legal framework provided for fast-tracking trials.

In Chapter 7, however Jean Bosco Muntagana examines the role of lawyers (prosecuting and defence attorneys) in facilitating speedy trial. Although the author primarily discussed Rwandan law and practice, the chapter's exposition of the application of concepts like plea bargain and private prosecution as mechanisms for case management underscores the need for practitioners in other countries to test similar mechanisms before the law courts. The plea bargain may have originated from practice of the clergy in medieval England, but it was in the United States that it took firm root. Nowadays, the concept is acknowledged generally in many common law and some civil law systems as a useful case management tool in criminal proceedings.

### *Part 3: Decriminalisation, Restorative Justice, and Implementation of Non-Custodial Measures*

In this part of the book, contributors examined the scope, nature, and implementation of non-custodial measures and the extent to which the newly introduced measures are consistent with restorative justice theory. Is the push towards non-custodial measures really in deference to the need to repair the harm caused by criminal behaviour or is it simply a response to over-crowded custodial centres? Chapter 9 written by Awele Ikobi-Anyali and Dr. Habilla Ardzard (late) assesses the rights of victims of violent crimes with reference to Nigeria, Ghana, and Kenya. The authors acknowledge the laudable and impressive wordings of the laws reviewed but noted that implementation is poor mainly due to socio-cultural and other institutional challenges.

Chapter 10 is an examination by Dr. Suzzie Onyeka Oyakhire of the need for the protection of victims of crime and restorative justice. The author argues that there are insufficient safeguards in the criminal justice system in Nigeria to insulate victims from being re-victimised during criminal justice processes. While in Nigeria some measures have been put in place for the counselling and protection of witnesses, the rights and interests of victims who may not necessarily testify are not of paramount interest to the prosecutor, the court, or the correctional facilities. Dr. Suzzie Oyakhire argues that victim protection is a mechanism which can minimise victimisation and through which victim participation in criminal processes in Nigeria could be enhanced and as such achieve the aims of restorative justice. In Chapter 11, Professor Mariam Adepeju Abdulraheem-Mustapha presents the results of a study that established that young female offenders in the four regions of Nigeria studied are deprived the rehabilitative facilities offered by borstal institutions to male juveniles due to the failure of the state to provide such institutions for female juveniles. However, a cursory survey of the state of borstal institutions and custodial facilities for the rehabilitation of youths in conflict with the law in many sub-Saharan states reveals a sorry state of dilapidation and neglect.[6] The poor state of these institutions would seem to suggest that despite a flurry of laws supposedly designed to strengthen the rehabilitation of offenders, states are simply paying lip service to the concept.

In Chapter 12, Dr. Robert Nanima discusses emerging practices of non-custodial sentences under the criminal justice system of South Africa. He reviewed guidance provided by international and national law with respect to adults and minors as two distinct classes of offenders and argues that the view that justice is dispensed whenever a court hands down a non-custodial sentence is not true in all cases. The chapter makes some recommendations, such as a more spirited application of the Child Justice Act, which has provisions for non-custodial alternatives, in a manner that adds value to the promotion and protection of the rights of minors. In Chapter 13, Reuben Imarha considers the implementation of non-custodial penal measures and implementation strategies in Nigeria. He traces the quest for non-custodial penal measures to the overcrowding of custodial institutions. He acknowledges the fact that despite the adoption of non-custodial penal measures under the ACJA and the Nigerian Correctional Services Act 2019, disregard of extant guidelines on sentencing has been responsible for the high numbers in the population of prisons and infrequent recourse by the courts to alternatives to custodial punishment.

The final chapter by Stanley Ibe argues that in order to reduce the spate of arbitrary arrests and detention, there is a need to decriminalise petty offences which typically have greater impact on the poor and other vulnerable groups.

By criminalising petty offences, it impacts greatly on the poor and by implication contributes to the injustices of the criminal justice system which perpetuates poverty given that the poor who are implicated in such offences cannot afford the services of lawyers and are therefore more likely to suffer violations of human rights including prolonged pre-trial detention.

## Conclusion

What does law reform really entail? While legislators may reshape the law by introducing new principles, the relevant stakeholders must then unlearn the old ways of doing things and adapt to the new ways. Existing attitudes, skills, methodologies, and even equipment may need adjustment or complete overhaul for reform ideas to be fully actualised. The adjustment process can be slow and frustrating particularly regarding the legal profession and its traditions for precedents. The experiences and practices from the countries showcased in this publication; those that are currently undergoing or having undergone transition should enrich the experience and perspectives of countries contemplating similar reform as well as lawyers, judicial office, and other stakeholders.

From inception, this book set out to examine reforms within three specific themes/issues. These themes form the crux of several criticisms of criminal justice systems in Africa and reform in these areas are continuous. Focusing on these issues does not dismiss or undermine the existence of other relevant issues or concerns; rather it emphasises the need to define scope. Ultimately, the book acknowledges that reform, regardless of how minor, continues to enhance the delivery of justice and remains relevant. Reform is by its nature continuous especially in consideration that criminal justice systems differ and are at various stages of implementation. Therefore, it may not be ideal to consider waiting for an ideal or model criminal justice system before advocating or undergoing such reforms or even writing about them.

## Notes

1 Act No. 30 of 2013.
2 See Article 24 of the Criminal Procedure Law No. 027/2029.
3 Criminal and Other Offences (Procedure) Amendment Act, 2022 (Act 1079) Ghana.
4 Section 34 ACJA 2015.
5 See ACJA 2015, section 34. It is noteworthy that similar powers are vested in Magistrates in India under s. 44 of the Police Act 1861. Although inspection visits by Judges to correctional are generally applicable, there does not appear to be provision similar to section 34 elsewhere in sub-Saharan Africa.
6 See Pwaberi Denis, Talent Behind Bars: Juvenile Inmates in Need of Support' (*3 News* (Ghana) August 18) 2021 at https://3news.com/news/talent-behind-bars-juvenile-inmates-in-need-of-support/ accessed 5 June 2024; contrast a Report Department of Children Services (Kenya), *Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, 2021.

# Part 1

# Effective Mechanisms for the Management of Pre-Trial Detention

# 1 Effective Mechanisms for the Management of Pre-Trial Detention

## A Comparative Analysis of Nigeria, Kenya, the Democratic Republic of Congo, and South Africa

*Francis Enobore Osagiede*

### Introduction

The detention of suspects pending the final determination of their case is widely used in many jurisdictions. During an average year, an estimated 15 million people are remanded to pre-trial detention.[1] In South Asia, Central and West Africa, and parts of Latin America, most prisoners are pre-trial detainees.[2] Pre-trial detention is not expected to vitiate the right of presumption of innocence of an accused. Hence, its application is considered legitimate when there are reasonable grounds to suspect that a person, having committed an offence, may interfere with the course of justice during pending procedures or commit another crime. However, judicial systems in Africa resort to arbitrary and excessive use of pre-trial detention to address law breaking, sometimes on flimsy infractions.

Africa accounts for about 40% of the one-third prisoners globally awaiting trial with Central and West Africa sub-regions accounting for 50%.[3] Also, of the world's ten prison systems with the highest proportion of pre-trial detainees, half are in Africa.[4] The African Commission on Human and Peoples' Rights (ACHRP) observed that the justice system in several African states is characterised by arbitrary, excessive and, at times, abusive recourse to police custody and pre-trial detention. Similarly, a report by the United Nations Development Programme (UNDP)[5] noted that nearly half of Africa's prison population consists of people in pre-trial detention, with some waiting months or even years for a trial. More disturbing is the fact that mechanisms to regulate the use of pre-trial detention and expeditious trial have not effectively addressed the problem. Consequently, accused persons sometimes spend time in custody more than they would have if found guilty of the offence for which they are charged.

Reports by the United Nations Children's Fund (UNICEF) and United Nations Special Rapporteur on Torture indicate that many pre-trial detainees are treated more harshly than convicted prisoners.[6] Many are regularly held in police cells, sometimes for extended periods, where conditions can be particularly crowded.[7] Recognising that the character of pre-trial detention poses a significant threat to the rule of law and access to justice particularly given the arbitrary and routine manner in which the power is exercised over vulnerable

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and poor persons, this chapter canvases for a review of circumstances in which the power of pre-trial detention should be exercised. The chapter undertakes a comparative analysis of four African countries, namely – Nigeria, Kenya, the Democratic Republic of Congo, and South Africa – and examines the importance of Goal 16 of the UN Sustainable Development Goals (SDG) which aims inter-alia at ensuring equal access to justice and building accountable and responsible institutions including the police and law enforcement institutions. Studies have found that pre-trial detention, particularly in sub-Saharan Africa, leads to overcrowding, which precipitates security issues, health challenges, human rights abuses, pressure on infrastructure, and a host of other problems/challenges.[8] In this chapter, recommendations are made for better pre-trial management system in line with international best practices.

## Pre-Trial Detention in Nigeria

In Nigeria, pre-trial detention is supposed to be a temporary detention of persons suspected or indicted to have committed an offence, but currently, some persons on pre-trial detention, popularly called 'awaiting trial persons,' have stayed for up to ten years without being tried.[9] This is in spite of the provision of Section 269 of the Administration of Criminal Justice Act (ACJA) of 2015, which provides that the remand period should not exceed 28 days. Statistics from the Nigerian Correctional Services as at 2024 estimates that 67% of the prison population in Nigeria are pre-trial detainees.[10] This problem has been attributed to several factors such as the slow pace of investigation by law enforcement agencies, the loss of case files, the inadequate court system, poor access to legal representation, lack of coordination among the agencies in the criminal justice sector, and corruption.[11] Partners Global also noted that the situation of pre-trial detainees is often dire, with the most marginalised rarely able to meet bail conditions and pay their legal fees, thus, people are left to languish in prison for extended periods.[12]

Inadequate logistics to take awaiting trial persons to court as and when due also contributes to the ugly scenario. The Nigerian Correctional Service in 2017 had a total inmate population of 70,212 out of which 47,044, representing 67%, were Awaiting Trial Persons (ATPs), who must be taken to court as scheduled, for trial. Unfortunately, not more than 25% of court duty vehicles were serviceable.[13] Many inmates continued to miss court appointments, resulting in avoidable elongation of their pre-trial detention. The Open Society Justice Initiative, in 2013, stated that the Nigerian Prisons was overcrowded and pre-trial detention remains a severe problem.[14] According to the report, 70% of detainees are in pre-trial custody, and one-fifth of them have been held for over a year. The report further indicated that it was not uncommon for those accused of capital offences to spend over ten years in pre-trial detention. Among the 47,044 pre-trial detainees recorded by the Nigerian Correctional Service in 2017, 212 had been awaiting trial for over 11 years; 2,881 for between six and ten years; 32, 34 for between one and five years; and 11, 917 for less than one year.[15]

***Challenges of Pre-Trial Detention in Nigeria***

Pre-trial detention and its arbitrary use constitute a huge challenge to justice dispensation in Nigeria and notable among them are:

*Overcrowding*

The designed combined capacity of the 244 custodial centres in Nigeria is about 58,270 inmates. As of September 2022, these facilities held about 75,635 inmates. Out of this number, only 30% have been tried and convicted, while a total of 52,745 (constituting 70%) are awaiting trial on remand in prison custody.[16] Over 100 out of the 244 custodial centres in the country were inherited from the colonial administrators. Consequently, the structural integrity of the facilities can hardly cope with the present influx.

The situation has health implications as there have been reported cases of outbreaks of dangerous diseases in some Nigerian prisons leading to poor health and untimely death of many inmates.[17] Unfortunately, this challenge has been long-standing. Ajayi reported that between 1997 and 2005, the number of people in pre-trial detention had been more than half of the total number of people imprisoned in Nigeria.[18] Overcrowding also results in the proselytisation of crimes by hardened criminals who cannot be effectively separated from minor offenders or suspects due to inadequate space. According to Ugwuoke, this exposes inmates to negative influences and socialisation such as drug abuse, molestation, and other vices, thereby creating an impossible environment for their effective rehabilitation, reformation, and reintegration.[19]

Similarly, Lowenkamp, VanNostrand, and Holsinger[20] observed that in jurisdictions where pre-trial detainees are not confined separately from convicts, such mixing heightens the risk of abuse and can have a criminogenic effect. Evidence suggests that pre-trial detention – especially of longer duration – is positively associated with the likelihood that pre-trial detainees will subsequently (re) offend. Furthermore, overcrowding mounts severe pressure on available prison facilities and services such as potable water, hygiene, and sewage management. Lastly, overcrowding creates difficulties in carrying out effective supervision to ensure that inmates are not bullied either by their fellow inmates or staff.

*Human Rights Abuse*

The prolonged detention of suspects to await trial amounts to a human rights violation because their right to a fair and expeditious hearing is abused. Pre-trial detainees are most likely to lose touch with their relations, contract diseases, risk being abandoned, suffer violence and abuse from fellow inmates and staff. They may die in incarceration without consequences.[21] Agomoh observed that pre-trial detention has resulted in suspects being incarcerated almost interminably, sometimes for minor infractions and in unbefitting conditions that compromise their dignity, respect, and self-worth.[22]

*Security*

Keeping suspects in prison to await trial for excessively long periods has continued to be linked to restiveness and riots among the inmates, including armed attacks on prison/correctional facilities. Many pre-trial detainees in Nigeria have spent over five years with no hope for fair and expeditious trial; hence, they often spearhead most jailbreaks. It is noteworthy that the mastermind of the 8 August 2016 riot in Abakaliki Custodial Centre in Ebonyi State was an inmate who had spent over nine years awaiting trial.[23] The Punch records that in the past decade, 20 jailbreaks have occurred in the country, eight of them between 2021 and 2022 alone with over 4,000 inmates escaping. A tally by Sunday PUNCH recorded the escape of 6,675 inmates in 13 jailbreaks in the past five years.[24]

***Addressing Pre-Trial Detention in Nigeria***

Several concerns have been raised in different quarters on the dire need to address the unacceptable conditions of pre-trial detainees in Nigeria. Consequently, several responses have been triggered from both state and non-state actors.

*Infrastructural Intervention*

As a response to the unabating influx of persons, mostly suspects, into custodial facilities, the authorities, in 2017, conceptualised a 3,000-capacity custodial centre in each of the six geopolitical zones in the country.[25] The complex is designed to accommodate courtrooms to eliminate logistics challenges that sometimes impede speedy trial of cases.

*Case Tracking System*

In 2020, the Nigerian Judicial Council (NJC) launched the Case Management Information System, a computer software that allows the effective and efficient management of all court activities, cases, case files and proceedings, the judge responsible, the lawyers, the plaintiff and defendant, and nature of case or crime.[26] This has resulted in improved justice delivery in courts through the development of online courts and digital processes thereby ensuring that justice is delivered expeditiously and under the most comfortable conditions.[27] Hitherto, the phenomenon of 'missing' and 'untraceable' case files with vital documents, such as statements of witnesses/accused persons, and police investigation reports, has slowed down trial of criminal cases. However, only a few courts have adopted the Case Management Information System. Therefore, more advocacy is needed to enhance widespread application.

*Virtual Court Hearing System*

The digital courtroom is one of the nine pilot projects initiated by the NJC in 2020 to move from paper-based to an electronic-based system, which will further standardise court proceedings and speed up the processes and procedure of prosecution. The lockdown propelled the idea during the COVID-19 pandemic, which led to difficulty in accessing justice as well as delay in the administration of justice and non-compliance with case timelines. The federal government of Nigeria has since 2020 been encouraging digital court rooms for effective justice delivery.[28] This system captures all activities in the courtroom with the capacity for playback and direct reference to being recorded by court officials. At the same time, it is protected by a secured security system to avoid unwarranted access.

*Prison Decongestion Visits (Jail Delivery)*

One of the mechanisms for effective management of pre-trial detention in Nigeria is jail delivery. It is cost-effective, enhances agency collaboration, and engenders public trust in the criminal justice system.[29] Statutorily, all Chief Judges are required to regularly visit Correctional Custodial Centres within jurisdiction to review cases of those awaiting trial.[30] In such exercises, most prisoners whose cases are reviewed could be discharged, acquitted, or released on bail. The essence of the jail delivery exercise is not to set offenders free, but to decongest the prisons by ensuring that those who do not deserve to be in custody are set free. Jail delivery serves an oversight function and helps to monitor the activities of the courts, the police, and the prosecution department with respect to specific cases. It also serves more financial, administrative, moral, and judicial purposes to decongest the prison and ensure innocent people do not suffer.[31]

In most states, the exercise has been structured with particular attention paid to what needs to be done before, during, and after the jail delivery exercise, including the need for post-release training and support by state governments and non-governmental organisations to ensure better reintegration.[32]

*Presidential Committee on Prisons Reforms and Decongestion*

As a strategy to address the pre-trial detention phenomenon, the federal government of Nigeria in October 2017 set up a Presidential Committee on Prisons Reforms and Decongestion (PCPRD).[33] It is headed by a respected retired jurist, Honourable Justice Ishaq Bello, with membership drawn from the Judiciary, Correctional Service, Police and Civil Society Organisations. The Committee periodically visits custodial centres to review cases. Where sufficient grounds exist to summarily discharge suspects or relax bail conditions or pay fines for minor offenders, actions are taken immediately. As of 2019, the committee had facilitated the release of more than 5,000 inmates, out of which over 70% are pre-trial detainees.[34]

*Pro Bono Services*

Pro bono legal services are encouraged in Nigeria. The Legal Aid Council of Nigeria (LACoN) has the responsibility to spearhead this service for indigent inmates, where private legal practitioners are encouraged to offer their services free of charge.[35] However, its effect in addressing the plight of pre-trial detainees is still marginal. While LACoN complains of underfunding, less than 15% of private lawyers provide quality pro bono legal services.[36] Unini attributes this to lack of statutory institutional framework that makes it mandatory for all lawyers to set aside a number of hours each year for pro bono cases.[37]

*Legislative Intervention*

There have been some legislative interventions through the enactment of the ACJA, 2015. The Act provides some practical solutions to the problem of pre-trial detention through promoting efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime, and protection of the rights and interests of the suspects and victims in Nigeria.[38] For instance, under Section 28 of the ACJA, an Officer in charge of a police station or any other detention facility is mandated to report to the nearest Magistrate every last working day of the month the cases of all suspects arrested without a warrant, whether or not the suspects have been admitted to bail. The Magistrate shall then forward the report to the Criminal Justice Monitoring Committee for analysis, report and advice to the Attorney General of the Federation with respect to the trend of arrests, bail, and other related concerns.[39]

Section 111 mandates the Controller General of Prisons to make returns every 90 days to the Chief Justice of Nigeria, as well as the Attorney General of the Federation, of all pre-trial detainees held in prisons for a period beyond 180 days from the date of arraignment. Upon receipt of such returns, the recipient shall take steps necessary to address the issues.[40] Section 167(3) also provides for women to stand sureties for suspects. This has helped to expand the space for bail to be secured by suspects thereby decongesting the prisons. Section 306 abolishes stay of proceedings and automatically checks the misuse of interlocutory applications to scuttle criminal proceedings. Similarly, Section 296 (1)–(3) stipulates a period of 14 days detention for a suspect on remand to be heard. The prosecuting agency enjoys another 14 days to keep the suspect in custody if a reasonable course is presented to the magistrate. At the expiration of the second tranche of 14 days, the magistrate may release the accused on bail.

Also, the Nigerian Correctional Service Act 2019 has provisions for appropriate responses to pre-trial detainees and expeditious trial of cases. Section 12 (4)–(8) provide for rejection of additional inmates into a facility that has reached its capacity.[41]

*Alternative Dispute Resolution*

Alternative Dispute Resolution (ADR) is another mechanism employed in Nigeria to minimise pre-trial detention. It involves using different ways such as mediation, arbitration, and neutral evaluation, to resolve disputes without going through formal litigation processes. The Nigerian Law School has been encouraged to run trainings in ADR before graduating students.[42] Many states are putting in place the multi-door court house, a court-annexed programme that offers a variety of alternative dispute resolution processes.[43] According to the United Nations Office on Drugs and Crime (UNODC), multi-door is a platform for the various options of resolving conflicts such as case evaluation, mediation, arbitration, conciliation, and complex case management.[44]

## Pre-Trial Detention in Kenya

Kenya is regarded as the economic and transport hub of East Africa, with pre-trial detainees constituting 42.7% of the total number of inmates in its prisons.[45] The United Nations Human Rights Office of the High Commissioner reports that prison overcrowding in Kenya was at 195% overall, while it is worse in some facilities with over 400%, which adversely threatens the health of inmates.[46] Pre-trial detainees are kept in worse conditions than convicts and are not allowed to participate in reformatory programmes that facilitate recovery and re-entry into the community.[47]

Remarkably, Kenyan law prohibits arrest or detention without a court order unless there are reasonable grounds for believing that a suspect has committed or is about to commit a criminal offence.[48] However, it is reported that police arrest and detain persons arbitrarily or accuse them of a more severe offence than they had committed to mask underlying interests.[49] Most pre-trial detainees in Kenya are young, come from low-income families, and have little or no education. A good number of them have been charged with petty offences such as creating a disturbance, loitering, brewing illicit liquor, touting, minor traffic offences, simple thefts such as shoplifting, being drunk and disorderly, and trespass.[50] Ocharo criticised the arbitrary application of pre-trial detention, stating that it undermines the principle of a fair trial and the presumption of innocence until proven guilty.[51] He argued further that pre-trial detention has become a chronic problem, noting that suspects spend an average of four years in custody before their cases are scheduled for hearing. He attributed the problem to trial delay, considered a bane of the Kenyan justice system.[52]

The 2020 Country Reports on Human Rights Practices in Kenya states that conditions in prisons and other detention centres are harsh due to overcrowding with acute food and water shortages, as well as inadequate sanitary conditions and medical care.[53] It is reported that approximately 48,000 persons are held in prisons with a designated capacity of 26,837.[54]

### *Challenges of Pre-Trial Detention in Kenya*

Pre-trial detention and its arbitrary use constitute a huge challenge to justice dispensation in Kenya and notable among them are:

#### *Inadequate Funding of the Judiciary and Prosecution Agencies*

One of the challenges of pre-trial detention in Kenya is that state agencies including the judiciary and the prosecution agencies are underfunded because of political and national agenda, thereby creating a serious clog in the criminal justice system.[55] In the 2020 Human Rights Report on Kenya, it was observed that poor casework, incompetence, and corruption undermined successful prosecutions, compounding pre-trial detainees' conditions.[56] It stated further that the police frequently failed to enter detainees into custody records, making it difficult to locate them.

#### *Poor Coordination of Transportation to Court*

Another challenge observed is the lack of coordination in producing detainees in court. As far as the escort of detainees to and from prison to court is concerned, it is the responsibility of the National Police Service (NPS). At the same time, the Kenya Prisons Service (KPS) is responsible for transporting convicted persons. In practice, however, the KPS transports pre-trial detainees in some cases, while in other cases, the NPS collects pre-trial detainees from prison precincts and transports them to court. This arrangement is fraught with considerable bulk passing. It has been reported that the KPS sometimes delays or fails to transport pre-trial detainees due to a lack of suitable vehicles or petrol. As a result, pre-trial detainees miss their court dates, thus prolonging the duration of their detention.[57]

#### *Ignorance and Misconception of Bail and Bonds*

Furthermore, Kenyan Law Reform Commission reported little understanding of bail and bond amongst the public.[58] Many Kenyans have no knowledge of bail or bond, while those who claim to know think it is money paid to the police or the court for a pre-trial detainee to be released from custody. Therefore, they see granting bail or bond to persons accused of serious crimes as a great injustice. Addressing this challenge requires deliberately creating public awareness to enhance acceptability and reduce pre-trial detention.

### ***Efforts at Addressing Pre-Trial Detention in Kenya***

The government of Kenya has made several conscious efforts towards addressing pre-trial detention. One of such is the noticeable decongestion programme which entails releasing petty offenders and encouraging the judiciary to increase the use of a community service programme in its sentencing. COVID-19 pandemic brought innovations to fast-track the trial of cases through virtual court sessions.[59] In many courts, computers were provided with internet connectivity to enable pre-trial detainees to connect with court proceedings virtually. Legal Aid services are presently encouraged to facilitate access to justice, to provide pro bono services for indigent defendants who cannot afford legal representation. Also, several new prisons have been constructed in 2012, while six new female prisons were constructed in 2018 to ease congestion in female facilities.[60] This effort is geared towards increasing the capacity of the prison facilities to manage inmates more humanely.

The government is also exploring the alternative dispute resolution mechanism to tackle the phenomenon of pre-trial detention.[61] Alternative dispute resolution structures, such as the multi-door courthouse and family courts, have been set up in many states of the federation. It is reported that alternative dispute resolution at police stations resolved many crimes, but authorities did not report or record them. Hence, there is a need for more efforts in this regard by government and other stakeholders.

## Pre-Trial Detention in the Democratic Republic of Congo (DRC)

The Democratic Republic of the Congo operates a centralised constitutional republic due to pockets of violent conflicts between the government and non-state armed actors. As a result, several arrests are made, sometimes indiscriminately and kept on awaiting trial.[62] According to Karugonjo-Segawa, most pre-trial detainees are victims of arbitrary arrests and do not enjoy the rights that accrue to them during their arrest and detention.[63] Sometimes this is based on inadequate police training and capacity for criminal investigations, discrimination, political interference, and corruption, among others. Detainees who are poor and cannot afford legal services often remain in custody longer. It has been acknowledged that the phenomenon of excessive and prolonged pre-trial detention, ranging from months to years, constitutes a major challenge in the justice sector in the DRC, and it is estimated that approximately 75% of the population in detention centres are pre-trial detainees.[64]

The Immigration and Refugee Board of Canada noted that pre-trial detainees are also found in temporary detention centres known as *cachots* serving as lockups for suspects taken in by police and for preventive detention of individuals awaiting trial by the public prosecutor's offices.[65] It has been estimated that about three-quarters to four-fifths of the prison population in the DRC are in pre-trial detention and this is attributed to factors such as the inefficiency of the judicial system, administrative bottlenecks, high rate of graft, poor funding, and shortage of personnel.[66] These statistics are unlikely to include detainees in police cells and other quasi detention facilities in the country and may, therefore, be significantly higher.

### *Challenges of Pre-Trial Detention in the DRC*

Pre-trial detention and its arbitrary use constitute a huge challenge to justice dispensation in the DRC and notable among them are:

#### *Human Rights Violation*

According to the Human Rights Watch, inmates in the DRC are treated in a manner that negates the presumption of innocence and respect of the person's inherent dignity.[67] Apart from being overworked in prison farms, they suffer torture and other forms of degrading treatment. Although torture and ill treatments are prohibited, they are rampant in places of detention, especially those housing pre-trial detainees, as some have been reported killed due to torture, cruel, inhuman, and degrading treatment.[68] It has been reported that the temporary detention centres serve as public torture institutions in the DRC.[69] Human Rights Commission Report noted that pre-trial detainees are not protected from torture and ill treatment by their fellow inmates.[70] This seems to be the case in almost all parts of the country with several reports of pre-trial detainees who were tortured in the temporary detention centres.[71] The situation is often compounded by stringent bail conditions.

According to the Human Rights Report, the prison conditions in most prisons throughout the country worsened in 2021 due to worsening global economy and the outbreak of COVID-19 pandemic.[72] This further aggravated the already harsh and life-threatening conditions due to food shortages, gross overcrowding, and inadequate sanitary conditions and medical care. Even harsher conditions prevailed in small detention centres where detainees spend lengthy pre-trial periods without access to family or legal counsel. The Report further noted that the bail system was dysfunctional and many persons in detention could not access legal services on account of poverty.

### *Lack of Institutional Capacity*

Pre-trial detention in the DRC is fundamentally caused by a weak criminal justice system characterised by inadequate capacity, poor funding, and lack of independence to function optimally.[73] Trial processes, especially arraigning suspects in court and ensuring court order enforcement, are difficult as the legal protection framework is practically non-existent. Most courts are overwhelmed with cases of about 400 magistrates, including judges and prosecutors assigned to several military courts. For civil courts, out of 660 scheduled to be established throughout the country, one-third is yet to be set up.[74] Moreover, this anticipated number still needs to be increased to cover the needs of a country with an estimated population of 75 million in 2014 and a territory of 2.3 million square meters, including conflict-affected areas which have very limited budgetary resources.[75] This challenge is further compounded by a shortage of logistics and security threats. Consequently, millions of Congolese have no access to justice. Most times, defendants are transferred to urban centres with prosecution offices and courts leaving victims and witnesses to choose between finding resources to travel to the location where the accused is or abandoning their quest for justice.[76]

### *Pressure on Infrastructure*

Another major challenge is the stress on the physical structure of prisons in the country. Pre-trial detention is known to increase prison population, which ultimately exerts pressure on the infrastructure. Karugonjo-Segawa noted that prison structures in DRC are weak, poorly ventilated, overcrowded, and lack basic amenities such as potable water, beddings among others for minimal comfort.[77] The harsh conditions trigger frequent agitations and escapes, which constitute a serious security threat for the victims, witnesses and human rights defenders involved in investigations, including judges and judicial personnel. The United Nations Joint Human Rights Office (UNJHRO) documented the escape of 2,604 people from detention centres in 2014 and 2015 in DRC.

#### ***Addressing Pre-Trial Detention in the DRC***

##### *International Collaboration*

Initiatives and public advocacy conducted by government authorities in the DRC, with the support of international communities, have resulted in speeding up conviction rates and reducing pre-trial detention in the country. This includes setting up institutions to fast-track the dispensation of justice. In 2015, for instance, the Ministry of Justice and Human Rights of the Democratic Republic of Congo with the High Judicial Council launched a national discourse known as *Etats généraux de la justice*.[78] The aim was to identify weaknesses of the judicial system and establish a roadmap to strengthen justice and develop a national reform programme. This initiative, which brought together participants of the country's civil and military justice sector, was able to draw a precise inventory of situations and identify challenges and obstacles in pre-trial detention in the country.

##### *Legislative/Policy Intervention*

Some inherent obstacles observed in the judicial and legislative frameworks are being addressed by the Ministry of Justice and Human Rights through drafting legislative instruments to strengthen the institution for better accountability and dispensation of justice. Furthermore, the desire to implement the Organic Law of 2013 which provides a context for the creation, organisation and functioning of the National Commission on Human Rights (CNDH), constitutes another strong signal for the government to intervene in pre-trial detention in the country.[79] The Commission is an independent, pluralist, and apolitical tool responsible for ensuring compliance with human rights and the different mechanisms that promote and protect pre-trial detainees. The Commission is vested with a controlling power over the actions and omissions of the State and other actors that could constitute human rights violations of pre-trial detainees.[80] The government is ensuring that the Commission gets sufficient resources to exercise its powers independently and impartially in the interest of pre-trial detainees.

### **Pre-Trial Detention in South Africa**

With a prison population of 144,938 as of 1 June 2022, the pre-trial detainee population in South Africa is approximately 32.9% of the total inmate population. This has almost doubled the Department of Correctional Services' proposed benchmark figure of 25,000.[81] It has been reported that some prison facilities were overcrowded and degenerated into a worrisome situation.[82]A report by the United Nations Human Rights Commission identified some of the critical factors responsible for overcrowded prisons to include lengthy duration of detention, indiscriminate and avoidable arrests, restrictive and delay-creating bail regime, lack of mandatory review mechanism, and a slow-moving court system.[83] The 2009/2010 Annual Report of the Department of Correctional Services of South Africa shows that 48% of pre-trial detainees had been in custody for longer than three months, 14% of them had been detained for over 12 months, while about 3–4% had been detained for over two years.[84] The 2005 UN Working Group on Arbitrary Detention Report noted that thousands of pre-trial detainees in South Africa spend long stretches of their lives in conditions frequently described as inhumane and without access to educational or rehabilitative or reformatory programmes.[85]

Ballard reported that overcrowding and prolonged detention are two crucial issues associated with using pre-trial detention in South Africa, which also significantly contribute to the problem of overcrowding in prisons.[86] According to Section 12 of the South African Constitution, every citizen has the right to freedom and security of the person. This includes the right not to be deprived of freedom arbitrarily or without just cause or to be detained without trial. This supports the fundamental right to be presumed innocent until proven guilty. Many pre-trial detainees, however, have this right violated as they lose jobs and their families suffer while they languish behind bars for crimes which they may not have committed.

### *Challenges of Pre-Trial Detention in South Africa*

Pre-trial detention and its arbitrary use constitute a huge challenge to justice dispensation in South Africa and notable among them are:

#### *Institutional Challenge*

There are numerous challenges of pre-trial detention in South Africa. It is noted that the Constitution of South Africa, and local laws make provisions for establishing several oversight institutions with a mandate of administering the criminal justice system and ensuring speedy dispensation of justice. However, there are deep concerns about their ability to provide efficient and effective remedy to the swelling number of pre-trial detainees. These concerns are borne out of the institutions' lack of independence, political interference, and general underfunding.[87]

#### *Overcrowding*

The prison system is also plagued by overcrowding and dilapidated conditions. The Judicial Inspectorate of Correctional Services (JICS) noted in its 2009/2010 Annual Report that the overcrowding of correctional facilities leads to unhygienic conditions. Furthermore, access to adequate health care is limited resulting in the possible spread of contagious diseases and a lack of treatment for more serious illnesses such as HIV/AIDS and diabetes.

*Security*

The increasing prison population and other recent developments suggest pre-trial detention is increasingly becoming a national security issue in South Africa. Explanations for the rising prison population centre around arbitrary arrests that have increased the number of persons arrested and put into prison. While awaiting trial, the time taken by the criminal justice system to process cases, the enforcement of longer sentences, and the backlog of persons awaiting trial all have impacted the conditions of the detainees.

***Addressing Pre-Trial Detention in South Africa***

The Department of Correctional Services in South Africa has recently embarked on a legislative process to improve the conditions of awaiting trial detainees. Fortunately, it appears that the long-held concerns around the conditions of pre-trial detainees have finally started to get the attention of the government. Most notable is the approval of the 'White Paper on Remand Detention Management' by the government of South Africa.[88] The White Paper was developed in consultation with all other government departments who accommodate persons awaiting trial and proposes the establishment of a specific 'Remand Detention Branch.' This structure will be used for 'coordinating the provision of services in relation to remand detainees in South Africa.' The purpose is to improve access to needed services.[89]

## Comparative Analysis in Managing Pre-Trial Detention

| *Country* | *Percentage Pre-Trial Detention* | *Some Key Management Strategies* |
|---|---|---|
| Nigeria | 70% | Virtual courts, case tracking, jail delivery, legislative intervention, legal aid and pro bono services, infrastructural intervention, encouraging Alternative Dispute Resolution mechanisms, Presidential Committee on Prison Reforms and decongestion. |
| Kenya | 42.7% | Decongestion programme by the government, virtual court, Legal aid services, infrastructural intervention, encouraging Alternative Dispute Resolution Mechanisms. |
| DRC | 75% | Collaboration between the Ministry of Justice and Human Rights groups, inauguration of a neutral and independent committee with adequate funding to supervise human rights compliance, carrying out public advocacy. |
| South Africa | 32.9% | Collaboration between all stakeholders to develop a white paper to create a remand detention branch that will promote the interest of pre-trial detainees. |

Comparatively, Nigeria and Kenya appear to have common strategies, but the responses, as shown in the percentage of awaiting trial, markedly differ. The reason for this requires further interrogation. The DRC may need to incorporate legal aid and introduce a virtual court system.

The four countries are, however, observed to have some common features, which are as follows:

i Overcrowding is associated with pre-trial detention, and human rights violations reported in all cases.
ii A knowledge gap in investigation and prosecution leading to delays in the trial process.
iii They all suffer from poor funding, which means they do not have enough financial resources to operate effectively. They all suffer from poor funding, which means they do not have enough financial resources to operate effectively.
iv There are allegations of corruption and indiscriminate arrests.
v Logistics challenge is also reported in all.

## Conclusion and Recommendations

Pre-trial detention remains a lawful means of temporarily restraining a suspect where there are reasonable grounds to do so. However, its application in sub-Saharan African region is observed to be arbitrary, excessive, and sometimes abusive. Investigation and prosecution procedures are slow and, at times, they become subject to government interference. Thus, the contemporary presumption that an accused is innocent until proven guilty is often blatantly ignored. This has precipitated rights violations, degrading treatments, security risks, prison overcrowding, stress on prison infrastructure, and so on. The problem is further made worse by weak institutional capacity of the criminal justice system, often characterised by lack of due process, respect for the rule of law and, in some cases, lack of independence of the judiciary among others. Hence, no definite institutional framework exists to pragmatically address the menace, thereby allowing continuous waste of state resources and human potential.

It is of grave concern that these countries are signatories to international conventions such as the Standard Minimum Rules (now Mandela Rules), African Convention on Human and Peoples Rights, Convention against Torture and other cruel, inhuman, and degrading treatments, among others. This also includes local laws that comply with global standards in pre-trial detention. However, the challenges remain intractable. It therefore requires coordinated and integrated strategies, identifying and cross-matching peculiar challenges and solutions from different climes to develop a workable template for better management of pre-trial detention in Africa.

Flowing from the above and the need to evolve enduring solutions to the problem, the following recommendations are preferred:

i The media and civil society groups should promote public awareness of the problem of pre-trial detention in Africa, including collecting and publishing statistics as well as the consequences of the practice when abusively used.

ii The Administration of Criminal Justice Monitoring Committee established under section 469 and 470 of the ACJA in Nigeria which is charged with the responsibility of ensuring effective and efficient application of the Act by relevant agencies should be properly managed and funded to perform its duties. This will make relevant agencies in the chain of justice delivery sit up to their tasks, thereby speeding up the dispensation of justice.

iii There should be a centralised administrative structure to which all criminal justice system agencies report. This will improve coordination among actors and speedy resolution of limiting factors.

iv There is a dire need to advocate for the use of pre-trial detention only in exceptional cases and as a last resort in sub-Sahara Africa. A situation where suspects are arrested and detained while investigations are ongoing should be discouraged.

v There should be increased use of alternatives to detention in a greater range of cases in Africa, considering vulnerabilities and risk profiles. More importantly, alternative dispute resolution mechanisms in sub-Saharan Africa should be encouraged and explored.

vi There is a need for legislative intervention to make bail conditions less stringent to minimise prolonged detention, and conscious efforts must be made by the government to penalise heads of detention centres who demand bribes or other forms of gratification before detainees are released on bail.

vii Capacity building in investigation and prosecution procedures should be expanded to more relevant officers in the criminal justice chain, including equipping them for efficient service delivery. This will encourage the police and the prosecution to make sure that relevant evidence and witnesses are presented before the court when they are required to avoid delays.

viii There is a need to change the culture or attitude of law enforcement officers who view pre-trial detention as a legitimate punishment. This culture or attitudinal change will promote pre-trial detention systems that are fair, based on core principles of human rights, and which do not place an overwhelming burden on court and detention systems.

ix Some practices in the judicial systems, such as 'holding charge' in Nigeria, should be abolished as they are subject to abuse and further aggravate the problem of pre-trial detention in Africa. In Nigeria, for example, even though conscious efforts have been made by the draftsman in Sections 293–299 ACJA, it is submitted that a more enduring approach to ensure that suspects are brought before only courts that have jurisdiction to entertain their cases.

x There is a need to strengthen prison systems in Africa through the allocation of more resources, the provision of logistics to facilitate access to courts as and when due, including establishing more habitable prisons. The personnel also require capacity building in risk and needs assessment of pre-trial detainees to enhance standard management.

xi Advocacy for pro bono services and legal aid by private legal counsels for indigent inmates should be incentivised in Africa through the award of Africa regional honours and privileges. This will go a long way to decongest prisons and address problems associated with the menace.

xii There should be regular visits and jail delivery exercises. Unannounced monitoring of detention centres with the aim of identifying problems and making constructive recommendations for change is also necessary. It is also important that the media and civil society groups regularly monitor trial procedures to improve the monitoring and accountability of actors in the justice system.

xiii Access to justice should be encouraged through the establishment of virtual courts. This will help in no small measure to reduce the challenges associated with conveying detainees to courts. It is important that resources are galvanised to assist countries that have far-flung detention centres from courts, which may create acute problem of logistics. Also, a platform for tracking cases should be made available.

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# 2 Assessment of Pre-Trial Detention and the Protection of the Fundamental Human Rights of Suspects/Defendants in Burundi

*Germain Ntawuyamara*

## Introduction

The dignity and value of humans and the right of every person to enjoy inalienable rights even of a suspect or defendant in criminal proceedings are critical benchmarks for measuring the extent to which any state is advancing or retrogressing in so far as attainment of the United Nations Sustainable Development Goals (SDGs) are concerned particularly Goal 16 that relates to fair hearing, accountable institutions, and access to justice.[1] Burundi has integrated international instruments of fundamental human rights into its National Constitution. Furthermore, it has put in place necessary mechanisms to ensure that the judicial and administrative decisions, guidelines, and strategies are respected. Burundi has several national instruments in place to enforce respect for human rights for detainees. These include the Constitution of the Republic of Burundi;[2] the Penal Code;[3] the Law amending the Code of Criminal Procedure (CCP);[4] the Law revising the Prison System;[5] and the Ministerial Order governing the internal regulations of prison establishments.[6]

Burundian courts manage two kinds of cases, i.e., civil cases and criminal cases. The lawsuit in legal proceedings can be different when it comes to the ordinary courts: High Court, Court of Appeal and Supreme Court, or specialised Courts like the Constitutional Court, the Anticorruption Court, and the Administrative Court. It is also noteworthy that the legal system applied in Burundi is civil law, also called continental law or French law, inspired by Roman law. Therefore, the legal system of Burundi is based on codes, not on precedents or stare decisis as the case under the common law. This chapter assesses the quality of existing instruments compared with the level of the performance with regards to the respect of human rights in prisons and centres.

The chapter draws inferences from the analysis of data obtained from documents, site observations, and interviews. Surveys were conducted in four prison establishments, two rehabilitation centres for minors in conflict with the law, and a centre for under-aged girls, located in different parts of the country. The data collection exercise targeted the staff of the prisons or centre's management, on the one hand, and the prosecutor's offices, on the other hand. The same exercise ensured gender balance where applicable.

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This study sought to verify the following three hypotheses:

1 The Burundian judicial system is equipped with all necessary legal instruments to enforce respect of human rights in the prison system.
2 The Burundian judicial system needs an increase of logistic and infrastructural capacities to better ensure respect of human rights in the prison system.
3 The Burundian judicial system needs digitalisation to ensure better respect of human rights in the prison system.

The variables used in this research are:

- *Variable 1 (Var1) the number of national and international instruments in place.*
- *Variable 2 (Var2) the rate of law enforcers who are aware of the existence and content of the instruments.*
- *Variable 3 (Var3) the rate of cases of non-respect of human rights in prisons and in centres.*
- *Variable 4 (Var4) the share of reasons of non-respect of human rights due to ignorance of the law.*
- *Variable 5 (Var5) the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures*; and
- *Variable 6 (Var6) the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention or rehabilitation centres.*

The scoring of the variables reflected as *1 = very low*; *2 = low*; *3 = average*; *4 = high*; *5 = very high.*

The chapter is divided into five sections. Following the introductory section, a review of the role of stakeholders in the criminal justice system is undertaken in Section 2. Section 3 focuses on presenting the data collected, while Section 4 is dedicated to the analysis of the data. Discussion arising from the analysis will also be undertaken in this section. The last part of the chapter concludes the study and includes some recommendations.

## Stakeholders in the Criminal Justice System of Burundi

### *The Public Prosecution Service*

The Public Prosecutor's office occupies a central place in criminal proceedings and the penal code.[7] The service holds a quasi-monopoly over proceedings (it accuses, prosecutes, and implements decisions) and wields a degree of power sometimes deemed overwhelming by the respondents interviewed in the survey. One respondent, for example, himself a magistrate in the Public Prosecutor's office, lamented the absence of added value in the proceedings within the Public Prosecution Service beyond the results of the preliminary investigation conducted by the police, noting that the Public Prosecutor's office is often happy to accept the first testimonies of the prosecution without considering the case of the defence. The service has also been accused of collusion and improper conduct with respect to its powers. However, Burundian law is unambiguous: The Public Prosecution Service is the body responsible for public prosecutions and shall demand application of the law[8] as well as ensuring strict respect of laws authorising restrictions of individual freedom.[9]

#### *The Judiciary*

The role of Burundian judges is not rated very highly, and the survey showed that they are subject to significant social pressure. There is a high prevalence of executive interference in the administration of justice, sometimes for private motives, sometimes for penal and civil ones. Evidence of this is founding multiple presidential statements and the arbitrary dismissal or sanctioning of administrative and judicial officials by the president for 'failure to render fair verdict.'[10] The lawyers interviewed confirm this fact, and lament that the Public Prosecution Service's use of its dominant position to ensure its demands (for release, continued detention, etc.) are met, to the detriment of requests formulated by the defence.

#### *The Bar*

Burundian lawyers struggle to make a credible and effective intervention and face certain difficulties in relation to

1. judges, who see them as an 'assistant' as opposed to a 'representative' of the detainee,
2. the Public Prosecution Service, which uses its influence to rally the judge to its cause, and
3. their clients, who doubt their lawyer's strategy whenever it involves them being kept in detention.

In reality, the interviews show that not everyone considers lawyers to be fully fledged participants in the penal process. Lawyers themselves regularly question their role in the penal process and often neglect to exercise the principle of equality of arms which would place them on an equal footing with the Public Prosecution Service, not subordinate to it.

#### *The Prison*

The prison administration is also experiencing difficulties in establishing itself as a real stakeholder in the penal chain. Aside from the lack of organisation of the prison legal services and file management problems, officials report that they feel they are treated as inferior and suffer from a lack of respect, notably from the Public Prosecution Service. Although prison directors are accorded the power to report irregularities by law administration,[11] officials complain of inertia on the part of the Public Prosecution Service, but fear that if they react, they will personally be taken to task by the magistrate who is the subject of their complaint. The prison administration, which would like to play its role as watchdog, believes it deserves more recognition in the exercise of its mission.

## Factors Responsible for Delays in Pre-Trial Proceedings

### *Service*

The service procedure (notification of the detainee and the prison administration) is the first factor which slows down the procedure. Service of a decision is required both in order for it to be executed (in the event of interim release, for example) and in order to launch an appeal (in the case of continued detention, for example). In principle, the registry of the court having rendered the decision is responsible for managing this process. In practice, however, the Public Prosecution Service often requests that the ruling passes through its own office so that it can serve the decision itself, which results in considerable delays in the procedure.

### *Delays in Transmission of Files*

Transmission of the first instance files to the court of appeal is another source of delay in the procedure. Without a file, the case cannot, a fortiori, be dealt with, neither by the Public Prosecution Service nor by the appeal judge. However, the file is often not forwarded – or is forwarded with a large delay and after much persuasion – which means that certain appeal cases are postponed up to several times because the recorded delays in the submission of the files from counterparts at the court of first instance.

## Data Collection

'Data collection instruments' means tests, questionnaires, inventories, interview schedules or guides, rating scales, and survey plans or any other forms which are used to collect information on substantially identical items from ten or more respondents.[12] The data collection instruments were designed to be clear, consistent, and appropriate for data needs. During our survey, the data were collected using the above-mentioned methods based on the above-stated variables. From the point of view of prison authorities of the sampled prisons and centres, and the three prosecutors interviewed, our findings are displayed in Table 2.1.

According to Table 2.1, it is noted that the number of national and international legal instruments in place is *very high (5)* (*Var1*); the rate of law enforcers who are aware of the existence and content of the instruments ranges

*Table 2.1* Findings Collected by Interview Method

| | *Var1* | *Var2* | *Var3* | *Var4* | *Var5* | *Var6* | *Tot* |
|---|---|---|---|---|---|---|---|
| Prison 1 | 5 | 4 | 4 | 1 | 5 | 2 | 21 |
| Prison 2 | 5 | 4 | 3 | 1 | 5 | 2 | 20 |
| Prison 3 | 5 | 4 | 4 | 1 | 5 | 2 | 21 |
| Prison 4 | 5 | 4 | 4 | 1 | 5 | 3 | 22 |
| D. centre 1 | 5 | 4 | 3 | 1 | 5 | 2 | 20 |
| D. centre 2 | 5 | 4 | 4 | 1 | 5 | 2 | 21 |
| R. centre | 5 | 4 | 5 | 1 | 5 | 3 | 23 |
| Prosec. office 1 | 5 | 5 | 3 | 1 | 5 | 2 | 21 |
| Prosec. office 2 | 5 | 5 | 3 | 1 | 5 | 2 | 21 |
| Prosec. office 3 | 5 | 5 | 3 | 1 | 5 | 1 | 20 |
| Tot | 50 | 43 | 36 | 10 | 50 | 21 | 210 |

between *high (4)* and *very high (5)* (*Var2*); the rate of cases of non-respect of human rights in prisons and in centres ranges from *average (3)* and *high (5)* (*Var3*); the share of reasons of non-respect of human rights due to ignorance of the law is *very low (1)* (*Var4*); the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures is *very high (5)* (*Var5*); and the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention centres ranges between *very low (1)* and *average (3)* (*Var6*).

From the point of view of our field visit and observation in the sampled prisons and centres, and the three prosecutors interviewed, our findings are displayed in Table 2.2.

According to Table 2.2, during our field visit and observation in the sampled prisons, centres, and prosecutor's offices, it was noted that the number of national and international instruments in place is *very high (5)* (*Var1*); the rate of law enforcers who are aware of the existence and content of the instruments ranges between *high (4)* and *very high (5)* (*Var2*); the rate of cases of non-respect of human rights in prisons and in centres ranges from *average (3)* and *high (5)* (*Var3*); the share of reasons of non-respect of human rights due to ignorance of the law is *very low (1)* (*Var4*); the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures is *very high (5)* (*Var5*); and the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention centres ranges between *very low (1)* and *average (3)* (*Var6*).

During the same observation exercise, we noted challenges such as overcrowded prisons and detention or rehabilitation centres; limited transportation means from place of arrest to or from prisons or centres to the prosecutor's office; limited access to health care in prisons and detention or rehabilitation centres; lack of well-equipped dungeons; long distances between police cells and the prosecutor's office; lack of enough nutritive food for all suspects and defendants; insufficiency of female police officers; and lack of technological means to fast share data among stakeholders in this field.

*Table 2.2* Findings Collected by On-Ground Observation Method

| | *Var1* | *Var2* | *Var3* | *Var4* | *Var5* | *Var6* | *Tot* |
|---|---|---|---|---|---|---|---|
| Prison 1 | 4 | 4 | 4 | 2 | 5 | 2 | 21 |
| Prison 2 | 5 | 4 | 3 | 1 | 5 | 2 | 20 |
| Prison 3 | 4 | 4 | 5 | 1 | 5 | 1 | 20 |
| Prison 4 | 5 | 4 | 4 | 1 | 5 | 3 | 22 |
| D. centre 1 | 5 | 4 | 3 | 1 | 5 | 2 | 20 |
| D. centre 2 | 3 | 4 | 4 | 2 | 5 | 2 | 20 |
| R. centre | 5 | 4 | 5 | 1 | 5 | 1 | 21 |
| Prosec. office 1 | 5 | 5 | 3 | 1 | 5 | 2 | 21 |
| Prosec. office 2 | 5 | 4 | 4 | 2 | 5 | 2 | 22 |
| Prosec. office 3 | 5 | 5 | 3 | 1 | 5 | 1 | 20 |
| Tot | 46 | 42 | 38 | 13 | 50 | 18 | 207 |

#### *Data Discussion*

Our survey covered four prison establishments, two rehabilitation centres for minors in conflict with the law, and one centre for underage girls in Burundi. The survey targeted the staff of the prisons or centre's management, on one hand, and the prosecutor's offices in the municipality of Bujumbura, on the other hand. The findings we observed on the ground fairly match with the responses that we collected from the staff of the prisons or centre's management and the prosecutor's offices in the municipality of Bujumbura. Both data collection methods indicate that the number of national and international instruments in place is very high (*Var1*);[13] the rate of law enforcers who are aware of the existence and content of the instruments is relatively high (*Var2*); the rate of cases of non-respect of human rights in prisons and in centres is fairly high (*Var3*); the share of reasons of non-respect of human rights due to ignorance of the law is very low (*Var4*); the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures is very high (*Var5*); and the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention or rehabilitation centres is fairly low (*Var6*).

We used the same variables to verify our three hypotheses: *Hypo1*, *Hypo2*, and *Hypo3*.

In the following paragraph, we discuss the findings of our survey in comparison with the above three pre-determined hypotheses.

#### *Data Analysis*

Burundian judicial system is generally equipped with enough national and international legal instruments required for the law enforcers to enhance respect of human rights in the prison system (*Hypo1*). This hypothesis is verified by the findings under variables *Var1 ('The number of national and international instruments in place')* and *Var2* (*The rate of law enforcers who are aware* *of the existence and content of the instruments*). There exists a significant number of national and international instruments and the rate of law enforcers who are aware of the existence and content of the instruments is relatively high (*Var2*).

Equally important, we noted that the Burundian judicial system needs to increase logistic and infrastructural capacities to better enhance respect of human rights in prisons and centres (*Hypo2*). Our hypothesis 2 (*Hypo2*) '*The Burundian judicial system needs increase of logistic and infrastructural capacities to better ensure respect of human rights in the prison system (Hypo2)*' is therefore verified by the findings under variable 5 (*Var5*) '*The share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures*' whereby it was noted that the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures is very high (*Var5*).

Furthermore, we also noted that the Burundian judicial system needs digitalisation to better ensure respect of human rights in the prison system (*Hypo3*). Our hypothesis 3 (*Hypo3*) '*The Burundian Judicial system needs digitalisation to better ensure respect of human rights in the prison system (Hypo3)*' is therefore verified by the findings under variable 6 (*Var6*) '*The share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention centres*' whereby it was noted that the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention centres is fairly low (*Var6*) including lack of technical skills and sufficient equipment for them to deliver on their mandate.

## Conclusion and Recommendations

### *Conclusion*

This study aimed to assess and identify the level of performance of prisons and detention or rehabilitation centres' management with regard to enforcing respect of fundamental human rights prescribed by both national and international legal instruments. The variables we used in this research are *Variable 1 (Var1), the number of national and international instruments in place*; *Variable 2 (Var2), the rate of law enforcers who are aware of the existence and content of the instruments*; *Variable 3 (Var3), the rate of cases of non-respect of human rights in prisons and in centres ; Variable 4 (Var4), the share of reasons of non-respect of human rights due to ignorance of the law*; *Variable 5 (Var5), the share of reasons of non-respect of human rights due to lack of enough logistics/infrastructures*; and *Variable 6 (Var6), the share of reasons of non-respect of human rights due to lack of enough skills of the law enforcers in prisons and detention or rehabilitation centres.*

The scoring of those variables was as follows: *1 = very low*; *2 = low*; *3 = average*; *4 = high*; *5 = very high.* We used the same variables to verify our three hypotheses: (1) *The Burundian judicial system is equipped with all necessary legal instruments to enforce respect of human rights in the prison system*

*(Hypo1)*; (2) *The Burundian judicial system needs increase of logistic and infrastructural capacities to better ensure respect of human rights in the prison system (Hypo2)*; and (3) *The Burundian judicial system needs digitalisation to better ensure respect of human rights in the prison system (Hypo3)*. It was conducted based on the evaluation of six variables (*Var1, Var2, Var3, Var4, Var5, and Var6*) to verify three hypotheses (*Hypo1, Hypo2, and Hypo3*). The same study covered four prison establishments, two rehabilitation centres for minors in conflict with the law, and one centre for underage girls in Burundi using the documentary, interview, and on-ground observation methods.

The study found that the Burundian judicial system is equipped with all necessary standard and legal instruments to enforce respect of human rights in the prison system (*Hypo1*); the Burundian judicial system needs increase of logistic and infrastructural capacities to better ensure respect of human rights in the prison system (*Hypo2*), and that the Burundian judicial system needs digitalisation to better ensure respect of human rights in the prison system (*Hypo3*). Regarding the above-mentioned logistic and infrastructural capacity challenges, the study observed overcrowding in the population of prisons and detention or rehabilitation centres; limited transportation means from place of arrest to or from prisons or centres to the prosecutor's office; limited access to health care in prisons and detention or rehabilitation centres; lack of well-equipped dungeons; long distances between police cells and the prosecutor's office; lack of enough nutritive food for all suspects and defendants; insufficiency of female police officers; and lack of technological means to fast-share data among stakeholders in this field.

The study further found that all required mechanisms and legal instruments are in place and disseminated to relevant law enforcers to ensure respect of fundamental human rights in prisons and in detention or rehabilitation centres and some progress has been made in this regard. However, data collected from our sampled prisons and centres indicated that a number of challenges still hindering the efforts of the government to ensure full respect of human rights in prisons and detention or rehabilitation centres are notably *limited transportation means to transfer minors from the place of arrest to re-education centres; most of dungeons are not well equipped*; *no food containing the required nutritive components for prisoners; no access to quality health care; over-crowdedness of the existing infrastructures; lack of separation of genders in detention centres; long distances between police cells and the prosecutor's office; and insufficient female police officers*.

Finally, the study revealed that Burundi has set in place the necessary legal framework to enforce respect of human rights in prisons and centres. All the same, relevant international human rights instruments have been ratified by the country and integrated in the domestic legislation. Mechanisms to monitor their implementation are in place but still face challenges related to required logistic, skills-related, and infrastructural capacity to effectively enforce respect of the fundamental human rights in prisons and detention or rehabilitation centres. It is worth mentioning that efforts by government were noted to regularly improve performance in the respect of fundamental human rights for suspects and defendants by upgrading the skills of the law enforcers, e.g., one Judicial Professional Training Centre is available in the country (at Kigobe Quarter in the Municipality of Bujumbura) but the operationalisation of the centre faces tremendous financial and logistic challenges.

Further study should pursue, among other things, this area of research by specifically focusing on the assessment of the exact financial, logistic, and infrastructural means (both in quantity and in quality) effectively required to better enforce the respect of human rights in prisons and detention or rehabilitation centres in Burundi.

### *Recommendations*

Although significant efforts have been made by the Government of Burundi and other stakeholders in the area of enhancing respect of fundamental human rights in prisons and detention or rehabilitation centres,

a The government should consider extending the prisons and centres' capacity, adequately equip them, to effectively accommodate the suspects and defendants according to the required standards.
b The government should consider multiplying and effectively equipping professional training centres for law enforcers in different parts of the country.
c The government should collaborate with her partners to digitalise the judicial system in order to reduce delays and expedite the suspects/defendants' file transmission and processing.
d The government should ensure that all the existing national and international instruments are well and regularly disseminated among the law enforcing mechanisms.
e The government should consider gender balance in the appointment of prison police staff to enforce respect of human rights in prisons and detention or rehabilitation centres.
f The government should ensure gender separation to enforce respect of human rights in prisons and detention or rehabilitation centres.
g Today, the fundamental principle which stipulates that 'freedom is the rule and detention is the exception' is frequently invoked by stakeholders. However, this must also be reflected in practice and must be implemented through legal acts and decisions.
h Stakeholders in the legal system must strictly respect the rights of defence and, in particular, the presumption of innocence, the principle of strict interpretation of criminal law, the adversarial principle, and the equality of arms.
i Legal stakeholders must make use of existing tools (doctrine, national and international case law, preparatory work and explanatory memorandums, comparative law) to interpret the Code of Criminal Procedure and to make progress on the issue of freedom towards improved application of international standards and general principles of law.

j Dialogue between stakeholders in the penal chain, both at provincial and national level, must become a long-term and regular practice.
k Stricter monitoring mechanisms and disciplinary procedures must be put in place for stakeholders in the penal chain by the respective hierarchical authorities.
l A compensation mechanism for victims of illegal detention must be set up in conformity with Article 23 of the Constitution of Burundi.

## Notes

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# 3 Pre-Trial Detention

## Challenges, Opportunities, and the Role of Technology in Sub-Sahara Africa

*Oluwafunke Adeoye*

### Introduction

For most people, five years is enough to change their lives. Law students in many African countries receive a law degree at the end of five years.[1] A child born five years ago is fully aware of their environment and has achieved major cognitive, physical, emotional, and social milestones.[2] Christian John had dreams and plans for the next five years of his life after completing his education.[3] However, nothing could have prepared him for the fate that befell him on his way back from school after he came in contact with the Special Anti-Robbery Squad, a now-defunct arm of the Nigerian Police Force. In one fell swoop, everything changed; life as he knew it paused, and when the Hope Behind Bars Africa[4] team met him at Kuje Custodial Centre, on 29 January 2019, he had spent five years in pre-trial detention.[5] In South Africa, Mavuka was arrested in 2008, but his trial began only in October 2016. At the last count, he had spent ten years awaiting trial while appearing in court 91 times.[6] Mavuka's case is not unique, as he is one of over 40,000 people in South African prisons awaiting trial, making up over a quarter of South Africa's entire prison population.[7]

There are around three million pre-trial detainees worldwide, representing around one-third of all prisoners globally.[8] Between 2000 and 2016, pre-trial detainee numbers rose by 15% overall, but some countries and regions saw much larger increases than this in their pre-trial prison populations.[9] Notably, Europe is the only region that has experienced a decline in these numbers during this period.[10] African countries have witnessed continued growth in these populations.[11]

Excessive pre-trial detention undermines access to justice, disproportionately impacting indigent populations, who often lack the resources to secure timely legal representation or bail, resulting in prolonged incarceration without conviction. Access to justice is more than improving an individual's access to courts or guaranteeing legal representation, it encompasses the ability of all people, regardless of socio-economic status, to resolve disputes, protect their rights, and obtain fair remedies through accessible, transparent, and impartial systems.[12] This broader ideal is undermined when individuals fear the justice

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system, when legal processes are financially or socially prohibitive, when lawyers are inaccessible, or when people lack knowledge and awareness of their rights.[13] As reflected in the United Nations Sustainable Development Goal 16 promoting peace, justice, and strong institutions, achieving genuine access to justice requires dismantling these barriers to create systems that are equitable, inclusive, and trusted.

This chapter examines the pervasive issue of pre-trial detention in Africa and how its prolonged use contravenes international human rights law as well as Goal 16 of the UN Sustainable Development Goals – Peace, Justice, and Strong Institutions and Goal 11 of the African Union's Agenda 2063, which envisions democratic governance, respect for human rights, and the rule of law across the continent. The technology-focused section of this chapter critically explores innovative, tech-driven reforms to address prolonged pre-trial detention in sub-Sahara Africa highlighting best practices, challenges, and opportunities from different parts of Africa and concludes with recommendations.

## Conceptualising Pre-Trial Detention

Generally, pre-trial detention can be described as the practice of holding individuals in custody by law enforcement or judicial authorities before their trial or sentencing.[14] It is recognised as a lawful measure in various international, regional, and national legal frameworks, provided it is implemented within defined parameters to protect individual liberties. While its primary purpose is to ensure the accused's presence at trial, prevent interference with investigations, and safeguard public safety, these frameworks impose strict limits on their duration and require robust judicial oversight to prevent abuse and arbitrariness.[15]

The International Covenant on Civil and Political Rights (ICCPR)[16] establishes foundational principles safeguarding the rights of individuals facing criminal charges, including those subjected to pre-trial detention. It provides that '(e)veryone has the right to liberty and security of person, nobody may be detained or arrested without cause. Nobody's freedom may be taken away from them unless there are specific reasons and a legal process in place.'[17] By Article 9(3) of the ICCPR,

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.

The ICCPR defines pre-trial detention, espousing the principle of 'presumption of innocence' until proven guilty. This principle acts as a safeguard against excessive or unnecessary detention, emphasising the need for fair and timely judicial proceedings. For example, Article 6 of the African Charter on Human and Peoples' Rights (ACHPR) states that,

> Every individual shall have the right to liberty and the security of his person. No one may be deprived of their freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

This article establishes a strong foundation for the right to personal liberty and protection against arbitrary arrest and detention because it is rooted in the principle that personal liberty is a fundamental human right that can only be limited to specific, legally defined circumstances. It must be noted that the emphasis on 'reasons and conditions previously laid down by law' underscores the need for clarity, legality, and predictability in any restrictions on individual freedom, which is often absent in pre-trial detention. The ACHPR further goes on to define pre-trial detention as the period during which an accused person is deprived of liberty pending trial.[18] This is contextualised in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which reiterates that pre-trial detention must be reasonable, proportionate, and imposed only when no other less restrictive measure can ensure the accused's presence at trial.[19]

In the case of *Muboyayi v. Democratic Republic of Congo*,[20] a landmark decision by the African Commission on Human and Peoples' Rights (African Commission) concerning the rights to liberty, security, and a fair trial, particularly in the context of pre-trial detention, Muboyayi, a journalist in the Democratic Republic of Congo, was arrested and detained for an extended period without being brought to trial. The African Commission found that Muboyayi's detention violated Article 6 of the African Charter on Human and Peoples' Rights, which guarantees the right to liberty and security of the person. The Commission emphasised that pre-trial detention must not be arbitrary and should always be subject to judicial review and that such detention undermines the presumption of innocence, a cornerstone of fair trial rights.

National constitutions across Africa do not expressly define pre-trial detention but emphasise the right to personal liberty. For example, Article 23 of the 1995 Constitution of Uganda safeguards the right to personal liberty, mandating that detained individuals must be charged within 48 hours or released on bail, supporting the principle that detention should be limited and subject to judicial oversight.[21] Similarly, Section 35 of the 1999 Constitution of Nigeria provides for the right to personal liberty, including provisions against arbitrary detention. It requires that any person detained must be brought before a court within a reasonable time, particularly if held on suspicion of committing a criminal offence.[22] Article 49 of the 2010 Constitution of Kenya protects the rights of arrested persons, specifically granting the right to be informed promptly of the reasons for detention and to be brought before a court within

24 hours.[23] Section 35 of the 1996 Constitution of South Africa protects the rights of arrested, detained, and accused persons, including the right to challenge the lawfulness of detention and to be brought promptly before a court.[24] Article 14 of the 1992 Constitution of Ghana guarantees the right to personal liberty and outlines that anyone detained must be informed of the grounds and taken before a court within 48 hours, emphasising procedural safeguards.[25]

While these provisions underscore the importance of procedural fairness and oversight in detention practices, they fall short in explicitly defining pre-trial detention or prescribing its scope and application. This omission leaves room for inconsistent interpretation and potential misuse, as the lack of clarity can enable over-reliance on pre-trial detention. Furthermore, vague timelines, such as 'reasonable time,' are open to subjective judicial interpretation, risking prolonged detention without trial. The impact of this lack of clarity disproportionately affects vulnerable populations, including those from low socio-economic backgrounds, who often lack the resources to challenge their prolonged detention or secure bail. In many cases, these groups become trapped in a cycle of imprisonment due to systemic inequalities and the overuse of pre-trial detention as a default rather than an exception.

This chapter, however, adopts the position that pre-trial detention occurs when an individual who is accused of committing a crime or charged with one is deprived of their right to personal freedom while a court of competent jurisdiction considers whether to grant bail or finds the accused innocent or guilty. This would apply to everyone who has been deprived of their freedom and is:

i under investigation – they have not been charged yet and are currently being questioned by the investigative agency.
ii awaiting trial – the period after an investigation is completed and a decision taken to bring a court case.
iii undergoing trial – while the trial is taking place, but unable to perfect bail conditions, bail was denied, or bail was not sought because he/she lacks legal representation.

## Pre-Trial Detention Trends and Data in Africa

While the presumption of innocence is enshrined in international and regional human rights frameworks, its practical application in several African countries often falls short. Pre-trial detainees constitute a substantial proportion of prison populations in many African countries. Statistics show that seven of the world's 20 countries with high pre-trial detention rates are in Africa.[26] Gabon has the highest pre-trial detention rate of 80%.[27] In Benin, around 76% of inmates are held in pre-trial detention.[28] The Democratic Republic of the Congo (DRC) has 73%,[29] Libya around 71%,[30] and Togo roughly 70%.[31] As of July 2025, approximately 66% of inmates in Nigeria's correctional centres are held in pre-trial detention, though a modest improvement from 70% in July 2024.[32]

The increasing rates of pre-trial detention over the past two decades highlight the challenges posed by outdated legal systems that rely heavily on custodial measures. Many judicial systems in Africa are underfunded and understaffed, resulting in significant delays in processing cases.[33] Alternatives to detention, such as bail systems, community service, or diversion programmes, are underutilised, leaving pre-trial detention as the default option in many cases. Access to legal representation remains a significant barrier, particularly for individuals from marginalised or low-income communities who cannot afford quality legal services.[34] Remnants of colonial-era laws that criminalise poverty remain in force in parts of Africa, effectively targeting those who are already economically disadvantaged.[35] Individuals accused of minor crimes like loitering, homelessness, or vagrancy often face financial barriers to bail, even when the amounts are relatively small.[36]

People from disadvantaged origins are, therefore, more likely to be arrested and to be held in pre-trial custody, and they are also less likely to have the funds to pay their bail and to adhere to other court-approved requirements. For most of them, getting legal representation is more of a facade. Many may have to wait for their cases to languish in congested court lists for months or perhaps years. This prolonged pre-trial detention exacerbates poverty, undermining Sustainable Development Goal (SDG) 1, which seeks to eradicate poverty in all its forms, by stripping detainees of their ability to work, generate income, and support their families, thus perpetuating a cycle of poverty and vulnerability. Significant repercussions from pre-trial imprisonment typically include loss of housing, work, and relationships with family and community, as well as a decline in the person's physical and emotional well-being.

Furthermore, pre-trial detention raises other significant human rights concerns. For instance, statistics shows that pre-trial detention often occurs in facilities where overcrowding, lack of basic hygiene, inadequate food, and medical neglect are rampant[37] thus violating Article 7 of the ICCPR and Article 5 of the ACHPR, which[38] prohibits torture or cruel, inhuman, or degrading treatment. In the case of *Purohit and Moore v. The Gambia*,[39] the case focused on the inhumane conditions in a psychiatric facility where pre-trial detainees were subjected to overcrowding, unhygienic conditions, lack of adequate medical care, and insufficient food. The African Commission found that the Gambia had violated multiple provisions of the African Charter on Human and Peoples' Rights, including the Article 5 protection against torture, cruel, inhuman, or degrading treatment.

## Utilising Technology to Reduce Pre-Trial Detention and Address Judicial Case Backlogs in Africa

With the inclusion of technology in almost every aspect of human life, it is hard to think of human survival without the use of technology.[40] From smartphones – connecting distant families to AI-driven healthcare systems diagnosing diseases – technological innovation has seamlessly integrated into human existence. It not only simplifies complex tasks but has become essential for solving pressing global challenges.[41] Technology has also increasingly become a transformative tool in the administration of justice across the world.[42] Technology, encompassing software, hardware, and digital tools designed to streamline and enhance criminal justice administration, particularly by reducing pre-trial detention, remains significantly underutilised across Africa; this underuse is evident in the continued prevalence of outdated systems, which exacerbates delays in the system.

In the DRC, manual record-keeping dominates the system, resulting in frequent loss or mismanagement of case files.[43] Police and court records are often stored in insecure physical locations, making them prone to theft, damage, or loss.[44] In Uganda, court proceedings and documentation are largely paper-based, with few courts equipped with electronic case management systems.[45] Police rely on handwritten statements, and the lack of digital tracking systems often results in case backlogs and difficulties in retrieving files. The judiciary in Sierra Leone relies heavily on manual documentation, and the lack of functional court websites or online databases restricts access to case information for lawyers and justice stakeholders.[46]

However, in the face of these systemic challenges, such as overcrowded courts, insufficient legal representation, and financial barriers to bail among others, technology presents a transformative opportunity to reduce reliance on pre-trial detention. A few African countries have begun to leverage technology in criminal justice delivery, which is beginning to impact the number of people they have in pre-trial detention.

### *The Need for an Enabling Legal Framework for Technology Integration*

For technology to effectively transform any governance system, an enabling legal framework is critical to provide legitimacy and operational consistency. Without such frameworks, technological interventions risk facing resistance, limited applicability, or challenges regarding their validity and admissibility in court.[47] Scholars such as Antonio and Francesco emphasise that clearly defined laws, procedural rules, and guidelines not only facilitate seamless technology integration but also protect accountability in digital justice processes.[48]

The judicial arm of the government is a crucial cornerstone of the criminal justice system and critical to reducing case backlogs.[49] Oftentimes, pre-trial detention is directly impacted by delays in completing paperwork, finding documents, and registering cases, among others. Thus, the efficiency of daily court operations and the impartiality of judicial rulings depend critically on an accurate and trustworthy case file system.[50] The absence of systematic record keeping and controls leaves scope for corruption or collusion between court officials and lawyers.[51] As a result, court time is wasted, delays are created, and the judiciary's standing is lowered. A Case Management System allows prosecutors and defence lawyers to access their cases from any location. It also allows for case tracking, court scheduling, and instant transcription, which is easier and less time-consuming. Case backlogs are decreased by speeding up case decisions through the digitisation of court records and the automation of various court procedures.

In Kenya, prison overcrowding has long been a problem, with the number of inmates exceeding the capacity of the institutions.[52] Previously largely characterised by paper-based procedures and physical court appearances, the disruptions caused by the COVID-19 pandemic shook the very foundation of the system, forcing the Kenyan judiciary to come up with measures to enable technology in its justice delivery.[53] Its implementation came in through the Practice Directions on Electronic Case Management , gazetted on 24 March 2020 in Kenya even though the journey had begun in 2005[54] with different pilots across Mombasa and Nairobi. The platform enables lawyers, prosecutors, and the public to file cases online, pay filing fees electronically, search for their cases, and track the progress of their cases.[55] The system has two interfaces: the user interface which is accessible to litigants, and the court interface accessible to judicial officers. The portal allows for the registration of law firms, organisations, self-represented parties, and the state. Once registered, all entities can file and serve documents via the portal.[56]

In July 2020, the Office of the Director of Public Prosecution (ODPP) developed and integrated its Case Management and Document Tracking system into the Judiciary's electronic filing system to enhance efficiency in the criminal justice system. The integration of the two systems facilitated easy access and retrieval of information between the prosecution and the courts, allowing for ease of access to information regarding the progress and status of criminal cases.[57] Administration of Justice for criminal cases has also been done remotely, as bail and plea-taking have been conducted with prisoners on video conferencing platforms.[58] This shift towards digital case management and record keeping has enhanced the organisation, security, and retrieval of court records. Kenya's digital advancement was accelerated during the COVID-19 pandemic[59] and alongside a lot of other efforts resulted in a decline in the number of pre-trial detainees. Based on the study conducted by Desche and Bosire, the population in Kenya's penal institutions was over 55,000 in March 2020, the number dropped to 41,119 in August 2020.[60]

In some other African countries, there has also been a move to swiftly revamp justice delivery by transforming it from being analogue to digital through the adoption of an online digital case management system. For example, South Africa introduced CaseLines (formerly known as Court Online)[61] a few years back. CaseLines has been recorded to have led to an overhaul of the case management and legal administration systems in many cities in South Africa, providing the High Court with the technological tools to refine the internal workflow process, enhancing transparency and accountability in justice delivery which had an impact on case backlogs and pre-trial detention.[62] Also, Rwanda, one of the early adopters of digital technology for judicial service delivery in Africa since 2016 implemented the Integrated Electronic Case Management System,[63] a unifying platform that connects all institutions belonging to the Justice, Reconciliation, and Law and Order Sector. The platform reduced case backlogs from 42% to 23%. Before its adoption, Rwanda also suffered incidences of prison overcrowding and high pre-trial detention rates.[64] Countries like Nigeria and Ghana piloted virtual court hearings during the pandemic to mitigate the disruptions caused by lockdowns. In Nigeria, states like Lagos and Rivers introduced e-filing systems, and some courts transitioned to online hearings.[65] Ghana implemented virtual court sessions in high courts, enhancing access to justice during the crisis.[66]

### *Challenges with Adopting Technology in Criminal Justice Systems in Africa*

Despite some African countries increasing momentum to leverage technology in their criminal justice administrations, they continue to grapple with deep-rooted challenges that limit the effective adoption of digital tools, particularly in reducing pre-trial detention. Notably, SDG16 seeks to promote peaceful and inclusive societies, provide access to justice for all, and build effective, accountable institutions at all levels. Within this goal, Indicator 16.3.2 specifically measures the unsentenced detainee rate, serving as a key benchmark for assessing the fairness and efficiency of criminal justice systems.[67] At the continental level, the African Union's Agenda 2063, particularly Aspiration 3, underscores the importance of a continent rooted in good governance, democratic values, and the rule of law. It envisions justice systems that are accessible, efficient, and people-centred.

Overcoming the barriers to technological adoption in Africa's criminal justice systems is therefore not just a matter of efficiency, it is a prerequisite for achieving SDG 16, meeting Agenda 2063 targets, and ensuring that justice systems work for all, especially the most marginalised. Several factors hinder the broad adoption of technology in judicial systems across Africa and in tackling the prolonged use of pre-trial detention. One major factor is the digital infrastructure deficit. A significant portion of the population lack access to stable internet connectivity, smartphones, or computers, leading to digital exclusion, especially in rural areas.[68] No doubt, the effectiveness of any technological intervention is inherently dependent on the availability and quality of foundational infrastructure, such as stable electricity, reliable internet connectivity, and adequate hardware. For instance, Uganda's Case Backlog Reduction Strategy, launched in 2017, sought to digitise case management processes to address the country's overwhelming backlog of pending cases. While the initiative showed promise in urban centres, its implementation was uneven, especially in rural regions where internet connectivity was unreliable, and hardware availability limited.[69] Courts in these areas faced delays and disruptions, effectively excluding a significant portion of the population from the potential benefits of digitised justice systems.[70] The broader implications of these infrastructural gaps are profound. Bailard underscores that the digital divide not only reinforces existing inequalities but also creates new layers of marginalisation.[71] Without the necessary infrastructure, pre-trial detainees in remote regions are more likely to remain incarcerated for extended periods without trial, contributing to overcrowding in detention facilities and undermining the principles of timely and equitable justice.

Also, the lack of training for judicial staff, legal practitioners, and court users is another obstacle. Effective use of digital tools requires a well-trained workforce, but in many African countries, courts and lawyers are not adequately prepared to transition to digital processes.[72] Critics, such as Lount, highlighted that while the judiciary is beginning to embrace innovation, adequate training for judicial officers, lawyers, and court staff were not uniformly provided, leading to inefficiencies in some instances.[73]

Additionally, while virtual hearings can expedite case management and reduce the need for prolonged pre-trial detention by enabling faster bail applications or trials, they also raise legitimate concerns regarding security and privacy. Without robust encryption, user authentication, and secure data storage, sensitive proceedings may be vulnerable to interception, unauthorised access, or data breaches. These risks are particularly acute in jurisdictions where court IT infrastructure is under-resourced, potentially undermining the integrity of proceedings and eroding public trust in digital justice solutions.[74]

Funding is another constraint as many African nations face financial limitations, which significantly impede their ability to invest in and sustain judicial digitisation initiatives.[75] This is where partnership with the private sector and other groups comes in. Kenya took advantage of the financial and technical support provided by the World bank and other international groups. Outdated or inconsistent legal frameworks also hinder the integration of technology into judicial systems. As highlighted above, technological adoption in Kenya during COVID-19 was largely successful because the legal framework was in place.

## Recommendations

Having examined the current state of pre-trial detention across Africa, including the alarming statistics, systemic gaps, and emerging opportunities, it is now imperative to move from diagnosis to action. The following recommendations are designed to be practical and solution-oriented. They draw from what is already obtainable within the continent, building on promising practices while addressing persistent shortcomings.

### *Establish Enabling Legal and Policy Frameworks for Technology Integration*

Governments across Africa must enact comprehensive legal and regulatory frameworks that recognise and legitimise the use of technology as formal tools in the pre-trial justice process. These laws should set out procedural standards, rights protections (e.g., the presumption of innocence, privacy, and access to counsel), and oversight mechanisms to prevent abuse or unequal application. These laws range from legislative reforms, judicial rules of procedure like the case of Kenya,[76] and data protection laws adapted to justice technologies.

#### *Scale Up Remote Hearing Infrastructure to Decongest Courts and Prisons*

To effectively reduce pre-trial detention through digital tools, Africa's justice institutions must invest in modern, interconnected infrastructure. To ensure inclusion, systems should support local language interfaces and be accessible to non-digitally literate users. Mobile integration and offline functionality should also be considered, particularly in rural or under-resourced areas.[77]

#### *Institutionalise Electronic Monitoring as a Rights-Respecting Alternative to Pre-Trial Detention*

Electronic Monitoring (EM) should be formally legislated and institutionalised as a rights-based, non-custodial alternative to pre-trial detention in African countries. EM is particularly effective for low-risk individuals who pose minimal flight or public safety risks but remain in custody due to the inability to meet bail conditions while the trial is pending. By allowing individuals awaiting trial to reside in the community under supervised conditions, EM supports family and economic stability while ensuring compliance with court obligations. It also addresses the punitive effect of prolonged pre-trial detention, especially on vulnerable groups. To ensure sustainability, EM technologies should be locally sourced or adapted to regional contexts to reduce import costs and support local innovation.[78] Governments should allocate dedicated funding not only for the procurement and maintenance of EM devices, but also for training supervision personnel, establishing monitoring centres, and conducting independent evaluations to assess human rights compliance, effectiveness, and cost-efficiency. Public education campaigns are also crucial to counter stigma and build community understanding of EM as a rehabilitative not punitive tool.

#### *Mainstream Human Capacity Development across All Justice Actors*

Technology reforms often fail not because of hardware issues but from human resistance, lack of skills, or fear of redundancy. All reforms must include continuous training for judges, magistrates, law enforcement, correctional staff, and legal aid providers. Training should go beyond operations to cover ethics, digital rights, trauma-informed practice, and user accessibility. National Judicial Training Institutes and Bar Associations should embed digital justice modules into regular curricula. Cross-sector training encourages coordination across institutions.

#### *Strengthen Data Systems for Reform*

Establishing strong monitoring, evaluation, and public transparency mechanisms is essential if we are serious about reforming pre-trial detention in Africa. One of the biggest gaps highlighted in this chapter is the lack of reliable, disaggregated data to inform policy and practice. Without clear data on how long people are held in pre-trial detention, the reasons they are denied bail, or how justice is served across gender, age, and offence types, we are simply working in the dark. Governments must begin to develop practical, transparent metrics to track these indicators. These systems should not only be internal but also open to independent oversight by judicial inspectorates, ombudsmen, and coalitions of civil society actors who can monitor and report abuses and gaps.

#### *Funding*

Sustainable funding is essential to scale and maintain technology-based solutions aimed at reducing pre-trial detention. Most justice institutions in Africa are underfunded, and technology reforms often rely on short-term donor support. Governments must prioritise justice tech in national budgets while also exploring innovative financing models such as public-private partnerships (PPPs) with local tech firms. Donor engagement, multilateral support, and cost-sharing models can ensure long-term viability, while local partnerships foster innovation, reduce costs, and strengthen institutional ownership.

#### *Leverage Artificial Intelligence for Judicial Efficiency in Pre-Trial Cases*

Emerging technologies, notably artificial intelligence (AI), present the next frontier in reducing pre-trial detention. AI can also be leveraged in several ways and used in addition to some of the tools discussed in this chapter. One example is by using it to modernise courtroom processes that slow case progression, such as the continued reliance on judges taking notes in longhand, a practice that extends hearing times and contributes to case backlogs. AI-powered speech-to-text systems, already piloted in few courts in jurisdictions like Kenya[79] can produce accurate, real-time transcripts of proceedings, freeing judges to focus on substantive decision-making rather than manual recording. Incorporating AI could help expedite hearings, shorten remand periods, and improve record-keeping, which is crucial for monitoring pre-trial detention timelines. However, safeguards must be in place to ensure accuracy, protect sensitive information, and comply with evidentiary standards, in line with recommendations from the United Nations Office on Drugs and Crime (UNODC). Implementing such tools across Africa's courts would require investment in infrastructure, training, and data security measures to prevent misuse or breaches.

### Conclusion

Pre-trial detention remains a critical challenge across Africa, disproportionately affecting marginalised populations and undermining the principles of justice, fairness, and human dignity. The over-reliance on custodial measures highlights systemic failures, including outdated legal frameworks, inadequate infrastructure, and insufficient judicial capacity. The aspirations of UN SDG

16 promoting peace, justice, and strong institutions, underscores the critical importance of equitable and efficient criminal justice systems in fostering inclusive societies. One of its key targets, 16.3, aims to ensure equal access to justice for all and to address systemic barriers, including the overuse of pre-trial detention. Similarly, SDG 9 focuses on industry, innovation, and infrastructure along with the integration of technology to modernise judicial processes.

Digital tools and platforms offer innovative solutions to long-standing challenges in the criminal justice system, such as case backlogs, lack of transparency, and inequitable access to justice. The adoption of e-filing systems, electronic case management platforms, and virtual court hearings exemplify how technological innovation can enhance institutional efficiency, improve transparency, and reduce the delays that contribute to prolonged pre-trial detention. In other words, digitisation has come to stay. What is left will be to create an enabling environment by strengthening systems to enhance the implementation of existing legal frameworks.

There is a need for capacity-building training of justice administrators in sub-Saharan African countries on global technological trends. Furthermore, to fully realise a functional criminal justice system built on technology, the government stakeholders must welcome the collaboration of other stakeholders from the private and civic sectors, and the relevant legal framework must be put in place to ease adoption. Ultimately, addressing pre-trial detention through digitisation requires a holistic approach that prioritises equity, efficiency, and inclusivity. The time to act is now. Investing in technology and systemic reforms will pave the way for a fairer and more just society, where no one is left behind.

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# 4 Effective Mechanisms for the Management of Pre-Trial Detention in Sub-Saharan Africa

## The Case of Rwanda

*Denis Bikesha*

### Introduction

Pre-trial detention is a concept that has been defined in various documents. For example, the Guidelines on the Conditions of Arrest, Police Custody, and Pre-Trial Detention in Africa define Pre-Trial Detention as 'the period of detention ordered by a judicial authority pending trial.'[1] In general, it has a big socio-legal and economic impact on every society. Still, when it comes to sub-Saharan Africa, it becomes more negatively impactful because of the situation of the detention facilities that do not fulfil the required standards. Pre-trial detention deprives a person of the right to the presumption of innocence and liberty. In fact, some human rights activists consider this one of the most unpleasant actions that a state can take against a human being and which has devastating consequences.[2]

Pre-trial detention is legal if it is done within the parameters stipulated in the International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides that

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[3]

The repercussions of detention are significant. Individuals who are detained often face separation from their families and friends, risk losing their jobs and homes, and may suffer damage to their reputations. This is particularly true for public figures, as media coverage of their arrest and detention can amplify the impact on their personal and professional lives. This can negatively impact on the suspect's life especially when the suspect is victimised and may infringe the right to presumption of innocence. With this era of social media, information goes very fast; often people read and hear of public figures and celebrities that are detained but not often do people hear about them when they are released.

As a report of the Open Society Foundation/UNDP indicates, 'excessive and arbitrary pre-trial detention is an overlooked form of human rights abuse

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that affects millions of persons each year, causing and deepening poverty, stunting economic development, spreading diseases, and undermining the rule of law.'[4] Considering all the hardships that are aligned pre-trial detention, it should be a measure of last resort and should only be used where necessary and where no other alternatives are available.[5] In some of sub-Saharan Africa, there are complaints and stories about governments that throw their opposition leaders in detention facilities for some time to silence them from their political views.

Whenever the right to liberty is infringed unlawfully, there is room for the arrested and detained person to approach a judicial body that should quickly decide on the matter and order an immediate release if the detention is not lawful. The courts should make sure that they are also quick in making decisions. For example, in *Bezicheri v. Italy*,[6] the European Court on Human Rights (ECtHR) held that an interval of five and a half months from the time the applicant lodged his application up to the time the investigating judge dismissed it did not comply with the term 'speedily' under article 5(4) of the European Convention on Human Rights (ECHR). The government's arguments were that 'the investigating judge suffered from an excessive workload at the material time.' This was not a convincing argument since 'the Convention requires the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements.'[7]

Matters of pre-trial detention should be analysed at the level of detention facilities so that even those held as a last resort are treated appropriately. Africans discussed matters concerning pre-trial detention in different meetings to get proper solutions for the persisting related matters. For example, in 2004, at Lilongwe, Malawi, conference participants on legal aid in criminal justice advised governments to introduce some prison measures. Some of the suggested measures include the need for magistrates/judges to screen the remand caseload regularly to ensure that people are remanded lawfully, that their cases are being expedited and that they are held appropriately.[8] The participants added that it should be a last resort, not the order of the day, for those who are detained.[9] In sub-Saharan Africa, building on the regional legal instruments that have been enacted to help deal with this matter of pre-trial detention, States such as Rwanda, also have domesticated laws that may help in case of violation of a person's liberty in the course of arrest or detention of criminal suspects.[10]

These regional instruments also put in place measures that may lead to State agents being summoned by the courts in case of arbitrary arrest or detention. Regional Courts such as the African Court on Human and People's Rights receive complaints from individuals on the condition that they have exhausted their local remedies otherwise the cases will be inadmissible.[11] This is a good approach because matters like this should be handled domestically. But when States show little or no willingness to act, regional blocs may need to intervene to help improve the judicial system and promote human rights.

Rwanda has faced numerous challenges emanating from the genocide against the Tutsi. It is important to note that within a period of just 100 days, Rwanda befell a tragedy whereby, over one people were slaughtered.[12] However, this situation offers some success stories that can be beneficial to other African States to learn from. Rwanda's Constitution has a provision on arrest and detention. It provides that 'a person's liberty and security are guaranteed by the State. No one shall be subjected to prosecution, arrest, detention or punishment unless provided for by laws in force at the time the offence was committed.'[13] In Rwanda, arrest and detention of a person is possible only when they are suspected of being involved in the commission of an offence under national or international law.[14] But according to the Rwandan law relating to the criminal procedure, a criminal suspect will be arrested and detained if he or she is suspected to have committed a crime that is punishable with at least two years of prison custody. It is also possible that if a crime is less than two years but not less than six months, the investigator or prosecutor may provisionally detain the suspect. Nevertheless, this kind of treatment can only happen if there is reason to believe that the suspect may evade justice, when his or her identity is unknown or doubtful or if the provisional detention intends to prevent the suspect from disposing of evidence or exerting pressure on witnesses, victims, or to prevent connivance between the suspect and their accomplices.[15]

This chapter assesses the mechanisms employed as an alternative to pre-trial detention in sub-Saharan Africa with a particular focus on Rwanda's experience. Rwanda has used both tradition-based approaches in the form of home-grown[16] solutions as well as other common practices, especially in Common Law, which is being underlined in the criminal justice in the aftermath of the genocide against the Tutsi. Most of the work done in this chapter shows Rwanda's experience in handling pre-trial detention matters using tradition-based approaches such as Gacaca Courts and *Abunzi* Committees and other Alternative Dispute Resolution (ADR) mechanisms such as mediation.

## Exploring the Mechanisms for the Management of Pre-Trial Detention Concerning Criminal Suspects in Crimes of Genocide

On 7 April 1994, immediately after the death, in a plane crash, of President Habyarimana, together with President Cyprien Ntaryamira of the Republic of Burundi, the genocide against the Tutsi started. It has been estimated that close to a million people lost their lives in a period of 100 days.[17] The genocide against the Tutsi was stopped by Rwandese Patriotic Front (RPF) fighters who toppled the regime, called *Abatabazi*, that had taken power after the death of President Habyarimana.[18] Some criminal suspects handed themselves over to the authorities for pre-trial detention because they anticipated that they could be killed by the survivors of the genocide, especially those who had survived because they had joined the rebel group, RPF and who now had information about the perpetrators of the crime.

As suggested by Phil Clark,[19] the genocide against the Tutsi should be distinguished from other incidences of genocide that took place in the 20th century for the following reasons:

a The use of weapons of low technology (machetes, clubs, and rifle-wielding groups in a period of 100 days):[20]
b The mass involvement of Hutu in the killings (close to million people involved):
c Social and cultural similarities of the perpetrators and the victims:
d The speed at which it happened (only took 100 days, i.e., from 7 April to around 15 July).[21]

The Government of Rwanda also carried out a census to determine the number of people killed during the genocide and revealed more than a million victims. The Ministry of Local Government-MINALOC announced 1,050,000 people to have been killed during the genocide.[22] In the aftermath of power being reinstated by the RPF, there was a need to restore justice, law and order in the country. The first deal was to negotiate with United Nations to establish an International Criminal Tribunal to prosecute the genocidaires. The International Criminal Tribunal for Rwanda (ICTR) was created on 8 November 1994.[23] This was mainly charged with prosecuting the 'big fish,' therefore, there was still more needed to consider how the ordinary genocidaires should be prosecuted.[24]

In 1996, the law governing prosecution of genocide crimes was enacted and genocide cases started to be tried in the ordinary court system of Rwanda.[25] There were two main challenges faced by the ICTR: firstly, it was very slow to render justice, resulting in only 93 indictments throughout its existence, with proceedings concluded for 82 accused.[26] Secondly, within the jurisdiction of Rwandan ordinary courts, there were already many pending cases and the system could not try an increased number of suspects within a reasonable time. In five years, only 6,000 cases were tried and concluded from over 120,000 pending cases with criminal suspects who were in pre-trial detention.[27] Within such a situation, pre-trial detention would take at least a century for the cases in place and the persons in pre-trial detention to face justice.

This created conditions for the emergence of a think-tank in the country whereby a group of people, including civil servants, non-governmental organisations, and diplomatic corps, were commissioned to think of and work out a more effective and efficient modality of handling the huge number of those cases. They soon came up, from revisiting the Rwandan traditional system of resolving conflicts, the Gacaca as an alternative system to address these concerns. The proposal was formally introduced in 2001 by a law establishing *Gacaca* Courts.[28] According to the *Gacaca* Organic Law, the temporal jurisdiction (*ratione temporis*) considered for the genocide perpetrated against the Tutsi is between 1 October 1990 and 31 December 1994.[29] In contrast, the temporal jurisdiction for the genocide against the Tutsi, according to the International Criminal Tribunal for Rwanda (ICTR), is considered to be from 1 January 1994 to 31 December 1994. Gacaca Courts have tried 1,958,634 cases,[30] in a period of ten years.

The success of Gacaca Courts in handling genocide cases led to the conclusion that homegrown solutions should be part of the Constitution of Rwanda of 2003 following the revisions that took place in 2015. Accordingly, the Constitution provides that 'to build the nation, promote national culture and restore dignity, Rwandans, based on their values, should initiate home-grown mechanisms to deal with matters that concern them.'[31] Connected with this system, Rwanda established *Abunzi* Committees[32] and other homegrown solutions.

When the Gacaca Courts started operating, the situation in prison facilities worsened because, through the collection of information, the number of genocide criminal suspects increased adding to those that were already detained. This prompted the Government of Rwanda to find a solution for the issue of overcrowded detention facilities. The Organic Law on Gacaca Courts was revised and many people that were in detention got provisionally released. A significant feature in the Gacaca Courts was citizen's participation in judicial matters. Citizens' participation 'is a process which provides private individuals an opportunity to influence public decisions and has long been a component of the democratic decision-making process,' thus leading to peace and security.[33] Citizens' participation leads to restorative justice and helps combat the mentality of indiscriminately incarcerating individuals. Restorative justice[34] should be emphasised because in a situation where the mentality is retributive, punishing begins from detention and in this regard, even the innocent ones suffer.

With the orientation of restorative justice to support unity and reconciliation of Rwandans, at a particular stage, in 2005, the president of the Republic of Rwanda instructed the responsible authorities to provisionally release the young people, the older people, those who had illness and the minors who were suspected to have been involved in the genocide.[35] This change took effect immediately and provided some relief in Rwanda's detention facilities. It was also the case that participation should involve those most affected by the wrongdoing – victims, offenders, and their communities – rather than State representatives.[36] Many people claim that citizen participation is expensive and thus opt to avoid it. During *Gacaca* Courts activities, Rwandans participated wholesomely.

In her article, Wierzynsky wrote that the *Gacaca* Court system, Rwanda's traditional, community-based restorative justice institution, has assisted in promoting participation and contestation.[37] The Rwandans, who were previously hostile to one another, communally channelled their animosities through such community participation in a constructive dispute-resolution process rather than through communal violence.[38] Wierzynsky concludes that the *Gacaca* Court system played a seminal role in promoting democracy and thus qualifies to be a successful transitional justice mechanism.[39] Rwanda has not only been involving citizens in public decision-making, but also the financial expenses have been avoided on a greater scale, leading to various voluntary services rendered by the citizens for their own betterment. The participation of citizens helped in the prevention of victimisation, thus protecting some of the accused persons from prolonged pre-trial detention.

## Management of Pre-Trial Detention for Ordinary Crimes in Rwanda

Significant features adopted in the prosecutions and pre-trial detention management of crimes other than those connected to the genocide against the Tutsi include plea bargaining, fine without trial, bail, Alternative Dispute Resolution (ADR) mechanisms such as *Abunzi* Committees, and mediation in general. These are discussed in the subsequent paragraphs of this chapter.

### *Plea Bargaining*

Plea bargain is an agreement between the prosecutor and defendant in which the defendant agrees to plead guilty to some of the charges, or a lesser charge, in exchange for a reduced sentence, or some other concession by the prosecution.[40] In the criminal justice system, plea bargaining is regarded as a contract like any other, and it must fulfil the legal requirements for the formation of the contract, namely consideration, offer, acceptance, legal purpose, and intention to create a legal relationship.[41] Additionally, a plea-bargaining agreement must be given voluntarily, with a clear understanding of the charges the defendant is admitting to and the consequences that follow.

In Rwanda, the practice of plea bargain has evolved within two distinct jurisdictions. Firstly, it has evolved as part of proceedings within the International Criminal Tribunal for Rwanda (ICTR). Pursuant to United Nations Security Council Resolution 955 of 8 November 1994, the ICTR was responsible for prosecuting the individuals responsible for genocide in Rwanda. Under the criminal procedure and evidence rules of the ICTR, an accused can enter a plea agreement expressing their admission of guilt to all or certain charges. Such an agreement is negotiated between the prosecution and the accused.[42] The ICTR, while in operation, started with Jean Kambanda's case. Jean Kambanda was the prime minister of Rwanda during time when the genocide against the Tutsi occurred. He pleaded guilty to all the charges at the ICTR Trial Chamber but much as he target was to get released, he was instead sentenced to life imprisonment.[43] Kambanda's case shows that although plea bargaining aims at negotiation done by two parties (the prosecutor and the defendant), it is not always the case that an accepted plea will lead to the reduction of the punishment, especially when dealing with masterminds of crimes, particularly the ring leaders.

Rule 65 of ICTR Rules of Procedure stipulating the conditions for a plea agreement procedure, states that

> The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the prosecutor shall; apply to amend the indictment accordingly, submit that a specific sentence or sentencing range is appropriate; or shall not oppose a request by the accused for a particular sentence or sentencing range.[44]

Plea bargaining in genocide cases seemed a bit cumbersome especially when it came to the planers of the genocide against the Tutsi. For example, in the case involving the former Prime Minister Jean Kambanda before the ICTR, he was convinced by the prosecution to enter a plea deal and get a lesser sentence before the court. The court, however, refused the prosecution's request for Kambanda, requesting a shorter sentence of 15 years.[45] Whichever form a plea bargain takes, an important feature is that the plea agreement is not binding on the court and is subject to the court's approval.[46] Jean Kambanda was sentenced to life imprisonment but appealed. The Appeals Chamber confirmed the sentence before the bench presided over by Judge Claude Jorda.[47] Considering the situation of Jean Kambanda, plea bargaining helped ICTR but did not help the criminal suspect during the time of sentencing.

Secondly, plea bargain arrangements are recognised in the context of prosecutions under the control of the National Public Prosecution Authority (NPPA). The law relating to the criminal procedure stipulates that,

> At the end of the suspect's interrogation, the prosecutor may propose a plea-bargaining agreement whereby the suspect helps the prosecutor to obtain all the necessary information in the prosecution of the offence and to know other persons involved in the commission of the offence and in return of some benefits but without hindering good administration of justice. The prosecutor makes concessions to the suspect concerning charges against them and the penalties that they may request.[48]

Recently, plea bargaining has only been referenced in two provisions of the Criminal Procedure Code of Rwanda, which is insufficient for effective implementation. On 19 July 2022, the prosecutor general of Rwanda signed instructions that currently facilitate the implementation of plea bargaining in criminal procedure.[49] In September 2023, the president of the Supreme Court issued Practice Directions that govern the plea-bargaining procedure.[50] Currently, the legal system of Rwanda has not adopted a civil law nor common law system; instead, Rwanda is practicing a hybrid approach.[51]

To ensure the effective implementation of plea bargaining, the Government of Rwanda is collaborating with Pepperdine University in California, United States.[52] The university has provided experts to work alongside Rwandan staff from both the Judiciary and the Public Prosecution Authority who are responsible for this process. Also, the judiciary of Rwanda is carrying out a campaign in Rwandan detention facilities to ensure that all stakeholders, including criminal suspects, understand the process. The judiciary of Rwanda selected five Intermediate Courts: Nyarugenge Intermediate Court, Gasabo Intermediate Court, Musanze Intermediate Court, Muhanga Intermediate Court, and Gicumbi Intermediate Court where this pilot phase is ongoing.[53]

In Rwanda, crimes such as stealing[54] and assault or battery[55] are the most common crimes that lead to the pre-trial detention of many criminal suspects. The judiciary of Rwanda has considered these crimes for the pilot phase in order to decrease the number of pre-trial detainees. Also, Intermediate Courts in the Kigali District were selected in the pilot phase because they have very many files compared to other courts. However, to balance the selection, a few countryside courts were also selected (Musanze and Muhanga).[56] Pepperdine University availed seven experts that worked with the Rwanda team composed of staff from the Judiciary, the National Public Prosecution Authority, the Bar Association of Rwanda, Rwanda Investigations Bureau,[57] and Rwanda Correctional Service, and this campaign has been impactful beyond expectations. In the few days of the collective campaign by these organs involved in rendering justice in Rwanda, over 200 criminal suspects demonstrated their will to be involved in plea bargaining and when the exercise started, some of the criminal suspects that were detained went home on account of penalties that were suspended and other reasons.[58] This marked a significant success in the reform attempts at managing the complexities around pre-trial detention in Rwanda.

The Rwandan Criminal Procedure[59] provides a prosecutor may propose a plea-bargaining agreement at the conclusion of a suspect's interrogation. This agreement requires the suspect to assist the prosecutor to obtain all the necessary information regarding the offence and identifying other persons involved in the commission of the offence. In return, the suspect receives some benefits but without compromising the proper administration of justice.[60] The prosecutor also makes concessions to the suspect concerning charges against them and the penalties that they may request.

A plea-bargaining agreement obligates the public prosecution to charge the suspect as both parties agree. The court has the discretion to admit or reject an agreement of plea bargaining but cannot alter the agreement.[61] Therefore, the plea-bargaining contract is solely binding on the prosecution and accused. Until September 2023, there were no instructions stipulating how the prosecution should relate with the judiciary around sentencing from plea agreements and, therefore, the situation seemed unclear. As a result of reform initiatives around this gap, the Chief Justice (CJ) of Rwanda issued Practice Directions.[62] Unlike the previous situation that was guided by only two provisions found in the law relating to criminal procedure, the CJ's Practice Directions improved the situation, in regulating much more, plea bargaining in the administration of criminal justice in Rwanda. These instructions cover the definition of plea bargaining, the procedures taken during plea bargaining (including signing an agreement between the parties), the role of court, the role of prosecution and the role of the defendant/defence counsel providing for a more uniform practice.

### *Fine Without Trial*

According to Rwandan law of Criminal Procedure,[63] for any offence that falls within their competence, if the prosecutor considers that the offence may be punishable by a fine, they may ask a suspect to choose between being brought before the court or paying a fine without trial. Also, according to Rwanda's

Criminal Procedure law, this practice is different from plea bargaining because this process has only one option: the fine that the criminal suspect will pay whereas in plea bargaining even custodial sentences may be part of the penalty.[64] This fine referred to cannot exceed the maximum fine stipulated by law. If the suspect decides to pay the fine without trial, the criminal action against them is discontinued and the decision is notified to the victim.[65] With the discontinuation of the criminal proceedings against the suspect, there would be no need to detain the suspect as there is no trial.

***Bail***

According to the Rwandan Criminal Procedure Code,[66] bail can be paid for a criminal suspect to be provisionally released. However, this release must be approved by either an investigator, a prosecutor, or a judge, depending on the circumstances related to the crime and the suspect. Also, a criminal suspect may be provisionally released on bail only or with additional conditions; this helps in the management of pre-trial detention. A suspect may be asked to report to the responsible authorities such prosecution at a given time but reside in his or her home other than being detained.[67] Although bail is provided for in Rwandan law, in practice it is seldom used. Sometimes legal experts have a conversion about 'from jail to bail' but still there is no legal culture of involving bail in the administration of criminal justice.

***Alternative Dispute Resolution (ADR)***

Rwanda is a country that has developed ideas that are tradition-based ranging from the time solutions were sought to deal with the crimes of genocide in Rwanda.[68] As part of reform initiatives, the Government of Rwanda recently approved two important policies: Alternative Dispute Resolution (ADR) Policy[69] and Criminal Justice Policy.[70] These two policies, established in 2022, are established to assist Rwanda in effectively managing pre-trial detention. They address some existing practices in the Rwandan criminal justice sector, while also introducing systems such as *Abunzi* Committees to be involved in criminal matters. The subsequent paragraphs discuss these ADR initiatives.

*Abunzi Committees*

*Abunzi* Committees were constitutionally established in 2003 in the first version of the Constitution and started operating in 2004.[71] *Abunzi* Committees is a traditional African mechanism initiated by Rwandans for conflict resolution of unique conflicts within a specific context. *Abunzi* is responsive to the justice needs of society.[72] These committees were created to address the backlog in Rwanda courts. According to the Constitution, 'the *Abunzi* Committees are responsible for conciliating parties in conflict to consolidate national unity and peaceful co-existence among Rwandans.'[73]

Reports published by the Rwandan Judiciary indicate that the committees have been very effective in this regard. For example, in the fiscal year 2015–2016, *Abunzi* Committees received 47,966 cases, and 44,679 were successfully handled. There were 35,953 civil matters and 12,013 criminal matters.[74] At a certain stage, *Abunzi*'s jurisdiction to settle criminal cases was suspended. However, the ADR Policy proposed that *Abunzi* regain jurisdiction albeit limited to handle some criminal acts in *the* public interest as may be determined by the concerned authorities after a proper feasibility assessment.[75]

*Mediation*

In Rwanda, mediation has gained a good foundation in the judiciary. However, there is much to be done to ensure that the mentality of professionals, including advocates, are changed to support ADR in general and mediation in particular. The mentality of most professionals involved in the administration of criminal justice is to start a case file with the aim of prosecution rather than considering diversion to ADR. As a member of the court-annexed mediators in Rwanda, the author has discovered that advocates fear that supporting mediation would lead to losing their honorarium because more money is made when an advocate is involved in a case file oriented in the courts of law than mediation. A firm mediation can lead to effective management of pre-trial detention since the parties involved in some criminal cases such as family could mediate. For example, the prosecution of adultery is initiated only upon complaint of the offended spouse. In that case, the prosecution is initiated against the accused spouse and the co-offender.[76] The provision adds that the offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint.[77]

Like the campaign regarding plea bargaining currently happening in Rwanda as mentioned above, there is a need to campaign for mediation to pick up a higher momentum in the Rwandan society. Currently, mediation is done free of charge by the court registrars and judges. As a result, parties tend to prefer approaching registrars and judges rather than other professional court-annexed mediators who charge a fee. But judges, who are mostly approached, often lack the time to manage their ordinary court workloads effectively.

### *Promotion and Implementation of the Principle of Habeas Corpus*

Habeas corpus is a Latin expression that literally means that 'you have the body.'[78] The principle of *habeas corpus* provides that detainee is brought before the court to determine if the person's imprisonment or detention is lawful. Usually, a *habeas* petition proceeds as a civil action against the official who holds the defendant in custody.[79] The *habeas corpus* first originated back in 1215, through the 39th clause of the Magna Carta signed by King John, which provided 'No man shall be arrested or imprisoned…except by the lawful judgment of his peers and by the law of the land.'[80]

In Rwanda, criminal suspects can be held by investigators for a maximum of five days.[81] Prosecutors can then extend this period for an additional five days. This means that an individual may be detained for up to ten days before a court issues a formal detention order, which can last for a maximum of 30 days.[82] In the management of pre-trial detention, it is made clear that there has not been abuses by the National Public Prosecution Authority (NPPA). It the responsibility of the Department of the Inspectorate to do all the duties related to supervision of the work done by the (NPPA) including mistakes related to arbitrary arrests and detention.[83] This office is headed by the inspector general that has five other inspectors plus one legal researcher that assists in making sure that NPPA respects rules and regulations in its mission. Additionally, the Rwandan High Council of the Judiciary and High Council of the National Public Prosecution are vital to the discipline of judges and prosecutors that may abuse their powers and act unprofessionally such as being involved in arbitral arrests and detention. The councils impose administrative sanctions after uncovering misconduct by prosecutors and judges. The administrative sanctions may include terminating individuals who have acted unprofessionally, including violations of the principle of habeas corpus. All these is put in place to ensure that the reasons for having this in place has not been abused.

## Conclusion

This chapter examined the issue of pre-trial detention and examines the reform initiatives in Rwanda to ensure that the complexities often associated with pre-trial detention are managed effectively. A key finding of the chapter is that pre-trial detention negatively impacts African communities and should always be adopted as a measure of last resort. Closely linked to this is the need to improve detention facilities in sub-Saharan Africa, as the current conditions are unhealthy, even for those held as a last resort. There is an increasing need for people especially stakeholders involved in criminal justice administration in sub-Saharan Africa to see detention as only an option or as an exception and embrace the idea that a criminal suspect may not be in detention pending criminal prosecution and remain free until such a time that they are convicted or otherwise continue to be free when acquitted.

A lot must be done in terms of reshaping the mentality of citizens and creating an awareness to debunk the long-held attitude of considering detention the only option. While Rwanda has made significant strides in addressing pre-trial detention, by introducing tradition-based approaches in the form of homegrown solutions such as plea bargaining, mediation, and the use of Gacaca courts, there is still more work to be done, a situation that is also true for many criminal justice systems across sub-Saharan Africa. Nevertheless, Rwanda must be commended for the way the aftermath of the genocide against the Tutsi was handled in terms of the administration of pre-trial detention. The measures adopted by the country have ensured that only a limited number of persons were detained, compared to the number of persons undergoing investigation or prosecution.

In Africa, for pre-trial arrest and detention as well as other related matters to be effectively employed, the independence of the personnel involved such as investigators, prosecutors, and judges should be guaranteed so that they do not fall in this trap spearheaded by some politicians who would want to use them to give hard time to their opponents. Although sub-Saharan African courts may intervene in arbitrary arrest and detention matters, African States should consider mechanisms that can help effectively manage matters such as pre-trial arrest and detention. For example, in Rwanda, these mechanisms include plea bargaining, fine without trial, bail, compensation for arbitrary arrest and detention, *habeas corpus*, alternative dispute resolution, and standards of detention facilities. These can be used elsewhere, and they should be helpful in mitigating irregularities found in the management of pre-trial detention.

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# Part 2

# Mechanisms for Speedy Trials in the Criminal Justice Systems across Sub-Saharan Africa

# 5 Practical Steps and Best Practices in Achieving Speedy Trials in Criminal Justice Systems

## An Experience from Uganda

*Eva K. Luswata*

### Introduction

Historically, many legal systems have jealously guarded the right of an accused person to have a speedy trial in criminal prosecution. Speedy trials are guaranteed as a civil right in various international, domestic, and regional instruments.[1] Additionally, speedy trials are mentioned as an integral part of the Bills of Rights in the Constitution[2] and similar legislations. Furthermore, the courts have attempted to interpret the meaning of speedy trials and offered redress in cases of violations. That notwithstanding, delays in processing, prosecuting, and the determination of criminal cases is one of the most visible problems facing the courts in many, if not all sub-Saharan jurisdictions. In Uganda, this problem has persisted for a long time, despite constitutional provisions emphasising the necessity and importance of the right to a speedy and fair trial.[3]

Speedy trials, as an integral component of due process, are designed to protect the accused from oppressive pre-trial incarceration, and the anxiety and concern accompanying public accusation. In addition, a speedy trial should limit the possibility that memories will fade, witnesses will lose interest or disappear, and will, in general, impair the accused's ability to defend themselves or even have direct or indirect implications in forfeitures. Delayed judgements for criminal cases equally harm litigants in several ways. There lies the psychological and economic harm that may negatively impact their ability to effectively prepare an appeal, which can only be activated after a final decision in a case.

Delayed judgements also may cause the litigants to incur additional legal fees, and in Uganda, this is significant because many who go through the criminal justice system, are poor. Furthermore, delayed judgements may adversely undermine the efficient functioning of the legal system because the availability of precedent is curtailed and lawyers are prevented from fulfilling their professional responsibility to represent their clients.[4] Delayed judgements may also create the unflattering impression of an inept and despotic judiciary, which may result into loss of trust and public confidence in the judicial system, and a situation where people resort to vigilante justice where citizens take matters

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into their own hands because they feel, criminal prosecutions are inept in punishing offenders and ending crime. Therefore, although obviously categorised as individual rights of concerned accused persons, speedy trials are in fact a matter of public interest.[5] That is because speedy trials enhance the integrity and fairness of criminal proceedings, as well as serve the needs of a well-ordered society in many respects. As such, all societies should prioritise securing expeditious trials in any type of criminal prosecution.

The principle of speedy trials is also integral to advancing Goal 16 of the United Nations Sustainable Development Goals, which member states have committed to achieving by 2030.[6] This goal emphasises the promotion of peaceful and inclusive societies as a foundation for sustainable development, ensuring universal access to justice, and fostering effective, accountable, and inclusive institutions across all levels of governance. In Uganda, the right to a speedy trial is guaranteed by the Constitution and other legislation. However, bottlenecks within and outside court rooms, along with significant backlog statistics, indicate that the problem persists.

This chapter discusses the legal and policy framework within which criminal trials are conducted and how the courts and other justice actors have come up with innovations to reduce delays. In addition, it is a limited comparative study of different legal and policy frameworks to identify potential solutions that could enhance the speed of the criminal trial process. The aim is to improve efficiency without compromising the quality of prosecutions and respect for human rights of both the victims and offenders. This chapter employs a desk review research method to uncover the practical steps and best practices in achieving speedy trials in criminal justice systems. This involves utilising existing data to support and validate the recommendations.[7]

## The Legal Framework for the Right to Speedy Trial in Uganda

### *International and Regional Human Rights Frameworks*

The right to a speedy trial is guaranteed in numerous international and regional human rights treaties and conventions to which Uganda is a signatory. Article 10 of the Universal Declaration of Human Rights[8] affords without discrimination, all those charged with crimes, the right to fair and public hearing by an independent and impartial trial. The International Covenant on Civil and Political Rights (ICCPR) is more succinct, as it provides that anyone facing a charge shall be brought promptly before a judge or other authorised officer to be tried within a reasonable time, or be entitled to release.[9] As a minimum, the trial must be carried out without undue delay.[10] Similar provisions appear in the United Nations Convention on the Rights of the Child.[11] It stipulates that matters involving children must be determined without delay and with emphasis on their best interests in the presence of legal or other appropriate assistance, or their parents or legal guardians.[12] Similar provisions can be found in the core regional human rights instruments of Africa. Both the African Charter on Human and People's Rights[13] and the African Convention of the Rights and Welfare of the Child,[14] make provisions for the right to be tried within a reasonable time by an impartial court or tribunal.

Having ratified the above instruments, Uganda is obligated to respect, protect, promote, and fulfil the right to a speedy trial.[15] The State is mandated to prevent violations, as well as provide an enabling environment for enjoyment of the right and, where necessary, to make tangible provision in certain circumstances.[16] Additionally, State actors and other duty bearers must refrain from violating the right and not interfere in its enjoyment.[17] Human rights protection in the core instruments follows an approach that focuses on the protection of vulnerable and marginalised groups who are charged with crimes. Therefore, in this chapter, some emphasis is placed on how such groups are processed through trials and suggested responses or actions and principles underpinning their special circumstances including discrimination.

### *Domestic Legislation of the Right to Speedy Hearing*

Uganda follows a dualistic approach to ratification of international treaties.[18] As such the provisions in international and regional instruments have largely been incorporated into the Constitution and other legislations. The Constitution provides that justice shall not be delayed.[19] Specifically, the right to a speedy hearing is guaranteed in the Bill of Rights under Article 28 which provides that:

> In determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

These right forms part of the wider provisions of due process, that should serve as the cornerstone for any civil or criminal litigation. A speedy trial translates into one receiving fair hearing, which in Uganda is a non-derogable right in the Constitution.[20] It is arguable then that in Uganda, this right is accorded a very high place in the human rights framework that the courts should enforce.

In expounding on the State's obligations to protect the right, it is further provided in the Constitution that a person charged with a criminal offence shall be immediately informed in a language they understand the nature of the offence[21] and given adequate time and facilities to prepare their defence including witnesses,[22] appear before a court in person or by a lawyer at their expense, and for capital offences, at the expense of the State.[23] The Constitution gives a time frame of 48 hours from the time of arrest, after which a person arrested should be presented before the court to answer the charge.[24]

Save for the provision that a suspect must be produced before a court within 24 hours, Uganda's Constitution gives no further guidance on what the expected time frame for criminal trials should be and what would be considered delay and, therefore, contravention of the constitutional provisions. This is also evidenced by the large number of backlogged cases due to incessant delays, and this greatly impacts the parties. Equally, there is no principle or subsidiary legislation that provides what should be the mandatory or at least reasonable timeline to be followed. Therefore, it has majorly been left to the Courts to interpret the scope of the right and pronounce reparations when it is violated. Indeed, some of the good practices and innovations discussed in this chapter have been introduced to address issues raised out of court decisions and an attempt by the judiciary as the responsible arm of government, to conclude prosecutions within the reasonable minimum time as it is required to do under the Constitution.[25]

### *Understanding the Right to a Speedy Trial in Uganda*

It may perhaps be useful to begin by understanding the right within the human rights context set by international instruments and domestic legislation. The normative content of the right is discussed by the United Nations Human Rights Committee in General Comment No. 32.[26] The Committee notes that an important aspect of fairness of a hearing is its expeditiousness.[27] Further, that the right is not only designed to avoid keeping persons too long in a state of uncertainty about their fate, but also to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of a specific case, and to serve the interests of justice.[28] What is reasonable has to be assessed in the circumstances of each case,[29] taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. However, where the accused is denied bail by the court, they must be tried as expeditiously as possible.[30] This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.[31] All stages, whether in first instance or on appeal, must take place without undue delay.

Similar observations are found in the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003.[32] The Commission explained that the right to a trial without undue delay means the right to a trial which produces a final judgement and, if appropriate, a sentence without undue delay. Factors relevant to what constitutes undue delay are mentioned to include the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings.

In Uganda, the High Court has had the opportunity to consider and enforce the above guidelines. In Kanyamunyu *Mathew v. Uganda*,[33] the judge emphasised the importance of the provisions in the Constitution that guarantee a fair, speedy, and public hearing. He noted the need to conduct and conclude trials in the shortest appropriate period with an emphasis that *'all stages must take place in a speedy manner.'* The same court in another matter considered the dictum in *Barker v. Wingo*[34] and observed that for any accused person 'there must be a hearing; the hearing should commence in good time, should proceed at a reasonable pace, and it must be completed within a reasonable period. This process is driven by the evidence on record…'[35] In the same vein, the High Court considered a period of detention (before committal for trial) of three years and nine months as exceptionally long so as to raise an inquiry as to whether the proceedings against the accused were not oppressive or otherwise in breach of his right to a fair and speedy trial.[36] For that reason, the High Court has been prepared to consider a delayed trial as illegal and to award compensatory reparations in damages for violation of personal liberty.

The Constitutional Court of Uganda has also interpreted the right to a fair hearing in the context of the Peoples' Defence Forces Act. This Act establishes the General Court Martial and other subordinate courts, such as Division Court Martials, for the purpose of trying service offences.[37] While the law does include safeguards for due process and mandates that trials must proceed without undue delay, it also permits summary trials that can be conducted by commanding officers or higher authorities.[38] Notably, individuals facing summary trials are not entitled to legal representation. Complaints have arisen about the rushed nature of these proceedings, which can result in executions without proper adherence to due process and constitutional safeguards.[39] An illustrative example of this issue involves a situation where two soldiers were arrested and charged with murder in the morning. By noon, they were indicted, tried, convicted, and sentenced to death by a Field Martial Court, and later executed by firing squad on the same day.[40] When the constitutionality of this was challenged, the Constitutional Court considered the trial to have been one carried out in violation of the right to life, and a fair and speedy hearing.[41] The court cautioned that requirements of a speedy trial must be reasonable and measured against the overall objective of achieving fair trial.

### *Powers of Courts to Curb Delays: Legislative Safeguards*

The agreed position is that it is the court that should have full control of a trial and thereby determine its pace in any given circumstances. However, given that different justice actors control different aspects of a trial, delays are inevitable. For example, it is the constitutional mandate of the Director of Public Prosecutions (DPP) to institute and discontinue criminal proceedings.[42] The DPP is expected to stop trial by tendering in court a *nolle proseque*, if no evidence is available to maintain the charge or for other sound reasons. The prosecution can be reinstated when the DPP is ready to continue.[43] This is synonymous with the powers of Attorney Generals in Nigeria.[44] However, in Nigeria, the Attorney General can delegate his powers.[45]

In Uganda, the power to discontinue proceedings is for the DPP alone and cannot be delegated, and for private prosecutions, the DPP can only tender a *nolle proseque* after obtaining consent of the court.[46] Considering the volume of prosecutions that take place in High Court Divisions and Circuits around the country, ring-fencing this duty has created backlogs. Fortunately, there is legislation in place to aid judicial officers in curbing delays. The High Court has unlimited powers to discontinue delayed prosecutions.[47] However, since those powers stem from an Act of Parliament as opposed to the constitutional mandate of the DPP, the courts can only act with caution and after reliable information that, in a given case, the prosecution must be discontinued to respect constitutional safeguards of the accused. This law has been liberally used in many criminal cases to curb unnecessary delays and save many accused persons from long periods of detention without trial.[48]

The courts also have alternative powers to prevent constitutional violations of those suffering delayed trials by a temporary release on bail. This can happen upon application by the accused person (who may or may not be legible for statutory bail) or on the court's volition.[49] Except in cases of statutory bail, the decision to grant an application rests within the court's discretion, guided by the grounds outlined in the Trial on Indictments Act.[50] Following a decision of the High Court that bail is a constitutional right,[51] the trend has been for each Judicial Officer to exercise their discretion, often without strictly applying the statutory grounds for bail. This resulted in an outcry especially from the executive branch and some sectors of the public, that undeserving accused persons are wrongly released back into the community, causing insecurity.

To address those concerns, in June 2022, the Chief Justice issued guidelines,[52] which, it is hoped, will (*inter alia*) ensure compliance with the Constitution, reduce incidences of pre-trial detention, promote uniformity and consistency when courts are considering applications, and also balance the rights of complainants and accused persons with the public interest. In essence, save from stripping magistrates of most of their powers to grant bail for capital offences, the Directions restate what appears in the Constitution and existing legislation, and in addition, provide a clear framework on how bail applications should be handled. The guidelines are currently being contested in the Court of Appeal.[53] It is yet to be seen whether there will be improvement in how courts hear and manage bail applications, and if that will translate into expeditious trials in general.

Conversely, legislative safeguards for children charged with crimes are strong and effective. The Children Act mandates every judicial officer to handle children-related cases expeditiously and without unnecessary delay.[54] Once a child takes a plea, their prosecution must be completed within three months or dismissed, after which the child shall not be liable to any further proceedings for the same offence.[55] The maximum remand period for capital offences is three months, after which statutory bail becomes applicable, and prosecution after plea must be completed within 12 months or the case dismissed and the child discharged for good.[56] In practice, many structural bottlenecks impede this right. Currently, there are only seven functional remand homes[57] – one rehabilitation centre and one reception centre for children in the country[58] and the police are constrained to detain child offenders at police stations and other ungazetted places pending their trial.

Due to lack of funds, long distances from courts and other logistical support issues, offenders are not produced in courts in time which results into delayed trials.[59] Existing support from civil society organisations (CSOs) has dwindled, and State funding for child-centred interventions is inadequate.[60] Courts have improvised by being more proactive about their mandate. The criminal division of the High Court in Kampala periodically moves court sessions into the Remand Home in Kampala. By doing so, more trials are handled in an expeditious manner that safeguards child offenders' rights, and at a minimal cost.

### *Reasons for Delayed/Prolonged Trials in Uganda*

#### *Prolonged Pre-Trial Procedures*

In most domestic jurisdictions, the ability of any court to quickly conclude a trial largely depends on the pre-trial processes which are sometimes lengthy. These processes are outside the court's control and fall within the domain of laws and other justice actors who have the mandate during that stage. In Uganda, trials before the High Court can only begin after the formal committal of the suspect by a magistrate.[61] The magistrate commits the accused only after investigations are complete. There is no set time for how long investigations can take, and that interim period has on many occasions led to long delays sometimes stretching into years.[62] Further, in a trial where the accused person denies previous confessions made to police, the court is mandated to conduct a *'trial within a trial,'*[63] and depending on the complexity of the matter, that has often resulted into further delays. Accused persons with mental disabilities sometimes face indefinite trials because of inclusion of the executive arm in their trials.

Delays have been recorded in the specialised courts as well. An example is in the High Court International Crimes Division. The court largely adopts the procedures of the International Criminal Court (ICC) which, because of unique local circumstances, have resulted into prolonged prosecutions.[64] The requirement for confirmation of charges in a pre-trial, which may involve extensive disclosure, interim applications for special measures and open-ended field outreaches, have exacerbated delays. The nature of the offences which are international in nature have high-cost implications and call for special expertise of the prosecution and bar. The main trials are conducted before a panel of four judges, a constraint to an already stretched bench. One acts as an alternate Judge to step in the event a permanent member of the panel is unable to complete the trial. Since most crimes are national and transnational in nature, hearings are conducted in multiple languages which prolongs hearings and requires the added cost of obtaining interpreters. The core purpose of the court was to ensure expeditious disposal of international crimes, but systemic delays in such trials are common; for example, in one particular trial, the accused who were committed for trial in September 2015, had their pre-trial closed in September 2019.[65] However, due to adjournments sought by either side to deal with issues of legal representation, procurement of evidence, disclosure, amendments in the indictment, and cost implications, the actual trial commenced November 2025.

*Other Reasons*

Other reasons for delays in trials in Uganda have been advanced. Funding for the judiciary remains inadequate to support the required personnel for a growing population.[66] Changing social and economic dynamics in the society have resulted into increased crime and increased trials that outnumber an understaffed judiciary that is in addition still struggling with inadequate infrastructure, inept judicial officers and other personnel.[67] Political interference and a legal system wrought with legal technicalities have also led to delays.[68] Litigants themselves may for a myriad of reasons delay matters, the most common being unnecessary adjournments.[69] The police and Office of the Director of Public Prosecutions (ODPP) have also complained of inadequate staffing and funding and more still needs to be done in terms of training for sophisticated cases and white-collar crimes.[70] Further, routine transfers of officers halt investigations and prosecutions which result into delays.[71]

***The Effects of Delay in Criminal Trials***

Delay in trials will in most cases result into constitutional and a host of other human rights violations, including:

*Injustice*

Delays may reduce the chance of a court arriving at a proper decision, thus compromising fairness for either the victim or the accused. In addition, where an accused person is wrongfully or unjustly detained, and the proceedings are not completed in a timely fashion, this amounts to grave injustice. In this regard, it would mean that the accused person has been subjected to punishment for a crime which they did not commit. The unlawful detention, unlawful restraint, and their attendant risks and issues are punishments in themselves. Other related injustices include reputational damage, loss of livelihood, loss of income, loss of employment, and other related issues.

Delays in trials can result in punishments beyond the threshold of liability of the accused person. For instance, where a crime attracts a maximum sentence of one-month imprisonment, but the accused person is detained for years before trial or before trial is completed, it means that the person has been detained far beyond the prescribed imprisonment term. This is also a form of injustice.

*Other Effects*

Other effects of delay in criminal trials include loss of interest/confidence, death, relocation, and disappearance of witnesses. With passage of time, witnesses tend to forget the exact details of the events, or lose interest, which weakens the prosecution. Yet again, witnesses may die or move away to other places, making it costly to trace them. Furthermore, delay makes it harder for accused persons to effectively prepare their defence. For the community, when accused persons are eventually convicted after long trials, it can create the perception that justice has not truly been served especially if public interest in the case has waned. Furthermore, overcrowded detention facilities place immense pressure on inmates, leading to financial loss, the breakdown of family and community ties and in severe cases, exposure to abusive conditions, including physical and sexual violence while in detention.

## Current Solutions to the Problem of Prolonged Trials

Having highlighted the bottlenecks placed at the pre-trial and trial stage, a discussion of the innovations implemented by the government and other actors is necessary.

### *The Justice Law and Order Sector Initiative*

The Ugandan Judiciary has increasingly tailored innovations that involve other key justice actors and the public. In 1999, the Government of Uganda established the Justice Law and Order Sector (JLOS).[72] The government thought it wise to bring together institutions with closely linked mandates of administering justice and maintaining law and order and human rights, into developing a common vision, policy framework, unified on objectives and plan over the medium term.[73] In JLOS, all key state actors in the administration of justice came together under the administration of a secretariat, with the aim of improving a coordinated framework for access to justice and the rule of law.[74] The overall goal is to promote the rule of law.[75] On the general goal, it seeks to improve access to and administration of justice through the sector-wide approach to planning, budgeting, programme implementation, monitoring, and evaluation.[76]

The judiciary as the leading member of JLOS successfully secured support from partner institutions in ways that impacted speedy trials in courts. Quarterly review and monitoring meetings were held at the secretariat, during which effective strategies were discussed to address the challenges faced by various institutions.[77] This approach helped the judiciary enhance the quality of trials. For example, partner institutions like the Law Development Centre (LDC), Uganda Law Society (ULS), and Justice Centres Uganda (JCU) provide advocates who offer pro bono services for the State Brief Scheme. They also visit prisons during which they sensitise inmates of their rights and generally assist them in navigating the trial process, which improves the pace of proceedings in court. Pro bono services are now regulated by the Judicature (Legal Representation) at the Expense of the State Rules SI No. 55 of 2022. More recently, there has been a change in policy by the Government of Uganda (GOU) to make a shift from sectors to programmes. JLOS was replaced with the Governance and Security Programme with similar objectives and membership, with the Judiciary retained as a leading institution.

At the grassroots level, a structure similar to that of JLOS structure is in place. Each Chief Magistrate is expected to set up and head a District Coordination Committee (DCC) with representations from all former JLOS institutions, political and civic leaders, as well as health and security personnel.

Issues concerning the administration of justice are more intimately discussed on a quarterly basis and support systems reinvigorated from time to time. A High Court Judge in charge of each circuit equally convenes a Regional Coordination Committee (RCC) that brings together all the magisterial areas within their circuits. The RCC receives quarterly reports from the DCCs which are then centrally considered. Factors hindering expeditious criminal trials are then addressed and resolved.

### *Plea Bargains*

Another important innovation was the introduction of the plea bargain procedure in criminal trials by the Judicature (Plea Bargaining) Rules SI No. 43 of 2016. Ugandan laws permit a guilty plea at any stage in the trial. The objectives of the plea bargain rules are: (a) to enhance the efficiency of the criminal justice system for the orderly, predictable, uniform consistent, and timely resolution of criminal matters; (b) to enable the accused and the prosecution in consultation with the victim, to reach an amicable agreement on an appropriate punishment; (c) to facilitate reduction in case backlog and prison congestion; (d) to provide quick relief from anxiety of criminal prosecution, (e) to encourage accused persons to own up to their criminal responsibility; and (f) to involve the victim in the adjudication process.

The plea bargain procedure is open to accused persons facing various charges. The accused person (one who appreciates their culpability) is permitted to indicate readiness to plead guilty in exchange for the prosecutor to drop one or more charges, reduce a charge to a less serious offence, or recommend a particular sentence acceptable to the accused person, and subject to the approval of the court.[78] The accused initiates the bargain at any stage of the proceedings and victim participation as well as full disclosure by the prosecution of all matters pertaining to investigations is ensured.[79] Judicial officers remain substantially outside the negotiations and only intervene to guide the process on matters of the sentence agreed upon. The judicial officers have powers to reject the proposed sentence and will then direct the negotiations to continue. When the two parties agree, the plea bargain is reduced into an agreement which is then presented to court. The court will then conduct proceedings akin to those followed in for a plea of guilty.[80]

The judge must confirm that the accused makes the plea bargain in a genuinely voluntary manner, and in full awareness of the facts of the case. They must also appreciate the legal consequences of forfeiting the rights to a full trial, and the plea bargain must not run counter to any important public interest. After the accused submits a guilty plea, the judge will then convict and sentence the accused according to the agreement and then follow to endorse it.[81] If the two parties fail to agree or the judge or victim rejects the sentence, then the process is closed, and the prosecution will resume before a new judicial officer to avoid bias.[82]

Plea bargaining offers significant advantages, such as reducing bureaucratic delays at both the pre-trial and trial stages by enabling swift case processing through periodical judicial camps across the country. This streamlined procedure, though occasionally impeded by the need for victim participation, is both efficient and predictable. Since its introduction as a pilot programme in 2014, plea bargaining has been implemented in all High Court circuits and piloted in Magistrates Courts nationwide. This initiative has notably contributed to reducing the percentage of cases aged over three years from 24% in 2017 to 17% in 2019. Between 2021 and 2022, the judiciary successfully resolved 2,144 cases during 15 sessions, achieving a disposal rate of approximately 98%.[83] Plea bargain is regulated by legislation which if properly implemented should achieve its four objectives.

Notwithstanding the above, the procedure still has some challenges. The majority of recorded offenders are indigent and illiterate, and most times do not understand the process and are not properly guided by counsel. Further, there have been reports that those who have stayed long on remand agree to plead guilty even when innocent in order to secure some certainty in their imprisonment. Thus, there is danger that many trade their constitutional right of innocence and liberty. Owing to funding constraints, most camps are held within the prison premises, which is not the best environment to obtain free and fair bargaining on both sides which raises concerns of due process. Another objection to the design of the process has been its emphasis on case backlog clearance with little or no attention to the victims of the crimes. Funding constraints have also limited the presence of victims and their families, which often leaves this vital third party outside the bargaining process. Again, judicial officers, either through sheer negligence or ignorance, fail to follow the proper procedures resulting in agreements being challenged on appeal, which reinstates backlog.

Again, the communities who are still focused on retributive rather than restorative type of justice are yet to understand and appreciate the results and benefits to social justice that it can provide. It is also still debatable whether the innovation, which is hinged on agreements between two consenting parties, can be extended to child offenders. Attempts have been made to allow children to bargain and then contract through their parents or legal guardians (and usually those are few or non-existent), but the impact of this is still under investigation.[84]

### *The Administration of Judiciary Act, Cap 4*

In recent times, the judiciary has attained full financial autonomy through the enactment of the Administration of Judiciary Act. This new power allows the judiciary to manage and allocate funding to enhance various functions, including the conduct of trials. There has been significant recruitment of judicial officers at the magistracy and high court levels which it is hoped will translate into better case workload management. A Case Backlog Monitoring Committee headed by the Deputy Chief Justice concerns itself of the needs of the courts in order to improve services and setting performance benchmarks for judicial officers to monitor disposal at individual level and, in general, counter the backlog challenge. The emphasis now is to migrate from management of case backlog to better case load management.

The current legal framework has fostered innovations within the court system. In January 2022, the Criminal Division of the High Court undertook a pilot programme on daily hearing of cases with the aim of testing and making comparisons between handling High Court criminal cases on a rolling daily basis as opposed to the traditional Session System. The project was set to run till January 2024 and thereafter get weighed and measured for possible rolling out across the country. The strategies adopted by the court were detailed in the Pilot Project Concept Note prepared by the Head of the Criminal Division and are discussed below.

In 2022, the Criminal Division constituted five Case Clearance Teams that were headed by a judge and comprised of a State Attorney, an Advocate, a Research Assistant, a Court Clerk, an Interpreter, a Process Server, a Prison Warder, and two Assessors. The target of each team was to complete 20 trial cases and 50 plea bargain cases. The performance of the Case Clearance Teams would be reviewed at a monthly Division Judges' meeting to facilitate monitoring and preparation of well-informed Quarterly Case Clearance Reports. The Division also adopted day-to-day hearings for criminal cases, which has so far led to improved case disposal rates. Additionally, the process for accused individuals who plead guilty has been expedited, resulting in earlier convictions. Witnesses can now provide their evidence closer to the dates of the offences, contributing to higher conviction rates.

The downside was that the improvements in the volume of judicial officers were not matched with a commensurate increase in public prosecutors. This adversely affects the quality of prosecutions and causes delays from repeated adjournments to complete investigations and obtain replacement for prosecutors and police officers on transfer. The DPP has also complained that daily hearings negatively impact many pre-trial preparations like service of criminal summons and preparations of witnesses, matters further exacerbated by limited funds. On the other hand, more funding is available to the State Brief Scheme (SBS) that is now regulated by legislation[85] and has become more competitive, which translates into quality defence and faster case disposal. The SBS is well supported by lawyers in private practice and those attached to CSOs. Compliance with ethics and good conduct remain key for those who offer defence services, and monitoring is carried out by registrars at the courts and the Law Council. A new legislation[86] to make provision for legal aid by the State and related matters was recently tabled before Parliament. It is hoped that its comprehensive provisions in that area should streamline legal defence in line with constitutional standards and a corresponding improvement in trials and case disposal.

Further, the Courts of Judicature also resolved to undertake a data cleaning process to reconcile the soft and hard records and promote robust and efficient registry and archives management systems. This innovation was targeted to resolve the discrepancies and inconsistencies in the management of data, particularly between the Court Case Administration System (CCAS) and the actual physical case files. Court clerks were tasked to update both soft and hard records daily. The Division Judges were encouraged to actively monitor effective management of Records by their subordinate teams. Physical files had to be jointly carried out with the ODPP and Prisons, for immediate reconciliations of data while accounting for missing files.

Another innovation by the Criminal Division of the High Court is joint cause listing of cases. It was decided that prior to the hearing of cases, there would be pre-session monthly meetings with the Division Registrar, the Office of the Director of Public Prosecutions, the Prisons Services, and the Officer in Charge of Children Remand Home to jointly handle cause listing. The cause listing would take into consideration peculiar needs of the individual cases, such as medical conditions, age of the cases, matters of public interest, children, persons with disability, and breastfeeding mothers among others. Priority would be placed on cases which concern gender equality, the rights of special interest groups, and the welfare of children shall be prioritised alongside cases which are of public interest.

The Court also adopted a *Two-Times-Zero* initiative under which cases pending for more than two years would be prioritised until a zero-pendency rate is achieved. The plan includes a quarter system where 60% of the cases on the cause list are backlog, and the rest are fresh cases. The Court established a fast tracker lane managed by a division judge on a monthly rotational basis, with a sole objective of tracking urgent special interest and high-profile cases. The fast tracker would also fast track fresh plea bargain cases, right from inception at the Magistrate Courts level. A Research Assistant under the supervision of the Registrar of the Division would constantly monitor and coordinate the fast tracker lane with Magistrate Courts under the Division. In addition, there would be forward and backward linkages with the Magistrates' Courts, the ODPP, and the Prisons Services, to fast-track committal and hearing of cases at the earliest opportunity. A Research Assistant attached to the programme under the supervision of the Division Registrar would coordinate daily with Magistrate Courts, State Attorneys, and Prisons Services, to identify cases that are ready for immediate committal, plea taking, and hearing/plea bargain.

The impact of the Pilot Project was reviewed on 14 February 2024. The project reduced the case backlog from 43% to 22.3% and shortened case lead times from 2,190 days to 502 days.[87] It also lowered the remand-to-convict ratio to 45.7/53.7%, approaching the international standard of 45/55%, and streamlined joint cause listing.[88] Over the 20-month period, the Criminal Division completed 2,242 cases, averaging 111 per month. Of these, 361 cases (16.1%) were resolved through plea bargaining, while 1,881 cases (83.9%) were completed through daily hearings. The total cases completed accounted for 47% of the project's expected output.[89] Although the goal was to reduce case load times to 365 days and eliminate the backlog in two years, the average time to dispose of a case was reduced to 502 days.[90]

***Prioritisation of Vulnerable Groups***

There are corresponding innovations in trials involving vulnerable groups like children. Judicial officers are urged to prioritise children-related cases and handle them expeditiously. Some judicial officers hold special sessions or move sittings into remand homes. Statutory bail for children is also respected, and since children have no legal capacity to enter plea bargaining agreements, they are encouraged to consider offering guilty pleas and, in return, their speedy conviction in line with the relevant law is affected. Further, the Children Act eliminated the requirement of children convicted of capital offences being returned to a magistrate for sentencing. The judiciary has readily funded courts to hold child-friendly procedures, for example, the use of video link technology to protect child victims and witnesses during trial. Judicial officers are encouraged to don less severe attire, use simple or friendly language, and to retire into chambers when recording evidence from children.

Special attention is now given to trials involving sexual and gender-based violence ('SGBV'). For example, the GOU with funding from developing partners undertook a four-year project on disposal of SGBV-related cases in selected districts.[91] The project that has returned 88% clearance rate is meant to test the viability of using a specialised framework for hearing cases of that nature. Under similar projects, women judicial officers and others have under their umbrella organisation[92] received special training to improve their adjudication of SGBV-related cases which currently form the bulk of trials. Such training, which hinges on the importance of the inter-disciplinary approach to trials, improves on the quality and quick disposal of trials in a manner that is gender-sensitive and responsive to human rights of women and girls.

***Interventions by the Bar, CSOs, Police, and Prosecutors***

There have been corresponding innovations within the prosecutorial arm, as well as the bar. Case review and management by the ODPP has been improved with periodical *weed out* sessions done to eliminate cases with poor or no evidence and *nolle prosecue* secured before, or early enough in the trials. Like JOs, state prosecutors receive routine training to improve their professional and social skills especially regarding trials involving vulnerable victims and accused persons. A case in point is the creation of special procedures where child victims, witnesses, and their guardians can be made at ease. The use of anatomical dolls has proved invaluable in guiding children to provide vital evidence of sexual assaults. Similarly, structural improvements in courts, like the introduction of video link equipment that offers some protection to victims and witnesses in similar trials, improve privacy and shorten delay.

The private bar and CSOs have continued to be a robust participant in the quest to improve trials in general. The Uganda Law Society[93] which is represented at the JLOs has a Legal Aid Scheme and forms the bulk of the bar providing legal defence in the SB and PB schemes. The ULS has other services, for example, the annual pro bono day at which over 1,500 advocates offer all manner of legal services to the public all over Uganda. In addition, duty counsels are active at selected police stations and courts in the seven districts daily and the Society operates a pro bono app where legal aid services are offered. Although pro bono is not compulsory, it is encouraged with recognition and awards by the Society. The quality of services may still be wanting but the presence of defence counsel translates into an alive, defended, and expedited trial.

Notable CSOs also offer legal defence and do extend their services to other activities that result into speedy trials. For example, the Foundation of Human Rights Initiative (FHRI) runs a paralegal advisory services programme that carries out outreach in prisons through which accused persons are sensitised of their rights and assisted in navigating the complicated trial procedures. The same CSO offers tracer services to help suspects and accused persons locate lost or missing police files ensuring their cases are heard and resolved more quickly. Similarly, the Legal Aid Clinic, a subsidiary of the Law Development Centre that offers pro bono legal education to bar course students, has given special attention to juveniles in conflict with the law.

Bar course students offer pro-defence at a designated Magistrate's Court under the Bar Course Student Practice Programme. Students and the clinic advocates instruct suspects on self-representation and attend to reconciliation programmes that are promoted for petty offences. In addition, the clinic supports a diversion programme for juveniles to expedite juvenile cases and divert them from the formal systems. They also conduct visits into remand homes to sensitise accused persons about their civil rights and innovations, like the plea bargain. Parallel innovations are currently recorded by the police as the investigative branch. The immediate innovation has been a deliberate effort to increase the number of detectives and improved networking with stakeholders like the ODPP, prisons, judiciary, and the Inspector of Government.

Work plans are designed against a result-oriented style. Investigators are appraised against the number of cases properly investigated, concluded, and prosecuted. The police now take on a prosecution-led investigation where they work together with the ODPP from when a complaint is reported until the matter is disposed of. Investigators are encouraged to adopt case prioritisation by concentrating and fully investigating a few cases so that they are completed promptly. An elaborate curriculum for all investigating officers is now in place, within which specialised training for investigators and SOC personnel in gender issues and white-collar crime, leading to improved investigations and reduced trial delays.

Funding has been secured to bolster scientific-led investigations, with plans to set up mini laboratories to aid the central laboratory in forensic analysis. Other departments within the police have received equal attention. For instance, there is a Women Affairs and GBV Department both with independent funding, while the Children and Family Protection Unit has been elevated to a full department. Diversion into non judicial audits within communities[94] is encouraged for petty and juvenile offenders and guidelines are in the works to streamline those procedures. Such innovations are key to an improved force, whose pre-trial mandate are vital in setting into motion expeditious trials that vindicate the rights of both the victims and accused persons, save time for courts, and ensure that the public interest is served.

## Innovations Adopted in Other Jurisdictions

### *Nigeria*

Nigeria has adopted several innovations to achieve better coordination between providers of services in the criminal justice system. These include the enactment of the Administration of Criminal Justice Act (ACJA) 2015, Practice Direction and Electronic Performance Management System. The ACJA provides a model for wholesale adoption or adaptation at the sub-national levels. Generally, a mechanism called the Administration of Criminal Justice Monitoring Committee (ACJMC) has been created under Section 469 of the ACJA and under state Criminal Justice Procedure laws.

At the federal level, the ACJMC comprises key stakeholders in the criminal justice system namely the Chief Judge of the Federal Capital Territory who presides and a secretary appointed by the Attorney General of the Federation on the recommendation of the Committee. Other members of the ACJMC are drawn from key players in the justice system such as the Federal High Court, Federal Ministry of Justice, Nigerian Police Force, Nigerian Correctional Service, Legal Aid Council of Nigeria, Nigeria Bar Association, National Human Rights Commission, and one civil society organisation representative. Like the JLOS in Uganda, the mandate of ACJMCs is mainly to see to the efficient operation of the criminal justice system particularly in areas where inter-agency cooperation is critical. Thus, the ACJMC is to ensure that:

a Criminal matters are speedily dealt with,
b Congestion of criminal cases in courts is drastically reduced,
c Congestion in prisons is reduced to the barest minimum,
d Persons awaiting trial are, as far as possible, not detained in prison custody,
e The relationship between the organs charged with the responsibility for all aspects of the administration of justice is cordial and there exists maximum cooperation amongst the organs in the administration of justice in Nigeria.[95]

The ACJA also provides for measures to expedite criminal trials and processes leading up to trial. For example, the Act provides for time limits regarding pre-trial detention where bail is not granted. Under Section 293, a suspect arrested for an offence which a magistrate court has no jurisdiction to try shall, within a reasonable time of arrest, be brought before a magistrate court for remand. Upon application ex parte, the magistrate may, where there is probable cause, order remand in the first instance for 14 days pending receipt of advice from the Attorney General or arraignment. Section 296 further provides time limits for the completion of investigation and action of the DPP. It provides that:

a An order of remand made by a court shall not exceed a period of 14 days in the first instance.
b The court may make an order for further remand of the suspect for a period not exceeding 14 days, on application in writing, showing good cause why there should be an extension of the remand period or otherwise grant bail.
c After the expiration of the 14 days' extension, the court shall order the release of the person remanded unless good cause is shown why there should be further remand order for a period not exceeding 14 days.

Other innovations under the ACJA relate to the restriction of adjournments, the stipulation that hearings should be conducted on a day-to-day basis[96] and the stipulation that proceedings should not be interrupted on account of an appeal on an interlocutory issue.[97]

Regarding the Practice Directions, it is also noteworthy that the judiciary in some states and the Federal Capital Territory have adopted these for de-clogging the court dockets. Under Order 13 of the FCT High Court Practice Directions of 25 April 2017, the Chief Judge may set up a panel of judges which may include magistrates to review and reduce the backlog of cases on the docket of courts. The panel may work by itself or in conjunction with the Administration of Criminal Justice Monitoring Committee (ACJMC).

An Electronic Performance Management System (PMS) is in place to track cases efficiently.[98] It offers a clear process for accomplishing tasks and evaluating activities within defined timelines for both management and staff. The system also supports courts by monitoring and tracking the assignment of cases. Additionally, it aids in identifying gaps and obstacles to timely trials, particularly in scheduling court dates. A pilot programme is in place to monitor performance of judges in the way they discharge and fast track cases.[99] A similar performance enhancement tool is in its final implementation stage in Uganda.[100]

***United Kingdom***

The Early Guilty Plea scheme for Crown Court cases and Stop Delaying Justice in the magistrates' courts are two reforms implemented by the judiciary to strengthen the way that cases are managed through the courts.[101] These are designed to fast track cases in which a guilty plea is anticipated, reducing the amount of work that has to be undertaken, allowing for quicker and more cost-effective resolutions. The Early Guilty Plea Scheme is designed to ensure that cases where individuals plead guilty in the Crown Court are resolved as quickly as possible.[102] It is intended that these cases will be identified at an early stage in the court process and then be listed in the Crown Court within 21 days of the matter being committed from the Magistrates Court.[103] A single Crown Court hearing will take place dealing with both plea and sentence. Where appropriate, the Probation Service will prepare reports for the Crown Court hearing date to avoid an adjournment.

The 'Stop Delaying Justice!' project in the United Kingdom, initiated by the judiciary in the magistrates' courts, is a collaborative effort to address and reduce delays in criminal trials. It is a joint initiative involving the Magistrates' Association, the National Bench Chairmen's Forum, and the Senior District Judge (Chief Magistrate), with support from various legal organisations and funding from the Judicial College. Its key objectives and strategies are as follows,

i *Accepting Responsibility for Delay*
The project acknowledges that judges and magistrates play a crucial role in preventing trial delays. It emphasises the need for all stakeholders to recognise their responsibility when a trial collapses, adjourns, or faces issues that could have been avoided with proper case management.

ii *Positive Attitude of Stakeholders*
The project highlights the positive attitude of Crown prosecutors and defence lawyers who share the frustration with system failures. It aims to work collaboratively with these stakeholders to address issues collectively.

iii *Standardisation and Compliance*
The project calls for the Crown Prosecution Service to have a file complying with the National File Standard at the first hearing. It stresses the importance of having a properly instructed advocate who can make appropriate decisions. Similarly, it expects defence lawyers to provide required information on case management forms.

iv *Prompt Handling of Legal Aid and Avoiding Overloaded Lists*
The project urges the courts service to promptly deal with legal aid applications and allocate sufficient time for early case management hearings. It emphasises the need to avoid overloading court lists, which can lead to delays.

v *Sanctions for Non-Compliance*
The project introduces straightforward sanctions for non-compliance. If the defence has fulfilled its responsibilities and is fully prepared for trial, but the prosecution has failed to comply with its responsibilities, then the Crown may not be granted an adjournment, and the prosecution may fail. On the other hand, if the defence has not complied with its responsibilities, it will not gain any advantage, and ambush defences will result in adjournments and cost awards.

### *United States of America*

The strategies that are employed by the courts in the United States of America as a means of tackling the high incidences of delayed trials, include the Effective Criminal Case Management Project (ECCM). The ECMM is a national initiative designed to discover and document effective practices that drive high performance in handling felony and misdemeanour cases in the state courts.[104] ECCM created and implemented a rigorous national data collection effort to assemble the largest case-level data set of felony and misdemeanour cases ever created – 1.2 million cases from 136 state courts in 21 states.[105] The results of the extensive data collection, analysis, and policy recommendations provide insights on how courts in certain states have dealt with delays. The insights below are gathered from one of the reports from the study.[106]

### *Judicial Collegiality*

Judicial collegiality and cooperation play a vital role in effective case and calendar management. In the Virginia court, judges exhibit a high level of camaraderie and cooperation. Regular meetings, communication, and collaboration between judges and administrative staff are essential for maintaining an effective master calendar system. Judges' confidence in their colleagues' commitment to firm trial dates and workload completion contributes to the success of case flow management.

### ***Collaboration with Justice Partners***

Collaboration with justice partners is essential for efficient case flow management. Many courts, such as Minnesota and California, convene regular meetings involving various stakeholders, including district attorneys, public defence, law enforcement, and private bar representatives. These meetings foster communication, coordination, and cooperation among justice partners, helping to streamline processes.

### *Managing Discovery*

Efficient completion of discovery is crucial for case flow management. Several courts, such as Virginia, emphasise the importance of early discovery, where the prosecution provides basic information at the preliminary examination, facilitating early plea negotiations. Some courts face challenges related to delays in obtaining forensic reports, which can impact case preparation. Scheduling orders specifying dates for discovery completion are cited as effective in keeping cases on track.

### *Calendar Control System in Virginia*

The Virginia court employs a distinctive approach to case and calendar management through its Calendar Control system. This system involves two judges being available at designated times each morning to address requests for continuances, which are granted only with good cause. Parties can appear on a first-come basis, even by phone. The court maintains a firm policy discouraging continuances and places significant importance on establishing and adhering to firm trial dates. Additionally, an emergency calendar control system is scheduled for afternoons to handle urgent matters.

*Addressing Continuances*

One of the significant contributors to case delay is continuances. ECCM courts recognise the importance of controlling continuances and applying a reasonable but firm continuance policy. While some stakeholders may express concerns about prioritising timeliness over representation, the dominant viewpoint is that continuances should be tracked, analysed, and granted judiciously. Controlling continuances is crucial for expediting trial processes.

The Bill of Rights in most sub-Saharan African democracies are in place to remind states to make all necessary arrangements to avoid prolonged or indefinite trials that have resulted into rights violations. The right to fair hearing is made up of other components of which speedy trial is one. Having analysed the problems and causes of delays and looked at the measures and legal frameworks put in place; it is therefore necessary to uphold the right to speedy trial at highest esteem. Looking at the South African Constitutional Courts and laws, other sub-Saharan countries may need to emulate, strengthen, and provide support to this right to improve the justice system.

Some recommendations include:

a Funding: Improved funding for courts of judicature and other justice actors is the first step to improve the quality of prosecutions. Increased funding will mean more courts and other services nearer to the people, which translates in faster and more effective handling of trials.
b Checks: Courts should become innovative with case management and disposal. There should be a consensus on time limits to conclude, investigations, and pre-trial procedures as well as agreed time frames for trials.
c Legislative reforms: These could formalise and improve innovations that have shown success in terms of statics of backlog clearance and quality of trials. Kisekka has advised that plea bargaining processes must statutorily delineate to conform to the parameters of a fair hearing and where the rights of the accused and rights of all other parties are well balanced.[107]
d Enhancement of jurisdiction of the lower bench is key in saving the High Court of incessant backlog leaving that court with appellate jurisdiction or cases that merit that level of adjudication, for example, international crimes. Trials before military tribunals ought to be interrogated and specialised courts for handling matters of SGBV set up as a matter of urgency.
e Increase in judicial officers: The burden of the court is more than the available officers. There is need to appoint more judges to improve the swift determination of cases.
f Capacity building: Efficiency and knowledge for both the Judiciary and prosecutorial arms must be enhanced through continuous training and capacity building and Judicial activism in fair and speedy trials encouraged.
g The trial process simplified: Dispensing with technicalities involves streamlining legal procedures and reducing unnecessary complexities in the trial process. Courts may encourage concise and straightforward pleadings,

focusing on the key issues of the case. This reduces the scope for technical challenges related to the form of pleadings. Further, encouraging parties to explore ADR methods, such as mediation or arbitration, can bypass the formal trial process, saving time and resources. Lastly, judges may hold pre-trial conferences to identify and address potential administrative and technical issues in advance, promoting efficiency during the trial.

h Dealing with frequent adjournments: Frequent adjournments can significantly contribute to trial delays. Courts should exercise caution when granting adjournments, considering them only in exceptional and genuine cases. Frivolous requests for adjournments should be discouraged. Parties requesting adjournments should provide compelling reasons for the delay, such as the unavailability of a key witness due to illness or a legitimate emergency. Some legal systems impose cost consequences on parties responsible for unjustified adjournments. This serves as a deterrent against unnecessary delays.

i Setting timelines: Setting timelines for case progression is a proactive approach to managing trial delays. Courts can adopt case management techniques to establish specific timelines for different trial stages, including filing of pleadings, disclosure of evidence, pre-trial conferences, and trial dates. Courts may maintain trial lists with scheduled trial dates, ensuring that cases are slotted for trial within a reasonable time frame.

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# 6 Trial Within Trial as a Clog to Fostering Speedy Trials in Sub-Saharan Africa

## A Review of the Nigerian Practice

*Asma'u Muhammad Sulaiman*

### Introduction

One of the fundamental principles of the criminal justice system is to make it expeditious to ensure that no one is unduly burdened, including the defendant, the victim, and society. This principle must be followed from the arrest to the trial, judgement, and sentencing. *Justice delayed is justice denied*, as summed up in the legal maxim. To ensure that innocent people are not wrongly detained or convicted, upholding the right to a fair criminal trial is recognised by international human rights instruments.[1] This principle is enshrined in the 1999 Constitution of the Federal Republic of Nigeria (CFRN) (as amended) as a fundamental right to a fair hearing, which includes a speedy and fair trial.[2] The Nigerian Constitution provides that judgement shall be delivered no later than 90 days after the conclusion of the hearing of evidence and final addresses.[3]

The Administration of Criminal Justice Act, 2015 (ACJA), introduced in 2015 as part of criminal justice reform initiatives, aims to enhance the justice system. The drafters understood that the speedy dispensation of cases must be a priority to have an effective criminal system. To this end, the ACJA provides for the electronic recording of confessional statements and day-to-day trials, among other provisions.[4] This provision has been adopted by all 36 states in Nigeria, including the Federal Capital Territory (FCT). Delays in administering justice are a long-standing issue in Nigeria despite existing laws addressing this problem. Pursuing justice in Nigeria is often obstructed by procedural hurdles, with the 'trial within trial' practice standing out as a significant barrier. Initially designed to ensure the voluntariness of confessional statements and to protect the accused, this practice has evolved into a substantial impediment to timely justice. If properly utilised, recent reforms in Nigeria's criminal justice system have removed the practice of 'trial within trial.'

This chapter explores the use of the trial within trial process in trials in sub-Saharan African countries, especially Nigeria. It examines the legal framework of the trial within trial and speedy trials, as well as the appropriate situations for conducting a trial within trial. Additionally, the chapter compares Nigeria's practices with those of South Africa, Botswana, Kenya, and Uganda. The goal is to contribute to ongoing discussions on reforming the criminal

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justice system in sub-Saharan Africa, with a particular emphasis on promoting speedy trials, which aligns with Sustainable Development Goal 16 (SDG 16) and the African Union's Agenda 2063, which advocates for peace, justice, and strong institutions.

Adopting a doctrinal research method, the chapter examines primary sources such as the Constitution, legislative provisions, and case law alongside secondary sources like scholarly opinions in books and journals. The chapter recommends that the initiatives introduced by the Administration of Criminal Justice Act (ACJA) 2015 should be applied uniformly across all states in Nigeria and that an ACJA Monitoring Committee be established in states lacking one. Non-governmental organisations should also be encouraged to oversee the committee and provide support as needed.

### *The Nature of Trial Within Trial in Nigeria*

Research indicates that trial within trial is a process in the jury system[5] that can be traced back to common law practice.[6] In any criminal trial, the admissibility of a confession is a key question that a judge must consider before making a final ruling based on all the evidence presented.[7] A trial within trial occurs when the court temporarily halts the main trial to determine the validity of a confession made by the defendant.[8] Originating from common law traditions, the trial within trial is a procedural mechanism designed to determine the admissibility of confessional statements.[9] This mini trial occurs when the voluntariness of a confession is challenged, typically on grounds of duress, coercion, or inducement. The main trial is temporarily halted, allowing the court to assess whether the confession meets the requisite legal standards.[10] This is a common practice in Nigeria, where defendants can challenge the voluntariness of a confession presented by the prosecution. While this process safeguards the accused/defendant from self-incrimination and potential abuse by law enforcement, it significantly elongates trial proceedings, undermining the principle of a speedy trial.

In Nigeria, the procedure for conducting a trial within trial starts with the prosecution calling witnesses who testify against the defendant. Among these witnesses are security operatives who recorded the accused person's statement. The statement is tendered through these personnel.[11] Once the prosecution seeks to tender the statement in evidence as an exhibit, the defence may object to the statement's admissibility on two grounds.[12] Firstly, the defendant did not make the statement or that the signature on the statement was not his. Secondly, the statement was not voluntarily made due to duress, torture, or other forms of threats.[13] The trial within trial requires the prosecution to prove that the defendant was administered with a word of caution in the language understood by the defendant before the statement was given and signed. The trial will further prove that the defendant understood the statement after it was read over in the language they understood.[14] The defence may counter the prosecution's assertion by producing evidence that force was used, displaying scars from such use of force, if any, or calling other witnesses who may have visited the accused while in detention and saw the injuries or were threatened with fear by law operatives to coerce the defendant to admit the allegation.[15] The court will decide whether to admit or reject the statement of the defendant based on the evidence presented by both parties.[16]

The Court of Appeal in the case of *Gimba v. FRN*[17] provides for when a trial within trial will and will not be conducted as follows:

> The position of the law is that when an o**bjection is raised** to the admissibility of a confessional statement or statement made by an Accused on the ground that it was **not made by him or that the signature on the statement is not that of** the defendant, there is **no need** to conduct trial-within-trial. Trial within trial will be **conducted only** where the defendant complains that the statement was **not voluntarily made** either due to duress, torture, or other forms of threats exerted on the Accused to obtain the statement from the Accused….
>
> *(Emphasis is mine)*

Therefore, the right time to raise the issue of voluntariness or otherwise of a confessional statement is when the prosecution seeks to tender the purported confession in evidence.[18] If the defendant objects, the judge would order a trial within trial to determine whether the defendant made the statement voluntarily.[19] This trial within trial is a full trial on its own, which requires calling witnesses, examination, cross-examination, and re-examination of witnesses. Where there is evidence to show the statement was not voluntarily made, they will also be tendered. All these are done while the main trial has been put on hold. It is important to note that the objection must be raised timeously.[20]

In *Augustine Ibeme v. State*,[21] the court pointed out that the purpose of conducting a trial within the main trial was to test whether the accused's statement was made voluntarily or if the accused was coerced, induced, threatened, deceived, or forced using any unnatural intervening factors that would have influenced the making of the statement.

## Legal Framework for Trial Within Trial in Nigeria

In Nigeria, some laws provide guidelines for extracting statements from suspects in custody to uphold the constitutional provision of the presumption of innocence.[22] These laws include the Evidence Act,[23] the ACJA 2015,[24] and the various states' Administration of Criminal Justice Laws (ACJL). Although the ACJA and ACJLs do not explicitly mention or refer to trials within trials, they contain provisions designed to ensure that confessions are made voluntarily. This effectively eliminates the need for trials within trials to protect the rights of the accused. These laws ensure that no suspect is coerced into self-incrimination and that the prosecution must prove the defendant's guilt beyond a reasonable doubt.[25]

The Nigerian Constitution provides protections for defendants. Section 36(5) states that defendants are presumed innocent until proven guilty, and section 35(2) allows defendants to remain silent if they do not wish to make a statement. The prosecution must prove guilt, not the duty of the defence to prove innocence. The sections provide as follows,

> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proven guilty.[26] Also, by section 35(2), 'any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.' The Nigerian constitution goes on to state that, whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a **reasonable time** by a court or tribunal.[27]

The Evidence Act is a comprehensive piece of legislation that outlines the legal framework governing the acquisition and use of evidence in legal proceedings. It sets forth specific guidelines for obtaining evidence, including the confessional statement of a defendant, and establishes clear definitions of key terms related to evidence. Section 29(2) of the Evidence Act provides the following:

> If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained – (a) by oppression of the person who made it, or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.

A trial within trial in Nigeria can be construed to flow from section 29(2) of the Evidence Act reproduced above.

From the above, the Nigerian legal framework governing the trial within trial is rooted in constitutional and statutory provisions. Section 36(5) of the 1999 Constitution (as amended) presumes the innocence of the accused, while section 35(2) grants the right to remain silent. Further guidance is provided under section 29(2) of the Evidence Act 2011, which bars the admission of confessions obtained through oppression or coercion unless proven otherwise by the prosecution. The ACJA 2015 also introduces safeguards, such as the electronic recording of confessions and the presence of legal counsel or designated witnesses during statement-taking.[28] Despite these provisions, enforcement remains inconsistent. Prosecutors and investigating authorities often neglect the ACJA's mandates, necessitating frequent invocation of the trial within the trial. Consequently, this procedure consumes valuable judicial time, delays substantive trials, and exacerbates the case backlog.

To curb this, the same ACJA established the Administration of Criminal Justice Monitoring Committee (ACJMC) by section 469(1) of the ACJA as the custodian of the ACJA. It is charged with ensuring the effective application of the Act by all stakeholders in the criminal justice system. The ACJMC strengthens the implementation of the ACJA by monitoring compliance with the critical, essential, and unifying elements of the Act, which focus on pre-trial processes, trial proceedings, case management processes and time frames, and institutional frameworks for sustainable reform. The ACJMC advocates for compliance with the provisions of the ACJA and establishes and guides monitoring committees in the states that have adopted the ACJA. Monitoring and raising awareness can significantly enhance adherence to the necessary provisions of the Act. Therefore, non-governmental organisations (NGOs) play a crucial role in ensuring that stakeholders in the criminal justice system are well-informed about the law and respect its provisions to the greatest extent possible.

## Comparative Analysis of Practices in Sub-Saharan Africa

Other sub-Saharan African jurisdictions have grappled with similar challenges, albeit with varying approaches. These are discussed below.

### *South Africa*

In South Africa's criminal justice system, a confession is proved admissible through a trial within trial. Each side leads to evidence and then argues its admissibility.[29] Evidence at a trial within trial is not admissible at the main trial, whether the confession is allowed or excluded. If the confession is ruled admissible at the trial within trial, the evidence to prove the confession still must be led at the main trial.[30] Once the defence counsel objects to the admissibility of any evidence, not necessarily that of confessional statements, the court has the discretion to order a trial within trial on the application of the defence.[31]

In *S v. Ntzweli*,[32] the accused was charged with possession of cannabis, popularly known as 'dagga.' The defence challenged the admissibility of the evidence on the ground that the search conducted in which the cannabis found was illegal. The defence applied for the issue of admissibility to be decided in a trial within trial, but the court refused the application. Consequently, an appeal was lodged. The Cape Provincial Division ruled that the refusal by the trial court to hold a trial within trial was a gross irregularity, and the trial court had incorrectly exercised its discretion.

Chapter 2 of South Africa's Constitution[33] contains the Bill of Rights, which includes rights such as equality, human dignity, life, freedom, and security of person, as well as access to court and rights of arrested, detained, and accused persons.[34] Section 35(3) of the constitution stipulates that every accused person has the right to a fair trial and to have their trial begin and conclude without unreasonable delay. An accused person is presumed innocent, has the right to remain silent, and cannot be compelled to give self-incriminating evidence. Furthermore, evidence obtained through violating any right in the Bill of Rights must be excluded if it would render the trial unfair or detrimental to the administration of justice according to section 35(5) of the Constitution.

In *S v. Mphalas*,[35] the investigating officer obtained a confession from the accused person in breach of his constitutional right to legal representation. At the same time, the attorney was on his way to consult with the accused. The officer's conduct was considered intentional and detrimental to the administration of justice. Therefore, as Cloete J emphasised in the case, checking the motives of law enforcement agencies is of the utmost importance. Also, in *S v. Mkhwanazi*,[36] the court ruled that confessions extracted from accused persons after persistent interrogation should be viewed suspiciously, especially where the questioning led to the impairment of the accused's exercise of free will. Under South Africa's laws, the voluntariness requirement applies to all extra-judicial statements made by the accused, whether they were intended to be incriminating or exculpatory. No evidence or statement made by an accused person can be given in evidence against them unless it is proved by the prosecution beyond a reasonable doubt that it was obtained freely and voluntarily.[37]

### *Botswana*

The Botswana Constitution[38] spells out the rights of its citizens under Chapter 2 as the protection of fundamental rights and freedoms of individuals, including the right to life, personal liberty, protection against inhumane treatment, freedom of expression, and provisions to secure the safety of the law. Section 10[39] states that, 'if any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a **fair hearing within a reasonable tim**e by an independent and impartial court established by law.'

Several laws, such as the Criminal Procedure and Evidence (Amendment) Act, have been implemented to achieve this constitutional provision.[40] The Act has simplified the work of the police and protected them to a certain extent. Section 228 of the Criminal Procedure Act[41] stipulates that a confession is admissible against the maker if it is proven to be freely and voluntarily obtained while the person is in sound and sober senses and without undue influence. The section also states that if such a confession is shown to have been made to a policeman, it shall not be admissible in evidence unless it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a member of the Botswana Police Force.[42] The Act further provides in section 231 that the police may still take any person lawfully detained in their custody before a magistrate or any justice who is not a member of the Botswana Police Force, and the magistrate or justice shall give that person the opportunity to make a statement in respect of any offence that person is alleged to have committed.[43] The magistrate or justice shall caution the person that they are not obliged to say anything unless they wish to do so but that if they elect to say anything, it will be recorded in writing and may be used in evidence either for or against them.[44] The magistrate or justice shall record the statement in writing in the language in which it is made or in some other language into which it is duly translated while being made.

Every statement recorded by this procedure shall be admissible in evidence either for or against the maker thereof at any subsequent trial or preparatory examination for any offense to the extent that the contents thereof are sufficiently relevant for the trial or preparatory examination.[45] Though a statement recorded by this procedure shall not be admissible in evidence against the maker thereof unless it is proved to have been freely and voluntarily made by him in his sound and sober senses and without having been unduly influenced thereto.[46] There have been some arguments that sections 228 and 231 are different.[47] In the unreported Court of Appeal case *Gaolatlhe Kwae v. The State*[48] Amissah, J.P. held that:

> … Although there are differences in the legal coverage of the two sections, the modality of getting the person affected by sections 228 and 231 have converged, and the same principles and practice for establishing the freedom or voluntariness with which a confession statement is made or confirmed under both sections, if not found in statutes, have been developed and applied uniformly.

From the above, it is evident that the Criminal Procedure Act[49] of Botswana creates special rules for the admissibility of confession and has emphasised this. Section 217 of the Act further states that a confession is admissible only if made freely and voluntarily, in sound and sober senses, and without undue influence.[50]

### *Kenya*

Confession laws in Kenya are governed by the Constitution of Kenya,[51] the Evidence Act,[52] the Evidence (Out of Court Confessions) Rules of 2009, and case law. According to Article 49 of the Kenyan Constitution, arrested individuals are guaranteed certain rights, including the right to remain silent and communicate with an advocate or other necessary persons. The law also prohibits compelling arrested individuals to make any confession or admission that could be used as evidence against them. Kenyan law is explicit that evidence obtained in violation of any right shall be excluded, if the admission of that evidence would make the trial unfair or detrimental to the administration of justice.

In Kenya, confessions made by an accused person are generally not admissible unless made strictly under the law.[53] Section 25A of the Kenyan Evidence Act stipulates that:

> (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.
>
> (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights, and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

While commenting on section 25(2) produced above, Justice S.N. Mutuku of the High Court of Kenya[54] stated that:

> The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules…This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication… is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment… ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

***Uganda***

The right to a speedy trial is guaranteed under Article 28 of the Constitution of Uganda.[55] However, the Evidence Act[56] is the law that guides evidence, and it provides that:

> No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of – (a) a police officer of or above the rank of the assistant inspector, or (b) a magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b) unless the confession is corroborated by other material evidence in support of the confession implicating that person.[57]

According to the law, any confession made by an accused person that appears to have been obtained using any form of violence, force, threat, inducement, or promise calculated to cause an untrue confession is considered irrelevant.[58] In Uganda, a trial within trial ensures that incriminating evidence is only accepted after its authenticity has been established.[59] The accused person is entitled to a fair trial under Article 28(1) of the Constitution. If the accused pleads not guilty, they are entitled to a full trial of all the facts in issue. In case of any incriminating or prejudicial evidence, the court cannot allow it without first ascertaining from the accused person that they know the consequences of its acceptance.[60]

The Supreme Court of Uganda *in Binuge & Ors v. Uganda*[61] upheld these principles where it states:

> It is trite that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within trial…The purpose of a trial within trial is to decide upon the evidence of both sides, whether the confession should be admitted. The court cannot by simply looking at the statement, conclude that it was made voluntarily.

What is clear from the preceding analysis of the practice within the criminal justice systems of South Africa, Botswana, Kenya, and Uganda, is that these countries had implemented measures to prevent confessions from being obtained illegally. Yet, the outdated practice of conducting a trial within a trial is still employed, even when confessional statements are admitted as evidence. It is argued here that the reason cannot be ignored and includes a number of reasons such as that law enforcement agents are not adhering to contemporary provisions to ensure that confessional statements are obtained voluntarily. It is also important to highlight that within these jurisdictions, the definition, procedure, and timing of the trial within a trial are consistent across these jurisdictions. However, it remains unclear whether the impact of the trial within trial on the substantive trial has been considered in any of these jurisdictions.

### *Impact of Trial Within Trial on Justice Delivery*

The Constitutions of Nigeria, South Africa, Botswana, Kenya, and Uganda guarantee a defendant the right to a fair and speedy trial. However, these countries allow a procedure called 'trial within trial,' which has received judicial approval. This time-consuming procedure involves calling witnesses, examination-in-chief, cross-examining, re-examining, adoption of written addresses, and the ruling. The court is expected to take fresh evidence in the substantive trial that was paused initially, and evidence adduced in the trial within trial is not to be used or considered in the main trial as earlier demonstrated in the various jurisdictions.[62] It is conducted solely to determine compliance with the law regarding the voluntariness requirement.

The effect of this procedure can be summarised as follows:

i It consumes the court's time and the prosecution. Pausing the main trial to conduct a trial within trial to determine the voluntariness of confessional statements no doubt consumes time. It is a full trial. Both sides call witnesses, tender evidence (if any), and address the court. The court will also evaluate the evidence and arrive at a ruling. After all these, the main trial that was paused continues. This extra time for the prosecution as the case will take a more extended period, in which tracing some witnesses may become difficult. For the court, it is an extra workload.

ii It affects the judge's neutrality. The judge is supposed to be neutral if, at the time of the trail within trial, the investigating officer presents evidence; the judge might inadvertently appear influenced by this information, which could undermine their impartiality regarding the main trial.
iii It elongates defendants' detention. Determining the voluntariness of confessions can lead to extended periods of detention for defendants because it takes time, which is against the principle of timely justice.
iv It is an additional cost for the government/prosecution. The necessity of conducting separate proceedings adds financial burdens on the government and trial. Additional resources are required to present witnesses and manage the complexities of both trials, which ultimately strains public resources and can divert attention from pursuing justice effectively.

Several laws and decisions have been made to reduce the occurrence of trial within trial in all these jurisdictions. It is for the arresting authority to comply with the law. For instance, in Uganda,[63] if an officer is part of the investigating team, he should not be the one taking the accused's statement. In Botswana,[64] The accused should be brought before a magistrate or judge before giving their statement. In Nigeria, the arresting authority needs to comply with the provisions of the ACJA/L, depending on which is applicable. This is because sections 15 and 17 of the ACJA have provided an option to obviate recurrent objections to the voluntariness of confessional statements to reduce to the barest minimum the incidents of retractions and time consumed by trial within trial proceedings.[65] Section 15 of the ACJA states that 'where a suspect who is arrested with or without a warrant, volunteers to make a confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio-visual means.'[66] Alternatively, section 17 of the ACJA states that:

> Where a suspect is arrested on an allegation of having committed an offence, his statement shall be taken. Such statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organization or a Justice of the Peace or any other person of his choice. Provided that the Legal Practitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement.[67]

The above provisions impose a duty on an investigating officer to record the confessional statements of suspects electronically on retrievable video compact discs or other audio-visual means in the presence of any of the person(s) set out above.[68] These provisions protect private citizens suspected of committing crimes, as the police or other law enforcement agencies may not abuse their powers by intimidating or bullying them.[69] It also protects law enforcement agents from false accusations of coercion when taking statements from suspects.[70] Therefore, the Supreme Court of Nigeria confirms that using 'may' in those provisions imposed a mandatory and not permissive duty on law enforcement agents, the failure of which will be held against them.[71]

The ACJA also provides that upon arraignment, the defendant's trial shall proceed from day to day until the conclusion of the trial.[72] If impracticable, not more than five adjournments from arraignment to final judgement shall be allowed, provided the interval between each adjournment shall not exceed 14 working days.[73] Where it is still impracticable for the parties to conclude a criminal proceeding after having exhausted their five adjournments, the interval between the subsequent adjournments shall not exceed seven days, including weekends.[74] The court may award reasonable costs to discourage frivolous adjournments in all circumstances.[75] The law has made a reasonable provision for a fair and speedy trial and has proffered a solution to the issue of voluntariness. This provision on speedy trial and how confessional statements are obtained create a broad framework for protecting the accused's right as guaranteed by the Constitution without the need for trial within trial.

While some scholars[76] have argued that trial within trial checks the excesses of law enforcement agents, this chapter suggests that examining law enforcement agents and defendants through examination-in-chief, cross-examination, and re-examination during the main trial without the need for trial within trial, as well as considering the duration of the defendant's time in police custody before making a statement on electronic records, can also check these excesses.[77] It is common for police or any law enforcement agent to keep suspects in their custody until they admit to the statement's content or the commission of the offence with which they are charged. Hence, the duration of custody is an essential factor to consider. Additionally, laws in Nigeria, South Africa, Botswana, Kenya, and Uganda have listed persons in whose presence law enforcement can take the suspect's statement as discussed above. The defence can call any such person to testify if it is revealed that the defendant's statement was not voluntarily given.

## Recommendations and Conclusion

The practice of a trial within a trial hinders the speedy dispensation of justice, leading to several adjournments and more extended periods of detention for defendants awaiting trial. The introduction of the ACJA was aimed at enhancing Nigeria's justice system, with speedy dispensation of cases being a top priority. The ACJA provides for the electronic recording of confessional statements in the presence of certain persons to achieve this goal and eliminate the need for a trial within trial. The criminal justice systems of the sub-Saharan countries discussed above also revealed this trend of reform that takes a fundamental shift from the need to conduct trial within trial, which is in line with Goal 16 of the United Nations SDG.

To enhance the criminal justice system, this chapter recommends strict adherence to the ACJA and ACJL provisions by all investigating authorities. The old practice of the jury system should be abandoned, and the provisions of the Universal Declaration of Human Rights on the right to fair and speedy trial should be upheld. State actors in Africa, particularly sub-Saharan Africa, should strive to see that Agenda 2063 is actualised for the betterment of the continent. Judges in Nigeria and various countries with innovative provisions in their criminal justice system should ensure that they are strictly adhered to. In the context of Nigeria, the provisions of the ACJA, particularly sections 15, 17, and 396, should be held as sacrosanct in criminal justice administration, as rightly pointed out by the Supreme Court.[78] Investigating officers who use torture to obtain confessional statements should be punished by the court. The ACJA Monitoring Committee should be inaugurated in states without it, and those with it should efficiently ensure full implementation.

NGOs should assist in discharging their duties by conducting state assessments, regular workshops, and communication with the judiciary, prosecution counsel, defence counsel, and investigating departments, including officers of the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and Other Related Offences Commission (ICPC) the National Drug Law Enforcement Agency (NDLEA) and not just the police. This can be achieved through regular training and workshops and regular monitoring and evaluation of the activities of law enforcement agents. To ensure compliance with the provisions of the ACJA, the Inspector General of Police established Force Order 20 of 2017, which introduced the Police Duty Solicitor Scheme (PDSS). Under this scheme, private lawyers visit police stations to inform suspects about their rights and ensure they are not detained longer than the constitution permits. Other institutions can adopt a similar approach or utilise their legal departments to achieve the same objective. The laws exist, and though some amendments may be needed, compliance with these available laws is essential to make Africa a better place for all.

## Notes

1 See European Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1); the Universal Declaration of Human Rights, art 10 and the African Charter of Human and People's Rights, art 7(1).
2 CAP C 23 LFN 2004.
3 CAP C 23 LFN 2004, section 294.
4 Section 17 & 396 ACJA 2015.
5 It is known as *vior dire (to tell the truth)*; The procedure is that the jury is sent out of the court when the question of admissibility of confession arises.
6 The procedure of holding a trial within trial is traced to ancient times when the terminology *voir dire* (to tell the truth) evolved. The terminology itself was used at its inception to refer to a special administration of oath to a witness testifying to issues incidental to the main trial. The actual procedure of administering the special oath has fallen into disuse, yet the terminology was retained and forms the foundation of a trial within trial. See also *Gbadamosi v The State*, [1992] LPELR 1313.

7 V.S. Winslow, 'The Admissibility of Testimony at a Trial within trial: Not the Whole Truth?' [1977] 19(2) *Malaya Law Review* 312 https://www.jstor.org/stable/24863728 accessed 13 January 2025.
8 Kemasuode Wodu, 'Trial within Trial: Regulation by Means of Practice Direction' (2020) https://edojudiciary.gov.ng/wp-content/uploads/2019/05/SEVENTH-SESSION-Trial-Within-Trial-Regulation-by-Means-of-Practice-Direction.pdf accessed December 26 2024.
9 Kemasuode Wodu, 'Trial within Trial: Regulation by Means of Practice Direction' (2020) https://edojudiciary.gov.ng/wp-content/uploads/2019/05/SEVENTH-SESSION-Trial-Within-Trial-Regulation-by-Means-of-Practice-Direction.pdf accessed December 26 2024.
10 Kemasuode Wodu, 'Trial within Trial: Regulation by Means of Practice Direction' (2020) https://edojudiciary.gov.ng/wp-content/uploads/2019/05/SEVENTH-SESSION-Trial-Within-Trial-Regulation-by-Means-of-Practice-Direction.pdf accessed December 26 2024.
11 See Evidence Act 2011, CAP E 14 LFN 2004, section 83(1) (b) which provides for tendering of documents through the maker and the exceptions thereto.
12 See *Gimba v. FRN* [2021] LPELR-53263(CA).
13 See *Gimba v. FRN* [2021] LPELR-53263(CA).
14 See *Gimba v. FRN* [2021] LPELR-53263(CA).
15 Idd Mandi, 'The Procedure of A "Trial Within Trial": The Need for a Statutory Intervention' (2009) Combined Issues 35–40 *East African Law Review* (99+)|Idd Mandi – Academia.Edu accessed 20 January 2025.
16 Idd Mandi, 'The Procedure of A "Trial Within Trial": The Need For A Statutory Intervention' (2009) Combined Issues 35–40 *East African Law Review* (99+)|Idd Mandi – Academia.Edu accessed 20 January 2025.
17 (n 12).
18 J.A. Agaba, *Practical Approach to Criminal Litigation in Nigeria* (3rd edn, Bloom Legal Temple, 2017) 113.
19 See the case of *The State v Abdullahi Sani* [2018] 9 NWLR (pt. 1624) 278.
20 *Alo v The State* [2015] All FWLR (pt. 775) 262 (SC).
21 [2013] 10 NWLR (PT 1362) 333.
22 CFRN 1999 (n 2), section 36(5).
23 Evidence Act (n 11), section 29.
24 ACJA, section 15(4).
25 Evidence Act (n 11), section 135(1).
26 CFRN 1999 (n 2), section 36(5)
27 CFRN 1999 (n 2), section 36(4).
28 See sections 15(4) and 17.
29 P.J. Schwikkard, and S.E. Van der Merwe, *Principles of Evidence* (3rd edn, JUTA, 2010).
30 Schwikkard and Van der Merwe, *Principles of Evidence*.
31 *S v Ntzweli* [2001] (2) SACR 361 (C).
32 *S v Ntzweli* [2001] (2) SACR 361 (C).
33 Constitution of the Republic of South Africa, Act 108 of 1996.
34 Constitution of the Republic of South Africa, Act 108 of 1996, sections 7–39.
35 [1998] (1) SACR 388 (W) at 399d.
36 [1966] (1) SA 736 (A).
37 SA Constitution (n 33), section 219A.
38 Constitution of Botswana see sections 3–19.
39 Constitution of Botswana see sections 3–19.
40 Criminal Procedure and Evidence (Amendment) Act no. 4 2017 (Botswana).
41 Criminal Procedure and Evidence (Amendment) Act no. 4 2017 (Botswana).

42 E.K. Quansah, 'Admissibility of Confessions in Criminal Trials in Botswana: An Appraisal of the Statutory Provisions' (1997) 30(3) *The Comparative and International Law Journal of Southern Africa* 325 https://www.jstor.org/stable/23250310 accessed 19 January 2025.
43 CPA Botswana (n 40), section 231(1).
44 CPA Botswana (n 40), section 231(2).
45 CPA Botswana (n 40), section 231(3).
46 CPA Botswana (n 40), section 231(4).
47 Quansah, 'Admissibility of Confessions' (n 42).
48 Unreported criminal appeal 32/95 (5 February 1996) at 12 of the transcripts.
49 CPA of Botswana (n 40).
50 E. Du Toit, *Commentary on the Criminal Procedure Act* (vol. I Juta & Company, 1987).
51 Constitution of Kenya 2010.
52 Evidence Act of 2007 Cap. 80 (Kenya).
53 *Republic v Omondi* [2015] eKLR.
54 *Republic v Omondi* [2015] eKLR.
55 Constitution of the Republic of Uganda 1995.
56 Uganda Evidence Act, Chapter 6 of 2000.
57 Uganda Evidence Act, Chapter 6 of 2000, section 23.
58 Uganda Evidence Act, Chapter 6 of 2000, section 24.
59 *Masiki Sosan Anor v Uganda* (Criminal Appeal No 7 of 2002) [2004] UGCA 18 (2 August 2004).
60 *Masiki Sosan Anor v Uganda* (Criminal Appeal No 7 of 2002) [2004] UGCA 18 (2 August 2004). The decision of the trial court sentencing the appellants to death was set aside by the Appellate court for 2 reasons: 1. Failure of the court to hold a trial within trial when the defence counsel objected to the admissibility of the confessional statement made by the 2nd appellant and 2. Allowing the Investigating officer that was part of the case to record the statement of the accused.
61 [1989] 23 SCCA reproduced in *Adiga v Uganda* [2021] UGCA 2.
62 Uganda and Botswana expressly exclude this evidence in their Evidence Acts.
63 *Masiki Sosan Anor v Uganda* (n 59).
64 Quansah, 'Admissibility of Confessions' (n 42).
65 *FRN v. Nnajiofor* [2024] LPELR 62559 (SC).
66 ACJA 2015, section 15(4).
67 ACJA 2015, sections 17(1) and (2).
68 Charles *v* State of Lagos [2023] LPELR-60632(SC).
69 *FRN v Akaeze* [2024] 12 NWLR (Pt. 1951).
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# 7 The Role of Prosecutors and Defence Attorneys in Enhancing Speedy Trials in Rwanda

*Jean Bosco Mutangana*

## Introduction

Advocates and prosecutors as well as other law enforcement officers within a judicial system have distinct roles to play to ensure that defendants are brought to trial for their alleged crimes within a reasonable time after arrest. It also means that before being convicted of crimes, a defendant has a constitutional right inter alia, to be assisted by a lawyer of their choice to defend them of the charges preferred by the prosecution and be tried by an independent court/tribunal.[1] The right to trial without undue delay means the right to a trial which leads to judgement and if appropriate, a sentence without undue delay. The longer suspects are detained without trial, the dimmer the prospects of a fair trial as well as realisation of the lofty goals of the United Nations Sustainable Development Goals (SDGs) particularly Goal 16 that focuses on access to justice and accountable institutions.

Unquantifiable benefits result to society from the elimination of unnecessary detention, the speedy processing of cases, fair and impartial trials, and the reduction of prison population. Unreasonable delay of a trial is a human rights violation and may lead the public to question *status quo* of such detained suspects that has exceeded reasonable time in any detention in criminal matters. When justice is not carried out at the right time, then even if it is carried out later, it is not considered to be real justice.[2] This is because when there is a delay in the proceedings, it implies that there was a lack of justice.

The right to a fair trial encompasses a speedy trial; it is both a standard of international and domestic laws signed by many African countries, intended to safeguard people from illegitimate and unnecessary delays in the process of achieving justice. The African Charter on Human and People's Rights[3] provides for the 'right to be tried within a reasonable time by an impartial court or tribunal'[4] and the same guarantees are provided for in the International Covenant on Civil and Political Rights,[5] an international convention that has been ratified by many African countries. Basic legal services help citizens to feel more secure in any relevant jurisdiction and increases their confidence in the justice system whenever speedy trials are conducted without unnecessary delays. It is therefore possible to assume that extremely lengthy criminal

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investigations and court processes are unfavourable to those rightly presumed innocents.

This chapter examines the concept of speedy trials in Rwanda. It highlights the challenges to speedy trial and the opportunities in place to foster speedy trial in Rwanda. Specifically, the chapter considers the role of prosecutors and defence attorney in ensuring and enhancing speedy trial. It examines the reform initiatives introduced into the criminal justice system in Rwanda to mitigate against delays in trial. Finally, the chapter suggests the need for design operational plans to enhance speedy trials.

## The Evolution of Rwandan Criminal Justice System

In order to properly contextualise how the court officers/population ratio came to become a problem within the criminal justice system of Rwanda, it is important to have a brief background of the justice system. This will involve an analysis of the pre-1994 era and post-genocide era.

For more than three decades up to 1994, Rwanda had known only regimes that had built their power on an indirect or direct massive violation of human rights, discrimination and division of the people that culminated into the genocide against the Tutsi in 1994.[6] The rights of the accused including the right to a speedy trial were at stake for all that time. The pre-1994 Rwandan justice system was partly manned by judges and prosecutors who had no legal training and corruption within the system was appalling.[7] The people of Rwanda endured human rights violations on a massive scale over a period spanning more than three decades, beginning in 1959.[8] State-inspired violence directed against innocent citizens in the form of persecution, loss or destruction of property, torture, imprisonment, death, and punishment to exile. Unfortunately, the culture of impunity prevailed for all that long and no attempts were ever made to bring the perpetrators of this violence to justice. Furthermore, under a law on General Amnesty,[9] conditional amnesty was granted to the perpetrators and actors of the 1959–1962 massacres including certain political offences, covering those who had been involved in the 1972 violence and massacres under which many Tutsi students and scholars were killed.[10] One unfortunate consequence of the law is the encouragement of the culture of impunity in the country.

By virtue of her history, in the immediate aftermath of the genocide, Rwanda experienced problems of a high magnitude that its judicial institutions would hardly operate with the standard one would ideally desire. As indicated earlier, Rwanda did not have enough lawyers (judges, prosecutors, and advocates) even prior to 1994. As the genocide began to unfold, most of the magistrates were either killed or fled, or were implicated in the genocide themselves and therefore detained pending trial.[11] The system of administration of justice after the genocide had to be rebuilt from scratch. This involved recruiting new personnel, training and equipping them providing new infrastructure, and preparing and passing new legislation to prescribe processes for the trial of persons accused of genocide and related violations of international humanitarian law.

In 1996 legislation was passed, which sought to address the problem of impunity by addressing individual accountability.[12] The objective was also to build a state governed by the rule of law where the case load of the genocide had to be adjudicated within the jurisdiction of ordinary Rwanda courts. The 1996 law established a confession and guilt plea programmes by which detained participants in that programme would get reduced sentences in exchange for their confessions and achieve speedy trials that would rather take decades to complete.[13] Also, in response to both domestic and international concerns, Rwanda chose to begin the trials using *lay magistrates*, rather than wait until new judicial personnel had received years of legal training.

A tremendous achievement has been recorded so far in the past 20 years in building a competent judiciary, given the legal reform processes that have been undertaken since 2001. Qualified lawyers have been recruited at all provinces in Rwanda. Recognition by the International Criminal Tribunal for Rwanda (ICTR) of these measures came in the form of a decision to transfer cases for trial before the Rwandan courts under rule *11 bis*.[14] These reforms are, however, an on-going process in the sense that any legal system would like to make reforms at a particular time and it may have no end because society is dynamic and all these changes are to be reflected in the legal environment in which Rwanda would like to operate in continuously upgrading its legal and judicial sector and to have it operate in the strict sense of delivering justice to its nationals and residents alike.

To date, Rwanda has embarked on the continuation to update various laws, and established a law reform commission in 2001[15] that continues to evaluate, review, and update the laws and harmonise them with both regional and international instruments to which Rwanda is a party – or to which it would wish to be a party.[16] Although the system is not perfect, there is a continuous review of the laws, updating them and making them compatible with the people's aspirations. This will however take some time because there may be no perfect situation anywhere in a strict sense of it, but Rwanda continues to build its institutions and capabilities of its legal practitioners to be able to handle and deliver equitable justice. This is done by continuous capacity building that improves the credibility, capacity of Rwandan judges, prosecutors and judicial police force as well as improving relationship with foreign jurisdictions through mutual legal cooperation.

## Pre-Trial Detention and Its Impact on Speedy Trials

In criminal matters, it is a fundamental right to the detainee to be tried expeditiously in case the defence cannot secure pre-trial release or bail. It is very important that suspects be tried within a reasonable time to avoid undue delays.[17] The right to a speedy trial was first mentioned in the landmark document of English law, the *Magna Carta*, regarded as the 'great charter' of freedoms and widely viewed as one of the most important legal documents in the development of modern democracy which has become a constitutional philosophy to many if not all constitutional democracies.[18] It addresses speedy disposal of cases, to make the judiciary more effective and to impart justice as quick as possible. However, the goals yet to be achieved on this right is still far in many jurisdictions. The *Magna Carta* was a crucial turning point in the struggle to establish freedoms in England which are inevitably linked with fair trial and its related components.

The Constitution of Rwanda[19] and international instruments[20] guarantee of a speedy trial as an important safeguard to prevent undue and possibly oppressive incarceration prior to a substantive trial, to minimise concerns accompanying public accusation and to limit possibilities that long delays will impair the ability of an accused to defend him/herself. Like many constitutional frameworks in other African countries, the Constitution of the Republic of Rwanda 2003 guarantees human rights in criminal proceedings. The human rights guarantee in the Rwanda's Constitution is contained in Chapter 4 which deals with freedoms and human rights, and it provides that human rights are inviolable.[21] It is important for advocates and prosecutors to always invoke constitutional provisions in their defence submissions rather than relying on procedural and substantive criminal law before their domestic courts. Judges always wish to hear and make their arguments based on the supreme law of the land before they embark on criminal procedures.

In attempting to define reasonable time before trial, the Rwandan Criminal Procedure Code[22] stipulates that a person detained under pre-trial detention may be detained for 30 days upon a court's decision.[23] In this case such a decision cannot be renewed for petty offences, and not more than three months for misdemeanours. However, there should be a court's decision extending the periods of preventive detention which is usually 30 days renewable by court and for which felonies cannot exceed six months before the court is seized with the matter.[24]

In many African countries, pre-trial detention is often prolonged, which raises concerns about its reasonableness. This is because detention should be an exception, used only when absolutely necessary, while an individual's right to liberty should be the guiding principle. Despite the respect of this procedural law, the time for extending the detention of the suspects should not be maximised as a need to justifying the extension of duration in detention. Once the police decides to detain and hand over the suspects to the prosecution, they should have a *prima facie* case justifying this act and in a position to have a criminal case formed against the suspect otherwise the procedural preventive detention is prone to abuse.

Given the provisions of *Article 79 of the Rwandan Code of Criminal Procedure*, six months is the maximum time set for a suspect to last in pre-trial detention. It is, therefore, understood that those suspects that have exceeded six months in prison, suspected to have committed felonies require a speedy adjudication of their criminal cases. Viewed in the context of the Rwandan law, one can conclude that the reasonable time for pre-trial detention that should lead to a substantive hearing should be a maximum of six months and beyond that, a requirement for a speedy trial and the role of parties involved must be actively pursued. In the Rwandan context, the right to trial within a reasonable time is more important because they are closely linked to the protection of other rights of suspects including the right to appear before the competent court and the right to freedom during investigations.[25] It is the responsibility of advocates especially those defending their clients to ensure that these constitutional and criminal law provisions are clearly defended and understood to contribute to a speedy trial in order to avoid lengthy and unnecessary detentions that may lead to abuse.

## Opportunities for Prosecutors and Defence Attorneys in Ensuring Speedy Trials

In the quest to enhance speedy trial in the Rwanda socio-legal system, *Home Grown Solutions* (HGS) were initiated and supported in Rwanda. These comprise a range of institutional mechanisms developed by Rwandan citizens themselves based on local opportunities, cultural values, and the history of the country, to fast track its development. Rwandans were faced with seemingly insurmountable problems – the country had a deep social divide. However, Rwandans were determined to pursue self-reliance (literally known as *kwigira*) and were thus compelled to find innovative solutions. To do so, they used one of their most valuable social resources that was available: their cultural heritage. These are community-based and give a central role to the population in dealing with diverse social challenges including but not limited to justice and accountability. HGSs gradually emerged from the challenging post-genocide context in Rwanda.

Rwanda thus introduced informal and traditional mechanisms of justice accessible to all citizens while providing speedy, cheap, and meaningful remedies and this is seen as *user-friendly* and provides a comparative advantage of both formal and traditional adjudication which creates an environment for a speedy process.[26] Any unnecessary delays brought about by any party to the case can lead to sanctions by the court especially in civil and commercial matters.[27] However, determining whether a trial has been conducted within reasonable time or not is not based on a single factor or reason but based on cross-cutting factors highlighted in this chapter. What specifically constitutes a reasonable time is a matter of fact and includes debates associated with the hearing, objections associated with the case which are admissible by the law, required expertise, evidentiary matters, litigation process, and legislation itself. However, the complexity of a specific case would determine the length of time the trial will take. The subsequent paragraphs thus show some of the homegrown efforts by prosecutors/advocates and defence attorneys in enhancing speedy trials in Rwanda.

### *Role of Prosecutors and Objectives to Be Pursued*

The overall objective of any criminal justice system is to improve effectiveness of the institutional capacity to be able to deliver fair and timely prosecutorial services in order to help their respective governments to achieve accountable governance. Towards this end these other specific objectives should also be pursued. These include,

i *increasing the public satisfaction with the quality and timeliness of prosecution services*;
ii *delivering* fair and *timely* prosecution and minimising illegal/unnecessary detentions;
iii *accelerating* the prosecution of serious crimes affecting the public; and
iv *speeding up* the investigation and prosecution of emerging crimes and cross-border crimes and encouraging mutual legal assistance and cooperation in criminal matters which is at its low pace *in our regional blocks*.

Delayed investigations and prosecutions of offenders lead to other cases taking so much time than earlier anticipated. With weak human and logistic resources in Rwanda that are stretched, where the few human resources have also been investigating crimes such as genocide, war crimes and crimes against humanity, terrorism, and other serious crimes that attracts much time and affects the prosecution of the ordinary crimes. It has, for example, been suggested that given the number of judges in relation to cases before the court, there is a need to prioritise the prosecution of serious crimes over and above less serious ones.[28]

### *Effectiveness of a Plea Bargain Procedure and Its Impact on Speeding Up Trials*

Prosecutors are reminded that under the law,[29] it is important to be sensitive to the need to initiate plea-bargaining processes that do not only repair the victim of the crime but also serve as a mitigating circumstance as per Rwandan criminal procedure. It is also important for the judges to remember their constitutional mandate as well as the professional obligation to protect the rights of the defendant and deliver justice rather than treat them as subjects to be quickly processed and sent to jail.

Plea bargaining in criminal cases has been enshrined in the criminal justice process in Rwanda since 2019 when the criminal procedure law came into force. From Rwanda's shared experience, one way of expediting criminal proceedings is the enforcement of the plea bargain process. Effective 11 October 2022, the judiciary and prosecution commenced using plea bargain on pilot basis in five intermediate courts and on two crimes of assault and theft.[30] Plea bargain is the practice of negotiating an agreement between the prosecution and the defence, whereby the defendant pleads guilty to particular charges in exchange for a more lenient sentence or other possibilities that may even include dismissal of the charges.[31] Ahead of the commencement, which has been coupled with a nationwide awareness drive, the prosecution service had issued guidelines on the processes of entering a plea bargain for a suspect to understand first on which crimes plea bargain can apply. Several suspects in preliminary detention expressed preference for this procedure and it has enabled the judicial institutions to expedite their trials. It has also helped both prosecutors and defence lawyers to work together in speeding up the criminal cases especially cases of defendants that are willing to confess and enter a guilty plea.

### *Role of Defence Counsel in Avoiding Unnecessary Application for Adjournments*

Meeting the demand for speedy trials in any criminal jurisdiction requires a range of services and actors to support such a criminal justice system. Notably and most importantly are defence attorneys in view of the right to defence which is an inherent and inalienable right of any suspect. It should be noted that the role of advocates should be clear as officers of the court in seeking expeditious trials. Their role in legal aid services should be a high aspiration to access to justice for all people especially in most developing countries mainly in Africa where it is still not accessible to many and remains remote for ordinary people. Delays occasioned by unnecessary requests for adjournments – often the case when advocates look at the interests of their respective clients and disregard the concerns of the other parties to the case – are particularly disruptive of trial. Any adjournment of a case should always be reasonable and appropriately submitted and explained before the court of law.

The responsibility to make proposals that can contribute to the promotion of justice in general is a legal requirement in Rwandan law.[32] Promotion of justice itself entails the responsibility of an advocate/lawyer to play a role in securing speedy trials before courts of law. Among other responsibilities, an advocate also helps the government in the provision of legal aid.[33]

### *Application for Compensation in View of Unlawful and Delayed Detentions*

Speedy trials will not only guarantee citizens trust towards their judicial institutions but will also avoid illegal detentions. Many African countries that have ratified the International Covenant on Civil and Political Rights 1976 (ICCPR) understand the remedies prescribed by the ICCPR especially regarding the right to compensation to the victims of illegal detention. The ICCPR states that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[34] Advocates should always advance the rights of defendants under their respective domestic criminal laws in order to seek compensation in this regard. It should be noted that arrest and detention is done by public officials; therefore, the acts or omissions of these officials when acting as officers of the state should be attributed to the state. Article 2(3) of the ICCPR states that each state party to the ICCPR undertakes to ensure that any person whose rights or freedoms are herein recognised are violated shall have an effective remedy notwithstanding that the violations has been committed by the persons acting in an official capacity.[35]

***Quality Investigations to Avoid Backlogs***

It is important for prosecuting agencies to review the *quantity versus quality* of cases processed by all investigators in order to determine whether they are prosecutable or not. These cases simply clog the dockets of the court and tend to put unnecessary pressure on the allocation of case files. The more there are backlogs in our court systems, the more justice is delayed (and hence denied). Any prosecuting agencies should be aware of the situation to avoid unnecessary delays and take measures to prevent the emergence of clogs. This helps in continuation and facilitation of follow up on indictments sent to court as well to ensure a speedy trial.

It is equally important that the message should be delivered to the investigators of crime, to assess carefully, any case whether in any instance there is a need to arrest and detain any suspects. There should be strategies in place to expedite the prosecution of detained suspects in order to avoid having many people in prison even where there are no serious grounds to keep them detained. Detention has special consequences on any citizen's life.

***Initiating Private Prosecution Procedures as a Way of Speeding Up Trials***

In Rwanda, private prosecution is allowed in criminal matters for parties seeking damages or for victims of crime in a criminal case where the state has preferred not to proceed with the case or else taken too much time to complete investigations. Under Rwandan law, an individual or advocate can always initiate a case before the court by way of private prosecution.[36] However, the burden of proof in a private prosecution rests on the victim of the crime or rightful beneficiaries.[37] Filing a claim by way of private prosecution takes place when a criminal case file is finally closed without further action or when a period of three months for petty offences and six months for misdemeanours and felonies elapse after the public prosecution receives the file but without taking any action.

This procedure from Rwanda can be replicated in other jurisdictions as it speeds up criminal trials especially initiated by the advocates of the victims of crimes, who have reasonable and tangible reasons that the prosecutor has not been diligent enough in expediting trials, either for *lack of prosecution evidence* or any reason that may be advanced by the prosecutor. A trial through this process relieves the victims of crime from waiting for a longer time or getting through tedious processes requesting prosecutors to resume investigations that they had earlier closed.

***Monitoring and Strategic Plans in Managing Cases***

In order to contribute to the overall objective of any prosecuting agency/authority in delivering speedy access to justice, there is a need to design strategic plans that incorporate clear monitoring and evaluation benchmarks for the measurement of case flows and management. It is, however, important to update strategic plans with reports of achievements for decision makers to adjust to such progresses. These reports will show the exact number of case files that the Criminal Investigation Department (Preliminary Investigations level) transmitted to the prosecutions for analysis and whether such cases must continue for a court process.

The Rwanda Investigation Bureau (RIB) as the preliminary investigator of crime is under the supervision of the Prosecutor General's Office on all works related to criminal investigations.[38] Using benchmarks and strategic plans prepared by the Prosecutor General enables the RIB to prioritise investigations and improve on timelines resulting in positive impact on any speedy trial outcome.

### *Equality of Arms and Speedy Trial*

The discrepancy between the resources available to prosecutors on one hand and the defendant's advocate in Rwanda is significantly unequal. The Office of the Prosecutor has not only the tools of an office that is better funded, but typically also has police department investigators and technical staff at its disposal. The inability to access financial resources has hit the criminal defence bar with full force and sometimes advocates are not capable of visiting their own detained clients to have lawyer/client time due to fewer available funds and towards indigent accused. The Constitution prescribes that the state should provide support for indigent defendants; however, this takes a long time to secure and hence affects the effectiveness of a speedy trial.[39] It is important for governments and the private sector to create a sustainable fund to indigent accused and to all those vulnerable suspects who have no idea on how and when their cases will conclude.

Lack of funding has created overwhelming caseloads and certainly defence lawyers need to fight the battle courageously and persistently for increased funding that will enable them to pursue their client's cases in view of speeding up defence/trials in court. Advocates availability to always access their detained clients in criminal matters and be adequately briefed by the defendant in order to make an informed defence application is the beginning of advocates' roles in speeding up the trials. Though advocates are not the ones who determine how justice should be served but their critical defence role in the criminal trial process should contribute to speeding up any trials.

### *Judicial Fraternity in Discouraging Delaying Conduct by Parties*

Prosecutors and advocates together with courts should discourage the delays attributable to parties and authorities involved in investigations and urge them to comply with reasonable time requirement. It is important to discourage applicants requests for adjournments or through failing to appear in court. Advocates especially must address, through their Bar Associations, the issues related to unusual lengthy criminal investigations, delays in relation with obtaining expert opinion in some cases, adjournments and stays of proceedings, delay of the judge in charge of the preparation for the trial in hearing experts and ordering expert opinions.[40]

**Recommendations and Conclusion**

The right to be tried within a reasonable time is a fundamental right of the accused suspects and should be protected by the Constitution and criminal laws. The following three key recommendations should be considered by law enforcement agencies involved in preliminary and subsequent investigations that lead to a court process. These are:

1 Establishing appropriate remedies and sanctions in the event suspects' rights to trial within a reasonable time is intentionally denied. Remedies such as reduction of sentences, compensation in case of acquittal after serving long pre-trial detentions as well as considerations to dismiss charges.
2 Time limits should be set and respected within which defendants must be brought to trial or else be granted bail immediately. Computing the time within which the trial must be commenced is a key recommendation that should be enforced by all parties to the case. The principle of liberty is an exception to detention. Judges should therefore set nearest dates and communicate the same to the prosecuting authorities as well as defence counsel.
3 Advocates should challenge any delay in court that hinder a speedy process, as the law allows them to do so. While criminal proceedings are typically initiated by the prosecution, defence lawyers should actively engage courts and other stakeholders in the judicial chain. This proactive engagement is crucial to ensure that investigations, once sent to court for adjudication, are at the earliest possible convenience for the accused.

A speedy trial indicates that the defendant is tried for the alleged crimes within a reasonable time after being arrested. The role of advocates and prosecutors as well as other law enforcement officers is paramount. If the defendant is not tried when the demand for speedy trial is made, then the defendant should be given provisional release from prison as long as conditions on bail are put in place. Detention should always be an exception to the principle of liberty that should be enjoyed by everyone including those suspected of committing crimes in society. Once a decision to detain someone is taken, then guarantees for a speedy trial must be enforced to avoid justice delayed. However, while an expeditious judicial process is a fundamental right of the accused and many people want their case resolved quickly, in some situations it can be beneficial to the suspects to have a large gap between the arrest and the trial as defence prepares evidence to challenge the prosecution case especially regarding cross-border and transnational organised crimes where evidence may be collected from different countries.

The role of prosecutors and advocates for speedy trials should therefore be viewed in effectively pushing different institutions to achieve such a right to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases but also most effectively utilise the few and scarce resources before the African judicial institutions.

## Notes

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22 Rwanda Criminal Procedure Code, No. 07/2019 of 19 September 2019 Relating to Criminal Procedure, Published in the Official Gazette of the Republic of Rwanda No. Special of 8 November 2019.
23 Rwanda Criminal Procedure Code, No. 07/2019 of 19 September 2019 Relating to Criminal Procedure, Published in the Official Gazette of the Republic of Rwanda No. Special of 8 November 2019, Article 79.
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25 Rwanda Criminal Procedure Code, No. 07/2019 of 19 September 2019 Relating to Criminal Procedure, Published in the Official Gazette of the Republic of Rwanda No. Special of 8 November 2019, Article 66.
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36 Criminal Procedure Code (n 22) Article 107, 118 and 120.
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# 8 Justice Delayed Is Justice Denied

## Delay in Trials as a Clog on the Wheels of Justice

*Rita Ititim*

### Introduction

The most fundamental objective of any criminal trial is justice, and the effectiveness of the courts in this regard lies not only in their ability to be fair, firm, and neutral but also in their ability to dispense justice in a timely manner, for justice delayed is considered justice denied.[1] By justice, we mean the process of using laws to judge and punish crimes and criminals fairly.[2] In expanding the meaning of justice, the Supreme Court of Nigeria in the case of *Godwin Josiah v. The State*[3] stressed that:

> Justice is not a one-way traffic. It is not justice for the Appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic; justice for the Appellant, accused of a heinous crime of murder; justice for the victim, the murdered man, the deceased, 'whose blood is crying to heaven for vengeance' and finally, justice for the society at large, the society whose social norms and values have been desecrated and broken by the criminal act complained of.[4]

Thus, for a person seeking justice, the time taken to resolve a dispute is essential to the justice experience of the person. It can render their perception of the judiciary as an unjust system in circumstances where the finalisation of the dispute takes too long.[5]

Moreover, since law is a major driver to achieving sustainable development, the need for people to be able to understand and use the law to defend their rights and secure justice cannot be overemphasised.[6] Thus, delay in accessing justice appears to be one of the obstacles inhibiting the achievement of the United Nations Sustainable Development Goals (SDGs).[7] In recognition of the role of law in developing society, the United Nations adopted the 17 SDGs for transforming the world by 2030. Specifically, through Goal 16, member states of the United Nations have committed to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and the building of effective and accountable institutions at all levels.[8] Access to justice, therefore, serves as an essential enabler to the realisation of the other

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SDGs without which chaos, violence, maltreatment, corruption, and injustice thrive.[9] In fact, studies have revealed that one of the reasons for the failure of the MDGs was their lack of commitment to ensuring justice.[10] Therefore, to enhance access to justice in any society, certain basic infrastructures must be put in place, as well as the requisite number and quality of personnel involved in the scheme.[11] In view of this, discussions on the issue of reforming the administration of justice, especially the criminal justice sector in Nigeria has over time, attracted the attention of criminologists, legal practitioners, judges, academic writers, legislators, police officers/prosecutors, correctional centre officials, other government officials, the media, and members of the general community.[12]

Consequently, to reform Nigeria's criminal justice system and meet the requirements of SDG Goal 16 and Goal 11 of the African Union's Agenda 2063, which centres on access to justice and promoting the rule of law, the Administration of Criminal Justice Act (ACJA) was enacted in 2015.[13] ACJA was birthed to generally cure most of the anomalies and lacunas in the criminal procedure laws that were in force.[14] To this end, it repealed the Criminal Procedure Act (applicable in Southern Nigeria) and the Criminal Procedure Code Act (applicable in Northern Nigeria).[15] However, despite several years of the existence of this Act, the delay in the administration of criminal justice in Nigeria has remained intractable.

Although several studies have examined the causes of these persistent delays and evaluated the adequacy of the administration of criminal justice in curbing them, comparatively juxtaposing the Nigerian situation with countries with better criminal justice structures to draw workable recommendations has received limited attention. In comparatively exploring the issue of delayed justice, this chapter argues that paucity of funds, lack of willpower, and corruption are the major factors that continually drive these delays among critical stakeholders in the criminal justice sector. In addition to these, an evaluation of the ACJA reveals that, subject to a few reviews, the Act encompasses a detailed framework for speedy dispensation of justice and generally can serve as a veritable tool for reforming the Nigerian criminal justice system if adequately implemented.

This chapter is divided into several parts. Part 1 is a general introduction. Parts 2 and 3 conceptualise delay in the administration of criminal justice in Nigeria. Part 4 examines key reformative provisions of the ACJA that are geared towards quick dispensation of justice. Part 5 undertakes a comparative analysis of the criminal justice reform regime in Rwanda and the Netherlands so as to adopt innovative reforms that have been successfully applied to aid the speedy dispensation of justice in these jurisdictions. Lastly, Part 6 contains the conclusion and recommendations.

## The Concept of Delay in the Administration of Criminal Justice

Delay is often used to describe a period when somebody or something has to wait because of a problem that makes something slow or late.[16] It can also refer to a situation where time has elapsed that is avoidable.[17] The right to speedy trial emphasised in this chapter is therefore not a right to be protected over every delay but against delays that could be reasonably avoided. Delay in the administration of criminal justice has become a real menace to society with far-reaching effects.[18] One of which is the ability to partially paralyse the business activities of the litigants and keep a defendant in a prolonged suspicion of guilt, which in many cases is not dispelled even upon acquittal.[19] The longer a defendant has to wait for trial, the more severe these effects become. For those in custody, a lengthy trial may amount to punishment before conviction of someone who may never be convicted.[20]

Additionally, an extended period before trial may compromise the quality of the evidence and the thoroughness of the eventual hearing. The longer the period before trial, the more likely it is that the witnesses' testimony will become less reliable. An accused could be wrongly convicted on unreliable evidence, which would be manifestly unjust.[21] In essence, the longer it takes for a criminal charge to be determined, the less certain it becomes that a just and fair outcome will result as the likelihood of the justice system being manipulated increases. Therefore, from whatever angle one considers delay, the results are often detrimental and sometimes even disastrous.[22] This works to further exacerbate an already severe situation by placing additional burdens and pressures on detention facilities and, by extension, decreases the respect for the courts and the rule of law in general.

In Nigeria, prison congestion is a deducible result of how certain factors work to slow down the criminal justice sector, thereby hindering access to justice. The longer the period before trial and the more people are detained, the less likely it is that there will be acceptable conditions in these detention centres.[23] Detaining innocent citizens is a procedural injustice. Additionally, extended periods of detention caused by delays in legal proceedings can violate human rights.[24] In an interview in 2022, the Nigerian Minister of Interior was quoted to have said that a total of 51,541 inmates out of the 75,635 inmates (68%) in various prisons in the country are awaiting trial.[25] This is quite suggestive as it indicates that 68% of inmates in custody in Nigeria today are either yet to have their cases concluded or are yet to begin trial.

This is in complete disregard of the fact that the aim of judicial proceedings is not all about having a person convicted or acquitted and discharged at the end of the trial but ensuring that justice is served at the end of the day. As Lord Hewart CJ aptly notes, 'justice should not only be done but should manifestly and undoubtedly be seen to have been done [even to the common man on the street].'[26] To achieve this, the criminal trial must be conducted in a manner in which decisions of the court are reached when the facts as presented by the parties are still fresh in the mind of the court to avoid any miscarriage of justice that may result from undue delays between the commencement of the trial, taking of evidence, and final determination of the case.[27]

The Constitution of the Federal Republic of Nigeria succinctly puts it that 'whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a *reasonable* *time* by a court or tribunal.'[28] Although the Constitution does not define reasonable time in relation to the trial period, the court in *Ariori v. Elemo*[29] defined the term to mean the period 'which the search for justice does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to be reasonably done.' However, the rationale for determining whether justice delayed amounts to a denial of justice depends on whether the delay is inappropriate, avoidable, or out of proportion.[30] Thus, it was held in *Gozie Okeke v. The State*[31] that the following factors are a guide in determining whether an accused person was denied his constitutional right to a speedy trial; (a) the length of the delay, (b) reasons for the delay as given by the prosecution, (c) accused person's assertion of his right to a speedy trial, and (d) prejudice caused by the delay to the accused or to which he may be exposed. The court held in that case that though the trial lasted for six years, no prejudice was done to the appellant, having regard to the circumstances of the case. There was, therefore, no breach of his constitutional right to a fair trial. One is forced to ask what are the causes of these delays?

## Causes of Persistent Delay in the Administration of Criminal Justice in Nigeria

It is indisputable that Nigeria has a flood of laws and institutions created to ensure timeous administration of justice in the country. With this framework, ordinarily, Nigeria should have been listed among the countries with the best policies for the speedy dispensation of justice in the world. Sadly, Nigeria is still far from achieving this. Despite committing to the SDGs since its adoption in 2015, her criminal justice sector ranks 91st out of 142 countries in a 2024 report by the World Justice Project.[32] The following clogs though not exhaustive, account for this ugly trend.

### *Inadequate Facilities/Personnels*

The quality of judicial infrastructure and the expediency with which cases can be handled in court depends on how much a state is willing to spend on the courts and other institutions in the criminal justice chain.[33] A visit to many courtrooms will reveal the severe state of dilapidation of the courtrooms, especially in semi-urban/rural areas.[34] Courtrooms are inadequate and basic amenities such as light, typewriters or computers, conveniences, and vehicles, that will help to make the system function optimally are not available. Other stakeholders in the justice sector are not exempted from this problem as the correctional centre in particular usually encounters difficulty transporting inmates from the prison to the court premises for avoidable reasons like the unavailability of means of transportation.[35] In addition, the criminal justice sector also experiences a shortage of personnel.[36] This is reflected in the delay in preparing the Attorney General's advice, the inability to conduct proper investigation as well as the congestion of cases before courts, especially appellate courts.[37]

The workload of these courts is usually heavy, and sometimes it can take close to a decade to fix hearing dates for an appeal filed.[38] Other times, such appeals can stay pending for up to 10–20 years at the appellate courts.[39]

### *Poor Remuneration/Welfare Packages*

It is common knowledge that the welfare and working conditions of some judicial officers and other stakeholders in the criminal justice chain in Nigeria is very poor.[40] While some struggle with ridiculously poor remuneration, others must work under very poor conditions.[41] In some states, magistrates jump taxis, tricycles, boats, or even motorbikes to courts. Sometimes, they share these means of transportation with litigants that appear in their courts. The authorities involved do not seem to care that these magistrates risk their lives to effectively do justice to matters before them, particularly with the worsening security situation in the country. This creates a lot of room for delay as most of these persons may need more motivation to do what their job ordinarily requires of them or even stand for what is right when faced with very difficult situations.

### *Lack of Will Power*

The apparent lack of willpower to do what is right sometimes makes litigants and prosecutors pursue matters that should not be subject to criminal investigation.[42] They also take undue time to duplicate files and send them to the Director of Public Prosecutions (DPP) for advice. Additionally, some lawyers choose to pursue frivolous adjournments and applications to intentionally delay the matter in court.[43] Sometimes, the system condones excessive adjournment from either of the parties even though adjournment is usually at the discretion of the court. The effect of this is that it often prolongs the life span of court cases.[44] According to Justice Mann of the Plateau State High Court, '50% of criminal appeals coming before my appeal panel in the High Court of Plateau State are interlocutory appeals against no case submissions that were overruled'.[45] For this, Uwais, CJN (as he then was) has admonished counsels in the following words:

> …Counsel owes it as a duty to the court to help reduce the period of delay in determining cases in our courts by avoiding unnecessary preliminary objections…so that the adage, 'justice delayed is justice denied' may cease to apply to the proceedings in court.[46]

### *Transfer of Personnel*

Frequent and sudden transfer of judicial officers is also another contributing factor to the delay of cases in court. When such transfers are done, most uncompleted matters automatically start *de novo* before another magistrate or judge is sent to replace the former. Solutions to delays occasioned by the transfer of court officials have been captured in section 315 of ACJA as well as in the controversial section 396 of ACJA. Closely related to this is the continuous transfer of police officers and, at other times, the official assignment to duty away from their regular postings, making the investigating police officer unavailable to give evidence at the appropriate time.[47]

***Corrupt Practices***

Corruption is a serious problem that has permeated every sector of Nigeria, including the judiciary. It has been rated as one of the greatest obstacles that impede the efficient administration of criminal justice.[48] Corruption in the criminal justice sector cuts across the various stakeholders; the police, the judicial officers and courts staff, litigants, legal practitioners, and the prisons.[49] In this instance, corruption can take any of the following forms: bribe taking, gratification, granting of injunction in breach of the principles governing it, frivolous adjournment of cases, refusal to file proof of service after the service of a court process, and undue devotion to technicality.[50] A judge who is influenced, therefore, does not have the interest of justice at heart and thus employs every possible means, including the granting of frivolous adjournments to delay the course of justice.[51] Internally, the integrity of the judiciary is also questioned following numerous corruption charges against senior judicial officers; this in turn hinders the anti-corruption efforts of various institutions and ultimately the implementation of sustainable development Goal 16 by weakening the institutions in the justice sector.[52] As a result, Nigerians are increasingly moving away from the idea of courts as impartial dispensers of justice, to the model of 'cash and carry' justice where judges ignore precedent and even the law, to subvert justice.[53]

## Legal Framework for Speedy Dispensation of Justice in Nigeria

Nigeria has an avalanche of laws to ensure a speedy dispensation of justice in the country. Notable amongst these laws are those discussed below.

***The Constitution of the Federal Republic of Nigeria 1999 (as Amended, Hereinafter referred to as the 1999 Constitution)***

Section 36 of the 1999 Constitution provides that a person charged with a criminal offence is entitled to a fair hearing within a reasonable time. In a bid to give meaning to section 36 of the Constitution, the court in *Okeke v. State*,[54] stated that considering a fair trial within a reasonable time will depend on the circumstances of each case. The question, then is, what can be considered fair hearing? In *Eye v. FRN*,[55] fair hearing was described as a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. These rules stem from the array of rights that accrue to the defendant from various provisions of the Constitution.[56] Worthy of mention is the provision of section 36(6) of the Constitution, which comprises the rights to be promptly informed of the nature of the offence, the right to be given adequate time and facilities to prepare a defence, the right to a legal practitioner, the right to call and examine witnesses, and the right to have an interpreter.[57]

To cement these provisions properly, section 294 of the Constitution further provides that judgement be delivered not later than 90 days after the conclusion of evidence and final addresses. Likewise, in *Effiom v. The State*,[58] the Supreme Court of Nigeria prescribed the essential elements of fair hearing to include easy access to court, right to be heard, impartiality of the adjudicating process, principles of *nemo judex in causa sua*, and whether there is an inordinate delay in the delivery of judgement. It therefore follows that where the above-listed essential ingredients are absent, the defendant will be deemed to have been denied access to justice.

### *The Administration of Criminal Justice Act 2015 (ACJA 2015)*

Due to its innovations, the Act may be described as a watershed in Nigeria's criminal justice administration. Thus, the Court of Appeal[59] summarised the importance of the enactment of the ACJA in the following words:

> Before now, the administration of criminal justice was in a chaotic state, and the problem of incessant delay topped the list of overall malfeasance in the system. There was undue delay in the prosecution of even the most important cases and sometimes the most serious offences. There were long and sometimes inexcusable periods of adjournment, unpreparedness or untidiness in the calling of witnesses, transfer of prosecutors, magistrates, and Judges without effective plans for the cases they are handling, and indeed poor working attitudes of the various stakeholders…the essence of the Administration of Criminal Justice Act, was to ensure amongst others, speedy trial and quick disposal of criminal cases in the interest and as of right of a suspect, the defendant, the victim and in fact the society at large…[60]

To bring about a reformative dimension to criminal justice delivery in Nigeria, it became necessary for the ACJA to repeal the Criminal Procedure Act (applicable in Southern Nigeria) and the Criminal Procedure Code Act (applicable in the North).[61] This repeal was needed as the laws were obsolete, and inadequate and also served as a contributing factor to the incessant delays that were experienced in court. Defendants were detained/remanded without proper monitoring and supervision; there were no restrictions on applications that could be moved during proceedings, no provision for the proper recording of confessional statements as well as several other matters that the ACJA has now addressed. As specifically stated in section 1(1), the objective of the ACJA is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy administration of justice, protection of the society from crime and protection of the right and interest of the suspect, the defendant, and the victim. In essence, the objective of ACJA is to generally reform the criminal justice sector to conform to both the sustainable development goals and the AU agenda 2063. Some of the attractive innovations in the Act aimed at speedy dispensation of criminal matters include but are not limited to the following:

*Abolishment of Stay of Proceedings*

Section 306 of ACJA prohibits bringing an application for stay of proceedings in a criminal matter. The section dispenses with the need to bring such an application by providing that although objections as to the validity of a charge or information could be brought at any time before judgement, the objection shall only be considered along with the substantive issues and a ruling made at the time of delivering judgement.[62] The implication is that notwithstanding that the defendant has a right to raise objections as to the validity of the charge or information, such objections will no longer be taken as an interlocutory application and ruling given in the course of the trial. Rather, it will be entertained with the main issues and rulings made when delivering judgement. This rules out any application for a stay of proceedings to appeal, as there will be no interlocutory ruling to be appealed against. This provision is a very laudable development in the criminal justice sector as it will help to curb delays usually occasioned by a stay of proceedings in pursuit of matters in the appeal courts, which could take a long time (sometimes, several years) to conclude.

For instance, in *Uba v. FRN*,[63] the trial had started in 2009 and after two witnesses testified and were cross-examined, issues arose during the cross-examination of the third witness for which the defendant appealed to the Court of Appeal in 2013. The court delivered its judgement in 2014 and ordered a continuation of the hearing at the trial court. In 2016 again, on issues arising from the same third witness, another appeal was filed for which the Court of Appeal delivered judgement in 2018 dismissing the appeal.[64] While delivering its judgement, the court decried the time frame the case had already spent without conclusion of even the prosecution's case and proceeded to admonish that the speedy dispensation of justice in criminal trials remained key and all unwarranted delays must be avoided and discountenanced. This case reflects the unwarranted delays occasioned by the abuse of the rights to appeal, which section 306 of ACJA tries to curb.

However, the constitutionality of this provision has been queried because it has the probability of infringing on the defendant's right to fair hearing as guaranteed by the Constitution.[65] Further concerns have also been raised about the likelihood of the interlocutory appeal affecting the final judgement. The question then is will it be just for a defendant to stand trial on a faulty charge and wait for the final judgement only to have his objection sustained? I strongly align with the provisions of section 306 of ACJA abolishing stay of proceedings and reserving rulings on interlocutory proceedings till judgement because if these unnecessary delays are avoided, trials will be timeously held and concluded, giving opportunity to the parties to appeal the decision where any of them is not satisfied. This is not to unduly emphasise speed without recourse to justice but to encourage courts to make haste slowly with a view to arriving at justice.[66] Thus, to ensure the right to fair hearing is achieved and to prevent the infringement of the right, compensation should be provided to the unsuccessful party when judgements delivered in line with section 306 are overturned on appeal, as a means of acknowledging the inconveniences caused by the hearing at the trial court.

### *Limitation on the Number of Adjournments*

Section 396(3) of ACJA provides that criminal trials be held daily. While considering the practicability of the criminal justice system in entertaining trials on a day-to-day basis, the section provides further that where day-to-day trials are impossible, none of the parties would be entitled to more than five adjournments from arraignment to final judgement, and the interval between each adjournment should not exceed 14 working days.[67] However, where parties exhaust these adjournments without due conclusion of the matter, the Act further permits an adjournment on the condition that the interval between one adjournment and the other does not exceed seven days, inclusive of weekends.[68] It has been submitted that subsection 5 of section 396 has the probability of returning the system to *status quo* as there seems to be no limit to the number of additional adjournments that could be sought.[69] Nevertheless, it is hoped that the courts will use the provisions of section 396(6) to award cost where necessary to discourage the making of frivolous applications for adjournment.

### *Supervision of Remand Proceedings*

Section 293 permits a magistrate to remand a suspect arrested for committing an offence for which the magistrate has no jurisdiction to try.[70] However, the suspect will only be remanded where probable cause has been established for the remand pending the receipt of the Attorney General's advice and arraignment of the suspect before the appropriate court.[71] The section further provides that the remand shall only be for 14 days and subject to a further 14-day extension where good cause is shown.[72] Moreover, where the suspect is remanded and his trial does not commence at the appropriate court at the expiration of the 14 days, the section empowers the court to issue hearing notice on the Commissioner of Police or any other relevant authority in whose custody the suspect is being held to inquire as to the position of the case and also show cause why the suspect should not be released unconditionally. Where good cause is not shown, the court can immediately discharge the defendant.[73]

This strict regulation of the remand proceedings in the Magistrate court flows from the provisions of section 35 of the Constitution, which frowns at the restriction of a person's liberty except by procedures permitted by law. One of such provisos as it relates to remand is if it is to secure the defendants' attendance in court, upon reasonable suspicion of the defendant having committed the offence, or to prevent the commission of an offence.[74] Hence, the court must always consider these factors in granting or refusing an application for remand so as not to infringe on the defendant's right to liberty. This section calls for quick commendation as it ends the era of 'holding charge' whereby suspects were remanded in prison custody for several years without arraignment on mere suspicion of having committed an offence. It further energises the prosecution to prosecute diligently or risk having the suspect discharged, thereby making it difficult to secure the defendants presence in court to stand trial.

As innovative as section 293 is, it is submitted that the time frame provided within which the Attorney General is expected to forward his legal advice might be too short for quality legal advice, especially in a complicated matter, bearing in mind the lack of adequate manpower.[75] It is also worth noting that even when information is filed before the appropriate court, the remanding court must keep up with proceedings in that court until the defendant is appropriately arraigned so as not to lose track of the case.

### *Protection of Witnesses*

The ACJA addresses the problem of delays caused by getting witnesses to court to testify. The Act seeks to protect victims of certain crimes, such as terrorism, financial crimes, and sexual crimes, among others, who had previously been reluctant to come out publicly to testify.[76] Witness protection is no doubt an essential tool in the fight against domestic and international crime, especially corruption and other organised crimes, and the lack of it undermines the quality of justice sought to be achieved.[77] Where policies are not in place for the protection of witnesses, they are usually reluctant to testify because of the risk it may cause them or the shame and ridicule it may bring to them. Section 232 therefore provides for the masking of witnesses as well as the non-disclosure of witnesses' identities, names, addresses, and telephone numbers in offences relating to rape, defilement, trafficking, terrorism, or economic/financial crimes.[78]

The court may, in such circumstances where the need arises, restrict the public from the hearing, receive evidence by video link, and employ any other measure it considers appropriate in the circumstances.[79] In *Sambo Dasuki v. FRN*,[80] the Court of Appeal upheld the decision of the Federal High Court, Abuja division granting an application that allowed witnesses to testify by giving evidence behind the screen to be provided by the court. The decision also directed that the identities of all prosecution witnesses be not disclosed in any record or report of proceedings that are accessible to the public and permitted all prosecution witnesses to be addressed with pseudonyms in the course of proceedings.

*Proof of Evidence Made Essential*

The Act has made frontloading of documents compulsory in criminal trials to do away with unnecessary delays that may be caused by the uncertainty of how the prosecutor intends to prove their case.[81] The goal is to ward off surprises that the prosecutor may spring up as the defence will be aware of the nature of the offence against him. The requirement also enables the defendant to study the documents and, in case of any objections, raise them timeously. Specifically, section 350(2) provides that in a trial at the Magistrate Court, the prosecution should provide the defendant with all materials they intend to rely on at trial before or at the commencement of the trial.

On the other hand, with regards to information filed at the High Court, section 382 provides that on assigning the information, the court to which the information is assigned should within ten working days of the assignment issue notice of trial to the witnesses and defendants and the Chief Registrar should 'ensure the prompt service of the notice and information not more than three days from the date they are issued.'[82] Section 376(4) further provides that the proof of evidence should include the list of witnesses, list of exhibits, statement of witnesses and the defendant's particulars of bail, particulars of place of custody (where the defendant is in custody), particulars of any plea bargain arranged with the defendant, particulars of any previous interlocutory proceedings, and any other document the prosecution intends to rely on.[83]

*Delivery of Judgement by Alternate Judge/Magistrate*

ACJA has also introduced very laudable provisions to cure the problem of *de novo* trials in situations where the magistrate or judge may be prevented from delivering judgement or sentence due to illness or other unavoidable causes.[84] Having written and signed the judgement, the judgement may be delivered in open court by another magistrate or judge in the presence of the defendant. Another commendable cure to the *de novo* trial is section 396, which permits a High Court Judge elevated to the Court of Appeal to continue sitting at the High Court to enable him to conclude any part-heard matter. This offers relief to parties in such cases as it assuages the waste of efforts and resources suffered in the past when such elevation occurs and the matter had to start de novo before another judge.[85] Unfortunately, this provision was declared unconstitutional in *Udeogu v. FRN*,[86] and there have been calls for the 1999 Constitution to be amended to allow the provision to take full effect.[87] Others have argued that the section is impracticable as it is inconsistent with the constitutional provision on the proper constitution of a High Court.[88]

*Taking of Confessional Statements in the Presence of a Legal Practitioner*

Section 15 of ACJA provides that where a defendant volunteers to make a confessional statement, the investigative police officer should ensure that the statement is in writing and 'may' be recorded electronically.[89] The Act further provides that the statement be taken in the presence of a legal practitioner of the suspect's choice, an officer of the Legal Aid Council, civil society organisation, a Justice of the Peace, or any other person of his choice.[90] This provisions addresses the issue that usually leads to a trial within trial, as the presence of the third party already serves as a witness to the procedure of obtaining a statement. In as much as he is not to interfere while the defendant makes his statement, the named persons are to protect the defendant's interest and guide the defendant as to what is legally required of him in making a statement. When this is done, the defendant may not need to object to its admissibility during the trial, thereby putting to rest the issue of the involuntariness of confessional statement.

This provision, however, has been criticised for making the recording of statements optional by including the word 'may' in sections 15(4) and 17(2) leaving loopholes for exploitation.[91] Interestingly, the Supreme Court in resolving this controversy, held in *Nnajiofor v. FRN*[92] that although the ordinary interpretation of the word 'may' is permissive, its usage in section 15(4) read along with section 17(1) and (2) is mandatory and not permissive. Besides, the proper enforcement of the provision by states like Cross River that have made the provisions of section 15 mandatory by using the word 'shall' instead of 'may' raises concerns about the possibility of getting and maintaining such equipment, which are usually capital intensive.[93]

### *Dispensing with the Presence of the Defendant*

Generally, it is a fundamental principle of fair hearing that a person standing trial for a criminal offence has to be present in court throughout the period of his trial and a violation of it renders the trial a nullity.[94] Under the ACJA, exceptions to this principle have been established. Specifically, section 266 dispenses with the presence of the defendant at the hearing of an interlocutory application and in situations where he misconducts himself and renders his presence impracticable or undesirable. Also, by section 352(4), the court can continue with the trial of an absent defendant and proceed to convict him at the end of the trial where he absents himself from the trial without any reasonable excuse. However, such proceedings are permitted to take place only after two adjournments and the sentence will only be passed when the defendant is arrested or surrenders to the court.[95]

### *Limitation as to Time for Commencement of Trial*

Section 110(3) provides that trial for a charge should commence at least not later than 30 days from the date of filing the charge and it should be concluded within a reasonable time. Although the Act does not prescribe/define what a reasonable time should be, it is stated in subsection 4 that where the trial does not commence within 30 days or commences but it is not concluded within 180 days from arraignment, the court should forward particulars of the charge with reasons for the delay to the Chief Judge. Courts entertaining criminal proceedings are also mandated to make quarterly returns of the particulars of all criminal proceedings dealt with within the quarter to the Chief Judge and in reviewing these returns, the Chief Judge is expected to ensure that criminal matters are speedily dealt with, congestion of cases/prisons is drastically reduced, and awaiting trial persons are not detained in custody for a length of time beyond what is prescribed by the ACJA.[96]

## Comparison with Other Jurisdictions

A brief comparison with Rwanda[97] and the Netherlands[98] shows that efforts are being made globally towards achieving the SDG 16. In view of this and in consideration of the ranking of the criminal justice sector of both countries, recourse is being made to the reforms that have been implemented in both countries over time. Rwanda serves as a worthy comparator as a post-conflict nation that has been in the process of rebuilding institutions and generally reforming its economy since 2004.[99] The Netherlands on the other hand is compared in relation to indicator 2, target 3 of SDG goal 16 which is centred on the proportion of unsentenced detainees in the overall prison population. While the prison population is increasing the world over, there is a serious decline in the Dutch prison population to the extent that most prison facilities are being closed.[100] This research, therefore, seeks to explore the Dutch criminal justice sector to identify measures that have been adopted in the Netherlands which has drastically reduced their prison population since congestion of prisons as a result of pre-trial detentions is one of the many problems that has bedevilled the Nigerian criminal justice sector.

### *Criminal Justice Reforms in Rwanda*

The justice system in Rwanda was heavily destabilised by the genocide that killed hundreds of thousands of people and also destroyed the country's infrastructure.[101] After the war, the government and international donors had to invest heavily in reconstructing the courts and recruiting and training personnel.[102] The international criminal justice system positively impacted the justice system in general, leading to an enhanced acceptance and adherence to laws which facilitated Rwanda's growth.[103]

At the centre of the many challenges the Rwandan economy had to battle with were the backlogs created as a result of incarcerations from the 1994 genocide and fighting against these backlogs stood at the centre of the reforms initiated by the Rwandan judiciary since 2004.[104] The process of rebuilding the country necessarily involved the reform of institutions and laws in order not to just restore what was destroyed but to modernise it. Besides, the pre-1994 judicial system was inefficient and lacked credibility for various reasons, including a lack of accountability, corruption, and the fact that most judicial officers were not legally qualified.[105] To proffer solutions to these problems, a support court system was created. This included, amongst others, the Gacaca court, which existed for a couple of years and was manned by persons (not necessarily lawyers) with integrity from the community to help try lesser offences committed during the war; commercial courts to deal strictly with commercial disputes and an international criminal chamber in the high court to deal with cases related to the genocide transferred from the International Criminal Courts, as well as other international cases.[106]

Although the Rwandan Constitution has been criticised for not sufficiently incorporating the provisions on the rights to be tried within a reasonable time,[107] notable among its progressive legislation is the Rwandan criminal procedure law which provides for judgement to be in writing and delivered within 30 days of the close of hearing and in the case of accused persons in provisional detention three days from the close of the hearing.[108] Moreover, the Rwanda judicial system is separate and independent from the executive and legislature and it enjoys administrative and financial autonomy.[109] Owing to its autonomy, the judiciary was able to construct new courts and refurbish old and dilapidated ones with operational tools and measures to increase output and decrease the backlog of cases.[110]

In addition, the judiciary in Rwanda has also been able to clearly define basic professional qualifications for judges and judiciary staff as well as employ younger judges who are not accustomed to the old justice system, not prone to corruption, and willing to discharge justice to uphold the integrity of the judiciary.[111] This has significantly impacted the system as findings revealed that though the periods of prosecuting cases differ depending on the complexity of the cases, 70% of cases are handled within a period of less than six months.[112] However, in the Supreme Court where the bulk of the congestion is experienced, it takes a longer time for hearing to begin. Notwithstanding, in a 2016 research, it was revealed that the time it takes for a new case to begin hearing in the Supreme Court dropped significantly from 66 months to 20 months.[113]

Promoting the use of court technologies to increase efficiency, speed up court processes, and ease access to justice has been at the centre of judicial reforms since 2004.[114] For this reason, the Integrated Electronic Case Management System (IECMS) was introduced in 2016 to streamline judicial processes through automation and facilitate seamless information sharing among institutions, ultimately fast-tracking justice delivery.[115] The system fully integrates institutions involved in the justice chain – the Rwanda Investigation Bureau (RIB), the National Public Prosecutions Authority (NPPA), the Judiciary, the Rwanda Correctional Services (RCS), and the Ministry of Justice. The prosecutors can access the entire investigation case file, general information on the accused, and other case information as captured by the investigation bureau. The prosecutor is then expected to add prosecution-related information like suspect statements made before the prosecutor, which he then transmits to the court within the system.

In essence, the court, the defendant, and their lawyers have access to both the investigation and the prosecution's case and the system keeps track of the whole criminal record of the individual from detention through all appeals with the corresponding decisions from all the institutions.[116] This invariably helps to speed up trial in court as all information concerning a case is easily accessible. Besides enhancing efficiency, the system helps to minimise opportunities for corruption as there is little contact between litigants or their lawyers and the court.[117] It is for this reason that the IECMS received the Commonwealth 2024 Access to Justice Innovation Award.[118]

### *Criminal Justice Reforms in the Netherlands*

In the Netherlands, on the other hand, findings have revealed that their declining prison population could be attributed first, to the country's population which is only about 17.5 million people.[119] Secondly, it could also be attributed to its mild and tolerant attitude towards societal and morally controversial issues such as drugs, prostitution, and euthanasia.[120] Besides these, their penal system is less centred on incarceration but rather on the use of non-custodial sanctions.[121] Pre-trial detention is usually resorted to in rare circumstances such as for a dangerous suspect who needs to be incapacitated or where there are grave suspicions that a prison sentence of a certain length will be imposed at the end of the trial.[122] Even at that, the law provides compensation for time spent in pre-trial detention where the case ends without a sentence or with a sentence for an offence for which pre-trial detention was not admissible.[123] Compensation here could be either by fine or by reduction of the duration of the prison sentence imposed, where the defendant is convicted for another criminal offence. Though almost different from the Nigerian system, there are still some institutional and policy framework applicable in the Netherlands that Nigeria could adopt to better her criminal justice sector.

Generally, in the Netherlands, there is a crime control policy plan in force that aims to improve the criminal justice administration and, by extension, ensure a safer society by reducing criminality in the public domain.[124] The Judicial Organisation Act regulates the court system. Amongst other stakeholders, the prosecution service seems to wield enormous powers in dealing with criminal cases. They determine cases that should be instituted in court and the sentences that should be imposed. Approximately one-half of the crimes that reach the prosecutor's office through the police are not brought to trial. This is usually done not to waste the court's time due to technicalities that may arise as a result of insufficient evidence, settlement out of court, or the expediency principle to waive prosecution for reasons of public interest.[125] The police are also empowered to impose sanctions on certain offences, and it becomes irrevocable unless a complaint is lodged with the prosecution service, which acts as an administrative agency and its decision is subject to review by the district court.[126] This helps to reduce the workload on judges and by extension aids the speedy disposal of cases filed in court because the prosecution service must have sieved out unnecessary cases and applications to give room for more serious cases.

A register of experts, interpreters and translators is also kept to enable the public prosecution service, the police, and litigants to easily have access to them when the need arises because the public, prosecution, and police can only use interpreters whose names are listed in the register.[127] Where these professionals are not readily available in court, it can slow down the progress of trials because proceedings in court must be conducted in a manner that guarantees that the defendant understands all that transpires in court. In Nigeria, for instance, there have been several reports on how trials are stalled in courts because of the inability to find interpreters or translators for litigants, thereby increasing the time frame within which to dispose of a matter.[128]

In addition to these, recruitment to various agencies is done based on need. For instance, substitute judges to reduce the workload of the substantive judges are usually appointed from lawyers, legal scholars, and other persons possessing a law degree and possessing knowledge and experience of the criminal justice system.[129] Also, the size of the police usually depends on factors such as population size and crime level in the region, and though the police have jurisdiction in the whole of Dutch territory, their actions are usually restricted to the region where they are employed. This is unlike Nigeria where adjournments could be taken because the Investigating Police Officer has gone for another duty.

## Conclusion and Recommendations

This chapter examined the consequences of delays in the criminal justice sector in Nigeria and the adequacy of the ACJA in that regard. It reveals that speedy administration of justice is an important driver for sustainable development as delay in accessing justice may prove injurious to the defendant, the victim, and the criminal justice system. Despite the laudable reforms initiated by ACJA, the criminal justice system in Nigeria has only been able to make minor adjustments geared towards the speedy dispensation of justice. The reason is not far-fetched, as the ACJA can be said to be in the incubation stage as some states in Nigeria only domesticated it into state laws as recently as 2023, hence the applicability may still be a gradual process.

Additionally, appropriate follow-up mechanisms to ensure the proper implementation of laws is found to be another factor impeding the swift application of the ACJA. Besides, these implementation mechanisms only work with appropriate funding. The implication of this is that Nigeria is still lagging in its United Nations commitment to ensuring access to justice and the building of stronger institutions by 2030, because speedy dispensation is a key factor in accessing justice. Therefore, to effectively address these delays, it is essential that all key stakeholders within the Nigerian justice system collaborate and take combined action. The judiciary must be granted financial autonomy to ensure its independence; there must also be proper funding of the agencies involved in justice delivery, including the ACJA monitoring committee; trial within trial should be abolished, and like other objections, the involuntariness of a confessional statement should be raised during the tendering of the statement, but the ruling should be reserved till final judgement.

In addition, a register of experts and interpreters should be kept for quick reference when the need arises; specialised courts should be created to try other offences like terrorism to reduce the congestion of cases in court; the judiciary is encouraged to leverage on ICT, especially in recording proceedings in court and also to adopt the video conferencing provision of the Administration of Criminal Justice (Amendment) Law of Lagos State, 2021. Finally, for most of this to be achieved, an amendment of relevant laws in that regard is highly recommended to accommodate various concerns that have been raised.

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# Part 3

# Decriminalisation, Restorative Justice, and Implementation of Non-Custodial Measures

# 9 An Appraisal of the Rights of Victims of Violent Crimes in Nigeria, Kenya, and Ghana

*Awele Lauretta Ikobi-Anyali and Habila Ardzard*

## Introduction

Crime victims are an integral part of the criminal justice system; however, most studies are centred on the offender without much recognition for the victims of crime and their rights to protection.[1] Going by the United Nations (UN) sustainable development goals (SDGs), particularly Goal 16 on peace, justice, and strong institutions, which seeks to promote peaceful and inclusive societies, among others, and Goal 11 of the 2063 African Union (AU) Agenda, this chapter argues that the lack of recognition of the rights of victims of crime in the criminal justice system goes against inclusive societies and justice delivery, which is critical in promoting peace and stability.[2] In Nigeria, criminal law has mostly tended towards the punishment of a convicted offender and views crime as offences against the State, which ought to be prosecuted by the State through the Attorney-General.[3] This is also the case in Ghana, as the power to prosecute lies in the Attorney-General.[4]

Victims, especially those of violent crimes such as murder, armed robbery, are generally involved in the various stages of the criminal justice process. At the reporting stage, they are usually part of the prosecuting counsel's principal witnesses (except for murder, where the victim has died). However, they are often left dissatisfied with the process and do not have faith in the criminal justice process due to challenges to prosecution, such as a lack of credible witnesses and lengthy court trials.[5] During trials, victims often serve as prosecution witnesses, providing evidence to demonstrate the crime and the harm they experienced due to the defendant's violent actions. Unfortunately, the rights of victims of violent crimes are frequently overlooked or not recognised. As a result, many of these victims feel neglected and dissatisfied both during and after the trial process. In the case of victims of rape and assault, they may want some form of compensation to cater for medical bills, or to assuage the loss of loved ones.[6] This may not be provided in the final determination of the proceedings.

Many African countries have enacted various laws regarding crime and criminal prosecution, including constitutions and both substantive and procedural laws, that provide significant recognition and protection for the human rights of defendants at all stages of the criminal justice process, from arrest

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and investigation to trial and sentencing. However, this landscape has shifted with new laws aimed at protecting victims. In Kenya, the Victim Protection Act 2014, Chapter 79A gives effect to Article 50(9) of the Constitution. It provides for the protection of victims of crime.[7] In Ghana, the rights of victims are not pronounced but could be inferred from Fundamental Human Rights and Freedom encapsulated in Chapter 005 of the Constitution[8] and the Domestic Violence Act 2007 which has the Victims of Domestic Violence Support Fund with objectives towards 'the basic material support of victims of domestic violence, for training the families of victims of domestic violence, among others.'[9] Nigeria has also enacted the Administration of Criminal Justice Act 2015,[10] and the Violence against Persons Prohibition Act, 2015, respectively, which now recognise the rights of victims to restitution, compensation, and various forms of assistance.

These reforms no doubt align with Goal 16 of the UN SDGs and Goal 11 of the 2063 African Union Agenda. Goal 16 of the UN Sustainable Development Goals (SDGs) focuses on peace, justice, and strong institutions and emphasises the importance of ensuring access to justice and the presence of effective institutions to uphold it. Access to justice involves taking proactive measures to eliminate any activities that may infringe upon the rights of individuals in society, including the rights of victims. It further entails a society where individuals live in peace and harmony, where their rights and dignity are respected. Goal 11 of the 2063 AU Agenda reflects similar principles. Therefore, administration of justice under Goals 16 of the SDG and 11 of the AU Agenda must show that the processes, procedures, and institutions of criminal justice are in place.[11] Legal frameworks on victim protection reiterate the dictum by Oputa JSC, as he then was, in *Godwin Josiah v. The State*[12] that

> … justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant accused of a heinous crime of murder; justice for the victim, the murdered man… and finally justice for the society at large … That justice which seeks only to protect the appellant will not be even-handed justice. It will not even be justice tempered with mercy.' In other words, justice means fair treatment, and the justice in any case demands that the competing rights of the parties must be taken into consideration and balanced in such a way that Justice is not only done but must be seen to be done. - *Dr. Moses Obajimi v. Mr. P.T. Adediji*[13]

In line with the foregoing, this chapter explores the nature and extent of the rights of victims of violent crimes in Nigeria, Ghana, and Kenya. It examines substantive criminal justice legislation in these countries and raises the questions: Does the victim of crime matter in the criminal justice process? Can justice be fully achieved in a criminal justice process where the victim of a crime is alienated? What are the rights that are available to victims of violent crime?

How can these rights be protected in a criminal justice process? Following this introduction, Part 2 conceptualises the idea of crime and victims of violent crimes and Part 3 examines victimology theories. Part 4 discusses the rights available to victims of violent crime in Nigeria, Ghana, and Kenya, highlighting key reforms in the rights and interests of victims of crimes within these jurisdictions and Part 5 provides recommendations and concludes the chapter.

## Crime and Victims of Violent Crimes

Crime can be referred to as 'an action or omission that constitutes an offence that may be prosecuted by the state and is punishable by law.'[14] However, crimes which the law has designated have varied greatly from time to time, leading to the enactment of new laws to accommodate evolving manifestations.[15] Victims mean

> persons who individually or collectively, have suffered harm; including physical or mental injury, emotional suffering or economic loss or substantial impairment of fundamental rights through acts or omissions that violate criminal laws operative within member states, including those laws proscribing criminal abuse of power.[16]

In Kenya, the term victim 'means any natural person who suffers injury, loss or damage as a consequence of an offence.'[17] Ghana does not have 'victims' defined in its law. In Nigeria, the Violence Against Persons Prohibition Act (VAPPA) 2015 is the most comprehensive extant legal instrument protecting the rights of victims of violent crimes in Nigeria. Under the Act, victims mean

a any person or persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights through acts or omissions that are in violation of this Act or the criminal laws of the country; and
b includes the immediate family or dependents of the direct victim and any other person who has suffered harm in intervening to assist victims in distress.[18]

Notably, the VAPPA Act expands the meaning of victim by including immediate family or dependants of the victim, or other persons who suffer harm in assisting the victim and emotional or economic loss, among others. The Nigerian law implies that more people fall within the scope of 'victims,' and it is not clear how they all will get justice as victims.

It appears that the distinction between the definition of victims in Nigeria and Kenya is the inclusion of the immediate family or dependants of the direct victim and any other person who has suffered harm in intervening to assist victims in distress, as provided by the VAPPA. This means that anyone directly or indirectly impacted by the acts of the defendant carried out against the direct victim qualifies as a victim. This chapter supports this broad definition reflected in the Nigerian law and argues that any person who may be affected by the acts of the defendant should be regarded as a victim, who will benefit from the justice system. Furthermore, a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted; irrespective of the familial relationship between the defendant/accused and the victim. This means that anyone who is affected by a crime or any form of violent activity, including domestic, sexual, and gender-based violence, is a victim. A victim can be a woman, a man, a child, a youth, an elderly person, a relative of the accused, or a dependent of the victim.[19]

A victim of a crime is entitled to rights that need to be protected. Suffice to state that crimes, especially those by familial perpetrators, are not to be settled at home; they should be reported to law enforcement. Considering that the inputs of victims are crucial to solving crimes to sustain convictions and developing criminal justice systems, it is expedient that their rights are identified and protected. Violent crimes are generally on the rise and in Kenya, they rose significantly to 40,145 in 2023 from 35,920 in 2021–2022. The increase is attributed to economic instability, including inflation and food insecurity, as well as potential political tensions related to national or regional events, while the forecast for violent crimes from 2024 to 2026 suggests a moderate upward trend.[20] For Ghana, her crime rate and statistics for 2021 was 1.84, a 6.49% increase from 2020.[21] It is this nature of crime that the chapter seeks to examine; this is because these crimes are rampant in Nigeria, Ghana, and Kenya and have caused a lot of hardships to the people, economy, investments, and investors, leading to capital and economic flight and human capital flight from the continent to safer climes.[22]

## Victimology Theories

Victimology is the scientific study of victims and was a concept coined from a Latin word *victima* and a Greek word *logos*, as early as the 1940s.[23] It is the study of causes of victimisation, its consequences, and how the criminal justice system to which the victim belongs helps such a victim. It involves a scientific approach towards knowing the relationship between the criminal and the victim.[24] Victimology studies crime from the perspective of the victim who has suffered injury or damage due to the actions of an individual or group.[25] The rights of victims of crimes are very important, because a rights-based approach can help protect the victim. The victimology theories help understand why victims of crimes are seen to be neglected in the criminal justice process, and how the law has actually progressed to giving them protection.

There are several theories related to victimology and victimisation. According to Siegel, the four most common theories that explain victimisation and its causes are the victim precipitation theory, the lifestyle theory, the deviant place theory, and the routine activities theory.[26] These theories generally highlight the significant role of the victim, as their behaviour can directly or indirectly influence their fate and motivate criminal activity.

***Victim Precipitation Theory***

The victim precipitation theory suggests that crime victims attract victimisation to themselves by their provocative and 'instigatory' behaviours during interactions between perpetrators and their victims.[27] It suggests that 'a crime does not occur in a vacuum; numerous antecedent forces contribute to causing it. Many of these are peculiar to the individual offender; his psychological needs, motivations, and moral compunctions, for example.'[28] This can also be caused by society, such as the standard of living and environment. The victim precipitation theory also suggests that the characteristics of the victim provoke the crime. Subtly put, the actions or inactions of the victim can lead to the crime; were it not for the actions of the victim, the crime might never have been committed.[29] This theory shifts blame to the victim until it is proved beyond a reasonable doubt. It is the argument made here, that this shift in blame shows that this theory seeks not to protect the rights of victims and may negatively affect the victim from getting justice. Therefore, the victim precipitation theory may not serve the best interests of the victims.

There are two types of precipitation: passive and active – a failure to act (nonfeasance) or affirmative conduct.[30] For example, a property owner who fails to lock his doors or leaves property unattended, if stolen, may have been careless or inadvertent. The property owner's motives are irrelevant, in any event, to the concept of victim precipitation, which is measured from the perspective of the offender. If the latter has been incited by the victim's action to perpetrate a crime, a victim-precipitated offence has occurred.[31] Victim precipitation theory holds the view that the defendant or someone would never have contemplated the crime, but the victim's precipitative conduct leads to the defendant committing the crime.[32] However, traditional criminal law would not support this position because the offender chooses to commit a crime and not necessarily precipitated by the victim. This theory seems to be manifest in cases of rape, assault, and generally violent crimes. No doubt some precipitative conduct will seem trivial, but mere recognition of victim precipitation does not oblige the criminal justice system to give legal effect to every instance of it. The criminal justice system may never consciously consider this victim-precipitation factor in addressing each defendant's case, as meaningful distinctions may follow.[33]

Thus, in some victim-precipitation cases, there will be no criminality, in others, there will be charge reduction or sentence mitigation, and in others, the charge, guilt, and sentence will be unaffected by the precipitative circumstances.[34] In some situations, victim precipitation may be a legally recognised affirmative defence. On an informal level, victim precipitation might affect a prosecutor's decision to charge, a jury's verdict, or a judge's sentencing decision.[35] Thus, under the victim precipitation theory, the precipitator will be charged as a solicitor, conspirator, or accomplice.[36] This may also depend on the ingredients of the offence in a particular jurisdiction or country which may specifically impose some form of liability on the precipitator.

Victim precipitation theory can occur in murder and assault cases, where the victim was the first attacker by using physical force, gestures, and insinuating language or racist comments. When applied to homicide, victim precipitation is restricted to those cases in which Meier and Mieth argue that 'the victim is the first in the homicide drama to resort to physical force against the subsequent slayer.'[37] Victim precipitation in rape cases can occur where, for instance, the woman agreed to sexual relations but retracted before intercourse, or where she invited sexual relations by her language or acts.[38] The theory questions the victims' role in crime-causation. It can serve as an avenue for affirmative defence in cases of self-defence, entrapment for a police officer, and can also lead to a reduction of charges from murder to manslaughter. Although victim or third party precipitation generally should not be an exonerating defence, failing to accord these circumstances any effect is equally inappropriate. The implication of blame in victim-precipitation analyses has inhibited the full development of the concept of victimology in modern or contemporary criminal law.

### *Lifestyle Theory*

Hindelang Gottfredson and Garofalo developed the lifestyle theory in 1978.[39] This theory believes that those whose lifestyle increases criminal exposure are more likely to become victims of crime.[40] Thus, people's daily activities may bring them into contact with crime or increase their risks of being victims of crime. The lifestyle theory holds that crime is not random but a function of an individual's chosen lifestyle.[41] Here, the lifestyle of the victim is a deciding factor in crime. For example, if the victim keeps late nights, then the victim will be susceptible to attacks; if the victim lives in urban or affluent areas, wears expensive jewellery, displays cash, or an affluent lifestyle on social media, then he or she becomes a target of crime. Therefore, one can reduce the chances of being a victim by spending more time at home, avoiding the display of affluence, or living in suburban areas.[42]

The applicability of this theory in many African countries, including Nigeria, is debatable, particularly because violent crimes often do not relate to the lifestyles of the individuals or victims. Anyone can become a victim of violent crime, including kidnappings, rape, defilement, theft, and armed robbery. Various factors can contribute to crime, such as social inequality, economic hardship, unemployment, drug abuse, rapid urbanisation, and overcrowding, among others.[43] In Kenya, crime is caused by poverty, youth unemployment, and drug abuse.[44] This shows that the lifestyle of the victim may not necessarily be a precursor to violent crimes and crimes generally. Although status, characters such as gender, occupation, sex, race, education, and marital status are important correlates of violent and predatory crimes, this chapter posits that the lifestyle theory of a victim is not enough to sustain a defence for the defendant.

### *Deviant Place Theory*

Deviant place theory takes a different approach by taking the blame off the individual victim and puts it in the places the victim visits that are prone to crime. The deviant place theorists believe that victimisation can be stopped if people avoid certain places.[45] It holds that victims do not motivate crime. They become victims because they live in a society, neighbourhood, or environment susceptible to crime.[46] This theory is applicable in countries such as Kenya, Nigeria, and Ghana, where neighbourhoods with unfavourable economic conditions, hunger, and lack of social security often record high crime rates.[47]

The deviant place theory and lifestyle theory seem to have a correlation, because they connect with socio-economic approaches in that, a person who lives in a poor-income neighbourhood will be more exposed to crime than a person who lives in a high-income area.

### *Routine Activity Theory*

The basic premise underlying routine activity theory is that various social changes in conventional society increase criminal opportunities while placements within social contexts provide exposures for criminal victimisation.[48] Predatory crimes are linked to three variables: motivated offenders (addicts and unemployed), suitable targets (such as unlocked homes), and the absence of capable guardians (such as parents, police, and relatives).[49] The presence of any of these components increases the probability of the occurrence of crime. Routine activity theory is similar to lifestyle activity theory as both emphasise how patterns of routine activities or lifestyles in conventional societies provide an opportunity structure for crime. However, routine activity theory was originally developed to account for changes in crime rates over time, whereas lifestyle activity theory was proposed to account for differences in victimisation risks across social groups.[50]

What the victimology theories reveal is that victims are blamed for crimes against them, and as such may have over time influenced the limited existence or outright absence laws that seek to protect the rights of the victim. Accordingly, a rights-based approach that centres the rights and interests of victims of crime is critical. Recent criminal justice reforms in Nigeria, Kenya, and Ghana confirm these shifts to these rights-based approach for victims. For instance, the Kenyan law specifically provides for the Victims Protection Act 2014. The chapter argues that the position of the victimology theories could be a precursor to the criminal justice reforms, which now seek to protect victims whose rights were not protected before the reforms, giving credence to Goal 16 of the SDG.

## Rights of Victims of Crime in Selected African Jurisdictions

Crime is a universal phenomenon, and a society entirely free from it appears impossible. However, its nature and dimensions differ across societies. In Nigeria, Ghana, and Kenya, the investigation and prosecution of crime are primarily undertaken by the State, leaving victims with little or no active role in the process. Unlike offenders, whose rights are constitutionally protected, victims have traditionally been confined to the role of witnesses, with their participation ending once testimony is given. This imbalance raises a critical question: do victims truly have rights within the criminal justice framework?

Under international human rights law, ordinary crimes fall within the jurisdiction of national legal systems, making the protection of victims' rights and access to justice primarily a national responsibility.[51] The United Nations General Assembly (UNGA) identifies some basic rights that states are encouraged to domesticate, including access to justice, fair treatment, information about proceedings, adequate support services, respect for privacy, dignity, and compensation or restitution for harm suffered.[52] At the regional level, the African Union's *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture* Cruel, Inhuman and Degrading Treatment or Punishment in Africa[53] similarly emphasises reparatory measures and obliges states to provide redress for victims, whether or not there was a successful prosecution.[54] This section examines the recognition and protection of victims' rights within recent criminal law and justice reforms in Nigeria, Kenya, and Ghana, highlighting the scope of these reforms and the challenges of translating legal recognition into meaningful outcomes.

### *Rights of Victims of Violent Crime in Nigeria*

Over the years the criminal justice system in Nigeria has shown more concern for the punishment of offenders than with protecting the rights of victims of crime. This is because the aim of criminal justice was largely viewed as the protection of society from crime.[55] The rights of citizens protected under Chapter IV of the Constitution appear to prioritise the protection of defendants' rights in criminal trials.[56] Although the Penal Code provides for compensation of victims of crime,[57] the tepid compliance with this provision is a result of the perception of the officials who trivialise the interests of victims. The court also did not help matters as it did not consider the issue of compensation in sentencing hearing procedure.[58] Reform provisions in the ACJA and VAPPA in 2015 introduced a shift from retributive justice towards restorative justice for victims who may be affected by criminal behaviour. Some of these are highlighted below:

#### *The ACJA and Victim Rights*

The ACJA in section 1 provides that

> The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes …protection of the society from crime and protection of the rights and interests of the suspect, the defendant and the victim.

Some of the provisions of the ACJA which seek to actualise these provisions include:

i Award of Compensation to Victim in Judgement
Compensation is a remedy anchored on the principle of *restitutio in integrum*.[59] It is given to return an injured party to the actual losses arising from

the wrongful conduct, to effectively ensure that the victim is restored as far as possible to their previous status, while preventing the unjust enrichment of the offender.[60] In Nigeria, the right to compensation is not only available to the victims of violent crimes, but victims of crimes in general.[61] Where no loss or injury is suffered, the court cannot award compensation. Before the enactment of the ACJA, compensation was basically a remedy available in civil litigation.[62] Therefore, victims of crime were left with no compensation. The ACJA has, however, now provided for different circumstances in which the court is empowered to award compensation in criminal trials, reflecting the hallmark of victims' compensation in Nigeria's criminal justice system.[63] The power of awarding compensation is not fettered by the court's civil and criminal jurisdiction limits and can be awarded even when a victim did not ask for it.[64] What this means is that the various grades of Magistrate Courts whose monetary jurisdictions are circumscribed can award compensation in sum beyond the limits of their monetary jurisdiction.

The ACJA also allows the court to order the defendant to pay compensation to any person injured by the offence, during proceedings or while passing judgement. It also allows the court to order compensation for a *bona fide* purchaser, and medical expenses for a victim injured by the convict.[65] A defendant need not be first convicted before he can be ordered to pay compensation to the categories of victims mentioned therein, as the court can make the order of compensation.[66] The compensation the court may order to be paid is neither punishment for the offence nor an alternative to punishment for the offence. It is, rather, an indemnity to a person injured by the offence. A prominent reflection of the victim compensation regime principles is that granted to victims of the EndSARS protesters:[67] although the compensation was not granted by the courts, but a Judicial Panel of Inquiry and Restitution established for EndSARS-related killings and the Lekki Tollgate incident.[68]

The problem with the provisions of the victim compensation regime under ACJA is that by the provision of section 36(5) of the Nigerian Constitution, there is a presumption of innocence on the defendant. If the court orders suspects *in limine* to pay compensation to a victim, that may amount to the court finding them guilty of the offence charged even before the conclusion of the trial. If that is the case, it would appear also that the provision of s. 319(1) of ACJA is in conflict with the provision of s. 36(5) of the Constitution and likely to be challenged in court further limiting the rights sought to be protected by such provisions.

ii Power of the Court to Order Restitution

Section 321 of the ACJA empowers the court, in determining an appropriate sentence for each convict, to order the convict to make restitution to any victim of the crime for which the offender was convicted. The court may also order restitution for the loss or destruction of the victim's property in addition to or in lieu of any other penalty prescribed by law.[69] In so doing, the court may direct the convict to return the property to the owner or to any person designated by the owner; to pay an amount equal to the value of the property where the return of the property is impossible or impracticable; or to pay an amount equal to the property calculated on the basis of what is fair and just where the property to be returned is inadequate or insufficient.[70] This provision seeks to restore victims of crime to the position they were before the offence was committed. Therefore, even where it is impossible or impracticable to return the property to the victim, for instance, in situations where the property has perished or is lost, an amount equal to the value of the property shall be paid to the victim.[71]

iii Award of Damages
Where a charge punishable by law has been proved against a defendant, if there are mitigating circumstances, a court can order a defendant to pay damages for any loss or injury caused by their behaviour. The court may require the defendant to pay reasonable costs of the proceedings instead of enforcing a punishment if it deems appropriate.[72] Although the order for damages is made at the discretion of the court, it serves the interest of justice for the court to make the order so that the victim who has suffered injury or loss has some level of redress.

*The VAPPA and Victim Rights*

The VAPPA seeks to prohibit all forms of violence in private and public life, prohibit all forms of violence against persons and provide maximum protection and effective remedies for victims and punishment for offenders.[73] The Act addresses the rising incidences of gender-based violence and human rights abuses in Nigeria, such as rape, spousal battery, intimidation, stalking, harmful traditional practices, genital mutilations, political violence, and killings. The Act specifically recognises the rights available to victims of these violent crimes to include the right to receive necessary materials, medical, psychological, social, and legal assistance through governmental or non-governmental agencies providing such assistance.[74] It also includes the right to be informed of the availability of the foregoing services and be readily afforded access to them; the right to rehabilitation and re-integration programme of the State to enable victims to acquire, where applicable and necessary, pre-requisite skills in any vocation of the victim's choice and also in necessary formal education or access to micro credit facilities.[75] Currently, 35 States in Nigeria have domesticated the provisions of VAPPA which is federal law into their State laws and have given jurisdiction to the State's High Court to hear and determine questions of violations under their laws. This integration makes the Act a significant tool for protecting the rights of victims in Nigeria.

Under the VAPPA, the police are mandated to assist victims in filing a complaint regarding violent incidents. They are also required to arrange transportation to a safe place, shelter, hospital, or medical facility for treatment of injuries where necessary. The police must also inform victims of their rights to protection against violence and the remedies available to them, including the right to file a criminal complaint alongside any other remedies that may be available.[76] Notably, these rights only apply to violent crimes under the VAPPA and have not been interpreted to include rights of victims under the Criminal Code or Penal Code, as the case may be. It is thus not universally applicable to other violent crimes such as murder and non-negligent manslaughter, robbery, and aggravated assault.[77]

Although the government may not face significant challenges in providing legal assistance to victims of violent, it is questionable whether the various rights outlined in the Act are more than just aspirational. There are several challenges to the realisation of some of the rights outlined in the VAPPA. A significant challenge includes a lack of infrastructure, which makes it difficult for the government to provide social services. Many rural areas in the country lack medical facilities or healthcare centres. Even in urban areas, the existing hospitals and healthcare centres are often poorly equipped and lack basic facilities to meet the needs of citizens.

### *Rights of Victims of Violent Crime in Ghana*

In Ghana, the Domestic Violence Act (DVA)[78] was passed following several years of advocacy efforts by key civil society and women's rights organisations, the media, and international bodies.[79] The Act outlines a comprehensive legal framework for the prevention of and protection against domestic violence. It criminalises various acts of physical and sexual violence, economic and psychological abuse, and intimidation in domestic relations.[80] Although similarities exist between Ghana's DVA and the VAPPA, the DVA appears to be more explicit in its definition of domestic violence. The DVA defines domestic violence to include sexual, emotional, verbal, psychological, and physical abuse as well as other forms of economic abuse, which is likely to detract from another person's dignity and worth as a human being.[81] Nigeria's VAPPA defines domestic violence in section 46, to include any act perpetrated on any person in a domestic relationship where such act causes harm or may cause imminent harm to the safety, health, or well-being of any person.

The DVA seeks to address the concerns of victims[82] and as such numerous remedies are enshrined therein to restore the victim of domestic violence and to assuage the injury or losses suffered. The Act mandates the police to respond to a request by a person for assistance from domestic violence and to offer the protection and assistance that the circumstances of the case or the person who made the report requires, even when the person reporting is not the victim of the domestic violence.[83] The police must also inform the victim of the right to any services which may be available. The victim must also be assisted to have free medical services from the state.[84]

The DVA also provides the establishment of a support fund for victims of domestic violence and how this fund will be applied. Money in the fund shall be applied towards basic material support of victims; training of families of victims; any matter connected with the rescue, rehabilitation, and reintegration of victims of domestic violence in regions and districts; and for training and capacity building of the persons associated with the provision of shelter, rehabilitation, and reintegration.[85] The existence of this fund is critical as it provides the means for implementing the rights of victims. Notably, in spite of this provision on the establishment of the fund, Ghana still suffers from inadequate infrastructure that would make the enjoyment of these rights by victims of violent crimes practicable. For instance, it was observed that victims of violent crimes still pay for medical care, the police are not funded enough to provide shelters to victims of violent crimes, and the victim support funds are never properly applied.[86]

***Victim's Right Protection in Kenya***

In Kenya, the principal legislation on the rights of victims of violent crime is the Victim Protection Act (VPA) 2014.[87] Before the enactment of this Act, there were pockets of legislation which provided limited relief to victims of crime in Kenya. For instance, the amendment to the Criminal Procedure Code in 2003[88] introduced a new Part IXA dealing with Victim Impact Statement, granting victims the right to voice concerns before sentencing a convicted offender.[89] Also, the 2008 amendment to the Criminal Procedure Code[90] introduced the concept of plea bargaining in criminal trials. It provides for compensation and restitution to victims by the offender and the involvement of the victim in the negotiation of the agreement.[91] Moreover, under the Bill of Rights contained in Chapter IV of the Kenyan Constitution, 2010, especially the right to fair hearing in Article 50, the Republic is mandated to enact legislation providing for the protection, rights, and welfare of victims of offences.

Prior to the enactment of the Victim Protection Act in 2014, the role of victims of crime in criminal trial in Kenya was similar to the position in Nigeria. This position was captured by the court in *Republic v. Leliman & 4 Ors*[92] in the following words:

> In Kenya, the place and role of a victim in criminal proceedings has been evolving. Initially, victims were silent observers in court and were only visible as witnesses and were represented by an advocate through watching brief. In watching brief, counsel lacked the right of audience and could only channel concerns through the prosecution, except in inquests or enquiries where the victim's counsel was allowed to cross-examine witnesses.

The VPA introduces the concept of restorative justice, which seeks to promote reconciliation, restitution, reparation, and closure.[93] It recognises the right of compensation by the offender to the victim for any economic or property loss occasioned by the offence and any physical, emotional, or psychological injury suffered and its treatment. The compensation rights include compensation for economic loss, loss of or damage to property, loss of use of the property, and personal injury.[94] Section 23(4) provides that 'a compensation order made against a convicted offender may be enforced as a judgment in civil proceedings.' Section 26 of the Victims Protection Act, Kenya provides for restitution in the form of damages.[95] There have been improvements since the recognition of victim rights to compensation in Kenya. Kenyan courts have interpreted the right to victim compensation following a High Court ruling in 2020 that ordered the government to compensate four female survivors of a wave of sexual violence that occurred after the violently disputed elections in 2007. The four victims each received approximately $36,000.[96]

The VPA introduced specific participation rights to victims of crime, which are in line with regional and international instruments. Accordingly, the Act mandates that the court or any administrative body ensures that a victim is provided with legal and social services, including the right to be represented by a counsel of their choice, just like the defendant; the right to an expeditious trial; the right to access information on evidence relied upon by both the prosecution and the defence; the right to be fully informed of the charges framed against the defendant; the right to make submissions in any plea bargain; and the right to present views at every stage of the trial where the victim's interests are affected.[97] The victim may also present evidence by himself or through an advocate where the prosecution has left out crucial evidence.[98] This range of rights are not present under Nigerian laws.

The right of the victim to information under the VPA is not limited to being informed about the charges against the defendant or the evidence to be relied upon by the prosecution and the defence, but to all materials the victim may need to advance their case against the offender. This position received judicial affirmation in *Legal Resources Foundation Trust v. Attorney General & 2 others; Council of Governors & 2 others (Interested Parties)*[99] where it was held per Muchemi J as follows:

> The right to information under the Victim Protection Act includes all the material that a victim may need in the prosecution of his case against the perpetrator. It is my considered view that, a P.3 form is part of this vital information that will be needed in proof of criminal cases of assault and sexual offences.

The Act makes elaborate provisions for victim support services. This is in recognition of the fact that the victim may suffer physical, material, financial as well as psychological injury that may require mitigation. The victim support services provided for under the Act may take different forms, including provision for speedy investigation and prosecution of cases and unhindered access to justice;[100] appropriate cultural and religious-based support initiatives; and availability of adequate medical services.[101] The foregoing helps to mitigate the effects of primary victimisation and prevent secondary victimisation, which may manifest in trauma, financial expenditures, or different forms of discrimination.

Finally, the Act establishes the Victim Protection Trust Fund, which is funded from monies appropriated by the National Assembly, grants and donations, victims' surcharge levy, among others.[102] The Fund provides resources to cater for the interests of victims of crime and is administered by the Victim Protection Board.[103] The Board is empowered to design and establish policies, programmes, and activities towards enhancing the protection of victims of crime and providing succour to them.[104] Kenya, like many other African countries, suffers from inadequate revenue to meet its developmental needs. It grapples with infrastructure deficits, including inadequate and often poorly equipped medical facilities and a poorly funded criminal justice system. This makes it difficult to sufficiently finance the Victim Protection Trust Fund and provide adequate support services to victims of violent crimes in the country.

## Recommendations and Conclusion

The chapter observed that although there exist legal frameworks in Nigeria, Ghana, and Kenya for the protection of victims of crime, which indeed support SDG 16, lethargic enforcement of the provisions of these legislation, and inadequate infrastructure interplay to inhibit the full enjoyment of the rights enshrined in the various legislation by victims of crimes. Flowing from the foregoing observation, the chapter makes the following recommendations:

a African countries must take swift action to provide essential facilities and infrastructure, such as adequate courtrooms, personnel, reliable electricity supply, and recording devices, to make the adjudication system more effective and timelier. This can be achieved through improvements in criminal justice delivery and advocacy for greater access to justice. Additionally, strong governmental commitment to the rule of law and criminal justice administration is crucial. Moreover, it is important to ensure the judiciary's fiscal independence.

b Nigeria, Ghana, and Kenya must do more to provide adequate healthcare centres and facilities that can easily be accessible to victims of violent crimes such as rape because medical reports are vital to proving the offences of rape or defilement.

c The office of the Attorney-General that prosecutes offenders of violent crimes and crimes generally and legal practitioners and defence counsel should sensitise victims of violent crimes of their protected rights and how to enforce the same during the criminal justice process to ensure they are adequately protected.

d Like the DVA in Ghana and the VPA in Kenya, the VAPPA in Nigeria should be amended to make provisions for victims' support fund as this is lacking in Nigerian legislation.

e The governments of Nigeria, Ghana, Kenya, and other African countries should create programmes to raise awareness among the citizens of the available rights to victims of violent crimes.

The chapter examined legislation in Nigeria, Ghana, and Kenya regarding the protection of the rights of victims of violent crimes. Legal reforms in these countries now recognise such rights, including rights to compensation or restitution for injury or loss, as outlined in the United Nations General Assembly Resolution 40/34 of 29 November 1985. This recognition aligns with Goal 16 of the UN SDGs and Goal 11 of the AU Agenda 2063, thereby promoting a just and inclusive society. While the chapter commends the existence of these rights, it emphasises that formal recognition alone is insufficient. Much work remains for governments to ensure these rights are realistically implemented. Kenya has made significant progress by awarding monetary compensation to victims of sexual violence through judicial interpretation and decisions. In contrast, Nigeria and Ghana have yet to fully operationalise the legal frameworks supporting victims' rights. The chapter also notes several barriers preventing victims from fully accessing their rights and offers recommendations to address these gaps. These focus on speeding up trials, providing adequate medical facilities, and properly funding support systems for victims. Despite competing challenges for government resources, the protection of victims of violent crimes should not be underestimated, as victims play essential roles in the criminal justice process.

## Notes

1 Muhammed Tawfiq Ladan, *Crime Prevention and Control and Human Rights in Nigeria* (Econet Publication Company Limited, 1998) 214.
2 UN SDG Goal 16: Promote just, peaceful and inclusive societies, https://www.un.org/sustainabledevelopment/peace-justice/#:~:text=Goal%2016%3A%20Promote%20just%2C%20peaceful%20and%20inclusive%20societies&text=Goal%2016%20is%20about%20promoting,inclusive%20institutions%20at%20all%20levels accessed 7 January 2024.
3 Constitution of the Federal Republic of Nigeria (CFRN) 1999 CAP C23 LFN 2004, sections 174 and 211.
4 Constitution of the Republic of Ghana, 1992 Article 81(3).
5 Kwad Ofori-Dua, Nachinaab John Onzaberigu, and Richard Kofi Nimako, 'Victims, the Forgotten Party in the Criminal Justices System: The Perception and Experiences of Crime Victims in Kumasi Metropolis in Ghana' [2019] 2 (2) *Journal of Victimology and Victim Justice* 109.
6 Ofori-Dua, Onzaberigu, and Nimako, 'Victims, the Forgotten Party in the Criminal Justices System', 109–110.
7 The Victims Protection Act in its section 3 recognises and give effect to the rights of victims of crime; protect the dignity of victims.
8 Constitution of the Republic of Ghana, 1992.
9 Domestic Violence Act, 2007, section 29–31. However, the law is limited to victims of domestic violence.
10 The recent legislation now recognises the rights of victims to restitution, victim compensation, witness protection among others. See s 314 and Part 32 of the ACJA 2015. See also section 78 of the Penal Code which also provides for compensation of victims.
11 Rex Ugwuda, 'An Appraisal of the Implementation of SDG 16 in the Administration of Criminal Justice in Nigeria' an LL.B thesis, University of Nigeria, Enugu,

submitted July 2023) 16–17 https://www.researchgate.net/publication/373107825_AN_APPRAISAL_OF_THE_IMPLEMENTATION_OF_SDG_16_IN_THE_ADMINISTRATION_OF_CRIMINAL_JUSTICE_IN_NIGERIA/link/64d9f01278e40b48bd4978d1/download?_tp=eyJjb250ZXh0Ijp7InBhZ2UiOiJwdWJsaWNhdGlvbiIsInByZXZpb3VzUGFnZSI6bnVsbH19 accessed 20 December 2024.

12 (2007) LPELR-12857(CA).

13 (2007) LPELR-12857(CA), paras. B-G.

14 Raymond J. Michalowski, 'What is Crime?' [2016] 24 *Critical Criminology* 181, 184.

15 Michalowski, 'What is Crime?' 186.

16 United Nations general Assembly (UNGA), *The United Nations Declaration of the Basic Principles of Justice for the Victims of Crime and the Abuse of Power* (Res 40/34) Annex (29 November 1985), paragraph 1.

17 The Victim Protection Act 2014 of Kenya, section 2.

18 VAPP Act 2015, section 42.

19 Department of Justice (South Africa), *Victims' Rights Brochure* https://www.justice.gov.za/VC/docs/victims-rights-brochure.pdf accessed 21 December 2024.

20 Crime Research Centre (Kenya), *Analysis of Violent Crimes in Kenya (2015–2023)* https://www.crimeresearch.go.ke/wp-content/uploads/2024/11/Analysis-of-Violent-Crimes-in-Kenya.pdf accessed 20 December 2024.

21 Macrotrends, 'Ghana Crime Rate & Statistics 2001–2024' https://www.macrotrends.net/global-metrics/countries/GHA/ghana/crime-rate-statistics accessed 20 December 2024.

22 Godwin Okafor and Obiajulu Ede, 'Kidnapping Rate and Capital Flight: Empirical Evidence from Developing Countries' [2023] 28 (3) *International Journal of Finance and Economics* 2593.

23 Edna Erez, 'The Impact of Victimology on Criminal Justice Policy' [1989] 3 *Criminal Justice Policy Review* 236, 237–238.

24 Manav Goyal, 'Emerging Trends in Victimology' [2020] 1 *Law Essentials Journal* 41.

25 Goyal, 'Emerging Trends in Victimology'.

26 Larry Siegel, *Criminology* (9th edn, Thomson Wadsworth 2006).

27 Ochuko Oluku, 'Repositioning the Victim in Victimology through Theory: The Concentric Model' [2020] 1 (1–2) *Journal of Management and Social Science Research* 43, 44–45.

This postulation was made by Hans von Hentig in a 1941 article in which he advanced the view that, both offender and victim are to blame for any incident of victimization. His views are shared by Benjamin Mendelsohn, another criminologist of the period.

28 James J. Gobert, 'Victim Precipitation' [1977] 77 *Columbia Law Review* 511.

29 Gobert, 'Victim Precipitation'.

30 Nasimah Hussin and Majdah Zawawi, 'Preventing Criminal Victimization through Community Education: An Islamic Formula' [2012] 68 *Procedia – Social and Behavioral Sciences* 855–864. Active Precipitation occurs when the victim deliberately acts in a provocative manner, uses abusive words or threats, or even attacks first. Passive precipitation on the other hand, occurs when the victim contains characteristics that unknowingly incites or threatens the aggressor. It can happen due to personal conflicts such as two individuals rival for a love interest, a promotion, a job, or any other desirable interest.

31 Robert F Meier and Terance D. Mieth, *Understanding Theories of Criminal Victimization* cited in Wolfgang, 'Crime and Justice' [1958] 17 *The University of Chicago Press* 459–499.

32 Mieth, *Understanding Theories of Criminal Victimization* cited in Wolfgang.
33 James J. Gobert, 'Victim Precipitation' [1977)]77 *Columbia Law Review* 511–553, 535.
34 Gobert, 'Victim Precipitation' 535.
35 Gobert, 'Victim Precipitation' 513.
36 Gobert, 'Victim Precipitation' 548.
37 Meier and Mieth (n 31).
38 Gobert (n 33) 517.
39 Meier and Miethe (n 31) 460.
40 Hussin and Zawawi (n 30).
41 Hussin and Zawawi (n 30). Lifestyle is defined in this context as 'routine daily activities, both vocational activities (work, school, keeping house, etc.) and leisure activities.'
42 Siegel (n 26).
43 Emmanuel Umana, Daniel Thomas, and Oluchukwu Precious Obioma, *Crimes in Nigeria: Investigating Its Menace and Remedies* (Erudite Compendiums in Education 2024) 128–129.
44 Kyalo Musoi et al., *A Study of Crime in Urban Slums in Kenya: The Case of Kibra, Bondeni, Manyatta and Mishomoroni Slums* (Security Research and Information Centre) 17 https://www.srickenya.org/publications/slum_Crime_Survey_Report_Thur_2.pdf accessed 23 December 2024.
45 Oluku (n 27).
46 Hussin and Zawawi (n 30).
47 Musoi et al. (n 44).
48 Musoi et al. (n 44), 463.
49 Musoi et al. (n 44), 470.
50 Meier and Miethe (n 31).
51 CFRN 1999, sections s174 and 211; Constitution of the Republic of Ghana, 1992 article 81(3).
52 United Nations General Assembly Resolution 40/34 (29 November 1985).
53 Adopted by the African Commission on Human and Peoples' Rights, 'Resolution on the Rights of Victims of Crime and Abuse of Power' (32nd Ordinary Session, 17–23 October 2002) cl 50.
54 Adopted by the African Commission on Human and Peoples' Rights, 'Resolution on the Rights of Victims of Crime and Abuse of Power' (32nd Ordinary Session, 17–23 October 2002) cl 50.
55 Ladan (n 1) 192.
56 CFRN, section 35(3)(4).
57 Penal Code s.78 provides that

> A person who is convicted of an offence under this Penal Code may be adjudged to make compensation to a person injured by his offence and the compensation may be either in addition to or in substitution for any other punishment.

In Martins *v C.O.P* (2005) 7 NWLR (Pt.925) 614, the Court of Appeal ordered compensation, and stated that there is no limit to the amount of compensation that can be awarded by criminal courts. See also Criminal Procedure Code, section 357(1).

58 Tijani Abubakar, and Gilbert Tor, 'Revisiting the Legal Consideration for Victims of Crime in the Criminal Justice Process in Nigeria' (2019/2020) *Benue State University Law Journal* 265–266.
59 Elizabeth Adjin-Tettey, 'Discriminatory Impact of Application of Restitution in Integrum in Personal Injury Claims' (2009) 124–127. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006550 accessed 6 January 2025.
60 Adjin-Tettey, 'Discriminatory Impact of Application of Restitution'.
61 See generally, ACJA 2015, pt 32.

62 Elizabeth Ama Oji, 'Compensation for Victims of Crime in the Nigerian Criminal Justice System: The Need to Follow International Trends' [2015] 18 *Nigerian Law Journal* 122, 123.
63 ACJA 2015 section 314(1)(2).
64 ACJA 2015 section 314(1)(2).
65 ACJA 2015, section 319(1) (a–c).
66 ACJA 2015, section 319(1) (a–c).
67 See Amnesty International, '#EndSARS movement: from Twitter to Nigerian Streets' (8 February 2021) https://www.amnesty.org/en/latest/campaigns/2021/02/nigeria-end-impunity-for-police-violence-by-sars-endsars/ accessed 7 October 2025.
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70 ACJA 2015, section 321(b) (i–iii).
71 Furthermore, in Nigeria, the Advance Fee Fraud and Other Related Offences Act makes provision for restitution to victims of fraud. See Advance Fee Fraud and Other Related Offences Act 2006, section 11.
72 ACJA 2015, section 454(3) (a).
73 VAPPA 2015, Explanatory Memorandum.
74 VAPPA 2015, section 38(1)
75 VAPPA 2015, section 38(1).
76 VAPPA 2015, section 32(1).
77 Asongo Tersoo and Atim Terseer, 'The Effects of Violent Crime on Socio-Economic Development in Gboko Metropolis' [2021] 26(3)(1) *IOSR Journal of Humanities and Social Science* 51–59.
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80 There was also enshrined in the Criminal Code Amendment Act 1998 provisions criminalising harmful traditional practices such as widowhood rites, genital mutilations, and child abuse. See Coleman (n 79).
81 DVA 2007, section 1.
82 Obeng Mensah Richards, 'Rights of Victims: DVA Has Set the Pace' *GhanaWeb* https://mobile.ghanaweb.com/GhanaHomePage/features/Rights-Of-Victims-D-V-A-Has-Set-The-Pace-126450 accessed 5 January 2025.
83 DVA 2007, section 7.
84 DVA 2007, section 8. These obligations are similar to those placed on the police under the Nigeria police under the VAPPA, section 32(1) (a–f).
85 DVA 2007, sections 29 and 31.
86 Coleman (n 79).
87 Act No. 17, 2014.
88 Act No. 5 of 2003.
89 Act No. 5 of 2003, section 88.
90 Act No. 11 of 2008.
91 Criminal Procedure Code, section 3.
92 (2018) eKLR.
93 VPA 2014, section 15.
94 VPA 2014, sections 23(2) and 24.
95 VPA 2014, section 26(1)(a).

96 Jerry Fisayo-Bambi, 'Kenya: Rights Group Lauds Compensation Ruling for Sex Attack Victims' *Africa News* (13 August 2024) https://www.africanews.com/2020/12/11/rights-group-lauds-ruling-ordering-payouts-to-election-sex-attack-victims// accessed 6 January 2025.
97 VPA 2014, sections 4(2) and 9.
98 VPA 2014, section 13.
99 (2019) eKLR para 92.
100 VPA 2014, section 22.
101 VPA 2014, section 14.
102 VPA 2014, sections 27–28.
103 VPA 2014, section 28(2)(a).
104 VPA 2014, section 28(2)(a).

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# 10 Victim-Centric Reforms in Nigeria

## Examining Restorative Justice, Victim Participation, and Victim Protection Under the Administration of Criminal Justice Act (ACJA) 2015

*Suzzie Onyeka Oyakhire*

### Introduction

Over the years, conventional criminal justice systems prioritised the aims of criminal law around retribution, incapacitation, deterrence, and rehabilitation.[1] These aims significantly shaped the development of the legal framework and the philosophy of criminal law, especially in adversarial criminal justice systems such as Nigeria. Adversarial systems have primarily focused on the relationship between the prosecution (state), vis-à-vis the defendant (accused person), as the primary parties in a criminal proceeding.[2] An indicative rationale for this, within the context of Nigeria, for example, is that the criminal justice system is retributive and emphasises the punishment of offenders and deterrence from crime, but also emphasises the need to protect their rights in the process.[3]

While these aims have, over the years, ensured that social order is maintained in society, they have, however, overlooked the rights of victims of crime. Consequently, when crime is committed, it is perceived as an infraction against the state primarily rather than an injury suffered by the nominal victim.[4] There is an understanding within this context that prosecution is 'an exclusive right of the state' and that the victim is merely perceived as an informant who gives information about the crime in question.[5] As Kagu and Nur acknowledge, the interest of the victim is 'subsumed by public interest and overwhelmed by the prerogative of the state.'[6] Consequently, the rights and interests of victims in Nigeria were constrained, and given limited recognition in criminal justice processes. Research indicates that the participatory role of victims in Nigeria's criminal justice processes was long neglected, significantly undermining their interests.[7]

Contemporary criminal law increasingly recognises restorative justice as a key objective. Consequently, criminal justice reforms in various jurisdictions now incorporate restorative justice processes into their systems.[8] In Nigeria, recent criminal justice reforms beginning in 2015 in the Administration of Criminal Justice Act (ACJA)[9] include provisions that recognise the rights of victims.[10] These reforms indicate a modification from the extremely retributive

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criminal justice system to one that assumes more restorative justice objectives. More importantly, these reforms align with Goal 16 of the UN Sustainable Goals, which aim to 'promote peaceful and inclusive societies … provide access to justice for all and build effective, accountable and inclusive institutions at all levels.'[11] Restorative justice, unlike the retributive system, reiterates that crime not only affects the state but also the community and the victim. As such, victims should be involved in processes that repair injuries caused to them by offenders.[12]

While restorative justice includes broad objectives such as offender reintegration and non-custodial sentences, this chapter examines the specific objective which enables 'victims to express their needs and to participate in determining the best way for the offender to make reparation…'[13] That is, the objective that underscores the participation of victims in criminal justice processes. Unfortunately, victims' involvement in criminal justice processes frequently exposes them to revictimisation and secondary victimisation, which limits their effective participation as envisaged by the aims of restorative justice. This chapter, therefore, examines how victim participation in Nigeria's criminal justice processes can be enhanced and identifies victim protection mechanisms as crucial for attaining this.

Following this introduction, the chapter proceeds to a conceptual discussion of restorative justice, with particular attention to its core principles and objectives. It then examines the concepts of victim and victimisation, highlighting how these factors shape victims' capacity to participate effectively in criminal justice proceedings. The subsequent section examines the victim protection mechanisms within the ACJA 2015, evaluating their adequacy and potential for guaranteeing victim participation in Nigeria's criminal justice system. The chapter concludes by drawing on comparative insights from Kenyan practice to propose recommendations for reforming the Nigerian framework.

## What Is Restorative Justice?

Restorative justice is an ancient concept with roots in pre-colonial African societies,[14] as well as in the civilisations of ancient Arabs, Greeks, Romans, and Hindus.[15] However, modern conceptualisations of the concept are widely considered to have emerged in the 1970s, in jurisdictions such as Canada, New Zealand, Australia, and the United States specifically in response to criticisms of the existing criminal justice system.[16]

While the concept of restorative justice has evolved over time there is no universally accepted definition. However, a widely cited definition from the United Nations Office on Drugs and Crime (UNODC) describes it as 'a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders.'[17] There however appears to be a distinction between the concept of restorative justice and restorative processes.[18] Accordingly, the UNODC defines a restorative process as

> Any process in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime generally with the help of a facilitator.[19]

These definitions are crucial because restorative justice and its embedded processes emphasise a departure from retributive criminal justice. The latter focuses on punishing offenders without fully considering the needs and interests of other stakeholders, especially direct victims and the communities most affected by the crime.[20] The emphasis is on restoration and on addressing the problems caused by criminal conduct rather than on punishment.[21]

Restorative justice also emphasises the importance of the victim's participation in criminal processes, especially in getting answers from the offenders, such as why they committed the crime which caused victims harm.[22] The process underscores the participation of the different parties most impacted by the effects of crime as an essential element in facilitating the aims of criminal justice, especially reconciliation between the victims and offenders.[23] The process significantly centres on restoring the victim, financially, socially, and emotionally.[24] Maculan and Gil describe this as a victim-oriented theory of criminal punishment which focuses on the victims and their satisfaction.[25] On the other hand, Harogovan notes that one reason for the rediscovery of restorative justice across jurisdictions is the realisation that victims were completely excluded in criminal justice processes.[26] It is therefore the argument made in this chapter that since restorative justice emphasises recognising the harm done to victims and the reconciliation of victims with their offenders,[27] it is important for criminal justice processes to facilitate their active participation in the formal processes.

In the context of criminal justice reforms in Africa, academic discourse highlights a growing trend towards the formal recognition and protection of victims' rights.[28] Jurisdictions such as Nigeria and Kenya exemplify this shift, where recent legislative and policy changes have introduced provisions that safeguard the rights of victims.[29] This inclusion demonstrates a deliberate effort to incorporate victim-centric approaches into the formal criminal justice systems. This development indicates a progressive move towards a more victim-inclusive understanding of justice that prioritises the victim's interests alongside the need to hold offenders accountable within the continent.

In Nigeria, the ACJA formally incorporates several restorative justice principles, notably victim compensation,[30] restitution,[31] rehabilitation, non-custodial sentencing,[32] and victim protection.[33] These provisions largely align with the UNODC's definition of restorative justice, as they prioritise the healing of harm experienced by victims, offenders, and communities. Consistent with reforms in other jurisdictions, these processes seek to shift from a primary focus on retribution towards embracing more restorative approaches to justice and conflict resolution, particularly for less serious offences.[34] While the ACJA highlights a range of restorative justice principles, this chapter focuses on victim participation in judicial processes and the role of victim protection mechanisms as a key to realising this broad objective of restorative justice within Nigeria.

Beyond the ACJA, restorative justice principles and practices are also an integral part of criminal justice reforms in states across Nigeria that have adopted the ACJA's provisions.[35] Restorative justice objectives have gained significant attention in cases of sexual violence, where victims often experience deep emotional and psychological harm, made worse by societal stigma and insufficient support from the formal justice system.[36] This focus has led to schemes like the Restorative Justice Centre in Lagos State, formally established in 2022.[37] A key function of this Centre is to involve victims of crime and the community in criminal justice processes, helping to address their needs for repairing harm.[38]

It is important to clarify the application of restorative justice, particularly considering the objections and criticisms that frequently accompany the concept. In the Nigerian context, as in other jurisdictions that have incorporated restorative justice within broader criminal justice reforms, the framework is not intended to replace the formal criminal justice system, but rather to function as a complementary mechanism. Its purpose is to introduce elements that respond more effectively to the needs of a wider range of criminal justice stakeholders.[39] Nonetheless, restorative justice has attracted sustained criticism. One concern is that it undermines the objectives of retribution and deterrence, which continues to align with dominant public expectations of what the criminal justice system ought to achieve.[40] In addition, critics point to the perceived lack of certainty and consistency in restorative models, which may appear ad hoc since outcomes often depend on the participants involved.[41] Finally, restorative justice is sometimes regarded as unduly lenient or soft on offenders, with the risk that individuals who commit similar offences may receive markedly different punishments.[42]

Despite the criticisms, Isiaka and Others argue that within the context of Nigeria, incorporating restorative justice into the criminal justice system presents 'a promising opportunity to…promote a more community-centred approach to justice.'[43] This is especially as it remains an effective means of facilitating the participation of victims in formal criminal justice processes, as it has been shown to empower victims in ways that conventional systems often fall short.[44]

## Victims, Victimisation, and the Barriers of Participation in Criminal Justice Processes

In seeking to understand the role of victims within the criminal justice system, it is necessary to begin with a conceptual clarification of who a victim is and how the experience of victimisation shapes their ability to participate in criminal proceedings. The United Nations defines a victim as 'any person who, individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states.'[45] This definition recognises not only individuals directly affected by crime, but also includes their immediate family members, dependants, and persons who suffer harm while assisting victims and communities as well, where the consequences of crime are felt collectively.[46] In Nigeria, while the ACJA does not define a victim, it is defined in the Violence against Persons Prohibition Act (VAPPA) 2015,[47] which adopts the definition of victim provided in the UN Declaration of Basic Principles.

As indicated in the introductory paragraphs of this chapter, traditionally, the Nigerian criminal justice system, like many others, has focused primarily on the state and the accused person as the primary actors, with the victim relegated to the margins. This contrasts with developments in international human rights law, where several instruments recognise victims as rights holders entitled to information about proceedings, medical and psychological support, reparation, protection, and meaningful participation in criminal justice processes.[48] In Kenya, the Victim Protection Act (VPA) explicitly incorporates these dimensions, recognising the victim's physical, psychological, economic, and social needs.[49] Although the ACJA makes no provisions for the rights of victims, some of these rights are recognised, especially under the VAPPA, which indicates the obligation to provide support to the victim. The extent to which these rights translate into practice remains contested.

A crucial part of conceptualising victims lies in recognising the process of victimisation. Victimisation refers broadly to the harm, loss, or suffering inflicted upon victims, encompassing physical, emotional, and financial effects.[50] It is typically divided into primary victimisation, which is the direct harm resulting from the offence itself, and secondary victimisation, which occurs through the reactions of institutions, communities, or individuals to the victim.[51] While primary victimisation is the inevitable consequence of the offence, secondary victimisation is more complex and is likely to be more responsible for the non-participation of victims in criminal processes.[52] This is because it arises within the very systems and structures intended to provide justice.[53] Examples of such secondary victimisation include insensitive or hostile treatment by police officers, repeated exposure to the perpetrator during court proceedings, humiliating cross-examination,[54] victim-blaming attitudes from professionals, or breaches of privacy by the media[55] or where the prosecution abandons the case or takes other decisions regarding the continuance of the case without seeking the opinion of the victim of crime.[56]

This chapter argues that secondary victimisation has a particularly detrimental effect on victims' willingness and ability to participate in criminal proceedings.[57] Rather than fostering trust, secondary victimisation can retraumatise the victim, foster fear of reprisals, alienation, and a reluctance to engage with criminal justice institutions at all.[58] As existing literature and anecdotal evidence in Nigeria demonstrate, victims frequently report being disbelieved, extorted, or pressured into informal settlements by law enforcement agents.[59] In sexual and gender-based offences, secondary victimisation manifests through stigma, intrusive questioning, and lack of sensitivity by police and health workers, thereby discouraging victims from reporting crimes, which is the very first step towards participation.[60] As the UNODC notes, it is important that from the first contact with criminal justice institutions, especially at the point of reporting crime, institutions must act in a way that is victim-sensitive.[61] Where victims do not report crime, it is impossible to participate in other stages of the criminal justice process.

Generally, victims expect that the criminal justice system will be supportive and attend to their expectations of recovery.[62] Accordingly, article 4 of the UN Declaration of Basic Principles provides that 'victims should be treated with compassion and respect for their dignity.' They are entitled to access to the mechanisms of justice and to prompt redress as provided by national legislation for the harm that they have suffered.[63] Early iterations of victims' rights movement, while advocating for the recognition of victims' rights, predominantly conceptualised victims as beneficiaries or recipients of services provided or supported by the state[64] rather than as individual rights holders actively participating in criminal justice outcomes. More recent reforms, however, encourage the victim's participation in the decision-making processes in their own capacity and not merely when they act in the interest of the state.[65]

Participation is generally understood as the right to be heard, to provide input at various stages of criminal proceedings, and to have their views taken into account without prejudice to the rights of the accused.[66] Although no binding international human rights instrument explicitly establishes the victim's right to participate, Leyh argues that this right can be deduced from broader human rights principles relating to dignity, equality, and access to justice.[67] Jurisdictions such as Kenya have sought to include these participatory rights within victim protection legislation mandating courts and administrative authorities to ensure victims are heard before decisions affecting them are taken.[68]

As Ullrich notes, 'victims' rights to participate in international criminal justice have long been celebrated as empowering victims to have their say, share their experiences, engage in truth-seeking, and/or receive emotional closure.'[69] Restorative justice processes strive to support victims, give them a voice, encourage them to express their needs, enable them to participate in the resolution process, and offer them assistance.[70] Such participation can be actualised by reporting victimisation to authorities, providing statements, giving information, supplying evidence, giving witness testimony, responding to cross-examination, making submissions for various purposes, and being present.[71] In Nigeria, however, victim roles remain largely limited to that of witnesses for the prosecution or as complainants providing information, without formally recognising them as independent rights holders.[72]

Despite growing reform developments advocating for victim participation in Nigeria, these appear to be merely tokenistic gestures as victims largely remain excluded. The idea that victims are now meaningfully involved is, for the most part, academic. While some progress has been made, it is inadequate in a system still fundamentally resistant to genuine victim engagement. This reality can be seen in the arguments made by Mwale that '…evidently, the criminal justice system has always been unemotive and blind to social realities as far as the victims of crimes are concerned. This status quo has led to a manifest situation of systemic injustice…'[73] The literature attributes this persistent non-participation to systemic barriers rather than isolated incidents. These barriers include mistrust in the state's capacity to protect its citizens, the reluctance of victims to invoke criminal process against offenders, and a lack of faith in the efficiency of criminal justice institutions, particularly the police and the courts.[74]

Presently, there is no legal obligation in Nigeria for investigators or prosecutors to consult victims on their investigative or prosecutorial strategies, or on the manner in which they provide updates on the status of a case.[75] This seems contrary to a primary rationale for reporting crimes, which is the desire to hold offenders accountable for their criminal behaviour.[76] It has been noted that victims should be given more opportunities to express their views and concerns within the criminal justice process because they suffer the most in the events that led to the criminal prosecution.[77] The interaction between victimisation and participation is therefore critical.

While international standards and reform agendas highlight the need to empower victims through meaningful participation, the persistence of secondary victimisation in practice often undermines this goal. By hindering the participation of victims in criminal processes through acts of victimisation, it is difficult to actualise the objectives of restorative justice. Hence, restorative justice emphasises the importance of protecting the interests of victims to ensure that they are not retraumatised.[78] Unless victims are protected from both primary and secondary harms, their participation risks being perfunctory rather than transformative. In this sense, the challenge is not only to expand opportunities for participation but also to ensure that such participation occurs within a justice framework that is sensitive to the vulnerabilities and experiences of victims.

## Victim Protection Mechanisms in Nigeria

Since victimisation occurs in different forms and at different stages in the criminal justice process, victims have a range of protection needs. Criminal justice reforms, which recognised the interests and rights of victims particularly in the United States in the early 1970s, began when the importance of providing protection for victims of crime emerged. Victim assistance programmes were established to provide support for victims and to encourage them to report crime and collaborate with investigators and prosecutors.[79]

Victim protection refers to a set of rights and guarantees that 'aim at preventing any further harm or intimidation on the victim's side either because of a subsequent crime (repeat victimisation) or inappropriate criminal proceedings (secondary victimisation).'[80] Different provisions of the UN Declaration recommend that states should adopt measures that ensure the protection and assistance of victims of crime.[81] It recommends that states should implement measures to minimise the inconvenience for victims in the judicial and administrative process, to protect their privacy, when necessary and to ensure their safety as well as that of their families and witnesses on their behalf, from intimidation and retaliation.[82] The general aim of protective measures is to encourage victim participation in criminal processes. Victim protection thus recognises the overall needs of victims regardless of their actual cooperation during a criminal trial as prosecution witnesses. In Kenya, recent criminal justice reforms, particularly the enactment of the VPA in 2014, have introduced provisions and services to support crime victims throughout the legal process.[83] These measures are aimed at mitigating secondary victimisation and ensuring effective participation from the initial police report to navigating court procedures.[84]

Victims often have a diverse range of needs, including emotional, psychological, financial, legal, or practical assistance,[85] because of the wide range of victimisation that they are exposed to. To address these, various protective measures are available, which can be broadly categorised as either physical or psychological. Physical protective measures include police escorts, the use of safe houses, and surveillance.[86] In contrast, psychological measures encompass victim assistance, counselling, legal aid, and providing information to victims on how to navigate the legal process and access further support.[87]

In Nigeria, section 232 of the ACJA recognises the protection of victims of crime and outlines the nature of available protective measures. These include ensuring closed-court proceedings; the non-disclosure of names, addresses, telephone numbers, and the identity of victims; and the use of pseudonyms in referring to victims.[88] This is similar to the provisions of section 8 of the Victim Protection Act of Kenya, which upholds the victims' right to privacy and confidentiality. Furthermore, the ACJA stipulates that:

> In any proceedings the court deems it necessary to protect the identity of the victim, the court may take any or all of the following measures (a) receive evidence by video link, (b) permit victim-witnesses to be screened or masked, (c) receive written deposition of expert evidence and (d) any other measure that the court considers appropriate in the circumstance.[89]

However, a significant inadequacy of these protective mechanisms is their limitation to procedural measures within the courtroom, therefore offering a very limited scope for protection. Consequently, these provisions seem most effective against specific forms of secondary victimisation, particularly those perpetrated by the media. By ensuring the non-disclosure of victims' names, addresses, and identities, the ACJA restricts media sensationalism and public scrutiny, thus mitigating the risk of re-victimisation and stigmatisation, especially in cases involving sexual offences. Yet, this procedural focus means that the provisions are less equipped to address other forms of secondary victimisation that may arise from encounters with criminal justice personnel or social stigma within the community.

Furthermore, the protective measures outlined in section 232(3) of the ACJA can enable victim participation by mitigating the risks associated with testifying. These provisions aim to shield victims from direct, confrontational encounters with the accused while in court, thereby reducing the risk of intimidation and revictimisation. This is crucial because a sense of security is a prerequisite for a victim's ability to participate effectively.[90] By creating a less hostile environment, these protective measures empower victims to exercise their rights where they participate in their limited role as witnesses testifying in court. Thus, the ACJA's provisions, while procedural, are vital tools for encouraging victim participation within the adversarial system.

As stated earlier, restorative justice processes envisage a situation that allows for the participation of victims in different stages of the criminal process and not just as witnesses in court. The protective measures in the ACJA seem inadequate for the other forms of secondary victimisation, such as victim-blaming and stigmatisation, hostile cross-examination tactics by defence counsels, repeated interrogation of victims by investigators and prosecutors, monetary inducements demanded by investigators, or actual physical threats from offenders. These forms of victimisation retraumatise the victims and affect their emotional and psychological needs. Accordingly, it is apt to state that the ACJA excludes psychological and victim assistance measures.

Psychological protective measures are designed to safeguard the emotional and mental well-being of victims by preventing emotional harm and re-victimisation.[91] They tackle implicit intimidation in the form of psychosomatic intimidation against witnesses. While these measures, such as counselling, rehabilitation, administrative support, and use of safe houses, are crucial for addressing the psychological impact of secondary victimisation, they are largely absent from the ACJA. In contrast, criminal justice reforms in Kenya have adopted a more holistic approach by formally recognising psychological protection as a form of security for victims.[92]

In addition, the ACJA's provisions are limited in scope, applying only to victims of specific offences such as sexual crimes, terrorism, economic and financial crimes, and human trafficking, and other offences which an Act of the National Assembly permits the use of such protective measures or as the judge may consider appropriate in the circumstances.[93] In Kenya, the VPA provides for a wider scope of victims and even extends extraterritorially in instances where the victim is a citizen of Kenya.[94] It is evident that the failure to provide comprehensive protective measures for victims significantly hinders their participation in criminal proceedings, due to the wide-ranging psychological effects of secondary victimisation. This narrow focus on a limited set of crimes and the neglect of psychological support leaves a substantial gap in Nigeria's victim protection framework, undermining the very goal of empowering victims within the justice system.

While the protective measures under the ACJA are limited, victim protection could be augmented by the broader range of protective measures included in the VAPPA. The VAPPA's provisions extend beyond courtroom procedures to offer a range of practical and psychological support measures. The Act provides for logistical support such as providing or arranging safe transport for victims to an alternative residence, safe place or shelter,[95] providing or arranging transportation for the victim to the nearest hospital or medical facility for treatment.[96] It also provides that victims are informed of their rights to protection and available remedies.[97] Moreover, it specifies that victims have the right to file a criminal complaint and offers to escort them to their residence to collect personal belongings.[98]

These provisions are very instrumental in tackling secondary victimisation inherent in aggressive cross-examination techniques used by some defence counsels, as they equip the victims with the requisite knowledge needed to assert their rights throughout the process. Furthermore, the provision of the VAPPA that prohibits service providers from publishing any information that could directly or indirectly reveal the identity of parties to the proceedings[99] is designed to protect victims from unwanted public scrutiny and media-induced secondary victimisation and thus fosters an environment conducive to victim participation. Likewise, the Act's broader emphasis on victims' assistance, including crucial support services such as rehabilitation and counselling, provides a basis for assisting victims to cope with their experiences and participate more effectively in criminal justice processes.

It is important to highlight that, despite the innovative victim protection measures outlined in the ACJA and the VAPPA, there is limited evidence in the literature regarding their effective implementation by Nigerian agencies, particularly by prosecutors and investigators. This raises concerns about the capacity to protect victims and ensure their participation in criminal processes. This problem is compounded by the dearth of judicial interpretation, which leaves the legal scope of these measures largely undetermined. This gap between legal provisions and practical application is a consistent theme in Nigerian restorative justice reforms. As Nnamdi observes, the lack of official data on the use of restorative justice measures raises critical questions about whether harm is being repaired, victims are being satisfied, and the adequacy and efficiency of these structures are being assessed.[100] A reason for this lack of effective implementation and poor judicial review can be attributed to several factors including a fundamental absence of public awareness regarding victims' rights and the new reforms. According to Olugbo and Wachira, 'most victims are ignorant of their rights and those who know have little or no means to pursue them.'[101]

Furthermore, while Ojo acknowledges that the ACJA includes good provisions for victims' remedies, she argues that the Act itself lacks a sufficient framework for full implementation.[102] One of the most significant gaps is the absence of a specific institution designated to oversee the implementation of protective measures under the ACJA. This is because evidence from the literature suggests that the effectiveness of victim protection is contingent on the establishment of a formal, dedicated authority responsible for managing and supporting victims' needs during criminal proceedings.[103] This requirement appears to have been catered for in Kenya as the Act establishes a Victim

Protection Board. This Board is responsible for formulating a comprehensive and integrated programme to protect victims of crime as well as coordinating activities relating to their protection.[104]

Within international criminal law, the International Criminal Court (ICC) established a Victims and Witnesses Unit to assist and support victims in ensuring their participation in criminal processes.[105] Consequently, it is essential for Nigeria to establish a comprehensive victim protection and assistance structure. Such a structure should be capable of addressing the emotional trauma of victimisation, facilitating participation in the criminal justice process, and assisting victims in obtaining reparations and support for their overall recovery.[106] As Oyakhire has argued, such a victim protection unit can be vested in the National Human Rights Commission to ensure that protection of victims is independent of their usefulness to investigators or prosecutors in their limited role as witnesses[107] and rather upholds the broader objectives as rights holders throughout the criminal justice processes.

## Recommendations and Conclusion

As restorative justice processes continue to evolve and become integrated into Nigeria's criminal justice system, it is envisaged that this will lead to a greater recognition and entrenchment of victims' rights. This is because victims are fundamental stakeholders as their complaints and crime reporting represent the crucial step in initiating criminal proceedings. However, the reality is that victim participation in criminal proceedings in Nigeria continues to be hindered by the secondary victimisation they experience as a direct consequence of their cooperation in the criminal justice process.

While criminal justice reform continues to prioritise the fair trial rights of the accused, a balanced approach requires a parallel focus on the rights of victims. This necessitates ensuring victims' right to participate in criminal proceedings and guaranteeing their protection from victimisation, intimidation, and other forms of reprisals from the accused, the community, and criminal justice actors. This approach is consistent with Goal 16 of the United Nations Sustainable Development Goals, which aims to promote inclusive societies, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. Moreso, the unencumbered participation of victims, is a fundamental objective of restorative justice, particularly when victims seek answers from offenders regarding the harm they have caused them.[108] It is, therefore, important that effective mechanisms are put in place to facilitate and protect victim participation.

As this chapter has highlighted, while the ACJA introduces a list of protective measures for victims, they are inadequate and have limited application. This is because the provisions are largely confined to procedural and physical security and excludes the psychological and emotional mechanisms necessary to prevent re-victimisation. This chapter therefore argues that a fundamental reform is necessary to move beyond the ACJA's fragmented approach. Inspired by the model in Kenya, it is essential for criminal justice reform to legislate a dedicated and holistic victim protection framework that caters for the rights, needs, and interests of victims, such as a Victim Protection Act.

This recommendation does not call for the amendment of the ACJA in this regard but a systemic overhaul that includes the establishment of a dedicated victim protection agency or naming an existing criminal justice institution as the responsible agency for all victim protection concerns. This will include centrally managing and coordinating all aspects of victim support from psychological counselling to physical protection. The most significant benefit of this holistic framework would be its unified application across a broad spectrum of crimes. Unlike the current approach, which offers fragmented protection for only specific crimes as identified above, a dedicated Victim Protection Act would ensure that all victims, regardless of the crime, have access to consistent sets of rights and support, as is the practice in Kenya.[109]

Apart from the formal responsibilities of a dedicated agency, this chapter also argues that the effective implementation of victim-centric reforms would require a proactive sensitisation and public awareness campaigns to educate victims about their rights and the protective mechanisms available to them. In the absence of such awareness, legal provisions for protecting victims and ensuring their rights will remain largely theoretical as victims cannot invoke rights that they are not aware of. Also, the role of legal professionals in the scheme of things cannot be ignored. Prosecutors must be ready to proactively seek judicial review and interpretation of the ACJA's provisions, and any victim-centric legislation enacted as part of reform and therefore encourage the judiciary to define and entrench the rights, needs, and interests of crime victims. In essence, true victim participation cannot be legislated in a vacuum. It requires a collaboration between a well-informed public and a legally equipped advocacy community willing to challenge existing institutional norms.

Despite the promising aspiration of victim-centric reforms, their successful implementation will depend on the proactiveness of criminal justice stakeholders to confront some deep-seated systemic challenges. This is because the efficacy of these reforms can be stalled by prevailing socio-economic, socio-political, and socio-cultural factors such as corruption, societal attitudes, and lack of resources. The experience of Kenya provides an example of such realities. The implementation of the VPA has been hampered by the inadequacy of physical facilities, such as dedicated waiting rooms for victims within court premises.[110] This specific challenge resonates with persistent issues facing Nigeria's criminal justice system, where poor infrastructure and inadequate funding are well-documented and recurring obstacles.

Consequently, the actualisation of an effective victim protection framework will require a demonstration of political will to ensure adequate funding for the justice sector. The enactment of legislation on its own will be inadequate, as it will depend on a concerted effort to address the foundational barriers of institutional neglect and resource scarcities. Without such political commitment, even the most innovative legal provisions will remain largely aspirational and fail to translate into meaningful protection and participation for victims.

## Notes

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9 This chapter focuses on reforms under the ACJA which is of limited application and applies in criminal trials for offences established by an Act of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja. The ACJA has been enacted by all 36 states in Nigeria adapting it to their local context where necessary mostly as the Administration of Criminal Justice Law (ACJL).

10 See section 1 (1) ACJA.

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18 UNODC, *Handbook on Restorative Justice* (n 13), 7.

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50 Olaniyan (n 7) 42.
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# 11 Bridging the Gender Gap

## Interrogating the Exclusion of Female Offenders in Borstal Institutions in Nigeria

*Mariam Adepeju Abdulraheem-Mustapha*

### Introduction

All egalitarian societies should be free of crime. This can be achieved by providing equal opportunity to all offenders for rehabilitation. One of the cardinal objectives of Nigeria's criminal justice system is the rehabilitation of both adult and juvenile offenders, irrespective of their gender, and to facilitate their successful reintegration into society as law-abiding citizens.[1] The negative effects of the traditional hardline approach of punishment of both adult and young/juvenile offenders have spurred humanitarian and penal reformers to advocate various forms of humane treatment for young offenders.[2] In aligning with international best practice, the Nigerian government engaged in the reformation of its criminal justice system with the establishment of borstal training institutions as custodial centres in the administration of juvenile/child justice. Thus, demonstrating its obligations under the Sustainable Development Goals (SDGs) and African Union (AU) Agenda 2063, which obligate member states to promote peace, justice, and inclusive societies through sustainable reforms. Juvenile justice reforms with the establishment of borstal institutions in Nigeria ensure that young offenders are rehabilitated rather than criminalised. Thereby fostering their reintegration into society as law-abiding citizens. Arguably, this system seems to balance the need to punish or control young offenders and to encourage them to take responsibility for their actions. It is a welfare-based approach that carries out intensive monitoring of juveniles in an effort to control and limit the opportunity for their criminal activity.

Unfortunately, in practice, the Nigerian borstal institutions that were established with focus on the rehabilitation of young/juvenile offenders have excluded female offenders. Thus, confining them in squalid correctional centres/remand homes and being deprived of the salutary impact of a rehabilitative custodial environment.[3] This chapter, therefore, examines the effects/implications of the missing rehabilitative opportunity for young female offenders in correctional centres/remand homes and why young female offenders are excluded from the rehabilitative opportunity at borstal training institutions in

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Nigeria. The analysis in this chapter is significant because the discrepancy in the rehabilitative strategy of male vis-à-vis female juveniles in custodial institutions and the empirical verification of the lived experiences of young female offenders at the correctional centres/remand homes will help to accentuate the underlying causes of young female offenders' continuing involvement in crimes and how to reduce it to the barest minimum.

The chapter focuses on the following research questions: (i) Are borstal institutions able to effectively rehabilitate male offenders to become law-abiding, socially, and morally responsible individuals who are capable of conducting a crime-free life? (ii) How can adequate rehabilitation through borstal institutions benefit female offenders towards social and moral reintegration? (iii) To what extent can borstal institutions minimise the commission of crimes by young female offenders in Nigeria?

## Methodology and Design of the Study

### *Design, Instrument, and Administration*

In answering the above research questions and achieving the set objectives of this chapter, quantitative and qualitative methods are adopted to generate rich descriptive data from the primary and secondary sources. After ethical approval was sought and obtained from the Ethical Review Committee of the University of Ilorin, Nigeria, data is elicited from the participants through a questionnaire and semi-structured interview tool[4] used for the collection of data from stakeholders of the child justice system in Nigeria. Informed consent forms were provided for the respondents to sign/thumbprint after explaining to them the ethical considerations, and when they perfectly understood the purpose and objectives of the study, before the interviews were conducted and questionnaires were administered. Emphasis was placed on the freedom to withdraw from participating in the study. Total confidentiality of the respondents' information was maintained, and they were completely anonymous with respect to their responses. It is pertinent to note that the use of mixed methods strengthens the overall results, making it more reliable than either quantitative or qualitative research. This method of using a questionnaire has been acclaimed by Babbie to be 'an excellent method for measuring the attitudes and opinions of people within a large population.'[5]

This socio-legal approach sought to elicit information from the respondents, their perceptions of borstal training institutions in Nigeria, as well as the impact of keeping female juvenile offenders at the correctional centres/remand homes instead of borstal training institutions like their male counterparts. The scope of the study was limited to four states in Nigeria.[6] Therefore, the results cannot be generalised to all the states in Nigeria, especially with respect to those states that neither domesticated the Administration of Criminal Justice Act (ACJA) 2015 nor the Child Rights Act (CRA) 2003.

***Study Setting***

As indicated earlier, the research in this chapter focused on four states in Nigeria which cut across four of the six geopolitical zones of Nigeria. These are Abeokuta (South-west), Ilorin (North-central), Kaduna (North-west), and Bauchi (North-east). These four states were selected because they had enacted their state version of the Child Rights Act (CRA) and Administration of Criminal Justice Act (ACJA).[7] Additionally, the three established borstal training institutions fall within three of those states (Kaduna, Kwara, and Ogun States) within the 36 federating units. The states have Family Courts that hear and determine criminal matters relating to child offenders irrespective of gender. The details of the distribution of respondents by geographical zone and cities are presented in Table 11.1.

***Population, Sampling, and Recruitment***

The study population consisted of all stakeholders in the child justice system in Ogun, Kwara, Bauchi, and Kaduna States. The stakeholders/respondents included the police as the agency of the State, saddled with the responsibility of arrest, investigation, and prosecution of criminal cases.[8] Another group of respondents were the judiciary and prison/correctional centres/remand homes, who are responsible for adjudication and the detention of child offenders whose guilt has been established. Social welfare officers who often file petitions against the child in court, and child offenders are also interrogated in the course of this study about their lived experiences at the prisons/correctional centres/remand homes.

The study further used multi-stage purposive sampling and simple random sampling techniques in the administration of the survey instrument. These techniques were used primarily because of the non-availability of a sampling frame for this target population. With the support of research assistants, questionnaires were administered to 400 target population. Three hundred of the respondents returned the filled questionnaire as shown in Tables 11.2 and 11.3.[9] Simple percentage and frequency tables were used to present and analyse

*Table 11.1* Distribution of respondents involved in the study

| *Zone* | *States* | *City* | *Sample Size* |
|---|---|---|---|
| South-West | Ogun | Abeokuta | 100 |
| North-Central | Kwara | Ilorin | 100 |
| North-West | Kaduna | Kaduna | 100 |
| North-East | Bauchi | Bauchi | 100 |
| Total | | | 400 |

*Source*: Author's fieldwork survey 2021–2022 (Ethical approval was sought and obtained from the Ethical Review Committee of the University of Ilorin Nigeria).

*Table 11.2* Shows the Details of the Frequency and Percentage of Returned Questionnaires with States and Cities

| *States* | *City* | *Frequency* | *%* |
|---|---|---|---|
| Ogun | Abeokuta | 85 | 28.3 |
| Kwara | Ilorin | 100 | 33.4 |
| Kaduna | Kaduna | 75 | 25 |
| Bauchi | Bauchi | 40 | 13.3 |
| Total | | 300 | 100 |

*Source*: Author's fieldwork survey 2021–2022.

*Table 11.3* Shows the Details of the Respondents and Their Demographics

| *Socio-Demographic Background* | *Frequency* | *Percentage* |
|---|---|---|
| **Sex** | | |
| 1 Male | 155 | 51.7 |
| 2 Female | 145 | 48.3 |
| Total | 300 | 100 |
| **Age** | | |
| 1 14 ≤ 20 years | 50 | 16.7 |
| 2 21 ≤ 45 years | 145 | 48.3 |
| 3 46 ≤ 65 years | 60 | 20 |
| 4 66 years and above | 45 | 15 |
| Total | 300 | 100 |
| **Occupation** | | |
| 1 Police/State | 45 | 15 |
| 2 Prison/Correctional/Borstal training institution officer | 90 | 30 |
| 3 Judiciary | 35 | 11.7 |
| 4 Social welfare | 35 | 11.7 |
| 5 Remand home | 45 | 15 |
| 6 Delinquent child | 50 | 16.6 |
| Total | 300 | 100 |
| **Educational Qualification** | | |
| 1 No formal education | 30 | 10 |
| 2 Primary school | 20 | 6.7 |
| 3 Secondary school education | 50 | 16.6 |
| Tertiary education | 200 | 66.7 |
| Total | 300 | 100 |

*Source*: Author's field survey 2022.

the data in addition to the in-depth interviews to determine the impact of borstal training institutions in the rehabilitation of male juvenile offenders and the impact of the correctional centres and remand homes' rehabilitative strategy on the female juvenile offenders and the subsequent attempt at reintegrating them into the society.

The author considers the number of the respondents that returned the questionnaire as appropriate in analysing the data by relying on the postulation of Cozby that 'a descriptive survey where the population is less than 50,000, then 200 respondents will be appropriate.'[10]

## Legal Framework for the Operation of Borstal Training Institutions in Nigeria

Historically, attempts to separate young offenders from associating themselves with adult offenders in the Nigerian prisons ushered in the establishment of borstal training institutions.[11] The idea was traced to the borstal institution which was established in England in 1902 for the purpose of stimulating young offenders to their best through large workshops by a system of marks and privileges.[12] The borstal system seeks to turn around the youths, mostly from ages 16 to 21, by instilling in them habits of industry, self-respect, and self-control through the technique of manual labour, games, physical training, mental education, the incentive of useful and interesting trade and a carefully planned series of rewards.[13] The establishment of borstal institutions drew its legitimacy from the proviso to section 35(1)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The subsection provides that:

> every person shall be entitled to his personal liberty, and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law – in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare.

The intention of the above constitutional proviso suffices in a situation where a child is adjudged delinquent, and the court considers confinement to a borstal institution to be in the child's best interest. Instructively, the purpose of this proviso is for the education, rehabilitation, reformation, and reintegration of the child back into society as a law-abiding citizen.[14] According to Ogbolumani,

> The inmates at any rehabilitation centre shall receive education according to his/her age and development, and such education shall be at least the equivalent of that which he/she would receive in his/her own special circumstances where he/she is attending school in the usual way of education.[15]

In other words, the inmates who cannot cope with educational training have the option to get into various other vocational trades such as welding, tailoring, signwriting, and carpentry.

In the literature, most scholars have focused on the rehabilitative role of borstal institutions on young offenders.[16] Regrettably, many Nigerian scholars have not considered the experiences of young female offenders or even the question of the effects of their exclusion from the welfare-based approach of borstal institutions. Through empirical analysis, this chapter seeks to address why borstal institutions cater exclusively to boys and male juveniles, despite the Borstal Institutions and Remand Centres Act – which established these institutions – stating in section 3(1)(b) that a borstal institution is

> A place in which offenders who were not less than sixteen but under twenty-one years of age on the day of conviction may be detained and such training and instruction as will conduce to their reformation and prevention of crime.

Furthermore, section 35(2) of the Nigerian Correctional Service Act (NCSA) 2019, requires separate borstal institutions for male and female juvenile offenders in every State, with rehabilitation as the central principle of their custody. These provisions, especially that of the NCSA, do not exclude female juvenile offenders from rehabilitation and reformation at the borstal institutions.

These subsections further reflect section 1 of the Child Rights Act, 2003, which emphasised that 'the best interest of the child should be of paramount importance in any matter relating to a child.' The interpretation of the word 'offenders' under the Borstal Institutions and Remand Centres Act reflects both male and female genders because the Act does not discriminate, and there is no ambiguity in the construction of the provision of the law. Ostensibly, the criminal justice system focuses on criminals/offenders and neither sex or gender of the criminal/offender and it is expected to be applied for both sexes or genders. Regrettably, the interpretation and application of the Borstal Institutions and Remand Centres Act provisions are not sex blind in reality or practice, as the interpreters have deliberately excluded young female offenders from receiving the same treatment of rehabilitation and reintegration into society like their young male counterparts. Arguably, the interpreters of the provisions of the law do not avert their minds to the postulation of Simon that:

> There is no difference between females and males in terms of morality and that there is nothing particularly inherent in human biological sex that predisposes men or women towards crime. When succinct opportunities for criminal activities abound, both male and female are likely to perpetrate crime.[17]

The rise in the number of young female offenders has attracted significant attention and has prompted commitment to gender equality and to bridging the gender gap in rehabilitation efforts.[18] For instance, in the United States of America, the trend of an increase in female delinquency cases led to an amendment of the Juvenile Justice and Delinquency Prevention Act of 1992 and Juvenile Justice Reform Act, 2018, in order to address 'potential gender bias and related call for gender-specific treatment and prevention services by the Office of Juvenile Justice and Delinquency Prevention.'[19] Unfortunately, Nigeria still shows little real progress, with ongoing disparities in how young male and female offenders are treated.[20] Smart opines that 'our knowledge is still in its infancy. In comparison with the massive documentation on all aspects of male delinquency and criminality, the amount of work carried out on the area of women and crime is extremely limited.'[21]

In Nigeria, young female offenders make up more than 10% of the population of prisoners at the prison/correctional institutions where adult offenders are confined.[22] Several female offenders in prisons start as female juveniles who re-offend. Akinseye-George's study focusing on Kuje Prison re-affirms the position that 'few of the inmates at prisons had crime history as juveniles and at least 20% of Kuje prisoners under study were children.'[23] Abrifor and others' study also reveal that 'more than a quarter of those who re-offend are juveniles and that it is juvenile delinquent children that usually graduate into adult criminals.'[24] Similarly, the 2009 Annual Report of the Nigerian Prison Service reveals that female offenders have re-offended more than six times and have been sentenced to prison in Nigeria.[25]

Abrifor and others opine that

> A great majority of children in conflict with the law were held together with adults in the regular prisons and as the children advance in age behind bars, their association with adult criminals invariably expose them to the danger of aggravated criminal tendencies and recidivism.[26]

Research has further shown that the lack of borstal institutions for training and rehabilitation of young female offenders and their mingling with adult offenders at the prison/correctional centres increases their perpetration of crimes.[27] Research by Abrifor and others[28] carried out in Enugu, Kaduna, Lagos, Oyo, and Rivers States revealed that 57% representing 323 out of 567 recidivists chosen for the survey were those convicted or imprisoned for crimes earlier as juveniles and 80.4% representing 456 out of the population sampled in another phase of the survey of 567 recidivists have not been confined to a borstal institution/remand home as juveniles. Abdulraheem-Mustapha claims that borstal institutions in Nigeria have rehabilitative programmes and have been effectively rated high among the custodial institutions in Nigeria for young offenders.[29] Analysis of the respondents' opinion, as shown in Figure 11.1, supports this assertion. On the effectiveness of custodial institutions in the child justice administration, 53% of the respondents rated borstal institutions as effective compared with prisons/correctional centres, government-approved schools, police cells, and remand homes.

Unlike some countries that provide borstal facilities for girls – such as the Republic of Cameroon and Kenya, which have the Borstal Reformatory School and Kamae Girls Borstal Institution, respectively – all three borstal institutions in Nigeria, located in Abeokuta, Kaduna, and Ilorin, are exclusively for male young or juvenile offenders.[30] Historically, women have often been perceived primarily as victims, rather than agents, of crime.[31] Silvestri and

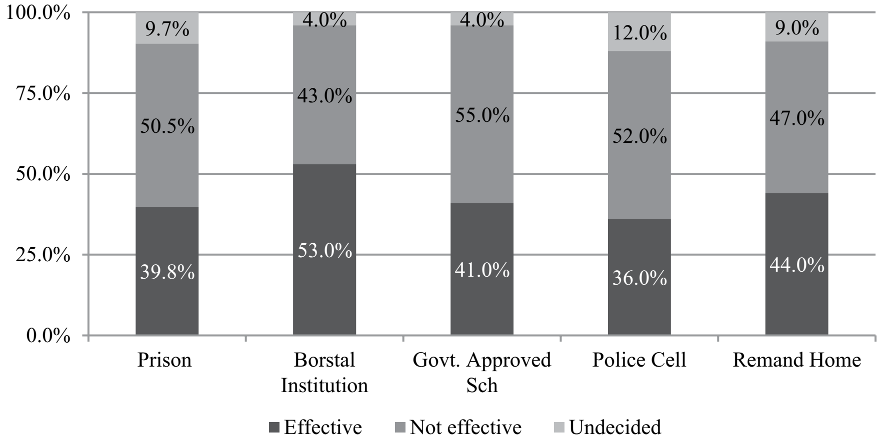


*Figure 11.1* Respondents' views on the effectiveness of custodial institutions in Nigeria.

*Source*: Author's fieldwork survey 2022.

Crowther-Dowey's research supports this view, stating that 'women do not offend as much as men and their offending behaviour is less serious.'[32] Such beliefs have shaped Nigeria's rehabilitative approaches, resulting in borstal training institutions that cater almost exclusively to boys and young male offenders. Recent events, however, have contradicted these assumptions; female juveniles in Nigeria have been involved as both agents and victims in crimes. According to Chukuezi, female crimes in recent times have included 'drug trafficking, armed robbery and white-collar crimes in government offices.'[33]

Female juveniles have also been involved in suicide bombings. Jason Warner and Hilary Matfess's study indicates that from 11 April 2011 to 30 June 2017, *Boko Haram* deployed 434 bombers to 247 different targets during 238 suicide-bombing attacks. At least 56% of these bombers were women, and at least 81 bombers were specifically identified as children or teenagers.[34] Similarly, it was reported that

> Of the 134 suicide bombers whose age could be determined, 60% were teenagers or children. The youngest suicide bomber identified to date was just 7 years old. *Boko Haram* has used four times as many young girls as it has young boys.[35]

There is this continuing debate regarding the effects of the absence of rehabilitation and lived experiences of young female offenders whose conditions are frequently aggravated by patriarchal beliefs that label them as the weaker sex. These inherent patriarchal ideas cause the female gender to lose self-confidence[36] and continue to engage in antisocial activities.[37]

It is pertinent to note that the Nigerian government has devised means of reducing the perpetration of crimes by both young males and females with the introduction of a restorative justice system, which calls for reconciliation and restitution. Laws have been enacted and reformed to demonstrate the government's unalloyed commitment to this cause. Among the extant laws are the Child Rights Act (CRA), 2003; the Administration of Criminal Justice Act (ACJA), 2015; and the Nigerian Correctional Service Act, 2019. These instruments demonstrate the Nigerian government's legislative commitment to improving its justice system in alignment with global and regional frameworks.

For example, Nigeria's criminal justice reforms as a member state under the United Nations Sustainable Development Goals (SDGs) aligns especially with Goals 5, 10, and 16, which enjoins member states to adopt gender justice, equality, restorative justice, and build strong institutions by fostering peace to reduce recidivism and promote reconciliation between offenders and victims. Being a member state under the AU Agenda 2063, the Nigerian criminal justice reforms also advance the goals of the African Union (AU) Agenda, especially Goals 11 and 13, which seeks to entrench democratic values, the rule of law, and promote restorative justice in attaining sustainable peace, equity, and security.

Section 1 of CRA provides for the 'best interest of a child to be of paramount consideration in all actions.' The CRA also empowers the Family Court to promote reconciliation, restitution, and responsibility through the involvement of the child, family, community, and the victim in order to provide the child offender with the opportunity to develop his/her individual capacity and contribute to society. Section 223 of the CRA allows the disposition of children's cases by giving alternatives to custodial or institutional placements where the court is satisfied that an offence has been committed. Section 223 (1)(c)(iii)(f) and (2) of the CRA mandates that, if no alternative exists, the court must commit a child to custody. Specifically, the court has no choice but to send a child offender to a custodial institution when releasing the child would risk public safety, when the offence committed is a capital one with a mandatory maximum sentence, or when committal aligns with the child's best interests. This leads to a critical question: Can prisons, correctional centres, or remand homes be suitable custodial institutions for rehabilitating child offenders, particularly female offenders? Notably, these institutions do not offer rehabilitative programmes; instead, they tend to increase the child's criminal tendencies.

Regrettably, committal of young female offenders at the remand homes and correctional centres have negated the provisions of section 35(1)(d) of the 1999 Constitution, which calls for the rehabilitation of young offenders through educational or vocational training and that can only be achieved at borstal institutions. More so that remand homes under section 3(1)(a) of the Borstal Institutions and Remand Centres Act seem to be used as temporary or passage for remand pending the final determination of juvenile cases without any form of rehabilitative model. Interestingly, the combined effects of sections 371 and 452(1) of ACJA specifically direct the court to apply the provisions of the CRA in any criminal proceeding against the child.

When considering restorative justice under the ACJA, section 460(1)(2) allows for diversionary measures, such as performing specified community service as the court may direct. Section 460(4) explains the reasoning for this approach: rehabilitating offenders by engaging them in productive work. However, section 460(3) limits eligibility for such options, providing that convicts are not eligible for suspended sentences or community service if their offence involves the use of arms, offensive weapons, sexual offences, or carries a punishment exceeding three years' imprisonment. As discussed in the earlier literature, young female offenders are implicated in serious capital offences like drug trafficking, suicide bombing, and armed robbery, each carrying the maximum legal penalties. Consequently, these offenders cannot avail themselves of the provisions under section 460(1)(2) of the ACJA. Their best interest would be served through rehabilitation in a custodial institution, with the borstal considered the most suitable option.

## Presentation of Results and Discussion of Findings

The empirical verification conducted during this fieldwork is presented in Tables 11.4 and 11.5. From Table 11.4, majority of the respondents representing 83.3% (250), 99% (297) out of total population of 300 at different phases of administering of the questionnaire hold the views that rehabilitation is key to administration of criminal justice and that the law establishing borstal institutions should be amended to make specific provision to accommodate young female offenders since the law has been erroneously interpreted. These views exceed those of respondents who either disagreed (16% and 0.7%) or chose not to express an opinion (0.7% and 0.3%). The expression of the respondents is in tandem with the literature reviewed during this study.

From the result in Table 11.4, 99% (297) of the respondents and 83.3% (250) of them at different parts of the questionnaire expressed the views that the interpretation of the laws on rehabilitation should accommodate both sexes, and these views correspond with the postulation of Simon reviewed in this chapter. Expressions of the respondents' views as per non-custodial service and inadequate and ineffective laws regulating borstal institutions in Nigeria are very disturbing when more than half of them representing 60% and majority of them representing 81.7% in another phase of the questionnaire lamented that rehabilitation of young offenders cannot be maximally achieved in a non-custodial service and that the extant laws on borstal institutions are inadequate and ineffective as the extant law is obsolete being law enacted since 1960.[38]

These expressions are equally in consonance with the reviewed literature in this chapter. Table 11.4 also shows the views of the respondents where 81.7% of them and 83.3% in another interval of the questionnaire agreed with the author that committal of female offenders at remand homes is bad and non-domestication of CRA and ACJA by some states in the federation adversely affect the rehabilitation of young female offenders.

*Table 11.4* Perceptions of the Respondents on the Exclusion of Young Female Offenders at Borstal Institutions in Nigeria

| *Perception of the Respondents* | *Frequency* | *%* | *Perception of the Respondents* | *Frequency* | *%* |
|---|---|---|---|---|---|
| Do you agree that one of the basic objectives of criminal justice system is rehabilitation? | | | There is need to amend the laws establishing borstal institution to reflect the mind of the Legislatures. | | |
| Yes | 250 | 83.3 | Yes | 297 | 99 |
| No | 48 | 16 | No | 2 | 0.7 |
| Undecided | 2 | 0.7 | Undecided | 1 | 0.3 |
| Total | 300 | 100 | Total | 300 | 100 |
| Is rehabilitation meant for all offenders irrespective of sex? | | | The masculinity phrase used in the Borstal Act should accommodate girls/ young female offenders? | | |
| Yes | 297 | 99 | Yes | 250 | 83.3 |
| No | 2 | 0.7 | No | 48 | 16 |
| Undecided | 1 | 0.3 | Undecided | 2 | 0.7 |
| Total | 300 | 100 | Total | 300 | 100 |
| There needs to be custodial institution for rehabilitation? | | | The law establishing borstal institutions should provide equal rehabilitating treatment for both male/boys and female/girls offenders? | | |
| Yes | 290 | 96.7 | Yes | 297 | 99 |
| No | 8 | 2.7 | No | 2 | 0.7 |
| Undecided | 2 | 0.6 | Undecided | 1 | 0.3 |
| Total | 300 | 100 | Total | 300 | 100 |
| Can rehabilitation of offenders be maximally achieved in a non-custodial service? | | | Is the existing law to regulate the operation of borstal institution adequate and effective? | | |
| Yes | 110 | 36.7 | Yes | 50 | 16.7 |
| No | 180 | 60 | No | 245 | 81.7 |
| Undecided | 10 | 3.3 | Undecided | 5 | 1.6 |
| Total | 300 | 100 | Total | 300 | 100 |

(*Continued*)

*Table 11.4* (Continued)

| *Perception of the Respondents* | *Frequency* | *%* | *Perception of the Respondents* | *Frequency* | *%* |
|---|---|---|---|---|---|
| Committal of young female offenders at remand homes is? | | | Refusal of some states to domesticate CRA and ACJA adversely affect the rehabilitation of young female offenders? | | |
| Good | 50 | 16.7 | Yes | 250 | 83.3 |
| Bad | 245 | 81.7 | No | 48 | 16 |
| Undecided | 5 | 1.6 | Undecided | 2 | 0.7 |
| Total | 300 | 100 | Total | 300 | 100 |
| Committal of young female offenders at prisons/correctional centres is? | | | Is the availability of only three borstal institutions enough to cater for rehabilitation of all young offenders? | | |
| Good | 50 | 16.7 | Yes | 50 | 16.7 |
| Bad | 245 | 81.7 | No | 245 | 81.7 |
| Undecided | 5 | 1.6 | Undecided | 5 | 1.6 |
| Total | 300 | 100 | Total | 300 | 100 |
| Committal of only boys/young male offenders at borstal institutions is? | | | Can diversion or non-custodial measures solve any child delinquency? | | |
| Good | 18 | 6 | Yes | 50 | 16.7 |
| Bad | 280 | 93.3 | No | 245 | 81.7 |
| Undecided | 2 | 0.7 | Undecided | 5 | 1.6 |
| Total | 300 | 100 | Total | 300 | 100 |
| Committal of child offender should be in the best interest of the child? | | | Do we need borstal institutions in Nigeria for delinquent children? | | |
| Yes | 290 | 96.7 | Yes | 275 | 91.7 |
| No | 9 | 3 | No | 20 | 6.7 |
| Undecided | 1 | 0.3 | Undecided | 5 | 1.6 |
| Total | 300 | 100 | Total | 300 | 100 |
| Committal of young female offenders at prisons/correctional centres/ remand homes increases their criminal tendency? | | | Which of the custodial institutions offered educational and vocational training? | | |

| | | |
|---|---|---|
| Yes | 275 | 91.7 |
| No | 20 | 6.7 |
| Undecided | 5 | 1.6 |
| Total | 300 | 100 |
| Borstal institution is the only custodial institution that offers educational and vocational training to child offenders? | | |
| Yes | 296 | 98.7 |
| No | 3 | 1 |
| Undecided | 1 | 0.3 |
| Total | 300 | 100 |
| Committal of child offender at borstal institution helps in reducing the commission of crimes? | | |
| Yes | 296 | 98.7 |
| No | 3 | 1 |
| Undecided | 1 | 0.3 |
| Total | 300 | 100 |
| Is there need for borstal institutions for girls/young female offenders? | | |
| Yes | 298 | 99.4 |
| No | 1 | 0.3 |
| Undecided | 1 | 0.3 |
| Total | 300 | 100 |
| Mingling of young female offenders at prisons/correctional centres is? | | |
| Remand homes | 7 | 2.3 |
| Borstal institutions | 290 | 96.7 |
| Prisons/correctional centres | 1 | 0.3 |
| Government-approved schools | 2 | 0.7 |
| Total | 300 | 100 |
| Are borstal institutions adequately funded? | | |
| Yes | 50 | 16.7 |
| No | 245 | 81.7 |
| Undecided | 5 | 1.6 |
| Total | 300 | 100 |
| Are the roles and functions of Nigerian prisons/correctional service as relate to custodial of child offenders at borstal institutions well spelt out in the laws? | | |
| Yes | 50 | 16.7 |
| No | 245 | 81.7 |
| Undecided | 5 | 1.6 |
| Total | 300 | 100 |
| Is observance of the law establishing borstal institutions likely to reduce the incidence of child delinquency? | | |
| Yes | 296 | 98.7 |
| No | 3 | 1 |
| Undecided | 1 | 0.3 |
| Total | 300 | 100 |
| Is non-availability of borstal institution for girls/young female offenders contribute to their re-offending? | | |

(*Continued*)

*Table 11.4* (Continued)

| *Perception of the Respondents* | *Frequency* | *%* | *Perception of the Respondents* | *Frequency* | *%* |
|---|---|---|---|---|---|
| Good | 5 | 1.7 | Yes | 298 | 99.4 |
| Bad | 292 | 97.3 | No | 1 | 0.3 |
| Undecided | 3 | 1 | Undecided | 1 | 0.3 |
| Total | 300 | 100 | Total | 300 | 100 |
| Do you agree that young female offenders are now involving in capital offences? | | | Do you agree that committal of young female offenders to custodial institution in capital offences the best? | | |
| Yes | 5 | 1.7 | Yes | 250 | 83.3 |
| No | 292 | 97.3 | No | 48 | 16 |
| Undecided | 3 | 1 | Undecided | 2 | 0.7 |
| Total | 300 | 100 | Total | 300 | 100 |
| Committal of only boys/young male offenders at borstal institutions is discriminatory? | | | Do you agree that there should be aftercare for young offenders after their release from custodial institutions? | | |
| Yes | 298 | 99.4 | Yes | 298 | 99.4 |
| No | 1 | 0.3 | No | 1 | 0.3 |
| Undecided | 1 | 0.3 | Undecided | 1 | 0.3 |
| Total | 300 | 100 | Total | 300 | 100 |

*Source*: Author's Fieldwork survey 2021 and 2022.

*Table 11.5* Experiences of Boys/Male and Girls/Female offenders at Borstal Institutions/ Prisons/Correctional Centres/Remand homes in Nigeria

| *Perception of the Respondents* | *Frequency* | *%* | *Perception of the Respondents* | *Frequency* | *%* |
|---|---|---|---|---|---|
| Do you prefer borstal institution than prisons/ correctional centre/remand home? | | | Do you need borstal institutions for girls/female offender? | | |
| Yes | 298 | 99.4 | Yes | 298 | 99.4 |
| No | 1 | 0.3 | No | 1 | 0.3 |
| Undecided | 1 | 0.3 | Undecided | 1 | 0.3 |
| Total | 300 | 100 | Total | 300 | 100 |
| Your answer above is because of the availability of educational and vocational training at borstal institutions? | | | Is your mingling with adult offenders at prisons/ correctional centres likely to increase your criminal intent? | | |
| Yes | 250 | 83.3 | Yes | 50 | 16.7 |
| No | 48 | 16 | No | 245 | 81.7 |
| Undecided | 2 | 0.7 | Undecided | 5 | 1.6 |
| Total | 300 | 100 | Total | 300 | 100 |

*Source*: Author's Fieldwork survey 2021 and 2022.

Table 11.5 confirms the above position where the majority of the child offenders, representing 99.4%, expressed that they prefer a borstal institution in comparison with remand homes. Nearly 88.3% of the female offenders reiterated in another phase of the questionnaire that they prefer borstal institutions because of the availability of educational and vocational training compared to other custodial institutions. This is further re-affirmed by the author in one of the juveniles' matters defended in the Kwara state Family Court[39] that the only option available to explore is to commit the girl offender to a remand home because of the non-availability of borstal institutions for girl/female offenders, despite the existence of borstal institutions in Kwara state.

Most of the respondents, representing 91.7% and 98.7% at different intervals of the questionnaire, agreed that committal of young female offenders to prisons/correctional centres increases their criminal tendency, and of course, committing them to a borstal institution has the potential to reduce their re-offending. This is affirmed in Table 11.5 where 83.3 and 81.7% of the child offenders expressed their views that the availability of educational and vocational training prompted their responses to vote for borstal institutions, because mingling with adult offenders at prisons/correctional centres will likely increase their criminal intent. This is further re-affirmed by a respondent's observation:

> I pity those young female offenders brought to us at prisons because there is no way they will not become hardened. Although, there is a wing for female offenders, but the wing is within the premises of prison and there are no way those young female offenders will not mingle with the adult offenders either with the adult female offenders inside the wing or with adult male offenders.[40]

One of the respondents, a Director overseeing the remand home at the Ministry of Social Welfare and Development, expressed the view that a 'remand home is not the best rehabilitation centre for the child offender, whether male or female, because there we do not have what it takes to rehabilitate them.'[41] In the same vein, Table 11.4 further shows that the majority of the respondents, representing 97.3% and 83.3% in another phase of the questionnaire, agreed that young female offenders are now becoming agents of crime, unlike in the past when they were victims of crimes. Respondents expressed that committing them to custodial institutions will be in their best interest.

The expressions from the results in Tables 11.4 and 11.5 align with the studies of several scholarly works reviewed in the course of this study. The analysis revealed that Nigeria needs more borstal institutions, especially for young female offenders. One of the borstal boys expressed,

> I am very happy that I am able to continue my education here and I will read hard to pass my West African Examination Council (WAEC) and Joint Admission and Matriculation Board (JAMB) examinations so that I will enter University. My dream is to read computer science.[42]

Another borstal boy at Kaduna said, 'I have learnt how to do carpentry work here and I pray that I get money to establish my workshop when I come out of Borstal.'[43] One young female offender at Bauchi Remand Home said sadly, 'I am just here. No school, nothing but just to eat, play and sleep.'[44] It is therefore imperative to establish more borstal institutions that will cater for young female offenders.

## Conclusion

In this chapter, the reform of Nigeria's child justice system is analysed in the context of broader criminal justice reforms. The legal framework governing borstal institutions is examined, with particular focus on the exclusion of female offenders. This exclusion is discussed in relation to its impact on gender equity within the criminal justice system. Furthermore, the chapter points out that the increasing number of young female offenders in prisons and correctional facilities poses significant challenges for a nation striving to improve the status of female children. Female juveniles are totally excluded from the reformative initiative of borstal institutions, thereby further complicating their plights as offenders.

The chapter shows the inherent problems inhibiting the rehabilitation of female juveniles in Nigeria and has answered the research questions formulated for the study. The author, through the fieldwork, revealed that keeping female juveniles in correctional centres/remand homes makes no impression on them as they graduate through a succession of short sentences into a fixed career of habitual crime in Nigeria. The deliberate focus on male offenders in these institutions reflects systemic gender biases that perpetuate unequal access to rehabilitative services for female juveniles. This practice of exclusion undermines the constitutional principle of equal treatment and the commitment of the Nigerian government under the SDGs and AU Agenda 2063, thus limiting the opportunities for female offenders to reintegrate successfully into society.

The chapter highlights the urgent need for a gender-inclusive approach to juvenile correctional system. Establishing borstal institutions for female offenders or providing alternative rehabilitative frameworks tailored to their needs will promote gender equity, enhance rehabilitation outcomes, and contribute to reducing recidivism. The chapter emphasises that the absence of equal opportunities for female juveniles at borstal institutions like their male counterpart increases their re-offending. More importantly, the chapter reveals that mingling of female juveniles with adult offenders in prison has had an adverse effect and contributed to their re-offending.

The chapter concludes that, comparatively, borstal institutions to some extent rehabilitate the male offenders, and such custodial institutions should be made available to female juveniles as well. Addressing this gap requires implementing extant laws and gender-sensitive policies within Nigeria's criminal justice system. Bridging the gender gap in borstal institutions is not only a matter of social justice but also a critical step towards fostering a fair and inclusive society where both male and female juvenile offenders are given equal opportunities for reform and reintegration.

## Notes

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2 J. Muncie, *Youth and Crime: A Critical Introduction* (Saga Publication, 1999) 55. See also G.B. Vold, T.J. Bernard, and J.B. Snipes, *Theoretical Criminology* (4th edn, New York Oxford University Press, 1986) 52–54. The terms 'young/juvenile' or 'child' offender is used interchangeably in this study to refer to the subject of concern which is children who are 'in conflict with the law or beyond parental control' or 'children in need of care and protection.' See N. Roy, *Justice Denied: The Treatment of Children in Conflict with the Law* (Final Report, Save the Children UK Juvenile Justice Global Review, 2001). http://www.crin.org/docs/save/jjmodern_concepts.pdf-similar accessed 28 December 2024

3 Abdulraheem-Mustapha, *Child Justice Administration in Africa* (n 1).

4 The interviews were conducted by the author between September 2021 and June 2022 with set of team players of the 'Network for Vulnerable Persons in Nigeria' a non-governmental organisation recruited and trained as research assistants to join the author in conducting the interviews.
5 Earl Babbie, *The Practice of Social Research* (Wadsworth Publishing Company, 2010)
6 The author experienced limitations as to finance and space as the study could have covered other states of the federation apart from the four states under study.
7 Ogun State enacted Child Rights Law (CRL) and Administration of Criminal Justice Law (ACJL) in 2006 and 2018, Kwara state enacted CRL and ACJL in 2005 and 2018 respectively; Kaduna state enacted its ACJL and CRL in 2017 and 2018 respectively. Bauchi enacted its ACJL in 2018 and Child Rights Law in 2023. See ACJL and CRL Tracker- Partners West Africa Nigeria. https://www.partnersnigeria.org accessed on December 28, 2024; The Law to provide and protect Rights of the Child in Bauchi State and Other Related Matters 2023 signed by Governor Bala Mohammed on December 28, 2023. https://www.guardian.ng accessed on December 28, 2024.
8 See generally Police Act, 2020, s 4; Child Rights Act 2003, s 207(2).
9 The author is grateful to her undergraduate supervisees and the members of Network for Vulnerable Persons in Nigeria, a Non-governmental Organisation for their assistance during the administering of the questionnaire phase of this study and interpretation from English Language to local dialects.
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# 12 Non-Custodial Sentencing Alternatives

## A South African Experience

*Robert Nanima*

### Introduction

Non-custodial sentences are a worthwhile option due to the prison population in Africa. African prisons hover near the global average for pre-trial detainees. On average, 45 prisoners per 100,000 await trial, which is above the global rate of 44 per 100,000.[1] Whereas the global awaiting trial detention rate averages 29%, Africa's is 36%.[2] According to Muntingh, prisons in Africa have long-standing issues such as overcrowding, disease, inadequate nutrition, and rights violations.[3] To ascertain the correct picture, it is important to look at the prison population. As of 2020, Southern and East Africa consisted of 24 internationally recognised prisons holding 655,000 persons with an average of 533 prisoners.[4] South Africa has an average of 160,000 prisoners at an average size of 657 prisoners per facility.[5]

Furthermore, a closer look at the prison population shows that most prisoners are often in two categories: awaiting trial or serving sentences.[6] Notably, a significant portion of the prison population in African states consists of individuals in the first group.[7] It is reported, for instance, that over two-thirds of the 18,000 inmates in Uganda are yet to be tried.[8] In South Africa's Johannesburg prison, some inmates have not seen a judge in as many as seven years, leading to overcrowding.[9]

International law provides various sentencing options under various instruments. The United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[10] provide that sentencing options include verbal sanctions, such as admonition, reprimand, and warning, as well as conditional discharge, status penalties, and both economic sanctions and monetary penalties, including fines and day fines. Other options include confiscation or an expropriation order, restitution to the victim or a compensation order and a suspended or deferred sentence. The other aspects include probation and judicial supervision, community service orders, referral to an attendance centre, and house arrest.[11] The application of the Tokyo Rules in South Africa is governed by constitutional directives on the application of international law that require the use of the Bill of Rights,[12] and an application of international law that is not inconsistent with the Constitution.[13] From a procedural perspective, South Africa operates as a dualist state, which means that after an

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international instrument is ratified, it must undergo an additional domestic ratification process. This process involves both the government and the National Assembly, as well as the National Council of Provinces.[14]

This chapter reflects on the emerging practices concerning non-custodial sentences in South Africa. The recent legislative reforms on punishment and sentencing, age of criminal liability, all point to possible improvements regarding the use of non-custodial sentences. To achieve this, it juxtaposes the importance of non-custodial to custodial sentences, followed by evaluating the normative guidance in international and national law. Drawing on this evaluation, the chapter deciphers the forms of non-custodial sentences for both adults and minors. A conclusion and recommendations follow.

**Setting the Scene: Why Non-Custodial Sentences**

Before 2018, South Africa's criminal justice system faced numerous challenges. Inefficient investigation and prosecution processes led to cases taking years to resolve, with corruption rampant throughout. Furthermore, those in power were not held accountable for their actions, fostering a culture of impunity. Prosecutors and investigators also lacked the necessary training and resources to tackle complex crimes effectively. Additionally, the system relied heavily on imprisonment, neglecting alternative forms of punishment and rehabilitation.[15] Various institutions in South Africa like the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and African Criminal Justice Reform (ACJR) called for non-custodial criminal justice reforms as alternatives to imprisonment.[16] Despite the availability of statutory non-custodial sentencing options, overcrowding remains a significant concern in South Africa.[17] This raises the question – why non-custodial sentences? In South Africa, non-custodial sentences refer to punishments that do not involve imprisonment. These alternatives to incarceration aim to rehabilitate offenders, promote restorative justice, and reduce recidivism rates.[18]

Various reasons inform the use of non-custodial sentences. Although a detailed evaluation of all the reasons may not be possible here, a few key points are worth noting. First, non-custodial sentences are preferred for offences that are less serious in gravity like petty offences or victimless crimes.[19] The point of departure is where victimless offences have serious connotations for the general public.[20] The main option is usually the issuance of a custodial sentence – a position that defeats the call to depart from the same.[21] Secondly, they are used to avoid individuals' imprisonment and promote the rehabilitation and integration of offenders into the community.[22] Some proponents of incarceration state that it may not lead to the rehabilitation of prisoners, and they argue for 'prisonisation' that makes them more dangerous to society.[23] Thirdly, non-custodial sentences are considered less costly than custodial sentences due to the need to provide shelter and food for individuals.[24] It is also not in doubt that non-custodial sentences ease prison overcrowding and thus facilitate the administration of prisons and the proper corrective treatment of those who remain in prison.[25]

## Normative Guidance on Sentencing in International Law

South Africa recognises the application of international law on two fronts. First, in the course of interpretation of the Bill of Rights, on the one hand,[26] and second, where the application of international law is not inconsistent with the Constitution of the Republic of South Africa.[27] From a procedural perspective, South Africa remains a dualist state where the direct application of a given law has to, in addition to receiving the executive blessing, be confirmed by the National Assembly and the National Council of Provinces.[28] This procedure was tested when South Africa attempted to withdraw from the Rome Statute of the International Criminal Court.[29] Similarly, principles on sentencing from international law are imperatively instructive in the Republic. This section explores some international instruments that outline several key principles that apply to punishment and sentencing.[30]

### *The Convention Against Torture*

The United Nations Convention against Torture (UNCAT) provides both normative and jurisprudential guidance on punishment.[31] A couple of concepts can be derived from the definition of torture concerning punishment. From a general perspective, about six points are discernible from the definition of torture. First, in the UNCAT, torture means any act by which severe pain or suffering occurs, and secondly, it may be either physical or mental.[32] Secondly, this pain is intentionally inflicted on a person. Thirdly, the sole purpose of obtaining information or a confession from him or a third party.[33] Fourthly, torture may also be for the sole purpose of punishment for an act that a person or a third party has committed or is suspected of having committed.[34] On a fifth note, torture may also serve the purpose of intimidation or coercion of a person or third party for the commission or suspicion of the commission of an offence.[35] Lastly, torture may be based on discrimination, instigation, consent, or acquiescence by a public official or someone in an official capacity.[36] The caveat to the application of torture is that if it is provided for as a lawful sanction in the laws of a state, the punishment mustn't be ascribed to torture, cruel, inhuman, and degrading treatment.[37]

The question is: can non-custodial sentences be tagged as torture or cruel, inhuman, and degrading treatment? A clear picture of the punishment as torture has to be reconciled with the obligation of States Parties to prevent 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.'[38] A look at the drafting history of articles 1 and 16 of the UNCAT offers an understanding that distinguishes torture from cruel, inhuman, or degrading treatment based on the purpose of the conduct of the state that hands down the sentence. This includes the powerlessness of the victim (in this instance a person and the extent to which (s)he has been subjected to due process and found guilty, with channels of appeal and review), rather than only looking at the intensity of the pain or suffering inflicted.[39]

The then Special Rapporteur on torture and cruel, inhuman and degrading treatment (CIDT), stated that while torture is prohibited in all circumstances, the circumstances in which other forms of treatment are perpetrated will determine whether they qualify as cruel, inhuman, or degrading within the meaning of the UNCAT.[40] To this end, if force is used legally (under domestic law) and for a lawful purpose, and the force applied is not excessive and is necessary to meet the purpose (that is to say, it is proportionate), then this generally will not qualify as cruel, inhuman, or degrading treatment.[41] A good example of a non-custodial sentence which amounts to torture, cruel, inhuman, and degrading treatment is corporal punishment.[42]

Jurisprudence from the UNCAT accords further guidance on punishment (and sentencing) and torture. The UNCAT General Comment 4 (2017) on the implementation of article 3 of the Convention guides the interpretation of articles 1 (and 3 and 15).[43] For instance, it reminds state parties not to expel, return ('refouler'), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[44] The competent authorities should consider all relevant considerations, such as a consistent pattern of gross, flagrant, or mass human rights violations (like continued imposition of the death penalty). This was tested in *Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening)*,[45] where the question before the court was whether it was constitutional for South Africa, a country that had abolished the death penalty, to deport persons to another country where they would face the risk of the death penalty.[46]

The government argued that it had simply deported Mohamed and not extradited him to the US, and as such, article 3 did not apply. The Court departed from this narrative and indicated that the UNCAT does not distinguish between expulsion, return, or extradition of a person to another state to face an unacceptable form of punishment.[47] It noted that all are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. This marked the concretisation of a principle that in circumstances such as Mohamed's, the principle of non-refoulement is of universal application and included instances of punishment and sentencing that would subject a person to torture, cruel, inhuman, or other forms of ill-treatment in the country to which (s)he is sent amounted to a violation of the UNCAT.[48] It is argued that this principle largely speaks to custodial sentences and does not offer adequate guidance to non-custodial sentences.[49]

### *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) reiterates the UNCAT position that no one shall be subjected to torture or cruel, inhuman or degrading treatment, or punishment. In particular, no one shall be subjected to medical or scientific experimentation without their free consent.[50]

Interestingly, the ICCPR recognises the place of punishment as a way in which CIDT may be occasioned on an individual. This concerns the requirement that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[51] The deprivation extends to both convicts and persons on remand.[52] To this end, accused persons shall save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as persons who have not yet been convicted.[53]

The ICCPR takes a thematic approach and requires that children be separated from adults and that their trials be brought as speedily as possible for adjudication.[54] Furthermore, the ICCPR calls on States Parties to look at the reformation and rehabilitation of offenders as the primary goal of punishment. At its core, punishment should engage a thematic tone that underscores the segregation of children from adults, and accord them the treatment that is appropriate to their age and legal status.[55] This is a shift from the provisions of the UNCAT that offers guidance on custodial sentences to the end that they do not pass as torture and CIDT. The ICCPR emphasises the need for sentencing that incorporates rehabilitation and reformation – an aspect that may be interpreted to include non-custodial sentences.

The ICCPR also provides for fair trial guarantees that inform the outcome of the trial and the final punishment that is meted out to an individual.[56] These include equality before the courts, the presumption of innocence, and fair trial guarantees. The fair trial guarantees include being informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; having adequate time and facilities for the preparation of a defence and communication with counsel of one's choosing.[57] Others include the right to a trial without undue delay; to be present; and to defend oneself in person or through the legal assistance of one's choice; to be informed if one does not have legal assistance.[58]

While these stand alone as fair trial guarantees, they serve the ultimate goal of ensuring that punishment and sentencing are based on due process that spans from the pre-trial to the appellate stages. In the interim, the ICCPR also reiterates the use of fair trial guarantees to ensure the ultimate punishment of an individual. It is thus correct to state that the ICCPR uses the right to due process as a foundation upon which sentencing practices should be based. The relevance to non-custodial offences is in the recognition that a fair trial should be reflected in the sentence that is handed down on an individual following an evaluation of the evidence and factors that may be used to mitigate a punishment.[59]

### *The African Charter on Human and Peoples' Rights*

Various provisions in the African Charter on Human and Peoples' Rights (ACHPR) protect against torture. First, it prohibits CIDT, affirming every individual's right to dignity and recognition of their legal status.[60] All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment shall be prohibited.[61] This is intrinsically linked to the right to a fair trial under article 7, which requires that every individual has the right to have his cause heard and has specific guarantees such as the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations, and customs in force. Furthermore, the right to be presumed innocent until proven guilty by a competent court or tribunal is a platform for the right to a fair trial.[62] As such, the ACHPR uses a human rights-based approach in dealing with issues of torture, cruel, inhuman, and degrading treatment and punishment.[63]

A human rights-based approach seeks to empower people to know and claim their rights, increasing their ability to advocate for the enjoyment of these rights, while holding individuals and institutions accountable for respecting, protecting, and fulfilling them.[64] At its core, this approach ensures that both the standards and the principles of human rights are integrated into policymaking as well as the day-to-day running of organisations. The human rights-based approach inculcates four principles: participation, accountability, non-discrimination and equality, empowerment, and legality.[65] Participation requires that everyone has the right to participate in decisions which affect their human rights in a manner that is active, free, meaningful, and gives attention to access to information.[66] In the context of sentencing, the prosecution, the victim, and the convict should retain the urgency to address the court on the amplifying and mitigating circumstances before the court hands down a sentence.[67]

Accountability, on the other hand, is evident in the existence of laws, policies, institutions, administrative procedures, and mechanisms of redress to secure human rights.[68] It can be argued that the existence of forms of punishment as a consequence of the commission of offences speaks to the existence of accountability by the judiciary in handing down a sentence that fits the crime.[69] Another question that may arise is how convicts that seek other remedies such as parole may be able to access them within the legal and administrative bounds. A good example is the administrative exercise of ministerial discretion, either allowing or denying parole to a convict.[70] Furthermore, a human rights-based approach means that all forms of discrimination in the realisation of rights must be prohibited, prevented, and eliminated.[71] Non-discrimination must be demonstrated in the sentencing process.[72] Empowerment remains critical so that individuals and communities understand their rights and are fully supported to participate in the development of policies and practices that affect their lives, and to claim their rights where necessary.[73] It has to be seen to be done by the courts where the principle is applied.

The principle of legality requires recognising rights as legally enforceable entitlements as provided by international law.[74] This principle also calls for the recognition of principles of criminal liability such as *nulla crimen sine lege* and *noela puna sine lege*.[75] In instances where the national laws fall short of the requisite international human rights standards, there should be a harmonisation of the domestic laws to reflect the desired position.[76] It is worth noting that the principle of legality is a cornerstone of criminal justice, with a significant connection to non-custodial measures. It ensures that individuals are held accountable only for actions explicitly prohibited by law, with punishments that fit the crime. Non-custodial measures provide a more tailored approach to addressing minor or first-time offences, by offering alternatives to imprisonment to promote fairness, reasonableness, and proportionality in punishment.[77]

### *The African Charter on the Rights and Welfare of the Child*

A critical question that arises in sentencing, particularly in cases involving child offenders, is the place of child protection and how international law deals with it. In this context, non-custodial measures play a crucial role in promoting child protection and upholding the rights of child offenders. The African Charter on the Rights and Welfare of the Child, which provides normative and institutional guidance on child rights, emphasises the importance of non-custodial measures in promoting the best interests of the child by adopting a child rights-based approach,[78] which includes principles such as non-discrimination,[79] right to life, survival and development,[80] best interest principle,[81] and participation of the child.[82]

The African Charter on the Rights and Welfare of the Child reiterates various principles of juvenile justice. First, it requires that every child accused or found guilty of having infringed the penal law has a mandatory right to special treatment that upholds their dignity and worth, and the reinforcement of the respect for human rights and fundamental freedoms of others.[83] This points to the normative guidance on the need for special treatment for children who have infringed penal laws. Secondly, the state has specific obligations concerning the detention or imprisonment of a child.[84] The state has to ensure that no detained or imprisoned child or otherwise deprived of their liberty is subjected to torture, inhuman, or degrading treatment or punishment.[85] Furthermore, the protection accorded to the child requires that detained children be separated from adults in their place of detention or imprisonment.[86] To this end, detention should not amount to torture, inhuman, degrading treatment, or punishment. While not all detention amounts to torture, inhuman, degrading treatment, the conditions in some prisons and rehabilitation centres can be deplorable.[87]

The ACRWC also calls for the guarantee of a fair trial for a child using the child rights-based approach to inform the proper punishment.[88] It is a requirement that every child accused of infringing the penal law:

- i shall be presumed innocent until duly recognised guilty;
- ii shall be informed promptly in a language that he or she understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

iii shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
iv shall have the matter determined as speedily as possible by an impartial tribunal and, if found guilty, be entitled to an appeal by a higher tribunal;
v prohibit the press and the public from the trial.[89]

The cumulative effect of the foregoing provision is to ensure that there is an incorporation of the principles of rehabilitation and reformation in the child justice system. Furthermore, it elucidates the emphasis on non-custodial measures over punishment and sentences. Effectively, the essential aim of the treatment of every child during the trial and if found guilty of infringing the penal law shall be their reformation, reintegration into his or her family, and social rehabilitation. Instructive jurisprudence from the African Committee on the Rights and Welfare of the Child (ACERWC) calls for the application of the added value that the charter brings to the table, the use of the child rights-based approach and the contextualisation of the various theories of punishment and how their application may affect children (especially where a caregiver is imprisoned).[90]

## Normative Guidance on Non-Custodial Sentencing Alternatives from a Domestic Perspective

The South African sentencing regime creates a dichotomy regarding the sentencing of adults and children or minors. Until 2008, the Criminal Procedure Act guided the sentencing of adults and minors. The Child Justice Act provides for the sentencing of children. Following the enactment of the Child Justice Act, the Criminal Procedure Act no longer applies to minors, unless it is expressly provided otherwise. These reforms point to more rehabilitative and reformative, rather than punitive, approaches to punishment and sentencing, specifically regarding children.

Sentencing and punishment take a critical place in the Bill of Rights of the Constitution of the Republic of South Africa.[91] The provisions of the Constitution are given shape by the provision of various models of punishment and sentencing.[92] Section 39(1) of the Constitution refers to the use of public international law and foreign law as a tool for interpretation. In *S v. Makwanyane*, the court stated that both binding and non-binding public international law may '…be used as tools of interpretation. International agreements and customary international law accordingly provide a framework within which … [the Bill of Rights] can be evaluated and understood and for that purpose decision of tribunals dealing with comparable instruments…'[93] A look at the options for non-custodial sentences for both adults and children follows.

### *Non-Custodial Sentencing Options for Adults*

Custodial sentences include imprisonment,[94] periodical imprisonment,[95] declaration as a habitual criminal,[96] and committal to any institution established by law.[97] Non-custodial sentences include fines,[98] correctional supervision,[99] and imprisonment, which may be imposed at the discretion of the commissioner or a parole board.[100] It is worth noting that all these reforms are stipulated in the laws of South Africa.

*Fine*

Fines are provided for in the Criminal Procedure Act and may be rationed under the Adjustment of Fines Act 101 of 1991. For instance, the law provides that:

> If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not C prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which concerning the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine D in terms of section 92(1)(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92(1)(a) of the said Act, where the court is not a court of a regional division.[101]

Where a statutory offence carries a fine not exceeding a stated maximum fine or imprisonment for a period not exceeding a stated maximum period, the court is given the discretion to impose either the fine or imprisonment.[102] About whether a sentence on a traffic offence with an alternative of imprisonment would be subjected to an adjustment, the ratio of fines to imprisonment has to be read in the context of both sections 1(1)(a) of the Adjustment of Fines Act 101 of 1991 and 92(1)(a) and (b) of the Magistrates' Courts Act 32 of 1944 through the provision of a statutory rule to guide magistrates to calculate the maximum fine or the term of imprisonment.[103] The accused participates by providing the court with their circumstances to mitigate the amount of a fine or the nature of a non-custodial sentence. Although the practice is to reduce a custodial sentence to a non-custodial one, which shows mitigation of the sentence, the severity of the non-custodial sentence must be closely examined.

*Correctional Supervision*

The term 'correctional supervision' was redefined to mean a community-based sentence where a person is sentenced with conditions that suspend the same and is released subject to the fulfilment of specific conditions over a specified period.[104] Correctional supervision is governed by section 276A, which lays down a couple of principles that the courts follow in their application. It operates in a triangular model – it may be invoked by a court as the appropriate punishment at the first instance; may be applicable through the conversion of imprisonment to correctional supervision and may also lapse at its conversion to imprisonment at a second or third instance.[105] The second and third options may be made by the court, the commissioner or the parole board.[106] In addition, correctional supervision may be at the court's motion or on the motion of either a commissioner or the parole board.

Correctional supervision may be invoked by the court on its own accord, where there is the placement of a report by a probation officer (for children) or a correctional official, and the punishment of imprisonment for a period not exceeding three years (for sexual offences) or five years.[107] Imprisonment may also be converted to correctional supervision, where, following the conviction of a person to any sexual offence, demonstrates the potential to benefit from treatment and participation in sexual offence-specific treatment programmes.[108] This conversion may be made by the court on one hand, or by the commissioner or parole board on the other hand.[109] The challenge arises when the process is abused by the commissioners or the parole board, which is expected to set expectations for the prisoners.[110]

Correctional supervision at the discretion of the Commissioner or the parole board applies where the Commissioner or parole board seeks to convert a sentence of imprisonment to correctional supervision. The convict may be placed under correctional supervision where the court has handed down a sentence of imprisonment. Following the imposition of imprisonment (with or without the option of a fine) for a period not exceeding five years or a fixed period not exceeding five years.[111] The concept of a fixed period not exceeding five years applies to instances, among others, where the person has been sentenced to a period of more than five years, but the application of the Correctional Services Act and its regulations compute a period that is less than five years.[112] Following the admission of such a person to prison, the Commissioner or parole board may, in its opinion, apply to the court to reconsider the said sentence. The court is still empowered even after converting imprisonment to correctional supervision to reconsider the latter to another form of punishment, to which imprisonment is not an exception.[113]

### *Suspended Sentence*

This is where the court in its discretion, following the conviction of a person of any offence, (provided it does not have a minimum punishment), postpones for a period not exceeding five years from the passing of sentence and releases the person concerned upon various conditions.[114] These include compensation, rendering a benefit to the victim, community service, submission to correctional supervision, treatment, supervision by a probation officer, and compulsory attendance at a rehabilitation centre, among others.

Concerning whether a suspended sentence can be appealed against to stop its application, the court held in *Stow v. Regional Magistrate, Port Elizabeth No and Others*[115] that although the original sentence may well be the 'resultant sentence' in the strict sense, there was no reason why the phrase should not be more expansively interpreted to encompass the putting into operation of a suspended sentence. This is an indication that the proper interpretation of section 309(1)(a) is not to have a statutory prohibition on the appeal of a decision to put into operation a suspended sentence. The said section arguably allows a presiding officer to put a suspended sentence into operation, a construction that gives proper effect to the spirit, purport, and objects of the Bill of Rights.

### *Non-Custodial Sentencing Options for Children*

Sentencing for children is constitutionally provided for in the Constitution of the Republic of South Africa. Accordingly, detention must be engaged as a matter of last resort and for the shortest appropriate period.[116] This reinforces the narrative that punishment should be related to restorative justice.[117] The South African sentencing regime makes it mandatory that every child who has committed an offence be subjected to diversion from the criminal justice system as a matter of law. It is imperative to look at it briefly before considering sentencing, where children are subjected to the trial system.

The purpose of diversion under the Child Justice Act is to minimise the child's contact with the criminal justice system, encourage accountability on the part of the child, promote reintegration and/or reconciliation between the child, family, and community.[118] In addition, it allows victims to express their views on impact, prevents stigmatisation, reduces the potential for re-offending, and promotes the dignity and self-worth of the child. Some of the guiding principles for diversion require that the child acknowledge responsibility, not be unduly influenced, have a prima facie case, and, where available, that the parent or guardian consent to diversion.[119] While it offers both custodial and non-custodial options, this chapter focuses on the non-custodial options available to a child who has been engaged with the child justice system.[120]

Where a child has gone through the criminal trial process, a pre-sentence report must be present on the file before sentencing by a court. Various principles underscore this report. It is a mandatory requirement for the court to have before a sentence is imposed.[121] The only exception is where, following the conviction of a Schedule 1 offence, obtaining the report will cause undue delay in the conclusion of the case to the prejudice of the child.[122] If a sentence will involve compulsory residence in a child and youth care centre, where the child will carry out specific programmes, the report has to be obtained.[123] The probation officer's role is very central as (s)he must complete the report as soon as possible but before the expiry of six weeks.[124]

Furthermore, where the probation officer recommends a sentence of compulsory residence to a child and youth care centre to carry out a programme referred to in section 191 (2) (j) of the Children's Act, it must be supported by current and reliable information from the person in charge of that centre, regarding its availability.[125] Where the court seeks to impose a sentence other than that recommended in the pre-sentence report and must furnish reasons for the imposition of a different sentence on the record of the proceedings.[126] This may be informed by other facts, such as the consideration of the number of days that a child has spent in prison or a child and youth care centre before the imposition of the sentence.[127] It is reiterated that a sentence of direct imprisonment should only be imposed as a measure of last resort.[128] Concerning suspended sentences, the CJA requires that they may have conditions at the discretion of the court for a period not exceeding five years, and it has to be monitored by a probation officer.[129] Fines may only be imposed after an inquiry into the ability of the child's caregivers to pay the same.[130]

## Conclusion

The high numbers of the prison population in Africa and South Africa point to the importance of non-custodial sentences. It is essential that the notion that whenever a court hands down a non-custodial sentence, it is an indication of justice being dispensed, should be discouraged. One must look closely at the nature of the non-custodial sentence, for instance, the use of corporal punishment in some countries or the issuance of a high fine as an alternative to imprisonment. The guidance from international law shows a strong stance against punishment that is cruel, inhuman, and degrading under the UNCAT, especially with custodial sentences.

The ICCPR offers a shift in direction that utilises the right to a fair trial as a critical foundation for the informed issuance of non-custodial sentences. The human rights system demonstrates the application of a rights-based approach, which necessitates a balance between participation, accountability, non-discrimination, equality, and legality. In the context of South Africa, there is considerable momentum towards consolidating reforms in punishment and sentencing, particularly concerning children. The adoption of the Child Justice Act heralds an era that contextualises the punishment of children from the perspective of rehabilitation and restoration. The greatest strength is how the regime uses diversion to arrive at a logical conclusion of a matter but also as a means to ensure that the child is diverted from the child justice system.

It is recommended that a close application of the Child Justice Act in a manner that adds value to the promotion and protection of the right to a child is critical if South Africa is to maintain its moral voice in the conversations on the adoption of nuanced methods of child justice, its guidance to the international community on the promotion and protection of the rights of the child. This will add to the traction on the much-needed reform of the sentencing guidelines and/or options in South Africa so that they conform to various international initiatives, such as the aspirations stated in Goal 16 of the UN SDGs and aspiration 11 of the 2063 AU Agenda.

## Notes

1 See generally A. Bukten, and M.R. Stavseth, 'Suicide in Prison and after Release: A 17-year National Cohort Study,' [2021] *36* (10) *European Journal of Epidemiology* 1075-1083.
2 Benjamin Okorie Ajah, and Others, 'Investigating the Awareness of Virtual and Augmented Realities as a Criminal Justice Response to the Plight of Awaiting-Trial Inmates in Ebonyi State, Nigeria' [2022] 77 (2) *Crime Law and Social Change* 111.
3 Lukas M. Muntingh, 'Africa, Prisons and COVID-19' [2020] 12 (2) *Journal of Human Rights Practice* 284, 285.
4 Muntingh, 'Africa, Prisons and COVID-19'.
5 Muntingh, 'Africa, Prisons and COVID-19.'
6 A small percentage may be incarcerated due to civil prison over non-payment of debt.
7 Emeka Nwefoh and Others, 'Depression and Experience of Incarceration in North Central Nigeria: A Situation Analysis at Makurdi Medium Security Prison', [2020] 14 (1) *International Journal of Mental Health Systems* 1,5. K. Auty, and A. Liebling, 'Exploring the Relationship between Prison Social Climate and Reoffending', [2020] 37 (2) *Justice Quarterly* 358.
8 N.J. Materu, *Reducing Overcrowding in Prisons: Public Perceptions on Community Services: The Case of Ilala Municipality, Dar–Es-Salaam* (Doctoral dissertation, The Open University of Tanzania, 2021).
9 Cynthia Carlos Chimatilo, *The Protection of Prisoners' Rights in International Law* (LLM Dissertation University of Johannesburg South Africa 2021). See also M.C. Van Hout, and J. Wessels, 'Human Rights and the Invisible Nature of Incarcerated Women in Post-Apartheid South Africa: Prison System Progress in Adopting the Bangkok Rules' [2022] 18 (3) International *Journal of Prisoner Health* 300.
10 United Nations General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures Resolution 45/110*, 14 December 1990 https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-non-custodial-measures accessed 14 March 2025.
11 This list is not exclusive as the Rules provide for '(a)ny other mode of non-institutional treatment and a combination of any of the above.'
12 The Bill of Rights requires that international law is applied in the adjudication of cases. See Constitution of the Republic of South Africa, section 217.
13 Constitution of the Republic of South Africa, section 39.
14 This is beyond the scope of this chapter, however, see W. Mutubwa, 'Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution', (2019) 3 (1) *Journal of CMSD*, 27–37. See also U.M. Ogisi, and E.O. Okumagba, 'International Law and Municipal Law: Towards a Unifying Framework of Applicability' (2021) 3 *IRLJ* 87.
15 Gareth Newham, 'Bold Criminal Justice Reforms Are Needed to Uncapture SA'(*ISS Today* 15 August 2019) https://issafrica.org/iss-today/bold-criminal-justice-reforms-are-needed-to-uncapture-sa accessed 13 March 2025.
16 National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), 'Comment on the draft DCS Position Paper on a revised parole system for South Africa' (Cape Town, 2018) https://www.nicro.org.za/ accessed 1 July 2024.
17 See generally, Mziwoxolo Mfeketo, *A Study on Leadership in the Implementation of Non-Custodial Sentencing by the Department of Justice and Constitutional Development and the Department of Correctional Services* (MPA Dissertation, University of the Western Cape, 2019).
18 Examples include fines, community service, probation, restorative justice, suspended sentences, correctional supervision, and treatment centres. These sentences are often imposed for less serious offenses like theft, assault, or traffic violations,

but can also be used in conjunction with custodial sentences or as an alternative to imprisonment for more serious crimes.

19 P.H. Rossi, J.E. Simpson, and J.L. Miller, 'Beyond Crime Seriousness: Fitting the Punishment to the Crime' [1985] 1 *Journal of Quantitative Criminology*, 59–90.

20 Inna Levy, Keren Cohen-Louck and Sergio Herzog, 'Predicting Support for Community Corrections: Crime Type and Severity, and Offender, Observer, and Victim Characteristics' [2022] 24 (3) *Punishment & Society* 346, 354.

21 For a dated but interesting piece on victimless offences, see T.M. Dutton, 'Victimless Crime: A Comparison of Public Offense Ratings of Misdemeanour Offenses and Virginia Sentencing Guidelines' (2020)https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1180&context=sociology_criminaljustice_etds accessed 17 March 2025.

22 Irene Marti, *Doing Indefinite Time: An Ethnography of Long-Term Imprisonment in Switzerland* (Palgrave Macmillan, 2023) 353.

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# 13 An Overview of Non-Custodial Penal Measures and Implementation Strategies in the Nigerian Criminal Justice Administration

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## Introduction

Current trends in the criminal justice system show that imprisonment, especially of non-violent criminals, does not constitute a panacea to either crime prevention or to the social reintegration of offenders. In many countries, the prison system faces major challenges because of congestion and outdated facilities.[1] Recently, due to prison congestion, the use of imprisonment, especially for crimes that attract shorter term, has been discouraged by the courts around the world. For instance, in the United Kingdom, the senior presiding judge of England and Wales issued fresh guidance to judges to encourage the use of non-custodial sentencing in cases where offences attracted short prison terms.[2]

The Nigerian Criminal Justice System's overreliance on custodial sentences and pre-trial custodial processes contributes significantly to the surge in prison congestion. The use of other forms of penal measures is almost non-existent.[3] According to the World Prison Brief data, the Nigerian correctional service centre's population total (including pre-trial detainees/remand prisoners) as of 25 November 2024 was 82,382.[4] A report from the Nigerian Correctional Service (NCS) on inmate populations – differentiating between convicted individuals and persons awaiting trial (PAT) – as of 4 October 2021, revealed significant overcrowding in the nation's correctional facilities. The NCS data shows that although Nigeria's correctional centres are built to hold 50,083 inmates, they are currently housing 81,193[5] inmates. The data also revealed that of the 81,193 inmates at the facility, 54,249 are awaiting trial. That equates to roughly 67% of the total. Only 26,944 inmates have been convicted, accounting for 33% of the total. As a result, at least seven out of ten Nigerian prison inmates are serving time without being convicted.[6]

Prison congestion is caused by several factors, such as strict bail conditions set by the courts, over-reliance on imprisonment, and judicial delays. Congestion of the correctional centres has a negative economic impact, draining public resources and impeding the efforts of the Nigerian Correctional Service to fulfil its mandate using the custodial measures. A major strategy for prison decongestion globally is adopting non-custodial penal measures as an

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alternative to custodial sentencing. This chapter focuses on the Nigerian Criminal Justice System, specifically examining the inadequate implementation of non-custodial measures outlined in the Administration of Criminal Justice Act 2015 (ACJA), the Administration of Criminal Justice Laws (ACJL) of various states, and the Nigerian Correctional Service (NCS) Act 2019.[7] It will further examine strategies that improve the implementation and promote the use of non-custodial measures in Nigeria.

## Non-Custodial Penal Measures Under the Nigerian Criminal Justice Framework

Non-custodial measures are sentences that are imposed on an offender as an alternative to imprisonment and are administered by the state or by another agency on behalf of the state. It is usually evoked in the sentencing of less violent (petty) offences – for example, traffic offences, victimless offences, misdemeanours, delinquencies – rather than serious offences.[8] The introduction of the use of non-custodial penal measures (as alternative measures) in Nigeria was in line with international best practices to address the prison congestion and the financial burden that incarceration places on the government under the administration of criminal justice.[9]

Ordinarily, the court should not impose a non-custodial sentence where the statute that creates an offence provides for a mandatory sentence or a minimum custodial sentence. The Supreme Court in *Amoshina v. The State*[10] held that:

> where a statute prescribes a mandatory sentence in clear terms, the courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law.

Before a court can order a non-custodial sentence as punishment for a criminal wrong, it must act only on the discretionary power vested in it by law and in total compliance with stipulated provisions of the law criminalising that offence.[11]

During the COVID-19 pandemic, non-custodial measures became more prevalent due to the need to tackle the challenges posed by the pandemic. In response to the pandemic, the federal government of Nigeria, Lagos State, and several other states introduced regulations to help manage the crisis. The penalties in these regulations are noteworthy, particularly for their focus on non-custodial sentencing amid rising infection rates. For instance, the Lagos State Infectious Diseases (Emergency Prevention) Regulations allow for fines of ₦100,000 or non-custodial sentences for individuals, and ₦500,000 for corporate bodies. In the Federal Capital Territory (FCT), violators of lockdown regulations also faced non-custodial sentences. On 15 March, mobile courts sentenced 20 individuals for lockdown violations, issuing fines between ₦2,000 and ₦5,000. Individuals whose vehicles were impounded were allowed to retrieve them after the lockdown ended.[12]

Stakeholders in inmates' rehabilitation and parole considerations in Nigeria, including the Nigerian Correctional Service (NCS), Prison Rehabilitation and Welfare Action (PRAWA) and the British Council, identify non-custodial sentencing for inmates as a way of decongesting custodial centres. Accordingly, the Controller General of the Nigerian Correctional Service described non-custodial sentencing as the hub of modern corrections globally, relevant for decongesting Nigeria's already overstretched facilities and providing mental health support to inmates suffering such conditions.[13]

There are several categories of non-custodial penal measures contained in the ACJA 2015 and the respective state replicas. Part 44 of the ACJA outlines non-custodial penal measures, including conditional release and payment of compensation for jury or loss causes (section 454 ACJA), probation (section 455), suspended sentences and community service (section 460), confinement to a rehabilitation or correctional centre instead of imprisonment, and parole (section 467). Other measures include fines, restitution, compensation, suspended sentences, and deportation. Notably, section 37(2) of the NCS Act creates the National Committee on Non-Custodial Measures to oversee the formation of technical committees on non-custodial penal measures.[14] The National Committee will coordinate non-custodial penalties through its work with the judiciary and relevant agencies, monitor effectiveness, address feedback from affected parties, and fulfil additional duties as needed for the Act's implementation.

### *Probation*

Probation is a form of recognisance ordered by a competent court, requiring a convicted person to comply with certain conditions. It includes supervision by a probation officer of the same sex, as named and approved in the court's order, for a specified period.[15] Probation as a punishment offers the opportunity of rehabilitation and reintegration into the community without the social and family disruption caused by imprisonment. This is particularly true of juvenile supervision. Both the ACJA and the NCoS Act provide adequately for probation as a non-custodial measure, aiming to rehabilitate offenders or convicts. For example, section 454(1) and (2) of the ACAJ provides that:

1 where … the court thinks that a charge is proved but is of the opinion that, having regard to:

  a the character, antecedents, age, health, or mental condition of the defendant charged.
  b the trivial nature of the offence; or
  c the extenuating circumstances under which the offence was committed,

> It is inexpedient to inflict a punishment or any order than a nominal punishment or that it is expedient to release the defendant on probation, the court may, without proceeding to conviction, make an order …

2 …

a dismissing the charge; or
b discharging the defendant conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding 3 years as may be specified in the order.

In issuing the Recognisance Order, the court would order that the defendant be under the supervision of a (named or unnamed) probation officer of the same sex.[16] A recognisance is a solemn obligation or bond entered into before a court or official under which a person binds himself to the performance of certain obligations. Where the court makes a probation order to the defendant, the court states in simple terms the conditions the defendant is required to observe such as requiring the defendant not to leave their residence, abstention from intoxicating substance, and any other matters as the court may deem fit.[17] The various duties and powers of the probation officers are stipulated in sections 456–458 ACJA.

The NCS Act makes provision for probation services to support the implementation of the non-custodial measure. Section 41 of the Act highlights that probation services comprise production of a pre-sentencing report to assist courts in determining appropriate sentencing decisions, supervision of convicts on probation order as directed by a court of competent jurisdiction, production of pre-release report to aid the reintegration of offenders into society, and provision of any other support as prescribed under the NCS Act. While statutory provisions for probationary sentences have always existed, they are rarely utilised by judges and magistrates, except in cases involving juveniles.[18]

#### ***Suspended Sentence and Community Service***

A suspended sentence in criminal law means, in effect, that the defendant is not required to serve the sentence at the time it is imposed.[19] Prior to the enactment of the ACJA and Administration of Criminal Justice Laws (ACJL) of various States in Nigeria, the use of suspended sentences as an alternative to incarceration was not recognised in the Nigerian justice system. The Court of Appeal, addressing the issue of whether a suspended sentence is recognised in *Gloria Nya v. Bassey Edem*,[20] held that ‘a suspended sentence is not part of Nigerian law and does not apply under Nigeria’s criminal justice system.’ In the said case, a Cross River State High Court, in a contempt proceeding, convicted the appellant and in doing so, imposed a suspended sentence.

The ACJA regime recognises the imposition of a suspended sentence. Section 460(1) of the ACJL Edo State provides that where the court sees reason, the court may order that the sentence it imposed on the convict be, with or without conditions, suspended, in which case, the convict shall not be required to serve the sentence in accordance with the conditions of the suspension.[21]

In *Ilanma v. Suleiman*,[22] the appellant was charged along with two other persons for the offences of criminal conspiracy, criminal breach of trust, and criminal misappropriation contrary to sections 96, 311, and 308 of the Penal Code Law. The appellant, who was the third accused person, pleaded not guilty to the charge. The trial court, in a considered judgement, found the appellant and his co-accused guilty as charged. In an apparent probationary order, the trial court bound over the appellant and his co-accused persons under section 25 of the Criminal Procedure Code to be of good behaviour for six months, in default of which they were to serve a prison term of three months. The trial court went further to order the appellant to pay compensation to the respondent and one other person as victims of the crime under section 78 of the Penal Code Law. On further Appeal, the court held, on the issue of the power of court to impose a suspended sentence or make a probationary order against an accused person, that a trial court, having convicted an accused person of an offence, can proceed to make a probationary order or suspended sentence, otherwise called an order of 'cautioned and discharged.'

### *Community Service*

This form of non-custodial sentencing gained traction in Nigeria during the height of the global COVID-19 pandemic.[23] A community service order requires an offender to do unpaid work in the community as reparation for his offence. Failure to comply with the order, attracts the risk of imprisonment. Community service is provided for under the ACJA (section 461 (4)) and the various states ACJL.[24] States like Lagos have implemented this approach as seen in some cases like *COP v. Ayoola Yusuf*,[25] *COP v. Olamide Kolade*[26], *COP v. Abiodun Tijani*,[27] and *COP v. Adewale Dayo*,[28] where the accused persons were upon conviction at the Ikeja Magistrate Court were sent to engage in community services like cleaning the court premises, sweeping the court and helping in any prescribed work.

Yekini and Salisu notes that the Chief Judge of Lagos State has, in recent times, encouraged magistrates to consider community service as an alternative to imprisonment.[29] The rationale for community service is that correctional centres are expensive to maintain, considering the enormous taxpayers fund spent on feeding, housing, and caring for inmates. Another justification for community service sentence is that it caters for many convicts who are not violent or dangerous criminals that would require the protection of society from them.[30]

In sentencing an accused person to community service, the court usually would also consider the character, circumstances, and antecedents of the convict when making the Order.[31] The reasons for these considerations by the court is to ensure that the punishment aligns with the principles of fairness, rehabilitation, and societal benefit. The court assesses a convict's character to decide whether they are likely to comply with the order and complete community service responsibly. It also considers whether their character or past actions might pose a risk to the community where the service is performed, ensuring the sentence aligns with the public interest. The court in considering the convict's circumstances and antecedents, will ensure the punishment is commensurate with the crime and the individual. This helps avoid a situation of overly harsh or lenient sentences that could undermine justice.

Further, consideration of the convict's circumstances can guide the court in recommending conditions that facilitate the convict's reintegration into society, fostering positive change. Section 461(5) of the ACJA states that a community service sentence should be carried out as close as possible to the convict's usual place of residence to ensure that the community can monitor his movement. The reason why the performance of community service should be within the convict's usual place of residence is to allow the convict to contribute directly to their own community. This fosters a sense of accountability and responsibility while strengthening ties with the local society, which is key to rehabilitation. Also, when the local community sees the offender actively contributing to repairing harm caused by their actions, it reinforces trust in the justice system and demonstrates its restorative goals. The convict, by the service, makes amends to the community that he harmed by his actions by doing socially useful work.[32]

Under the ACJA,[33] community service ordered by the court may include:

a Environmental sanitation (e.g., cutting grass, cleaning drainages, and public places).[34]
b Assisting in productive activities (e.g., agriculture, construction, or mining).
c Other beneficial services deemed by the court to have a reformative effect on the convict's character.

The length of community service imposed as part of a sentence is generally at the discretion of the court. The discretion of the court in determining the length and nature of the service is guided by several factors, such as the gravity of the offence, the age, health, and personal circumstances of the offender and public interest. For instance, under the relevant sections of Lagos State Law[35] on this subject, Magistrate Courts can sentence a convict to community service of certain hours. In the unreported cases of *COP v. Abiodun Adebayo*, *COP v. Taiwo Aminu*, *COP v. Emeka Wisdom*, *COP v. Barinde Ezikel*, *and COP v. Nelly Osa*[36] in Ikeja Magistrate Court, Lagos State, all the accused were sentenced to various community service ranging between 1 hour to 24 hours to be performed within the premises of the court.

Where a defendant or convict does not diligently perform or complete their community service to the satisfaction of the court, the court may either impose a term of imprisonment for the remaining portion of the sentence or levy a fine as an alternative penalty.[37] A community service shall not be performed for more than six months, and the convict shall not work for more than five hours a day.[38] Where a convict fails to comply with Community Service Order, the court may issue a summons for the convict to appear.[39] The court cannot sentence offenders to community service or suspension in cases involving the use of arms or offensive weapons, sexual offences, and offences with penalties exceeding three years' imprisonment.[40]

There seems to be a controversy between the NCS Act and ACJA on who oversees Community Service Order, and this extends to states that have enacted the ACJL. Under section 42(1) of the NCS Act, the Controller-General of the Nigerian Correctional Service has the authority to appoint supervisors for the implementation of community service orders. These supervisors monitor individuals sentenced to community service and regularly report their findings to the Controller-General. The report shall indicate the number of completed community service and the status of compliance with the court order. The NCS Act mandates the Controller-General to report all cases of non-compliance submitted to him by the designated community service supervisors to the appropriate court for action. Conversely, under section 461(1) and (2) of the ACJA, the Chief Judge in every Judicial Division is empowered to establish a Community Service Centre to be headed by a Registrar who shall oversee the execution of Community Service Orders in that Division. The Registrar, with support from appropriate personnel, shall supervise the implementation of court-ordered community service.

Similarly, the ACJLs of states also assign the responsibility of overseeing community service to persons other than the Comptroller-General.[41] For example, section 461(1) of the Edo State ACJL states that the Chief Judge must establish a Community Service Centre in each judicial division. Each centre, led by a Registrar with appropriate staff, oversees community service orders.[42] In contrast, the Lagos State ACJL assigns the appointment of a Community Service Officer for each Magisterial District to the Attorney-General, following consultation with the Commissioner for Social Development.[43]

Clearly, we have a situation where the same responsibility has been given to different persons. This 'different persons' situation has generated some form of controversy, which potentially impedes the effective implementation of the community service order as a non-custodial measure. This controversy is particularly relevant in the context of the ACJA and NCS Act which are both applicable within the Federal Capital Territory and aim to achieve similar objectives. However, following the recent constitutional amendment, this comparison is less meaningful in the states.[44] The amendment removes item 48, 'Prisons,' from the Exclusive List and introduces a new paragraph 10A, 'Correctional Services,' to the Concurrent List. This change now grants both the National Assembly (NASS) and State Assemblies the authority to pass laws establishing and managing correctional services and custodial facilities.

### *Parole*

This is another non-custodial penal measure where the court may direct the release of a prisoner before the completion of the sentence. Section 468(1) ACJA indicates the cumulative circumstances where the court, after hearing the prosecution and the prisoner or his legal representative, may release a prisoner before the completion of his/her sentence. This occurs where the Comptroller of Correctional Service makes a report to the court recommending that a prisoner serving his sentence in prison is of good behaviour and has served at least one-third of his prison term, where he is sentenced to imprisonment for a term of at least 15 years or where he is sentenced to life imprisonment.

Where such prisoner is released, the prisoner is mandated to undergo a rehabilitation programme in a government facility or any other appropriate facility to enable the prisoner to be properly reintegrated into society.[45] Both the ACJA and NCoS place responsibility for the parole's administrative processes on the Comptroller-General of the Correctional Services.[46] Such processes include arrangement (including budgetary provision) for the facility, the appointment of members of the parole board, supervision of parolees, rehabilitation of the parolees and administration of the designated parole facilities.

Despite the above provisions, the ACJA is silent on parole conditions for those sentenced to less than 15 years of imprisonment. The reason why ACJA is silent on parole conditions for those sentenced to less than 15 years of imprisonment could be that parole is typically designed for offenders serving longer sentences, where rehabilitation and reintegration into society require structured supervision over an extended period. For shorter sentences, the emphasis might be on completing the sentence rather than conditional release. It is also unclear how the Comptroller-General would calculate one-third of a life sentence when recommending such inmates for parole. Additionally, while the ACJA does not lay out the conditions courts may attach to parole releases, the Nigerian Correctional Service – Standing Orders Non-Custodial (Revised Edition) 2020 addresses parole and outlines the conditions for offenders' release.[47] The effect is that before offenders are released on parole, their readiness and circumstances must be assessed. This includes evaluating their behaviour during incarceration, their potential risks to society, and their rehabilitation progress. Preparation involves helping them acquire the necessary skills, support, or resources for reintegration. The process should begin well before the actual release date. Starting early allows enough time to develop individualised reintegration plans that address specific needs, challenges, or risks.

## Non-Custodial Penal Measures and Sentencing Guidelines

The court is to impose a non-custodial sentence where there is discretion, and such discretion is to be exercised judiciously and fairly. Injustice could result from an inappropriate sentence imposed upon conviction, particularly in cases where the judges or magistrate have discretion and there are no clearly defined parameters for the exercise of the discretion. This could lead to concerns about foul play among the convict and their relatives regarding the judges' decisions. Likewise, some may accuse foul play when lighter sentences are given for serious offenses.

Having regard to the fact that a sentence should be fair and just, judges and magistrates must have regard to the gravity of the offence, its impact on the victim, the circumstances of the accused, and the wider public interest. Arbitrary or discriminatory practices may interfere with fair and just sentencing and by extension the criminal justice system. The way to prevent this is through implementation of sentencing guidelines. The primary purpose of a sentencing guideline is to assist judges and magistrates, to attain some level of uniformity, proportionality, and fairness in sentencing within the criminal justice system. Only a few states, such as Cross River, Lagos, Edo, and FCT have adopted the Sentencing Guidelines.[48] The nexus between non-custodial sentencing and sentencing guidelines is that the court would require a sentencing guideline in imposing a non-custodial sentence.

The court may, in all cases, sentence a convict to a non-custodial option, including fine as provided under the ACJA. In this case, it does not matter whether the statute creating the offence is silent on or does not specifically provide for non-custodial punishment. However, where the statutes that create the offence expressly disallow some categories of non-custodial measure, the court should not consider those categories of non-custodial sentence which were expressly disallowed. For instance, where the statute creating the offences disallows community service and parole, the court is at liberty to consider fine, probation, and any other non-custodial sentences as it deems fit. The court should impose a non-custodial sentence where the offence has been categorised as 'low culpability offence' and 'limited harm offence' and there are other mitigating factors. The court, prior to the imposition of a non-custodial sentence, should ensure that:

a the interests of the victim, the convict, and the community are considered;
b it is appropriate to impose a non-custodial sentence as an alternative to imprisonment in the particular case;
c there are necessary mitigating factor, evidence, information, or circumstances that necessitate the imposition of the non-custodial sentence; and
d the convict is not a habitual convict and will not pose a danger to the community by the imposition of non-custodial sentence.[49]

## Implementation of Non-Custodial Penal Measures and Goal 16 of the Sustainable Development Goals

The Sustainable Development Goals (SDGs) comprise 17 interconnected objectives addressing key aspects of sustainable development at both international and domestic levels, tailored to address contemporary global challenges. Specifically, SDG 16 emphasises the need for inclusive access to justice for all, the rule of law, and the development of accountable institutions at all levels by the expiration of the year 2030.[50] There are three fundamental aspects and/or pillars that drive this goal. On the one hand, there is the goal to achieve peace for sustainable development. Then there is the goal to achieve access to justice for all, and finally, there is the goal to develop strong institutions.[51]

The implementation of non-custodial penal measures contributes to SDG 16 in several ways. Probation, community service, and restorative justice programmes, ensure that offenders are not disproportionately punished or detained, thus promoting fair and equitable access to justice. They reduce the over-reliance on incarceration, particularly for minor offences, which can disproportionately affect vulnerable populations. Non-custodial measures help reduce prison overcrowding by diverting eligible offenders from custodial sentences. This, in turn, enhances the efficiency of the justice system, allowing for improved conditions and better allocation of resources for individuals who genuinely require incarceration. By addressing the underlying causes of criminal behaviour, these non-custodial measures help reduce recidivism and contribute to building a peaceful and inclusive justice system. Non-custodial measures, which emphasise rehabilitation rather than punishment, help ensure respect for human rights and dignity. This strategy supports the core goals of SDG 16 of achieving justice for everyone and building robust institutions that foster long-term social harmony.

## Impediment to the Implementation of Non-Custodial Measures in Nigeria

Despite the vast provisions of non-custodial measures in ACJA, ACJL of various states and NCoS Act, implementation of these measures remains limited. A significant challenge lies in the lack of basic facilities necessary to implement non-custodial penal measures. Many of these alternatives exist only in the statutes and are rarely applied beyond juvenile cases. The Correctional Services lack appropriate facilities and logistics to maintain and monitor the implementation of non-custodial measures, such as supervising probationary inmates. Also, there are limited numbers of correctional homes and community service centres across the states of the federation.

The effectiveness of probation service orders, which require proper supervision, is hampered by obstacles like inadequate transportation and poor coordination between the courts, police, and probation officers. These challenges make effective implementation of probation as a sentencing option difficult in Nigeria's criminal justice system. Addressing these issues is crucial, as strengthening probation services could help alleviate prison overcrowding.

The implementation of non-custodial measures is hindered by a prevailing preference for custodial sentences. Courts have the discretion, particularly for minor offences – such as traffic violations, victimless crimes, misdemeanours, and acts of delinquency – to order non-custodial measures. Section 460(1) and (2) of the ACJA authorises suspended or community service sentences for those found guilty. However, these alternatives are rarely applied, meaning overcrowding in correctional facilities persists. Ezeanokwasa and Negede reveal that many courts favour punitive, retributive sentencing despite laws encouraging non-custodial measures.[52] Many judges remain wary of non-custodial options, equating them with undue leniency and believing they undermine the determination of guilt. Influenced by retributive justice philosophies, the judiciary continues to emphasise deterrence rather than rehabilitation or reform in criminal justice policies.

A major obstacle to implementing non-custodial measures in the criminal justice system is insufficient funding, which is needed to create new structures and develop personnel such as probation and parole officers. Thankfully, the NCS Act introduces the Special Non-Custodial Fund, managed by the National Committee on Non-Custodial Measures, which receives contributions from government sources and donations from individuals and organisations. However, as noted by Izevbuwa and others, it is important to provide clear disbursement guidelines to promote accountability and prevent the misuse of these funds.[53]

The lack of coordination and cooperation among criminal justice participants – judges, prison staff, police, and social workers – undermines effective implementation of non-custodial measures.[54] Adekunle asserts that the criminal justice system must work as an integrated system.[55] To achieve this, all the role players including the victims of crime and their communities, the police, the courts, the Nigerian Correctional Service, should act together to make sure that there are no obstacles in the system, and that it works efficiently and effectively.

## Strategies to Improve the Implementation and Sustainability of Non-Custodial Measures

Improving the implementation and sustainability of non-custodial measures is crucial for promoting a more effective and humane criminal justice system. The following strategies outline how this can be achieved:

### *Supervision*

Supervision aims to reduce re-offending and support offenders' reintegration into society, minimising the chances of relapse into criminal behaviour. If an offender does re-offend, they are referred to as a recidivist, a term derived from the Latin 'recidere,' which means 'to fall back.'[56] Recidivism in Nigeria's Correctional System is driven by multiple factors, with one significant cause being the lack of adequate care and support for inmates. Proper supervision will provide care to the offenders and will help in the proper integration of the offender into society in a way which will minimise the likelihood of a return to crime.

The supervision should be carried out by a competent authority under the specific conditions prescribed by law. Competent authority here may include:

1 Personnel mentioned under section 461(2) of the ACJA who may supervise the implementation of Community Service Orders that may be handed down by the courts. Supervisions shall be under a supervising officer, Non-Governmental Organisation, as may be designated by the Community Service Order.
2 Under section 38 of the NCS Act, the supervising officer for each of the non-custodial measures stated in section 37 of the NCS Act.

The Supervising Officer or personnel responsible for each non-custodial measure is to be appointed by the relevant authority. However, there is ongoing uncertainty regarding the legal basis for this authority to appoint, specifically whether it derives its power from the Administration of Criminal Justice Act or the Nigerian Correctional Service Act of 2019. Section 39 of the NCS Act is to the effect that the Controller-General of the Nigerian Correctional Service shall make regulations prescribing the duties of the supervising officer for each of the non-custodial measures, stated in section 37 of the NCS Act, which includes community service, probation, parole, restorative justice measures, and any other non-custodial measure assigned to the Correctional Service by a court of competent jurisdiction. The Controller-General under the Nigerian Correctional Service – Standing Orders Non-Custodial (Revised Edition) 2020, made provisions for the role of the supervising officer. This role includes ensuring the adequacy and effectiveness of probation supervision, the quality of compliance with service policies and procedures, and the proper oversight of non-custodial orders by a court.[57] To enable supervising officers to effectively fulfil their responsibilities under the Standing Orders, there should be an implementation guide detailing how the Orders' provisions are to be applied. This guide ought to specify the optimal approaches to supervision and treatment for individual cases, ensuring that both are regularly reviewed and modified when needed. The guide should require that supervising officers, while performing their duties under the Standing Order, provide offenders with psychological, social, and material support when necessary. Additionally, officers should offer opportunities to strengthen the offender's community connections and aid their reintegration into society.[58]

***Duration and Condition***

Defining appropriate, achievable, and supportive conditions and flexible durations for non-custodial measures can significantly enhance their implementation and long-term sustainability. The duration of a non-custodial measure should not exceed the period established by the competent authority in accordance with the law. Periodic reviews throughout the duration of non-custodial measures allow for necessary adjustments to align with the offender's progress, compliance, and rehabilitation needs. Under the ACJA, the length of any such measures can be extended or shortened based on how the offender responds to sentencing.[59] Preventing unnecessarily long duration of supervision reduces the risk of institutional dependency and avoids overburdening correctional services.

The conditions and manner in which the defendant must comply with a non-custodial measure should be determined by a competent authority. In setting these conditions, both the needs of society and the rights and needs of the defendant and the victim must be considered. Requirements should be tailored to the offender's specific needs, risks, and rehabilitation goals, which may include employment, education, or community service. Conditions should also integrate access to mental health care, substance abuse programmes, and vocational training to address factors contributing to criminal behaviour. Compliance should be encouraged through incentives, such as reduced supervision periods for good behaviour, to promote engagement, and accountability.

### *Funding*

One of the main strategies for sustaining non-custodial measures in Nigeria is ensuring appropriate funding. Activating the Non-Custodial Special Fund, as provided in section 44 of the NCS Act, is essential. This is especially crucial because past budget constraints have been a major challenge to the effective implementation of these measures.[60] The establishment of the Non-Custodial Special Fund will engage state governments in the management of corrections in Nigeria, alleviating the federal government's burden – particularly as most offenders in correctional centres are from the states where these facilities are located. Adequate funding is crucial for the successful implementation of non-custodial sentences and for strengthening the criminal justice system. Both federal and state governments must promptly contribute to the Special Non-Custodial Fund. All relevant ministries, departments, agencies, and stakeholders should play active roles in mobilising the necessary resources and ensuring timely payments as required under section 44(b). The Comptroller-General is responsible for ensuring the fund is used with integrity, free of corruption, to achieve its designated purpose.

## Conclusion

Based on the analysis, Nigerian correctional facilities are severely congested, making decongestion crucial. A persistent issue is the high number of inmates awaiting trial, which significantly contributes to overcrowding. The heart of the problem is not simply the total prison population, but the disproportionate number of detainees awaiting trial. To ensure access to justice – especially for those who may be innocent – it is essential to explore strategies for reducing this population to more reasonable levels to ensure access to justice to these sometimes innocent 'prisoners.'

Effective implementation of existing non-custodial measures and creatively exploring new alternatives to imprisonment is one of the strategies recommended to achieve this. This chapter has highlighted some of these strategies, including improving funding, addressing any conflict that causes confusion in the roles of the relevant stakeholders and the use of sentencing guidelines to ensure discretion is judiciously utilised. It is important that the courts in Nigeria retrace their steps from the retributive ideology and begin to tilt towards the ideology of rehabilitation in the criminal justice system. This will ensure that non-custodial sanctions recognised globally as the new norm are effectively implemented in Nigeria.

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# 14 From Rhetoric to Reality

## Transforming the Africa Court's Decriminalisation of Petty Offences Advisory Opinion into Tangible Benefits for Africa's Poor

*Stanley Ibe*

### Introduction

The World Bank estimates that 67% of the global population living in extreme poverty is in sub-Saharan Africa.[1] For this population, life is ordinarily difficult. Unfortunately, the continent's criminal justice systems complicate issues. Without access to the three Bs of the system – bribes, bail, and barristers, most poor people in conflict with the law are stuck. Even more devastating is the fact that several African states have maintained colonial-era laws that penalise poverty. Laws creating offences such as loitering – offences originally designed to keep 'subjects' away from areas occupied by the invading colonialists.[2] Offences focusing on the socioeconomic situation of the 'offenders' rather than their acts and/or omissions. Decades after most of Africa became independent, these laws remain in the books and continue to push many poor people into needless incarceration. Fortunately, a network of organisations, including the Pan African Lawyers Union (PALU), decided to challenge the compatibility of these laws with human rights obligations states owe under the *African Charter on Human and Peoples' Rights*.[3]

This chapter reflects on the advisory opinion of the African Court on Human and Peoples' Rights (African Court) on the decriminalisation of petty offences[4] and its implications for the 'fight against poverty and status' on the continent.[5] Following this introduction, Section 2 indicates the level of poverty and its impact on access to (criminal) justice on the continent. Section 3 examines petty offences – what they are, why we should be concerned about them, and how they impact SDG 16.1. Section 4 focuses some attention on what has been done to address some of the concerns about petty offences using the campaign on the Decriminalisation of Poverty and Status (the campaign) as the organising framework. Section 5 offers some recommendations on what more can be done – leading up to a sixth section on possible hurdles on the path to implementation and a final section, which concludes the discussion.

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## Poverty and Access to Justice in Africa

According to a 2021 Hague Institute for Innovation of Law (HiiL) and World Bank study the poor 'receive significantly worse outcomes on their justice journeys.'[6] The reasons for this conclusion are not far-fetched. The poor often have less access to information about how to address their legal problems. They are also less likely to be able to afford the services of a lawyer, to get bail or to pay a bribe. Therefore, they are more likely to suffer violations of rights, including prolonged pretrial detention and limited opportunity to prepare for their cases. Why is this a concern for Africa?

Ordinarily, the interaction between the poor and the (criminal) justice system is concerning anywhere because the system is only as strong as its weakest link. This is especially true for Africa, where a significant portion of its population lives in extreme poverty. A report by the Institute for Security Studies pointed out that before COVID-19, Africa had 445 million people living on less than $1.90 a day.[7] Regrettably, 30 million more joined by the time the pandemic entered its second full year.[8] The situation is made more precarious by the limited priority African states accord official legal aid programming.[9]

As former United Nations Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Carmona highlighted in a joint publication, 'the exclusion of people living in poverty from the protection provided by the law denies them the opportunity to improve their enjoyment of rights.'[10] In a sense, the poor – as a result of their socioeconomic circumstances – often cannot access the protections afforded by the law when their rights are violated, primarily because they do not have the financial and other resources to trigger the system to accord them appropriate remedies. Ideally, the state should take the burden off poor people in this circumstance by providing state-funded legal aid and support. The reality is that this is often either unavailable or inadequate. This is one reason petty offences deserve some attention.

## Petty Offences and Why We Should Be Concerned About Them

Before discussing why we should be concerned about petty offences, a brief description of what constitutes petty offences is necessary.

### *What Are Petty Offences?*

The Open Society Foundations (OSF) describes a petty offence as a 'minor infraction of the law' and provides some examples of these infractions – loitering, i.e., the act of standing somewhere with no apparent purpose.[11] In its *Principles on the Decriminalisation of Petty Offences in Africa*, the African Commission on Human and Peoples' Rights (African Commission) toes a similar line.[12] It defines petty offences as 'minor offences for which the punishment is prescribed by law to carry a warning, community service, low-value fine or short-term imprisonment, often for failure to pay the fine.'[13]

The definition is not problematic until we consider who is impacted by these minor offences. Indeed, a cursory look at the commission's definition suggests that convicts who are unable to pay a low value fine get short-term imprisonment as an alternative. The question is: who is more likely to be unable to pay a low-value fine and therefore end up imprisoned? The answer is obvious – the poor.

#### *Why Are Petty Offences Concerning?*

Petty offences are concerning because they disproportionately affect the poor, marginalised and vulnerable.[14] They are often vague and broad in terms of the discretion they offer law enforcement personnel.[15] This can be seen, for example, in the offence of loitering, which the OSF defines as the act of 'standing somewhere with no apparent purpose.'[16] What are the possible indicators against which an arrest can be made here? The way the offence is described offers the widest possible latitude to arresting institutions.

It bears mentioning that petty offences have a colonial origin and were originally designed as instruments of social control – to keep the natives away from areas occupied by the invaders. With that in mind, it is fair to say that these offences were not intended to protect the general population from crime and criminality.[17] They had the stamp of discrimination based on race and socioeconomic status. Finally, petty offences violate the principles of presumption of innocence and equality before the law.[18]

#### *Petty Offences and SDG Goal 16*

Adopted in 2015, SDGs invite the global community to take steps to end poverty, protect the planet, and ensure that by 2030, all people enjoy peace and prosperity.[19] Goal 16.3 of the SDGs calls attention to the need to promote the rule of law at domestic and international levels. It also enjoins states to ensure equal access to justice for all. The concerns highlighted in the preceding sub-sections make it very clear that petty offences target the poor and the vulnerable and the justice systems in most African states often make it difficult for individuals in this category to access justice on an equal basis with others. It is therefore fair to say that the deployment of petty offences directly violates the obligations assumed by states under goal 16.3 of the SDGs.

### Steps Taken to Address the Concerns – Campaign to Decriminalise Poverty and Status

The campaign currently has a membership of 79 organisations with a mandate to 'repeal laws that unfairly target poor and marginalised people based on their status…'[20] In furtherance of this mandate, the campaign has conducted research, led advocacy, and instituted cases before national, sub-regional, and regional courts. This section reflects on what the campaign has done to address the crisis of criminalisation of poverty and status in Africa.

### *Advocacy*

Perhaps the biggest win of the campaign's advocacy effort is the adoption of the *Principles on the Decriminalisation of Petty Offences* (the principles) by the African Commission in November 2017.[21] The campaign member, African Policing Civilian Oversight Forum (APCOF), led this initiative with support from another campaign member, the Open Society Foundations (OSF). The commission adopted principles aimed at addressing a significant concern: that the poor and socially excluded are often unfairly targeted for minor offences and therefore deserve protection.

The six-part principles make the effort to define decriminalisation as 'changing the law so that an act is no longer illegal' in Part 1. In Part 2, the principles define a purpose – to help African countries guarantee petty offence laws that do not unfairly target poor and socially excluded people. The next three parts describe how petty offences violate rights guaranteed under the charter, including non-discrimination, liberty and security of the person, and dignity. The final part urges states to decriminalise petty offences or provide alternatives to arrest for these offences. It also requests states to address the root causes of poverty and marginalisation rather than punish people who are victims of these conditions. In addition, it urges states to guarantee access to a lawyer, review existing petty offences to ensure consistency with the principles, make the principles widely available, provide training to police officers, collect data and information on the enforcement of petty offences, and report to the commission on steps taken to comply with the principles.

Seven years after adoption, the principles are due for an implementation-focused review. Although that review is beyond the scope of this chapter, it is worth mentioning that although the principles are soft law, they are backed by the authority of the African Charter, which is a binding treaty to which every one of Africa's 55 states has subscribed.

### *Litigation*

The campaign recognised quite early that litigation would play a crucial role in its effort to promote the decriminalisation of petty offences in Africa. Consequently, it decided to approach the African Court on Human and Peoples' Rights through the advisory route primarily because an advisory opinion has a broader scope of implementation – all states that have ratified the court protocol come under its radar.[22] It is important to highlight that the court has both advisory and contentious jurisdiction.[23] The main distinction between the two is that the latter has named defendants on record, and a decision therefore specifically applies to the named defendants.

In a request filed at the court's registry on 11 May 2018, campaign member, Pan African Lawyers Union (PALU) sought the court's opinion on the compatibility of vagrancy laws (laws creating petty offences) and by-laws across the continent with the obligations of state parties in respect of specific provisions of Articles 2,[24] 3,[25] 5,[26] 6,[27] 7,[28] 12,[29] and 18[30] of the African Charter;[31] the *African Charter on the Rights and Welfare of the Child* (African Children's Charter)[32] and the *Protocol to the African Charter on the Rights of Women* (African Women's Protocol).[33] The request also sought the court's opinion on the existence or otherwise of state parties' positive obligation to amend or repeal their vagrancy laws or by-laws.[34]

In the framework of this request, the court invited the African Commission, states, and NGOs to submit amicus briefs. The commission, one state, and a few NGOs responded.[35] Following a review of the briefs and the request, the court released its opinion in December 2020. In it, the court agreed with PALU that by their formulation and application, vagrancy laws criminalise the status of individuals; trigger discriminatory treatment of marginalised and underprivileged individuals and thereby deny those individuals the guarantee of equal treatment before the law, contrary to Articles 2 and 3 of the *African Charter*.[36] The court also agreed that the application of vagrancy laws violates Article 5 concerning the dignity of the human person in that its application deprives underprivileged and marginalised people of their dignity by unlawfully interfering with their efforts to build or sustain decent lives.[37]

Concerning labelling people as 'rogues,' 'vagabonds,' or 'vagrants' and ordering them to be relocated to another area against their will, the court ruled that this practice degrades the dignity of such people, just as their arrest on account of these labels amounts to arbitrary arrests.[38] Specifically on violations of the *African Charter*, the court held that arresting individuals under vagrancy laws violates their right to liberty (Article 6); the guaranteed presumption of innocence (Article 7); right to freedom of movement (Article 12), and the duty to assist families and prevent discrimination against women and children (Article 18). In addition, the court resolved that the application of vagrancy laws involving the arrest, detention, and sometimes forcible relocation of women and children was incompatible with Article 3 of the African Children's Charter, which prohibits discrimination; Article 17 on fair trial and Article 24 of the African Women's Protocol, which prescribes the duty to provide special protection to women in distress.[39]

In the final analysis, the court resolved that the combined effect of Article 1 of the *African Charter*, Article 1 of the *African Children's Charter*, and Article 1 of the *African Women's Protocol* leads to the conclusion that all states owe an obligation to either amend or repeal their vagrancy laws and by-laws so as to make them compatible with the referenced international instruments.

### *Advisory Opinion as a Transformative Tool*

Following this landmark decision, several campaign members have been keen to use it as a tool to transform the unfair treatment of poor and marginalised people across the continent. They have deployed follow-up litigation, awareness raising, advocacy for law and policy reform, research, and documentation to make the case for the decriminalisation of petty offences across Africa. Some of these efforts are highlighted below.

Firstly, Sierra Leone-based campaign member, AdvocAID, with the support of the Institute for Human Rights and Development in Africa (IHRDA) in Banjul, filed a case at the Community Court of Justice of ECOWAS challenging the constitutionality of alleged discriminatory loitering laws, specifically the *Public Order Act of 1964*[40] and the *Summary Convictions Offences Ordinance* of 1906.[41] The case provided the first opportunity for West Africa's regional court to make a pronouncement on the criminalisation of petty offences using the African Court's advisory opinion as a tool. On 7 November 2024, the court issued a decision directing the Republic of Sierra Leone to amend, modify, or repeal its existing domestic laws regarding loitering in public places. This directive aims to ensure compliance with the country's obligations under Articles 1, 2, 3(1), and 12 of the African Charter on Human and Peoples' Rights.[42]

Beyond follow-up litigation, campaign members have been involved in awareness raising at national and regional levels. In Ghana, the Commonwealth Human Rights Initiative (CHRI) organised a national conference on the decriminalisation of petty offences in March 2022 in Accra. The conference, which had the support of OSF, drew attention to the provisions of sections 291, 292, and 298 of the *Criminal Offences Act* of 1960, criminalising drunkenness, riotous living, nuisance, and disturbance to the public. Although the Ghanian Attorney General, Godfred Yeboah Dame, admitted that section 296 was similar to a petty offence, he argued that decriminalising petty offences must be weighed against the state's overriding obligation to guarantee public safety and public order. That is a fair point to make. However, decriminalising petty offences is actually one way of guaranteeing public safety because the more people locked up on account of their socioeconomic status, without addressing the underlying reasons for that, the more bitter and criminally minded people churned out by often congested prisons with limited rehabilitative capacities.

In September 2022, the campaign met in Cape Town, South Africa. One outcome of this meeting was the *Cape Town Declaration on Decriminalising Poverty and Status*,[43] which was conceived as a consensus-based document for use in many advocacy contexts by members. The Declaration invites stakeholders across the world to challenge the increasing use of laws that unfairly target poor and marginalised people. It also challenges the misuse of mandatory pretrial detention for petty offences and the overreliance by states on criminal law to address problems triggered by socioeconomic inequalities. With respect to recommendations, the Declaration requests the convening of an intergovernmental meeting of experts to study ways and means of addressing the global crisis of criminalisation of poverty, status, and activism and the possibility of proposing a global declaration of basic principles and guidelines.

With respect to law reform, Nigeria-based campaign partner, Lawyers Alert, has led the charge for a reform of existing subnational-level legislation recognising petty offences. As of the time of this writing, the organisation has drafted and is supporting efforts to place legislative proposals before four state parliaments – Bauchi, Benue, Kano, and Niger.[44] These initiatives are commendable on their own. Combined, they represent a substantial effort to consign minor offences to the annals of history. There is still a significant amount of progress to be made. The issue of petty offenses affects 38 out of 55 countries in Africa. This problem has persisted for nearly 60 years, and it will take time to change both the laws and the prevailing policing culture that supports them.

## Recommendations on What More Can Be Done

From the brief reflections above it is clear that a lot of work has been done. However, there is still room for improvement. This section recommends several steps to be taken in the interest of the majority of poor who need to see tangible benefits of the decision of the African Court. These recommendations include establishing country-level baselines and success indicators; conducting a review of implementation at both state and continental levels, ensuring that state reporting reflects steps taken to implement the principles and decision of the court; and advocacy for legal and policy reform at state level.

### *Country Baselines and Success Indicators*

Baselines provide the basis to compare start with mid- or end points. Freudenthal and Narrowe assign three interconnected functions to baselines: evaluation, monitoring, and planning.[45] The evaluation function embodies the identification of benchmarks and indicators by which progress will be measured during the monitoring phase. Benchmarks and indicators provide clarity and direction for monitoring and planning. Where they do not already exist, campaign members and in-country partners may wish to conduct country baselines to ascertain how compatible domestic legislation, policies, and practices are with the African Court decision and the *Principles*. The process of developing these baselines offers an additional benefit, namely, a chance to agree on a set of indicators by which to measure success as implementation proceeds. When concluded, these baseline reports could be domiciled in a platform that is widely accessible by individuals and groups within and beyond the state. For those outside the state, the baseline could offer comparative data and information.

### *State/Continental Reviews*

The country baselines and subsequent implementation reports provide the basis for state-level debate on how well (or badly) the state is performing on its obligation to implement this decision. It also provides the impetus for policy and decision-makers to be more intentional in promoting implementation. Beyond the states, these reports offer a tool for comparative review of states' implementation efforts as well as data/information for a continental review report. It also has the potential to trigger healthy competition as states make the effort to set standards one for another.

### *State Reporting Under the African Charter*

The baselines and periodic reviews could form the basis for states' reports to the African Commission on Human and Peoples' Rights under its state reporting mandate. Article 62 of the *African Charter* requires states to report to the commission every two years on steps they have taken to ensure compliance with the provisions of the charter. Since both the *principles* and the court's decision focus on the provisions of the charter, states are required to report on them. Indeed, the *principles* made very clear provisions in Part VI for this purpose.

### *Advocacy for Law/Policy Reform*

To turn the tide on petty offences on the continent, laws and by-laws enabling penalisation of poverty and status must be repealed or revised. Advocating for these reforms must be sustained across the continent by campaign members and other partners interested in fairer and more equitable criminal justice systems. Beyond revising or repealing laws and policies, there is a crucial need to change practices. That can be done by incentivising good practice.

## Hurdles to Realising Implementation

The issue of implementation is a challenge that every system faces. In terms of domestic law, implementation is generally easier because states have law enforcement institutions to assist in enforcing the laws. However, international law poses a different set of challenges. When considering the commission's principles and the court's advisory opinion, it's important to examine the potential obstacles to implementation and explore ways to overcome them as much as possible.

### *The (Non) Bindingness of Soft versus Hard Law*

The chapter had earlier highlighted that the commission's principles fall under soft law, which is considered non-binding. What is interesting about soft law is that it could morph into hard law.[46] One of the most notable examples of this phenomenon is the transformation of the non-binding Universal Declaration on Human Rights (UDHR) into two binding international treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). States' insistence on the non-binding nature of soft law creates obstacles for implementation compared to binding treaty law. However, the *Principles* present a slightly different story. They constitute soft law firmly grounded on a treaty – the African Charter. Indeed, the preamble to the *Principles* makes clear that they derive their authority from Article 45(1)(b) of the charter, which empowers the African Commission to 'formulate and lay down principles and rules' with a view to 'solving legal problems relating to human and peoples' rights and fundamental freedoms…'

It is reasonable to conclude from the analysis above that the distinction between hard and soft law is not a significant issue in this context. Nonetheless, it is important to bear in mind that states still struggle to comply with the decisions of the African Commission and in fulfilling their obligations relating to state reporting even though these obligations stem from a binding treaty.[47] The contours of the struggle to improve implementation of decisions of the commission is well beyond the scope of this chapter but suffice to say that getting states to the point where they recognise that the principles do not fall under the rubric of soft law simpliciter is good progress.

### *The Non-Bindingness of Advisory Decisions*

Judge Jose de Barrose Azevedo formerly of the International Court of Justice (ICJ) made one of the more compelling arguments against advisory decisions. He feared that these decisions could

> Rise to the anomaly of settling a dispute without having the authority of a judgment and sometimes without the consent of the interested parties; in this way, the principle of voluntary jurisdiction, which was at the core of the system, ran the risk of disappearing.[48]

The absence of state consent is often at the heart of the challenge to advisory decisions. In the instant case, that challenge is mitigated by the fact that the African Court invited states to present amicus briefs and one state, Burkina Faso, submitted a brief. Does submitting an amicus brief amount to consenting to the case? Possibly. Does it make the advisory decision binding on those states? Perhaps. Can we extend that bindingness to all states, whether they submitted to the jurisdiction of the court or not? The straightforward answer is no. Only the states that have ratified the court's treaty can be bound by its decisions.[49] This brings us back to the question of whether advisory decisions are binding.

To the extent that ratification signals an interest to be bound by the decisions of the African Court and the outcome of the advisory opinion is a decision of the court, one could argue that ratifying states are bound. Even if the argument that the decision is merely advisory is accepted, there is still an obligation under the principal treaty – the African Charter – to report to the African Commission on the implementation of its provisions, which would include the previously referenced principles. In summary, there is no escaping the obligation to implement for any state that has ratified.

### *The Absence of Political Will to Implement*

Belafi describes 'political will' as four interconnected ideas – a sufficient set of decision makers, a common understanding of a particular problem, a commitment to support, and a commonly perceived effective policy solution.[50]

Implementation of the decision or opinion to decriminalise petty offences is both a legal and political process. No matter how brilliant the decision of a court or the opinion of a commission, it amounts to little or nothing if states do nothing about implementation. What states do is often informed by several factors, including their interests, the influence of other states, and the coercive or persuasive power of political institutions with some leverage over the states. In the context of the African Court's advisory decision and the African Commission's principles, the influence of other states and the coercive/persuasive power of political institutions with leverage are crucial.

This is why implementing activities at the state and regional levels is recommended to promote peer pressure, which can help strengthen the political will of state actors to take action. When states falter on implementation, political institutions of the African Union, such as the Executive Council (formerly Council of Ministers) and especially the Assembly of Heads of States, are primarily responsible for applying political pressure. Regrettably, these institutions do not have a great record of promoting the implementation of decisions of the court. Indeed, the institutions did nothing when Benin (2020), Côte d'Ivoire (2020), Rwanda (2016), and Tanzania (2019) withdrew their Article 34(6) declarations on spurious grounds.[51]

## Conclusion

The African Court advisory opinion on the decriminalisation of petty offences, together with the commission's *Principles*, offer an excellent opportunity to address the crisis of criminalisation of poverty and status on the Continent. This chapter calls attention to the high poverty levels on the Continent and what that portends for access to justice, particularly in contexts where official legal aid is largely either non-existent or inadequate. The chapter also briefly highlighted what the campaign has done in terms of implementation and what more can be done to translate the court's laudable decision into tangible outcomes for most of the poor. What is left is for states, civil society, and other relevant stakeholders to act, keeping in mind that implementing the decision and principles reinforces the obligations assumed under Goal 16.1 of the SDGs. In doing so, they must be aware of some of the possible obstacles to implementation, including the non-bindingness of soft versus hard law; the non-bindingness of advisory decisions; and the contentious question of the absence of political will.

## Notes

1 World Bank Group, *Poverty, Prosperity & Planet Report 2024* (World Bank Group 2024)6https://openknowledge.worldbank.org/server/api/core/bitstreams/f75dd18d-4e3f-44f9-b455-7f0d8e189609/content accessed 18 December 2024.

2 See Anneke Meerkotter, 'Litigating to Protect the Rights of Poor and Marginalised Groups in Urban Spaces' (2019) 74 (1) *University of Miami Law Review* 1–36 https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf accessed 18 December 2024.

3 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

4 *Request for an advisory opinion by the Pan African Lawyers Union (PALU) on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa. No. 001/2018*, African Court on Human and Peoples' Rights (Dec. 4, 2020). Unlike the contentious jurisdiction which only concerns states before the Court, the advisory jurisdiction provides an opportunity for every state party to the Protocol establishing the Court to contribute to the decision-making process. Additionally, the focus of a court exercising contentious jurisdiction is the case before it. For a court exercising advisory jurisdiction, the focus is a cause.

5 The campaign to decriminalise poverty and status is a global coalition of organisations that advocate for the review and repeal of laws that target people based on poverty, status or activism. For more on the campaign and its activities, see www.pettyoffences.org

6 Martin Gramatikov, Rupinder Kaur, Isabella Banks, and Kavinta Heijstek-Ziemann, *Poverty & Access to Justice* (HiiL & The World Bank Group, 2021) 8 https://www.hiil.org/wp-content/uploads/2021/10/HiiL-report-Poverty-and-Access-to-Justice-web.pdf accessed 18 December 2024.

7 This represented 34% of the continent's population and 9 times the global average. See Enoch Aikins, and Jacob Du Toit Mclachlan, 'Africa Is Losing the Battle against Extreme Poverty' *ISS Today*, 13 July 2022 https://issafrica.org/iss-today/africa-is-losing-the-battle-against-extreme-poverty accessed 18 December 2024.

8 The African Economic Outlook for 2022 points out that 30 million people on the continent fell below the poverty line by 2021. The continent also lost 22 million jobs. See Africa Development Bank, *African Economic Outlook 2022* https://www.afdb.org/en/knowledge/publications/african-economic-outlook accessed 18 December 2024.

9 See United Nations Development Programme*, Legal Aid Service Provision: A Guide on Programming in Africa* (UNDP 2014) v. https://www.undp.org/sites/g/files/zskgke326/files/publications/Legal%20Aid%20Service%20Provision%20-%20A%20Guide%20on%20Programming%20in%20Africa.pdf accessed 18 December 2024. According to the Report of the UN Special Rapporteur on Extreme Poverty & Human Rights (A/66/265) on Penalization of Poverty, a significant obstacle in breaking the cycle is the 'inability of persons living in poverty to access legal assistance as they are unable to afford private legal representatives and legal aid is often unavailable or inadequate.' Report submitted to the 66th session of the UN General Assembly on 4 August 2011 https://digitallibrary.un.org/record/709907 accessed 18 December 2024.

10 Magdalena Carmona, and Kate Donald, *Access to Justice for Persons Living in Poverty: A Human Rights Approach* (Finland Ministry of Foreign Affairs 2014) 7 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437808 accessed 18 December 2024.

11 Open Society Foundations, 'Why it's Time to Repeal Petty Offence Laws.' 21 May 2021 https://www.opensocietyfoundations.org/explainers/why-it-s-time-to-repeal-petty-offense-laws accessed 19 December 2024.

12 African Commission on Human and People's Rights (ACHPR), Principles on the Decriminalisation of Petty Offences in Africa (Banjul, 2018).

13 African Commission on Human and People's Rights (ACHPR), Principles on the Decriminalisation of Petty Offences in Africa (Banjul, 2018).

14 Clare Ballard, Patrick Burton, Louise Edwards, Abdirahman Maalim Gossar, and Chumile Sali, *Poverty Is Not a Crime: Decriminalising Petty By-Laws in South Africa* (African Policing Civilian Oversight Forum 2021) 16 https://apcof.org/wp-content/uploads/030-study-on-decriminalising-poverty-in-south-africa-clare-ballard-patrick-burton-louise-edwards-abdirahman-maalim-gossar-and-chumile-sali.pdf accessed 19 December 2024.

15 Take the examples the African Court on Human and Peoples' Rights provided in its decision on the Advisory Opinion on the Decriminalisation of Poverty in Africa: 'idle and disorderly, begging, rogue and vagabond, no fixed abode, homeless, wanderer and reputed thief.' It is unclear by what parameters law enforcement will determine any one of these 'offences.'

16 Open Society Foundations, 'Why it's Time to Repeal Petty Offense Laws.' May 2021 https://www.opensocietyfoundations.org/explainers/why-it-s-time-to-repeal-petty-offense-laws accessed 19 December 2024.

17 Meerkotter (n 2). The author describes vagrancy laws as a 'measure of social control over marginalized groups in society.' Vagrancy-related offences (similar to petty offences) generally criminalise 'persons who do not have a means of subsistence and from a police perspective, cannot give a good account of themselves.'

18 Primarily by enabling the detention of poor suspects – who are often unable to access bail or lawyers - pending trial. Although the presumption is universal, a survey by the Open Society Justice Initiative found that no right is so broadly accepted in theory but so commonly violated in practice as the right to presumption of innocence. See Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention* (Open Society Foundations 2014) https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf accessed 19 December 2024.

19 United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' https://sdgs.un.org/2030agenda accessed 19 December 2024.

20 These organisations include ADVOCAID, *Advocat Sans Frontieres* (ASF-France), African Policing Civilian Oversight Forum (APCOF), Amnesty International, Commonwealth Human Rights Initiative (CHRI), Hope Behind Bars Africa, International Commission of Jurists (ICJ-Kenya), International Legal Foundation (ILF), Network of African National Human Rights Institutions (NANHRI), Open Society Foundations (OSF), Pan African Lawyers Union (PALU), Penal Reform International (PRI), Prisoners Rehabilitation & Welfare Action (PRAWA) and Southern Africa Litigation Centre (SALC). For a full list, see https://decrimpovertystatus.org/ accessed 19 December 2024.

21 It is worth noting that campaign partners have led and continue to lead advocacy initiatives at the national and sub-regional levels. For instance, Lawyers Alert, a campaign partner from Nigeria is leading legislative advocacy to review non-compliant laws on petty offences across four states – Bauchi (Northeast), Benue (North Central), Kano (Northwest) and Niger (North Central). See *Campaign Digest*, June 2022 https://mailchi.mp/c5a143d3014d/campaign-digest-june2022 accessed 19 December 2024.

22 As of 20 December 2024, 34 states have ratified the Protocol establishing the Court compared to 8 states that have deposited article 34(6) declarations allowing direct access by NGOs and individuals.

23 Article 4 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples Rights empowers the court to provide an advisory on any legal matter relating to the charter or other relevant human rights instrument provided the application is made by a state party, an organ of the African Union or an African organisation recognised by the African Union. Article 5 of the Protocol creates the contentious jurisdiction and empowers states, NGOs and individuals to bring cases against states alleged to have violated human rights provided the defendant state has ratified the protocol and made the declaration under article 34(6) allowing access to the court by NGOs and individuals. The case could relate to interpretation and/or application of the African Charter, the court protocol or any other human rights instrument ratified by the defendant state.

24 Right to enjoy all the rights recognised under the charter without any form of discrimination.

25 Right to equal protection of the law and equality before the law.

26 Right to personal dignity.
27 Right to liberty and security of human person.
28 Right to be heard for any offence and right not to be punished for an offence which did not constitute one at the time it was committed.
29 Right to freedom of movement and residence.
30 The duty of states to assist families; ensure eliminating of discrimination against women and protection of the rights of women and children; duty to provide special measures of protection for persons living with disability.
31 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21. I.L.M 58 (1982) and entered into force 21 October 1986.
32 Adopted 1 July 1990, OAU Doc. CAB/LEG/24.9/49. Entered into force 29 November 1999 https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf accessed 19 December 2024.
33 Officially Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted 1 July 2003. Entered into force 25 November 2005 https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf accessed 19 December 2024.
34 The states in question cut across anglophone and francophone Africa. For example, the following francophone states have penal codes which define vagrants as persons with no fixed address or means of livelihood or trade or profession – Algeria, Burundi, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Cote d'ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Sahrawi Arab Republic, Senegal and Togo. Botswana, Gambia, Malawi, Nigeria, Seychelles, Tanzania, Uganda and Zambia are anglophone countries with laws punishing 'rogues' and 'vagabonds' described as 'suspected persons and reputed thieves who have no visible means of livelihood.' For their part, Central Africa Republic, Ethiopia, Eritrea, Mauritius, Sierra Leone, Sudan and South Sudan have offences of 'being idle and disorderly.' All of these offences aim to achieve the same purpose – punish people for their socioeconomic situation. They are overly broad and clearly discriminatory against these people. See 'Submission on the Decriminalization of Homelessness and Extreme Poverty.' Report presented by the Campaign on the Decriminalization of Petty Offences to the Special Rapporteur on the Right to Adequate Housing & the Special Rapporteur on Extreme Poverty and Human Rights on 30 November 2021 https://www.ohchr.org/sites/default/files/2022-03/CampaigntoDecriminalizePoverty.docx accessed 20 December 2024.
35 The African Commission; Network of National Human Rights Institutions in Africa (NANHRI); Burkina Faso; Centre for Human Rights, University of Pretoria; Human Rights Centre, University of Miami; Kenyan section of the International Commission of Jurists (ICJ – Kenya); Lawyers Alert; and Open Society Justice Initiative submitted amici briefs.
36 Decrim. Advisory Opinion, p. 21, para. 75.
37 Decrim. Advisory Opinion, pp. 21-22, paras. 80-82.
38 Decrim. Advisory Opinion, p. 23, paras. 86-87.
39 Decrim. Advisory Opinion, p. 38, para. 140.
40 Section 7 of the Public Order Act provides that

> Any person loitering in or about any stable house or building, or under any piazza, or in the open air, and not having any visible means of subsistence, and not giving a good account of himself, shall be deemed an idle and disorderly person, and shall, on conviction thereof, be liable to imprisonment for any period, not exceeding one month.

41 The case was filed on 21 April 2022. See Joanna Howarth, 'Court Case Filed against Sierra Leone to Overturn Discriminatory Loitering Laws.' *Advocaid Press Release*, 4 May 2022 https://advocaidsl.org/press-release-court-case-filed-against-sierra-leone-to-overturn-discriminatory-loitering-laws/ accessed 20 December 2024.

42 Joanna Howarth, 'ECOWAS Court Orders Sierra Leone to Repeal Loitering Laws Violating Human Rights' *Premium Times* (Online) 7 November 2024 https://www.premiumtimesng.com/foreign/africa/752627-ecowas-court-orders-sierra-leone-to-repeal-loitering-laws.html?tztc=1 accessed 20 September 2025.
43 The Campaign to Decriminalise Poverty and Status, *Cape Town Declaration on Decriminalising Poverty and Status* (Stellenbosch, September 2022) https://cdn.penalreform.org/wp-content/uploads/2023/01/Cape-Declaration.pdf accessed 20 December 2024.
44 See *Campaign Digest*, June 2022 https://mailchi.mp/c5a143d3014d/campaign-digest-june2022 accessed 20 December 2024.
45 Solveig Freudenthal, and Judith Narrowe, *Baseline Study Handbook: Focus on the Field* (3rd edn, SIDA 1993) 9–10 https://cdn.sida.se/publications/files/sida34545en-baseline-study-handbook.pdf accessed 20 December 2024.
46 Sarah Joseph and Joanna Kyriakakis, 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power' [2023] 36 *Leiden Journal of International Law* 335, 337.
47 In reviewing states implementation of decisions of the commission from 1988 to 2018, Chairman Okoloise found that only 13–14% of all decisions received full implementation. See Chairman Okoloise, 'Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27 https://www.researchgate.net/publication/326609507_Circumventing_obstacles_to_the_implementation_of_recommendations_by_the_African_Commission_on_Human_and_Peoples'_Rights/link/5b58b421a6fdccf0b2f486f0/download accessed 21 December 2024.
48 Individual opinion of Judge Azevedo in the *Advisory Opinion on the Conditions of a State to Membership of the United Nations* (Article 4) 1948 International Court of Justice Report 57, 73.
49 As of 20 December 2024, 34 of Africa's 55 states have ratified the Court's Protocol. They are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire. Comoros, Congo, Gabon, Gambia, Ghana, Guinea Bissau, Kenya, Libya, Lesotho, Mali, Malawi, Madagascar, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Republic of Congo, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Zambia. See https://www.african-court.org/wpafc/basic-information/#:~:text=54%20of%20the%2055%20Member,the%20principles%20set%20out%20therein accessed 20 December 2024.
50 Carmen Belafi, 'Where There's a Will There's a Way: The Role of Political Will in Creating/Producing/Shaping Education Systems for Learning.' 2022 RISE INSIGHTS Series1,3 https://doi.org/10.35489/BSG-RISE-RI_2022/043 accessed 20 December 2024.
51 See African Court website https://www.african-court.org/wpafc/declarations/ accessed 20 December 2024.

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