



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



Working Paper

South African Human Rights Commission

"The role of South Africa in following up the implementation of Alternative Sanctions and Measure Law"

The International Conference: "Alternative Sanctions and Measures Law: Qualitative Experience in Criminal Legislation"

HE Mr. Andre Hurtley Gaum

Chief Executive Officer - Human Rights Commission,
South African Human Rights Commission

27 - 28 September 2022

Manama - Kingdom of Bahrain

1. Introduction

National Human Rights Institutions ("NHRIs") plays a crucial role in promoting and monitoring the effective implementation of international human rights standards at a national level.¹ The role of NHRIs in the implementation of alternative sanctions in criminal law is very important and feeds into alternatives to imprisonment. In turn, this assists in addressing high incarceration levels and ensures the protection and promotion of human rights in general.

Although imprisonment is considered as a measure of last resort in many leading and modern democracies, direct imprisonment has serious challenges and is counterproductive at times, especially where minor crimes are concerned. Except for a steep rise in detainees and prisoners, which is alarming worldwide,² direct imprisonment has had no significant impact on public safety. As a result, a need arises for alternative sanctions to imprisonment based on a human rights approach.

¹ Accessible at: <https://www.ohchr.org/en/countries/nhri>. Accessed on 23 September 2022.

² R Walmsley World prison population list (2005).



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



2. National Human Rights Institutions

NHRIs, such as the South African Human Rights Commission ("Commission"), have an important role to play in ensuring that the criminal justice system is mindful of and compliant with the Constitution of the Republic of South Africa, 1996 ("Constitution"), particularly the Bill of Rights,³ and various international treaties and relevant legislation such as the Criminal Procedure Act, 51 of 1977, especially where crimes have been committed and the state intervenes. The Commission is mandated by the Constitution to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic.⁴

3. Criminal Sanctions and Human Rights

The right to freedom of movement⁵ is a basic human right which is protected at a national and international level. However, imprisonment stifles liberty and hits at the heart of human rights as a theory and a practical tool, hence liberty rights are protected at national and international levels. That said, imprisonment is one of the exceptions to these rights and serves as a justification for the limitation of rights such as the freedom of association;⁶ freedom of movement; and the right to vote,⁷ in some jurisdictions.

Notably, imprisonment should not be seen as a means to an end in itself. Traditional sanctions are expensive, and largely ineffective in addressing societal challenges. It is estimated that prisons collectively cost governments over \$70 billion per annum to operate – South African prisons are maintained at a cost of R10 billion per annum. Further, traditional sanctions consistently target the poor and marginalized groups in the sense that these sanctions are at times applied more harshly to these groups. Without mentioning countries by name, minorities and foreign nationals are often grossly over-represented in the criminal justice systems and in prisons. According to recent UN reports, in some jurisdictions, minorities are represented in larger numbers in prison, more than double their share of the total population.⁸

³ For example, section 35 of the Constitution.

⁴ Section 184(1)(a)-(c) of the Constitution.

⁵ Section 21 of the Constitution.

⁶ Section 18 of the Constitution.

⁷ Section 19 of the Constitution.

⁸ <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



4. Alternative Sanctions

Although a case has been made for direct imprisonment, and there are merits to this form of criminal sanction, it is apparent that as a result of the current conditions of overcrowding across the globe,⁹ an effective correctional service cannot be expected. Due to the negative consequences of traditional methods of sanctioning individuals, namely: overcrowding in prisons; human rights violations associated with imprisonment and costs related to operating the prison system, it is important to consider alternatives. These alternative sanctions are more human rights compliant methods of punishment, geared towards efficiency and effectiveness, and will be discussed in detail below. Further, such methods ought to be more orientated towards rehabilitation and the involvement of the community, rather than purely punitive motives.

4.1 Diversion

Diversion, in the South African context, is one example of an alternative sanction to imprisonment. Diversion is used to divert the offender from the formal court procedures and towards a more constructive and positive solution. Diversion is based on the principles of restorative justice, which requires that offenders accept responsibility for actions, actively seek means to change course and engage their victim(s) with the aim to initiate a healing process for themselves, their families, and the community at large.¹⁰ In terms of section 51 of the South African Child Justice Act 75 of 2008 and the Criminal Procedure Act, diversion is described as a means to deal with offenders in conflict with the law, however, outside of the criminal justice system. This programme is directed at what would be considered petty or minor offences and is geared towards promoting reconciliation between the offender and the community. Another primary aim of the diversion programme is to prevent the stigmatization that often accompanies offenders who have previously been incarcerated.

On an international level, diversion can be a meaningful tool to de-escalate the tension between communities and the police and uplift poor and marginalized communities. The police could use this method to regain the trust of the communities they serve and show that the interest of the police is not to merely arrest and imprison. On the side of the offenders and the communities, this alternative sanction initiates mediation and addresses historical traumas.

⁹https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

¹⁰<https://www.westerncape.gov.za/generalpublication/whatdiversion#:~:text=Diversion%20is%20based%20on%20the,the%20victims%20and%20the%20community.>



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



4.2 Community service

Another alternative sanction to imprisonment in South Africa is community service. The aim of community service and its programmes is to exercise supervision and control over offenders and persons who have been sentenced to or placed under correctional and parole supervision in the community. This alternative sanction falls under the umbrella of community corrections and involves the reduction of overcrowding in prisons and the costs associated with direct imprisonment. Further, this alternative sanction is geared towards rehabilitation and reintegration of offenders into the community, in this way addressing stigma too. Unlike the diversion programme, which occurs outside the criminal justice system, community service is administered by the criminal justice system. In South Africa, community service is administered under the Criminal Procedure Act of 1997, read together with the Correctional Services Act of 1998.

4.3 Suspended sentences

In respect of suspended sentences, a South African offender is released on the condition that he or she would be liable to serve the assigned period of direct imprisonment in the event that he or she violates any of the conditions of a suspended sentence. The advantages include that an offender is prevented from going to prison and is allowed to continue with normal activities in the community. Generally, this sanction is ordered in circumstances where the offender is remorseful and possess no further threat to the community, and in instances where the type of offence is not violent in nature. Lastly, studies suggest that offenders who receive suspended sentences are less likely to re-offend than those given custodial sentences.¹¹

4.4 Declassification and decriminalization of petty offences

The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa of 2003¹² endorsed recommendations calling for reducing the size of prison populations in Africa. The Plan of Action recommended for the "decriminalization of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents" as a strategy to reduce the prison population. It is over a decade and fewer countries have made any progress in implementing this strategy endorsed by the African Commission on Human and Peoples' Rights ("ACHPR"). Most of the offences identified by the ACHPR as ripe for repeal amounted to

¹¹ <https://www.russellwebster.com/the-effectiveness-of-sentencing-options/>

¹² ACHPR /Res.64 (XXXIV) 03: Resolution on the adoption of the "Ouagadougou Declaration and plan of action on accelerating prison and penal reform in Africa". 2003.



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



nothing more than the criminalization of poverty, homelessness, and unemployment.¹³ Certain offences, such as loitering and being a 'rogue' and 'vagabond', have their origins in the colonial period and are no longer applicable in Africa anymore. There is an urgency for it to be repealed. Research shows that its continued enforcement is disproportionately experienced by poor and marginalized populations, including persons with disabilities. The existence of these laws, and their enforcement, are justified by proponents with unsubstantiated arguments based more on anecdote and bias than facts.

Petty offences in South Africa are prohibited by by-laws that focus on issues such as nuisance, noise, trading on the streets and littering. The motive for the enactment of laws which criminalise petty offences was to maintain public order; public safety; and crime prevention. An analysis of the trends of the violation of the by-laws shows that most of those arrested are the homeless people, street children, beggars, informal traders, and sex workers. This situation is mostly caused by their socio-economic circumstances. The continuing enforcement of these laws punishes, segregates, and undermines the dignity of persons based on their status. These laws permit for the arrest of the poor without a warrant, without an investigation, and without evidence of an intent to commit, or actual commission of an offence. They are inconsistent with the right to equality, non-discrimination, and equal protection of the law.

These laws are vague and permit arbitrary arrests as they give law enforcement officials wide discretion for enforcement. This has resulted in unnecessary arrests. Consequently, there has been overcrowding in places of detention which is a violation of the right to liberty and security of the person and freedom from arbitrary arrest and detention. The question is whether criminalising such conduct is effective, or, if in fact, these by-laws overburden an already strained criminal justice system.¹⁴

Petty offence cases place a heavy burden on the police, courts, and correctional centres. If decriminalised, this could create financial savings for the police and courts and reduce overcrowding in correctional centres. Secondly, arrests and imprisonment for petty offences disproportionately affects poor and marginalised people.

A suitable approach would be to introduce warnings and fines encompassing other restorative justice approaches. This would serve as suitable for minor contraventions of the law at law enforcement (arrest) level.

¹³ Muntingh, L and Petersen, K. "Punished for Being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences" 2015.

¹⁴ Accessible at: <https://www.saferspaces.org.za/blog/entry/poverty-is-not-a-crime-decriminalise-and-declassify-petty-offences>. Accessed on 23 September 2022.



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



5. Conclusion

The United Nations Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules")¹⁵ list a wide range of dispositions other than imprisonment for the sentencing stage and which, if clearly defined and properly implemented, have an acceptable punitive element. The list includes:

- (a) Verbal sanctions, such as admonition, reprimand, and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment; and
- (m) Some combination of the measures listed above.¹⁶

The above list can also be implemented as alternative sanctions to imprisonment.

In light of the above, it is evident that traditional sanctions undermine fundamental rights and that the use of imprisonment has little to no impact in terms of public safety. To this effect, community-based sanctions, which are wholistic and human rights-driven, address concerns of access to rehabilitative resources and services which is considered to be a more efficient, economic, and humane measure towards the treatment of the offender.¹⁷

¹⁵ Adopted by General Assembly resolution 45/110 of 14 December 1990.

¹⁶ Rule 8.2 of the Tokyo Rules.

¹⁷ Singh, S. "Alternatives to imprisonment in South Africa: a historical perspective, 1980's to present".
Accessible at:



المؤتمر الدولي: "قانون العقوبات والتدابير البديلة:
تجربة نوعية في التشريع الجنائي"

International Conference: "Alternative Sanctions and Measures
Law: Qualitative Experience in Criminal Legislation."

2022 سبتمبر 27-28 Sep. 2022

المؤسسة الوطنية لحقوق الإنسان
National Institution for Human Rights

مملكة البحرين - Kingdom of Bahrain



Finally, alternative sanctions include many different initiatives, such as victim/offender reconciliation programmes, restitution and compensation, fines, community service, electronic monitoring, and supervision programmes. That said, one is mindful of the fact that these initiatives are not necessarily less expensive options of punishment because it requires community involvement, and at times, may not enjoy the support of the community.

The role of NHRIs is always to safeguard human rights, even of those who have transgressed against the state and community. Therefore, it is important for NHRIs to promote alternative means to traditional sanctions. NHRIs have instruments, both domestic and international, to call on government to implement alternative sanctions, and to draw the attention of government to these alternative human rights compliant sanctions, other than imprisonment. Further, it is incumbent upon NHRIs to monitor the implementation of alternative sanctions because it is beneficial for communities and ensures that human rights are protected at all times. Human rights are not for us, but those who do not look like us – and alternative sanctions are the best way to extend human rights and human dignity to such people.

Released on 27 September, 2022

Manama - Kingdome of Bahrain

End /-