Avocats Sans Frontières

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PERSPECTIVES ON PREVENTIVE DETENTION IN BURUNDI: PUTTING STANDARDS INTO PRACTICE

Analyses of interviews on stakeholder perceptions

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Developments in criminal procedure in Burundi

In Burundi, deprivation of liberty as a response to crime or delinquency is a relatively recent phenomenon. Before colonisation, Burundian society had been putting in place mechanisms to respond to violations of standards without resorting to detention (fines, restitution, exile or subjugation for the most serious offences). It is only over the course of colonisation by Western states that there was a rise in the number of prisons built, whereby detention grew to be seen as the primary means of repressing behaviour regarded as detrimental to the public order.

At the same time, the introduction of written law profoundly transformed the Burundian criminal procedure, which had previously been governed by customary rules. Drawing up a legal framework governing preventive detention, meaning detention ordered pending a verdict on the culpability of the person having committed the offence, became one of the concerns of the Burundian legislature, who considered this measure a violation of the fundamental right to freedom of movement which prevailed at the time.

After adoption of the first texts in 1959 – which were innovative in terms of the codification they implied, but which lead to the systematisation of recourse to detention before judgment – and an initial reform in 1999, the Burundian legislature finally adopted a new Code of Criminal Procedure on 3 April 2013. This was more demanding in terms of procedure, but above all more respectful of the rights of defence in conformity with international human rights standards.

The Constitution and the Code of Criminal Procedure (CCP) now both stipulate that *«all persons shall be presumed innocent until proven guilty in the course of a public trial during which their right to a proper defence has been appropriately safeguarded»* (Article 40 of the Constitution), whereby *«freedom is the rule, and detention the exception»* (Article 110 CCP).

The gap between law and practice

The legislative progress made in Burundi on the subject of preventive detention should be welcomed, as should the efforts towards reducing the number of detainees awaiting judgment. Whilst 62.4% of the Burundian prison population was made up of individuals under preventive detention in December 2012, this percentage fell to 51.8% in December 2013[1].

However, in spite of these improvements, the number of detainees awaiting judgment, and therefore presumed innocent, remains too high. This questions the «exceptional» nature of preventive detention guaranteed in legal texts, and creates a gap between law and practice.

1 http://www.prisonstudies.org/country/burundi.
2 *Idem*.
3 Figures provided by the Directorate General of the Prison Administration of Burundi (DGAP).
4 Through the framework of the study carried out by Léonard Gacuko and Caroline Sculier.

The impact of preventive detention on prison overcrowding

Recent statistics[2] illustrate the major problem posed by prison overcrowding in Burundi, which is a result of excessive recourse to preventive detention for persons suspected of having committed an offence.

Although progress has unquestionably been made over the past few years (the occupancy rate of prisons was approaching 276.1% of their capacity in August 2011, compared to 157.3% in December 2012), prison overcrowding is on the rise again today in Burundi. In July 2014, there were a total of 8,344 detainees being held in prison (193.7% of capacity), 2,686 of which were in the Mpimba Central Prison in Bujumbura, which has a capacity of only 800 prisoners[3].

In order to better understand this phenomenon, as well as the continuing gap between law and practice, ASF questioned stakeholders from the penal chain about their perceptions of their own roles, and of those of other stakeholders. Qualitative interviews were arranged between August and September 2014 with officials from the Public Prosecution Service, former judges, lawyers and prison administration officials, to bring to light all of their perceptions and concerns on the subject of preventive detention[4].

Prevailing resistance

The interviews revealed a certain number of obstacles, sometimes in the form of public perceptions, which are detrimental to the effectiveness of standards.

Presumption of guilt

The person placed in detention before judgment is often guilty in the eyes of the population (the polar opposite of the presumption of innocence guaranteed by law). This influences the work of judicial stakeholders who, in turn, come under significant social-pressure, and who say they fear people will take justice into their own hands if part of the population believes a detainee has been wrongfully freed. Such a conception may explain a certain loss of a sense of responsibility on the part of judges themselves, who remain only marginally accountable to their hierarchy.

The absence of accountability

There is a greater number of mechanisms available for coordination between stakeholders than in the past, and these have been improved, but follow-up remains inadequate. Failures to respect the rules and abuses committed usually go unpunished.

Cronyism in the justice system

Moreover, the justice system in Burundi still very much works on the basis of personal relations: relationships between people often take precedence over the institution or the role they represent in principle, which is detrimental to transparent administration of justice. In the Burundian cultural context, distrust is rampant, rooted in years of conflict and complex inter-community relations, and as a result social or territorial links are very important. In case of disagreement, it is more likely that the matter will be settled between individuals rather than through confrontation.

The absence of financial and material resources

The study did not specifically focus on the issue of insufficient resources, but it cannot be left unmentioned: its consequences are felt at all levels.

Stakeholder perceptions

The Public Prosecution Service

The Public Prosecution Service is present throughout the criminal procedure, holding a quasi-monopoly over proceedings (it accuses, prosecutes and implements decisions) and a degree of power sometimes deemed overwhelming by the stakeholders interviewed. One of them, himself a magistrate in the Public Prosecutor's Office, lamented the absence of added value in the proceedings within the Public Prosecution Service compared to 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 then considering the case of the defence. It also stands accused of preferring collusion and deal-making to respecting the law, as it fosters special relationships both with criminal police officers and judges. However, Burundian law is unambiguous: *«The Public Prosecution Service is the body responsible for public prosecutions, and shall demand application of the law»* (Article 47 CCP), as well as ensuring *«strict respect of laws authorising restrictions of individual freedom»* (Article 52 CCP).

Judges

In the view of some people seeking justice, judges are nothing but «assistants to the government», whose power consists in «awaiting orders» from the Public Prosecution Service. The lawyers interviewed confirm this fact, and lament 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. It must be recalled, nonetheless, that the role of Burundian judges is not rated very highly, and that they are subject to significant social pressure. The public administration, which has the support of the population, frequently interferes in the administration of justice, sometimes for private motives, sometimes for electoral ones.

Faced with this uncomfortable situation, judges tend to avoid debates on interim release and on the legality of preventive detention. There are multiple testimonies of detainees being influenced during hearings, after the judge explains to them that a debate on the legality of the matter would solely prolong their case (and therefore, their period in detention), implying that their lawyer is wasting their time. Put in such an awkward position, the lawyer knows that their client does indeed risk spending more time in detention if they insist on debating the legality of that detention.

Lawyers

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 chain: people seeking justice say lawyers are *«powerless»* in the face of the weight of the administration and the Public Prosecution Service. 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 administration

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 (Article 115, paragraph 4 CCP), administration 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.

Some factors which explain the lengthening delays in the pre-judgment procedure and which as a result impede effective administration of justice:

- 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 service the decision itself, which results in considerable delays in the procedure.
- The 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 20 times simply because the Public Prosecutor's Office has not yet received the file from their counterparts at the court of first instance.

Conclusions and recommendations

Despite promising legislative progress and the efforts made, there is still a wide gap between standards and practice in Burundi when it comes to detention before judgment. Too often, the stakeholders in the penal chain misuse recourse to detention, regarded as the only response to offending conduct, and therefore struggle to guarantee the rights of defence and to ensure respect of legal provisions.

On the basis of the findings brought to light by the qualitative interviews, recommendations were drawn up and shared with the stakeholders in the penal chain during a campaign on detention, organised in October 2014 by Avocats Sans Frontières and the Ministry of Justice:

Policy recommendations:

- 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.
- 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.
- 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.

Operational recommendations:

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

Avocats Sans Frontières' approach towards detention before judgment

In collaboration with its partners in Democratic Republic of Congo, Burundi, Tunisia and Uganda in particular, Avocats Sans Frontières (ASF) is taking structured action in defence of persons placed in detention before judgment (custody and preventive detention), who require access to a high-quality justice system which respects the rule of law.

Several interdependent factors justify ASF's intervention in this field:

- The persons placed in detention find themselves in a severely vulnerable situation:
  - The prison population is largely composed of persons who were already in a fragile situation before entering prison.
  - Detention exacerbates their vulnerable situation by stopping them from continuing their pre-existing economic activities, and places them in poor sanitary conditions.
  - Detention results in marginalisation of individuals, who will subsequently have to reintegrate themselves into society. It also gives rise to spiralling criminality.
- Within the countries where ASF is active, detention before judgment is one of the main causes of prison overcrowding.
- It is also a frequent source of major human rights violations.

Based on these findings, ASF recommends:

- Enhancing the ability of the detainees to act effectively as fully-fledged stakeholders, in particular through awareness-raising activities and legal advice.
- High-quality legal advice and judicial assistance from lawyers and providers of legal aid for persons placed in detention before judgment.
- Commitment on the part of those involved in providing access to justice to establish a penal system that respects the rule of law.

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Avocats Sans Frontières

Founded in Belgium in 1992, Avocats Sans Frontières (ASF) is an international NGO specialising in the defence of human rights and support for justice in countries in fragile and post-conflict situations. For more than 20 years, ASF has been implementing programmes which improve access to justice for persons in vulnerable situation.

For more information about ASF's projects on detention before judgment, visit **www.asf.be/detention**

Detention before judgment: at what cost?
A video by ASF
www.youtube.com/asfinmotion

www.asf.be

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