

## 10. Alternatives to Arrest for Nuisance-Related Offences

*The arrests of persons for minor nuisance-related offences raise a number of complex questions: What should the scope of policing be in Malawi? Is it an appropriate response to arrest and detain a person for a minor, nuisance-related offence when this not only affects the rights of the accused, as discussed in the previous chapter, but also diverts considerable police resources away from investigating more serious crimes? Where do we draw the line between criminal, restorative justice, primary justice, municipal regulation and social development responses to concerns around inappropriate nuisance-related behaviour in public spaces? What are alternatives to the arrest of persons suspected of committing minor nuisance-related offences? This chapter starts exploring some of these questions through a cursory literature review.*

### Introduction

The African Commission on Human and Peoples' Rights has noted its concern at the abusive use of police custody and pre-trial detention in Africa which severely infringes on the rights of individuals in custody.<sup>430</sup> As explained in the previous chapters, this report suggests that some nuisance-related offences in the Penal Code should be repealed and do not warrant police enforcement. However, it is accepted that there are some offences which would be retained, but for which the police should not be exercising their powers of arrest. It is for this reason that we think it is pertinent to also consider alternatives to the arrest of persons suspected of having committed nuisance-related offences. The problems associated with such arrests are explained in the previous chapter.

The Australian Law Reform Commission in its report on Criminal Investigation stated the concerns as follows:

*Our society rightly puts a premium on freedom of movement. Arrest is the complete negation of freedom. As a result it casts a considerable onus on those who would justify it. Further, arrests cost the state a considerable amount of money, both in terms and as compared to other ways of bringing people to court. Innumerable man-hours are spent transporting,*

---

<sup>430</sup> Resolution of the African Commission on Human and Peoples' Rights meeting adopted at its 52<sup>nd</sup> Ordinary Session in Yamoussoukro, Cote d'Ivoire, 9 to 22 October 2012. Subsequent to this, the African Union released a discussion document on draft Guidelines on the Use and Conditions of Police Custody and Pre-Trial Detention in Africa, 21 February 2013.

*guarding and processing the arrestee. American experience suggests that an arrest costs the state on average five times the cost of a summons. As well, American, Canadian, English and Australian studies have all shown the eventual outcome of a case is markedly affected according to whether or not the accused is in custody before the trial or come to court by way of release on bail or a summons proceeding. A partial causal connection at least has been claimed. One further disadvantage of arrest which it is appropriate to mention is the fact that there is strong disapproval, in many parts of society, of anyone who has an arrest record.*<sup>431</sup>

## Purpose and Scope of Policing

The Malawi Police Service's Strategic Development Plan (July 2012 to June 2017) has identified as one of its roles the prevention of crime. The strategy for preventing crime includes increased visibility and accessibility by police, and deployment based on crime analysis. The assumption is that the increased presence of officers in uniform will deter the commission of crime.<sup>432</sup> The anticipated activities include the introduction of street duty units in urban areas; deployment of police officers from support and administrative functions to frontline policing; conduct of intelligence driven patrols and operations including sweeping operations; and increased deployment of police officers in public places.<sup>433</sup>

The police must assert its role to address crime in a manner which respects existing laws and the rights of citizens, whilst it also addresses the specific concerns of communities. From previous chapters it is clear that police who engage with the public and are involved in arresting accused should be fully conversant with the laws of Malawi, including recent amendments.

Terpstra notes that the police hold important symbolic power as a source of "some powerful, efficacious collective representations about community, order, the distinction between good and evil, and about security and protection."<sup>434</sup> According to Terpstra, the legitimacy of police has both a normative and social aspect:<sup>435</sup>

- Social legitimacy is not static and requires that citizens understand the authority of police, accept that police determine their behaviour, trust the motives of police and believe in their capacity to protect them.
- Normative legitimacy is based on the values of democratic policing and requires police officers to adhere to rule of law, observe human rights, be externally accountable and be responsive.

However, there is often an assumption about what the concerns of the communities really are and additional research and consultations should be conducted with communities to

---

431 Report 1, 1975 at para. 28 quoted in Law Reform Commission of Western Australia, Project 85, *Police Act Offences*, Report (1992) 168.

432 Interview with Kayira and Kainja *supra* note 264.

433 Government of Malawi, Malawi Police Service, *Strategic Development Plan 1 July 2012 to 30 June 2017*, Lilongwe, 6.

434 J Terpstra "Two theories on the police – The Relevance of Max Weber and Emile Durkheim to the Study of the Police" (2011) *Int Journal of Law, Crime and Justice* 1 – 11, 7.

435 *Id* 8.

find out what role they perceive for the police. In many countries, the police struggle to maintain a balance between respect for human rights and rule of law. This results in police practices which are either partisan, corrupt or which are prone to excessive force. Thus, it is not always clear whether communities accede to the power of police because they view such power as legitimate, or whether it is rather a case of communities being too unequal to assert their rights. In many instances, individuals might have become so used to abusive police powers that it is accepted as a norm. This was suggested by interviews with sex workers during the research. However, in the context of a democratic society, it is the responsibility of government to ensure that its police force is publicly accountable to the citizenry.

Marx defines democratic policing as “a publicly accountable police force subject to the rule of law embodying respect for human dignity which can intervene in citizens’ lives only under limited and carefully controlled conditions in an equitable fashion.”<sup>436</sup> For Marx, the term police neutrality refers to the “equal enforcement of the law focusing on the behaviour of the suspect, regardless of irrelevant characteristics such as ethnicity, gender, class and life style, or the personal attitudes of the enforcer”.<sup>437</sup> Thus, it is the responsibility of the government to ensure equitable enforcement of laws by police and to address current concerns regarding the legitimacy of police.

In general, only 18 percent of victims of crime in Malawi report crimes to the police.<sup>438</sup> Under-reporting of cases is a reflection on general public confidence in the ability, accountability and responsiveness of the police. A recent survey indicates that 31 percent of respondents were of the opinion that the police were “fast”, 32 percent felt that they were “professional”, 35 percent viewed them as “fair” and 20 percent felt that they were not “corrupt”.<sup>439</sup> The survey further revealed a low police visibility, especially in rural areas and a police population ratio in the rural areas of 1:6485 compared to the urban the ratio of 1:266.<sup>440</sup> Much can be done to improve the public’s perceptions of the police, especially if less police resources are spent on futile and abusive arrests of persons for minor nuisance-related offence.

## Limits of Preventive Justice

The police have always had a role in preventing crimes from taking place. Thus, the criminal procedure laws allow police to arrest someone without a warrant if they have a reasonable suspicion that a crime will be committed. Whilst such preventive justice is often taken for granted, there are also some critiques with regard to the extent to which government should empower police where no crime has yet taken place.

Punitive prevention measures have historically been used on occasions when a person has already committed a crime and shown some recidivist tendencies. So, for example, a person’s

---

436 GT Marx “Police and Democracy” in Amir, M and Einstein, S (eds) *Policing, Security and Democracy: Theory and Practice* (2001) Office of the Int. Crim. Justice, 8, <http://web.mit.edu/gtmarx/www/dempol.html> (last accessed: 2 June 2013).

437 *Id.*

438 National Statistical Office (NSO) *Malawi Justice Baseline Survey 2010* (2011) UNDP & Government of Malawi.

439 *Id.* 129.

440 *Id.* 16.

sentence could be lengthened if there is a risk of reoffending. Some vagrancy provisions contained in the English vagrancy laws and incorporated in Malawi's Penal Code contain an element of punitive preventive justice – for example, allowing police to arrest someone where the person has no explanation for their whereabouts or means of subsistence.<sup>441</sup>

Some preventive policing practices have come under specific scrutiny – e.g. order-maintenance practices, which assume that minor disorder, left unattended, will cause serious crime (commonly referred to as “broken-windows” policing).<sup>442</sup> Harcourt notes that the empirical basis for broken-windows policing has not been justified – “the alleged correlation between disorder and serious crime fails to take into account other factors that may contribute to the deterioration of a neighbourhood”.<sup>443</sup> If we look at the police responses to the use of sections 180 and 184 of the Penal Code, the police officers argue that these sections provide an important tool to prevent more serious crimes from being committed. However, there is no evidence that this is in fact the case.<sup>444</sup> Even the argument that minibuses should be banned on the basis of the crimes committed by some minibuses lacks veracity in this context since there are many other related factors contributing to the crimes committed against public transport passengers. Sampson and Raudenbush suggest that “attacking public disorder through tough police tactics may thus be a politically popular but perhaps analytically weak strategy to reduce crime”.<sup>445</sup> Harcourt further criticises preventive searches and profiling or labelling of some persons as more likely to commit crimes.<sup>446</sup>

Where police are able to work with social services personnel to address underlying causes of behaviour, there have been significant benefits – including diversion from the criminal justice system and reduced costs associated with the incident of arrest, more appropriate use of prison facilities and police time, improved relationships between police and communities and improvement of police morale.<sup>447</sup>

## Community Policing and Alternative Responses to Arrests for Nuisance-Related Behaviour

The community policing movement is described by criminologists as a gradual adoption of a change in philosophy in an attempt to “re-legitimise” the police.<sup>448</sup> Community policing encourages the police to work closer with communities in addressing crimes and to develop problem-solving strategies. The community policing approach focuses on more democratic decentralised policing, placing more discretion and responsibility in the hands

---

441 Section 184(b) of the Penal Code.

442 BE Harcourt “Punitive Preventive Justice: A Critique” *Chicago Institute for Law and Economics Working Paper* No. 599 (2012), 10 (forthcoming in A Ashforth & L Zedner (eds) *Preventive Justice*, Oxford University Press).

443 *Id* at fn 28.

444 Harcourt *supra* note 442 at fn 31 (“There are no statistically significant relationships between disorder and purse-snatching, physical assault, burglary or rape when other explanatory variables are held constant.”)

445 Quoted in Harcourt *supra* note 442, 14.

446 *Id* 17.

447 United States Interagency Council on Homelessness *supra* note 447, 27.

448 JP Crank, “Institutional Theory of Police: A Review of the State of the Art” (2003) *Policing: An Int Journal of Police Strategies & Management* 26(2):186-207, 189.

of uniformed police officers, encouraging more flexible leadership styles and partnership with communities which focuses on community needs, values and problems.<sup>449</sup> For Marx, community policing is “based on the assumption that policing will be more effective if it has the support of, and input from the community and if it recognises the social service and order maintenance aspects of the police role.”<sup>450</sup>

The Malawi Police Service’s Strategic Development Plan includes as an output the training of all police officers on values and principles of community policing activities.<sup>451</sup>

This report does not attempt to evaluate the Malawi Police Service’s community policing strategy. The report does seek to raise questions about whether measures could be employed within the community policing concept to develop alternative approaches to nuisance-related concerns which communities have, which does not involve criminalisation of, or arrest for, minor offences.

A problem which could arise is the extent to which all police officers embrace the notion of community policing. Walsh critiques the community policing model on similar grounds:<sup>452</sup>

- Community policing as a philosophy is often not wholly adopted and implemented by departments, relegating it to specific units;
- The organisational change needed to support the community policing model and strategies is “often incomplete”; and
- Operationally, implementation depends on patrol officers who are inexperienced.

Thus, there is a need for the notion of and principles underlying community policing to be taught to and applied by police officers in all branches of the Malawi Police Service.

### **Police Practices on Street-Level**

According to Biradavolu, “criminologists have shown that everyday policing – the socially messy arena of regulating daily life in public places – is not guided by clearly delineated laws but emerges from what Shearing and Ericson call the ‘craft of policing’”.<sup>453</sup>

This ‘craft of policing’ is determined by three elements of institutional organisation:

- As an institutional organisation, the police serves its constituents and its “behaviour and structure reflects the values in its institutional environment”.<sup>454</sup>
- Organisations loosely couple formal practices with actual behaviour. Thus there is a distinction between the rules of professional policing and the practices on street-level.<sup>455</sup>
- Since the police functions on ‘good faith’, it is sometimes difficult to supervise and “critically evaluate on-going organisational practices”.<sup>456</sup>

---

449 WF Walsh, “Compstat: An Analysis of an Emerging Police Managerial Paradigm” (2001) *Policing: An Int Journal of Police Strategies & Management* 24(3) 347-362, 351.

450 Marx *supra* note 436, 4.

451 Government of Malawi *supra* note 433, 10.

452 Walsh *supra* note 449, 351.

453 Biradavolu *supra* note 356, 1543.

454 Crank *supra* note 448, 187.

455 *Id* 188.

456 *Id*.

A further important consideration is the difference between police officers within the same institutional structure. Cochran and Bromley, in their research on the existence of police sub-culture in the United States, note that there are three types of police officers: adherents to a policing sub-culture (16%), a new sub-culture of police officers who emphasise a community-service orientation (25-30%), and average deputies (50%).<sup>457</sup> Their classification of police services into two sub-cultures: the negative, cynical police sub-culture outlined above, and a newer community oriented police culture, is similar to findings of other studies which distinguish between police officers who focus on crime fighting and those who are service oriented.<sup>458</sup> Paoline, Myers and Worden support claims that there have been changes in police culture based on two developments, the paradigm shift to community policing and the increased diversity within the police force.<sup>459</sup>

It is important to consider the various factors which contribute to the police's use of arrest as opposed to alternative measures in response to nuisance-related behaviour.

### **Developing Individualised Solutions**

An aspect of community policing is where police officers are allocated to particular areas with the goal of becoming familiar with local inhabitants. Such community policing seeks to present an innovative solution to persistent crime-related problems. Crime prevention efforts should always involve the community, including street children, in view of the rights of children recognised in the Child Care, Protection and Justice Act. For example, a dedicated officer who befriends street children and acts as a resource for positive change in their lives could well reflect a more effective way to address the causes of crime than arrests of street children. Another option is to locate the guardians of children to ensure that they take responsibility for the care of the children before or after criminal conduct occurs.

Whilst Malawi's social development services are immensely underfunded, there have also been creative solutions to divert persons from the criminal justice system, for example through the use of primary justice interventions at community level or Victims Support Units (VSUs) at police stations which adopt a more individualised approach:

- Currently there are VSUs based in all police formations in Malawi. This includes main district police stations as well as sub-stations. VSUs are a component of the Community Policing Services Branch and their key functions include: Counselling; First Aid; advice; referral; interviewing of complainants in cases of sexual abuse, rape, defilement, indecent assault and other offences that require privacy and confidentiality; dealing with cases of domestic violence; helping victimised children; and conducting general sensitisation on human rights and policing.<sup>460</sup>
- Chiefs' functions are currently informed by the Chiefs Act of 1967, which relate to "preservation of public peace, the carrying out of traditional functions in accordance with customary law and operating under directions given by the district commissioner". The Government of Malawi has indicated its commitment to ensuring that the informal

---

457 JK Cochran & ML Bromley "The Myth of the Police Sub-Culture" (2003) *Policing: An Int Journal of Police Strategies & Management* 26(1):88-117, 109.

458 *Id.*

459 EA Paoline et al "Police Culture, Individualism and Community Policing: Evidence from Two Police Departments" (2000) *Justice Quarterly* 17(3) 575-605.

460 Malawi Human Rights Resource Centre *Guidelines for the Support and Care of Victims of GBV and HIV/AIDS related abuses*, Malawi Police Service, Community Policing Services, Victim Support and Child Protection.

legal system “is accessible, efficient and equitable”.<sup>461</sup> Currently, the informal or primary justice system is generally more accessible to ordinary persons, particularly in rural areas where 84 percent have used it at some point, compared to 16 percent in urban areas.<sup>462</sup> Despite their shortcomings, traditional courts are popular with 73 percent of Malawians saying that they prefer to settle disputes through informal channels.<sup>463</sup> One of the key advantages of the system is its affordability - 87 percent of those who use the informal system find it affordable.<sup>464</sup> However, perceptions vary concerning the ability of chiefs to deliver justice fairly - 67 percent of Malawians surveyed in 2008 thought that chiefs are corrupt.<sup>465</sup>

The United Nations Office for Drug Control and Crime Prevention (UNODCCP) highlights the potential benefits of a more informal procedure where parties can take “an active part in deciding on the appropriate outcome, all underlying circumstances can be considered, and social pressure can often be exerted on the offender to comply with the decision”.<sup>466</sup>

## Alternative Approaches to Arrests

Apart from the informal options referred to above, implemented by VSUs and informal justice mechanisms, as alternatives to arrest, additional alternatives to arrest are briefly discussed below.

### Cautions or Warnings

It is suggested that the police should first caution a person and instruct them to cease particular conduct, before exercising their power to arrest the person.<sup>467</sup> A police officer could also issue a formal caution as opposed to arrest. Arrests should really be a last option because they take up significant police time.<sup>468</sup> The law requires that the police should only proceed with arrest when a summons would not be effective to bring the person before the court. It appears that police often fail to give adequate consideration to the option of a summons. It can be argued that any form of custody should be avoided unless the safety of the community is at stake.

The United Kingdom has been making use of a non-statutory “prostitutes caution” for many years. In terms of this procedure, a person who falls foul of the provision of soliciting in public for the purpose of prostitution would not be prosecuted until at least two cautions have been given.<sup>469</sup> The police are also encouraged, where they find someone soliciting for the first time in a three month period, to direct the person to a non-criminal justice intervention.

461 Government of Malawi, *Malawi Growth and Development Strategy 2006-2011* (2006) 68.

462 National Statistical Office, *supra* note 438, 94.

463 *Id* 107.

464 *Id* 87.

465 MG Tsoka & B Chinsinga, *Malawi Round 4 Afrobarometer Survey* (2008) Afrobarometer.

466 United Nations Office for Drug Control and Crime Prevention (UNODCCP) *Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 1-126, 41.

467 Community Law Reform Committee of the Australian Capital Territory, *Report on Street Offences*, CLRC 15 (1993), 5.

468 *Id* 6.

469 Home Office Circular (1959).

Section 32A of the Criminal Procedure and Evidence Code now allows caution and release procedures to take place after an arrest, but we would argue that caution should also be considered a viable option in lieu of the arrest of a person.<sup>470</sup>

### **Move-On Power**

The police's ability to order persons to move on has been suggested by some as an alternative to arrest in cases of minor offences. This would definitely be less resource intensive on the police. Whilst such powers would be good to use in a case where there is a disturbance, it could potentially violate the rights of persons when they are told to move on when they have not committed any offence. There have accordingly been objections to the police's use of move-on powers against, for example, homeless persons.<sup>471</sup>

A move-on power for police might be more appropriate than an arrest where the police officer has reasonable grounds for believing that the person is likely to commit an offence. So, a police officer could ask a person to explain his or her presence and if the person does not give an explanation, ask the person to leave the vicinity. Such a power for police could be more useful than the offence in section 184 of failing to give account of oneself. Thus, a person would only commit an offence where he or she does not abide by the police's order to move on.

### **Recording of Names**

Another option instead of arrest is the recording of a person's name. If the person committed a minor offence, the taking of the person's name, instead of arresting the person, might well act as a deterrent. However, if the person has not committed any offence, the taking of names could cause tension between the police and the community.<sup>472</sup> Some jurisdictions have held that a police officer is not permitted to seek a person's name and address unless the officer suspects that the person has committed an offence or may be a witness to the commission of an offence.<sup>473</sup> Section 31 of the Criminal Procedure and Evidence Code allows the police to arrest someone who does not give his or her name when requested to do so.

### **Administrative Fines**

On-the-spot fines or administrative fines are used in some jurisdictions and would discharge a person from further criminal process. Such fines are usually only applied in minor cases relating to traffic or environmental violations. Such fines should be limited to minor offences where there is little scope for a court to find that the offence was not committed. However, where police corruption is prevalent, the introduction of such fines is likely to increase police harassment of vulnerable groups such as sex workers.

The imposition of a fine does not mean that the person has to pay immediately. It would therefore be important to ensure sufficient civic education that persons know their rights in relation to such fines and know that payment of such fines can be deferred to a local government office or can be contested through a simple procedure. This would reduce the risk of corruption. Payment of the fine would mean that the person does not have a criminal conviction. Such fines should not be imposed on children.<sup>474</sup>

---

470 OSISA *supra* note 425, 40.

471 Community Law Reform Committee of the Australian Capital Territory *supra* note 469, 4.

472 *Id.*

473 Law Reform Commission of Western Australia, *Police Act Offences*, Report (1992) 181.

474 Community Law Reform Committee of the Australian Capital Territory *supra* note 469, 9.



The problem with administrative fines is that the amount is not tailored to the individual offender, the tendency is to lower the standard of proof in such cases and it would not work where the police are not able to identify the offender and thus not able to enforce non-payment.<sup>475</sup> A significant problem in Malawi is that many persons would be unable to pay such fines, thus again resulting in the criminal justice process being applied to the poor in particular. An administrative fine would only be appropriate in cases where the community is aware of the exact nature of the offence and the penalty involved.

### **Public Awareness and Community Consultation**

The police officers interviewed for this study have noted a range of interventions which could be used to engage communities to discuss nuisance-related behaviour and find solutions for such behaviour which would not involve arrest. These would include public sensitisation through pamphlets and radio programmes, civic education, and public meetings.

## **Conclusion**

The reality is that many of the offences listed in sections 180 and 184 of the Penal Code relate to poverty. Thus, sweeping exercises or police interventions which seek to arrest persons who beg, sleep in a public place, urinate in public or frequent public areas without any particular purpose tend to target the poor almost exclusively. Such criminalisation of human activities does not address the underlying causes of such behaviour.<sup>476</sup> It is not surprising that Coldham noted that punishment has historically played such a central role in the fight against crime in Africa that there is no interest in devising alternative strategies to combatting crime.<sup>477</sup>

It is clear that alternatives to arrest exist. In addition, it would be possible to craft specific additional alternatives to arrest which are situated within the Malawian context. Such measures should be developed through both research and community consultation.

The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that penalisation measures should not be designed and implemented without a meaningful dialogue with persons living in poverty.<sup>478</sup>

---

475 *Id.* 10.

476 United States Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalisation of Homelessness* (2012) 7.

477 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" *Journal of African Law* (2000) 44: 218-238, 230.

478 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 9.

