

An Annual
Publication of
Human Rights
Awareness and
Promotion Forum



THE HUMAN RIGHTS ADVOCATE

FIFTH ISSUE - NOVEMBER 2018

When being poor and 'undesirable' is a crime:
Reflections on the impact of the 'Idle and disorderly'
laws on marginalised groups in Uganda





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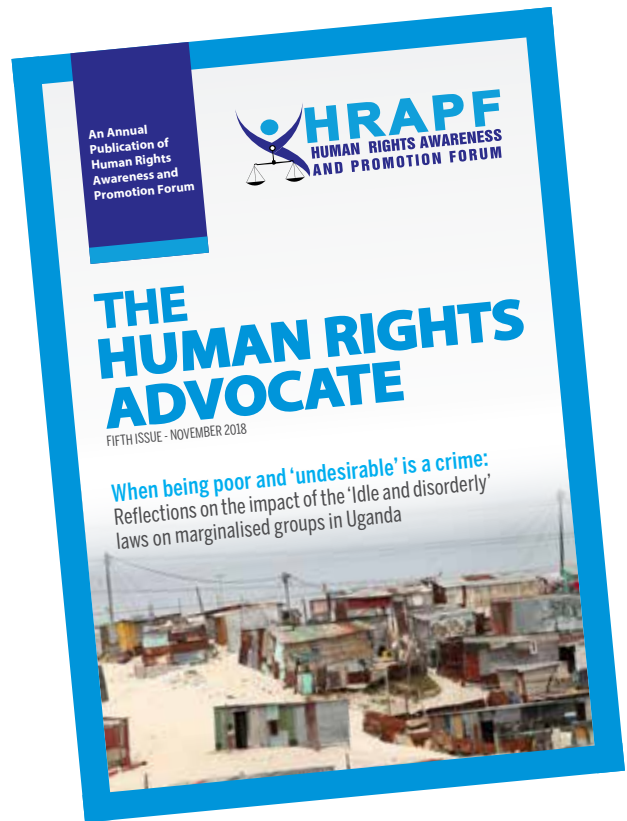
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INTRODUCTORY AND BACKGROUND NOTE

This is the fifth issue of *The Human Rights Advocate*, an annual legislative advocacy magazine published by Human Rights Awareness and Promotion Forum (HRAPF). Every issue of the magazine is dedicated to considering how a particular law or bill impacts upon marginalised groups in Uganda.

HRAPF is an independent, not-for-profit human rights organisation, which promotes, defends and raises awareness on the rights of marginalised groups in Uganda. This is done by means of legal research, legislative advocacy, legal and policy analysis, documentation and strategic litigation.

This fifth issue of *The Human Rights Advocate* focuses on section 167 and 168 of the Penal Code Act. These provisions criminalise 'being idle and disorderly' and 'being a rogue and vagabond'. Together, these two crimes can be referred to as the 'Idle and disorderly' laws. These laws mainly target persons that are poor and live in urban areas.

HRAPF, through its specialised legal aid clinic which has been in operation since 2010, has come across many cases where the 'Idle and disorderly' laws have been used to target for arrest poor and marginalised members of society. Members of the marginalised target groups that HRAPF work with: people who are lesbian, gay, bisexual, transsexual or intersex (LGBTI); sex workers; and drug users, are frequently charged under these provisions. In 2016, HRAPF undertook a study to enable the organization to better understand the extent of the use of these provisions and their impact on marginalised groups in Uganda.¹ In short, it was found that the offence of 'being a rogue and vagabond' is extensively implemented in Uganda and that the police usually carries out arrests under these provisions in swoops, which are sudden raids and which usually involve a large number of persons found in the targeted area, indiscriminately being arrested.

¹ Human Rights Awareness and Promotion Forum *The implications of the enforcement of 'Idle and disorderly' laws on the human rights of marginalised groups in Uganda* (2016).

It was also found that despite the rampant arrests, the provisions have little prosecutorial value in that only about half of arrests under these provisions lead to cases being heard in court. The study found that it is very difficult to prove the elements of the offences under section 167 and 168 of the Penal Code Act since these are not clearly defined. In instances where court cases end in conviction of the charged persons, this is largely because the accused persons do plead guilty for the sake of trying to avoid a long prison sentence. Some persons accused under these provisions, even if they are never convicted, will spend multiple months on remand. These offences contribute to the problem of overcrowding in Uganda's prisons.

The study furthermore found that the enforcement of these laws disproportionately impacts on the lives and rights of vulnerable and marginalised groups in Uganda, including LGBTI persons, sex workers and People Who Use Drugs. The implementation of these laws lead to the violation of a myriad of rights protected in Uganda's Constitution and the various regional and international instruments to which the country is a party. Rights typically violated include: the right to equality and non-discrimination; the right to dignity and freedom from cruel, inhuman and degrading treatment; the right to liberty; the right to a fair trial; and the right to life.

The findings of the study confirmed that action needs to be taken against the 'Idle and disorderly' laws in Uganda. HRAPF has joined the regional campaign on the decriminalisation and declassification of petty offences in Africa. The advocacy work of this campaign has led to the adoption of a set of Principles

HRAPF has joined the regional campaign on the decriminalisation and declassification of petty offences in Africa.

on the Decriminalisation of Petty Offences in Africa at the 61st Ordinary Session of the African Commission on Human and People's Rights (African Commission) in November 2017. The purpose of the Principles is to provide a standard for the review of domestic laws creating petty offences in African countries in line with the human rights protected by the African Charter on Human and Peoples' Rights.

HRAPF is of the view that there is no place for petty offences that target people simply because they are poor or different from the norm in a constitutional dispensation. The organisation is taking the lead in developing a court case to challenge these provisions in Uganda. This issue of *The Human Rights Advocate* serves as an advocacy tool in the local campaign accompanying the case. It brings together academic reflections and opinions on the 'Idle and disorderly' laws in order to consider all the reasons why and angles from which the provisions ought to be challenged.

The magazine starts out with an editorial which takes a detailed look at the provisions of the 'Idle and disorderly' laws and the primary reasons for challenging them in court. The second article offers a brief historical background on the development of the 'Idle and disorderly' laws and considers how these laws are no longer appropriate in a modern constitutional democracy. The next article is a summary of the findings of HRAPF's study on the implications of 'Idle and disorderly' laws in Uganda by the Head of HRAPF's Research and Advocacy Division. This is followed by an update of the

work of the campaign to decriminalize and declassify petty offences in Africa. The next article is a commentary considering section 167 and 168 in the context of police discretion to arrest a suspect without a warrant. An opinion on these laws is included by a human rights lawyer who defends the rights of marginalised groups in Uganda. A case update is also provided by one of the lawyers who was involved in the case of *Gwanda v The State* in which the Malawi High Court declared a subsection of the Penal Code provision criminalising being a rogue and vagabond unconstitutional.

The Researcher for the *Human Rights Advocate* conducted interviews with persons representing the LGBTI community, street vendors and sex workers in order to gather first hand views on the way in which these laws impact the particular groups. An opinion on the impact of these laws on the rights of people who use drugs (PWUDs) is also included from the perspective of a peer educator working with this group.

Articles have been contributed by authors from a variety of backgrounds including academics, human rights lawyers, members of civil society and grassroots activists and Community Paralegals. HRAPF would like to give a special word of thanks to all of our external contributors: Ms. Fridah Mutesi, a lawyer in private practice who was the external consultant and lead

researcher in HRAPF's 2016 study on vagrancy laws; Ms. Melody Kozah from African Policing Civilian Oversight Forum (AFCOP) based in South Africa; Prof. Lukas Muntingh from the University of the Western Cape's African Criminal Justice Reform (ACJR) in South Africa; Ms. Chikondi Chijozi from the Centre of Human Rights Education Advice and Assistance (CHREAA) in Malawi; Ms. Christine Nabatanzi a Ugandan sex worker and peer educator; Mr. Phillip Mutebi, a Community Paralegal working with the LGBTI community; Mr. Ronald Zibu, a street vendor and chairperson of the Kasubi Market in Kampala and Mr. Fred Kizito, a peer educator working with PWUDs. HRAPF also acknowledges the contributions by our staff including Mr. Adrian Jjuuko, Ms. Linette du Toit and Ms. Patricia Mercy Alum as well as one of our student interns, Mr. Dan Bwambale.

We hope that this magazine will help to strengthen and inform your views on the harms caused by 'Idle and disorderly' laws to vulnerable and marginalised groups in Uganda and elsewhere and stimulate further discussion and debate on the need to have these laws amended or repealed. I believe it to be another small step in advocating for an improved legal environment in Uganda in which the rights of all are respected and protected.

Adrian Jjuuko
Executive Director

EDITORIAL

Everyone wins when 'Idle and disorderly laws' are decriminalised



Adrian Jjuuko

The 'Idle and disorderly' laws are a remnant of an era in which the poor were not regarded as equal citizens, worthy of the protection of the law and bearers of fundamental human rights. Introduced during the colonial period into Uganda, these laws ensured that the 'have-nots' are not regularly seen by the 'haves.' While these provisions may serve the purpose of maintaining public order, regulating movement in public spaces, preventing annoyance to the public at large and deterring petty theft, the harms occasioned by them far outweigh any use and value that they may have for society.

A textual analysis of these provisions reveals their incompatibility with the principles of human dignity, the presumption of innocence, legal certainty and equal protection of the law.

The full provisions of the two sections read as follows:

Section 167

Any person who-

- a) being a prostitute, behaves in a disorderly or indecent manner in any place;
- b) wanders or places himself in any public place to beg or gather alms, or causes or procures or encourages a child to do so;
- c) plays at any game of chance for money or money's worth in any public place;
- d) publicly conducts himself or herself in a manner likely to cause a breach of peace;
- e) without lawful excuse, publicly does any indecent act;
- f) in any public place solicits or loiters for immoral purposes;
- g) wander about and endeavours by the exposure of wounds or

deformation to obtain or gather alms.

Shall be deemed to be an idle and disorderly person, and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or both such fine and imprisonment, but in the case, but in the case of an offence contrary to section (a), (e) or (f), that persons is liable to imprisonment for seven years.

Section 168

Every-

- (a) person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;
- (b) person going about as a gatherer or collector of alms, or endeavouring to procure charitable contribution of any nature or kind, under any false or fraudulent pretence;
- (c) suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself; and
- (d) a person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for

an illegal or disorderly purpose,

shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months and for every subsequent offence to imprisonment for one year.

Seven offences are created under the section 167 umbrella of 'being an idle and disorderly person'. These offences are punishable with a three-month prison sentence or a fine of three thousand shillings or both. In the case of 'loitering for immoral purposes in a public place'; and 'being a prostitute and behaving in a disorderly or indecent manner in any place'; and 'publicly doing an indecent act', the applicable penalty is a prison sentence of seven years.

Four different offences are created under section 168, punishable with 6 month imprisonment when the offence is committed for the first time and thereafter punishable with one year's imprisonment. The offences created by the provision include being convicted under section 167 a second or subsequent time; 'being found wandering in a public place at such a time and under such circumstances as to lead to the conclusion that the person is there for illegal or disorderly purposes'; and 'being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself'.

These provisions are problematic in a constitutional dispensation for three major reasons. The first reason is that they are overbroad and vague. It is a general principle of criminal law that offences ought to be defined clearly to enable those to which the law applies to know with certainty which conduct is punishable.¹ This principle is echoed in Article 28(12) of the Constitution of the Republic of Uganda, 1995, which provides that a person cannot be convicted of an offence unless that offence is defined by law. In the absence of clearly defined offences, the question of whether or not particular conduct amounts to a breach of law depends entirely on the discretion and subjective views of enforcing officers. This vagueness is displayed in section

1 JD Berg 'The troubled constitutionality of antigang loitering laws' (1994) 69 *Chicago-Kent Law Review* 469-470.

“ These provisions are in a constitutional dispensation for three major reasons. The first reason is that they are overbroad and vague.

167(a) which provided that any person 'being a prostitute, behaves in a disorderly or indecent manner in any place' is to be deemed an idle and disorderly person. The terms 'disorderly' and 'indecent' are subjective and thus are left to the discretion of individual law enforcement officers to determine their meaning. Section 167(d) provides that a person who 'publicly conducts himself or herself in a manner likely to cause a breach of peace' is an idle and disorderly person. A very broad range of behaviours can likely cause a breach of peace, once again depending on the personal views of the enforcing officer. In the case of *Uganda v Nabakoza Jackline and 9 Others*,² a Magistrates' Court held that a group of people advertising an event by dancing on a truck on the side of the road in full view of foreign dignitaries breached this provision. The High Court later reversed this order, stating that the facts did not support the charge.³ This group was lucky that the case went on appeal. The fact that people were charged and convicted attests to the use of these provisions to keep the poor and 'undesirable' out of the sight of the rich and privileged. The same deficiency is evident in section 167(e) and 167(f) which provides that a person who 'without lawful excuse, publicly does any indecent act' or 'in any public place solicits or loiters for immoral purposes'. The terms 'indecent act' and 'immoral purposes' are vague, undefined and capable of very broad interpretation.

The second major deficiency of the 'Idle and disorderly' laws is the fact that it criminalises people on the basis of their status, rather than their conduct. Criminalising characteristics and conditions of people runs contrary to the right

2 Criminal Revision No.8 of 2004.

3 High Court Miscellaneous Cause No. 24 of 2006.

to equal protection under the law as provided for in Article 21 of Uganda's Constitution of 1995. Section 167(a) makes 'disorderly and indecent' behaviour a crime *only* for persons who are 'prostitutes': the conduct is not prohibited for all people and therefore discriminates on the basis of a person's status as a sex worker. Section 167(c) criminalises playing games of chance for money in a public place. The action of playing games of chance in private is not criminalised, therefore making the provision applicable only to people who do not have the luxury of private spaces in which to undertake such recreational activities. The provision discriminates also discriminates on the basis of social-economic status- being poor. Section 167(6) and 168(b), which criminalise begging, also discriminate against people who are poor. The wide net which the 'Idle and disorderly' laws casts are intended to criminalise people based on their status of being poor and otherwise different from the norms of society.

The third concerning aspect of the 'Idle and disorderly' laws is the fact that they harshly deal with conduct that is not necessarily harmful to others or to society at large. It is the purpose of the criminal law to prevent *harmful* conduct.⁴ Many of the actions criminalised under section 167 and 168 of the Penal Code cannot be described as particularly harmful. While actions such as 'wandering near a highway' or 'loitering for immoral purposes' may arguably be deserving of regulation by the state, this can be done by measures that are less extreme and invasive than the criminal law.

Other articles in this publication deals in detail with the implications of the enforcement of these provisions on the human rights of marginalised groups in Uganda. At this point, it suffices to say that on the face of it, section 167 and 168 of Uganda's Penal Code Act suffer various constitutional deficiencies and ought to be declared void on the basis of these.

In Uganda, these laws are being implemented

.....
⁴ JS Mill *On Liberty* (1854) 14-15; Human Rights Awareness and Promotion Forum *The Implications of the enforcement of 'Idle and disorderly' laws on the human rights of marginalised groups in Uganda* (2016) 29.

not only to restrict the movement of poor people in public places, but also to target various 'undesirable' minority groups such as LGBTI persons, sex workers and people who use drugs. While these offences by their very nature should be considered as 'petty offences', they are nevertheless punishable with imprisonment. An arrest under these provisions may mean spending two or more months in prison on remand, .Sentences of up to 6 months have been given to those who were found guilty under the 'rogue and vagabond' offence, and some aspects of the offences attract up to seven years imprisonment

There have been calls from within Uganda for the laws to be reformed. The Uganda Law Reform Commission has released a report, which considers alternatives to the implementation of the current petty offences in the Penal Code Act. The President of Uganda himself has occasionally announced that the 'Idle and disorderly' laws ought to no longer be enforced and need to be scrapped from the law books. Yet, the offences remain on the law books and they continue to be enforced. The major reason why they still remain is use is due to the ease with which they can be used for extorting money from vulnerable people.

Having them decriminalised would be a victory for all groups. For the poor and marginalised, they will no longer suffer the indignities of being arrested under these laws, for no justifiable reasons, and being and subjected to inhuman and degrading treatment. For the police, they will no longer have to undertake swoops to arrest people who are in reality harming no one, and will also be able to use their resources to curb crime that is really harmful. For the Directorate of Public Prosecutions, they will be bale to prosecute more harmful crime and thus contribute to deterring criminals. For the courts, they will have fewer cases to deal with and devote their time to solving the huge case backlog that currently exists. For the government, it will be bale to secure more votes, as the poor will feel less persecuted. Therefore at the end of the day, every wins when 'Idle and disorderly' offences are decriminalised.

HISTORICAL OVERVIEW

'Idle and disorderly laws' in modern-day Uganda: A dangerous relic of the British Empire

Linette du Toit¹



Uganda's 'Idle and disorderly' laws have their origins in the vagrancy laws of 14th Century England. Vagrancy laws, at their core, exist for the control of poor and unpopular members of society. This article looks at the history of the development of vagrancy laws and considers the suitability of the use of such laws in a constitutional democracy in 2018.

The notion of 'vagrancy' was first introduced in 1351 with the Statutes of Labourers, which made it a crime for anyone who was able to work to refuse to do so.² England faced a severe labour shortage after the Black Death pandemic of 1348 to 1350. The decrease in the population threatened the feudal system, which forced members of the lower classes to work on a particular piece of land in exchange for boarding.³ The small remaining labour force had much more bargaining power and the upper classes needed to act swiftly in order to protect their wealth. The early vagrancy laws prohibited the increase of wages and also made begging a crime. It furthermore limited the movement of members of lower classes

by prohibiting them from 'wandering' outside their villages in search of higher wages.⁴

As England industrialised, the original vagrancy offences were changed and expanded to continue to serve the needs of the upper classes of society.⁵ The laws controlled the presence of the poor in cities and regulated migration from rural areas. It also attempted to deal with emerging social problems such as thieves and highwaymen targeting travelling merchants.⁶ These laws furthermore served to prevent and deal with property crimes as they allowed a broad discretion to enforcement officials and authorised them to make arrests without evidence of a crime having been committed.⁷ Penalties for vagrancy offences increased in severity and included corporal punishment and even the death penalty.⁸

¹ Linette du Toit is a researcher at Human Rights Awareness and Promotion Forum. She holds an LLM in Human Rights and Democratisation in Africa from the University of Pretoria's Centre for Human Rights.

² A McLeod 'On the origins of consorting laws' (2013) 37 *Melbourne University Law Review* 13-14.

³ As above.

⁴ As above.

⁵ W Chambliss 'A sociological analysis of the law of vagrancy' (1960) 12 *Social Problems* 67-77, as discussed in JS Adler 'A historical analysis of the law of "idle and disorderly"' (1989) 27 *Criminology* 75.

⁶ As above; PA Slack 'Vagrants and "idle and disorderly" in England 1598-1664' (1974) 27 *Economic History Review* 360.

⁷ As above.

⁸ Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC), *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance Related Offences in Blantyre Malawi* (2013) 17, referring to Chambliss (n 5 above) 74, available at <https://acjr.org.za/resource-centre/no-justice-for-the-poor>. (accessed 8 September 2018).



During the period 1500 to 1700, paupers, slaves, rogues and vagabonds could be marked as such by making them wear tags on their clothes or by branding their skin with a hot iron.⁹ From 1700 up to 1824, at least 28 statutes were passed on the subject of vagrancy.¹⁰ The Rogues, Vagabonds and other Idle and Disorderly Persons Act of 1744 criminalised persons for ‘wandering’ under various conditions without being able to ‘give a good account of themselves’.¹¹ The Vagrants Act of 1824 consolidated all the previously existing laws on vagrancy and

9 As above.

10 N Rogers ‘Policing the poor in eighteenth century London: The vagrancy laws and their administration’ (1991) *Social History* 128.

11 CHREAA & SALC, n 8 above.



In 1894, Uganda became a British protectorate and all statutes of general application in Britain, including the Vagrants Act of 1824, became applicable to it.

also included new categories of offences against public decency and morality.¹² The Act furthermore reduced penalties for vagrancy offences, though the brutal discriminatory undertone of the traditional offences remained unchanged.¹³

In 1894, Uganda became a British protectorate and all statutes of general application in Britain, including the Vagrants Act of 1824,

became applicable to it.¹⁴ The 1824 Act remains in force in Britain, although many of its provisions had been amended or repealed and the offences which remain are no longer punishable with imprisonment.¹⁵ This is not the case in Uganda, where the remnants of the Vagrants

14 This was in terms of the 1889 Africa Order in Council; JM Gaughan ‘East Africa’ in S Mitchell (ed) *Victorian Britain: An encyclopedia* (2012) 232.

15 Human Rights Awareness and Promotion Forum *The Implications of the enforcement of ‘idle and disorderly’ laws on the human rights of marginalised groups in Uganda* (2016) 23; see the Criminal Justice Act 44 of 2003.

12 McLeod (n 2 above) 108.

13 CHREAA & SALC (n 8 above) 18.

“ These negative effects of the ‘Idle and disorderly’ laws are still rampant in modern day Uganda and provisions which enable exploitation of the poorest and most marginalised members of society ought to be removed from the law books.

Act, appearing in section 160, 167 and 168 of its Penal Code Act Cap 120, continues to be offences punishable with imprisonment.

Bearing in mind the origins of the Penal Code provisions and the purposes they were intended to serve, it is fair to say that such offences are inappropriate for a constitutional dispensation in which the fundamental human rights of all are respected and protected. The laws discriminate against the poor and ‘legalise’ a complete disregard of their fundamental human rights to dignity, equality and the presumption of innocence. As far back as 1821, it was already acknowledged that these laws were responsible for the development of a culture of police corruption.¹⁶ Earlier laws provided for a reward system to anyone who ‘apprehended a beggar’ and it was noted that bribery between the police and those qualifying as ‘vagrants’ were rife. These negative effects of the ‘Idle and disorderly’ laws are still rampant in modern day Uganda and provisions which enable exploitation of the poorest and most marginalised members of society ought to be removed from the law books.

Another major problematic effect of the ‘Idle and disorderly’ laws is that they conflate poverty with criminality. Historically, poverty was not treated as a social problem for which the governing authorities bore responsibility, but was rather coloured as a social evil, punishable

¹⁶ House of Commons ‘Report from the Select Committee on the existing laws relating to vagrants’ (1821) as discussed in CHREAA & SALC (n 8 above) 18.

and controllable by the criminal law. The only element of ‘welfare’ incorporated into these laws were the allowance of certain ‘deserving’ categories of persons to beg, particularly religious figures. ‘Idle and disorderly’ laws are blind to the structural inequality and historical oppression which are primary causes of poverty within a society. Instead of dealing with social problems holistically, and with proper consideration of their causes and context, these laws still provide a convenient tool for pushing the ‘unsightly’ symptoms of a warped social order out of view of the elites.

Finally, archaic vagrancy offences are used to enforce a certain pre-determined social norm. Pre-industrial England placed much value on the ‘morality of work’ and refused to tolerate people who did not conform to the norms of that ordered and disciplined society.¹⁷ In modern-day Uganda, the conservative society refuses to tolerate people whose gender identity and sexual orientation do not conform with what is considered ‘normal’ and ‘moral’. It is, however, grossly inappropriate for a country in which a constitution that protects fundamental human rights is the supreme law to tolerate laws that legitimise the constant harassment of ‘unpopular’ segments of society.

The ‘Idle and disorderly’ laws are an anachronism of an era in which human rights were not recognised or protected. Laws that discriminate against the most vulnerable members of society and negate their dignity and fundamental rights cannot be retained.

¹⁷ Rogers (n 10 above) 127.

RESEARCH BRIEF

The Implications of the Enforcement of 'Idle and Disorderly' Laws on the Human Rights of Marginalised Groups in Uganda

Fridah Mutesi¹



1. Introduction to study

In 2016, Human Rights Awareness and Promotion Forum (HRAPF) released a report which is concerned with the offences of being 'idle and disorderly persons' and being 'rogue and vagabond' under sections 167 and 168 of Uganda's Penal Code Act respectively, which are the most commonly used of the vagrancy laws, and it collectively refers to these provisions as the 'idle and disorderly' laws. This research brief is a summary of the research, setting out the background of the study, the methodology used, the findings made and the key recommendations addressed to various state and non-state actors.

¹ Fridah Mutesi was the lead researcher in the study carried out by HRAPF. She is a commercial lawyer in private practice and formerly headed HRAPF's Access to Justice Unit.

2. Historic background to the 'Idle and disorderly' offence

The 'Idle and disorderly' offence stems from many vagrancy Acts introduced in England over the centuries². 'Vagrancy' is understood as the condition of an individual who is idle, has no visible means of support and travels from place to place without working. Uganda's vagrancy laws are found in the 1950 Penal Code Act³ under Chapter XVI, which covers 'Nuisances and offences against health and convenience'. These laws have been part of Uganda's legal regime since colonial

² Introduced as far back as the fourteenth century and codified various Acts and codes and later the Vagrancy Act of 1824 which is still in force.

³ Cap 120, Laws of Uganda 2000.

times⁴. In England, the primary objective of vagrancy laws was to encourage the able-bodied to find work due to the shortage of labour and was later adapted to regulate criminality and idleness.⁵ These laws were imported to Africa to regulate conduct that was deemed against public order, public health and safety.

3. Methodology

The study examines the enforcement of 'idle and disorderly' laws in Uganda for a period of five years: 2011 to 2015. It documents the rates of arrest and prosecution and analyses the impact of this on vulnerable and marginalised groups.

⁴ English law was introduced in Uganda through the 1902 Order in Council, which made statutes of general application applicable in England to apply to Uganda.

⁵ A McLeod 'On the origins of consorting laws' (2013) 37 *Melbourne University Law Review* 106.

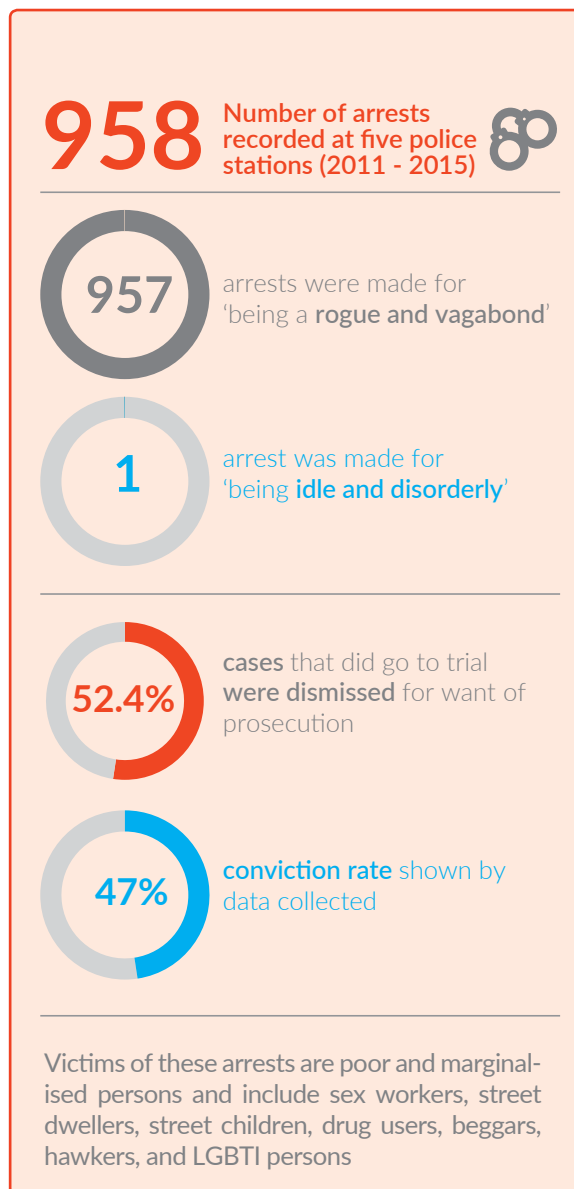
The study focused on Kampala Capital City as a case study. Due to the administrative structures of the judiciary and the Police, data was also collected from the metropolitan area of Kampala namely Wakiso and Mukono Districts. The population in Kampala is diverse in terms of income levels and home to the highest concentration of members of marginalised groups. The research team considered that the 'idle and disorderly' laws are more likely to be implemented in Kampala than in other parts of the country.

The study employed a mixed model design with both qualitative and quantitative elements. The study focused on three of the poorest and most marginalised groups in society namely sex workers; lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and drug users. Law enforcement agencies were also targeted and perspectives were sought from the Uganda Police Force (UPF), the judiciary, the Uganda Prisons Service (UPS), the Uganda Law Reform Commission (ULRC) and the Directorate of Public Prosecutions (DPP). Purposive sampling was employed to select the police stations and magistrates' courts that were included in the study. Data collection included holding Focus Group Discussions (FGDs), interviews with key informants, the perusal of record books kept by state institutions and the perusal of HRAPF's own case files.

4. Findings of the study

4.1 Trends in arrests under vagrancy laws

The study found that 'idle and disorderly' laws are widely implemented in Uganda. According to records from the five sampled police stations, 958 charges were recorded between 2011 and 2015. This high number of arrests were reached even though one of the police stations did not submit records for the first three years of the study and another has a policy where they use alternative charges for people that would be charged with 'idle and disorderly' offences at other police stations. Considering that not all who are arrested under these provisions are charged, the number of arrests must be much higher. The newspaper records of four daily newspapers for the same period confirmed that at least 889 persons were arrested in police swoops



in Kampala. It should also be considered that newspapers would not cover all instances of arrest.

Victims of these arrests are poor and marginalised persons and include sex workers, street dwellers, street children, drug users, beggars, hawkers, and LGBTI persons. The study found that even within these marginalised groups, the most vulnerable members are targeted. For example, while sex work is also carried out in cheap as well as expensive hotels, it is only places that are used by 'low-end' sex workers that are targeted for making arrests under these provisions. The highest number of arrests were furthermore from Kawempe Police Station, which serves a large slum area.

The study found that the Police normally carry out arrests under these laws during night swoops and operations, arresting large numbers of people at once. Such arrests are carried out without due regard to the laws and constitutional safeguards which ought to govern arrests. Research participants revealed that they suffer assault and humiliation during arrest. Some report being undressed and paraded before the media. One sex worker who was arrested was driven around in the police vehicle for about nine hours before being detained, while others never even make it to police or are released without being charged after police extorted money from them.

The study also found that the enforcement of 'idle and disorderly' laws is influenced by the political climate in the country. In the years of the study in which presidential election campaigns were run, namely 2011 and 2015, there were very few arrests compared to 2012-2014 which had no election campaigns. During the campaign periods the President and politicians often call for decriminalisation and direct police to stop arresting people. This seems to have the effect of reducing the number of arrests for a period.

Of the 958 arrests recorded at the five police stations during the study period, 957 of these arrests were made under the offence of 'being a rogue and vagabond' and only one arrest was carried out under the idle and disorderly

laws. This might be because the presidential and other political pronouncements specifically addressed the 'idle and disorderly' law while the offence of being a rogue and vagabond was not mentioned. The offence of being a rogue and vagabond is also more vague than the offence of being idle and disorderly and can easily be made applicable to any situation of arrest.

According to Police, the main motivation for using the 'idle and disorderly' when making arrests is the prevention and combating of crime. The police want to display that action is being taken in response to complaints of crime, even though those arrested are not necessarily the real criminals. The provisions are also used by police to remove people from the street when the President is receiving diplomatic visitors. The government is clearly not sincere in its announcements that the 'idle and disorderly' laws should not be enforced anymore.

4.2 Trends in prosecution

Despite the high number of arrests under 'idle and disorderly' laws, they have low prosecutorial value. Data from five selected magistrates courts show that only 597 cases involving the 'idle and disorderly' offences had been prosecuted. According to the Directorate of Public Prosecutions, these offences are hard to prove and in most cases there is no evidence from police to warrant their prosecution. More than half of the cases that did go to trial (52.4%) were dismissed for want of prosecution. This high dismissal rate is understandable since there are usually no complainants in these cases and the ingredients of the 'idle and disorderly' offences are unclear and therefore difficult to prove beyond reasonable doubt.

The data collected showed a 47% conviction rate. Most of these convictions are a result of the accused persons pleading guilty to the offences. The study found



that the option of 'pleading guilty' is viewed as convenient by both the courts and the accused persons: pleading guilty usually leads to a light sentence such as community service, a fine or a caution while pleading 'not guilty' involves long trials and detention periods on remand.

The long detention periods associated with trials for those accused under the 'idle and disorderly' offences have an impact on the Uganda Prisons Service. In 2012 alone, such offenders made up 9.9% of the total prison population. The Uganda Prisons Service is of the view that alternative sentences and punishments should be found in order to relieve overpopulation in prisons.

5. Impact of 'idle and disorderly' laws on those targeted

The existence of 'idle and disorderly' laws and their implementation have impacted negatively on the rights and lives of their victims. They confer wide discretion on law enforcement agencies to determine what constitutes a crime. They are applied without following due process. Under the Criminal Procedure Code Act⁶ for example, police have powers to effect arrest for offences such as vagrancy offences without arrest warrants or court orders. Considering that some of these offences actually carry serious punishments such as seven-years prison sentences, it is dangerous to leave their determination totally to the whims of police. The police find them easy to invoke for conduct or behaviour that they consider to be unacceptable and they are thus susceptible to abuse.

Vagrancy laws are also overly broad and cannot serve the legitimate purpose of criminal law, which is to forbid and prevent conduct that unjustifiably inflicts or threatens substantive harm to the individual or public interests. Members of the public cannot be held liable for particular conduct if prior to engaging in it it is not possible to determine whether such conduct is forbidden by law or not.

The study found that these laws lead to the infringement of different rights under Uganda's Constitution and under regional and

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⁶ The Criminal Procedure Code Act Cap 116, Laws of Uganda 2000.

international human rights law. Article 20(1) of the Constitution guarantees fundamental and other human rights and freedoms of the individual and groups and places an obligation on all organs and agencies of government to respect, uphold and promote human rights. The rights, guaranteed under the Constitution and other human rights instruments, which are found to be infringed by the 'idle and disorderly' laws will be discussed in turn.

5.1 The right to a fair hearing

The right to a fair hearing is provided for under Articles 28 of the Constitution.⁷ The framers of the Constitution condensed the meaning of right to a fair hearing: 'In the 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'. This right is also enshrined in article 14 of the ICCPR⁸ while article 44 (c) prohibits derogation from this right, which makes it mandatory to be observed by all organs and individuals.

In criminal laws, in order to consider the culpability of the accused persons, certain several principles of the law are considered. Article 28(12) lays the principle of legality, which is an integral part of the right to a fair hearing. It requires that every criminal offence be stated in clear and unambiguous terms for it to be an offence valid under the law. It provides that 'no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law'. Vagrancy offences are crafted in very broad and vague terms and lack proper definitions of what conduct is actually criminalised. They are left to police who determine when to invoke them and for what conduct due to their over breadth and vagueness.

Under section 167(a) for instance, it provides that to be idle and disorderly, "any person who being a prostitute, behaves in a disorderly or indecent manner in any place". This offence presupposes that there is a convict for an

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⁷ The Constitution of the Republic of Uganda 1995, as amended.

⁸ The right to be heard is also protected in art 7 of the African Charter on Human and Peoples' Rights adopted on 27 June 1981, entered into force on 21 October 1986

offence of prostitution.⁹ Law enforcers are vested with wide discretionary powers to determine who ought to be arrested. Demeanor and appearance is frequently used as the means for identifying suspect groups that are then arrested for further investigation. In addition, lack of definition of key terms and ingredients of these offences leaves them vague and arbitrary under the principle of legality discussed above. One can be considered to be idle and disorderly if he or she: *'without lawful excuse, publicly does any indecent act'*, and, *'in any public place solicits or loiters for immoral purposes'*: These offences are broadly worded and vague. The 'idle and disorderly' provisions are illegal and arbitrary and should not be enforced against any one.

It is a cardinal principle of criminal law that the burden of proving the guilt of an accused person lies on the prosecution¹⁰. This is the principle of presumption of innocence provided for under Article 28 (3) (a) of the Constitution and interpreted in *Uganda v Muwanga Kivumbi & 5 Others*¹¹. It was observed that, 'the duty of proving the guilt of an accused always lies on the Prosecution, on the basis of evidence adduced before Court, such evidence must be credible and not tainted by any lies or hearsay and the prosecution must prove all the ingredients of the offence beyond reasonable doubt'. Section 168(a) of the law provides that any 'person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person shall be deemed a rogue and vagabond'. This offence creates double jeopardy for the poor Ugandans who are usually arrested during swoops without following due process. It is ambiguous and undermines the cardinal principle of presumption of innocence well laid in the rule of law.

Furthermore, providing evidence to prove vagrancy offences is next to impossible without infringing on basic fundamental rights such as the right to privacy. For instance proving sexual or immoral related offences under vagrancy offences would be difficult without snooping in one's bedroom. Enforcers

⁹ Section 138 Of the Penal Code Act (n 1 above).

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¹¹ *Uganda v Muwanga Kivumbi & 5 Others* Criminal case number 0020/2011 (2014) UGHCC 89.

rely on vagrancy laws when they fail to find enough evidence to prosecute bigger crimes like prostitution. The offences created under vagrancy provisions are vague and overly broad and cannot be successfully proven without infringing on right to a fair hearing, which undermines rights and access to justice for the poor and the marginalised.

The punishments for offenders of vagrancy offences range from minor sentences such as fines, community service and cautions to serious punishments such as prison terms. Furthermore, as mentioned it was found that convictions recorded under these provisions are as a result of pleading guilty. Even where the accused persons are legally represented, they prefer to plead guilty to get off the hook. This leaves them with a criminal record and do receive a punishment even though they have not committed any crime. Therefore leaving enforcement of these offences to the police to determine conduct that is criminalised is not only dangerous but it also poses a risk to the accused be subjected to harsh punishments that exist in the statute. It goes against the principle of legality and presumption of innocence that impacts on the quality of access to justice received and thus violates the rule of law.

“ Even where the accused persons are legally represented, they prefer to plead guilty to get off the hook. This leaves them with a criminal record and do receive a punishment even though they have not committed any crime.

5.2 Right to equality and freedom from discrimination

Article 21 of the Constitution provides that 'all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'. To 'discriminate' under the Constitution means to give different treatment to different persons



“ Continued enforcement of vagrancy laws arbitrary and discriminatory as law enforcers use it to target certain ‘undesirable’ groups of people for enforcement.

attributable only or mainly to their respective descriptions by social or economic standing. Article 1 of the Universal Declaration¹² proclaims, ‘All human beings are born free and equal in dignity and rights’. According to article 2¹³ ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Article 7 provides that ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’

Although vagrancy laws seem to cover everyone, a deeper analysis reveals that they are deeply rooted in discrimination. The central purpose of vagrancy laws was to segregate those whose conduct is deemed out of public order, public healthy and security. They create status offences based on one’s

social or economic standing. In addition, their vague interpretation reveals that they prohibit conduct that is unacceptable by the rich. These offences for example targets poor women on the streets and in slums that sell sex for a living rather than targeting those who do the same in their private homes or hotels¹⁴; those that play at games of chances in poor slums unlike their counterparts in casinos and betting houses¹⁵; the poor with no visible means of subsistence and cannot give a good account of themselves¹⁶; those that are found walking as opposed those that use other means of transportation. Under these offences, there is no distinction between being poor and having committed a criminal offence. Once one is poor, they are simply criminals. Continued enforcement of vagrancy laws arbitrary and discriminatory as law enforcers use it to target certain ‘undesirable’ groups of people for enforcement. This violates the principle of equality and none discrimination enshrine in the rule of law.

¹² Universal Declaration of Human Rights (UDHR), 1948.
¹³ Article 2 and Article 26 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

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¹⁴ Section 167(a).
¹⁵ Section 167(c).
¹⁶ Section 168(3).

5.3 Respect for human dignity and protection from cruel, inhuman and degrading treatment

Articles 24 of the Constitution provides for this fundamental right. It states that 'no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.' Derogation from this right is prohibited under Article 44(a). This provision is similar to Article 5 of the UDHR and Article 7 of the ICCPR. Vagrancy laws as they exist in the Penal Code Act are broadly worded and vague thus subject to abuse by those who seek to rely on them. Historically, they have been used against those sections of society that are undesirable in the eyes of the majority and the powerful. Their vague interpretation puts those that are marginalised at risk of violation of their right to dignity, they subject them to inhuman and degrading treatment as though they are less human. Sex workers, Lesbian, Gay, Bisexual and Transgender persons and other poor persons vending merchandise on the streets suffer violations under these laws.

The study found that LGBTI persons, sex workers and drug users are usually mistreated upon arrest. Various stories were recounted of people belonging to one of these groups who suffered assault, humiliation and the invasion of their privacy during arrest.

5.4 Protection of personal liberty

Due to their vague and subjective interpretation, vagrancy laws violate the right to liberty enshrined under Article 23 (1) of the Constitution: 'no person shall be deprived of personal liberty except... for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda'. Although this right is limited under the same article, it should be noted that these offences are so broad and subjective, and encourage arbitrary and erratic

arrests and convictions. Vagrancy offences do not conform to the principle of legality and their continued enforcement thus become arbitrary. Vagrancy offences curtail the right to liberty of the poor and the marginalised. The study found that such provisions have become a means for state agents to harass and extort money from anyone, especially marginalised persons, walking on the street at night. This right is furthermore violated in that arrested persons are detained for longer than the constitutionally mandated 48 hours.

6. Conclusion and recommendations

The study found that the 'idle and disorderly' laws are not used to achieve a legitimate purpose which cannot be achieved by existing or less restrictive laws or means. The provisions are overly broad, vague and ambiguous, giving law enforcers unguided discretionary powers. These laws are used to arbitrarily target poor and marginalised groups in Uganda and the most vulnerable members of society suffer the violation of their basic rights due to the enforcement of these laws. Various stakeholders on the international, regional and national levels have come out to champion the decriminalisation and declassification of petty offences globally and in Uganda in particular. These stakeholders include the United Nations General Assembly; the African Commission on Human and Peoples' Rights; international organisations like Human Rights Watch and in Uganda's case, the Uganda Law Reform Commission; the Inspector General of Police and the President of the country. The study makes recommendations to various actors such as the Attorney General, the Uganda Police Force and the Law Reform Commission in line with the decriminalisation of petty offences or, in the least, halting their enforcement.

FEATURE

Decriminalisation and declassification of petty offences in Africa regional campaign

Melody Kozah¹



1. Introduction

The African Commission on Human and Peoples' Rights (African Commission), at its 61st Ordinary Session in November 2017, adopted a set of Principles on the Decriminalisation of Petty Offences in Africa (the Principles). The Principles provide a standard against which African States can review domestic laws creating petty offences to ensure that they are consistent with fundamental human rights guaranteed in the African Charter on Human and Peoples' Rights (African Charter). A group of civil society organisations, in collaboration with the Network of African National Human Rights Institutions (NANHRI), have been advocating for the decriminalisation and declassification of petty



offences in Africa since 2014. This has been done through a regional campaign on the decriminalisation and declassification of petty offences in Africa.² With the recent adoption of the Principles, the campaign is strategically positioned to support the implementation of the Principles as it continues its work in Africa.

This paper focuses on the

regional campaign and provides a background to the campaign, its purpose, work done by the campaign partners and what the campaign seeks to achieve in the years ahead.

2. Background and purpose of the campaign

Six organisations working in the criminal justice and human rights sector launched the regional campaign

¹ Melody Kozah is Research and Project Officer of the African Policing Civilian Oversight Forum (AFCOP).

² For more information on the campaign see www.pettyoffences.org.

in 2014.³ Currently, the campaign has 12 partners⁴ based in South Africa, Kenya, Malawi, Ghana, Tanzania, Uganda, Sierra Leone, and will soon include Nigeria and Guinea. NANHRI, which works across the African continent, has recently joined the campaign. The campaign arose as a result of findings from pre-trial justice audits that were conducted in Southern Africa.⁵ The audits found that many people were in detention for long periods of time for petty offences such as being a rogue and vagabond, loitering and being an idle and disorderly person.

The objective of the campaign is to advocate for the decriminalisation

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³ This was done with support from the Open Society Foundations (OSF).

⁴ Open Society Foundations (OSF); AdvocAid – Sierra Leone; Human Rights Awareness and Promotion Forum (HRAPF) – Uganda; Africa Criminal Justice Reform (ACJR) – South Africa; African Policing Civilian Oversight Forum (APCOF) – South Africa; Centre for Human Rights Education Advice and Assistance (CHREAA) – Malawi; Commonwealth Human Rights Initiative – Ghana; Centre for Accountability and the Rule of Law (CARL) – Sierra Leone; International Commission of Jurists (ICJ Kenya); Network of African National Human Rights Institutions (NANHRI) – South Africa; Pan African Lawyers Union (PALU) – Tanzania; Prisoners’ Rehabilitation And Welfare Action (PRAWA) – Nigeria; Southern Africa Litigation Centre (SALC) – South Africa.

⁵ A number of audits were conducted by the Open Society Initiative for Southern Africa (OSISA), see the one focusing on Zambia ‘Pre-trial detention in Zambia: Understanding caseflow management and conditions of incarceration’, OSISA, available at <https://acjr.org.za/resource-centre/Pre-trial%20detention%20in%20Zambia.pdf>. For more information also refer to <https://acjr.org.za/resource-centre/newsletter-5-pre-trial-detention-in-west-africa-guidelines-on-police-custody-and-pre-trial-detention-audit-of-pre-trial-detention-in-mozambique>.

Decriminalisation refers to the ‘process of removing an act that was criminal, and its associated penalties from the law’.

Declassification refers to the process of classifying offences thereby making it a non-arrestable or administrative offence, which can only be punished through non-custodial sentences or other alternatives such as cautions, community service, and community-based treatment programmes.

and declassification of petty offences in Africa. As the name suggests, the campaign focuses on petty offences, which are defined as ‘minor offences for which the punishment is prescribed by law to carry a warning, community service, a low value fine or short term of imprisonment, often for failure to pay the fine.’⁶ Petty offences include but are not limited to being an idle and disorderly person, being a rogue and vagabond person, bathing in public, loitering and begging. The campaign calls on States to either decriminalise or declassify petty offences. Decriminalisation refers to the ‘process of removing an act that was criminal, and its associated penalties from the law’.⁷ Declassification

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⁶ Principles on the Decriminalisation and Declassification of Petty Offences in Africa adopted at the 61st Ordinary Session of the African Commission on Human and Peoples’ Rights.

⁷ As above.

⁸ L Muntingh and K Petersen, *Punished for being poor: Evidence and arguments for the decriminalisation and declassification for petty offences* (2015) 12-13, available at <https://acjr.org.za/resource-centre/punished-for-being-poor/view>.

⁹ See www.pettyoffences.org website for more information.

refers to the process of classifying offences thereby making it a non-arrestable or administrative offence, which can only be punished through non-custodial sentences or other alternatives such as cautions, community service, and community-based treatment programmes.⁸

The existence and enforcement of petty offences has a disproportionate impact on poor, marginalised and vulnerable groups and the campaign seeks to advocate for the rights of these communities. The key message of the campaign is ‘Poverty is not a crime: decriminalise and declassify laws targeting the poor.’⁹ The campaign’s target audience is very wide:



Currently one can find these petty offences either in out-dated penal codes, or in by-laws which aim to control public nuisances in public spaces including public roads, parks and recreational areas and laws criminalising commercial activities such as hawking.

it reaches out to those affected by laws creating petty offences including vendors, homeless people, sex workers, street children; those that enforce the laws such as law enforcement officials including prosecutors, magistrates, judges; and local and regional civil society organisations and regional bodies.

The campaign seeks to highlight the incompatibility of some of these petty offences with legal principles and how some of them are enforced against particular categories of people in society in violation of a wide range of human rights. For most of the countries colonised by the British, these laws have been traced back to the English Vagrancy Act of 1824.¹⁰ Laws

creating petty offences were initially aimed at maintaining public order, public safety and crime prevention.¹¹ Currently one can find these petty offences either in out-dated penal codes, or in by-laws which aim to control public nuisances in public spaces including public roads, parks and recreational areas and laws criminalising commercial activities such as hawking.¹² Recent case law has noted how some of these offences, such as the rogue and vagabond offence, violate constitutional rights to dignity, freedom from discrimination and equal treatment before the law.¹³

3. Why the laws creating petty offences are problematic

Laws creating petty offences should be individually reviewed and assessed in order to determine whether they meet the

¹⁰ Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC), *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance Related Offences in Blantyre Malawi* (2013) available at <https://acjr.org.za/resource-centre/no-justice-for-the-poor>. Also see du Toit (this volume, above).

¹¹ As above at 15-19.

¹² Countries such as Malawi and Tanzania have penal codes that have retained petty offences as they were in the English Vagrancy Act, most of them list idle and disorderly persons and being a rogue and vagabond as offences and these two categories cover various other offences such as breach of peace or public order, behaving in an indecent manner, publicly soliciting for an immoral purpose and wandering in or upon any premises and gathering or collecting alms. The Malawi Penal Code is available at https://malawilii.org/system/files/consolidatedlegislation/701/penal_code_pdf_14611.pdf and the Tanzania Penal Code, Chapter 16, 1930 which list idle and disorderly person in section 176 and rogue and vagabond in section 177, is available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_penal_code.pdf. South Africa has by-laws for example the City of Cape Town By-Law Relating to Streets, Public Spaces and the Prevention of Noise Nuisances, the Ethekwini Municipality: Nuisances and Behaviour in Public Places By-Law, 2015 - Paragraph 21(1)(a) and The City of Johannesburg Metropolitan Municipality Public Road and Miscellaneous By-Laws. These by-laws create offences such as urinating in public, bathing or washing oneself in public and spitting amongst other. These by-laws are available at <https://openbylaws.org.za/>. Kenya has by-laws on hawking and by laws on general nuisance targeting public service vehicle touts. Refer to <http://www.nairobi.go.ke/assets/downloads/CITY-BYLAW.pdf>. Botswana Penal Code, Chapter 08:01, 1964, section 182 lists rogue and vagabond offences, available at <http://www.wipo.int/edocs/lexdocs/laws/en/bw/bw012en.pdf>. Zambia Penal Code. Zambia Penal Code Act, Chapter 87, section 181 lists Rogue and Vagabond available at <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>.

¹³ For example, *Mayeso Gwanda v The State* Constitutional Cause No. 5 of 2015 in Malawi.

legal requirements of a crime. Some of the offences satisfy the legal requirements of the law but provide for custodial sentences whilst others are discriminatory specifically targeting certain groups of people or allow for discriminatory or unlawful enforcement. In summary the campaign is concerned with the following:

- a. That some of the laws creating petty offences are drafted or written in vague and ambiguous terms. For example the law that criminalises being a rogue and vagabond person which is found in a number of penal codes, including in Zambia and Botswana, state that *'every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose shall be deemed to be a rogue and vagabond person.'*¹⁴ This provision is very broad, and is neither clear nor precise. It does not list the elements of the crime. It criminalises any person found in a public place suspected of committing a crime. How a law enforcement official is supposed to determine whether one is in a public space for an illegal or disorderly purpose is not clear and what exactly amounts to an illegal or disorderly purpose cannot be easily determined.¹⁵
- b. This leads to the second concern that because the laws are vague and broad, they leave much discretion to law enforcement officials to enforce them resulting in arbitrary arrests. Using the
- c. Some of the laws creating petty offences target specific categories of people based on their social status. For example in South Africa,¹⁶ by-laws in the Western Cape prohibit persons from bathing or washing in public places except as part of a cultural initiation ceremony in an area where such a ceremony is taking place.¹⁷ Another example is a by-law that prohibits persons from sleeping in public places during the night or erecting shelters except as part of a cultural ceremony.¹⁸ These by-laws target homeless people and street families that depend on public places and carry out necessary life sustaining activities in these places. As such these are the persons normally charged under these provisions because they will either bath or sleep in public as they have no home.
- d. The enforcement of certain petty offences which directly target poor, vulnerable and marginalised groups have a disproportionate effect on these categories of persons. The enforcement is often carried out in an unlawful and discriminatory manner. Law enforcement officials profile persons and then arrest them. For example laws such as loitering

¹⁴ Uganda Penal Code section 168, Malawi Penal Code section 184(1)(c). In *Chidziwe v Republic* a Person was charged under section 184(1)(c) because he was found at an odd hour with a bottle of beer. The High Court of Malawi overturned the conviction and held that there was no evidence that holding a bottle of beer implies an illegal purpose. This provision also exists in Kenya, Mauritius, Nigeria, The Gambia, Malawi, Zambia, Uganda, Botswana, Tanzania and Seychelles.

¹⁵ *The King v Attorney General* (Supreme Court of Ireland)(1981) declared a rogue and vagabond provision unconstitutional and found that the ingredients of the offence and the mode by which its commission may be proved are arbitrary, vague, and difficult to rebut.

¹⁶ In South Africa laws for the different provinces in the country provide for petty offences. For more information visit <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/eng/>.

¹⁷ For example, section 3(d) of the Western Cape Province, By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007, available at <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/resources/eng.pdf>.

¹⁸ For example, section 3(m) of the Western Cape Province, By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007, available at <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/resources/eng.pdf>.



Petty offences do not pose significant harm to the public and yet they carry severe penalties.



have constantly been used to arrest sex workers in public spaces.¹⁹

- e. Petty offences do not pose significant harm to the public and yet they carry severe penalties. The campaign is concerned that the punishment of these offences which include custodial sentences is not proportionate to the seriousness of the offence. Most of the offences attract a hefty fine for example in South Africa one can be fined R2500 for loitering and R500 for washing or bathing in public. These offences also attract imprisonment not exceeding two years for the failure to pay the fine.²⁰

The failure to pay a fine and/or raise money for bail for petty offenders results in detention. The campaign is concerned about the socio-economic impact on families of petty offenders that are detained. These families lose breadwinners and a source of income. In addition, once detained petty offenders add to the numbers detainees raising concerns of overcrowding. In 2017 an audit of Kenyan Criminal Justice System found that the majority of the offenders in the Kenyan prisons had been imprisoned

for petty offences due to failure to raise fines.²¹

The campaign therefore calls on States to decriminalise petty offences that are discriminatory and criminalise certain categories of people. It calls for the reclassification of those petty offences that satisfy all legal requirements into non-arrestable offences with the option of using alternatives to penal prosecutions and using restorative/traditional justice methods to deal with these offending behaviours.

4. Campaign Highlights

The regional campaign has grown in membership since 2014 from 6 to 12 partners. Its geographical representation of East, Southern and West Africa has been vital in ensuring that the campaign is representative and addresses challenges faced in different parts of Africa. The campaign has a threefold strategy to achieve its objectives: advocacy, litigation, and research. The campaign partners have undertaken much work and this section only highlights some of the achievements to date.

¹⁹ Federation of Women Lawyers *Documenting human rights violations of sex workers in Kenya: A report based on the findings of a study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi towns in Kenya* (2008) 40. See L Muntingh *Arrested in Africa: An exploration of the issues* (2015) 22.

²⁰ See <https://www.iol.co.za/news/durban-gets-tough-on-nuisance-by-laws-2023684> (accessed 14 September 2018).

²¹ It found that 28 768 inmates were in prison at the time. <http://pettyoffences.org/2018/02/20/kenya-chief-justice-david-maraga-launches-the-national-committee-on-criminal-justice-reforms/> (accessed 14 September 2018). See also <http://pettyoffences.org/2018/05/16/government-banks-on-law-changes-to-stop-jailing-of-petty-offenders/> (accessed 14 September 2015).

a. Regional and national advocacy efforts

Regional advocacy has been undertaken by all campaign partners at different forums and platforms. The campaign partners participated at the Pan African Lawyers Union (PALU) – Annual Conferences in 2016 and 2017.²² The annual conference brings together lawyers and lawyers' associations as well as law firms, human rights and good governance professionals.²³ These two conferences provided an opportunity for the campaign to generate interest on the decriminalisation of petty offences amongst legal practitioners including prosecutors, advocates and magistrates who deal with petty offenders on a daily basis. The campaign was also represented at the 2017 South Africa Public Interest Law Gathering (PILG), an event that brings together law students, legal practitioners and human rights organisations to discuss recent developments in law.²⁴ The campaign has also held various regional conferences to raise awareness of the

campaign including one in Sierra Leone.

During the year 2016 and 2017, the campaign partners undertook extensive advocacy and lobbying during the 58th, 59th, 60th and 61st Ordinary Sessions of the African Commission for the establishment of a regional soft law standard advocating for the decriminalisation of petty offences in Africa. The campaign held side events and was also featured in the main panels under activities of the former Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, the Hon. Commissioner Med S.K. Kaggwa (Special Rapporteur). The side events built knowledge around the subject of petty offences and raised much debate amongst human rights practitioners, government representatives of African states as well as civil society organisations.

The African Commission responded with the adoption of resolution 366 on the need for such principles,²⁵ and over the next year, received technical support from

the campaign to develop and consult on draft principles. At its 61st Ordinary Session, the African Commission formally adopted the Principles on the Decriminalisation and Declassification of Petty Offences in Africa. These Principles are a guide that states can use in the process of reviewing petty offences in order to recommend either decriminalisation or declassification. The principles set out a legal test to be used by states. The Principles refer to the African Charter rights, which are replicated in most national constitutions. The Principles make it clear that laws that violate the rights to non-discrimination, equality and equal protection of the law, the right to dignity and freedom from ill treatment and arbitrary arrest and detention are to be decriminalised.

At a national level, campaign partners have engaged in various advocacy activities. The African Criminal Justice Reform (ACJR) has developed IEC material used in the campaign such as pamphlets and participated in

²² The Pan African Lawyers Union (PALU) is a continental membership forum for African lawyers and lawyers' associations. PALU was founded in 2002, by African Bar leaders and eminent lawyers, to reflect the aspirations and concerns of the African people and to promote and defend their shared interests. It brings together the continent's five regional lawyers' associations, over fifty-four national lawyers' associations and over 500 lawyers. For more information visit <https://lawyersofafrica.org/> (accessed 8 September 2018).

²³ See PALU 2016 Annual Conference Page, available at <http://lawyersofafrica.wixsite.com/palu2016> (accessed 8 September 2018).

²⁴ For more information visit <https://www.publicinterestlawgathering.com/> (accessed 8 September 2018).

²⁵ ACHPR/Res. 366 (EXT.OS/XX1) 2017.

other various forums to raise awareness of the campaign. The Centre of Human Rights Education Advice and Assistance (CHREAA) developed prosecutorial guidelines on nuisance-related offences in order to guide prosecutors on the interpretation of vagrancy laws. The African Policing Civilian Oversight Forum (APCOF) in South Africa and International Commission for Jurists (ICJ-Kenya) have been featured on local radio stations and have engaged with the public on the subject. AdvocAid and the Centre for Accountability and the Rule of Law (CARL) in Sierra Leone have hosted conferences and meetings to encourage debate on petty offences with key criminal justice stakeholders. Human Rights Awareness and Promotion Forum in Uganda has held consultative meetings with grassroots communities that are mostly targeted by the enforcement of petty offences with a view to gather evidence of the impact of petty offences. The Southern Africa Litigation Centre (SALC) has made submissions to the Universal Periodic Review Mechanism highlighting the impact of petty offences in Nigeria. Commonwealth Human Rights Initiative - Africa in Ghana and other partners have also engaged with parliamentarians, prosecutors, magistrates,

judges and law enforcement officials whose role is vital in the campaign. The Network of African National Human Rights Institutions (NANHRI) has been engaging with national human rights institutions to gather data on the current status of laws creating petty offences.

b. Litigation

Another strategy that has been a feature of the campaign is litigation. The campaign successfully challenged section 184(1)(c) of the Malawi Penal Code which criminalises being a rogue and vagabond person. The High Court found that the offence violated the right to dignity, equal protection of the law, freedom from inhuman and degrading treatment and freedom from discrimination. The campaign also filed an application at the African Court on Human and Peoples' Rights seeking an advisory opinion on the compatibility of certain vagrancy laws with the African Charter and other human rights instruments. A finding that the vagrancy laws are inconsistent with the African Charter and other human rights documents is critical to the campaign as it will ensure the much needed criminal justice law reform.

c. Research

Various evidence-based research studies have been published by the partners on the campaign. Findings of the research has informed the campaign's strategy and engagement with the different key role players. The research has focused on the origin of petty offences, how they are enforced, their impact on vulnerable groups and the status of enforcement of petty offences in specific countries.

5. Way Forward

The campaign still has much work to do going forward. Whilst it has managed to ensure that a soft law standard is been adopted by the African Commission, the effectiveness of the Principles will be determined by whether they are implemented. The three-fold strategy used by the regional campaign remains useful as the campaign moves forward. Firstly, advocacy activities should be expanded to reach other sub-regions to raise awareness of the Principles. This will ensure that all African countries prioritise the review of petty offences and identify problems in their context. Secondly public interest litigation will certainly benefit the groups of people affected by these offences. It is important to note at this stage that the campaign partners will soon be challenging some petty offences. Evidence-based research continues to be key as it informs the focus areas to be prioritised by the campaign partners.

COMMENTARY

Vagrancy laws, a global perspective

Dan Bwambale¹



1. Introduction

Vagrancy laws originated in England's legislation that dated back to the Black Death.² The first act to criminalise vagrancy was passed in 1349. At common law, itinerants without employment or means of support were punished as vagrants.³ The laws found acceptance in subsequent generations based on the notion that the homeless were unwilling to work and that idleness led to crime.⁴ These notions justified the arrest and imprisonment of homeless people as a means of disciplining them.

Scholars have criticised vagrancy laws and referred

to them as anachronisms.⁵ Professor Caleb Foote, for example, thought it

‘... somewhat incongruous that... Modern and peculiarly urban problems are dealt with by statutes created centuries ago to meet the utterly dissimilar problems of a rural England faced with the break-up of feudalism and its resulting economic dislocation’⁶.

Criticism to these laws is their implementation: they are used to arrest people for being homeless and mentally ill which is reprehensible. There is no real evidence that vagrancy laws protect the public.

On the other hand, we cannot say that vagrancy laws in Sections 167 and 168 of the Penal Code Act

serve no purpose in society whatsoever. They may be serving a legitimate purpose which can be met through alternative regulations or alternative laws. Those provisions that have a positive element could be maintained after scrutiny and modification to match the current needs of the society and globally accepted human rights standards. This article looks at the steps and successes other jurisdictions have taken to challenge the constitutionality of vagrancy laws and those that have gone ahead to provide for alternative legislation to deal with matters such as begging, littering and disturbing the peace.

2. Court challenges to vagrancy laws

Apart from the successful challenge to the rogue and vagabond offence, discussed elsewhere in this publication,⁷ there have been two other

¹ Dan is a fourth year law student at Makerere School of Law and spent two months during 2018 at HRAPF as an intern in the Research and Advocacy Department.

² W Chambliss 'A Sociological Analysis of the Law of Vagrancy' (1960) 12 *Social Problems* 67-77.

³ For a historical discussion of English Vagrancy offences see Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of status Criminality* (1953) 37 *New York University Law review* 1203, 1206.

⁴ See n 2 above.

⁵ See, e. g. AH Sherry 'Vagrants, rogues and vagabonds: Old concepts in need of revision' 48 (1960) *California Review* 557.

⁶ C Foote 'Vagrancy-type law and its administration' 104 (1956) *University of Pennsylvania Law Review* 603, 615.

⁷ See Case Update: 'Mayeso Gwanda: One fight won in the battle for decriminalisation of vagrancy offences in Malawi' by Chikondi Chijozi below.



The High Court of Nigeria and the ECOWAS Court both declared the actions of the arresting authorities unlawful and in violation of their rights to dignity and freedom from cruel, inhuman or degrading treatment.



The High Court in New Delhi in a recent decision decriminalised begging in the national capital, saying the penal provisions in the law were unconstitutional and deserved to be struck down.

notable successful challenges to vagrancy laws in Nigeria and India.

In Nigeria, vagrancy laws were successfully challenged in the case of *Dorothy Njemanze & 3 Others v Federal Republic of Nigeria*⁸. In this case, Dorothy Njemanze and three other women were arrested and accused of being sex workers after being found on the streets at night. During the arrest they suffered assault and verbal abuse and were unlawfully detained by Nigerian law enforcement officers. The High Court of Nigeria and the ECOWAS Court both declared the actions of the arresting authorities unlawful and in violation of their rights to dignity and freedom from cruel, inhuman or degrading treatment. The case set the pace for challenging the often vague vagrancy laws, by finding the enforcement to be in violation of fundamental human rights, and also questioned the legality of vagrancy laws. The Court did not make recommendations on what the alternative to these laws should be since that was not part of the petitioners' prayers.

The High Court in New Delhi in a recent decision decriminalised begging in the national capital, saying the penal provisions in the law

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⁸ Suit No: ECW/CCJ/APP/17/14 ECOWAS Court, Abuja, Nigeria.

were unconstitutional and deserved to be struck down.⁹ The provisions of the Bombay Prevention of Begging Act which treats begging as an offence were said to be unable to sustain constitutional scrutiny. The Court held that criminalising begging was a wrong approach to deal with the underlying causes of the problem (and) violates the fundamental rights of some of the most vulnerable people.

These cases set foreign law precedents which can be followed in jurisdictions in which vagrancy laws remain on the law books and are helping to shape the global narrative which condemns baseless criminalisation of undefined conduct at the expense of the poor and marginalised.

3. Amendments to vagrancy laws and alternative legal regulation

Vagrancy laws can potentially be saved from invalidation through amendment of some of their problematic elements. The Law Reform Commission of Western Australia suggested that the laws on vagrancy should expressly specify which types of conduct should be

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⁹ PP Singh 'Begging decriminalised, Delhi High Court says state has failed to provide for them' *The Indian Express* 9 August 2018, available at <https://indianexpress.com/article/cities/delhi/begging-decriminalised-delhi-high-court-says-state-has-failed-to-provide-for-them-5298432/> (accessed 21 October 2018).



The Law Reform

Commission of Western Australia suggested that the laws on vagrancy should expressly specify which types of conduct should be regarded as criminal behavior.

regarded as criminal behavior. The Commission's 'Report on Police Act Offences' noted that a number of offences (which were, prior to their being repealed, similar to those in section 167 and 168 of the Ugandan Penal Code Act) singled out persons on the basis of their status rather than their particular conduct.¹⁰ The opinion of the Commission was that the laws should target the particular conduct engaged in rather than classes or types of person in contemporary society. It is important to note that the Commission did not recommend doing away with vagrancy provisions altogether.

Section 6 of Police Act Offences, which provides that a person must not commit a public nuisance also sets out the behaviors which constitute this public nuisance offence (disorderly, offensive, threatening or violent behavior) provided

¹⁰ Law Reform Commissioner of Western Australia, Report on Police Act Offences, Project No. 85, August 1992, p14.

that this behavior interferes or is likely to interfere, with the peaceful passage through, or enjoyment of a public place by a member of the public. Such a provision serves a similar purpose to that which section 167 and 168 of the Ugandan Penal Code is believed to serve, however, it accords with human rights standards and can be enforced to achieve a legitimate public purpose. Since it criminalises conduct rather than people, it is not susceptible to abuse.

In 2003 the Queensland Government amended the Vagrants, Gaming and other Offences Act 1931 (VGOA) to include a new section, section 7AA, entitled 'Public nuisance'. This provision replaced the previous section 7 offence in the 1931 Act. The new provision made it an offence to behave in a disorderly, offensive, threatening or violent manner where such behavior interfered with or was likely to interfere with the public's passage through, or enjoyment of, a public place.

The Queensland Government introduced section 7AA in response to community concerns about disruptive behavior in public spaces, and to allow people to enjoy public spaces free of such behavior. The objective of the legislation was to ensure 'that members of the public may lawfully use and pass through public places without interference from unlawful acts of nuisance committed by others.

Section 7AA reads as follows:

7AA. Public Nuisance

- 1) A person must not commit a public nuisance offence. Maximum penalty -10 penalty units or 6 months imprisonment.
- 2) A person commits a public nuisance offence if -


- a) the person behaves in -
 - i. a disorderly way; or
 - ii. an offensive way; or
 - iii. a threatening way; or
 - iv. a violent way; and
- b) the person's behavior interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

3) Without limiting subsection (2) -

- a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and
- b) a person behaves in a threatening way if the person uses threatening language.

4) It is not necessary for a person to make a complaint about the behavior of another person before a police officer may start a proceeding against the person for a public nuisance offence.

5) Also, in a proceeding for a public nuisance offence, more than 1 matter mentioned in subsection (2) (a) may be relied on to prove a single public nuisance offence.

 The Queensland Government introduced section 7AA in response to community concerns about disruptive behavior in public spaces, and to allow people to enjoy public spaces free of such behavior.

In 2005 the VGOOA was repealed and largely replaced by the Summary Offences Act 2005 (SOA). The section 7AA offence provision was transferred to section 6 of the new Act.

The old, repealed public nuisance provision included a requirement that ‘threatening, abusive, or insulting words’ be used ‘to any person’. This language implies that the conduct targeted by this part of the old offence was directed at a person and not simply at the world in general. The existing public nuisance provision no longer includes a requirement that threatening, abusive or insulting language be directed ‘to any person’. The wording of the existing public nuisance provision implies that an offence may take place even where there is no intention to create a public nuisance, nor any actual public nuisance.

Section 6(4) of the SOA provides that it is not

necessary for a person to make a complaint about the behavior of another person before a police officer may start a proceeding against the person for a public nuisance offence. This does not differ substantially from the spirit of repealed section 7, where a person could commit an offence ‘whether any person is therein or not’. It does, however, make the issue of a complainant’s presence or otherwise explicit in the Act. In borrowing this provision, caution should be taken not to include those acts that cause no interference or complaint from a member of the public as ‘public nuisance’


The public nuisance offence serves a legitimate purpose and accords with rule of law principle in that the criminalised behavior is clearly spelled out and defined. Similar provisions could be adopted in Uganda to replace section 167 and 168 of the Penal Code Act.

4. Conclusion

The examples cited from Nigeria and India serve to encourage a course of action in Uganda which challenges the vagrancy provisions in court. However, the fact that the invalidation of section 167 and 168 by a court need not lead to a gap in the law and regulation of public spaces has to be made part of the strategy in a court challenge. It is advisable to also follow the example of the Australian states which have amended their vagrancy laws in order to ensure that they line up with human rights

 The examples cited from Nigeria and India serve to encourage a course of action in Uganda which challenges the vagrancy provisions in court.

standards. Activist groups instituting a case in Uganda will do well to also lobby Parliament for the adoption of alternative provisions, or the amendment of section 167 and 168, in order to create vagrancy offences which criminalise conduct rather than people and which clearly defines which conduct is considered to be against the law. It is important to acknowledge in a challenge to section 167 and 168 that, apart from being abused, these provisions also serve a legitimate public purpose and ought to be replaced by alternative provisions which may pass constitutional muster.

 It is advisable to also follow the example of the Australian states which have amended their vagrancy laws in order to ensure that they line up with human rights standards.

COMMENTARY

Of rogues, vagabonds and police discretion

Lukas Muntingh¹



On the one hand the right to liberty is recognised by the Uganda Constitution (1995) and further supported by case law.² On the other hand, sections 167 and 168 of the Uganda Penal Code (1950) and sections 10 and 11 of the Criminal Procedure Code (1950) create the offences of being 'idle and disorderly' and being 'a rogue and vagabond.' In both instances the penalties upon conviction may be imprisonment for between three months and one year and in some instances for as long as seven years. A fine may also be imposed to the value of 3000 Uganda shillings. It is well documented that these offences are overly broad in their reach and there is no evidence that their

Moreover, questions need to be raised about offences created by the then British colonial administration nearly 70 years ago and their compatibility with the 1995 Constitution.

enforcement has any impact on public safety, but rather that there is more evidence that they are used in a discriminatory manner, targeting poor, vulnerable people and people perceived to have less power.³ Moreover, questions need to be raised about offences created by the then British colonial administration nearly 70 years ago and their compatibility with the 1995 Constitution. What may have served the purposes of the colonial administration in protecting the interests of an elite minority surely cannot be left untouched by current notions of individual rights, the rule of law and equality. For the purposes here, arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*:

First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody

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² In Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011 *Hon Sam Kutesa & Others v Attorney General* the right to liberty was emphasised. The court stated: 'The genesis of the right to bail is the protection of the right to liberty. It is now excoriates [sic] that the right to liberty is universal human right and freedom which is inherent and not granted by the state. Article 20(2) of the constitution enjoins all organs and agencies of Government and all persons to respect, uphold and promote the fundamental rights and freedoms, which also includes the right to bail' *Muwadu v Uganda* Miscellaneous Criminal Application No. 13 of 2012 [2012] UGHC 246 (24 December 2012).

³ L Muntingh & K Petersen *Punished for being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences* ACJR Research Report (2015). L Muntingh *Arrested in Africa: An exploration of the issues* (2015).

(sc. by action or words restraining him from moving anywhere beyond the arrester's control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate's judicial act.⁴

As noted above, sections 167 and 168 of the Uganda Penal Code should also be read together with section 10 of the Criminal Procedure Code affording police officials the discretionary power to arrest without a warrant:

Any police officer may, without an order from a magistrate and without a warrant, arrest – any person whom he or she suspects upon reasonable grounds of having committed a cognisable offence, an offence under any of the provisions of Chapter XVI [Nuisances and offences against health and convenience] of the Penal Code Act or any offence for which under any law provision is made for arrest without warrant’.

Section 11 of the Criminal Procedure Code then deals specifically with the arrest of ‘vagabonds and habitual robbers,’ authorising arrest when a person is attempting to conceal him or herself with the aim to commit a crime; any person who has no ostensible means of subsistence or who cannot

give a satisfactory account of him or herself; and any person who is by repute a habitual robber, housebreaker, thief, receiver of stolen goods or extortionist. The key issue explored in this article is the fact that the law states that a police official ‘may’ arrest a person suspected of the above listed offences and it does not say that a police official ‘must’ arrest such a person and from this flows the discretionary powers afforded to police officials to arrest or not. The extent to which these discretionary powers are guided by law is of vital importance.

It is important to set out some legal principles regarding arrest without a warrant, and South Africa is used as an example and comparisons drawn with Uganda as appropriate. From the outset, it must be emphasised that there are various ways to secure the attendance of a suspect at trial, as arrest ‘constitutes one of the most drastic infringements of the rights of an individual’, a police official should regard it as a measure of last resort.⁵ In 2004 the UN Human Rights Committee criticised Uganda for the prevalence of arbitrary arrests.⁶ In General Comment 35 the UN Human Rights Committee also warns against arbitrary detention and provides much needed

clarification:

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of ‘arbitrariness’ is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.⁷

An important issue is the definition of ‘reasonable suspicion or grounds’ as the motivation for an arrest without a warrant.⁸ The Ugandan Police Act reads as follows on the issue: ‘A police officer may, without a court order and without a warrant, arrest a person if he or she has *reasonable cause to suspect* that the person has committed or is about to commit an arrestable offence.’⁹ This much was recently confirmed with the release on new guidelines on arrest in Uganda and the Inspector General of Police is quoted as saying: ‘The arresting officer must satisfy himself or herself that there is reasonable ground to affect the arrest.’¹⁰ In *Kainamura & 2 Ors v Attorney General & 2 Ors* the court concluded:

Allegation of commission of a serious offence alone is

⁴ [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660.

⁵ SAPS Standing Order (G) 341, para. 3(1).

⁶ CCPR/CO/80/UGA para 17.

⁷ CCPR/C/GC/35 para 12.

⁸ South Africa, Criminal Procedure Act 51 of 1977 Section 40(1). Uganda, Criminal Procedure Code Section 10.

⁹ Section 24 Police Act 1994.

¹⁰ ‘IGP issues fresh guidelines on arrests, treatment of suspects’ *Softpower News* 2 July 2018 <https://www.softpower.ug/igp-issues-fresh-guidelines-on-arrests-treatment-of-suspects/>



Allegation of commission of a serious offence alone is not enough to justify arrest of the suspect, it must be supported by facts that lead to a reasonable suspicion that the offence alleged was committed and probably by the suspect. Only then would the arrest be justified.

not enough to justify arrest of the suspect, it must be supported by facts that lead to a reasonable suspicion that the offence alleged was committed and probably by the suspect. Only then would the arrest be justified. This is not the case in this case. The facts given in this case could not reasonably lead to suspicion that the alleged offence was committed and probably by the Plaintiffs. For that reason, I find that the police arrested the plaintiff without reasonable and probable cause.¹¹

The South African Police Standing Orders note that a police officer must *really* believe or suspect that the person had or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn, which any reasonable person would in view of those

¹¹ *Kainamura & 2 Ors v Attorney General & 2 Ors* Civil Suit No. 961 of 89 [1994] UGHC 35 (12 October 1994);

facts also draw.¹²

The Uganda Police Act states clearly that if an arrested person is not released earlier on bond, he or she must appear in court within 48 hours.¹³ As noted, in general, the purpose of an arrest is to secure the attendance of the suspect at his or her trial and this can be achieved by detaining the person or releasing the person conditionally with clear instructions to appear in court at a later date. The South African Police Standing Orders also make it clear that the purpose of arrest is not to ‘punish, scare or harass such person’.¹⁴

The Uganda High Court has also observed:

As to the determination whether or not “reasonable cause” exists, it has been observed by the then East African Court of Appeal in *Fernandes v Commercial Bank of Africa Ltd and Another* [1969] EA, 482, that: “The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether this belief

¹² SAPS Standing Order (G) 341 para. 2(2).

¹³ Section 25 Uganda Police Act.

¹⁴ SAPS Standing Order (G) 341 para. 4(1).

¹⁵ *Magezi Raphael v Attorney General* Civil Suit No. 977 of 2000 [2009] UGHC 150 (29 May 2009).

¹⁶ Plasket C ‘Controlling the discretion to arrest without warrant through the Constitution’ (1998) 1(2) *SA Journal for Criminal Justice* 186.

¹⁷ As above at 190.

¹⁸ *Brand v Minister of Justice* 1959 (4) SA 712 (A) cited in Plasket (n 16 above) 187.

arises out of the recollection and memory of the accuser or out of information furnished to him by others.¹⁵

At the core of the power to arrest without a warrant is the discretion exercised by the arresting officer, and South African jurisprudence is well-developed on the issue. In addition to the suspicion being reasonable, (a) the arrestor must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all the elements of the offence.¹⁶ Furthermore, when arresting without a warrant, the arresting officer

would have to satisfy the court that he had considered and not merely paid lip service to, the rights of the suspect to human dignity and to freedom and had not relegated them to “a worthless level of subservience.”¹⁷

In short, the arresting officer must think twice before making an arrest without a warrant.¹⁸

The enforcement of certain petty offences is highly reliant on police discretion,


including the offence of being a rogue and vagabond, loitering, breach of the peace, drunk in public, and drunk and disorderly. Individual police officers decide on the spot if a person's behaviour is in breach of a law, such as being idle and disorderly. Whether there are objective criteria for what constitutes, for example, being idle and disorderly, is highly questionable. The Ugandan Penal Code in section 168(1) (d) provides that any person -

found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.

It is this provision that is used to arrest people for so-called loitering and requires that a police officer must come 'to the conclusion that such person is there for an illegal or disorderly purpose.' How the police officer will come to this conclusion is evidently open to interpretation, thus leaving it to the police officer to use his or her discretion. There is no victim or property involved as an objective measure of a

crime committed. Section 168(1)(d) does not define a crime as such, but rather uses the time of day and the 'circumstances' without even hinting as to what such circumstances may be. The 'circumstances' will inevitably vary from one police official to the next, or be so generic (eg at night) that it is meaningless and without a causal link to a possible crime. When we then test such a situation with the three questions posed by Plaskett, it is increasingly evident that it will be difficult in most instances to support an arrest: (a) the arrestor must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all the elements of the offence.

As noted in the above, section 11 of the Criminal Procedure Code deals specifically with the arrest of 'vagabonds and habitual robbers' and authorises the arrest of someone 'who is *by repute* a habitual robber, housebreaker, thief, receiver of stolen goods or extortionist.' The wording 'by repute' is as vague as it is dangerous in its application. The implication is that even if a person has been convicted of several offences in the past and served the punishment, he or she can be arrested again, prosecuted and convicted for their reputation even though there was no

 These arrests are also executed without a warrant and there is thus no judicial review of the facts prior to the arrest.

further offence. The potential, but absurd, consequence is that a person can repeatedly be prosecuted for their 'reputation' and that would be a clear violation of article 28(9) of the Constitution protecting people from being prosecuted for the same crime twice, that is if holding a particular reputation is indeed a crime.¹⁹

These arrests are also executed without a warrant and there is thus no judicial review of the facts prior to the arrest. The situation invites stigma and societal stereotypes to play a role in criminalising people for who they are rather than for any particular criminal act. Having such broad discretion invites applying a stigmatic approach to persons with disabilities, for example, and may lead police officers to attribute a 'disorderly purpose' to someone whose only vice is looking non-typical, different or possibly 'strange'.

.....
¹⁹ Constitution Section 28(9): A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.



OPINION

Vagrancy laws: The jigger in the foot of Uganda's criminal justice system

Patricia Mercy Alum¹



One of HRAPF's clients, a drug user who has been arrested three times on allegations of being idle and disorderly recently revealed to me that he has a "well-to-do" cousin who is a "reputable police officer" who plays cards and board games, smokes and takes marijuana every weekend (sometimes even on weekdays), yet he has never been arrested for being a rogue and vagabond or for being idle and disorderly. On the other hand, thousands of poor and marginalised Ugandans (just like my client) face daily harassment on grounds that they allegedly engage in these same acts. How hypocritical!

As a human rights lawyer, I have had the opportunity to interface with numerous victims of the vagrancy laws. Whenever they recount the woes that they face while being arrested and while in

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custody, I am reminded of the bullies in primary school who would torment the weakest children for sheer pleasure. Their ordeal reminds me of the bullies who derive a feeling of self-importance from mistreating others, simply because they are different. What happened to humanity? What happened to embracing diversity?

Reports from the victims of the vagrancy laws to whom I have offered legal aid indicate that the majority of them are arrested during police raids wherein the police simply identify an area suspected of "being infested with rogue and vagabonds." They then stage an attack in the neighbourhood and simply round up anybody found within that locality, irrespective of what they were actually found doing. Most of the raids are carried out in slums and areas commonly inhabited by the poor. It appears to me that the police are out to prove a

point and they couldn't care less who gets hurt in the process.

It so happens that the groups of people rounded up and arrested under the guise of the vagrancy laws consist of mainly poor persons, drug users, sex workers, and other marginalised groups of persons. The majority of the victims confess that they were actually going about their normal activities, not engaging in any illegal acts. Why pick on a person because of their social status or orientation? The Ugandan Constitution prohibits discrimination and the continued targeting of marginalised persons by police officers is most certainly unconstitutional.

But even if the persons so arrested were indeed participating in the acts, so what? There is no justification for criminalising basic human actions. Section 167 and section 168 of the

“...the police simply identify an area suspected of “being infested with rogue and vagabonds.” They then stage an attack in the neighbourhood and simply round up anybody found within that locality, irrespective of what they were actually found doing. Most of the raids are carried out in slums and areas commonly inhabited by the poor.



Penal Code Act criminalise simple, harmless acts such as wandering, begging, gathering alms, playing any game of chance for money or money’s worth in any public place, exposing wounds or deformities to obtain or gather alms, endeavouring to procure charitable contributions of any nature or kind, having no visible means of subsistence, among others. How does any of these acts affect the Government? It is absolutely irrational to deny people their right to liberty for simply engaging in such harmless acts.

Article 79(1) of the Ugandan Constitution, 1995 places an obligation on Parliament to make laws on any matter for the peace, order, development and good governance of Uganda. The drafters of sections 167 and 168 of the Penal Code Act clearly did not take this obligation into account. All laws are supposed to be made with a purpose and I personally see no purpose for the vagrancy laws. As a matter of fact, this law was

simply copied and pasted from the laws of Britain, a country of which Uganda was formerly a colony. They are not relevant and have no place in Uganda’s criminal justice system.

A simple Google search will reveal that over the years, the vagrancy laws have been protested by both public individuals, civil society organisations as well as some government officials. Even the implementers themselves are aware that the law is problematic. In addition to the above-discussed disadvantages, the vagrancy laws also encourage arbitrary arrests and they also place unfettered discretion in the hands of the police, which is often abused. There are also many cases in which the arresting officers sometimes use it as an excuse to ask for bribes in exchange for not arresting and detaining ‘suspects.’ Moreover, it is practically impossible to prove these offences in court, considering the high burden of proof on the prosecution in criminal cases.

In my humble opinion, the vagrancy laws are nothing but a jigger in the foot of Uganda’s criminal justice system. The longer that it stays, the bigger and more entrenched it will get. For as long as this jigger remains intact, marginalised persons will never be able to fully enjoy their rights. It is high time that sections 167 and 168 of the Penal Code Act are expunged from Uganda’s laws. I therefore appeal to Parliament and all the other stakeholders to repeal sections 167 and 168 of the Penal Code Act.

“...the vagrancy laws also encourage arbitrary arrests and they also place unfettered discretion in the hands of the police, which is often abused. ...the arresting officers sometimes use it as an excuse to ask for bribes in exchange for not arresting and detaining ‘suspects.’

CASE UPDATE

Mayeso Gwanda: One fight won in the battle for decriminalisation of vagrancy offences in Malawi

Chikondi Chijozi¹



1. Introduction

On 10th January, 2017, the High Court of Malawi sitting as a Constitutional Court, delivered a decision which forever changed the landscape of vagrancy offences in Malawi when it declared the offence of rogue and vagabond under section 184(1)(1)(c) of the Penal Code unconstitutional. This was in the case of *Mayeso*

Gwanda v The State.² The decision of the Court was a cause of celebration for many human rights activists who had for a number of years, worked so hard under the campaign for the decriminalisation of vagrancy offences. For the activists, the case represented a ground-breaking success for the campaign, a model for activists in other African countries who are spearheading similar campaigns, a victory of liberal democracy,³ and a historic victory of human rights.⁴ The offence of rogue and vagabond under section 184(1)(c) of the Penal Code was a cause of much concern for the activists and many other ordinary Malawians

who had been victims of the offence, directly or indirectly. The offence unfairly targeted the poor and contributed to unlawful arrests and human rights abuses.⁵ Some scholars described the offence of rogue and vagabond to be 'completely redundant, unnecessary and discriminatory'.⁶

It has been over a year since the *Mayeso Gwanda* decision was made. This paper looks at the highlights of the decision and examines its aftermath, the challenges that still exist and the lessons that can be learnt.

¹ Chikondi Chijozi is a human rights lawyer working in Malawi with the Centre for Human Rights Education Advice and Assistance (CHREAA) as the Deputy Executive Director and Litigation Manager. She is a champion of rights of various vulnerable groups, including women, children and people in conflict with the law. Since 2013 she has taken lead in the organisation, in the campaign for the decriminalisation of vagrancy offences in Malawi which has resulted in the offence of rogue and vagabond under section 184(1)(c) of the Penal Code being declared unconstitutional by the High Court sitting as a Constitutional Court.

² *Mayeso Gwanda v The State and Others* Constitutional Case No. 5 of 2015 (Mtambo J, Kalembera J, Ntaba J) (10 January 2017) (*Mayeso Gwanda* case).

³ T Chiema. 'Vagabond Ruling Dominate Malawi Headlines; Papers, Activists Hail Win for Liberal Democracy' *Nyasa Times* 11 January 2017 <https://www.nyasatimes.com/vagabond-ruling-dominate-malawi-headlines-papers-activists-hail-win-liberal-democracy/> (accessed on 4 September 2018)

⁴ As above.

⁵ CHREAA and the Southern Africa Litigation Centre (SALC) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-related Offences in Blantyre, Malawi* (2013) 29.

⁶ Law expert E Kanyongolo quoted in a local newspaper: 'M Malikwa 'Vagabond ruling stirs excitement' *The Nation* 17 January 2017 <https://mwnation.com/vagabond-ruling-stirs-excitement/> (accessed 10 September 2018).

2. Background and highlights of the *Mayeso Gwanda* judgment

The applicant in the case was a street vendor by trade who was arrested by the police on his way to sell plastic bags. He was charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code. Section 184(1)(1c) of the Penal Code defined a rogue and vagabond as including:

‘every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose’.

The applicant challenged the constitutionality of the offence. He argued that section 184(1)(c) of the Penal Code in itself and in its general application violated his constitutional rights, and the violation of his rights was not reasonable, nor recognised by international human rights standards or necessary in an open and democratic society.⁷ The Court held that section 184(1)(c) of the Penal Code and its application violated the applicant’s constitutional right to dignity because it gave too much discretion to law enforcers and because the right to be presumed innocent was negated. The Court further held that the applicant’s right to freedom

⁷ *Mayeso Gwanda* case (n 2 above) 23.

“ One thing that the *Mayeso Gwanda* decision has done is to provide that empirical evidence that vagrancy offences do not serve as a tool for crime prevention. A year after the *Mayeso Gwanda* decision, the Malawi Police conceded that the fight against crime had not been affected by the removal of that provision of the rogue and vagabond law.



Mayeso with the support of the Centre for Human Rights Education Advice and Assistance and the Southern Africa Litigation Centre, challenged the validity of the rogue and vagabond law in Malawi. Court agreed with his claim that the offense was unconstitutional and invalid, violating his rights to dignity, freedom of movement, and security of person.

from inhuman and degrading treatment and punishment was violated in that he was arrested on unsubstantiated grounds and kept in custody for three days, an experience which was demeaning, traumatising and humiliating.⁸ The court further stated that the applicant’s constitutional right to freedom from discrimination and equal protection of the law was infringed because the negation of this right does not only relate to the content of the law but its enforcement as well. The Court further held that the three rights are not derogable so that a consideration of whether section 184(1)(c) is reasonable and necessary in an open and democratic society and in conformity with international

⁸ As above.

⁹ As above at 24.

¹⁰ As above.

human rights standards is unnecessary. The Court held that the application of section 184(1)(c) produces disproportionate results in many cases with respect to marginalised groups.⁹ Mtambo J went further to find that the offence also violated the right to freedom and security of person and the right to freedom of movement.¹⁰

3. What has been the impact of the *Mayeso Gwanda* judgment?

The proponents of the vagrancy offences have always used the argument of crime prevention as the reason for retention of vagrancy offences in the penal laws, post the colonial

era. This argument was also raised by the State in the *Mayeso Gwanda* case. The State argued that justification for retaining the rogue and vagabond offences is that of crime prevention. The general fear was that once the offence was declared unconstitutional, the crime rate would go up. The Court declined this assertion and stated that there was no evidence before it that section 184 was a useful tool of law enforcement and crime prevention and protection of the public which had a deterrent value.¹¹ One thing that the *Mayeso Gwanda* decision has done is to provide that empirical evidence that vagrancy offences do not serve as a tool for crime prevention. A year after the *Mayeso Gwanda* decision, the Malawi Police conceded that the fight against crime had not been affected by the removal of that provision of the rogue and vagabond law.¹² The *Mayeso Gwanda* decision has also cleared a way for challenging the other vagrancy offences.

4. The backlash

When the Court declared section 184(1)(c) of the Penal Code unconstitutional, there was much jubilee among the general public and especially those that had been victims of the offence. For them, the *Mayeso Gwanda* decision vindicated their rights. However, for the law enforcers, *Mayeso Gwanda* took them to the drawing table and reorganised their approach in terms of utilisation of vagrancy offences in the police 'sweeping exercise' (police indiscriminate arrest of people). After *Mayeso Gwanda*, there has been an increase in arrest of people under the idle and disorderly offences under section 180 of the Penal Code and in some cases the remaining

sub-sections of the rogue and vagabond offences.¹³ Unlike section 184 (1)(c), which was a 'catch all' offence, the practical challenge for the law enforcers with the idle and disorderly offences is that, they are somewhat more specific. They specifically target sex workers,¹⁴ beggars,¹⁵ unauthorised gaming,¹⁶ and acts of indecency in public.¹⁷ Under the offences of idle and disorderly, the police are unable to prosecute those that are arrested in circumstances which allowed prosecution under section 184(1)(c) of the Penal Code. The end result is that, when these people are arrested, the police use the offence of idle and disorderly as a holding charge and they will in many cases beat up the arrested persons, then release them at the police station or tell them to buy their freedom by paying a bribe but no prosecutions is pursued. For activists, this poses another challenge because many people still experience human rights violations in the name of idle and disorderly offences. Already there have been efforts by activists to challenge the constitutionality of the offences of idle and disorderly and the other sub-sections to section 184 of the Penal Code.¹⁸

5. Conclusion

The *Mayeso Gwanda* decision is a fight won in the battle for decriminalisation of vagrancy offences, however the battle still rages. The law enforcers will do anything to ensure that the stream of benefits they enjoy under these archaic laws does not dry up hence the increase in the use of idle and disorderly offences. However *Mayeso Gwanda* nevertheless gives hope for total decriminalisation of the vagrancy offence.

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¹¹ As above.

¹² A Zangaya 'We do not miss rogue and vagabond law - Police' *Malawi24* 24 February 2018 <https://malawi24.com/2018/02/24/not-miss-rogue-vagabond-law-police/> (accessed on 5 September 2018).

¹³ <https://southernafricalitigationcentre.org/wp-content/uploads/2017/12/Press-release-Queen-Banda.pdf>

¹⁴ Section 180(a) of the Penal Code provides that, 'Every common prostitute behaving in a disorderly or indecent manner in any public place is deemed an idle and disorderly person'.

¹⁵ Section 180(b) of the Penal Code provides that 'Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do, is deemed an idle and disorderly person. Section 180(f) provides that 'Every person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms, is deemed an idle and disorderly person'.

¹⁶ Section 180(c) of the Penal Code.

¹⁷ Sections 180 (d) and (e) of the Penal Code.

¹⁸ The Centre for Human Rights Education, Advice and Assistance (CHREAA) is currently challenging the offence of 'being idle and disorderly' under section 180(b) of the Penal Code where it targets a non-violate, single act of begging. CHREAA is also party to another case, challenging the police indiscriminate sweeping exercise and the offence of 'being a rogue and vagabond' under section 184(b) of the Penal Code.

INTERVIEW

The impact of 'Idle and disorderly' laws on street vendors in Kampala

The Human Rights Advocate editorial team met up with Mr. Ronald Zibu, the Chairman of Kasubi Market in Kampala, in order to gain an understanding of the way in which the 'Idle and disorderly' laws impact market vendors. Mr. Zibu gave an encouraging report that arrests under these provisions within his market has significantly decreased over the past few years.



Mr Ronald Zibu, Chairman of Kasubi Market in Kampala.

1. The Human Rights Advocate (HRA): What is your profession and role within this market?

Ronald Zibu (RZ): I am the Chairman of Kasubi Market and I am a trader dealing in matooke.

2. HRA: How long have you worked as a market vendor?

RZ: I have worked here for many years, about 25 years now. Meaning, I have never done any other job apart from this ever since I got out of school.

3. HRA: Have you or any other vendors ever been arrested while carrying out activities as a vendor?

RZ: KCCA (Kampala Capital City Authority) arrests people using the law. You need to know that we work on a road reserve. Kasubi Market is a road reserve market. Now KCCA has to make sure vendors do not operate in the road, more so the middle of the road. Dealing with road vendors is like dealing with children. When vendor A places their merchandise in the road, vendor B will follow suit and similarly vendor C come and they find themselves working in the road.

Unlike previous days, nowadays vendors are rarely arrested and taken to the police. In case a vendor has issues about anything in the market that may require police intervention, the police communicates to me as the Chairman of the Market first and we see how to settle the issues before being taken to police.

4. HRA: I understand that you have attended a consultative meeting, facilitated by

Human Rights Awareness and Promotion Forum on 'Idle and disorderly' laws in 2017 and that you raised particular issues concerning these laws during the meeting. Can you discuss what these issues were?

RZ: During the training with HRAPF, I raised my concerns that when KCCA officials or the police finds a vendor operating in the road, it would not be necessary to confiscate his or her merchandise. It would be right to tell him or her to remove his or her things and place them in the right place. If you start arresting vendors then you will have to arrest the entire market. Vendors believe that whoever is in front nearer to the road is the one that gets more clients, that's why they keep encroaching into the road. But I think we reached an understanding on how to handle that with the police and KCCA law enforcement officials since we had several meetings and trainings on the same. We even dealt with crimes related to being idle and disorderly. Currently, we are faced with fraud cases; however, we have an understanding with police and we asked them to let the market council handle crimes related to fraud first before they can be registered at the police because as a market, we have by-laws. For instance, if

A sold to B rotten potatoes, B is free to come back and pick fresh potatoes of the same price equivalence or to claim his/her money. I can say we rarely get cases where one has been arrested these days. What used to be crime was people being arrested for being idle and disorderly.

5. HRA: *During the arrests that do take place, are the trader's merchandise confiscated? Do they get them back?*

RZ: Yes, KCCA law enforcers usually take merchandise especially watermelon and sugarcane since these are the common merchandise along the roads. Besides, the President himself - His Excellence Yoweri Museveni - knows that our market operates along the road, and by the way got us land where the market is shifting soon. The foodstuffs are confiscated and taken with them. When taken on the KCCA trucks, most of the merchandise gets hit during the movement and damaged and perishables like watermelon rot and are useless to get back though it is also hard to get them back.

6. HRA: *Were you or the vendors charged when you reached the police? What were the charges?*

RZ: Those days they used to take vendors to court over charges of idle and disorderly until the President questioned the meaning of idle and disorderly, I also asked myself the same of



...the families of the victims in that, some family lacked what to eat as the only person who provides is taken behind bars for days plus mental torture to the children knowing that a parent has been arrested.

how someone comes up to say that the other person is idle and disorderly. They used to arrest people saying that they were about to commit a crime. Besides that, idle and disorderly charges no longer work in Kasubi Market but still apply elsewhere and I do not think they will be brought back.

7. HRA: *Were the arrested vendors asked to pay a bribe at any point during or after arrest?*

RZ: When vendors used to be arrested over idle and disorderly charges, the police used to contact me as the Chairman of Kasubi Market and the vendors would be freed without me bribing them.

8. HRA: *Were vendors ever harmed during the course of the arrest?*

RZ: During the arrests, I always tell the people being arrested to stay calm to avoid being beaten as they resist arrest. So most of Kasubi vendors are not harmed by the authorities during their arrest.

9. HRA: *The days vendors were taken to court, were they represented by legal counsel and what did they plead?*

RZ: When a trader was

arrested and taken to court, getting legal presentation by the market lawyer was hard if the arrest was over idle and disorderly. In such a situation, the arrested vendor would get their own external legal aid. Right now since three years ago, there has been no vendor who has been taken to court.

10. HRA: *Do you comply with the requirements of your LC and municipal regulations to operate your business?*

RZ: We as Kasubi market vendors have our own by-laws that we follow other than the Local Council and KCCA regulations.

11. HRA: *How has these arrests affected the business of vendors and their families?*

RZ: The arrests of the vendors under the idle and disorderly charges used to negatively affect the families of the victims in that, some family lacked what to eat as the only person who provides is taken behind bars for days plus mental torture to the children knowing that a parent has been arrested.

12. HRA: *Thank you for your time and for explaining the way in which the 'Idle and disorderly' laws affect vendors in your market.*

INTERVIEW

LGBTI persons suffer targeted arrests under 'Idle and disorderly' laws

The Human Rights Advocate editorial team interviewed Mr. Phillip Mutebi, a Community Paralegal working with the LGBTI community and intervening in arrests under these and other provisions.



Mr. Phillip Mutebi, Community Paralegal working with the LGBTI community in the Lugazi area.

1. The Human Rights Advocate (HRA): How long have you been working with the LGBTI community and what is your role?

Phillip Mutebi (PM): I am a Community Paralegal. I was trained by Human Rights Awareness and Promotion Forum. I completed my training in 2018. This is the third year that I am engaged in work with the LGBTI community.

2. HRA: Please tell me more about your work on the ground.

PM: When LGBTI people get arrested, I run immediately to help them. When I reach at the police I identify myself immediately. I ask the officer

to confirm whether my client is in custody. Then I request the officer to let me talk to my client and interview them. I then look for the investigating officer and get the case reference number. If our client has stayed in custody for more than 48 hours I request that the client should be released.

3. HRA: Which charges do your clients typically face?

PM: Charges of being idle or vagabond. LGBTI people are discriminated against. They are viewed as animals. Police officers do not accept same-sex relations.

4. HRA: What is the process after someone has been charged for being rogue and vagabond?

PM: I do my level best to make sure that the person charged is not taken to court. If the person has stayed in custody for more

than 48 hours and has substantial sureties, I will request for my client to be released on bond. I have handled many cases, more than 100, and only once has one of my cases gone to court. My cases end at the police station or the police post.

Some of our community members in Lugazi, fear contacting me when they get problems. For others it is due to poor communication, as some of them are on different islands or they don't have phones and airtime. Some of them don't know where they can get help.

5. HRA: What happened in the one case that was taken to court?

PM: The client was taken before the magistrate. The magistrate mentioned the case. The person was taken on remand for two weeks, and was eventually released.



I do my level best to make sure that the person charged is not taken to court. If the person has stayed in custody for more than 48 hours and has substantial sureties, I will request for my client to be released on bond.



6. HRA: *How do you intervene in cases and prevent them from going to court?*

PM: When I reach the police, I introduce myself and explain that I work as a paralegal. Then I discuss the case with the OIs or the OC CID, DPCs. The way you approach the police officer is very important. I talk with the police officers clearly and calmly and we negotiate. I promise them that I will counsel my client not to commit that offence again and reform.

7. HRA: *How does one reform from 'being a rogue and vagabond'?*

PM: I was talking about being an LGBTI person. Some officers arrest to look for money. There are rumours that LGBTI people are very rich. That is why they are often arrested and blackmailed. Blackmailers

would work with the police to entrap LGBTI people. Transgender people also attract arrest because their gender identity is more evident.

8. HRA: *Which advice can you give to the LGBTI community to protect themselves from being targeted under these provisions?*

PM: Targeted arrests mostly take place after 10pm at night. I would advise LGBTI people not to walk by themselves at night. It is risky for transgender people who are yet to pass to display their gender identity in places that may not be safe.

9. HRA: *Thank you very much for your time and for sharing your views on the impact of 'Idle and disorderly' laws on LGBTI people.*

INTERVIEW

The impact of 'Idle and disorderly' laws on sex workers: Legal intervention makes all the difference

Christine Nabatanzi, a sex worker and peer educator, met up with The Human Rights Advocate editorial team in order to explain the effect of 'Idle and disorderly' laws on sex workers.



Christine Nabatanzi is a sex worker, HRAPF trained Community Paralegal and sex worker peer educator.

1. The Human Rights Advocate (HRA): *Have you ever been arrested under the 'Idle and disorderly' laws?*

Christine Nabatanzi (CN): Yes. We were on the street in Wandegeya. The police came and detained us on rogue and vagabond charges. We were part of a huge police swoop, a group of sex workers as well as other people who are not sex workers. We were prosecuted and produced at the LDC [Law Development Centre] Court, charged with rogue and vagabond and remanded in court. We were on remand in Luzira prison. I spent one month in prison.

We were taken for digging and were doing chores like fetching firewood and even being caned if we were not working fast enough. The bedding and food was very poor.

2. HRA: *Did everyone who was arrested appear in court?*

CN: The groups were arrested in different places. We all appeared on the same charge sheet and we all appeared in the court together.

3. HRA: *Were the arrested persons given opportunity to plead?*

CN: They read the charge sheet and asked the whole group how they plead individually. I pleaded not guilty. No one pleaded guilty.

4. HRA: *Were you and others convicted at this point?*

CN: After being produced in court and already spending one month in Luzira, I paid a bribe of Ugx300,000 and was released. I am not sure where the money went. The people who got me out of custody paid through 'chambers' to have me released. Everyone who paid a bribe was released

that day.

5. HRA: *Did you have legal representation in court?*

CN: This was back in 2013. We did not have legal representation because we did not know about HRAPF.

6. HRA: *Have you been arrested under the 'Idle and disorderly' laws on any other occasion?*

CN: I was also detained in Kireka police station in 2016. Police found us on the street at around 9pm. The officers came, many ran away and the rest were taken to the police station. We called a volunteer at HRAPF who came to assist us. The volunteer told the police that it was wrong to arrest the sex workers. He spoke to the OC about the circumstances under which we were arrested. He negotiated with the police saying we are trying to find a way to survive and that we ought not be detained as we did not commit any other crime. He explained that arresting us arbitrarily worsens the situation and that we are mothers. There is also no evidence that we are engaging in sex work. Seven sex workers were

released after spending a night in police cells.

7. HRA: *So having legal representation at police level make the difference between spending one night in a police cell and spending one month in prison on remand. Are sex workers still regularly arrested under 'Idle and disorderly' provisions?*

CN: We asked whether sex workers are still regularly arrested under these provisions. Police say that these days sex workers have representatives so they no longer pay bribes, police have no motivation to arrest us. They detain the clients – the men – rather than the sex workers themselves. They

detain sex workers on other charges such as theft, assault and common nuisance.

8. HRA: How many times have you been arrested under provisions other than the 'Idle and disorderly' laws?

CN: I have been detained four other times. Then I was charged with theft and murder.

9. HRA: Thank you very much for your time and for giving us some insight into the impact of the 'Idle and disorderly' laws on sex workers.



We called a volunteer at HRAPF who came to assist us. The volunteer told the police that it was wrong to arrest the sex workers. He spoke to the OC about the circumstances under which we were arrested. He negotiated with the police saying we are trying to find a way to survive and that we ought not be detained as we did not commit any other crime. He explained that arresting us arbitrarily worsens the situation and that we are mothers.



OPINION

Knowledge of rights protects People Who Use Drugs from arrest under 'Idle and disorderly' laws

Fred Kizito¹



I work with the drug user community as a peer educator through Uganda Harm Reduction Network in the Makindye area. I was a drug user myself for three and a half years. I was encouraged by my parents to stop using drugs and I did, but it was a process. Since I have been through that process myself I know very well the challenges that other drug users face. I have many friends who are still in the community and I consider myself someone who is willing to fight for their rights. When people from the community are arrested they are usually quick to inform me. Whenever I can I go to the police stations to see how I can help.

Police would typically arrest groups of drug users at hotspots. They would arrest everyone they find there.

¹ Fred Kizito is a peer educator working with People Who Use Drugs in the Makindye area under Uganda Harm Reduction Network.

Sometimes parents of the arrested persons will come and speak on their behalf. At the station, sometimes they do not even allow you to see them. They tend to take the arrestees to cells at different police stations, regardless of where they had been arrested.

Drug users are never charged for using drugs. If they are found with 'exhibits' they are only charged for possession and trafficking. This is the case even though the people charged are not the people who sell drugs. When they are not found with any exhibits, they are simply charged for being rogue and vagabond.

The police tend to transfer arrested persons to many different prisons where they do manual labour like digging. As a community worker it is very hard to follow up on everyone who is arrested.

Sometimes they are taken to a court far away from where they had been arrested. Sometimes the process is so quick, a person would appear in court a day after being arrested. It is very difficult to get bail for people who have been charged in a group. The police would give everyone the same charges. Sometimes they can avoid prison by paying a bribe. The court processes are not fair. The

“ When they are not found with any exhibits, they are simply charged for being rogue and vagabond. The police tend to transfer arrested persons to many different prisons where they do manual labour like digging. As a community worker it is very hard to follow up on everyone who is arrested.



arrestees also appear in court as a group, and they do not always get a chance to speak. No evidence is produced and the charged persons are not given the opportunity to plead. When you know your rights and raise your hand and say something, that makes the difference.

When drug users are found guilty of the rogue and vagabond offence, they are usually imprisoned for four to six months. Some community members spend most of their lives in prison. When police get to know that they have been released from prison, they organize another operation.

The lives of people in the community are affected detrimentally due to these arrests and detention. Arrestees are beaten and abused in custody. You know in community we have many people who are HIV positive. When they come back they are very weak and can easily become infected with other diseases. One of our colleagues was arrested in 2016, after 3 months he was committed to Mulago hospital. When I reached there I found him still in handcuffs, on his hospital bed. He passed away two days later.

Arrestees are beaten and abused in custody. In June 2018 I heard that a young man had been arrested after he was found smoking bangi. He was beaten in police custody. I was forced to

“ It is very difficult to get bail for people who have been charged in a group. The police would give everyone the same charges. Sometimes they can avoid prison by paying a bribe. The court processes are not fair. The arrestees also appear in court as a group, and they do not always get a chance to speak. No evidence is produced and the charged persons are not given the opportunity to plead.

call the DPC [District Police Commander] and informed him about the case. I told him that his officers had injured by colleague. The DPC gave him Ugx50,000 to cover the costs of his treatment and told the officer to apologise to the young man. Some of the officers do not like me because they know I am against their abuse.

I have been arrested several times myself, but because I know my rights I cannot be locked up at the police station. I would simply ask them 'what wrong have I done? How do you know I am being idle? I am from work and I just came here? Tell me the crime I have committed?' Whenever they see that you know your rights, they let you go free. I have decided to give all my time to available workshops which educate about human rights. I am trying to also mobilise the drug user community and give them information about their rights.

ABOUT HRAPF

Background

Human Rights Awareness and Promotion Forum (HRAPF) is an independent non-partisan Non-Governmental Organisation that works towards the protection of the rights of marginalized communities in Uganda through the direct provision of legal aid services and legislative advocacy with a view to influencing policy reform in favour of marginalized persons. HRAPF operates a specialized legal aid clinic for marginalised groups in Uganda. It also engages different duty bearers like the Police, the judiciary, the Uganda Human Rights Commission and the Equal Opportunities Commission on protection of the rights of marginalised persons, as well as engaging in research and documentation on rights of sexual minorities.

Legal Status

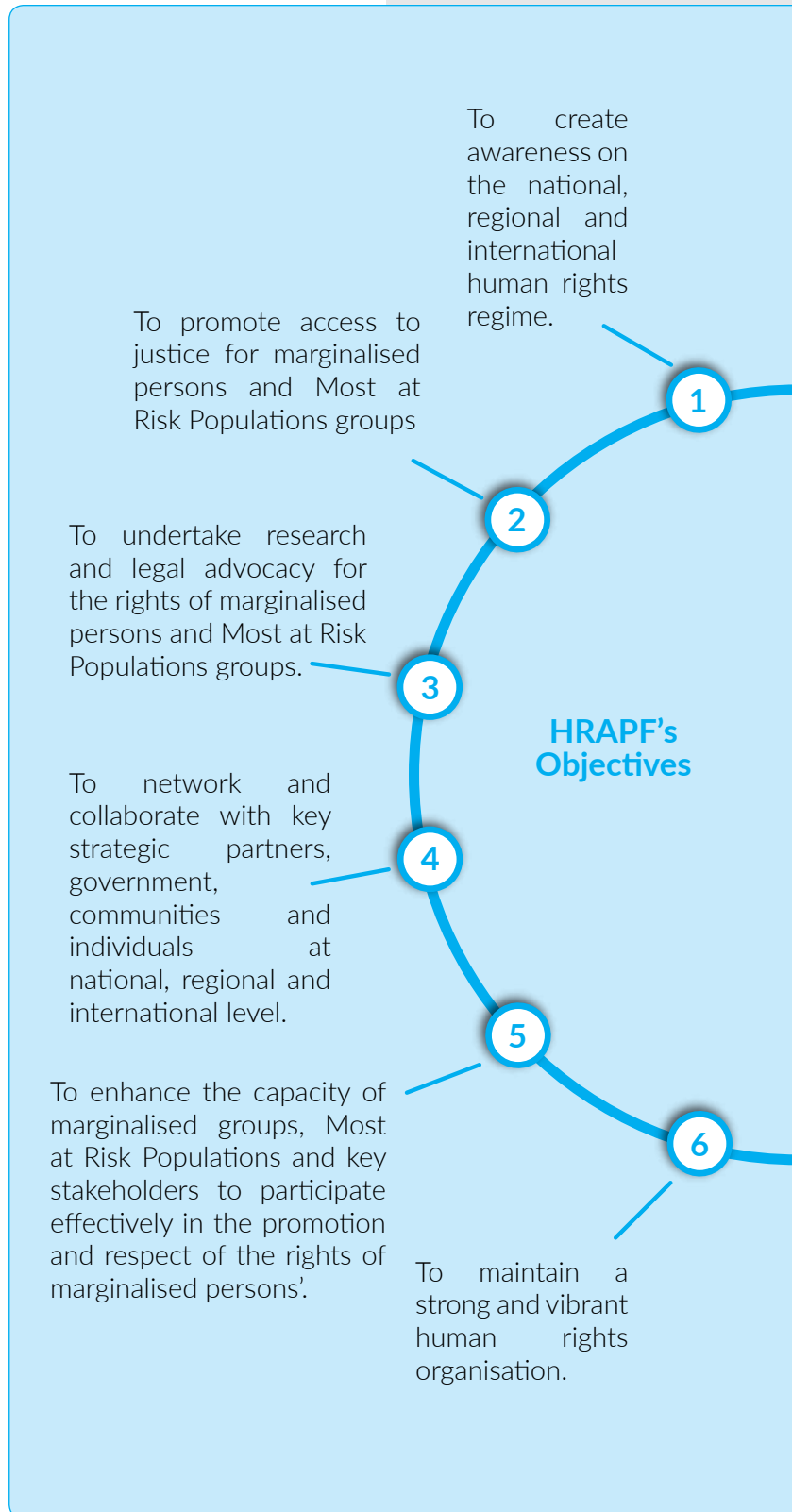
HRAPF is incorporated under the laws of Uganda as a company limited by guarantee.

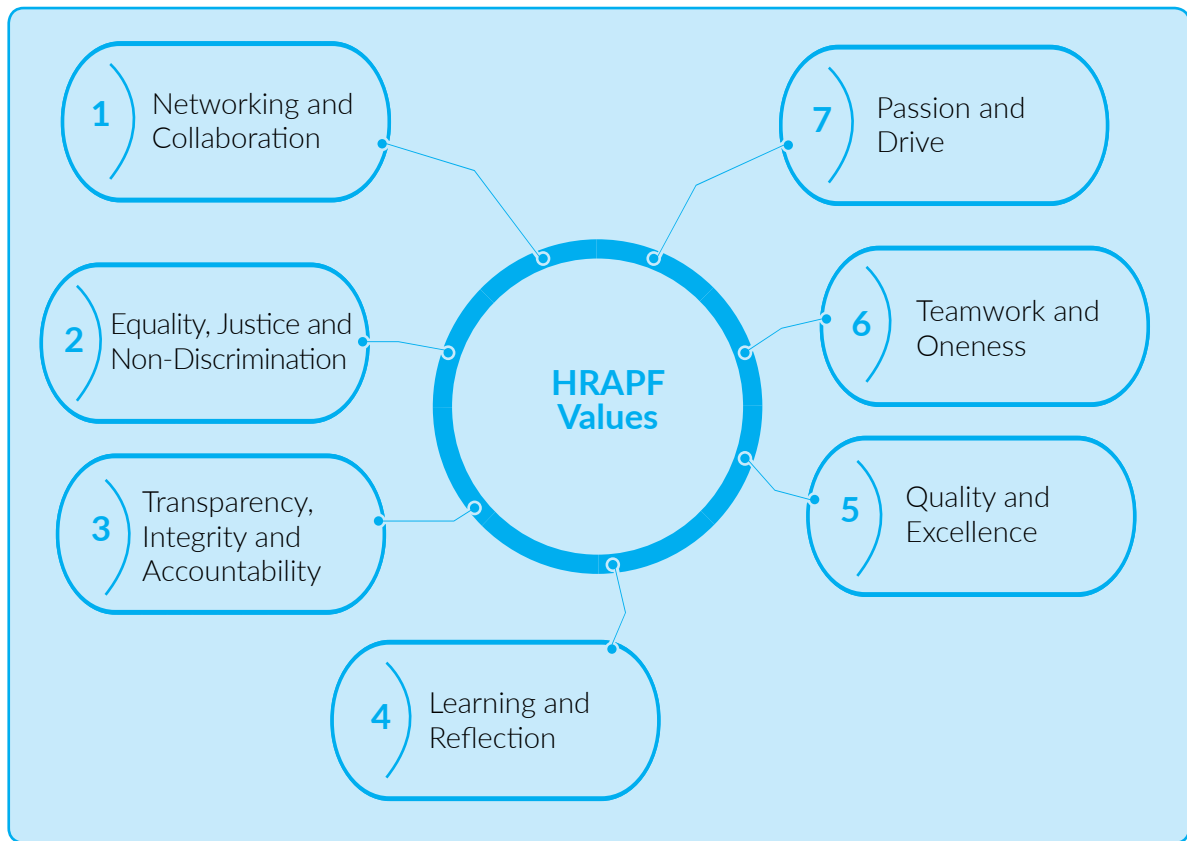
Vision

A society where the human rights of all persons including marginalised persons and Most at Risk Populations are valued, respected and protected.

Mission

To promote respect and protection of human rights of marginalised persons and Most at Risk Populations through enhanced access to justice, research and advocacy, legal and human rights awareness, capacity enhancement and strategic partnerships.





Slogan

Taking Human Rights to all



