



PALU Statement on the Decriminalization of Petty Offences and Vagrancy Law Issued by Advisory Opinion of the African Court on Human and Peoples Rights.

On 4 December 2020, the African Court on Human and Peoples Rights (the Court) rendered a landmark [Advisory Opinion](#) on the consonance of the Vagrancy Laws with the African Charter on Human and Peoples' Rights (the African Charter) and other relevant human rights instruments. Responding to a submission by the Pan African Lawyers Union (PALU) which has a mandate to make such filings before the Court due its standing MoU with African Union and did so on behalf of a broad coalition of civil society organizations. The Court unanimously declared these laws inconsistent with the African Charter, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on the Rights of Women in Africa. It further placed a positive obligation on African States to review and amend or repeal the relevant offences.

A pronouncement such as this is a major advancement for human rights on the continent. Delivered by the principal judicial organ of the African Union (AU) it carries significant legal weight and moral authority and has the potential to reshape profoundly criminal justice outcomes for poor and marginalized people in Africa. It also means that three of the key AU bodies tasked with the protection and promotion of human rights have now pronounced on criminal justice responses to minor offences, the others being the Pan African Parliament through its new Model Police Act, and the African Commission on Human and Peoples Rights (ACHPR). Specifically, the ACHPR Principles on the Decriminalization of Petty Offences read together with the Advisory Opinion provide an authoritative legal interpretation of States' Charter obligations.

Prior to this Historic Advisory Opinion a continental advocacy campaign ran to decriminalize and reclassify petty offences in Africa with the dual objectives of raising awareness of the disproportionate impact on the poor and vulnerable and advocate for the repeal and decriminalization of these laws. Together with other key regional partners of the Campaign, PALU's role was also to interrogate the legality of the provisions criminalizing petty offences in Africa, this was done on a regional level through engaging a multitude of stakeholders through numerous consultations through meetings, presentations and webinars throughout Africa. One key request to the Court was to determine whether State Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and by-laws to conform with the rights protected by the African Charter, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and if in the affirmative, to determine what these obligations are.

Key asks to the Court from PALU's Request for the said Advisory Opinion filed in March 2018:

- i. Whether vagrancy laws and by-laws, including but not limited to, those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; and cannot give good account of him or herself violate African Human Rights Treaties.
- ii. Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area violate African Human Rights Treaties.
- iii. Whether vagrancy laws and by-laws, including but not limited to, those which allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself violate African Human Rights Treaties.
- iv. Whether State Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and by-laws to conform with the rights protected by the African Charter, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and if in the affirmative, determine what these obligations are.

In accordance with the African Charter, Protocol, Rules of Procedure, and Practice Directions of the Court, the AfCHPR invited States Parties, the African Commission of Human and Peoples' Rights (the Commission), and other interested parties to file their written Submissions on these questions. States parties that filed written Submission included Burkina Faso and Kenya. In addition, the following key stakeholders applied and were granted leave to file their Submission as friends of the Court (*Amici Curiae*): Network of African National Human Rights Institutions (NANHRI), University of Miami School of Law, Kenyan Section of the International Commission of Jurists (ICJ-Kenya), University of Pretoria and the Open Society Foundations (OSF).

Burkina Faso, in its submission, points out that many of the vagrancy offences require social rather than penal responses. It also submits that vagrancy offences tend to perpetrate discrimination and also effect violation of the freedom of movement and choice of residence which are guaranteed in Article 12 of the Charter. It further submits that vagrancy laws violate the right to liberty and impede the right to a fair trial especially by diluting the presumption of innocence.

The NANHRI observes that enforcement of vagrancy laws often leads to the exacerbation of prison overcrowding and thus worsens the conditions of incarceration. It submits that vagrancy laws and by-laws that criminalise the status of a person as being without a fixed home, employment or means of subsistence are, therefore, contrary to the rights entrenched in the Charter. It further



submits that arrests and detention for vagrancy-related offences are a disproportionate response to unemployment, poverty and homelessness that may result in significant harm to the individual and his or her family. The essence of the NAHRI submission is also reflected in the observations filed by the OSJI.

The ICJ-Kenya observes that vagrancy laws have a net effect of targeting the poor and the marginalized, especially women, victims of domestic violence and sex workers. It submits that the continued enforcement of vagrancy laws has resulted in unparalleled human rights violations suffered by alleged petty offenders at the point of arrest, detention before trial, trial and post-trial periods and hence is incompatible with the principles of international human rights law, including the prohibition of arbitrary arrest and detention.

According to the Principles on the Decriminalisation of Petty Offences in Africa, which were submitted by the Commission, laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination in that they either target or have a disproportionate impact on the poor and vulnerable and perpetrate gender-based discrimination. The enforcement of 14 petty offences, it is argued, has the effect of punishing, segregating, controlling and undermining the dignity of individuals on account of their socioeconomic status thereby perpetuating the stigmatisation of poverty.

The CHR and DOI observed that arrests and detentions under vagrancy laws are often not for prosecuting the suspects but for intimidating and removing them from the streets. Such arrests are not supported by law enforcement officers' reasonable suspicion that an offence has been or is about to be committed. They further submit that vagrancy laws violate key human rights in the Charter which also results in an adverse socio-economic impact on those that are arrested or detained. According to CHR and DOI, such an infringement of the ability of individuals to be agents of their own development is only justified if it is within the ambit of democratic and rights-respecting laws.

The submission by HRC-Miami and Lawyers Alert reiterates the points made by the ICJ-Kenya, the NAHRI and also the CHR and DOI. Additionally, the HRC-Miami and Lawyers Alert point out that vagrancy is the principal crime in which the offence consists of being a certain kind of person rather than in having done or failed to do certain acts thereby violating Articles 2, 3, 5 and 6 of the Charter. 56. The OSJI submits that vagrancy laws are a colonial relic that work to reinforce patterns of discrimination instituted by colonial regimes contrary to Article 2 of the Charter.

Referencing Articles to the African Charter including right to discrimination & equality, right to dignity, right to liberty, right to fair trial and right to freedom of movement the Court unanimously ruled that:



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Vagrancy laws, including but not limited to those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence, as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate; and also those laws that order the forcible removal of any person declared to be a vagrant 42 and laws that permit the arrest without a warrant of a person suspected of being a vagrant are incompatible with Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter; iv.

- i. Finds that vagrancy laws and by-laws, including but not limited to, those containing offences which, once a child has been declared a vagrant or rogue and vagabond, summarily orders such child's forcible relocation to another area, are incompatible with Articles 3, 4(1) and 17 of the Children's Rights Charter; v.
- ii. Finds that vagrancy laws, including but not limited to, those that allow for the arrest of any woman without a warrant simply because the woman has no "means of subsistence and cannot give a satisfactory account" of herself are incompatible with Article 24 of the Women's Protocol; and vi.
- iii. Declares that State Parties to the Charter have a positive obligation to, inter alia, repeal or amend their vagrancy laws and related laws to comply with the Charter, the Children's Rights Charter and the Women's Rights Protocol within reasonable time and that this obligation requires them to take all necessary measures, in the shortest possible time, to review all their laws and by-laws especially those providing for vagrancy-related offences, to amend and/or repeal any such laws and bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol.

The findings of the Court are also an important tool in challenging the overly securitized response to the COVID-19 pandemic. Measures in many African countries to curb the spread of the virus have had a disproportionate impact on the lives of poor and other marginalized people. Draconian lockdowns have resulted in arrests for ordinary, life sustaining activities like fetching water or food, often using petty offence laws such as loitering. Likewise the introduction of new COVID-related offences such as curfew violations or failure to wear a mask have resulted in an increase in mainly poor people being detained in already overcrowded, decaying police cells, significantly increasing the risk of infection for all.