

# SADC LAWYERS ASSOCIATION

Regional High Level Consultation  
Dialogue Report on Implementation  
and Domestication of AU Standards  
to Decriminalize Petty Offences.

# 2021



Supported by



304 Brooks Street, Menlo Park,  
Pretoria, 0102,  
Gauteng, South Africa  
**Telephone:** +27 (0) 12 366 8800  
**Fax:** +27 (0) 12 362 0969  
**Email address:** [info@sadcla.org](mailto:info@sadcla.org)  
**Website:** [www.sadcla.org](http://www.sadcla.org)

# **SADC LAWYERS ASSOCIATION**

---

**Regional High Level Consultation  
Dialogue Report on Implementation  
and Domestication of AU Standards  
to Decriminalize Petty Offences.**

**2021**

# CONTENTS

---

**01 INTRODUCTION 04**

**02 WELCOME REMARKS 05**

**03 CONTEXT & HISTORY OF THE CAMPAIGN ON PETTY OFFENCES 06**

**04 SUCCESSES AND STEPS TAKEN IN THE CAMPAIGN 07**

**05 GAPS AND CHALLENGES IN IMPLEMENTATION OF AU STANDARDS 08**

**06 PANEL DISCUSSIONS 10**

**07 RECOMMENDATIONS AND WAY FORWARD 11**



## INTRODUCTION

SADC Lawyers Association's primary mandate is to promote good governance & the rule of law in the SADC region. There has been prevalent existence and application of petty offenses in the region & on the 28th of May the SADC-LA with the assistance of OSISA facilitated a High-Level Consultation on the Implementation of AU standards to decriminalize petty offences. The objective of the dialogue was to identify the positive findings, risk factors and to lay down recommendations which are essential to establish an effective strategy for implementation from both state and non-state actors.

## WELCOME REMARKS



On behalf of the stakeholders present, the opening address was delivered by Mrs. Sashi Nchito who is a member of the SADC-LA Executive Committee. Sashi Nchito recognized the presence of stakeholders from the Hon Minister of Justice in Namibia & The State Counsel of Zambia as well as the other stakeholders present. She explained how petty offences negatively affect the rights of marginalized groups due to selective application of the laws which violates fundamental human rights like dignity, freedom of movement & natural justice. It was highlighted that the current state of petty offences is consequential to criminalization of poverty discrimination of the poor from economic activity and decent

living in accordance with international human rights standards. Mrs Nchito outlined that in promotion of the rule of law & access to justice, it is important to sheer potential impact to deliver, amplify and direct critical messaging on matters of developmental significance in the Sub - Saharan region. She also noted that SADC-LA is excited to join the campaign on decriminalization of petty offences, recognize and acknowledge the work of existing partners which has resulted in many milestones and achievements, most recent among these, an advisory opinion on the ACHPR on petty offences and vagrancy laws. Mrs Nchito also observed that the ACHPR advisory opinion mandates states to amend and realign their laws accordingly, which presents an opportunity to all stakeholders to collaborate efforts & input a positive contribution in the implementation of AU standards.

---

Sashi Belinda Nchito - SADC-LA Executive Committee Member



## CONTEXT & HISTORY OF THE CAMPAIGN ON PETTY OFFENCES



Janelle Mangwanda

**The history of the campaign was discussed by Ms Janelle Mangwanda, a researcher at the Africa Criminal Justice Reform.**

### CONTEXT

Janelle highlighted that there have been several criminal justice audits which reveal that there are a

number of persons who were incarcerated/detained for extensive number of times were charged with petty offences. She indicated that the ACJR 'Punish the poor report' of 2015 further explained the challenges with petty offences and impediment of justice. These range from disproportionate sentences, pre-trial detentions, loitering prohibitions, as well as arrests without warrants. These laws have had an impact on prisons which are being overcrowded & she held that arrest and detention are inappropriate for offences that do not threaten public safety.

Therefore it was submitted that criminal justice systems criminalize poverty hence it is important to campaign on decriminalization of petty offences. Ms Mangwanda outlined the nature of the offences as archaic, overly broad, outdated, offensive, discriminatory. These offences provide law enforcement officials with unfettered discretion to arrest and disproportionately affecting poor and marginalised groups who are considered "undesirable" & "unwanted".

It was highlighted that the Campaign was formally launched in 2014 with obligations to;

- Decriminalize and Declassify certain laws and statutes.. Declassification: re-classifying offences as administrative or non-arrestable offences, or offences for which pre-trial detention may not be used or prison sentence not be imposed.
- Promote research and advocacy; law reform and the use of public interest litigation.
- Advocate for a regional normative framework.
- To pursue the African Court on Human and Peoples' Rights (African Court) for an Advisory Opinion.
- To expand the campaign membership to all regions on the African continent

## SUCCESSSES & STEPS TAKEN IN THE CAMPAIGN

It was indicated that the campaign has had successes on research and advocacy, law reform as well as litigation ever since the launch. There have been several research reports published by the campaign to raise awareness on petty offences. These reports expose gaps on issues ranging from corruption and extortions during arrests. The research has been used to sensitize and encourage governments & the African Court on Human & Peoples Rights to bring about law reform and policy practice.

The research and advocacy of the campaign was consequential to both domestic and international law reform. Ms. Mangwanda noted that in Malawi the Southern Africa Litigation Centre & the Centre for Human Rights Education released research explicitly highlighting that the terms 'rogue vagabond' & 'idle disorderly', were being enforced in a discriminatory manner. These findings were the background to a consultation with the Ministry of Justice, Judiciary and the Police Departments which resulted in an establishment of **Directives on Prosecutors on the Prosecution of Minor Offences**. It was highlighted that there was Law reform processes in other regions. In June 2017 in Kenya the chief Justice gazetted the formation of the National Steering Committee to review laws on petty offences and the criminal justice system, which was a landmark to review of petty offence laws in Kenya. Furthermore, Ms Mangwanda indicated that in 2017 the African Commission adopted the principles for the decriminalization and declassification of petty offences. These principles are significant in the decriminalization of petty offences as they assist states in the promulgation, application and implementation of petty offences & provide a leeway for alternative sanctions other than arrests and detention. The campaign was also conducted virtually in September 2020 through a **Regional Campaign Conference on COVID 19 & the Decriminalization of Petty Offences in Africa**. The statement of the conference was presented 67th the Ordinary session of the ACHPR.

Ms Mangwanda highlighted that the campaign successfully challenged several petty offence laws through strategic litigation and identified key examples.

**In 2015 in the case of The People v Kasonkomana the defendant was arrested and charged under section 178(g) of the Penal Code with the idle and disorderly crime of soliciting in a public place for immoral purposes after advocacy of the rights of LGBTI members on a television programme. The Zambian High Court acquitted him of the charges and this was a crucial precedence with regard to proportionality of sentencing on offences.**

Ms Mangwanda also highlighted a landmark decision in Malawi when the court declared the unconstitutionality of vagabond laws (Republic v Phempho Banda and 19 Others (Review Order) (Review Case No. 58 of 2016) [2016])

### **Advisory Opinion of the ACHPR**

Ms Mangwanda explicitly highlighted that the recent advisory opinion on the consonance of vagrancy laws with the ACHPR is the milestone achievement on the campaign on decriminalization of petty offences. The Pan African Lawyers Union, on behalf of broad coalition of civil society organizations delivered a submission to the African Court on Human & Peoples Rights on the compatibility of vagrancy related laws and by laws to the African Charter on Human & Peoples Rights. On the 4th of December 2020, the campaign obtained a favourable unanimous decision, finding that vagrancy laws are incompatible with the African Charter, the African Charter on the Rights & Welfare of the Child (ACRWC) & the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). The court further placed an obligation on states to amend or review offences due to their unlawful, discriminatory & arbitrary nature.



## GAPS AND CHALLENGES IN THE IMPLEMENTATION OF AU STANDARDS



**Connie Nawaigo Zhuwarara**

Connie Zhuwarara, an Independent Research Consultant outlined the issues regarding gaps on policy and implementation of AU standards on decriminalization of petty offences

Connie highlighted that SADC Lawyers Association has embarked on a scoping study on the status petty offences in the SADC region. The research has been embarked in Botswana , South Africa , Malawi , Zambia & Zimbabwe. SADC -LA has examined petty offences using the AU principles to break down specific challenges being faced by the affected groups to scale up advocacy in a country specific perspective. She indicated that gaps analysis is important as there is a peak rise in arrests and incarceration of marginalized groups for committing petty offences.

### GAPS IDENTIFIED

- Lack of data significant in pursuing a solid legislative agenda due to limited Legal Aid in campaigning on decriminalization of petty offences.
- Coordination with the targeted groups who are dominantly affected by similar laws such that the impact and challenges faced can be raised at a legislative level.
- Limited involvement of state actors in the campaign so there is a need to conduct advocacy with governments since petty offences are consequential to financial constraints to governments. An example will be on overcrowded prisons.



## CHALLENGES IDENTIFIED

- i.) The panellist from Namibia explicitly highlighted that pre-colonial laws are enforceable unless they are repealed or amended. It was indicated that the challenge is prevalent in the region because S178 & 181 of the Zambian Penal Code has existing valid vagrancy laws. There was a partial success in Malawi in decriminalization of petty offences as the constitutional court declared 'vagrancy' laws to be unconstitutional. However, the police continue to violate the rights of marginalized groups for example by charging offenders with other vagrancy laws which are still enforceable such as 'idle & disorderly laws'.
- ii.) Backlog in cases since the advent of the COVID 19 pandemic. It was indicated that in Namibia there are several arrests on petty offences and there is a limited number of prosecutors, magistrates & presiding officers and this is resultant to increases in remands and overcrowded prisons.
- iii.) Language in statutes that is discriminatory undermines the dignity of a person.
- iv.) The use of pre-colonial laws on marginalized groups such as vendors and hawkers.
- v.) Lack of competent & equitable legal representation to marginalized groups due to unaffordability.
- vi.) Absence of a mechanism through which public participation is entrenched in the regional integration agenda. This is substantiated by the fact that citizens' participation in the policy implementation processes is limited since their input in representative democracy ends on elections.
- vii.) A wide gap between policy and implementation with regard to petty offences and vagrancy laws.
- viii.) Lack of public participation in the implementation of laws & policies.

## PANEL DISCUSSIONS

The panellists present were Hon. Yvonne Dausab - Minister of Justice Namibia, Honourable Likando Kalaluka - State Counsel- Zambia, Ms Kahaki Jere- Legislative Counsel – Malawi, Mr Sheuneni Kurasha- Programme Manager-Democracy & Governance- SADC Parliamentary Forum, Mr Glen Fared- Executive Director- SADC CNGO, Mrs Fadzai Traquino - Executive Director-Women and Law in Southern Africa, Mr David Sigano-CEO-East Africa Law Society- Ms Ruth Kaima-Litigation Officer-CHREAA. The following were the key issues that were raised during the panel discussion;



**Hon Yvonne Dausab:** Minister of Justice-  
Namibia



**Hon Likando Kalaluka:** State Counsel-  
Zambia



**Ms Kahaki Jere:** Legislative Counsel-  
Malawi



**Mr Glen Fared:** Executive Director SADC  
CNGO



**Mrs. Fadzai Traquino:** Executive Director  
- WLSA



**Mr Sheuneni Kurasha:** Programmes  
Manager- SADC PF



**Ruth Kaima:** Litigation Officer-CHREAA



**David Sigano:** CEO -East Africa Law  
Society

## RECOMMENDATIONS AND WAY FORWARD

i.) Law reform is essential and it has commenced certain countries. The Zambia Law Development Commission has conducted research for purposes of reviewing S178 & S181 of the penal code which regulates petty offences. There is a technical committee established which has launched a report which highlights that S178 undermines the right to of marginalized groups and has to be repealed. Zambia is waiting for the next sitting of the parliament to effect amendments of S178 & S181 to realize both regional and International base practises to decriminalize petty offences. It was noted that in Namibia in the year 2018 144 laws were identified for repeal and amendment. There are ongoing initiatives towards reformation of laws.

ii.) Alternative sanctions for petty offences which are proportional to the crime committed by an offender. In SV Muchaka, a 2017 Namibian case the court held that the period of imprisonment must be reasonable in relation to the seriousness of the offence committed. Restorative justice to victims of crimes as an appropriate criminal sanction to offenders.

iii.) Suggestion on an immediate criminal sanction in statutes on all petty offences.

iv.) Legal Aid for the purposes of representation of offenders by competent and efficient lawyers. Contribution by both non-state actors & state actors on Legal Aid since it is dominantly provided for by the state.

v.) Establishment of a Small Claims Court & Community Courts in Namibia and other states to decongest the court role.

vi.) Amendment of laws by the legislature is significant applying the purposive approach in the statutes such that all laws should adequately address the challenge which will be in the society.

vii.) In 2017 the Directorate of Public Prosecutions of Malawi issued Guidelines for Prosecutors on Nuisance Related Laws in the Penal Code. These guidelines are significant as they assist prosecutors to focus on a sanction which is proportional to the offence committed.

viii.) Collaboration of both state and non-state actors by conducting educational workshops with the society to know the existing petty offences, and to allow them to submit their own views on how the

laws can be amended, repealed or reviewed.

ix.) One of the key objectives of the SADC Parliamentary Forum is to advocate the harmonization, ratification & domestication and Implementation of SADC protocols, treaties & other decisions at national level. The SADC PF has active standing committees which are a vehicle through which matters of regional importance are brought to the attention of member states.

x.) The SADC PF is continuously addressing the gap between policy & implementation of regional commitments through development of model laws. Adoption of model laws at a regional level is an imperative function as these laws will inform national laws on international human rights standards which are mandatory in amendment, repeal & review of petty offences & vagrancy laws.

xi.) Creation of a regional framework on decriminalization of petty offences that is accessible to non-legal experts & ordinary citizens.

xii.) The SADC PF seeks to enable monitoring of implementation of parliaments by building the capacity of parliaments and their committees to be aware of the regional continental international commitments and instruments. This is consequential in the ratification and Implementation of AU standards on petty offences.

xiii.) Evolving common actions among stakeholders to restore the SADC tribunal / establish an alternative regional human rights court.

xiv.) Engagements on the issues on petty offences with the Pan African Parliament and the SADC Parliamentary Forum.

xv.) Development of guidelines for the domestication of AU & SADC legal instruments for engagement with SADC & monitoring tools to measure progress and enable remedial actions where non-compliance is identified.

xvi.) Facilitating on a joint legal research led by the SADC-LA on the decolonization of the SADC judicial and legal systems to identified colonial era legislation.

xvii.) Drafting and publishing an annual review with National Human Rights Institutions on the progress, gaps and challenges to be addressed in the implementation of AU standards to decriminalize petty offences.



Supported by



304 Brooks Street, Menlo Park,  
Pretoria, 0102,  
Gauteng, South Africa  
**Telephone:** +27 (0) 12 366 8800  
**Fax:** +27 (0) 12 362 0969  
**Email address:** [info@sadcla.org](mailto:info@sadcla.org)  
**Website:** [www.sadcla.org](http://www.sadcla.org)