

Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter & Human Rights Instruments

African Court on Human and Peoples' Rights

Amicus Brief

I. VAGRANCY LAWS FACILITATE THE POLICING OF GENDER NORMS, VIOLATING BASIC RIGHTS

A. The historical roots of vagrancy laws underscore the essential character of this legal framework as a tool of social control that reinforces and maintains narrow gender norms through repeated harassment and arrest.

B. The use of vagrancy laws to perpetuate gender stereotypes and gender discrimination violates the fundamental right to equality.

C. Vagrancy laws facilitate arbitrary arrests to police gender norms, violating the basic rights to liberty and security of person and freedom of movement.

D. Vagrancy laws leading to detention in inhumane conditions violate the absolute right to freedom from cruel, inhuman and degrading treatment.

II. VAGRANCY LAWS PROVIDE COVER FOR OFFICER-PERPETRATED GENDER-BASED VIOLENCE, VIOLATING BASIC RIGHTS

III. VAGRANCY LAWS COMPOUND AND PERPETUATE SOCIOECONOMIC BARRIERS THAT EXIST DUE TO GENDER AND GENDER IDENTITY AND INHIBIT ECONOMIC DEVELOPMENT OF MARGINALIZED PEOPLE

IV. VAGRANCY LAWS PERPETUATE GENDER DISCRIMINATION AND EXACERBATE MARGINALIZATION, VIOLATING THE FUNDAMENTAL RIGHT TO DIGNITY

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Vagrancy laws contribute to prison congestion

Vagrancy laws disproportionately impact prison populations in the States Parties, and are a major cause of prison congestion. Decriminalizing vagrancy laws will therefore substantially reduce prison populations, thereby improving conditions and enhancing health in prisons, during the COVID-19 pandemic and beyond.

Vagrancy laws impact prisoners' right to health

The existence of vagrancy laws is a major contributing factor to ongoing violations of prisoners' right to health in a manner that is incompatible with Article 16 of the African Charter, especially in the context of the COVID-19 pandemic.

Vagrancy laws disproportionately impact the poor

By targeting poor people who, due to the cost of legal services, are effectively excluded from seeking remedies, vagrancy laws disproportionately affect prison populations in the territories of the States Parties.

Colonial laws entrench structural racism

Vagrancy laws reinforce patterns of structural racism instituted by colonial regimes, and are, and were always, incompatible with the explicit prohibition against discrimination in Article 2 of the African Charter, and the obligation to uphold equality before the law under Article 3.



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Overview of vagrancy-related offences in Africa

- 18 Penal Codes define a vagrant as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession: Algeria, Burundi, Burkina Faso, Cameroun, Chad, Comoros, Republic of Congo, Côte d'Ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Sahrawi Arab Democratic Republic, Senegal, and Togo.
- 7 Penal Codes include under the offence of being an idle and disorderly person someone who loiters or is idle and who does not have a visible means of subsistence and cannot give good account of themselves: Central African Republic, Ethiopia, Eritrea, Mauritius, Sierra Leone, Sudan and South Sudan.
- 8 Penal Codes include under the offence of being a rogue and vagabond, a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account" of themselves: Botswana, the Gambia, Malawi, Nigeria, Seychelles, Tanzania, Uganda and Zambia.

Arrests using vagrancy-related offences

- For an arrest to be legal, certain requirements contained in national constitutions, criminal procedure laws, and regional and international treaties, have to be met.
- Arrest is a violation of the right to liberty, security of person and dignity, and should be a measure of last not first resort.
- The persistence of practices of mass arrests is facilitated through various vague and outdated Penal Code offences that serve to give these arrests a veneer of lawfulness, including vagrancy-related offences.

Detention for vagrancy-related offences

- Of 52 countries in Africa for which information was available, 13 countries had prison population rates over 145 per 100 000 of the population, with 6 of these countries having prison population rates over 200 and 2 over 400.
- Persons in pre-trial detention and on remand made up between 20% and 49% of the prison population in 20 countries. In 17 countries, persons in pre-trial detention and on remand made up between 50% and 69% of the prison population; and in 4 countries persons in pre-trial detention and on remand made up 70% to 90% of the prison population.
- In some countries, prison overcrowding and conditions in detention reach levels which can be described as cruel, inhumane or degrading treatment or punishment, contrary to Article 5 of the African Charter, as confirmed by regional and domestic courts in Africa.
- Repealing vagrancy-related offences will have a positive impact on the prison population and the conditions in prisons.

Impact of vagrancy-related offences on children

- Children who live or find themselves on the streets are often described by police as unruly criminals. Such an approach shows little appreciation for the circumstances which have led to children finding themselves on the streets, including domestic abuse, child neglect, disease, poverty, drought, lack of educational opportunities and conflict.
- The extent to which vagrancy laws are used to arrest and detain children who live on the streets, shows a criminal justice system which ignores the fundamental principle of the best interests of the child. Instead, children who live or work on the streets are arrested and detained by police and subjected to exploitation, abuse, discrimination and stigmatisation both on the streets and by law enforcement officials.