

## FEATURE

# Law and Policy: Barriers to Accessing Justice for Sustainable Development

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*Despite the fact that Goal 16 of the United Nations (UN) Sustainable Development Goals (SDGs) calls for states to bring about just, peaceful and inclusive societies through non-discriminatory laws and policies for sustainable development, states are still enforcing discriminatory laws that fail to promote and protect the fundamental rights and freedoms of the poor and marginalised. A key instance of this is that people continue to be arrested under discriminatory laws for vagrancy and nuisance-related offences – such as begging, loitering, and being idle and disorderly – that criminalise life-sustaining activities or conduct in public.*

*These laws remain on the statute books even though they violate fundamental liberties and freedoms, perpetuate poverty and inequality, and hamper access to justice and sustainable development. This article highlights the nexus between, on the one hand, discriminatory laws that criminalises life-sustaining activities or conduct in public, and, on the other, human rights and access to justice for sustainable development. The point it makes is that, to achieve just, peaceful and inclusive societies, authorities in Africa would have to eradicate discriminatory laws and policies.*

## **The nexus of law, policy, equality and development**

Target 16B of the UN SDGs recognises the fundamental role that law and policy play in regard to access to justice. It accepts that, in order to overcome the burden of inequality, poverty and lack of development, governments across the world must ensure that their laws and policies respect and protect the basic human rights of people by enforcing laws that are non-discriminatory.

Key human rights instruments that safeguard people's basic civil, political, social and economic rights – among

them the Universal Declaration of Human Rights (UNDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and African Charter on Human and Peoples' Rights (ACHPR) – guarantee everyone, without distinction, the right to equality and non-discrimination.

There is also an obligation on states to ensure that their laws prohibit any discrimination and guarantee all persons equal and effective protection against discrimination (ICCPR, art. 26). Governments have a duty to ensure that all citizens have equal access



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to civil and political rights as well as economic, social and cultural rights without discrimination on grounds such as race, colour, sex, language, religion, political opinion, or national or social origin. Where law or policy provisions discriminate unfairly against persons on any ground, this is an indicator that the law or policy might be in violation of the principles of equality and non-discrimination.

Against this backdrop, it is the case that legislation in many parts of Africa contains vagrancy and nuisance-related offences that disproportionately target poor, homeless and marginalised persons based on their status. Such offences include begging, loitering, sleeping in public, and being ‘a rogue and vagabond,’ ‘vagrant,’ idle and disorderly,’ and ‘a nuisance.’ Most of these laws criminalise the performance in public places of life-sustaining activities such as begging, sleeping, bathing, hawking or otherwise earning a livelihood. The problem with these laws extends to both their enactment and their enforcement by criminal justice actors.

Such offences are often described in law in vague or overly broad terms and do not explain sufficiently what the prohibited conduct is. This gives law enforcement officials wide discretion to determine the ambit of the prohibited conduct. For example, a ‘rogue and vagabond’ is often broadly defined in law as someone with ‘no ostensible means of subsistence’ and ‘who cannot give good account of him or herself’, while in some francophone countries it is a crime to be ‘a vagrant’, often defined as a

person who does not have a fixed abode or means of subsistence. (Meerkotter 2019). In Sierra Leone, the offence of loitering in effect criminalises the act of being ‘in a place’ irrespective of whether the person is trespassing in that place, causing disorder or possessing any illegal purpose (Advocaid 2018).

Further examples of laws in regard to being ‘a rogue and vagabond’ or ‘idle and disorderly’ are found in Zambia’s Penal Code, Chapter 88 of the Laws of Zambia, as well as in the legislation of other anglophone countries such as Uganda and Malawi (see, for instance, Penal Code Act, Cap. 120 Laws of Uganda, s. 167 and 168; Malawi Penal Code, Chapter 7:01, s. 180 and 184(1)(c) (repealed).)

Zambia’s Penal Code Act provides that ‘every 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’ (art. 181(d)). Similarly, article 178 deems persons to be ‘idle and disorderly persons’ and liable to imprisonment if, among other things, they ‘wander or place themselves in any public place to beg or gather alms’, or, without lawful excuse, publicly commit ‘any indecent act’ or conduct themselves ‘in a manner likely to cause a breach of the peace’.

Phrases such as ‘having no means of subsistence’ or ‘no fixed abode’ offer illustration of the wide ambit of these laws. It is also clear that the laws target persons on the basis of their social or economic status, given that the conduct being prohibited is usually conduct exercised by poor, homeless, or other marginalised individuals. Such provisions grant law enforcement officials wide discretion to arrest and detain persons arbitrarily for offences based on their economic or social status or on mere observation of their appearance. Faugeron (1995) describes the detention of such people as ‘the imprisonment of differentiation’ – that is, as designed to exclude people in social categories deemed ‘undesirable’, notwithstanding that their only crime is that they are without a means of subsistence or are trying to earn a livelihood.

There is, furthermore, extensive literature which



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shows the disproportionate enforcement of such laws against poor and vulnerable persons such as the homeless, women, children, street vendors, sex workers and lesbian, gay, bisexual, transgender and intersex people (AdvocAid 2018; Muntingh & Petersen 2015; HURAPF 2016; SALC & CHREAA 2013; UN Doc. A/67/278).

The arbitrary enforcement of these laws infringes on fundamental rights guaranteed under the ICCPR and African Charter. Such rights include the right not to be discriminated against and the rights to human dignity, equal protection of the law, freedom against torture or cruel, inhuman or degrading treatment or punishment, and security of person, including the right not to be subjected to arbitrary arrest or detention (ICCPR, arts. 2, 3, 6, 7, 9, 10, 12 and 26; ACHPR, arts. 2, 3, 5, 6, 12 and 18). Laws against loitering, or being idle and disorderly or rogue and vagabond, also restrict a person's freedom of movement and right to liberty (ICCPR, art. 12; ACHPR, art. 12).

Moreover, across the continent, numerous overly restrictive trading laws or nuisance-related city by-laws target people seeking to earn a living through street hawking (Killander 2019; Muntingh & Petersen 2015). Persons violating restrictive trading or nuisance-related laws face arrest and detention, or are heavily penalised. The Special Rapporteur on Extreme Poverty and Human Rights (2012) has raised concerns about governments imposing bans, onerous

licences or strict restrictions on street vendors. She notes that such restrictions severely undermine the rights of persons living in poverty to earn a living.

The punitive enforcement of restrictive trading laws prevents people from realising their socio-economic rights. States are failing to safeguard everyone's right to the opportunity to gain work that he or she freely chooses; they are also infringing on people's rights to an adequate standard of living, including the rights to adequate food, clothing, housing and development guaranteed under international human rights law (ICESCR art. 6 and art. 11(1)–(2); ACHPR, art. 22). Street vendors should not face arrest and detention for trying to earn an income to provide for their families; instead, other measures that exclude criminalisation should be in place to deal with trading in contravention of laws or city-by-laws.

As has been emphasised, many of these laws disproportionately target and penalise poor and marginalised persons, thereby violating the principles of equality and non-discrimination. This is not in line with the sustainable development goal of promoting just, peaceful and inclusive societies and protecting the fundamental rights and freedoms of poor and marginalised persons. The principles of equality and non-discrimination in law and policy are important for the development of people. Conversely, discriminatory laws may cause and perpetuate poverty and thus present obstacles to alleviating poverty; in particular, anti-poor laws impair the ability of poor and marginalised persons to obtain fair justice outcomes.

## The effects of discriminatory laws on persons

Various human rights bodies have expressed concern that, along with a variety of measures that regulate public spaces, laws prohibiting activities such as loitering, camping, begging, and lying in public spaces have a disproportionate effect on vulnerable groups and people living in poverty (A/HRC/31/54, A/67/278, CERD/C/USA/CO/7-9, ACHPR/Res. 366 (EXT.



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OS/XX1) 2017). Contravening these laws and policies entails severe punitive consequences for poor and marginalised persons (AdvocAid 2018; Muntingh & Petersen 2015; HURAPF 2016; SALC & CHREAA 2013 UN Doc. A/67/278). Sometimes the consequences are arrest and detention; sometimes, the imposition of excessive fines. As Killander (2019) and Muntingh & Peterson (2015) note, the punishments meted out for such minor offences are often disproportionate for non-violent conduct.

The enforcement of such laws is also often associated with long periods of pre-trial detention when accused persons are unable to pay bail or when bail is denied. The detention of accused persons for such minor infractions of the law is associated as well with severe socio-economic consequences for their own wellbeing and that of their families (Muntingh & Repdath 2017; Wacquant 2001). Research into the socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia has shown that when individuals (particularly family breadwinners) are detained, their families and other households associated with them feel the impact. The research shows too that the impact on children is severe where the detainee is female (Muntingh & Redpath 2017).

Indeed, the UN Special Rapporteur on Extreme Poverty and Human Rights (2012) has highlighted the fact that those who are poor and vulnerable are likely to leave detention financially, physically and

personally disadvantaged. Detention can lead to loss of income and employment. The adverse health consequences of conditions of detention, combined with stigmatisation due to having a criminal record, further entrench the marginalisation of people living in poverty.

Another consideration is that many of these laws, as noted, are overly broad and grant police the discretion to make arrest without a warrant. This may encourage police corruption, harassment and extortion.

The laws, in short, are likely to perpetuate discrimination and marginalisation, hinder the development and empowerment of the poor, and push them further into poverty. What is essentially a social justice issue is met with a criminal justice response that may well aggravate the problems the laws are supposed to resolve.

## **Towards law and policy for sustainable development**

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Discrimination is one of the main underlying causes of inequality. The enforcement of discriminatory laws such as those under discussion perpetuates poverty and inequality and fails to protect the fundamental rights of the poor and vulnerable. States are using the criminal justice system to respond to homelessness and life-sustaining behaviours rather than adopting measures to address the root causes of the problem.

There is thus an urgent need, on the one hand, to thwart the multiplication of judicial laws and practices that widen the penal dragnet and, on the other, to develop social, health, or educational alternatives for addressing social problems (Wacquant 2001). The public funds spent on police and criminal justice operations to penalise 'undesirables' can be better used to assist families with social services, health care, and education and training that empowers them. Killander (2019) argues that the issue of illegal trading (or traders operating without license) cannot be resolved through criminalisation but rather through active engagement with traders and

by viewing the permitting of trade as a social issue rather than an income-generating activity for the municipality.

In her report to the Human Rights Council, the Special Rapporteur on the Right to Adequate Housing (2105) underlined that homelessness is caused by the failure of states to respond both to individual circumstances and to a range of structural factors – factors which include laws and policies that discriminate against homeless people. Among her recommendations to governments is that they embark on the immediate review and repeal of laws, policies or measures that discriminate directly or indirectly against poor or homeless people.

There has been some effort at the regional level to address the discriminatory impact of law and policy on poor and marginalised people. The Principles on the Decriminalisation of Petty Offences in Africa ('Principles') were adopted by the African Commission and call for a holistic approach to the challenges that arise in Africa at the intersection between poverty, justice and human rights. Amongst other things, the Principles urge governments to decriminalise offences that criminalise the status of a person, with such offences including those relating to performing life-sustaining activities in public places (ACHPR/Res. 366 (EXT.OS/XX1) 2017).

In addition, an advisory opinion is pending at the African Court on Human and Peoples' Rights on whether vagrancy-related offences are contrary to articles 2, 3, 5, 6, 7, 12 and 18 of the ACHPR (Request for Advisory Opinion No. 001/2018). There has also been a successful constitutional challenge in Malawi against one of the offences of being a rogue and vagabond (*Mayeso Gwanda v The State*). In Kenya, a commitment has been made to review discriminatory laws (*Judiciary of Kenya 2018*)

While these efforts are to be welcomed, governments in Africa are not doing enough to address problematic laws. Much depends on their political will to review their laws in line with SDG 16. To ensure that all persons can access justice equally, states need to identify laws and policies that are anti-poor and violate the principles of equality and non-discrimination; through legislative or administrative reform, the relevant laws should be repealed or amended.



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## Conclusion

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Although there is a duty on states to adopt legislative measures to ensure the progressive realisation of socio-economic and civil and political rights, governments are failing in their obligations by retaining discriminatory laws on their statutes. Legislative reforms are needed to limit arrests and imprisonment for vagrancy and nuisance-related offences.

As the UN Special Rapporteur on Extreme Poverty (2012) notes, persons living in poverty are not to blame for their situation, and so governments should not punish them for it. Instead, as a matter of urgency, governments should adopt wide-reaching measures to eliminate the conditions that cause, exacerbate or perpetuate poverty and aim to ensure the realisation of all the economic, social, cultural, civil and political rights of those living in poverty.

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