

Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces

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For centuries, and across the world, penal laws have been used to regulate urban spaces, with a cruel focus on relegating poor and marginalized groups from such spaces. Criminal laws, particularly vagrancy offenses, have consistently been used to arrest, detain, evict, or put to work those persons who are deemed unfit to occupy public spaces.

Realizing the impact of these offenses, jurists and human rights advocates have, at times, used litigation to challenge discriminatory laws and their enforcement. In doing so, they have exposed these laws and enforcement practices as inimical to the rule of law and the principle of universal rights. Such litigation, even when successful, has often failed to significantly change policing practices and prevent the creation of new offenses with similar effects.

Providing historical and current examples, this Article sketches the creation and implementation of vagrancy offenses in Africa. The Article postulates what the prerequisites are for public interest litigation, which seeks to protect poor and marginalized groups, reform policing practices, and ensure inclusive urban spaces.

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INTRODUCTION

In Africa, colonial era criminal laws, particularly vagrancy offenses,¹ have consistently been used by those in power as a measure of social control over marginalized groups in society.²

¹ See, e.g., *Apartheid in South-West Africa*, 30 BULL. INT'L COMMISSION JURISTS 26, 28–29 (1967).

² See generally Leslie Sebba, *The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies*, 3 CRIME, HIST. & SOC'Y 71, 76 (1999).

Vagrancy offenses are engrained with notions of the other—with those accused perceived as habitual criminals, outcasts, morally depraved, and indolent.³ Therefore, the enforcement of these offenses often shows no regard for persons' rights to dignity, due process, a fair trial, and freedom of movement, and it paints persons who fall within the ambit of these offenses as somehow less deserving of protections.

Many states in Africa are celebrating half a century of independence and constitutionalism,⁴ yet there is remarkably little public discourse on the continued use of some colonial era criminal laws, and the policing practices that have developed around these laws show scant regard for constitutional rights.⁵ Societal norms, influenced by the existence of these criminal laws, continue to tolerate—and even encourage—the use of criminal laws to ostracize certain individuals and groups in society.⁶ Occasionally, we see discourses questioning the use of criminal laws to police private behavior, particularly as these laws relate to the criminalization of consensual same-sex sexual acts.⁷ Whilst this is encouraging, these debates should also substantially interrogate the basis for the enforcement of criminal laws against persons who are homeless,

³ See, e.g., Prashan Ranasinghe, *Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972*, 48 OSGOODE HALL L.J. 55, 58, 60–61 (2010).

⁴ See generally, e.g., 1966 CONST. (Bots.); 1972 CONST. (Cameroon); 1968 CONST. (Mauritius) (revisited 2016); see also CONSTITUTE PROJECT, www.constituteproject.org/search?lang=en®ion=Africa&status=in_force&status=is_draft (last visited Nov. 22, 2019) (providing access to the constitutions of the various African states and listing the years these came into force).

⁵ See, e.g., Sheryl L. Buske, *A Case Study in Tanzania: Police Round-Ups and Detention of Street Children as a Substitute for Care and Protection*, 8 S.C. J. INT'L L. & BUS. 87, 123 (2011) (“Much of the legislation from [the colonial British rule] era, which obviously predates Tanzania’s independence, continues to survive despite being in direct conflict with newer constitutional principles.”).

⁶ See Sebba, *supra* note 2, at 87–88.

⁷ Various courts in Africa have recently expressed concern with criminal laws that seek to control consenting sexual acts committed in private. See, e.g., National Coalition for Gay & Lesbian Equality v. Minister of Justice [1999] (1) SA 6 (CC) at 56 D (S. Afr.); Letsweletse Motshidiemang v. Attorney Gen. of Botswana [2019] MAHGB-000591-16, at 3–4 (High Ct. Bots. at Gaborone) (Bots.).

street children, persons with HIV, persons with psycho-social disabilities, and sex workers.

This Article focuses on legal responses to the use of vagrancy laws by the police to target vulnerable groups. There are, however, many other laws that have a similarly marginalizing effect, including criminal provisions in public health and mental health laws, which need more attention. What all these laws have in common is that they were developed during the colonial period, when the criminology that underpinned them was itself influenced by the prejudices of the time.⁸ These laws were not the product of a constitutional democracy, and their enforcement remains framed within prevailing prejudices, including xenophobia, sexism, homophobia, transphobia, and racism.⁹

I. THE USE OF VAGRANCY OFFENSES TO REGULATE URBAN SPACES IN AFRICA

As discussed in detail below, vagrancy-related offenses generally criminalize persons who do not have a means of subsistence and, from a police perspective, cannot give a good account of themselves. The offenses generally entitle police to arrest such persons without a warrant and are often found in colonial era Vagrancy Acts, Penal Codes, and by-laws.

A. *The Historical Development of Vagrancy Offenses in Africa*

The vagrancy offenses found in Africa can be traced back to Fourteenth Century Europe, when Britain passed the Statute of Labourers to make it unlawful to refuse an offer of work, to stop the mobility of laborers, and to force laborers to accept low wages.¹⁰

⁸ Martin Chanock, *Criminological Science and the Criminal Law on the Colonial Periphery: Perception, Fantasy, and Realities in South Africa, 1900-1930*, 20 L. & SOC. INQUIRY 911, 914–15 (1995).

⁹ See, e.g., HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM 28–29, 42–43 (2008), https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf (linking colonial era vagrancy laws to various prevailing prejudices, including transphobia, homophobia, racism, and sexism).

¹⁰ ANNEKE MEERKOTTER ET AL., NO JUSTICE FOR THE POOR: A PRELIMINARY STUDY OF THE LAW AND PRACTICE RELATING TO ARRESTS FOR NUISANCE-RELATED OFFENCES IN BLANTYRE, MALAWI 16 (2013);

From the start, these laws discriminated against the poor with little regard for their rights.¹¹ As urbanization increased, the focus of vagrancy laws shifted to address perceived nuisances, criminality, and unemployment.¹² These vagrancy offenses were eventually incorporated in the primary laws of the day, including the English Vagrancy Act of 1824¹³ and the French Penal Code of 1810.¹⁴

In Britain, France, and Portugal, punishment for vagrancy included the forced conscription of the poor into military service and transportation to overseas colonies.¹⁵ These vagrancy offenses were transferred, sometimes verbatim, into the penal codes of these countries' colonies,¹⁶ shaping labor discipline, ensuring the production of labor at low wages, and addressing the effects of urbanization.¹⁷

In colonial times, complex fears in the white minority and clamor for racial segregation framed criminology.¹⁸ Criminology used science, ethnography, and constructions of otherness to explain individual and group propensity toward crime and, in doing so, fostered the continued use of vagrancy laws as part of the colonial

https://prisonstudies.org/sites/default/files/resources/downloads/salc_nojustice_report_proof_05.pdf; P. Michael Lahan, *Comment, Trends in the Law of Vagrancy*, 1 CONN. L. REV. 350, 350–51 (1968).

¹¹ MEERKOTTER ET AL., *supra* note 10, at 16–17.

¹² Paul Flynn, *Vagrancy Laws and the Right to Privacy*, 2 U.S.F. L. REV. 337, 338 (1968).

¹³ See Vagrancy Act 1824, 5 Geo. 4 c. 83 (Eng.).

¹⁴ 1810 CODE PÉNAL [C. PÉN.] [PENAL CODE] arts. 270–75 (Fr.).

¹⁵ Paul Ocobock, *Introduction: Vagrancy and Homelessness in Global and Historical Perspective*, in CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 1, 12–13, 22–23 (A. L. Beier & Paul Ocobock eds., Ohio Univ. Press 2008); see also Maria Antónia Lopes, *Poor Relief, Social Control and Health Care in 18th and 19th Century Portugal*, in HEALTH CARE AND POOR RELIEF IN 18TH AND 19TH CENTURY SOUTHERN EUROPE 142, 147 (Ole Peter Grell et al. eds., 2005).

¹⁶ MEERKOTTER ET AL., *supra* note 10, at 23–26; Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 J. AFR. L. 218, 223 (2000).

¹⁷ See, e.g., Mine Ener, *Prohibitions on Begging and Loitering in Nineteenth-Century Egypt*, 39 DIE WELT DES ISLAMIS 319, 337–38 (1999); Andrew Burton & Paul Ocobock, *The “Travelling Native”: Vagrancy and Colonial Control in British East Africa*, in CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE, *supra* note 15, at 270, 271–73.

¹⁸ See Chanock, *supra* note 8, at 922–23.

project.¹⁹ Criminal laws were only one way in which segregation and domination were maintained.²⁰ A complex system of land laws also reinforced racial segregation and made ventures outside of designated peripheral areas into the cities and settler communities a criminal offense for colonized populations.²¹ The complex interactions between criminal, public order, land, and public health laws continue to inhibit the development of egalitarian societies in Africa.²²

Initially, slavery was used to provide for the labor needs of the settler communities.²³ Following the abolishment of slavery, legal structures continued to force persons to engage in labor.²⁴ After World War II, the Houphouët-Boigny Law of 1946 prohibited forced and compulsory labor in all overseas French territories.²⁵ Britain's Colonial Office made similar demands on its colonies to ensure compliance with the International Labour Organization

¹⁹ *Id.* at 923 (“All the commentators, hostile or sympathetic to the plight of Africans, employed a basic binary imagery revolving around categories like innocence/corruption; savage/civilized; authority/lawlessness; purity/impurity.”).

²⁰ *See, e.g.*, Robert Home, *Colonial Township Laws and Urban Governance in Kenya*, 56 J. AFR. L. 175, 185–86 (2012).

²¹ *Id.* at 186–88.

²² *See, e.g.*, Siri Gloppen & Fidelis Edge Kanyongolo, *Courts and the Poor in Malawi: Economic Marginalization, Vulnerability, and the Law*, 5 INT'L J. CONST. L. 258, 263–65, 286 (2007) (“In these law-related cycles of economic marginalization, the lack of legal protection contributes to poverty; poverty drives lawlessness, which again contributes to the (re)production of poverty.”).

²³ *See History of Slavery and Early Colonisation in South Africa*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa> (last visited Dec. 19, 2019); Marcel de Coppet, *Manpower Problems and Prospects in Madagascar*, 59 INT'L LABOUR REV. 249, 253–54 (1949).

²⁴ *Félix Houphouët-Boigny: The Sage of Africa (1905-1993)*, UNESCO, <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/unesco-prizes/felix-houphouet-boigny-prize/about-the-prize/felix-houphouet-boigny/> (last visited Dec. 19, 2019); *see also* Marlous van Waijenburg, *Financing the African Colonial State: The Revenue Imperative and Forced Labor*, 78 J. ECON. HIST. 40, 41 (2018); de Coppet, *supra* note 23, at 253–54, 256.

²⁵ Alexander Keese, *Slow Abolition Within the Colonial Mind: British and French Debates About “Vagrancy”, “African Laziness”, and Forced Labour in West Central and South Central Africa, 1945–1965*, 59 INT'L REV. SOC. HIST. 377, 385–86 (2014).

treaties prohibiting forced labor in 1930 and 1957.²⁶ Colonial administrators, however, continued to plan for the reorganization of compulsory labor by employing vagrancy laws²⁷ in combination with other tools like pass laws²⁸ and poll and hut taxes.²⁹ Communities which resisted taxes, land alienation, and forced labor were violently repressed and their leaders were incarcerated or executed.³⁰

B. Overview of Vagrancy Offenses Still Existing in Africa

Post-independence, African states have mostly retained colonial era vagrancy offenses, although their enforcement varies among states depending on prevailing socio-economic and political factors.³¹ The driving force behind the enforcement of vagrancy offenses is no longer labor needs; but instead, the offenses are used to address the challenges cities face in managing the consequences of urbanization.³²

Vagrancy-related offenses can be found in various sources of law, although their enforcement and effect remain the same:

1) Some Penal Code offenses criminalize the status of being a vagrant. This is the position in many francophone countries in Africa, which define a vagrant as any person who does not have

²⁶ See Daniel Roger Maul, *The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present*, 48 LAB. HIST. 477, 486–87 (2007); Kwabena Opare Akurang-Parry, *Colonial Forced Labor Policies for Road-Building in Southern Ghana and International Anti-Forced Labor Pressures, 1900-1940*, 28 AFR. ECON. HIST. 1, 16–17, 20 (2000).

²⁷ Burton & Ocobock, *supra* note 17, at 272–74, 278–79; Keese, *supra* note 25, at 384.

²⁸ See Home, *supra* note 20, at 179.

²⁹ Burton & Ocobock, *supra* note 17, at 271–72.

³⁰ Sanderson Beck, *East Africa 1700-1950*, <http://www.san.beck.org/16-12-EastAfrica.html> (last visited Dec. 19, 2019).

³¹ See MEERKOTTER ET AL., *supra* note 10, at 25–26; see also Coldham, *supra* note 16, at 223.

³² See, e.g., Jocelyn Alexander, ‘Hooligans, Spivs and Loafers’?: *The Politics of Vagrancy in 1960s Southern Rhodesia*, 53 J. AFR. HIST. 345, 347–48 (2012); Magnus Killander, *Criminalising Homelessness and Survival Strategies Through Municipal By-laws: Colonial Legacy and Constitutionality*, 35 S. AFR. J. HUM. RTS. 70, 70–71 (2019).

a fixed abode nor means of subsistence, and who does not practice a trade or profession.³³

2) Some Penal Code offenses criminalize the act of loitering without a visible means of subsistence.³⁴ Police target individuals based on their activity then label them either an idle and disorderly person or a rogue and vagabond.³⁵ The idle and disorderly and rogue and vagabond offenses tend to cover a wide array of activities including loitering, public indecency, soliciting for an immoral purpose, and begging.³⁶

3) Laws relating to police powers of arrest often allow police to arrest without a warrant any person with no ostensible means of subsistence and who cannot give good account of him or herself.³⁷

³³ These countries include, for example: Algeria, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Côte d'Ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Sahrawi Arab Democratic Republic, Senegal, and Togo. INT'L BUREAU FOR CHILDREN'S RIGHTS, CONTINENTAL CONFERENCE ON ACCESS TO JUSTICE FOR CHILDREN IN AFRICA 38–41 (2018), <https://defenceforchildren.org/wp-content/uploads/2018/12/ReportContinentalConferenceAccessJusticeChildrenAfrica-Addis2018-Meryem.pdf>.

³⁴ See, e.g., MEERKOTTER ET AL, *supra* note 10, at 4 (referencing Section 184(b) of the Malawi Penal Code); see also Hannah Summers, 'I Beg Them to Let Me Go': Sierra Leone's Sex Workers Targeted by Police, *GUARDIAN* (Dec. 17, 2018, 7:41 AM), <https://www.theguardian.com/global-development/2018/dec/17/i-beg-them-to-let-me-go-sierra-leones-sex-workers-targeted-by-police>.

³⁵ See, e.g., MEERKOTTER ET AL, *supra* note 10, at 25–26, 29; HUMAN RIGHTS AWARENESS & PROMOTION FORUM, THE IMPLICATIONS OF THE ENFORCEMENT OF 'IDLE AND DISORDERLY' LAWS ON THE HUMAN RIGHTS OF MARGINALISED GROUPS IN UGANDA 17–21 (2016), <https://hrapf.org/images/researchpapers/160929idleanddisorderlyresearchfinalreport.pdf> [hereinafter HUMAN RIGHTS AWARENESS & PROMOTION FORUM].

³⁶ See MEERKOTTER ET AL, *supra* note 10, at 32–52; Louise Ehlers, "Rogues" and "Vagabonds" No More: Ending Africa's Imperial Legacy of Absurd Petty Offenses, *OPEN SOC'Y FOUND.* (Feb. 3, 2017), <https://www.opensocietyfoundations.org/voices/rogues-and-vagabonds-no-more-ending-africa-s-imperial-legacy-absurd-petty-offenses> ("Vague, disproportionate, and arbitrary in nature, these offenses are used to target street children, the poor, the homeless, LGBTI people, sex workers, hawkers, people with substance use problems, and people with disabilities.").

³⁷ Countries with such laws include, for example: Malawi, Kenya, and Nigeria. *Vagrancy-Related Provisions in Various Criminal Laws and Criminal*

4) Dated, dedicated vagrancy laws, define persons without employment and fixed abode as vagrants and allow for their detention.³⁸

5) Many municipal level laws criminalize a range of activities related to vagrancy.³⁹

During the past fifteen years, there have been some criminal law reform processes that seem to recognize the need for reconsidering the basis of colonial era criminal laws. For example, Angola recently removed vagrancy-related offenses from its new Penal Code in 2019,⁴⁰ and it has legislated to avoid detention for petty offenses,⁴¹ as well as to provide social protection for persons at risk of marginalization.⁴² The redrafting of Penal Codes has also been the

Procedure Laws in Africa, S. AFR. LITIG. CTR. (Jan. 23, 2018), <https://icj-kenya.org/jdownloads/Papers/Vagrancy%20laws%20in%20Africa%20by%20Southern%20Africa%20Litigation%20Center%20SALC.pdf> [hereinafter *Vagrancy-Related Provisions*].

³⁸ See, e.g., The Vagrancy Proclamation, § 2 (No. 39/1963) (Swaz.); Vagrancy Proclamation, § 1 (No. 25/1920) (Namib.). Some francophone countries, such as the Democratic Republic of Congo, retained the French King's Decree of 23 May 1896, which dealt with the suppression of vagrancy. This Decree was specifically criticized by the ILO in relation to Rwanda. *Direct Request (CEACR) - Adopted 2012, Published 102nd ILC session (2013): Forced Labor Convention, 1930 (No. 29) - Rwanda (Ratification: 2001)*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3073469 (last visited Sept. 25, 2019).

³⁹ See, e.g., Ubuhebezwe Municipality, Bylaws Relating to Public Amenities §10, PN 47 of PG 1602 (9 Feb. 2016), <http://www.ubuhebezwe.org.za/wp-content/uploads/2013/01/PUBLIC-AMENITIES1.pdf>.

⁴⁰ See *SALC Shadow Report—Angola's 3rd Universal Periodic Review: 34th Session (Oct-Nov 2019)*, SALC (July 3, 2019), <https://www.southernafricalitigationcentre.org/2019/07/03/salc-shadow-report-angolas-3rd-universal-periodic-review-34th-session-oct-nov-2019/>.

⁴¹ See Código Penal [Penal Code] ch. 2, art. 45, §1 (Angl.) (stating that where a sentence is to less than six months imprisonment, it shall be substituted with a fine unless imprisonment is required to prevent commission of future crimes).

⁴² See Lei de Bases da Protecção Social [Social Protection Bases Law] art. 5 (2004) (Angl.) (recognizing the need to support persons who live in poverty); see also *Aprovada Lei de Bases da Protecção Social*, AGÊNCIA ANGOLA PRESS (Dec. 7, 2004, 3:25 AM), http://www.angop.ao/angola/pt_pt/noticias/sociedade/2004/11/50/Aprovada-Lei-Bases-Proteccao-Social,426cca9f-25f8-4a42-9f45-2c9a7296b69d.html.

basis for removing vagrancy offenses in Cape Verde,⁴³ Lesotho⁴⁴ and Mozambique.⁴⁵

Vagrancy-related offenses are enforced through mass arrests in urban areas, colloquially referred to as sweeping or swooping exercises.⁴⁶ These police practices have changed little from policing practices during the colonial era.⁴⁷ The offenses are used by police to clear the streets of “undesirables” and to harass persons believed to be engaged in crime.⁴⁸ It manifests in police raids targeting groups perceived to be problematic, such as sex workers, street children, unemployed persons, persons who beg, street vendors, or migrant groups.⁴⁹ For these practices to have an appearance of legitimacy, persons are charged with offenses that are vague enough to allow a range of persons to fall within their ambit, including offenses such as common nuisance, loitering, being idle and disorderly, or being a rogue and vagabond. Vagrancy-related offenses afford police a justification for arrests that otherwise would not be present under prevailing constitutional and statutory limitations—to arrest, search, question, and detain persons solely based on suspicion that they have committed or may commit a crime.⁵⁰ Often, the objective of a sweeping exercise is to assure the

⁴³ Código Penal [Penal Code] n° 4/2003 (Cape Verde) (omitting mention of vagrancy, rogue, and vagabond laws).

⁴⁴ See 6 Penal Code Act, 2010 (Lesotho) (omitting mention of vagrancy, rogue, and vagabond laws).

⁴⁵ See Lei n.º 35/2014: Lei de Revisão do Código Penal [Penal Code Revision Law] (Mozam.) (omitting mention of vagrancy, rogue, and vagabond laws).

⁴⁶ See, e.g., Emily Corke, *277 Arrested for Loitering in JHB*, EYEWITNESS NEWS, <https://ewn.co.za/2015/03/04/277-arrested-for-loitering#> (last visited Nov. 19, 2019) (exemplifying metro police’s use of vague loitering charges to arrest a range of people on the premise of keeping streets and intersections clean).

⁴⁷ See generally Hartmut Elsenhans, *The Concept of the Periphery as a Constitutive Part of the Capitalist World System*, 5 MIDDLE EAST – TOPICS & ARGUMENTS 15 (2015).

⁴⁸ Lahan, *supra* note 10, at 363.

⁴⁹ MEERKOTTER ET AL., *supra* note 10, at 6–7, 9, 27 (describing the effects of vagrancy laws on sex workers, street children, beggars, street vendors, and marginalized groups generally).

⁵⁰ See Afr. Comm’n Hum. & People’s Rts., *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, at 8 (May 12, 2014) (“Arrests shall only be carried out by police or by other competent officials or authorities authorised by the state for this purpose, and shall only be carried out

public that sufficient attention is paid to crime prevention.⁵¹ The result is that many people find themselves imprisoned or detained when there is no proof or even reasonable suspicion of an actual offense having been committed.⁵²

The rationale behind these police practices would seem to be something akin to order-maintenance policing. This practice does not differ much from order-maintenance policing under colonialism, but has received a new lease on life through the so-called Broken Windows theory of the 1980s,⁵³ which is aimed at addressing communities' insecurities about crime and disorder.⁵⁴ The implementer of the Broken Windows theory in the United States, William Bratton, later re-labeled it "quality of life enforcement" to explain that the form of policing does not target, but instead, benefits minority communities.⁵⁵ Babe Howell cautions, however, that the aggressive policing associated with order-maintenance policing

pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.”).

⁵¹ MEERKOTTER ET AL., *supra* note 10, at 26 (explaining that classifying certain crimes as nuisance-related was meant primarily meant to keep public order).

⁵² See COMMONWEALTH HUMAN RIGHTS INITIATIVE, *DECRIMINALISING AND DECLASSIFYING PETTY OFFENCES IN GHANA* 3 (2018), <https://www.humanrightsinitiative.org/publication/decriminalising-and-declassifying-petty-offences-in-ghana>.

⁵³ See Bernard E. Harcourt, *Punitive Preventive Justice: A Critique* 10, 12 (Chi. Inst. for Law & Econ., Working Paper No. 599, 2012); Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 *YALE HUM. RTS. & DEV. L.J.*, 202–03 (2012).

⁵⁴ See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *MICH. L. REV.* 291, 389 (1998) (challenging broken-windows policing by arguing that the alleged correlation between disorder and serious crime fails to take into account other factors that may contribute to the deterioration of a neighborhood); Kaplan-Lyman, *supra* note 53, at 203–04.

⁵⁵ Renee Montagne, *NYPD Commissioner William Bratton On Why He's Stepping Down*, NPR (Aug. 3, 2016, 4:50 AM), <https://www.npr.org/2016/08/03/488477358/nypd-commissioner-william-bratton-on-why-hes-stepping-down>.

undermines the legitimacy of the criminal justice system and is disproportionately onerous on the poor.⁵⁶

In the absence of equitable allocation of police resources, poor neighborhoods often experience the brunt of crime and appreciate more policing in their communities, which, arguably, partly explains why vagrancy offenses and other laws that target vulnerable groups have not been widely condemned.⁵⁷ The police also justify the use of vagrancy offenses and mass arrests as convenient catch-all provisions and practices.⁵⁸ The media reinforces these assumptions about the crime prevention value of such offenses.⁵⁹

Order-maintenance policing has, however, been shown to have a bias against marginalized groups. Many cities in Africa apply order-maintenance policing practices through the enforcement of by-laws by city-level officers.⁶⁰ These officers are notorious for their aggressive tactics for dealing with nuisance-related behaviors—for example, the *askaris* assault street vendors in

⁵⁶ See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs Of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 274 (2009).

⁵⁷ See U.S. DEP'T OF JUSTICE, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012, at 1 (2014).

⁵⁸ See Gerald Magaro, *Criminal Penalties for Vagrancy—Cruel and Unusual Punishment under the Eighth Amendment*, 18 W. RES. L. REV. 1309, 1309–10 (1967); see also MEERKOTTER ET AL., *supra* note 10, at 64–65.

⁵⁹ See, e.g., *Uganda Police Arrests More Than 100 Pickpockets in Kampala*, DISPATCH (Mar. 23, 2018), <http://dispatch.ug/2018/03/23/uganda-police-arrests-100-pickpockets-kampala/> (referring to the arrest of 100 “pickpockets” even though there appeared to be no evidence in the article itself that the persons arrested were in fact pickpockets); *Kanengo Police Net 52 in Sweeping Exercise*, THE NATION (May 18, 2017), <https://mwnation.com/kanengo-police-net-52-in-sweeping-exercise/> [hereinafter *Kanengo Police Net 52*] (reporting fifty-two arrests where six were charged with possession of hemp, five with selling liquor without a licence, two with possession of property believed to be stolen, and thirty-eight with being idle and disorderly); Bright Malenga, *126 Nabbed in Sweeping Exercise*, MALAWI 24 (Aug. 7, 2017), <https://malawi24.com/2017/08/07/126-nabbed-sweeping-exercise/> (reporting 126 arrests where many were charged with being idle and disorderly and some with not complying with bail conditions).

⁶⁰ See, e.g., *Kanengo Police Net 52*, *supra* note 59 (reporting that Kanengo Police, a district-level law enforcement agency, arrested fifty-two people for vagrancy-related offenses).

Nairobi,⁶¹ and the Abuja Environmental Protection Board officers indiscriminately subject women to sexual harassment in Abuja.⁶²

At an international human rights mechanism level, there has been some condemnation about the enforcement of vagrancy-related offenses. The UN Special Rapporteur on Extreme Poverty and Human Rights has raised concerns that these offenses perpetuate social exclusion and economic hardship and constitute cruel, inhuman and degrading treatment.⁶³ The UN High Commissioner for Human Rights has noted that “criminalization of petty offenses can lead to overincarceration of poor and minority populations, children and women. . . . [and that c]riminalization of activities that persons living in poverty undertake to survive, such as street vending, begging or panhandling, can also result in their overincarceration.”⁶⁴

Other UN agencies have similarly cautioned that vagrancy offenses are neither fair nor accountable strategies to prevent

⁶¹ See, e.g., Dauti Kahura, *Dogs and Hawkers Not Allowed: The Brutal Dictatorship of Nairobi’s Predatory ‘Kanjo’ Askaris*, THE ELEPHANT (Sept. 21, 2018), <https://www.theelephant.info/features/2018/09/21/dogs-and-hawkers-not-allowed-the-brutal-dictatorship-of-nairobis-predatory-kanjo-askaris/>.

⁶² See, e.g., *Human Rights Commission Summons AEPB’s Director Over Alleged Molestation of Women at Night Club*, SAHARA REPORTERS (May 10, 2019), <http://saharareporters.com/2019/05/10/breaking-human-rights-commission-summons-aepbs-director-over-alleged-molestation-women>.

⁶³ Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 33, U.N. Doc. A/66/265 (Aug. 4, 2011), <https://www.ohchr.org/Documents/Issues/EPoverty/A.66.265.pdf> [hereinafter *Report of the Special Rapporteur on Extreme Poverty and Human Rights*] (explaining how the discretionary powers provided to the police by vagrancy laws “increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials.”).

⁶⁴ U.N. Human Rights Council, *Non-Discrimination and the Protection of Persons with Increased Vulnerability in the Administration of Justice*, ¶ 12, U.N. Doc. A/HRC/36/28 (Aug. 21, 2017).

crime⁶⁵ and have suggested that vagrancy ought not to fall within the scope of the criminal justice system in the first place.⁶⁶

II. CONSEQUENCES OF THE ENFORCEMENT OF VAGRANCY OFFENSES IN AFRICA AND THEIR IMPACT ON MARGINALIZED GROUPS

A. *Negative Consequences for States from Enforcing Vagrancy Offenses*

The closest states often come to questioning the enforcement of vagrancy-related offenses is when confronted with the impact these offenses have on prison overcrowding.⁶⁷ Calls on states to address prison conditions, prison overcrowding, and the consequent gross human rights violations have been around for some time, and states continue to grapple with the myriad of factors influencing over-incarceration.

For example, the Kampala Declaration's Plan of Action called on governments to review penal policies and reconsider the use of prisons to prevent crime because the over-use of imprisonment did not serve the interests of justice, protect the public, or constitute a

⁶⁵ U.N. Office on Drugs and Crime, *Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation*, ¶ 3 (2015), https://www.unodc.org/documents/congress/Declaration/V1504151_English.pdf (calling for crime prevention strategies to be implemented “along with broader programmes or measures for social and economic development, poverty eradication, respect for cultural diversity, social peace and social inclusion.”).

⁶⁶ U.N. OFFICE ON DRUGS AND CRIME, *HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT* 13 (2007), https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to Imprisonment.pdf (“Various societies have decriminalized vagrancy in whole or in part, significantly reducing rates of imprisonment . . . In such cases, decriminalizing the behaviour and dealing with it outside the criminal law does not produce a negative impact on public safety.”).

⁶⁷ See generally *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 63, ¶¶ 65, 70 (“Because law enforcement officials often use ‘poverty’, ‘homelessness’ or ‘disadvantage’ as an indicator of criminality, persons living in poverty come into contact with the criminal justice system with a disproportionately high frequency.”).

good use of scarce public resources.⁶⁸ The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa specifically recommended the decriminalization of vagrancy offenses.⁶⁹ More recently, the African Commission on Human and Peoples' Rights directly linked petty offenses with overcrowding in prisons and resulting rights violations.⁷⁰

As a result of the already high rates of overcrowding, imprisonment for minor offenses arguably constitutes a disproportionate measure that cannot be said to be a reasonable limitation on the rights to freedom and security of the person,⁷¹ to dignity,⁷² and to freedom from inhuman and degrading treatment or punishment.⁷³ In response, some countries have sought to reduce the number of persons in prison for minor offenses.⁷⁴ The most common

⁶⁸ Penal Reform Int'l, *Kampala Declaration on Prison Conditions in Africa and Plan of Action*, ¶ 3 (Sept. 1996), <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf> [hereinafter *Kampala Declaration*].

⁶⁹ Afr. Comm'n Hum. & People's Rts., *The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* (2003), ¶ 1 <https://www.achpr.org/legalinstruments/detail?id=42> [hereinafter *The Ouagadougou Declaration*] (recommending the “[d]ecriminalisation of some offences such as being rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents.”).

⁷⁰ Afr. Comm'n Hum. & People's Rts., *Principles on the Decriminalisation of Petty Offences*, at 13 (2017) [hereinafter *Principles on Decriminalisation*] (“Petty offences are inconsistent with the right to dignity and freedom from ill treatment on the basis that their enforcement contributes to overcrowding in places of detention or imprisonment.”).

⁷¹ See G.A. Res. 2200A (XXI), art. 9 (March 23, 1976); Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, art. 6, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

⁷² See G.A. Res. 2200A (XXI), art. 10 (March 23, 1976); Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

⁷³ See G.A. Res. 2200A (XXI), art. 7 (March 23, 1976); Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

⁷⁴ See Nikhil Roy, *Ten Solutions to the Problem of Prison Overcrowding in Africa*, PENAL REFORM INT'L (Feb. 25, 2013),

approach is to periodically release prisoners,⁷⁵ often to commemorate important events,⁷⁶ although states are also increasingly developing policies that discourage custodial sentences for minor offenses.⁷⁷ These actions, however, do not address the systemic causes of overcrowding and are not sufficient to deal with the crisis of overcrowding. Deplorable conditions exist in prisons throughout Africa, and they are so severe that they have repeatedly been highlighted at the international level, including in relation to

<https://www.penalreform.org/blog/ten-african-solutions-problem-prison-overcrowding-africa/>.

⁷⁵ See, e.g., Gikunga Kariuki, *1200 Prisoners to Be Released from Jail in Decongestion Move*, CITIZEN DIGITAL (May 10, 2018, 9:28 PM), <https://citizentv.co.ke/news/1200-petty-offenders-to-be-released-from-kenyan-prisons-in-decongestion-bid-199745/> (reporting on Kenya's announced plans to release 1200 petty offenders from prison, a move that followed the earlier release of petty offenders from various prisons).

⁷⁶ See, e.g., Sebastiane Ebatamehi, *Zambia's President Pardons Prisoners to Mark 63rd Birthday*, AFRICAN EXPONENT (Nov. 11, 2019), <https://www.africanexponent.com/post/4473-president-edgar-lungu-pardons-high-profile-prisoners-on-his-63rd-birthday>; *Prisoners To Be Released by Presidential Pardon in Eid El-Adha*, EGYPT TODAY (Aug. 1, 2019), <https://www.egypttoday.com/Article/1/73431/Prisoners-to-be-released-by-presidential-pardon-in-Eid-El>.

⁷⁷ See, e.g., *Community Service for Offenders with Short Sentences to Alleviate Prison Overcrowding*, CAPE TIMES (Dec. 7, 2018, 6:30 AM), <https://www.iol.co.za/capetimes/news/community-service-for-offenders-with-short-sentences-to-alleviate-prison-overcrowding-18413400> [hereinafter *Community Service for Offenders*] (reporting on a new South African policy whereby offenders with sentences of less than two years will serve their time doing community service to curb overcrowding in prisons).

Benin,⁷⁸ Ghana,⁷⁹ Malawi,⁸⁰ Mauritania,⁸¹ Burkina Faso,⁸² Burundi,⁸³ Cameroon,⁸⁴ Congo,⁸⁵ Côte d'Ivoire,⁸⁶ Comoros,⁸⁷ and the Democratic Republic of Congo.⁸⁸

A less acknowledged negative consequence of the enforcement of vagrancy offenses is its encroachment on the legitimacy of the police force. Arbitrary arrests in poor and marginalized communities can contribute to a breakdown of trust between the police and the public. This is because vagrancy laws lend themselves to arbitrary arrests for a number of reasons: they are broadly worded, allowing arbitrary enforcement of police

⁷⁸ U.N. Human Rights Council, *Summary of Stakeholders' Submissions on Benin*, ¶¶ 23–25, U.N. Doc. A/HRC/WG.6/28/BEN/3 (Aug. 8, 2017) [hereinafter *Submissions on Benin*].

⁷⁹ U.N. Human Rights Council, *Summary of Stakeholders' Submissions on Ghana*, ¶ 15, U.N. Doc. A/HRC/WG.6/28/GHA/3 (Aug. 8, 2017) [hereinafter *Submissions on Ghana*].

⁸⁰ U.N. Human Rights Council, *Summary of Stakeholders' Submissions on Malawi*, ¶¶ 27, 29, U.N. Doc. A/HRC/WG.6/22/MWI/3 (Feb. 10, 2015) [hereinafter *Submissions on Malawi*].

⁸¹ U.N. Human Rights Council, *Summary of Stakeholders' Submissions on Mauritania*, ¶ 65, U.N. Doc. A/HRC/WG.6/23/MRT/3 (Aug. 17, 2015) [hereinafter *Submissions on Mauritania*].

⁸² U.N. Human Rights Council, *Summary of Stakeholders' Submissions on Burkina Faso*, ¶ 16, U.N. Doc. A/HRC/WG.6/30/BFA/3 (Mar. 5, 2018) [hereinafter *Submissions on Burkina Faso*].

⁸³ U.N. Human Rights Council, *Report of the Commission of Inquiry on Burundi*, ¶ 44, U.N. Doc. A/HRC/39/63 (Aug. 8, 2018) [hereinafter *Report on Burundi*].

⁸⁴ U.N. Comm. Against Torture, *Concluding Observations on the Fifth Periodic Report of Cameroon*, ¶ 33, U.N. Doc. CAT/C/CMR/CO/5 (Dec. 18, 2017) [hereinafter *Report on Cameroon*].

⁸⁵ U.N. Comm. Against Torture, *Concluding Observations on the Initial Report of the Congo*, ¶ 13, U.N. Doc. CAT/C/COG/CO/1 (May 28, 2015) [hereinafter *Report on Congo*].

⁸⁶ U.N. Human Rights Council, *Concluding Observations on the Initial Report of Cote d'Ivoire*, ¶ 19, U.N. Doc. CCPR/C/CIV/CO/1 (Apr. 28, 2015) [hereinafter *Report on Cote D'Ivoire*].

⁸⁷ U.N. Human Rights Council, *Compilation on the Comoros*, ¶ 21, U.N. Doc. A/HRC/WG.6/32/COM/2 (Nov. 12, 2018) [hereinafter *Compilation on Comoros*].

⁸⁸ U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the Democratic Republic of Congo*, ¶ 33, U.N. Doc. CCPR/C/COD/CO/4 (Nov. 30, 2017) [hereinafter *Report on Democratic Republic of Congo*].

discretion; they allow arrests without any evidence of an offense having been committed; and they are enforced in a manner that ignores due process rights, including the right to be presumed innocent.⁸⁹ Trust is further eroded by the entrenchment of a culture within police institutions of soliciting bribes from persons who face arrest under vagrancy-related offenses and by the strains such arrest practices place on police institutions, which struggle to attend to serious crimes.⁹⁰

B. *Negative Consequences of Enforcement of Vagrancy Offenses for Vulnerable Groups*

Vagrancy-related offenses have a disproportionate effect on vulnerable groups in society.⁹¹ The offenses criminalize the status of a person either directly or indirectly by being broadly worded and creating the space for the application of police bias during enforcement.⁹² Phrases such as “common thief,” “without visible means of support,” and “without being able to give a satisfactory account of themselves” are imprecise and do not give fair and

⁸⁹ See Harold J. Engel, *Constitutional Law—Conviction as a Vagrant of Persons Who Are Unemployed and Who Are Able to Work and Who Have No Visible Means of Support Is an Overreaching of Police Power and a Denial of Due Process*, 14 HOW. L.J. 402, 403–06 (1968); see also *Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 4.40 (High Ct. Malawi) (Ntaba, J., concurring) (Malawi) (“Let me state that the rule of law which is a tenet of the Malawian Constitutional law and indeed Malawian constitutional democracy, should always be upheld and should not be compromised merely in the name of public safety or preventive policing.”).

⁹⁰ See MEERKOTTER ET AL., *supra* note 10, at 96–97; CHANDRÉ GOULD & NICOLÉ FICK, *SELLING SEX IN CAPE TOWN: SEX WORK AND HUMAN TRAFFICKING IN A SOUTH AFRICAN CITY* 61 (2008); JONNY STEINBERG, *THIN BLUE LINE: THE UNWRITTEN RULES OF POLICING SOUTH AFRICA* 107 (2008).

⁹¹ See *Principles on Decriminalisation*, *supra* note 70, at 10 (“Vulnerable persons are persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses. This includes, but is not limited to, the economically or socially marginalised, including persons living in poverty, homeless persons, street children, beggars, older persons, persons marginalised on the basis of sexual orientation or gender identity, key populations, persons with disabilities, street traders and vendors.”); see also Afr. Comm’n Hum. & People’s Rts., *Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the African Charter on Human and Peoples’ Rights*, at 20 (2011).

⁹² See Magaro, *supra* note 58, at 1312.

adequate notice to those who might come within their scope nor sufficient guidelines to those empowered to enforce them.⁹³

Vagrancy offenses are inconsistent with the principle of equality before the law and non-discrimination on the basis that they either target or have a disproportionate impact on poor and vulnerable persons; punishing a personal status involuntarily entered into and that cannot voluntarily or easily be abandoned undermines the right to dignity and equal protection before the law.⁹⁴

Often, it is the most marginalized and stigmatized within society who bear the brunt of the enforcement of vagrancy offenses. Street children are often arrested under vagrancy offenses, in violation of children's rights and without rational bases.⁹⁵ There are frequent reports of mass arrests of street children for vagrancy, for example,

⁹³ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 158, 162–63, 171 (1972) (holding that a vagrancy ordinance was void for vagueness because it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden, encouraged arbitrary and erratic arrests and convictions, and made criminal those activities which by modern standards are normally innocent and placed almost unfettered discretion in the hands of the police).

⁹⁴ See G.A. Res. 2200A (XXI), arts. 14, 16, 26 (March 23, 1976); Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, arts. 2–3, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986; see also Lahan, *supra* note 10, at 361.

⁹⁵ See *Republic v. Balala* [1997] 2 MLR 67, at 68–69 (High Ct. Malawi) (Malawi) (“When he was questioned by the police he said that he came to the northern region to look for employment . . . I am concerned that the charge of being a rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison.”).

in Democratic Republic of Congo,⁹⁶ Uganda,⁹⁷ Tanzania,⁹⁸ Egypt,⁹⁹ Kenya,¹⁰⁰ and Rwanda.¹⁰¹ Police have explained that they feel justified in arresting street children for loitering because they are predisposed to engage in criminal activity.¹⁰² Such policing practices are contrary to the principles of criminal law and criminal procedure.¹⁰³ Sex workers are also frequently harassed and arbitrarily arrested by police, and they are disproportionately affected by systemic police practices of sexual violence¹⁰⁴ and demands for bribes.¹⁰⁵ The tendency in society to frown upon sex workers and street children means that police actions against these groups are often met with impunity and makes it difficult to engage

⁹⁶ See HUMAN RIGHTS WATCH, WHAT FUTURE? STREET CHILDREN IN THE DEMOCRATIC REPUBLIC OF CONGO 24–26 (2006), <https://www.hrw.org/sites/default/files/reports/drc0406webwcover.pdf>.

⁹⁷ See HUMAN RIGHTS AWARENESS & PROMOTION FORUM, *supra* note 35, at 32–33, 35; HUMAN RIGHTS WATCH, “WHERE DO YOU WANT US TO GO?” ABUSES AGAINST STREET CHILDREN IN UGANDA 28–31, 50 (2014), https://www.hrw.org/sites/default/files/reports/uganda0714_forinsert_ForUpload.pdf.

⁹⁸ See MKOMBOZI CTR. FOR ST. CHILDREN, POLICE ROUND-UPS OF STREET CHILDREN IN ARUSHA ARE UNJUST, INHUMANE AND UNCONSTITUTIONAL 2–3, 8 (2005), <https://www.streetchildren.org/wp-content/uploads/2013/02/police-roundups-arusha.pdf> [hereinafter MKOMBOZI CTR. FOR ST. CHILDREN].

⁹⁹ See HUMAN RIGHTS WATCH, CHARGED WITH BEING CHILDREN: EGYPTIAN POLICE ABUSE OF CHILDREN IN NEED OF PROTECTION 3, 8, 13, 55 (2003), <https://www.hrw.org/reports/2003/egypt0203/egypt0203.pdf>.

¹⁰⁰ See HUMAN RIGHTS WATCH, JUVENILE INJUSTICE: POLICE ABUSE AND DETENTION OF STREET CHILDREN IN KENYA (1997), <https://www.hrw.org/legacy/reports/1997/kenya/>.

¹⁰¹ See HUMAN RIGHTS WATCH, SWEEP AWAY: STREET CHILDREN ILLEGALLY DETAINED IN KIGALI, RWANDA 6–7, 11–12 (2006), <https://www.hrw.org/legacy/backgrounder/africa/rwanda0506/rwanda0506.pdf>.

¹⁰² See MEERKOTTER ET AL., *supra* note 10, at 79.

¹⁰³ See *id.* at 78–82.

¹⁰⁴ Anneke Meerkotter, *Crackdown on Sex Workers in Zambia*, AFRICAN SEC. REV., Oct. 2012, at 51, 51–56.

¹⁰⁵ See *id.* at 90–92; S. AFR. LITIG. CTR., “THEY SHOULD PROTECT US BECAUSE THAT IS THEIR JOB”: A PRELIMINARY ASSESSMENT OF SEX WORKERS’ EXPERIENCES OF POLICE ABUSE IN LUSAKA, ZAMBIA 13, 21–22 (2016), <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Police-Abuse-of-Sexworkers-in-Zambia.pdf>; see also MEERKOTTER ET AL., *supra* note 10, at 91–92.

in objective discussions on law reform.¹⁰⁶ The solicitation of bribes is sometimes seen as a critical source of income for police officers, who do not receive a living wage, further inhibiting the likelihood of reform in policing practices.¹⁰⁷

Vagrancy offenses further place the onus on any person deemed undesirable by police to explain their presence.¹⁰⁸ As such, these offenses easily violate the presumption of innocence and the privilege against self-incrimination.¹⁰⁹ Whilst the terminology in vagrancy offenses lends itself to a violation of the presumption of innocence,¹¹⁰ some laws go even further.¹¹¹

The enforcement of these offenses also has a more visible effect on the lives of poor and marginalized groups.¹¹² Once arrested, police stations provide little or no food to persons in custody, and conditions are often unhygienic and hazardous.¹¹³ Consequently,

¹⁰⁶ See, e.g., Republic v. Pempho Banda [2016] No. 58, ¶ 4.35 (High Ct. Malawi) (Malawi) (noting that in the absence of frank discussion on law reform “prostitution related offences in Malawi shall remain an area of blatant discrimination, unfairness, inequality, abuse as well as bias from law enforcement as well as the courts as evidenced in this case.”).

¹⁰⁷ Cf. Monica Rao Biradavolu et al., *Can Sex Workers Regulate Police? Learning from an HIV Prevention Project for Sex Workers in Southern India*, 68 SOC. SCI. & MED. 1541, 1542–45 (2009) (studying the policing of sex work in a town in southern India where sex workers were usually charged under public nuisance laws and painting the picture of a poorly paid police force that often bribes sex workers in exchange for avoiding arrest).

¹⁰⁸ See Flynn, *supra* note 12, at 348–49.

¹⁰⁹ See Lahan, *supra* note 10, at 348–53.

¹¹⁰ See G.A. Res. 2200A (XXI), art. 14(2) (March 23, 1976); Organization of African Unity, African (Banjul) Charter on Human and Peoples’ Rights, art. 7(b)(1), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

¹¹¹ See, e.g., Penal Code Act (1960) ch. (53) § 409 (Nigeria) (providing, in the case of any of the vagrancy offenses, that a person may be convicted in the absence of any indication of intent if the person is of “known character”).

¹¹² See, e.g., NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 21 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (“Laws prohibiting loitering, loafing, or vagrancy, although often alleged to target suspicious behavior, are used to criminalize innocuous activities of homeless people, including sitting, standing still, or lying down.”).

¹¹³ See, e.g., Lukas Muntingh, *Survey of Conditions of Detention in Police Cells*, in PRE-TRIAL DETENTION IN MALAWI: UNDERSTANDING CASEFLOW

arrests burden families who have to spend scarce resources to visit the police station, bring food, and pay bail. The conditions in custody and the consequences of the arrest itself sometimes lead a person to plead guilty so that he or she can be released, even if no offense was ever committed.¹¹⁴

III. LITIGATION STRATEGIES TO AMELIORATE RIGHTS VIOLATIONS ARISING FROM THE ENFORCEMENT OF VAGRANCY OFFENSES

Realizing the impact of vagrancy offenses, human rights advocates have at times used litigation to challenge discriminatory laws and/or their enforcement.¹¹⁵ At other times, when defendants have been unrepresented, magistrates and judges have cautioned that vagrancy offenses and police enforcement practices are inimical to the rule of law.¹¹⁶

A. *Challenging the Constitutionality of Vagrancy Offenses*

Courts in Africa have often intervened to discourage the use of outdated colonial era offenses, usually by emphasising the need for a narrow application of these offenses.¹¹⁷ However, only when specifically asked to do so have courts had the jurisdiction to declare some of these offenses unconstitutional.¹¹⁸

A noteworthy early case that opposed the broad application of the vagrancy offense of being a “suspected person or reputed thief”

MANAGEMENT AND CONDITIONS OF INCARCERATION 52, 56–57 (2011), <https://acjr.org.za/resource-centre/Pre-trial%20detention%20in%20Malawi.pdf>.

¹¹⁴ See Lukas Muntingh & Louise Ehlers, *Introduction*, in PRE-TRIAL DETENTION IN MALAWI: UNDERSTANDING CASEFLOW MANAGEMENT AND CONDITIONS OF INCARCERATION, *supra* note 113, at 8, 10 (“The right to a fair trial is also compromised since a lengthy detention may be an incentive to plead guilty.”).

¹¹⁵ See, e.g., MKOMBOZI CTR. FOR ST. CHILDREN, *supra* note 98, at 1 (“This paper also supports the impact litigation recently initiated by the Arusha Caucus to recognise the Removal of Undesirable Persons Ordinance as unconstitutional.”).

¹¹⁶ See, e.g., Republic v. Balala [1997] 2 MLR 67, 68–69.

¹¹⁷ See, e.g., *id.*

¹¹⁸ See, e.g., Gwanda v. State [2015] Constitutional Case No. 5, ¶ 1.3 (High Ct. Malawi) (Ntaba, J., concurring) (Malawi); Anthony Njenga Mbuti v. Attorney Gen. [2015] No. 45 of 2014, ¶¶ 16, 21, 170–73 (H.C.K.) (Kenya).

was *Ledwith v. Roberts*.¹¹⁹ Interestingly, the reasoning expressed in *Ledwith* had some traction with judges within British colonies. In *R. v. Mutotole*, for instance, the Zambia High Court cited *Ledwith* and cautioned that the rogue and vagabond offense of being a suspected person or reputed thief without a means of subsistence could only apply to persons who had become an object of suspicion.¹²⁰ The Zambia court, in a case where six women were found with male patients in a hospital and charged with the rogue and vagabond offense of being found in circumstances leading to a suspicion that the person is there for an illegal or disorderly purpose, held that a conviction could not be recorded when all the elements of the offense had not been met.¹²¹ In the absence of the reform of vagrancy laws, the *Ledwith* case continues to be a beacon for other courts, which have issued similar calls for law reform many decades later.¹²²

During the 1940s, courts in East Africa not only sought a narrow application of vagrancy offenses, but at times, they resorted to declaring these offenses unlawful. For example, the Nairobi Municipality (Amendment) By-law 212 of 1944 prohibited a “native” from remaining in the municipality for more than thirty-six hours without employment or a permit. The by-law was declared

¹¹⁹ *Ledwith v. Roberts* [1937] 1 K.B. 232 (U.K.). In *Ledwith*, the court noted that since the offense allowed arrest without a warrant, it could only be applied to someone who is known to be a suspected person or reputed thief. *Court of Appeal: Ledwith and Another v. Roberts and Another*, 1 J. CRIM. L. 133, 134, 142, 147, 159 (1937). Lord Justice Scott went further to call for reform of vagrancy laws, stating the following:

The old phrases have to-day lost their meaning, but they remain on the statute book as vague and indefinite words of reproach. Is it not time that our relevant statutes should be revised and that punishment and arrest should no longer depend on words which to-day have an uncertain sense and which nobody can truly apply to modern conditions? To retain such laws seems to me inconsistent with our national sense of personal liberty or our respect for the rule of law.

Id. at 160.

¹²⁰ *R. v. Mutotole Glass* [1939] Criminal Case No. 165, at 52–53 (High Ct. Zambia) (Zambia).

¹²¹ *R. v. Mununga* [1941] Criminal Case Nos. 220–25, at 120 (High Ct. Zambia) (Zambia).

¹²² *See, e.g., Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 4.71 (High Ct. Malawi) (Kalembera, J., concurring) (Malawi).

unreasonable and *ultra vires* by the Kenya Supreme Court in 1945 on the basis that it placed an undue burden on the accused person and had the effect of being unequal “between different classes of natives.”¹²³ The Supreme Court in that instance did not, however, question the premise of the by-law itself, and commented that it was “no doubt, an honest attempt to fill the gap between unemployment on the one hand and vagrancy and destitution on the other.”¹²⁴ In Tanganyika, a magistrate in 1941 boldly declared a Dar es Salaam vagrancy by-law that allowed the repatriation of “undesirable” persons convicted of being a rogue and vagabond *ultra vires* on the basis that it was “unjust and oppressive.”¹²⁵ It was reported in the local press at the time that the Magistrate noted that the Township Rules were “not made by the people and for the people nor are they subjected to public criticism by a vigorous press or by public bodies before they become law and these are, after all, the most effective safeguards and those in which a democratic people place most store.”¹²⁶

Seventy years later, the courts continue to confront the inconsistencies between colonial era legislation and modern human rights standards. For instance, in *Mbuti v. Attorney General*, the Kenya High Court concluded that the state blatantly disregarded the dignity and rights to due process, equality before the law, and freedom from cruel and degrading treatment by subjecting the accused to the Peace Bond provisions that have their roots in Eleventh Century British criminal procedure.¹²⁷

¹²³ *Rex v. Awo D/O Wako* [1945] Criminal Case No. 223 of 1945, at 59 (H.C.K.) (Kenya); see also Burton & Ocobock, *supra* note 17, at 283–4.

¹²⁴ *Rex v. Awo D/O Wako* [1945] Criminal Case No. 223 of 1945, at 59 (H.C.K.) (Kenya).

¹²⁵ *Archive for January, 1941, Tanzanian Affairs*, <https://www.tzaffairs.org/1941/01/> (last visited Dec. 12, 2019); see also Burton & Ocobock, *supra* note 17, at 284–85 (“[The law] rendered ‘any African . . . subject to expulsion without process of law, without appeal, and without lawful reason’ and thereby represented ‘a gratuitous interference with the rights of the subject who is entitled to travel where he will throughout the country, and to use the public roads for passage wherever they are established.’”).

¹²⁶ *Archive for January, 1941, supra* note 125.

¹²⁷ See Anthony Njenga Mbuti v. Attorney Gen. [2015] Criminal Case No. 45 of 2014, ¶¶ 16, 21, 23, 109, 170 (H.C.K.) (Kenya).

The Malawi High Court has also consistently cautioned against the broad application of vagrancy laws, even when such arguments were not placed before the court. In 1948, for instance, the Malawi High Court held that in terms of the principles of criminal liability, where there is insufficient evidence to charge a person with an attempt to commit a crime, it is undesirable for the prosecution to use such evidence for the purpose of securing a conviction for vagrancy.¹²⁸

In a number of other vagrancy cases that came to the Malawi High Court for review, judges held that vagrancy offenses simply could not be read to criminalize persons who are homeless or criminalize the act of wandering.¹²⁹

In the case of *Gwanda v. State*, the High Court of Malawi finally had an opportunity to directly consider the constitutionality of the rogue and vagabond offense of being found in circumstances suggestive that the person may be there for an illegal or disorderly purpose, declaring that vagrancy offenses have no place in a constitutional dispensation.¹³⁰

B. *Challenging the Enforcement of Vagrancy Offenses*

Human rights organizations and prisoners themselves have resorted to the courts for orders to address prison overcrowding and

¹²⁸ R. v. Willie [1948] 1923-60 A.L.R. 152, at 152, 154 (High Ct. Malawi) (Malawi).

¹²⁹ See Republic v. Luwanja [1995] 1 M.L.R. 217 (High Ct. Malawi) (Malawi) (emphasizing that it is not an offense to simply wander about); Brown v. Republic [1996] Crim. App. No. 24 (High Ct. Malawi) (Malawi) (holding that arresting someone simply for sleeping in a public place amounted to a violation of the right to freedom of movement); Republic v. Ganizani [1999] Confirmation Case No. 290 (High Ct. Malawi) (unreported) (Malawi) (holding that merely finding someone asleep in a school when that person is unable to give a good account of themselves does not mean that the person was there for an illegal purpose); Mwanza and Others v. Republic [2008] M.W.H.C. 228 (High Ct. Malawi) (Malawi) (where thirteen women were found in a trading center at three o'clock in the morning, holding that "surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless.").

¹³⁰ See *Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 4.51 (High Ct. Malawi) (Ntaba, J., concurring) (Malawi) ("It is therefore this court's opinion that arbitrariness cannot be tolerated in an open and democratic society.").

conditions in detention.¹³¹ As a result, courts have made declaratory orders admonishing the state for perpetuating prison overcrowding.¹³²

Courts in Malawi,¹³³ Zimbabwe,¹³⁴ Zambia,¹³⁵ and South Africa¹³⁶ have issued judgments condemning the rights violations caused by prison overcrowding. The Malawi High Court, based on the constitutional provision that says that children in conflict with the law should be imprisoned only as a last resort, even ordered the release of all children who were incarcerated in prisons.¹³⁷ These declaratory orders, however, have not resulted in systemic changes within the prisons themselves and have had little effect on the practice of arresting persons for petty offenses.¹³⁸

Arguably, another area for litigation is the rights violations that occur during police arrests. Most countries have frequent tort cases for the unlawful arrest and detention of individuals, but it is much harder for poor and marginalized persons to access legal

¹³¹ See, e.g., *Masangano v. Attorney Gen.* [2009] Constitutional Case No. 15 of 2007, at 3 (High Ct. Malawi) (Malawi); *Kachingwe v. Minister of Home Affairs* [2005] No. SC 145/04, at ¶ 2 (Zimb. Sup. Ct.) (Zimb.).

¹³² See, e.g., *Masangano v. Attorney Gen.* [2009] Constitutional Case No. 15 of 2007, at 56 (High Ct. Malawi) (Malawi).

¹³³ See, e.g., *id.* (“[O]vercrowding and poor ventilation in our prisons amounts to inhuman and degrading treatment of the inmates . . .”).

¹³⁴ See, e.g., *Kachingwe v. Minister of Home Affairs* [2005] No. SC 145/04, ¶¶ 1, 50 (Zimb. Sup. Ct.) (Zimb.) (recognizing that good ventilation, sufficient lighting, clean mattresses and blankets, flushing toilets with toilet paper, and running drinkable water are required to ensure compliance with the prohibition against torture and inhumane and degrading treatment).

¹³⁵ See, e.g., *Mwanza v. Attorney Gen.* [2019] Appeal No. 153/2016, ¶¶ 5.1.2, 14.10–14.12 (Zambia Sup. Ct.) (Zambia) (finding congestion in a holding cell intended to accommodate fifteen prisoners but accommodating seventy-five, which resulted in no space to lie down and sleep, and prisoners forced to spend nights standing or sitting, with difficulty accessing the single, non-flushing toilet, and lack of ventilation, amounted to cruel, inhumane and degrading treatment).

¹³⁶ See, e.g., *Participative Mgmt. Comm. v. Minister of Justice & Correctional Service* [2018] No. 17/16317, ¶¶ 32, 52 (High Ct. S. Afr.) (S. Afr.) (holding that the overcrowding and conditions in detention violated prisoners’ rights to dignity and freedom from cruel, inhumane, and degrading treatment).

¹³⁷ See *Republic v. Children Det. Bvumbwe & Kachere Prisons* [2018] Criminal Div. No. 21 of 2017, at 6 (High Ct. Malawi) (Malawi).

¹³⁸ See *Muntingh*, *supra* note 113, at 80 (noting that the long-term solution to overcrowding is for the government to act, recognizing that it has not acted yet).

representation and engage in such litigation to assert their rights.¹³⁹ In a recent South African Supreme Court decision, the court ordered damages to twenty-seven applicants who were homeless and whose property was destroyed by municipal police, characterizing the police's actions as disrespectful and demeaning.¹⁴⁰

Some courts, like the Malawi High Court, have addressed the issue of mass arrests and misjoinder. Most recently, the Malawi High Court addressed the issue of misjoinder following arrests of sex workers during a police sweeping exercise.¹⁴¹ The court condemned the inherent unfairness of the practice:

Somehow these 19 individuals arrested at different places and times as indicated in their caution statements were tried and convicted in one case. It is trite law that where it is noted by an appellate, confirming or reviewing court that the circumstances of the offences were committed at various times or places and do not form a series of the same or similar offence for each party such would be declared a misjoinder to charge of the offences in the same count. In this case, this misjoinder further led to the defective plea taken which this court has already declared on. A misjoinder can warrant the setting aside of a conviction if it does occasion a failure to justice.¹⁴²

Another approach has been to target the rationality of conducting mass arrests in the first place in the absence of evidence of offenses having been committed. Courts in both Nigeria and

¹³⁹ See HUMAN RIGHTS AWARENESS & PROMOTION FORUM, *supra* note 35, at 45 (“Most persons who are charged with ‘Idle and disorderly’ offences do not get legal representation while in court.”).

¹⁴⁰ See *Ngomane v. City of Johannesburg Metropolitan Municipality* [2019] No. 734/2017, ¶ 21 (Sup. Ct. of App. of S. Afr) (S. Afr.).

¹⁴¹ See *Republic v. Pempho Banda* [2016] No. 58, ¶ 4.17 (High Ct. Malawi) (Malawi).

¹⁴² *Id.*

Malawi, for example, have admonished the gender bias in mass arrests of women.¹⁴³

What is apparent with many of these cases is that they have had little impact on police arrest practices. In Malawi, for example, the court's declaration of a rogue and vagabond offense as unconstitutional has simply resulted in police using other similarly problematic offenses during sweeping exercises.¹⁴⁴ Similarly, in the absence of media coverage and advocacy, unlawful arrest practices and magistrate court practices—which have frequently been condemned by the courts—seem to continue unabated.¹⁴⁵

¹⁴³ See, e.g., *Nkwocha v. Hon. Minister of the Fed. Capital Territory* [2019] No. FHC/ABJ/CS/483/2017, ¶ 1 (Fed. High Court of Nigeria) (Nigeria); *Njemanze v. Fed. Republic of Nigeria* [2017] No. ECW/CCJ/JUD/08/1, at 38 (Cmty. Ct. of Justice of Econ. Cmty. of W. African States) (ECOWAS) (“From the totality of evidence offered, it seems that the whole hug of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination.”); *Kaseka v. Republic* [1999] M.L.R. 116, at 118 (High Ct. Malawi) (Malawi) (“It seems to me that the police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity.”).

¹⁴⁴ See, e.g., *Malawi Court Rules ‘Rogue and Vagabond’ Offence Unconstitutional: Malawi Police to Respect Ruling But to Use Section 184 (1)(b) Instead*, MARABI POST (Jan. 13, 2017, 3:54 PM), <http://www.maravipost.com/malawi-court-rules-rogue-vagabond-offence-unconstitutional-malawi-police-respect-ruling-use-s184-instead/> (explaining that although police will follow the High Court order, they will continue arresting people lingering under another statute, showing how nothing has changed).

¹⁴⁵ See, e.g., *Norah Hanke, 35 People Arrested in a Sweeping Exercise in Limbe*, MALAWI NEWS AGENCY (Dec. 14, 2018, 12:19 PM), <http://www.manaonline.gov.mw/index.php/national/general/item/11220-35-people-arrested-in-a-sweeping-exercise-in-limbe> (exemplifying how the media does not focus on the lack of due process but emphasizes that sweeps are meant to protect the city).

IV. IMPROVING ON LITIGATION OUTCOMES

A. *Documenting the Impact of Vagrancy Offenses and Strengthening Public Discourse on the Use of Criminal Laws*

Vagrancy-related offenses are not uniformly applied throughout Africa—in some countries these offenses have fallen into disuse, whilst in others the problem lies less with their precise wording than with the manner in which they are applied in practice.¹⁴⁶ For this reason, any challenge to these offenses arguably requires country-specific research on the impact of laws, how the laws are interpreted by police and magistrates, and the extent to which the judiciary has sought to limit the ambit of these offenses. For instance, the Malawi High Court, citing such research, was able to make an informed decision about the impact and practical enforcement of the rogue and vagabond offense and the extent to which it violated constitutional rights in *Gwanda v. State*.¹⁴⁷ The research was not only useful in framing the litigation, but also the public debate that preceded the litigation.

Bringing the enforcement of vagrancy offense into the public spotlight through the use of objective research that highlights the history and practical effect of these offenses is a useful way to balance public discourse on vagrancy laws and assists to embolden the judiciary to carefully consider the issue when tasked with it.¹⁴⁸ Attention should be paid to inculcating discourses in the judiciary, law enforcement, and public spaces that counter prevailing public,

¹⁴⁶ *Vagrancy-Related Provisions*, *supra* note 37 (compiling the different vagrancy penal codes throughout Africa).

¹⁴⁷ *Gwanda v. State* [2015] Constitutional Case No. 5, ¶¶ 1.4, 4.52 (Ntaba, J., concurring) (High Ct. Malawi) (Malawi). In that case, the court held that the offense violated the applicant's rights to dignity, freedom from inhuman and degrading treatment and freedom from discrimination and equal protection of the law, freedom and security of person, the right to be presumed innocent and the freedom of movement. *Id.* at 9–19 (Mtambo, J.). The court held that the limitation of these rights were unreasonable and the overbreadth of the offense produced disproportionate results on marginalized groups in society. *Id.*

¹⁴⁸ *See, e.g., id.* at 24 (employing the work done by CHREAA and SALC, as published in MEERKOTTER, *supra* note 10, to find that “the main reason for arrests under section 184(1)(c) of the Penal Code is to deal with persons found merely loitering at odd hours and common prostitutes who have on occasions suffered abuse as opposed to the preservation of law and order.”).

police, and magisterial perceptions that mass arrests are effective crime prevention tools and that a tough response to crime necessitates rights violations of suspected persons.

It is often useful in strategic litigation to have an advocacy strategy that complements and builds on what is being requested from the courts. For this approach to be effective, it helps when the main applicant or the circumstances surrounding the case are relatable to the public and have the potential to garner public sympathy.¹⁴⁹ For example, in the case of *Gwanda v. State*, the Applicant was a street vendor who had been arrested by Malawi Police at four o'clock in the morning while he was on his way to sell plastic bags at the market. He was arrested and told that he would have to explain his case at the police station. The police detained him for three days before he was processed through the court and charged with being a rogue and vagabond.¹⁵⁰ Two days later he was released on bail pending trial. Although the offense of being a rogue and vagabond is most often used to target marginalized groups in society, including street vendors, the Applicant's specific circumstances were able to garner broad-based public support.

B. Identifying the Legal Issues and Arguments

Instead of launching constitutional challenges against a range of offenses, it is important to focus on the offense that most impacts the lives of the poor and marginalized groups. Detailed legal research is then required, which documents the history of the offense and its introduction into the country, the purpose and application of the offense, and its interpretation by domestic courts. Once a detailed analysis is made of domestic jurisprudence supporting the constitutional and procedural arguments to be raised in the case, regional and comparative jurisprudence can be sourced to support the arguments.

¹⁴⁹ See, e.g., *Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 1.2 (High Ct. Malawi) (Ntabo, J., concurring) (Malawi).

¹⁵⁰ Section 184(1)(c) of the Malawi Penal Code provides 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" is deemed a rogue and vagabond. 2012 Malawi Penal Code, ch. 7:01, § 184(1)(c).

In the case of vagrancy offenses, key principles relating to criminal law can prove useful arguments in court: an offense must not be overly broad by targeting conduct that bears no relation to the purpose of the offense; the ambit of the offense should be easy to ascertain by the public; the enforcement of an offense should not do more harm than the actual act penalized; a person cannot be convicted of a crime due to his or her status; a person is innocent until proven guilty in a court of law; the burden to prove guilt is on the prosecution; and the prosecution must prove all the elements of the offense beyond reasonable doubt.¹⁵¹ Originating in common law, these principles are incorporated into many countries' national constitutions and criminal procedure laws.¹⁵²

Amici curiae have proved to be useful in highlighting issues for a court to consider when assessing the constitutionality of an offense might not be in the purview of the parties.¹⁵³ In the *Gwanda* case, *amici* submissions were made by the Centre for Human Rights Education, Advice and Assistance, on conditions in detention and crime prevention policies; by the Paralegal Advisory Services Institute, on police arrest practices; and by the Legal Aid Board, on the impact of the offense on legal aid services.¹⁵⁴ *Amici curiae* interventions can also be detrimental to a case, for example, where political, religious, or moral issues are placed before the court by the *amici*, which obfuscate the legal issues.¹⁵⁵ Where case arguments have been carefully planned by the parties in a strategic litigation

¹⁵¹ See generally *Theories of Criminal Law*, STAN. ENCYCLOPEDIA PHIL. (Aug. 6, 2018), <https://plato.stanford.edu/entries/criminal-law/>.

¹⁵² See, e.g., Beatri Kruger, *The Impact of the Constitution on the South African Criminal Law Sphere*, 26 J. JURID. SCI. 116, 118, 131 (2001) (illustrating via different offenses and presumptions how a constitution embodying all of those aspects can affect criminal law).

¹⁵³ See John C. Mubangizi & Christopher Mbazira, *Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa?*, 16 LAW, DEMOCRACY & DEV. 199, 203–05 (2012).

¹⁵⁴ *Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 1.4 (High Ct. Malawi) (Ntabo, J., concurring) (Malawi).

¹⁵⁵ See, e.g., *Jason Jones v. Attorney Gen.* [2018] Claim No. CV2017-00720, ¶ 15 (High Ct. Justice) (Trin. & Tobago) (“This court thus had sight of the submissions of the interested parties and, where applicable, considered the authorities presented but ultimately saw this as a legal issue with due consideration given to the religious arguments under the question of whether the sections were reasonably justifiable.”).

case, interventions of *amici curiae* could result in a delay in the finalization of the matter. Any *amici curiae* interventions should consider the local jurisprudence and political context and evaluate any potential risks resulting from the intervention.

When considering the constitutional rights affected by an offense, it is important to set out each constitutional right separately and to discuss the exact manner in which this right is implicated, the jurisprudence on the ambit of the right, and an analysis of the permissible limitations to the right. It should be noted that in many countries in Africa, the chapter in the respective constitution pertaining to rights prescribes a test for the circumstances in which an infringement of rights may be permissible, either in a general limitations clause or as an internal limitation to a specific right.¹⁵⁶

The general limitations clause often requires that a law seeking to limit a right be of general application. Where an offense is vague and lends itself to arbitrary application, it can be argued that the offense is not a law of general application.¹⁵⁷ The United Nations Human Rights Committee, in *General Comment No. 35* on the right to liberty and security of person, notes that arbitrariness “include[s] elements of inappropriateness, injustice, lack of predictability and due process of the law, as well as elements of reasonableness, necessity and proportionality.”¹⁵⁸

¹⁵⁶ See, e.g., S. AFR. CONST., 1996, ch. 2, §36(1) (“[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”); see also IM Rautenbach, *Proportionality and the Limitation Clauses of the South African Bill of Rights*, 17 POTCHEFSTROOM ELECTRONIC L. J. 2229, 2231–32 (2014).

¹⁵⁷ See, e.g., *Gwanda v. State* [2015] Constitutional Case No. 5, ¶ 4.30 (High Ct. Malawi) (Ntaba, J., concurring) (Malawi) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156, 162, 169 (1972)). Ntaba noted that the rogue and vagabond offense is vague in that it does not sufficiently explain what the prohibited conduct is and gives police officers too much discretion to determine the ambit of prohibited conduct. This violates the principle of legality, which affects both the right to a fair trial and the rule of law. She concluded that the rights violations caused by the offense cannot be justified as they do not pass the first leg of the limitations analysis which requires that the offense be a law of general application which meets the principle of legality. *Id.* ¶¶ 4.28–4.35, 4.51.

¹⁵⁸ U.N. Human Rights Comm., *General Comment No. 35 - Article 9: Liberty and Security of Person*, ¶ 12, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter *General Comment No. 35*]; see also Zimbabwe Lawyers for Human

Once shown to be a law of general application, the onus is on the state to show that the law is reasonable and necessary in an open and democratic society and that the infringement of the right does not negate the essential content of the right.¹⁵⁹ This requires a proportionality test that looks at the stated purpose of the law, whether the law meets a legitimate government objective, and whether the limitation is the least restrictive.¹⁶⁰

In some jurisdictions, courts have created procedural hurdles to constitutional litigation, such as placing the onus of proving both the rights violation and that the limitation is not reasonable and justifiable on the applicant,¹⁶¹ upholding the presumption of constitutionality,¹⁶² and employing the doctrine of constitutional avoidance.¹⁶³ These barriers limit the instances when individuals can approach the court to assert rights by requiring conclusive

Rights & IHRD in Africa v. Zimbabwe [2009] App. No. 294/04, ¶¶ 89, 94, 102 (Afr. Comm'n Hum. & People's Rts.) (ACHPR) (holding that unfettered power in the hands of an officer is tantamount to unrestrained power based on "vague and unsubstantiated reasons of a danger to public order" and destroys "the right to equality before the law").

¹⁵⁹ *Principles on Decriminalisation*, *supra* note 70, at 14 ("There must be a rational connection between the law, its enforcement and the intended objective.").

¹⁶⁰ The test for proportionality most often referred to by courts in Africa, is set out in the Canadian Supreme Court case, *R. v. Oakes* [1986] S.C.R. 103, at 105–06 (S.C.C.) (Can.). The offense must be rationally connected to its objective and not be arbitrary, unfair, or based on irrational considerations; the offense, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question; and there must be proportionality between the effects of the offense, which are responsible for limiting the right or freedom, and the objective, which has been identified as of "sufficient importance" to warrant overriding a constitutionally protected right. *Id.*

¹⁶¹ *Gambia Press Union v. Attorney Gen.* [2018] Civil Suit No. 1/2014, at 8 (Sup. Ct. Gam.) (Gam.) (holding that the person challenging the constitutionality of legislation bears the onus of proving that the challenged provision does not serve a legitimate purpose). This understanding of the onus of proof is contrary to jurisprudence elsewhere on the continent and ignores the lack of equality of arms in cases where the constitutionality of a law is challenged.

¹⁶² *Id.* at 5 (presuming Acts of Parliament to be constitutional unless proven otherwise with regard to the offenses of sedition and publication of false news).

¹⁶³ *Outsa Mokone v. Attorney Gen.* [2018] Civil App. No. CACGB-201-16, ¶ 40 (Ct. App. Bots. at Gaborone) (Bots.) (upholding the principle that, where it is possible to decide any case "without reaching a constitutional issue, that is the course that should be followed.").

evidence of rights violations having occurred (as opposed to a potential threat of such violations) and defer decisions around the constitutionality of laws to parliament.

Ironically, the procedural arguments used to avoid deciding on the constitutionality of an outdated offense themselves originate from a bygone era. The presumption of constitutionality, for example, is based on the generalization that legislatures try to avoid enacting unconstitutional laws.¹⁶⁴ However, it is highly questionable whether this presumption is valid when considering offenses dating back to the colonial era. In addition, the idea that legislatures would avoid enacting unconstitutional laws is not based on empirical evidence and ignores the powers given to courts to assess the constitutionality of laws precisely to act as a backstop in cases where legislatures overstep their constitutional mandate.¹⁶⁵ The High Court of Trinidad and Tobago, when considering the constitutionality of the sodomy offense, rejected the fiction of a presumption of constitutionality, arguing that it originated in an era of parliamentary supremacy and does not apply in an era of constitutional sovereignty.¹⁶⁶

Some courts have been slow to recognize instances when individuals not affected by a particular right can approach the court when they realize the constitution is being violated and have required individuals to prove rights violations, limiting the instances when litigants can approach the court when their rights are threatened.¹⁶⁷ Whilst courts are starting to interpret standing in constitutional matters more broadly, it is preferable in strategic litigation to avoid this issue through choosing the right applicant and documenting sufficient evidence of rights violations.

In many countries, especially in the absence of advocacy on a case, it is unlikely that judgments would be made known to anyone

¹⁶⁴ See, e.g., *Gambia Press Union v. Attorney Gen.* [2018] Civil Suit No. 1/2014, at 8 (Sup. Ct. Gam.) (Gam.).

¹⁶⁵ See generally Matthew Chaskalson et al., *Chapter 3: Constitutional Litigation*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA 3-1-3-13 (2d ed. 2013).

¹⁶⁶ *Jason Jones v. Attorney Gen.* [2018] Claim No. CV2017-00720, ¶¶ 39–45 (High Ct. Justice) (Trin. & Tobago).

¹⁶⁷ These conservative positions have been challenged by recent court judgements. See, e.g., *Adrian Jjuuko v. Attorney Gen.* [2016] Cons. Petition No. 001 of 2009, at 15–16 (Cons. Ct. Uganda) (Uganda); *Jason Jones v. Attorney Gen.* [2018] Claim No. CV2017-00720, ¶ 9 (High Ct. Justice) (Trin. & Tobago).

outside of the immediate parties—including to those tasked with enforcing the principles established in those judgments.¹⁶⁸ For this reason, it is useful to craft remedies within strategic litigation that are more enforceable, as opposed to simply asking for declaratory relief,¹⁶⁹ and to ensure that those empowered to effect change are cited in court.¹⁷⁰

CONCLUSION

Over the past five years, various regional and national civil society organizations, such as the African Commission on Human and Peoples' Rights, have tried to engage in coordinated strategies to identify laws that have a disproportionate effect on poor and marginalized groups in society and police practices that perpetuate rights violations.¹⁷¹ Recognizing the importance of combining a range of strategies, including research, advocacy, law reform, police reform, prison reform, and strategic litigation, organizations, human rights institutions, judges, police officers, prison officials, and individual social justice activists are increasingly challenging common discourses around crime prevention and policing, which allow the use of vagrancy and other outdated offenses despite the apparent rights violations associated with these offenses. These efforts have been complemented by the African Commission on Human and Peoples' Rights, which has placed the onus on states to

¹⁶⁸ See HUMAN SCIENCES RESEARCH COUNCIL, ASSESSMENT OF THE IMPACT OF DECISIONS OF THE CONSTITUTIONAL COURT AND SUPREME COURT OF APPEAL ON THE TRANSFORMATION OF SOCIETY 47 (2015), <http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf>.

¹⁶⁹ See, e.g., *Mwanza v. Attorney Gen.* [2019] Appeal No. 153/2016, ¶¶ 5.1.2, 14.10–14.12 (Zambia Sup. Ct.) (Zambia); *Sonke Gender Justice v. Gov't. of the Republic. of S. Afr.* [2017] No. 24087/15, at 65–68 (High Ct. S. Afr.) (S. Afr.) (ordering that the prison immediately reduce overcrowding and develop and file a comprehensive plan including timeframes to put to an end the deficiencies in the provision of exercise, nutrition, accommodation, healthcare and ablution facilities).

¹⁷⁰ See, e.g., *Masangano v. Attorney Gen.* [2009] Constitutional Case No. 15 of 2007, at 31–32 (High Ct. Malawi) (Malawi) (ordering correctional services to reduce overcrowding within 18 months). Since the decision, however, little has changed, because the prisons do not have the legal authority to release prisoners in the absence of a court order to that effect or a presidential pardon.

¹⁷¹ See *Principles on Decriminalisation*, *supra* note 70, at 6, 13.

account for the use of outdated criminal laws and the incarceration of persons for minor offenses.¹⁷²

¹⁷² *Id.* at 4–5.