



## **THE IMPLICATIONS OF THE ENFORCEMENT OF 'IDLE AND DISORDERLY' LAWS ON THE HUMAN RIGHTS OF MARGINALISED GROUPS IN UGANDA**

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## ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM

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Human Rights Awareness and Promotion Forum (HRAPF) is an independent, non-partisan, non-governmental human rights advocacy organisation. HRAPF seeks to create awareness of human rights and provide legal support to the most marginalised groups as a means of stemming abuse of their fundamental rights. HRAPF envisions a society where the human rights of all persons, including marginalised groups, are valued and respected. This is achieved through promoting respect and observance of human rights of marginalised groups through legal aid service provision; legislative advocacy; research and documentation; legal and human rights awareness; and capacity building and partnership.

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## ACRONYMS

<b>CID</b>	Criminal Investigations Department
<b>CHREAA</b>	Centre for Human Rights Education, Advice and Assistance
<b>CSCHRCL</b>	Civil Society Coalition on Human Rights and Constitutional Law
<b>DPP</b>	Director of Public Prosecutions
<b>DPC</b>	District Police Commander
<b>HURINET</b>	Human Rights Network
<b>HRAPF</b>	Human Rights Awareness and Promotion Forum
<b>IGP</b>	Inspector General of Police
<b>JLOS</b>	Justice, Law and Order Sector
<b>KCCA</b>	Kampala Capital City Authority
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex
<b>NDPA</b>	National Drug Policy and Authority Act
<b>PCA</b>	Penal Code Act
<b>SALC</b>	Southern African Litigation Centre
<b>UHRN</b>	Uganda Harm Reduction Network
<b>ULRC</b>	Uganda Law Reform Commission
<b>UPF</b>	Uganda Police Force
<b>UPS</b>	Uganda Prisons Service
<b>WONETHA</b>	Women's Network for Human Rights Advocacy

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## EXECUTIVE SUMMARY

### i) Introduction and background

'Idle and disorderly' laws form part of what are usually referred to as 'vagrancy laws.' These are laws that criminalise persons regarded as 'vagrants'- persons who wander from place to place and have no permanent home or employment, in effect the poor. This report is concerned with the offences of being 'idle and disorderly persons' and being 'rogue and vagabond' under Sections 167 and 168 of Uganda's Penal Code Act respectively, which are the most commonly used of the vagrancy laws, and it collectively refers to them as 'idle and disorderly' laws. The 'idle and disorderly' laws in Uganda can be traced to 14<sup>th</sup> Century England. Being a British colony, the laws were introduced in Uganda during the colonial era pursuant to the 1889 Africa Order-In-Council, and later the 1902 Uganda-Order-In-Council. However, the 'idle and disorderly' laws were not introduced in Uganda until 1950 when the current Penal Code Act was introduced and adopted. They have remained unchanged and un-amended since then, and remain in the same form in which they were introduced by the British. This is despite global movements to have such repealed or amended. It has been argued that they still remain part of Uganda's law books because of the traditional justifications for their existence, which are public safety, public annoyance and fraud.

Human Rights Awareness and Promotion Forum (HRAPF), among other things, provides legal aid services to different marginalised persons including sex workers, LGBTI persons and drug users. Through its work, HRAPF has come across many cases where 'idle and disorderly' laws have used to arbitrarily arrest and extort money from the poorest and most marginalised members of society. For example in 2014 alone, of the 27 cases of arrests of sex workers that were received by HRAPF, 15 were cases of 'being rogue and vagabond', involving 128 sex workers. This is despite the presence of penal laws that directly criminalise sex work. Other groups of people that HRAPF works with were also more often than not victims of these laws, much more than they were victims of any other laws, some of which directly criminalise their conduct. It was upon this background that HRAPF launched this research into the implementation of these laws in Uganda especially as regards the most marginalised persons in Uganda. The study set out to find out how these laws are implemented, why, and how they affect selected marginalised groups, and more broadly, how they affect the criminal justice system.

### ii) Methodology

This study tracked the enforcement of 'idle and disorderly' laws in Uganda for a period of five years: 2011 to 2015, looking at the rates of arrest and prosecution and analysing their impact on the rights of vulnerable and marginalised groups. The study employed a case study method focusing on Kampala Capital City. However because of the administrative structures of the judiciary and the Police, the data collected include the metropolitan area of Kampala. This area goes beyond administrative Kampala and includes urban Wakiso district, and parts of Mukono district. This is the largest urban area in Uganda, with a population size of about 3.5 million persons. This population is diverse in terms of income levels and it is also home to the highest concentration of members of marginalised groups and the urban poor. The 'idle and disorderly' laws are thus more likely to be implemented in Kampala more than in other parts of the country. Purposive sampling was employed to select the police stations and magistrates' courts that were included in the study.

The study focused on three marginalised groups: sex workers; Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons; and drug users. These were selected because they are generally among the most marginalised persons in the country and also among the poorest. Law enforcement agencies were also targeted and perspectives were sought



out from the Uganda Police Force (UPF), the judiciary, the Uganda Prisons Service (UPS), Kampala Capital City Authority (KCCA), the Uganda Law Reform Commission (ULRC) and the Directorate of Public Prosecutions (DPP). The study employed a mixed model design where both qualitative and quantitative research methods were employed. This was through use of Focus Group Discussions (FGDs), interviews with key informants, perusal of record books kept by state institutions and perusal of HRAPF's own case files.

### iii) Findings

'Idle and disorderly' laws are extensively implemented in Uganda. According to records from the five police stations sampled out for the study, 958 charges were recorded at these stations between 2011 and 2015. It should be noted that even with these numbers, one of the police stations, did not submit records for the first three years, and the other has a policy where they use alternative charges for people that would ordinarily be charged with 'idle and disorderly' offences. The newspaper records for the same period reporting police swoops indicate that 889 persons were arrested in police swoops. Considering that not all those who were arrested were charged, the common practice of using these laws for extortion, that the newspapers did not cover all arrests, and the fact that one police station provided data for only two years, the number of persons arrested cannot be accurately defined but is definitely much higher.

Victims of these arrests are marginalised persons that arguably rank lowest on the social and economic ladders like sex workers, street dwellers, street children, drug users, beggars, hawkers, and LGBTI persons. Even among these, the most vulnerable are targeted. For example while sex work is also carried out in expensive hotels, it is only places that are used by 'low-end' sex workers that are targeted. This was even evident from the data collected from the police stations. Kawempe Police Station had the highest number of arrests, and it is the station that serves some of Kampala's biggest and worst slums. Implementation of these laws therefore targets the poor. This confirms the notion that historically, 'Idle and disorderly' laws have been used by the privileged classes of society to enforce their own notions of 'socially appropriate' behaviour on the lower classes.

The Police normally carry out arrests under these laws in night swoops and operations, arresting large numbers of people at once. One such swoop in 2012 involved the arrest of 102 people. Needless to say, such arrests are carried out without due regard to the laws that govern arrests. During the arrests, the police beat the arrestees, undress them, and parade them before media. One sex worker intimates that when she was arrested, she was driven around in the police vehicle for about nine hours before being detained, and all this time she was being harassed and humiliated. Some of the arrested persons never even make it to police or are released without being charged after police extorting money from them. In 2014, of the 27 cases of arrest received by HRAPF, 5 involved night swoops but all the arrestees were released without charge.

The enforcement of 'idle and disorderly' laws seems to fall the political climate in the country. 2011 and 2015 which were presidential/parliamentary election years saw very few arrests as compared to 2012-2014 which had no election campaigns. It is during the campaign periods that the President and politicians often call upon these offences to be decriminalised and to direct police to stop arresting people. This seems to reduce on the arrests during that period, but then these resume soon after the elections. They are also directives used to round up 'suspect' persons during period when high profile visitors are visiting the country.

Despite their popularity in implementation by the police, 'idle and disorderly' laws are of very little prosecutorial value. While police records and the press showed that more than 958 arrests were carried out during the study period, data from courts showed that only 597 cases had been prosecuted in courts involving 'idle and disorderly' offences. According to the

Directorate of Public Prosecutions, these offences are hard to prove and in most cases there is no evidence from police to warrant their sanction for prosecution. Even most of those that make it to courts for trial suffer the same fate. More than half of the cases that went for trial (52.4%) were dismissed for want of prosecution. According to one Magistrate, it is indeed hard to prove that a person was found 'being idle and disorderly'.

The data also showed a number of convictions on the offences, however most of these convictions are a result of the accused persons pleading guilty to the offences. The pleas of guilt are more to avoid long detention periods, that to accept criminal responsibility. Since finding evidence for 'idle and disorderly' offences is hard, and since they are petty offences, their trial always take long. One drug user said that he spent one year and five months in prison on remand before his case was dismissed. For most of the victims of these offences, they cannot be granted bail either for lack of funds or lack of sureties. Therefore to avoid long detention periods on remand, they plead guilty and are given lighter sentences like community service or payment of fines.

These long detention periods are felt by the Uganda Prisons Service who revealed that prisons harbor a sizeable number of petty offenders charged with 'idle and disorderly' offences. For example in 2012 alone, such offenders contributed 9.9% of the total prison population. This is quite a substantial number and worsens the problem of over population in Uganda's prisons. The Uganda Prisons Service is of the view that alternative sentences and punishments should be found.

The existence of 'idle and disorderly' laws and their implementation have impacted negatively on the rights and lives of their victims. These laws contravene different rights under Uganda's constitution and under regional and international human rights law. The rights violated include the right to equality and non-discrimination, the right to dignity and freedom from cruel, inhuman and degrading treatment, the right to liberty, the right to a fair trial, and the right to life among others. In addition, they affect victims in other ways like disruption of their lives and cause of harassment from the public as a result of the arrests. The enforcement of the 'idle and disorderly' laws not only affects individuals who fall victim to them but also their children and other dependents, as well as the state at large. When people are arrested, their families are usually left with no one to take care of them. At the state level, the amount of money spent in enforcement of these laws is enormous and yet most cases are never successfully prosecuted and many convictions are actually wrongful convictions.

Because of this, various stakeholders on the international, regional and national levels have come out to champion the repeal or amendment of these laws. These include the United Nations General Assembly, the African Commission on Human and Peoples' Rights, the Uganda Law Reform Commission, international organisations like Human Rights Watch and in Uganda's case, the Inspector General of Police and the President of the country. Even then, these laws persist, both on law books and in implementation. Some of the reasons to explain this, apart from the traditional justifications, include the difficulty in implementing certain laws against 'undesirable persons' which leave 'idle and disorderly' laws as the only option, the police need for approval from society through mass arrests to show that work is being done, the need to provide a clean image of the city especially in case of diplomatic visits/events, political reasons like election periods, their overbreadth and ambiguity which make them easy target among other reasons. All these reasons allude to the fact that the implementation of these laws are really not about prevention or deterrence of crime, and yet they continue to be used to violate the rights of already marginalised populations.

In light of the above, the government of Uganda, through its different stakeholders, should review and repeal and or amend all 'idle and disorderly' laws. The government should also consider finding less restrictive ways to regulate crime prevention, if the available laws, apart

from the ‘idle and disorderly’ laws are insufficient for this purpose. The Directorate of Public Prosecutions should ensure that the rights of persons belonging to marginalised groups are respected and refrain from sanctioning charges under these provisions where a prosecution cannot reasonably be sustained. The Uganda Police should also refrain from arresting persons in absence of reasonable suspicion that such a person has committed or is about to commit a crime.

#### iv) Key recommendations

##### To the Uganda Law Reform Commission

- Sections 167 and 168 of the Penal Code Act need to be reviewed in order to ascertain whether they serve a legitimate public purpose and whether these provisions ought to be repealed or amended in light of the Constitution.
- Consider the appropriateness of section 11 of the Criminal Procedure Act, 1950 as an alternative measure for crime prevention involving arrests.
- Review the appropriateness of using the criminal law to address social problems arising from poverty and unemployment.

##### To Parliament

- Repeal sections 167 and 168 of the Penal Code Act 1950.
- Alternatively, amend sections 167 and 168 of the Penal Code Act in order to ensure that these provisions comply with constitutional as well as regional and international human rights standards.
- Consider the passage of less restrictive laws which will regulate crime prevention if existing laws apart from the ‘Idle and disorderly’ offences are deemed insufficient for this task.

##### To the judiciary

- Recognise that cases brought before it under the ‘Idle and disorderly’ provisions are brought under provisions which are voidable under the Constitution of Uganda.
- Consider carefully whether all the elements of the crime have been proved prior to making a conviction under these provisions.
- Refrain from sentencing convicted persons under these provisions to prison but impose fines, community service and cautions instead.

##### To the DPP

- Ensure that the rights of persons belonging to marginalised groups are respected and refrain from sanctioning charges under these provisions where a prosecution cannot reasonably be sustained.
- Provide additional training to prosecutors on the sanctioning of cases, with particular focus on ‘Idle and disorderly’ offences.
- Develop a prosecutorial policy on how charges under section 167 and 168 are to be dealt with, bearing in mind the voidable nature of these provisions in light of the Constitution of the Republic of Uganda.

##### To the Attorney General

- Advise the Executive on the way in which the ‘Idle and disorderly’ laws are being implemented in practice.
- Advise the Executive, Parliament and the Judiciary as to the illegality and non-

constitutionality of the actions being undertaken in the name of implementing ‘Idle and disorderly’ laws.

#### **To the Inspector General of Police**

- Set a standard national policy for the implementation of ‘Idle and disorderly’ laws.
- Train police officers on the exact content of the ‘Idle and disorderly’ provisions and provide clear guidelines as to the circumstances which would warrant an arrest under these provisions.
- Ensure the adoption of effective internal policies which could serve to prevent and punish the extortion of arrestees and corruption within the police force.
- Encourage the use of section 11 of the Criminal Procedure Act in cases where it is deemed necessary to carry out an arrest without a warrant.

#### **To the Uganda Police Force**

- Refrain from arresting persons in the absence of reasonable suspicion that such a person has committed or is about to commit a crime.
- Keep proper records of all arrests made, charges instituted and cases handled.
- Cooperate with local leaders and crime preventers who may be in a better position to address issues of petty crimes, public disorder and persistent begging within their communities.

#### **To civil society organisations working with marginalised groups**

- Institute a challenge against sections 160, 167 and 168 of the Penal Code Act in the Constitutional Court on the basis that these provisions are inconsistent with the Constitution and lead to the violation of the constitutional rights of marginalised groups. Alternatively, lobby for the amendment of these provisions in order to better comply with human rights standards.
- Lobby for the reform of the entire Penal Code Act, including sections 160, 167 and 168.
- Engage the judiciary, police and government on the issue of the violation of rights of marginalised groups through the use of ‘Idle and disorderly’ laws.
- Conduct awareness-raising among marginalised groups in order to inform them about their rights during and after an arrest.
- Look into the expansion of targeted legal aid provision to drug users.
- Monitor and keep record of all cases of arrests of marginalised persons under the ‘Idle and disorderly’ provisions.

### To the President and cabinet

- The President and cabinet are urged to take note of the violations suffered by vulnerable Ugandans due to the implementation of 'Idle and disorderly' laws.
- The President is called upon to stay the enforcement of the 'Idle and disorderly' offences pending the reform of these laws.

### v) Areas for further research

Further research and studies need to be conducted into the following:

- The enforcement of 'Idle and disorderly' laws in areas of Uganda outside of Kampala.
- The legitimacy of convictions under the 'Idle and disorderly' laws, in light of the difficulty of proving all the elements of the crime and the high number of convictions.
- The trends in arrests, charges and prosecution of drug users under the 'Idle and disorderly' laws as well as under other provisions warrant further investigation.

# SECTION I

## INTRODUCTION

### 1.0 Introduction to the study

'Idle and disorderly' laws form part of what are usually referred to as 'vagrancy laws' which are laws that criminalise persons regarded as 'vagrants'- persons who wander from place to place and have no permanent home or employment, in effect the poor. They are regarded as 'petty offences.' Petty offences are those offences that are tried by the lowest courts in the land and usually attract the lowest punishments, which in some cases however may include imprisonment.<sup>1</sup> There is currently a move towards decriminalisation of petty offences generally, which has also been adopted by the African Commission on Human and Peoples' Rights (African Commission).<sup>2</sup> 'Idle and disorderly' laws are perhaps the most prominent among these. This study uses the term 'idle and disorderly' laws to refer to two specific offences in Uganda's Penal Code Act (Penal Code):<sup>3</sup> Section 167 on idle and disorderly persons; and Section 168 on being rogues and vagabonds. This is because the two offences target the same behavior, and they are all vague and wide sweeping and specifically target the poor because of their social and economic status. However perhaps due to the notorious nature of the offence of being idle and disorderly and the Presidential directives around it<sup>4</sup>, the criminal justice system simply employs the similar offence of being rogue and vagabond to exactly the same effect. Therefore, addressing them together as 'idle and disorderly' laws gives a much more complete picture of the enforcement of these laws.

This study analysed the trends of enforcement of the 'idle and disorderly' laws and how they affect the marginalised groups that HRAPF works with<sup>5</sup>, and more broadly their impact on the criminal justice system. The study covered a period of five years: 2011 to 2015 and was focused on Kampala district.

This report contains a discussion of the nature of these laws and their constitutionality; the trends of enforcement of these laws; and their impact on the identified marginalised groups and on the criminal justice system. It then makes recommendations to the different stakeholders on the way forward.

### 1.1 Background to the study

Through its work, HRAPF has come across many cases where the sections of the Penal Code Act, Cap 120 constituting the 'idle and disorderly' laws are used to arbitrarily arrest and extort money from the poorest and most marginalised members of Ugandan society.

- 1 L Mutingh & K Petersen 'Punished for being poor: Evidence and arguments for the decriminalization and declassification of petty offences' Civil Society Prison Reform Initiative (CSPRI), 2015, 15. <http://cspri.org.za/publications/research-reports/punished-for-being-poor> accessed 18 September 2016.
- 2 The African commission adopted the 'Ouagadougou Declaration and plan of action on accelerating prison and penal reform in Africa' (2003) ACHPR /Res.64 (XXXIV) 03, in which they called for '[d]ecriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents' as one of the ways for reducing the prison population. During the 58th Ordinary Session in Banjul, The Gambia hosted a panel on decriminalisation of petty offences in Africa. See African Commission on Human and Peoples' rights 'Final Communiqué of the 58th Ordinary Session of the African Commission on Human and Peoples' Rights' 5. [http://www.achpr.org/files/sessions/58th/info/communique58/final\\_communique\\_58os\\_eng.pdf](http://www.achpr.org/files/sessions/58th/info/communique58/final_communique_58os_eng.pdf) (accessed 18 September 2015).
- 3 Penal Code Act, Cap 120, Laws of Uganda, 2000.
- 4 'Museveni vows to scrap idle and disorderly law' *Daily Monitor* 11 February 2016.
- 5 HRAPF primarily works with LGBTI persons, sex workers, women and girls living with HIV/AIDS, the elderly, and drug users. However, this study focuses on LGBTI persons, sex workers and drug users.

HRAPF has since 2010 operated a legal aid clinic for LGBTI persons and sex workers. Over the years, the trends have become clear that ‘idle and disorderly’ charges are almost the only charges brought against sex workers in Uganda, and they are quite frequently used against LGBTI persons and drug users too. In 2014 alone, out of the 27 cases of arrest for sex workers recorded by HRAPF, 15 were for being ‘rogue and vagabond’ and seven were arrests without charges, which again arose out of police swoops. The charges of ‘being rogue and vagabond’ affected 84 sex workers out of a total 128.<sup>6</sup> HRAPF thus sought to discover what makes these charges popular and why they continue to persist despite their being discredited both in Uganda and in many parts of the world. It also sought to discover the trends of enforcement of these laws and their impact on persons who fall victim to them, especially the groups that HRAPF works with, as well as on the criminal justice system generally.

The ‘idle and disorderly’ laws are couched in such terms that they are overly broad, vague and almost incapable of implementation without infringing on basic human rights and freedoms under the Constitution, regional and international human rights instruments.<sup>7</sup> They thus seem to be the perfect tool for law enforcement agencies to use to crack down on marginalised persons as there is not much evidence needed to warrant an arrest beyond finding the person on the street.<sup>8</sup> Law enforcement officials are given a wide discretion, which increases the vulnerability of persons living in poverty to violence and harassment. The implementation of these laws is often done wantonly in swoops where groups of people are arrested without warrants, usually in an invasive and forceful manner, and without being given the basic guarantees of liberty like being told the reasons for the arrest or their right to a lawyer.<sup>9</sup> They are also subjected to extortion by police officers.<sup>10</sup>

Although seemingly neutral, ‘idle and disorderly’ provisions harbour deep discrimination. The people that fall victim to them are almost always those on the margins of society who lack proper documentation, proper employment and economic opportunities, and do informal undocumented work.<sup>11</sup> These laws therefore seem to be intended to legislate poverty out of the faces of the rich and powerful. Among those most affected are: sex workers, street dwellers, street children,<sup>12</sup> drug users, beggars, hawkers, and Lesbian, Gay, Bisexual, Transgender and

6 Human Rights Awareness and Promotion Forum (HRAPF) ‘Annual Report 2014’ 20.

7 They are not defined and this makes it impossible to determine the full extent of their application. One can never be sure whether what they are doing does offend these provisions. See Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) and Human Rights Awareness and Promotion Forum (HRAPF) ‘Protecting “morals” by dehumanising suspected LGBTI persons: A critique of the enforcement of the laws criminalising same sex conduct in Uganda’ (2004) 34.

8 C Banda & A Meerkotter ‘Examining the constitutionality of rogue and vagabond offences in Malawi’ in Southern African Litigation Centre (SALC) *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* (2015) 57-71, 58 <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/7.pdf> accessed 20 February 2016.

9 CSCRCL & HRAPF (n7 above).

10 ‘Police Officers using idle and disorderly law for extortion - Gen Kayihura’ *Uganda Radio Network* 9 December 2015.

11 See generally, The Southern Africa Litigation Centre (SALC) and Centre for Human Rights Education (CHREAA) ‘No Justice for the Poor: A preliminary study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre Malawi’ (2013). <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/No-Justice-for-the-Poor-A-Preliminary-Study-of-the-Law-and-Practice-Relating-to-Arrests-for-Nuisance-Related-Offences-in-Blantyre-Malawi.pdf> (accessed 13 February 2016).

12 Human Rights Watch ‘Where do you want us to go’ Abuses against street children on Uganda’ 2014. [https://www.hrw.org/sites/default/files/reports/uganda0714\\_forinsert\\_ForUpload.pdf](https://www.hrw.org/sites/default/files/reports/uganda0714_forinsert_ForUpload.pdf). (accessed 18 September 2016).



Intersex (LGBTI) persons.<sup>13</sup> Members of these marginalised groups have reason to fear being arrested since they are particularly susceptible to serious charges such as drug-related crimes for drug users; charges of violation of city authority by-laws for hawkers, street children and other street dwellers; charges under laws prohibiting ‘prostitution’ for sex workers and the charges under the offence of ‘having carnal knowledge against the order of nature’ for LGBTI persons.

The victims of these ‘easy-to-enforce’ laws suffer under them and their basic rights are typically violated. The key rights that seem to fall prey to these laws are: the right to equality and freedom from discrimination, the right to liberty, the right to freedom from cruel, inhuman and degrading treatment, and the right to privacy.<sup>14</sup> Beyond violation of rights, the enforcement of these laws has an effect on the legal system. They contribute to overcrowding in police cells and prisons and thus place a strain on resources in the criminal justice system.<sup>15</sup>

The negative impact of these laws on the persons who fall victim to them has been acknowledged and recognised in Uganda too at the highest political levels. While on the campaign trail during the 2016 presidential elections, President Yoweri Museveni asked the Police to stop the enforcement of the law on being idle and disorderly, and he promised to work for its repeal.<sup>16</sup> The Inspector General of Police, Gen. Kale Kayihura has also acknowledged that police officers use these laws for extortion.<sup>17</sup> There is thus an official acknowledgment that the impact of these laws outweighs the mischief they are intended to address.

HRAPF thus identified the need to deepen our understanding of the implications of ‘idle and disorderly’ laws on the basic human rights and freedoms of marginalised persons in Uganda in order to come up with effective harm-mitigation strategies. The intended purpose of the study was to gather a basis of facts and findings to be used as part of advocacy tools and to inform practical recommendations to various state and non-state actors on how the human rights abuses taking place under these laws could be stemmed.

## 1.2 Study rationale in light of existing literature

Although no comprehensive study interrogating the enforcement of ‘idle and disorderly’ laws in Uganda has been done, there has been a sustained discussion of the constitutionality of these laws, and there has been consensus that they are unconstitutional and ought to be decriminalised. The Justice, Law and Order Sector (JLOS) conducted a study on sentencing and offences legislation in Uganda and recommended that status crimes which include being idle and disorderly and being rogues and vagabonds should be decriminalised not only because they are vague and overly broad but because they also discriminate on the basis of economic status.<sup>18</sup> CSCHRCL and HRAPF highlighted the practice of using ‘idle and disorderly’ laws to arrest and charge LGBTI or suspected LGBTI persons and regarded them as being used to persecute rather than prosecute LGBTI persons.<sup>19</sup> Amnesty International also considered

13 CSCHRCL & HRAPF (n 7 above) 34.

14 Banda & Meerkotter (n 8 above).

15 Mutingh & Petersen (n 1 above) 49-52.

16 Daily Monitor (n 6 above)

17 Uganda Radio Network (n 110above)

18 Justice, Law and Order Sector ‘A study on sentencing and offences legislation in Uganda’ 5. Available <http://www.commonlii.org/ug/other/UGJLOS/report/R5/5.pdf> (accessed 18 September 2016).

19 CSCHRCL & HRAPF (n 8 above) chapter 3.

these offences in light of the persecution of LGBTI persons.<sup>20</sup> Human Rights Watch also found that the practice of routinely arresting street children in swoops under the idle and disorderly laws is a violation of their rights.<sup>21</sup> Nevertheless, there has been no comprehensive study on the implications of these provisions on the victims of these offences.

Elsewhere in Africa, Mutingh & Petersen<sup>22</sup> using examples and evidence from different African countries found that enforcement of these offences perpetuates discrimination and in effect criminalises poverty. They found that their enforcement does not promote public safety and is not proportional to the mischief that they purport to address. Their enforcement also has huge effects on the criminal justice system as they contribute to overcrowding in prisons and also continue to drain money that would have been used more productively. The Southern Africa Litigation Centre (SALC) and Centre for Human Rights Education (CHREAA) conducted a study on these laws in Blantyre, Malawi in 2013, which found that these laws are used to harass the poor and unprivileged in Malawi.<sup>23</sup> Banda & Meerkotter discussed the constitutionality of Malawi's 'Idle and disorderly' laws and concluded that these offences were unconstitutional.<sup>24</sup>

The existing literature therefore shows a gap as regards studying how these laws are implemented and the implications of these laws on the most marginalised persons for the case of Uganda.

### 1.3 Objectives of the study

The general objective of the study was: To assess the trends and implications of 'Idle and disorderly' laws on the rights of marginalised groups in Uganda.

The specific objectives of the study were:

- i. To analyse the 'idle and disorderly' offences in light of international, regional and domestic human rights standards
- ii. To study the trends of enforcement of 'idle and disorderly' laws in Uganda over the period of 2011 to 2015
- iii. To assess how the enforcement of 'idle and disorderly' laws affect the rights of marginalised groups in general and LGBTI persons, sex workers and drug users in particular

### 1.4 Scope of the study

This study tracked the enforcement of 'idle and disorderly' laws in Uganda for the period of five years: 2011 to 2015, looking at the trends of arrests, charges and prosecution. It also looked at the impact of enforcement on the rights of marginalised persons and on the criminal justice system. It was limited to the Kampala metropolitan area.

The study focused on three marginalised groups: sex workers; LGBTI persons; and drug users. Members of these groups as well as organisations working with them were interviewed. Law enforcement agencies were also targeted and data and perspectives were sought out from the Uganda Police Force, the judiciary, the Uganda Prisons Service, the Uganda Law Reform Commission and the Directorate of Public Prosecutions. 57 people in total were talked to for

20 Amnesty International 'Making love a crime: Criminalisation of same sex conduct in sub Saharan Africa' (2013).

21 Human Rights Watch (n 13 above) 50.

22 See Mutingh & Petersen (n 2 above).

23 The Southern Africa Litigation Centre (SALC) and Centre for Human Rights Education (CHREAA) (n 12 above).

24 Banda & Meerkotter (n 9 above).

this study.

### 1.5 The study area

The study area was Kampala metropolitan area. This covers Kampala, the capital city of Uganda<sup>25</sup> and the urban parts of the surrounding district of Wakiso, and Mukono municipality. This area has an estimated combined population of about 3,500,000.<sup>26</sup> Kampala is the capital city of Uganda.<sup>27</sup> It is the political, and economic capital of the country. It is located in the Central region of Uganda. Kampala has a population of 1,507,080 persons as per the 2014 census.<sup>28</sup> Kampala Capital City is divided into five administrative divisions: Central, Kawempe, Makindye, Nakawa, and Rubaga. All the divisions have both upscale and poor areas including slums. According to the Uganda Bureau of Statistics, only 7% of Ugandans live below the poverty line, and only 9.3% of these live in urban areas.<sup>29</sup> Kampala had the largest share of incomes at 47% showing that it is the richest district in Uganda.<sup>30</sup> Despite these statistics, Kampala has a substantial population of the urban poor. Official statistics show that urban poverty has reduced and that only a handful of Kampala's population live below the poverty line. UBOS shows that only 3.6% of the people in Kampala are poor, the lowest of any area in Uganda<sup>31</sup> while the Poverty Status Report of the Ministry of Finance regarded those below the poverty line in Kampala as less than 1%.<sup>32</sup> These figures are based on economic indicators rather than living conditions of the people. For example, the majority of the people who stay in slums in Kampala are calculated at 60%<sup>33</sup> and most of them are poor. Among the urban poor in Kampala, a report by Action Against Hunger identified the poor in Kampala as including: street children, squatters and slum dwellers.<sup>34</sup> They found that for most of the urban poor in Kampala, work was 'typically in the sectors of petty trade, casual unskilled labour, illicit/immoral activities (prostitution, theft, etc.), or any combination thereof.'<sup>35</sup> Many LGBTI persons, sex workers, and drug users are part of these urban poor in Kampala. The numbers of each of these categories in the city is not known, but it being the economic capital of the country and the second most populated area in the country, there is obviously a big concentration of all these groups in Kampala. Most LGBTI organisations and sex worker organisations are found in Kampala and so are the headquarters of all the law enforcement agencies. Marginalisation forces these groups to be poor and vulnerable.

Wakiso district on the other hand is the most populous district in Uganda with 1,997,418 persons as at census day in 2014.<sup>36</sup> The urban parts of Wakiso district contribute a sizeable number to this population with Nansana municipality, Kiira Municipality and Makindye

25 Constitution of the Republic of Uganda, 1995 (as amended), article 5(4)

26 United Nations Office for Disaster Risk Reduction 'Kampala strives to improve resilience' 17 May 2016

27 Constitution of the Republic of Uganda, 1995 (as amended), article 5(4)

28 Uganda Bureau of Statistics 2016, The National Population and Housing Census 2014 – Main Report, Kampala, 9.

29 Uganda Bureau of Statistics, 'Uganda National Household Survey' 2012/13, 85.

30 n 29 above, 98.

31 n 29 above, 86.

32 Ministry of Finance 'Uganda Poverty Status Report 2014' 12.

33 Un-Habitat, 2007 'Situation Analysis Of Informal Settlements In Kampala' 10.

34 P Dimanin 'Exploring livelihoods of the urban poor in Kampala, Uganda: An institutional, community and household contextual analysis' Action Against Hunger International, 2012, 23.

35 n 34 above, 14.

36 Uganda Bureau of Statistics n28 above,

Ssabagabo being respectively the most populous urban centres in Uganda after Kampala.<sup>37</sup> Mukono municipality is the sixth most highly populated urban area in Uganda with a population of 162,744. The characteristics of the poor and marginalised in the urban areas of Wakiso and Mukono municipality are similar to those in Kampala Capital city.

## 1.6 Methodology

### 1.6.1 Study design

The study employed a mixed methods research design where both qualitative and quantitative research methods were employed. Quantitative research methods were employed to study the data on the number of arrests, charges and convictions/acquittals under 'Idle and disorderly' laws within the study period in Kampala Capital City. Qualitative research methods were employed to study the perspectives of the law enforcement agencies and those of the subjects of this enforcement.

The study employed a case study approach focusing on the Kampala metropolitan area. This was due to its strategic importance as the most populous urban area in Uganda. The area's population is diverse in terms of income levels and it is also home to the highest concentration of members of marginalised groups. The trends identified in the Kampala metropolitan area though not directly generalisable to the rest of the country are indicative of general practices followed in the rest of Uganda as far as the implementation of 'Idle and disorderly' laws are concerned.

Purposive sampling was used to select the police stations and the magistrates courts to include in the study. In terms of the Police, the Kampala Metropolitan area is comprised of three regions namely: Kampala Metropolitan South, Kampala Metropolitan North and Kampala Metropolitan East. Kampala Metropolitan South is served by Katwe Police Division, Kabalagala Police Station, Entebbe Police Station and Kampala Central Police station. Kampala Metropolitan North is served by Kawempe Police Station, Old Kampala Police Station, Wandegaya Police Station and Wakiso Police station. Kampala Metropolitan East is served by Kiira Police Division, Kiira Road Police Station and Mukono Police Station.<sup>38</sup> Therefore the biggest police stations/divisions that serve the five divisions that make up Kampala were selected. These were: Katwe Police Division for Makindye Division, Old Kampala police station for Rubaga Division, Kawempe Police Station for Kawempe Division, Kiira Division for Nakawa Division and Central police Station for Kampala Central. This does not in any way cover the whole of Kampala district as all cases do not necessarily end up at the main police stations within the divisions. However, it is a good sample for cases received at that very police station and how they are handled.

The same approach was used for selecting which magistrates courts to include. Kampala district is served by different courts which also serve neighbouring districts. Under the Magistrates Courts Act, all magistrates have jurisdiction to hear 'idle and disorderly' cases since they are minor offences. As such the researchers chose those courts that have all levels of magistrates and serve Kampala.<sup>39</sup> As such Makindye Chief Magistrates Court were selected for Makindye Division; Mengo Chief Magistrates Court for Rubaga Division, Nabweru Chief Magistrates Court for Kawempe Division, Kiira Chief Magistrates Court for Nakawa Division and Buganda Road Chief magistrates Court for the Central Division. It has to be noted that

37 Nansana Municipality had a population of 365,857 persons, Kiira Municipality 317,428 and Makindye Ssabagabo 282,664. Uganda National Bureau of Statistics, n28 above, 11.

38 Uganda Police Force 'Regional headquarters and comprising districts' <http://www.upf.go.ug/contact-us/> accessed on 21st September 2016.

39 Following the Magistrates Courts (Magisterial Areas) Instrument, 2007

these courts also serve other police stations outside of Kampala.

The key informants were also determined based on purposive sampling. Specific individuals who were known to possess the required information were contacted for the in depth interviews.

### 1.6.2 Data collection

In order to conduct this study, primary and secondary data was collected. Primary data was obtained through focus group discussions, interviews with key informants and the perusal of record books kept by state institutions and HRAPF's own case files. Secondary data was obtained through the examination of comparative studies and the perusal of literature on 'Idle and disorderly' laws.

Qualitative data was collected using the following research methods:

- i) Focus Group Discussions (FGDs): These were held with members of marginalised groups who have been victims of the enforcement of these laws, who were identified by organisations working with the respective groups. Four FGDs were held with: ten sex workers, six LGBTI persons, eight drug users and six petty traders. In total 30 persons were reached out to through FGDs.
- ii) In-depth interviews with key informants: These were held with representatives of organisations working with the target communities and with representatives of state agencies. The key informants among civil society organisations were: one lawyer from HRAPF, which works on legal defence for LGBTI persons, sex workers and drug users; one representative of Sexual Minorities Uganda (SMUG) which works to protect and promote the rights of LGBTI persons in Uganda; three representatives of WONETHA, which is an organisation working with the rights of sex workers; one representative of Uganda Harm Reduction Network (UHRN), which is an organisation working on issues concerning drug users. Key informants from state institutions were: Nine Police officers (the Director of the Human Rights and Legal Affairs Directorate; the Deputy Director, Crime Intelligence; one Divisional Police Commander; one Deputy Divisional Criminal Intelligence Department (CID) Officer; two heads of Narcotics Desks at two different police stations; and three other police officers); the Deputy Spokesperson of the Directorate of Public Prosecutions (DPP); four state attorneys and one prosecutor; the Assistant Commissioner, Law Reform at the Uganda Law Reform Commission (ULRC); the Spokesperson of the Uganda Prisons Service; four magistrates who have handled cases under the 'idle and disorderly' laws, and one human rights lawyer who handles cases involving the poor and marginalised. In total 26 persons were reached out to through in-depth interviews.
- iii) Document review: Case files, especially those from HRAPF, were reviewed as well as published stories on the use of 'Idle and disorderly' laws. Also reviewed were research reports, and academic writings.

Quantitative data on the number of arrests under 'Idle and disorderly' laws within the study period in the Kampala district was collected using the following research methods:

- i) Document review: This was done to obtain records of cases that were handled by different entities. These are: The Police Annual Crime reports 2011-2015; Police crime record books of Kawempe, Katwe, Old Kampala, Kiira and Central police stations; reports on cases handled at Buganda Road, Nabweru, Mengo

(Mwanga II), Makindye and Kiira Magistrates' Courts; reports from the Uganda Prisons Service on the category of prisoners and offences; newspaper reports of cases recorded; HRAPF's case files on all the clients, who are sex workers or LGBTI, and were arrested under the 'Idle and disorderly' provisions during the study period.

The data collection tools that were used in the study were FGD guides and interview guides. The data collection tools were pretested to ensure that they were capable of facilitating the collection of the correct information.

### **1.7 Limitations to the study**

**Methodological challenges:** The study employed a case study approach which focused on Kampala city. This however was a challenge more especially in collecting quantitative data since the police and the judiciary determine their police divisions and magisterial areas respectively without necessarily following the political and administrative boundaries of Kampala. As such the data collected from the different police stations and courts does not strictly reflect the cases within the Kampala administrative area.

**Inaccurate and inconsistent records:** Records at both the police stations and the courts were not very accurate and well kept. This limited the quality and veracity of the data obtained from these different police stations and magistrates courts. Kiira Police Division could only provide crime records for two of the five years of the study period as they claimed that some of their record books had been sent to the police headquarters.

### **1.8 Ethical considerations**

The research team ensured that the respondents and key informants understood the purpose and likely benefits and risks of the research before commencing the interviews. In particular, interviewees who are members of marginalised groups gave both verbal and written consent. The research team also used pseudo names in cases where the respondents were not comfortable using their names.

### **1.9 Overview of sections**

Section I sets out the study rationale and methodology.

Section II discusses the nature of 'Idle and disorderly' laws as used in Uganda and how they stand in light of international human rights standards.

Section III sets out the findings of the study in terms of trends in the enforcement of 'Idle and disorderly' laws in Kampala over the period of 2011 to 2015.

Section IV shows the impact of 'Idle and disorderly' laws on the rights of marginalised groups in general and LGBTI persons and sex workers in particular.

Section V is the concluding chapter and it offers recommendations to a number of role-players in light of the findings of this study.

# SECTION II

## ‘IDLE AND DISORDERLY’ LAWS AS USED IN UGANDA

### 2.0 Introduction

This section discusses the nature of Uganda’s ‘Idle and disorderly’ laws, gives a brief overview of the history of ‘Idle and disorderly’ laws and explains how these laws made their way into Uganda’s law books. The section also considers a theory as to why these laws have been retained and the purpose they serve in modern Uganda. Finally, the section examines the two ‘Idle and disorderly’ provisions in light of the Constitution as well as regional and international human rights instruments.

### 2.1 The nature of Uganda’s ‘Idle and disorderly’ laws

‘Idle and disorderly’ laws are those laws that criminalise the state of being idle without doing any recognised work and wandering from place to place without a fixed place of abode or a job. In effect they are aimed at limiting the movement of the poor unemployed and homeless people on the basis that they may easily be tempted to commit crimes. Chambliss clearly puts it that these laws are ‘a reflection of the society’s perception of a continuing need to control some of its ‘suspicious’ or ‘undesirable’ members.’<sup>40</sup>

The ‘idle and disorderly’ laws that are in use in Uganda today are being idle and disorderly persons;<sup>41</sup> and ‘being a rogue and vagabond’.<sup>42</sup> This study focuses on these and they are each discussed in detail below.

#### 2.1.1 Being idle and disorderly

Section 167 provides:

*Any person who-*

- a) *being a prostitute, behaves in a disorderly or indecent manner in any place;*
- b) *wanders or places himself in any public place to beg or gather alms, or causes or procures or encourages any child to do so;*
- c) *plays at any game of chance for money or money’s worth in any public place;*
- d) *publicly conducts himself or herself in a manner likely to cause a breach of the peace;*
- e) *without lawful excuse, publicly does any indecent act;*
- f) *in any public place solicits or loiters for immoral purposes;*
- g) *wanders about and endeavours by the exposure of wounds or deformation to obtain or gather alms,*

*shall be deemed an idle and disorderly person, and is liable on conviction to imprisonment for ethree months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years.*

40 Chambliss as discussed in JS Adler ‘A Historical Analysis of the Law of ‘idle and disorderly’’ (1989) 27 *Criminology* 75.

41 Penal Code Act (n 3 above) Sec 167.

42 Penal Code Act (n 3 above) Sec 168.



This provision creates seven different offences under the umbrella of being idle and disorderly. These offences are analysed below for what they mean and how they have been interpreted by the courts:

- a) Section 167(a) *being a prostitute, behaves in a disorderly or indecent manner in any place:*  
For someone to be convicted under this offence, the prosecution must prove that: that person is a prostitute, and that the person behaved in a disorderly or indecent manner in any place, private or public. There is need for the prosecution to first prove that the person is a prostitute. A prostitute is defined under section 139 of the Penal Code as meaning ‘a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain.’ This in itself is a wide sweeping definition that actually would cover almost every adult person who engages in sex and this makes it very difficult to prove. Indeed, HRAPF has never come across a case where a person is convicted under this provision because of this. Behaving in a disorderly way is also not defined, and what would be indecent would vary from person to person. The offence is a status offence since it is based on a person’s status as a sex worker. Black’s Law Dictionary defines ‘status crimes’ as ‘a class of crime, which consists, not in proscribed action or inaction, but in the accused’s having a certain personal condition, or being a person of prescribed character’.<sup>43</sup> It is based on one’s social or economic standing, which would thus amount to discrimination under Article 21 of the Constitution. It is also vague and wide sweeping, which would not satisfy the constitutional requirement that a criminal offence must be well defined.<sup>44</sup>
- b) Section 167(b) *wanders or places himself in any public place to beg or gather alms, or causes, procures or encourages any child to do so:* This offence criminalises begging in a public place or causing a child to beg. The ingredients to prove are: the accused person wanders or places him/herself in a public place with the intention of begging or gathering alms, or encourages a child to wander with the intention of begging. The act that is criminalised is not begging itself but rather wandering or placing themselves in a place with the intention to beg. This makes it easy to abuse and many people who may be walking or standing may be regarded as doing so with the intention to beg. All this entirely depends on how the person appears, and is thus based on the person’s economic or social status and would amount to discrimination under Article 21 of the Constitution.
- c) Section 167(c) *plays at any game of chance for money or money’s worth in any public place:* This criminalises gambling in a public place. The prosecution must prove that: one was playing at a game of chance and it was for money and in a public place. This offence is also a status offence as the Gaming and Pool Betting (Control and Taxation) Act Cap 292 allows the playing of games of chance for money in licenced places. This offence therefore simply targets the poor who cannot afford to do betting in licensed places. It is therefore discriminatory on the basis of economic status. Also the provision could instead be placed in the laws that control gaming.
- d) Section 167(d) *any person who publicly conducts himself or herself in a manner likely to cause a breach of the peace:* The provision makes it a crime to ‘conduct oneself in a manner likely to cause a breach of peace’. The term breach of the peace is not defined by the Act. In the case of *Uganda v Tibemanzi Deus*,<sup>45</sup> the High Court interpreted the term to mean ‘Causing an unnecessary disturbance of the peace by

43 As quoted in Justice, Law and Order Sector (n 18 above) 7.

44 Constitution (n 26 above) Art 28(12).

45 Criminal Revision No.HCT-00-CR-CR-02-2006 (Arising from Kabale Criminal Case No. KAB-00-CR-CO-004)

*engaging in a riotous and unlawful assembly or a riot or affray or instilling fear or terror by sending challenges or provoking others to a fight or going about armed in public with unusual weapons or attendance without lawful excuse etc.* In that case, the accused person was convicted by a magistrate under Section 167(d) for taking a photograph of the President at a rally. On revision by the High Court, Lugayizi J held that considering the definition given above, the actions of the accused could not constitute a breach of the peace and quashed the conviction. The case illustrates the ease with which the offence can be abused. It is broad and undefined thus subject to abuse, and does not pass the principle of legality in Article 28(12) of the Constitution. In another case, persons who were dancing at a road side on a truck advertising an event at the exact time when heads of state were using the highway were charged under section 167(d), convicted and given the maximum sentence of imprisonment for three months and orders for their hair to be shaved, wigs burnt and the vehicle engine confiscated were also given.<sup>46</sup> The High Court reversed the decision and the judge commented that they were in fact not that 'idle' as they were quite busy. He found a violation of article 24 on dignity of the person due to how they were treated. In the case of *Victor Juliet Mukasa and Another v Attorney General*<sup>47</sup> the police and local council authorities forcefully entered the home of a gay rights activist and searched her documents and took some of them, arrested her visitor and took her to the local council offices and even fondled her and denied her the use of toilet facilities. They alleged that 'homosexual' conduct constituted conduct likely to result in a breach of peace under section 167(d). The provision is subject to abuse. Indeed, following Lugayizi J's definition of breach of the peace, there are many other Penal Code provisions that criminalise unlawful assemblies under which the conduct sought to be criminalised here can be criminalised.<sup>48</sup> The provision is thus unconstitutional and redundant.

- e) *Section 167(e) 'without lawful excuse, publicly does any indecent act'*: This offence requires the prosecution to prove that one committed an 'indecent act' and they had no lawful excuse. Indecent act is not defined and yet what is indecent would vary from culture to culture. It is thus vague and would be contrary to the principle of legality in Article 28(12).
- f) *Section 167(f) 'in any public place solicits or loiters for immoral purposes'*: This offence requires the prosecution to prove that one is soliciting or loitering for an 'immoral purpose.' Immoral purposes is not defined yet what is immoral is not universally understood. It is thus vague and would be contrary to the principle of legality in Article 28(12).
- g) *Section 167(g) 'wanders about and endeavours by the exposure of wounds or deformation to obtain or gather alms'*: The ingredients for this offence are 'wandering about' and 'endeavouring to obtain or gather alms by exposure of wounds.' The intention of wandering about and exposing of wounds would be to obtain or gather alms. This is also a status offence based on one's economic or social standing.

Therefore, as shown above, all the seven offences under this provision are either vague and wide sweeping and therefore cannot pass the requirements of Article 28(12) of the Constitution which requires a criminal offence to be defined, or are status offences which simply criminalise actions that are done only by the poor and are thus discriminatory on the basis of economic status.

The punishment for all these offences is three months imprisonment and a fine not

46 *Uganda v Nabakoza Jackline & 9 others*, Criminal Revision No. 8 2004

47 High Court Miscellaneous Cause No 24 of 2006.

48 Penal Code Act (n 3 above) Chapter VIII.

exceeding three thousand shillings or both punishments. They thus qualify as petty offences.

### 2.1.2 Being a rogue and vagabond

This is under Section 168 of the Penal Code which provides that:

Every-

- a) *person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;*
- b) *person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;*
- c) *suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself;*

and

- d) *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, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.*

This category of offences contains a total of four different offences: These are:

- a) Section 168(a) '*person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person*: this applies to any person who has been convicted before of an offence under section 167 and is convicted again. It is a bizarre offence because one would be charged under it without actually doing anything. Once someone is convicted twice under section 167, then they would have committed another offence under Section 168(a). This offence violates the right for one to be presumed innocent until proven guilty.
- b) Section 168(b) '*person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence*.' This offence is about fraudulently duping the public to contribute to a charitable cause. It is in effect theft and can be adequately covered under the offence of 'obtaining goods by false pretences.'<sup>49</sup> Including it under the rogue and vagabond provisions simply shows that it is intended to specifically target the poor and marginalised, and would thus qualify as a status offence.
- c) Section 168(c) '*suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself*: The prosecution must prove that one is 'a suspected person or a reputed thief'; that that person does not have obvious means of earning a living and the person cannot give a good account of him or herself. This offence is so subjective that it all depends on what the arresting officer thinks about the suspect and the person does not actually need

<sup>49</sup> Penal Code Act, section 305.

to do anything. There is actually no real criminalised conduct and neither is there a mental element required to be proved. It does not therefore fulfil the requirements of Article 28(12) of the Constitution, and it would also constitute ‘inhuman and degrading’ treatment under Article 24 of the Constitution.

- d) Section 168(d) ‘*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*’: This criminalises wandering or moving at hours that are not regarded as ‘normal’ hours. It is purely subjective and it depends on the whims of the arresting officer as there is no definition at all of what the normal time for moving is and what the circumstances that can be regarded as suspect are. The whole discretion is left to the police officer. This violates the principle of legality.

The punishment for being ‘rogue and vagabond’ is imprisonment for six months and for every subsequent offence, for one year. Its provisions are far more vague than those under being idle and disorderly and are thus more subject to abuse by law enforcement agencies. The conduct that is criminalised is not clearly defined and even not doing anything at all may constitute an offence under these provisions.

### 2.1.3 Common characteristics of these offences

The above nine offences have been joined in this study to be considered together under the collective title of ‘idle and disorderly’ offences. This is because apart from the express reference to the idle and disorderly offence in section 168(a), these offences share a number of common characteristics as regards their nature, legal substance and implementation, as explained below.

- a) All the nine offences under the combined sections (167 and 168 of the Penal Code) are similar and suffer from the same defects. They are thus fit to be considered together. They are all largely overly broad and they all target the poor and marginalised. The criminalised conduct is defined in very wide terms that do not make people aware of what may be criminalised. The unfettered discretion these provisions give to law enforcers is susceptible to abuse and can easily be used to extort money from the victims of the arrest or to violate the human rights of arrestees in other ways.<sup>50</sup> Those that seem constitutional are also redundant as other provisions of the Penal Code or other laws already cover them.
- b) They are all treated as minor offences. According to section 142 (2) of the Magistrates Courts Act, minor offences, are among others, offences punishable with imprisonment for a period not exceeding six months or a fine not exceeding one thousand shillings or both. Three of the offences under section 167 i.e. subsections (a), (e) and (f) are punishable by imprisonment for seven years while subsequent convictions under section 168 carries a punishment of imprisonment for one year. Despite this, law implementers still consider these offences as minor offences, and this determines how they are implemented. Under Section 142 of the Magistrates Act for example, magistrates are not required to record evidence in trials of minor offences. As will subsequently be discussed, this is the practice regarding ‘idle and disorderly’ trials in court, even when not all ‘idle and disorderly’ offences qualify as minor offences. The punishments given are for minor offences which goes to show that ‘idle and disorderly’ laws are not implemented for deterrence of particular conduct, but are rather targets of particular classes of persons. If they were about deterrence of conduct, they would be treated with the seriousness that their prescribed punishments suggest and imply.

<sup>50</sup> CSCHRCL & HRAPF (n 8 above) 34.

In addition to law implementers, certain laws also treat these offences like minor offences as regards their implementation. The Criminal Procedure Code Act in sections 10 and 11 is one such law. These sections give express powers to the Police to effect arrests without warrants or court orders in specified cases, which include cases on offences under Chapter XVI of the Penal Code, which Chapter concerns nuisances and offences against health and convenience, including the 'idle and disorderly' offences. This is problematic considering that as already noted, some of these offences carry very serious punishments and their implementation can therefore not be left to such wide discretion for the police officers.

- c) While the offences seem to be neutral and applicable to everyone, closer examination reveals that they target the poor and marginalised. By their very nature, these laws do not target the rich and have historically served in their favour. This is because they place within the realm of criminality behaviour that is merely unacceptable or inconveniencing in the eyes of the upper classes of society. This intrinsic inequality of the law led Anatole France to famously write that 'The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.'<sup>51</sup> In what follows, the origins of Uganda's 'Idle and disorderly' laws and a possible rationale for their modern-day application is discussed.

## 2.2 A brief history of Uganda's 'Idle and disorderly' laws

The origins of Uganda's 'Idle and disorderly' laws can be traced back to 14<sup>th</sup> Century England. After the Black Death pandemic of 1348 to 1350, England faced a severe labour shortage.<sup>52</sup> The existing feudal system, which forced the economic classes to earn their keep on a particular patch of land, was swiftly disintegrating.<sup>53</sup> Legislation was adopted in an attempt to restrict the movement of members of this class and to ensure that they would continue to render services as labourers at the same rates as before the pandemic.<sup>54</sup> The Statutes of Labourers of 1351 introduced the notion of 'vagrancy' by subjecting people who refused to work, while being able to do so, to the force of the criminal law.<sup>55</sup> This law prohibited increases in the wages of labourers and forbade them from begging or 'wandering outside of their parish' to seek higher wages.<sup>56</sup>

Over centuries, and according to the changing needs of the upper classes, these laws were adapted and used to prevent crime and respond to increasing levels of poverty.<sup>57</sup> As Britain industrialised, 'idle and disorderly' laws were used to control the movement of the homeless and the unemployed within cities.<sup>58</sup> While conflating criminality with poverty, they proved to be rather ineffective in dealing with either of these issues and became expensive to

51 A France *The Red Lily* (1894) Chapter VII.

52 A McLeod 'On the origins of consorting laws' (2013) 37 *Melbourne University Law Review* 106.

53 As above. See also *Ledwith v Roberts* [1937] 1 KB 232, 271 quoted in DC Brody et al *Criminal Law* (2001) 63.

54 LR Poos 'The social context of State of Labourers enforcement' (1983) 1 *Law and History Review* 27.

55 McLeod (n 53 above) 13-14 ; Poos (n 55 above) 30.

56 McLeod (n 53 above) 14.

57 With the sprouting prominence of trade during the 16<sup>th</sup> century, 'idle and disorderly' laws were amended and expanded to address the pressing socio-economic problem of thieves and highwaymen apprehending travelling merchants. See Chambliss (n 40 above) 211.

58 PA Slack 'Vagrants and 'idle and disorderly' in England 1598-1664' (1974) 27 *Economic History Review* 360.

administer.<sup>59</sup>

In 1824, Britain consolidated the legislative scheme, which regulated vagrants in the Vagrants Act of 1824.<sup>60</sup> New categories of vagrancy offences were included such as offences against public decency and morality and the Act provided for specific penalties for repeat offenders.<sup>61</sup> The 1824 Act remains in force in Britain though many of its provisions have been repealed or amended to be punishable with considerably lighter sentences.<sup>62</sup>

Uganda became a British protectorate in 1894.<sup>63</sup> As such the Africa Order in Council, 1889 was applied to it. Under this Order in Council, statutes of general application in Britain at the time applied to Uganda.<sup>64</sup> One of these was the 'idle and disorderly' Act, 1824. In 1902, the Uganda Order in Council gave powers to the Governor to make laws that apply to the protectorate.<sup>65</sup> The governor passed the Applied Indian Acts Ordinance in 1907, which made the law applicable to India at the time applicable to Uganda.<sup>66</sup> Thus Uganda started using the Indian Penal Code, 1860 until 1930 when the Uganda Penal Code Ordinance was introduced. The Indian Penal Code did not criminalise idle and disorderly conduct or being rogue and vagabond. Similarly, the 1930 Penal Code Ordinance<sup>67</sup> did not criminalise being 'idle and disorderly'. The criminalisation of both 'idle and disorderly' and 'rogue and vagabond' was introduced under the 1950 Penal Code, which is still the Penal Code Act in force today, now designated as the Penal Code Act, Chapter 120 of the Laws of Uganda, 2000.<sup>68</sup> These provisions have been in force since then and the amendments of the Penal Code since then have scarcely touched this part of the Penal Code.<sup>69</sup>

### 2.3 Why 'Idle and disorderly' laws continue to be used in modern day Uganda

'Idle and disorderly' laws continue to be used worldwide and, to some extent, do serve a legitimate purpose.<sup>70</sup> In some states of the United States of America, loitering laws are used to prevent gang-related crimes, drug trafficking and sex work.<sup>71</sup> Canada has laws which prohibit

59 McLeod (n 53 above) 108.

60 McLeod (n 53 above) 109.

61 Vagrants Act 1824 (5 Geo. 4. C. 83) Secs 3 and 4.

62 In terms of the Criminal Justice Act 44 of 2003, 'Idle and disorderly' offences are no longer punishable with imprisonment.

63 JM Gaughan 'East Africa' in S Mitchell (ed) *Victorian Britain: An Encyclopedia* (2012) 232.

64 The Africa Order in Council, 1889, Art 13.

65 The Uganda Order in Council, 1902, Art 15(2).

66 The Applied Indian Acts Ordinance, 1907.

67 The Penal Code Ordinance, No. 7 of 1930, later Cap 128 of the Laws of Uganda, Protectorate, Revised Edition 1935.

68 This is the current sections 160, 167 and 168 of the Penal Code Act Cap 120.

69 For a more detailed history of the Penal Code, see A Jjuuko 'The incremental Approach: Uganda's struggle for decriminalisation' in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity* (2013) 386-387, 385-387.

70 United Nations General Assembly 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (2011) A/66/625. JD Berg 'The troubled constitutionality of anti-gang loitering laws' (1994) 69 *Chicago-Kent Law Review* 461.

71 Berg (n 71 above) 462. An example of such a modern day 'Idle and disorderly' law is the anti-gang loitering ordinance enacted by the Chicago City Council.

public begging.<sup>72</sup> Consorting laws, which criminalise ‘habitual consorting’ with characters such as reputed thieves, sex workers, drug users or persons without a visible means of support, is a variant of ‘Idle and disorderly’ laws which still apply in New Zealand and Australia.<sup>73</sup> The main justifications for the retention of nuisance laws are that they serve to ensure public safety and order; protect the images of public spaces and avoid public disturbance.<sup>74</sup> ‘Idle and disorderly’ laws, which give the police a wide discretion to arrest people on the mere suspicion of intended criminal conduct are commonly justified on the basis that they serve to prevent crime.

In many countries outside of Africa where codifications based on English criminal law have been retained, ‘idle and disorderly’ offences have been tailored in order to ensure their constitutionality. However, Uganda, as is the case with many other African countries, has retained the ‘idle and disorderly’ offences in almost the same form as in which they were introduced by the British. A question arises as to what the peculiar reasoning could be for the retention of the ‘Idle and disorderly’ offences on Uganda’s law books, despite the many changes that the Uganda Penal Code 1950 has gone through.

It is suggested that a possible answer to this question can be found in the traditional underlying reasons for the adoption and retention of such laws. The traditional justifications given for the existence of common ‘Idle and disorderly’ laws are usually three: public safety; public annoyance; and fraud.<sup>75</sup> Under public safety, there is a belief that those who are regarded as idle could inevitably engage in more serious criminal conduct. The public annoyance justification is to the effect that those who are regarded as idlers or vagrants annoy the public by their appearance and their actions. The fraud justification is that those who are engaged in such behaviour could be fraudsters who are part of bigger fraud rings.<sup>76</sup>

Historically, ‘Idle and disorderly’ laws have been used by the privileged classes of society to enforce their own notions of ‘socially appropriate’ behaviour on the lower classes.<sup>77</sup> Those who refused or were unable to conform to this notion were met with criminal sanction and a definite stigma attached to the ‘idle’ and ‘worthless drunkards’ who were targeted by these laws.<sup>78</sup> It is argued that based upon this background, these laws exist in Uganda today for the same reasons.

Uganda is a conservative nation which is, at the very least, unsympathetic toward those whose lifestyles do not subscribe to a narrow view of morality. While ‘being idle’ is not considered the worst social crime imaginable as was the case in England from the 14<sup>th</sup> Century onwards, public nudity, indiscretion and any form of sexual diversity are viewed as deserving of criminal sanction. This extreme conservatism was clearly illustrated in the public reaction to the adoption of the Anti-Pornography Act in 2014, where the criminalisation of pornography was taken to justify the public undressing of women deemed to have dressed ‘indecently’.<sup>79</sup>

72 Safe Streets Act 1999 (Ontaria, Canada); Safe Streets Act 2004 (British Columbia, Canada).

73 McLeod (n 53 above) 133.

74 UNGA (n 71 above) 10.

75 For an overview of these see T Walsh ‘Defending begging offenders’ *Queensland University of Technology Law and Justice Journal* 4 (2004) 56-76, 60-63.

76 As above.

77 Southern African Litigation Centre (SALC) ‘Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia’ (2015) 27.

78 P Ranasinghe ‘Reconceptualizing ‘idle and disorderly’ and reconstructing the vagrant: A socio-legal analysis of criminal law reform in Canada 1953-1972’ (2010) 48 *Osgoode Hall Law Journal* 60-61.

79 The Act creates an offence of ‘pornography’ as, inter alia, the publication, exhibition, indecent show

The majority of Ugandans furthermore strongly oppose homosexuality. The introduction of a law, which created crimes such as ‘homosexuality’ and ‘the promotion of homosexuality’ and imposed heavy penalties was supported by the majority.<sup>80</sup> While this law has been annulled on procedural grounds, the homophobia of the society remains. The society also entertains and endorses many misconceptions and false generalisations in respect of sexual minorities.<sup>81</sup>

While ‘immoral’ and socially unacceptable behaviour such as engaging in sex work and consensual same sex conduct are criminalised under the Penal Code Act,<sup>82</sup> these crimes have proven to be largely unenforceable. In a previous study, HRAPF has found that not a single case concerning consensual same sex conduct, has been successfully prosecuted in the recent past.<sup>83</sup> It was found that police tend to charge ‘suspected homosexuals’ with related offences such as the ‘Idle and disorderly’ offences instead, since they are seemingly easier to prove.<sup>84</sup> Similarly, HRAPF has found through the operation of its legal aid clinic that ‘Idle and disorderly’ charges are almost the only charges brought against sex workers in Uganda despite the fact that ‘prostitution’ is criminalised.<sup>85</sup> The very reason for this unenforceability of criminal provisions targeting sex workers and LGBTI persons is the fact that these ‘crimes’ have no victim and no real harmful effect on society.

It is argued that the ‘Idle and disorderly’ laws, which tend to be vague and overly broad, are purposefully retained because they justify the arrest and prosecution of undesirable persons whose ‘crimes’ cannot otherwise be prosecuted successfully.<sup>86</sup> As was held in the 1956 case of *People v Moss*<sup>87</sup> by the New York Court of Appeals: ‘(a) ‘idle and disorderly’ prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest’.

Archaic ‘Idle and disorderly’ laws seemingly retain a role and a place in modern Ugandan society because they can be used to oppress and control the undesirable and ‘morally detestable’ members of society.

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by whatever means, for primarily sexual excitement

80 The Anti-Homosexuality Act 2014.

81 One such common misconception conflates homosexuality with paedophilia. This was illustrated in the publication of photographs and information of about 100 alleged homosexual Ugandans in the *Rolling Stone* newspaper in 2010 with the accompanying title to the effect that homosexuals ought to be hanged because ‘they are after our kids’. See *Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling Stone Publication Limited* High Court Miscellaneous Cause No. 163 of 2010.

82 Penal Code (n3 above) Secs 136 to 139 as well as Secs 145 to 148

83 CSCHRCL & HRAPF (n above), 43-45.

84 CSCHRCL & HRAPF (n 8 above) 47.

85 HRAPF (n 7 above)

86 *Lanzetta v New Jersey* 306 US 451.

87 *People v Moss* 309 N. Y. 429.



## 2.4 Analysis of the ‘idle and disorderly’ provisions in light of Uganda’s human rights obligations

### 2.4.1 Uganda’s human rights obligations

The Constitution of the Republic of Uganda of 1995 is supreme and any law that is inconsistent with it is void to the extent of its inconsistency.<sup>88</sup> Chapter four of the Constitution contains an expansive Bill of Rights. Article 20(2) provides that all organs and agencies of Government and all persons shall respect, uphold and promote the rights and freedoms of individuals and groups. Uganda is also party to numerous international and regional human rights instruments. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR) at international level and the African Charter on Human and Peoples’ Rights (ACHPR) at regional level.<sup>89</sup>

### 2.4.2 ‘Idle and disorderly’ offences in light of Uganda’s human rights obligations

Even at a merely textual level, the ‘Idle and disorderly’ laws are inconsistent with Uganda’s Constitution and infringe upon the fundamental human rights which Uganda has pledged to respect, protect, promote and fulfil in terms of regional and international law. The Assistant Commissioner interviewed by the research team was of the opinion that the ‘Idle and disorderly’ offences ought to be expunged from the Penal Code.<sup>90</sup>

The ‘idle and disorderly’ laws suffer a multitude of deficiencies, which can be classified under three broad themes, each of which will be discussed in turn.

### 2.4.3 Overbreadth and vagueness

The first general criticism to be levelled against the ‘idle and disorderly’ laws is that they are vague, overly-broad and ambiguous, leaving much room to law enforcers to exercise subjective, unguided discretion. When a crime is defined vaguely or in overly broad terms, it is not clear exactly which conduct is included in its ambit. The door is opened to selective enforcement.<sup>91</sup> Vagueness in criminal offences also means that those to which the law apply cannot be sure about what exactly would constitute criminal conduct.

A criminal provision which is overbroad or vague contravenes the principle of legality, which is protected under Articles 28(12) and 44(c) of the Constitution. Article 28(12) provides that a person shall not be convicted of a criminal offence unless the offence is defined and the penalty prescribed by law. Article 44(c) provides that there shall be no derogation from the right to a fair hearing. Offences must be clearly defined to create a clear standard of when they have been transgressed.<sup>92</sup> Criminal laws in particular need to be at the highest standard of specificity considering the serious effects of being found to have transgressed its provisions.<sup>93</sup> The Constitutional Court of Uganda has noted that the reason why the Constitution requires

88 Constitution (n 25 above) Art 2.

89 Uganda acceded to the UN Covenant on Civil and Political Rights, 1966 and the UN Covenant on Economic Social & Cultural Rights, 1966 on 21 January 1987 and ratified the African Charter on Human and Peoples’ Rights, 1981 on 10 May 1986. Article 287 of the Constitution of Uganda 1995, read together with objectives XIV and XXXVIII (i)(b) of the National Objectives and Directive Principles of State Policy and Articles 2, 8A and 45 recognise the treaties that Uganda entered into before the coming into force of the Constitution.

90 As above.

91 CS Yoo ‘The constitutionality of enjoining criminal street gangs as common nuisances’ (1994) 89 *North Western University Law Review* 252-253.

92 Berg (n 71 above) 469.

93 Berg (n 71 above) 470.

an offence to be clearly defined is to enable citizens to know exactly which conduct is prohibited.<sup>94</sup> It is also crucial for a defendant to know what the ingredients of the offence are of which he has been accused. In the absence of a clearly defined offence, it is up to police officers to exercise an unguided discretion in determining whether a crime has been committed.

The overbroad, vague and subjective character of the 'idle and disorderly' laws creates room for the further marginalisation of vulnerable minorities and the infringement of their rights to equality and freedom from discrimination;<sup>95</sup> personal liberty and security of person;<sup>96</sup> freedom from cruel, inhuman or degrading treatment,<sup>97</sup> freedom of movement<sup>98</sup> as well as the right to a fair hearing<sup>99</sup> as protected under Uganda's Constitution and regional and international human rights law. In particular, the criminalisation of 'disorderly or indecent'<sup>100</sup> behaviour or 'any indecent act' done in public<sup>101</sup> in terms of section 167 is vague, overbroad and subjective in character. Both law enforcers and those to which the law apply are at a loss as to which actions would constitute an offence under these provisions.<sup>102</sup> A similar criticism is applicable to the provision which makes it a crime to 'conduct oneself in a manner likely to cause a breach of peace'<sup>103</sup>. The Act does not give guidance on actions which are likely to constitute a breach of peace and thus it is left entirely to the discretion of law enforcers to decide when this will be the case. The provision criminalising the acts of soliciting or loitering for 'immoral purposes'<sup>104</sup> is also vague since it is not clear what is meant by 'immoral purposes'.

The criminalisation of 'wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place'<sup>105</sup> in terms of the 'rogue and vagabond' offence in section 168 is overbroad in that it targets seemingly harmless actions which people cannot even suspect to be illegal. The act of wandering in such a public place is criminalised, not on the basis of any criminal intent on the part of the wanderer, but on the basis that another person may subjectively reach the conclusion that the 'wanderer' is there for an illegal or 'disorderly' purpose. Article 9(1) of the ICCPR protects the right to liberty and security of the person, which right can only be taken away on 'such grounds and in accordance with such procedure as are established by law.' Article 6 of the ACHPR provides that '(e)very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.' Arbitrary arrests are thus condemned under international law and are also prohibited in terms of Article 23 of the Constitution. This broad and vaguely-defined offence of being a rogue and vagabond lends itself to be used for the arbitrary arrest of the poor and marginalised in particular and thus constitutes a violation of

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94 *Salvatori Abuki and Another v Attorney General* Constitutional Court Case No. 2 of 1997. See Human Rights Awareness and Promotion Forum (HRAPF) 'Memorandum on the human rights implications of selected offences under Chapter XIV of the Penal Code Act Cap 120' (2013).

95 Constitution (n 25 above) Art 21.

96 Constitution (n 25 above) Art 23.

97 Constitution (n 25 above) Art 24.

98 Constitution (n 25 above) Art 29.

99 Constitution (n 25 above) Art 28.

100 Penal Code (n 3 above) Sec 167(a).

101 Penal Code (n 3 above) Sec 167(e).

102 Berg (n 67 above) 469.

103 Penal Code (n 3 above) Sec 167(d).

104 Penal Code (n 3 above) Sec 167(f).

105 Penal Code (n 3 above) Sec 168(d).

this right. Even though the source of the deprivation of liberty is found in the law itself, it will be shown that the offence of being a rogue and vagabond cannot pass constitutional muster and therefore the violation of this right cannot be justified under Article 43 of the Constitution.

Article 23 of the Constitution provides that no one shall be deprived of the right to liberty apart from a few exceptions including 'for the purpose of bringing that person before a court in execution of an order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence'. The vague terms targeting a 'suspected person' and 'reputed thief' does not require that the suspicion has to be 'reasonable'. The provision violates the right to liberty as well as the principle of legality protected under Article 28(12) and 44(c) of the Constitution.'

Vague and broad provisions such as these can be used to achieve a very wide range of objectives; depending entirely on the wishes and motives of the enforcing officer. The inevitable result of the vagueness and overbreadth of these provisions is that they are subjectively applied at the expense of the rights of 'undesirable' minority groups.<sup>106</sup>

### 2.4.3 Status crimes

Black's Law Dictionary defines 'status crimes' as 'a crime of which a person is guilty of by being in a certain condition or of a specific character'.<sup>107</sup> They have the effect of criminalising *people* rather than conduct. Status crimes are contrary to Article 21(1) of the Uganda Constitution, which provides that 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'.<sup>108</sup> Article 21(2) provides that 'a person shall not be discriminated against on the ground of sex, ... social or economic standing, ...'. They also contravene Article 3 of the ACHPR which provides for equality before the law, and article 7 of the Universal Declaration of Human Rights (Universal Declaration) which proclaims that all persons are equal before the law and are entitled without any discrimination to equal protection of the law.

Criminalising a person for 'being a prostitute'<sup>109</sup> in terms of section 167 of the Penal Code Act amounts to a 'status crime' and is therefore discriminatory. Anyone who behaves 'in a disorderly or indecent' manner but who is not a 'prostitute' would not face a sanction under this provision. It is thus a crime based on a person's status rather than on their conduct. Since most of the people who engage in sex work are women, the provision also targets women. A provision which singles out sex workers for the enforcement of a criminal offence amounts to inequality of this group before and under the law in respect of other persons.

The aspects of the rogue and vagabond provision, which make it a crime for a person to wander or place himself in any public place to beg or gather alms<sup>110</sup> or to expose a wound or deformation in order to obtain alms<sup>111</sup> amounts to the criminalisation of begging. Considering that poor rather than rich persons are likely to beg and gather alms, this criminalisation has a disproportionate impact on the poor<sup>112</sup>, and thus violates their right to equality before the

106 Berg (n 67 above) 469.

107 Black's Law Dictionary 9<sup>th</sup> Ed (2009) 428.

108 Under Article 21 the protected grounds are: sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

109 Penal Code (n 3 above) Sec 167(b).

110 Penal Code (n 3 above) Sec 167(b).

111 Penal Code (n 3 above) Sec 167(g).

112 UN Committee on Elimination of Racial Discrimination Concluding Observations (United States)

law and equal protection of the law. Criminalising a person who has no choice but to beg furthermore violates that person's right to dignity.<sup>113</sup> In the absence of social assistance, the criminalisation of begging prevents a person who is incapable of earning an income from sustaining what could be their only means of obtaining a livelihood and this amounts to a violation of the right to life under article 22(1)<sup>114</sup> and cruel, inhuman and degrading treatment, contrary to Article 24 of the Constitution.

The criminalisation of playing a game of chance in a public place<sup>115</sup> also targets the poor. A game of chance played in a private home or at a casino is not criminalised. It is only people who do not have the means to enjoy private amenities that will be found playing games of chance in public places. The provision thus discriminates against the poor. The provision also amounts to a status crime in that the *act* of playing a game of chance is not criminalised; but the place where this game is played, and subsequently in this case, the economic status of the person performing the act.

The 'idle and disorderly' laws essentially criminalise *being* a poor or undesirable person in a public place. The provisions place a severe limitation on the freedom of movement of people who appear to be poor or non-conforming with societal norms since they would restrict themselves to only move about in certain areas and at certain times of day out of fear of facing an arrest. The provisions thus contravene Article 29(2)(a) of the Constitution, Article 12(1) of the ACHPR and Article 12 of the ICCPR which protect the freedom of movement within the territory of the country. They furthermore infringe upon the right to practise one's profession and carry on a lawful occupation protected under Article 40(2) of the Constitution in so far as people would be reluctant to take up jobs which might require them to work nightshift and move around at hours that would raise suspicion. These provisions furthermore unfairly target the poor in violation of Article 21(1) of the Constitution, Article 3 of the ACHPR and Article 7 of the Universal Declaration which prohibit discrimination. People who own cars and do not need to make use of public transport or travelling on foot are not affected by this provision. It is also a violation of Article 13(3) of the ACHPR which provides that '(e)very individual shall have the right of access to public property and services in strict equality of all persons before the law'. People whose appearance make them seem non-conformist with societal standards of gender expression and morality, or who appear to be poor, do not have equal access to public spaces and public property.

#### **2.4.4 The harmful nature of these laws**

On the topic of criminalisation, John Stuart Mill famously wrote that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'<sup>116</sup> As the minimum starting point, conduct ought to be harmful in order to justify its criminalisation.<sup>117</sup> Furthermore a 'minimalist approach' to criminalisation ought to be the point of reference and only the most serious conduct, which cannot be dealt with through less coercive means such as civil laws and administrative regulation, ought to be criminalised.<sup>118</sup> It is argued that the 'idle and disorderly' laws criminalise conduct which is

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CERD/C/USA/CO/7-9, 29 August 2014 at par 12.

113 SALC (n 74 above) 3.

114 In the case of *Salvatori Abuki v Attorney General*, Constitutional Appeal No. 1 of 1998, the supreme court regarded an exclusion order as violating the appellant the right to life as it took away access to the land which was his source of livelihood.

115 Penal Code (n 4 above) Sec 167(c).

116 JS Mill *On Liberty* (1854) 14-15.

117 Apart from being harmful, conduct furthermore ought to be wrongful and have a 'public element' as well. See A Ashworth & J Horder *Principles of Criminal Law* (2009) 29-31.

118 n 116 above at 31.

not necessarily harmful to others nor requires the strong arm of the law in order to effectively be dealt with.

It is questionable what the serious public harm is that is caused by actions criminalised by the 'idle and disorderly' laws such as wandering or placing oneself in any public place to beg or gather alms<sup>119</sup>, playing at any game of chance for money in any public place<sup>120</sup> or wandering near a public place or highway under 'suspicious' circumstances.<sup>121</sup> Even if a plausible argument can be made that public begging or gambling is harmful to others or that a wandering person poses a reasonable threat of harm, measures that are less coercive than the criminal law, such as municipal by-laws, are available to deal with these social issues.

Another element of the minimalist approach is that criminal laws ought to respect fundamental human rights protections.<sup>122</sup> The 'idle and disorderly' laws are overly invasive into the privacy and other rights of targeted individuals and are at the opposite spectrum of respecting human rights.

In particular, the requirement that a person ought to be able to give a good account of themselves at any time<sup>123</sup> infringes upon the right to privacy as well as the right to dignity guaranteed under Articles 24 and 27 of the Constitution and Article 5 of the ACHPR as well as the presumption of innocence as protected under Article 28(3)(a) of the Constitution. The offences allows for a situation where poor and marginalised persons can easily be humiliated and traumatised by falling victim to an arbitrary arrest. The mere fact that it is an offence to be a 'rogue' infringes upon the right to freedom of movement and person's security and well-being within a public place. The 'idle and disorderly' laws are dehumanising and invasive on top of failing to address a clearly discernible public harm.

## 2.5 Conclusion

This section shows that the two Penal Code offences of 'being idle and disorderly' and 'being a rogue and vagabond' tend to criminalise people rather than conduct and are generally vague, overly broad and susceptible to arbitrary enforcement. It is clear that, on a textual basis, the two 'idle and disorderly' offences constitute an infringement of a multitude of human rights as guaranteed under Uganda's Constitution as well as under regional and international human rights instruments to which Uganda is a party. 'Idle and disorderly' laws still do exist on Uganda's law books, despite repeated calls for them to be decriminalised. It is theorised that they exist because the powerful in society wish them to remain on the law books in order to 'deal' with the undesirable minorities. They ought to be decriminalised.

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119 Penal Code (n 3 above) Sec 167(b).

120 Penal Code (n 3 above) Sec 167(c).

121 Penal Code (n 3 above) Sec 168(d).

122 Ashworth & Horder (n 117 above) 32.

123 Penal Code (n 3 above) Sec 168(d).

# SECTION III

## THE IMPLEMENTATION OF 'IDLE AND DISORDERLY' LAWS IN UGANDA: TRENDS IN ARRESTS, CHARGES AND PROSECUTION

### 3.0 Introduction

This section presents the findings of the study in terms of trends in arrests, charges and prosecution of 'Idle and disorderly' offences for the period of 2011 to 2015 in Kampala district. The trends are pointed out and analysed.

### 3.1 Trends in arrests

#### 3.1.1 Number of arrests

Arrest is usually the first stage in the criminal process in Uganda. People will most likely come into contact with the criminal law upon being arrested. As such to analyse the trends in enforcement of 'Idle and disorderly' laws, determining the number of arrests is the first step. The research team sought to determine the number of people arrested under the 'Idle and disorderly' provisions in Kampala for the period of 2011 to 2015.

The police record the details of all persons arrested and brought to the station as well as any crime reports in the Station Diaries. As such these are voluminous records that are not readily accessible and they were therefore not analysed by the research team. What were instead analysed are the Minor Contraventions Books (MCBs) in which cases that have been opened for investigations and where charges have been laid are recorded in the case of petty offences. Records from five police stations serving Kampala district were analysed. These stations were: Kampala Central Police Station covering Central Division; Katwe Police Station covering Makindye Division; Kawempe Police station covering Kawempe Division; Kiira Police division covering Nakawa Division, and Old Kampala Police Station covering Rubaga Division. Data for the five years was obtained from the rest of the stations except Kiira Police Division which was only able to avail records for the years 2014 and 2015.

From these books, it was established that 958 persons had been charged under the 'Idle and disorderly' laws at the five division police stations over the period 2011-2015.<sup>124</sup> This number is of course much less than the number of arrests that were done over the same period, as some of the people arrested were certainly released without charges. It is also less than the total number of arrests in the Kampala metropolitan area over the same period since these police stations were just a sample, and indeed smaller police posts and stations are also likely to have a sizeable number of persons arrested and detained there for these offences which are not included in the records of the supervising Division/station.

Therefore it was not possible to establish the actual number of arrests that take place under the 'Idle and disorderly' laws in the Kampala metropolitan area, but the data obtained shows that indeed arrests do take place and they do take place very frequently. The trends that were established through qualitative research were.

Arrests under the 'Idle and disorderly' laws are usually carried out through police swoops with many people arrested at the same time. Newspapers usually cover these stories, and so as to paint a better picture of the number of arrests in the Kampala metropolitan area, newspaper records were used. Four daily newspapers were studied for information on police swoops that occurred in Kampala district and to analyse the trends. These were: The New Vision and the Daily Monitor (which are the two major daily English newspapers); the Red Pepper (a tabloid

<sup>124</sup> This data will be broken down when discussing charges in the next sub section.

format daily newspaper) and Bukedde (the daily Luganda language newspaper). From the newspaper records, it was found that the two daily English newspapers did not have any record of police swoops during the five years, an indication of the preferred coverage of the newspapers rather than an affirmation that there were no police swoops during that period.<sup>125</sup> Only Bukedde, the Luganda daily carried the stories of police swoops in the Kampala area. Whereas it reported no police swoops in 2011, it reported 6 police swoops in 2012, and 14 police swoops in 2013; 1 in 2014 and 6 in 2015. It is notable that eight of these 14 arrests in 2013 took place during the month of April, leading to the arrest of at least 223 people in different areas of Kampala in a single month.<sup>126</sup> This is indicative of a planned raid targeting the poor. These trends agree with the Police records which show that there were less arrests/charges in 2011 under the 'idle and disorderly' laws, perhaps due to the presidential and parliamentary elections and that there were more arrests in 2013 perhaps for the reason that there were no presidential campaigns then. What is extraordinary about these swoops are the numbers of persons arrested. One of them involved the arrest of 102 persons who were reportedly attending a strip tease show.<sup>127</sup> The total number of persons reported in the newspapers as arrested in police swoops were 889, and yet in many of the articles, it is stated that mass arrests were carried out, but mention is not made of the number of people arrested.<sup>128</sup>

While not always explicitly stating that the arrests were carried out pursuant to the 'idle and disorderly' offences, it is clear that this had to be the case where the stated reason for the arrests were innocuous activities such as 'moving at night'<sup>129</sup> and 'spending time in lodges'.<sup>130</sup> Therefore, since not every case is reported in the newspapers, and not all the numbers of arrestees during 'mass arrests' are reported, it is clear that the number of those arrested under these offences is much higher than the number reported.

It was reported that in some instances, the police arrest people and do not take them to the station, but rather release them after perhaps some money has exchanged hands. Such cases therefore do not get recorded anywhere. One police officer at the Central Police Station stated that *'We have reduced charging people with rogue and vagabond and instead when they are arrested especially during the night operations, they are usually released with no charges because even if you charge them and take them to court in the morning, in the afternoon you will find the same people you took to court walking'*.<sup>131</sup> Interviews with key informants confirmed the widespread trend of arrests which do not lead to the laying of charges or even to taking

125 The New Vision and the Daily Monitor both tend to cover elitist content and are therefore more likely not to be interested in police swoops where sex workers, LGBTI persons and suspected drug users are arrested.

126 See 'Poliisi eyodde bamalaaya ne bakasitoma baabwe' (Police arrests sex workers and their clients in a swoop) *Bukedde* 5 April 2013 3; 'Ayambala mmini waakutanzibwa obukadde 10' *Bukedde* 8 April 2013 7; *Bukedde* 5 April 2013 3; 'Bayodde 61 e Bwaise' *Bukedde* 11 April 2013 5; 'Poliisi eyodde ab'ekimansulo' *Bukedde* 12 April 2013 4; 'Ebikwekweto bya Poliisi' *Bukedde* 18 April 2013 10; 'Poliisi eyodde abasiiba mu loogi e Kitebi' *Bukedde* 19 April 2013 5.

127 'Poliisi eyodde 102 mu kimansulo' (Police net 102 persons attending a strip tease show) *Bukedde* 2 February 2013 2.

128 See for example 'Poliisi ekoze ebikwekweto' (Police conducts operation) *Bukedde* 1 January 2012 2; 'Ebikwekweto bya poliisi bibune wonna' (Operations by police carried out everywhere) *Bukedde* 22 January 2012 28 and 'Ekikwekweto ku bakolera ku luguudo ewa Kisekka' (Operation against roadside vendors) *Bukedde* 2 May 2015 5.

129 'Poliisi etandise okukuba ababbi ku nnyama' (Police adopts shoot on site strategy for thugs) *Bukedde* 10 September 2013 2.

130 'Poliisi eyodde abasiiba mu loogi e Kitebi' (Police arrests people who spend the day in lodges in Kitebi) *Bukedde* 19 April 2013 5.

131 Interview with police officer at Central Police Station, April 2016.



the persons arrested to the police stations at all.

### 3.1.2 Nature of arrests

Most of the arrests under the 'Idle and disorderly' laws take place as a result of police swoops as the newspaper records above show. This is where some over vigilante police officers/commanders make it a mission to arrest sex workers and other persons who they find 'objectionable.' They thus conduct raids on places where they are likely to be found, especially in slum areas. The officers simply pounce on the suspects and arrest them, and humiliate them in the process through undressing them and parading them before the media in some cases. They also usually demand for bribes. CM, a sex worker, narrated her arrest experience as follows:<sup>132</sup>:

*'I thought that I was being arrested for being a sex worker and for the crime of prostitution, that is what the police intimated to us when they were arresting us...we were beaten up, undressed and our photos taken by police officers who took me in police custody for two days. I was constantly asked questions like how long I have been involved in prostitution and I was taken to court after I failed to raise two hundred thousand Uganda Shillings that was demanded by the police officer.'*

These arrests are usually done without following due process of the law and respecting the rights listed down in Article 23 of the Constitution, like the right to be informed of the reasons for arrest, and the limited use of force during arrests.

The fact that Sections 10 and 11 of the Criminal Procedure Code Act allows police officers to arrest persons under these provisions without warrant and upon mere suspicion makes it much more easier to enforce these laws.

### 3.1.3 Who are the victims of these arrests?

In all cases, it was clear that the persons that are usually arrested under these laws are the poor and marginalised. It is almost exclusively these groups that get arrested. Indeed all the cases suggest that arrests take place in areas that are regarded as slum areas where mainly the urban poor reside or conduct their business in such areas as Katwe, Bwaise, Nakulabye and Kisenyi.<sup>133</sup> According to WONETHA, an organisation working for the promotion of rights of sex workers, the laws are unmistakably discriminatory on the basis of social status. *'These laws target the low cadres of society ... there are never arrests in areas like Kololo. It is the poor and marginalised who are targeted'*.<sup>134</sup>

Sex workers are among those mostly affected by these laws, and so are drug users. LGBTI persons are not frequently arrested for being rogue and vagabond as for some reason, the police find it easier to charge them with offences directly related to same sex relations.

Considering the purpose of idle and disorderly laws, it follows that persons who fall victim to arrests in terms of these provisions could only be the poor and marginalised. The poor are targeted in as far as they depend on public spaces to conduct activities which those who are not poor would conduct in the privacy of their homes. People are arrested while frequenting amenities that would generally be associated with lower-income groups. For example, 22 people who were found in bars and lodges allegedly taking drugs and playing cards were

<sup>132</sup> As narrated by a sex worker during Focus Group Discussion conducted on the 1<sup>st</sup> April 2016 at Nateete, Rubaga Division.

<sup>133</sup> For example see 'Bayodde 61 e Bwaise' (61 arrested at Bwaise) *Bukedde* 11 April 2013 5.

<sup>134</sup> Interview with Flavia Kyomukama, Director of Programmes, 6 April 2016.

arrested in October 2015 in Nateete.<sup>135</sup>

Street vendors are also among those mostly harassed by law enforcement agencies under these provisions. An FGD was held with six street vendors who had all been arrested under the idle and disorderly laws,<sup>136</sup> and other studies also indicate that street children are among those frequently arrested under these laws.<sup>137</sup>

### 3.1.4 Motivation for arresting under 'Idle and disorderly' provisions

All the nine police officers interviewed saw the main reason for implementing 'Idle and disorderly' offences to be the prevention and combating of crime. The officers are of the opinion that, should the laws be repealed, society would suffer. Arrests under these provisions take place mainly in reaction to complaints from concerned citizens. According to a senior police official, stationed at the Directorate of Criminal Investigations headquarters in Kibuli, the police would respond to complaints about an increase in crime in a certain area by arresting people under the 'idle and disorderly' laws. According to him *'police want to show that action is being taken and if we cannot identify the real criminals, those who have no work tend to be the ones to get arrested'*.<sup>138</sup> The 'idle and disorderly' laws are thus used by the police to win the favour and respect of the upper classes of society, at the expense of the poor and marginalised. The same official mentioned that these 'idle and disorderly' laws are *'used as a mop-up for police to remove people from the street when government is receiving diplomatic visitors in order to create a decent-looking city'*.<sup>139</sup> This creates the impression that the government is not sincere in its announcements that idle and disorderly laws should not be enforced anymore. These announcements are made publicly but the same government officials would order for the enforcement of these laws when it is convenient.

The Police would also undertake raids and arrest on their own mandate and initiative to detect and combat crime through night operations and patrol. Some statements by police officers convey a perception of arrests as an end in themselves, as opposed to being a last resort for the purposes of preserving life, preventing crime or bringing a suspected criminal to justice. A police officer interviewed at Kawempe Police Station said the following: *'in these cases of rogue and vagabonds or idle and disorderly or common nuisance, we do not need a lot of evidence to charge anyone...we only need to find a person in circumstances that are supposedly suspicious to warrant an arrest'*.<sup>140</sup> It seems that the catch-all nature of 'Idle and disorderly' offences are being exploited in circumstances where there is not necessarily a valid reason for the arrest.

The other motivation for the arrests is extortion. Members of all the three marginalised groups that this research focuses on: sex workers, drug users, and LGBTI persons, face arrests under these provisions, and all of them pointed out during the FGDs, that paying bribes is the easier way out compared to being taken to the police station and the courts of law.<sup>141</sup> In an interview with Flavia Kyomukama, the Director of Programmes, WONETHA, she stated that most of the sex workers who are arrested report that they are picked up by the police for purposes of

135 'Poliise eyodde 22 e Nateete' (Police arrests 22 at Nateete) *Bukedde* 2 October 2015 8.

136 FGD with street vendors, 8 April 2016.

137 Human Rights Watch (n 12 above).

138 Interview with RB (not his real name), senior investigative officer stationed at the Directorate of Criminal Investigations Department headquarters, Kibuli, interviewed at Kamwokya, Kampala, 22 September 2016.

139 As above.

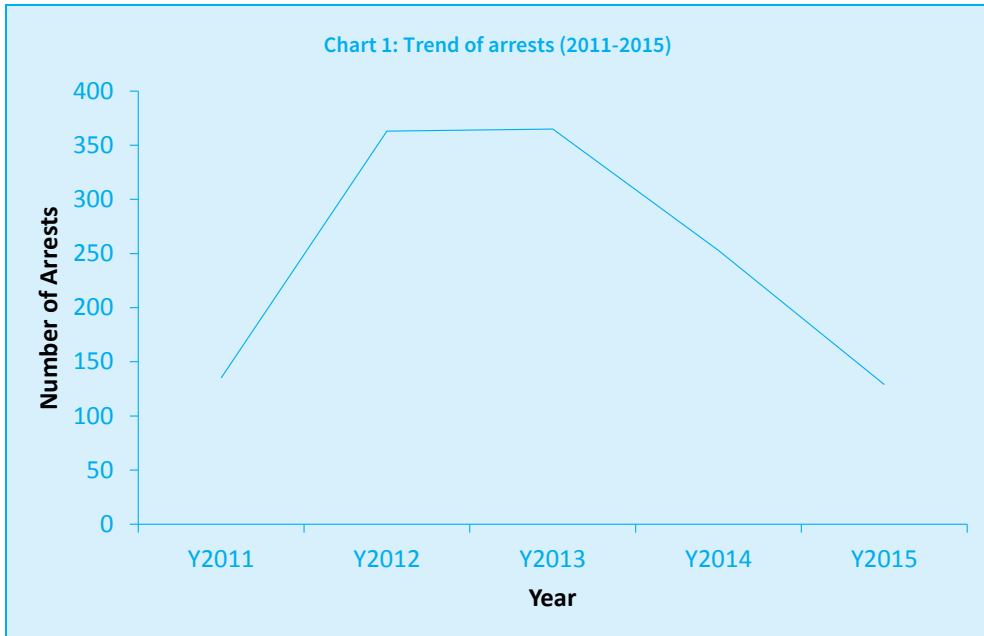
140 Interview with police officer from Kawempe Police Station (May 2016)

141 FGD with sex workers conducted on 1<sup>st</sup> April 2016 at Nateete, FGD with LGBTI persons on 8 April 2016 at Bwaise-Eden Service Part, FGD with drug users on 1 April 2016 at Katwe.

extorting money from them. Once they pay the money, they get released.<sup>142</sup> Patricia Kimera, a lawyer with HRAPF confirmed that in many cases involving the arrest of sex workers, by the time the lawyers get to the station, the persons have been released after ‘settling’ the cases with the Police.<sup>143</sup> This confirms that many cases do not even make it to the police records and many that do are also settled through bribes. These provisions therefore become a ripe source of monetary gain for the police officers, which makes them more popular.

### 3.1.5 Periods of arrests

There seem to be some peak periods for arrests under these offences, and this seems to rhyme with the political atmosphere. The chart below shows the periods during which arrests peaked from information from the charge records of the police.



From the data recorded at the five police stations for arrests that led to charges, it seems that there was a general increase in charges from 2011 to 2012 and then again a decline in arrests from 2013 up to 2015. During presidential campaign years (2011 and 2015) there was a marked reduction in the number of cases recorded by the Police and reported by the media. Whereas the police had fewer cases in 2011 than other years, the media did not record any police swoops during that period. The same thing seems to have happened in 2015 which was another campaign year. Meanwhile for the years in between presidential campaigns, the numbers of arrests increased.

This implies that presidential campaigns actually have an effect on arrests under ‘idle and disorderly’ laws. A police officer at Kiira Police Division confirmed this when he stated that ‘...we have radios and we listen to the news...the president on two occasions during the presidential campaigns, 2011 and 2015 announced that police should stop charging people for being idle and disorderly and related offences.’<sup>144</sup> Another police officer interviewed at Old Kampala

142 Interview with Flavia Kyomukama at WONETHA offices, 6 April 2016.

143 Interview with Ms. Patricia Kimera, is a lawyer and head of sexual minorities unit at HRAPF, 26 April 2016.

144 Interview with police officer at Kiira Police Division

Police Station also agreed with this sentiment when he stated that ‘*political pronouncements are seasonal and they have a purpose ... you might be touching someone’s vote if you arrest idlers during political peak time ... so as police officers we sometimes back off or arrest but charge with alternative offences ...*’<sup>145</sup> On the other hand, the District Police Commander of Katwe Police Division‘ dismissed this reason and stated that ‘*political pronouncements means nothing if the laws remain in the statute books...*’<sup>146</sup> Rather than weaken the political nature of these laws, this statement instead shows why soon after the political campaigns, the charges usually rise, because indeed, the law remains on the law books and there is nothing to stop charging people under it.

This implies that ‘Idle and disorderly’ laws also serve a political purpose. The President usually makes his pronouncements during campaigns and then there is nothing done about actually decriminalising the laws after the elections. By doing so, arrests reduce during campaigns thus ensuring votes for the President, and by not doing anything about this after the elections and the Police continuing to arrest during the intermediate years, the same ploy can easily be used during the next election. This may indeed explain why the laws are never decriminalised despite the presidential declarations. The laws serve a very important political function.

## 3.2 Trends in charges

A charge is defined as a written statement containing the accusations against any person alleged to have committed an offence. Charges are preferred at police stations by police officers. The Police publishes Annual Crime Reports with information including the number of cases that attracted particular charges. Unfortunately since ‘Idle and disorderly’ laws are regarded as petty offences, they are not specifically included in the reports. The Deputy Director, Crime Intelligence at the Uganda Police Force intimated to the researchers that these cases are among the ‘others’ category in the reports.<sup>147</sup> Indeed a perusal of the Police Annual Crime reports for this period does not find any mention of ‘idle and disorderly laws in the records. Therefore the Police also does not regard them as serious crimes but the question still remains as why people continue to be arrested and charged under them.

### 3.2.1 Number of charges per police station

To get an idea of how many people get charged under idle and disorderly offences at each police station, records from the five police stations were accessed. The table below summarises the findings from the police Minor Contravention Books (MCBs) which records all petty cases such as ‘Idle and disorderly’ offences.

**Table 1: Number of charges on ‘Idle and disorderly’ cases (2011-2015)**

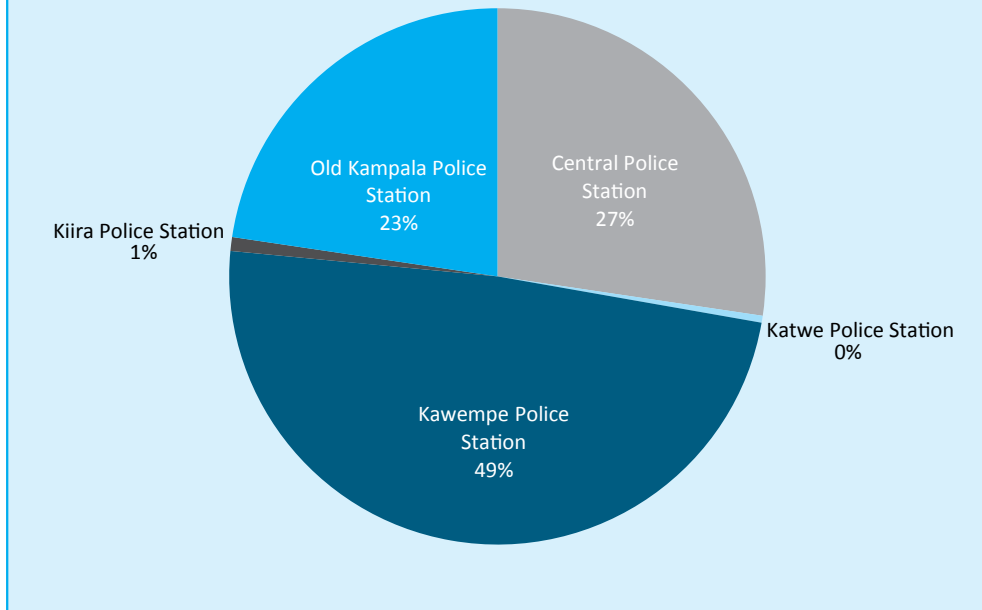
POLICE STATION	CHARGES					
	2011	2012	2013	2014	2015	TOTAL
Central Police Station	36	64	73	80	9	<b>262</b>
Katwe Police Station	2	0	0	0	2	<b>4</b>
Kawempe Police Station	10	152	161	108	36	<b>467</b>
Kiira Police Station	-	-	-	4	4	<b>8</b>
Old Kampala Police Station	61	58	54	19	25	<b>217</b>
<b>TOTAL</b>	<b>109</b>	<b>274</b>	<b>288</b>	<b>211</b>	<b>76</b>	<b>958</b>

<sup>145</sup> Interview with a police officer at Old Kampala Police Division

<sup>146</sup> Interview with the District Police Commander Hassan Musooba at Katwe Police Division, 9 September 2015.

<sup>147</sup> Interview with Deputy Director, Crime Intelligence, Uganda Police Force, SCP Charles Asaba, 26 May 2016.

Chart 2: Total number of charges per police station 2011 - 2015



Charges under 'Idle and disorderly' related offences were most rampant in Kawempe with 467 representing 49% of the 958 arrests followed by Central Police Station (27%), Old Kampala (23%) followed by Kiira (1%) and lastly Katwe with 0%.<sup>148</sup>

From the above data, it is clear that there is a discrepancy in the trends in arrests at the different police stations. The largest number of charges was mainly at Kawempe Police Station by far, then followed by Central police Station and then Old Kampala Police Station. Why Kawempe stands out is perhaps because of the many poorer areas that it covers, including the slums of Bwaise, Kalerwe, and Makerere- Kivvulu. Both the numbers from the Central Police Station and Old Kampala are quite high but not as high as Kawempe Police Station which also reflects the areas they serve- Central Division and Rubaga which are largely affluent but also with a number of poor areas, typical of the dualism that Kampala experiences in income gaps. Kiira Police Division provided data for only two years, but even then they posted much fewer numbers than the other police stations. If the data is accurate then the reason may lie in the areas served by the Police station- Nakawa and Kiira Town Council, which are mainly middle class areas. Katwe Police Division is the real surprise in this. Katwe covers some of the biggest slums in Kampala and should ideally have posted bigger numbers. This conundrum was resolved when it was discovered, that Katwe Police Division had only 4 cases under the 'idle and disorderly' laws- 2 in 2011 and 2 in 2015 because they do not charge people under these offences. They carry out arrests but charge people under section 48 of the National Drug Policy and Authority Act, which criminalises 'frequenting a place used for smoking opium.' It is an alternative offence that has the same characteristics as the 'idle and disorderly' laws.

During the study period, Katwe Police Division had 282 charges for this offence, which indeed

<sup>148</sup> It should be noted that Kiira Police Station could only make records of two of the five study period years available.

would restore it to the second highest number if these had been idle and disorderly charges. One police officer intimated that the station does not charge people under rogue and vagabond because of the presidential pronouncements. He stated that *'In 2011 during the presidential campaign, the president of the republic of Uganda announced that Police should stop arresting people on idle and disorderly...as police officers we then shifted from arresting and charging people under those provisions but looked for 'alternative charges' and that is why here at Katwe we have not recorded any cases of idle and disorderly or rogue and vagabond in the past five years'*.<sup>149</sup> Another police officer suggested that it was the difficulty in successfully prosecuting people under this offence that led them to use the alternative charges. He stated that *'As a police officer, I have a prerogative to prefer a charge that will succeed...it is not practical to charge rogue and vagabond very well knowing that they will fail ...'*<sup>150</sup>

The trends of charges therefore show that at police stations that serve the more poorer parts of the city, there are more persons charged under the 'idle and disorderly laws' as compared to those that serve the more affluent areas, except where a conscious decision has been made to charge people under 'alternative offences.'

### 3.2.2 Number of charges for specific 'Idle and disorderly' offences

The charges for specific 'Idle and disorderly' offences were recorded at each of the five police stations and appear in the table below:

**Table 2: Number of charges by offence per station (2011-2015)**

POLICE STATION	Idle and Disorderly	Rogue and Vagabond	TOTAL
Kawempe Police Station	0	467	<b>467</b>
Katwe Police Station	0	4	<b>4</b>
Central Police Station	1	261	<b>262</b>
Old Kampala Police Station	0	217	<b>217</b>
Kiira Police Division	-	8	<b>8</b>
<b>TOTAL</b>	<b>1</b>	<b>957</b>	<b>958</b>

These results show a consistency across the five police stations for effecting very few to no charges under the 'Idle and disorderly' offences. Almost all 'Idle and disorderly' related arrests are made under the offence of 'being a rogue and vagabond'. The reason that may explain why there are fewer charges for 'being idle and disorderly' may be the notoriety that the provision has achieved. All the presidential pronouncements and all other political pronouncements as well as calls from ordinary people to decriminalise have all been specifically on the law on

149 Interview with Ben Kirabo (not real names), a police officer at Katwe Police Station (May 2016).

150 Interview with John Paul (not real names) AIP who has served in the Uganda Police Force for 27 years and at Katwe Police Division for almost 10 years handling petty offences such as idle and disorderly, rogue and vagabonds among others.

being idle and disorderly and being rogue and vagabond is not specifically mentioned. Also, the seven offences under the provision of being idle and disorderly are clearer than those under the provision of being rogue and vagabond. This also explains why the charge of being rogue and vagabond is extremely popular. It is much more vague and broader, and serves exactly the same purpose as that of being idle and disorderly, and yet no one actually ever comments about it. The police can therefore easily argue that they do not charge people with being 'idle and disorderly' as indeed the statistics prove, as there is only one case in 5 years. However, they do charge under the offence of being 'rogue and vagabond' which is more vague than that on being 'idle and disorderly' and this indeed should also be equally and perhaps even more strongly targeted for decriminalisation.

### 3.3 Trends in prosecution

When the Police prefers a charge and they complete investigations, the charge is referred to the Directorate of Public Prosecutions for sanctioning. This function is usually served by state attorneys. The state attorneys follow the Prosecution policy which the Directorate has put in place to guide prosecutors in the performance of their duties. The Policy includes the criteria governing the decision to prosecute. The policy in part requires that '*Resources should not be wasted pursuing inappropriate cases but must be used to act vigorously in those cases worthy of prosecution.*'<sup>151</sup> They have also put in place the Prosecution Performance Standards and Guidelines<sup>152</sup> that prosecutors have to follow, which also lay down the standards and emphasise that charges should only be confirmed if the facts disclose so and the case is serious.<sup>153</sup> The guidelines provide that

*'For avoidance of doubt, the decision to prosecute or not will be strictly guided by the following considerations:*

- *The sufficiency of evidence*
- *Whether the intended prosecution is in public interest*
- *There is no abuse of the due process.* '

Despite these policies however, 'idle and disorderly' offences continue to be sanctioned and prosecuted. This is seen from the courts, which were included for this study, which, during the period considered for this study handled 597 cases in total as will be discussed in the next sub section. All these cases were obviously sanctioned by the state attorneys despite the presence of little evidence and usually the absence of complainants. The Deputy Public Relations Officer of the DPP,<sup>154</sup> Ms. Irene Nakimbugwe explained the situation as follows:

*'(w)hen state attorneys receive files with charges preferred by police officers, they consider the charge preferred and the evidence on file. The process is guided by the ... prosecutorial policy of all offences. The file and the proposed charge need to have some probable scanty evidence that is enough to warrant commencement of proceedings of the offence. The file and inquiries need not be completed and in most cases the state attorneys will pray for adjournments in order to have enough evidence to warrant full trial of the offences in question ... if there is reasonable suspicion that the offence was committed and some degree of evidence in support, the state attorneys will continue*

151 Directorate of Public Prosecutions 'Prosecution Policy' <http://www.dpp.go.ug/jdownloads/PROSECUTION%20POLICY.pdf> (accessed 25 September 2015)

152 Directorate of public Prosecutions 'Prosecution Standards and Guidelines 2014' <http://www.dpp.go.ug/index.php/publications/send/20-prosecution-performance-standards/15-prosecutions-performance-standards-and-guidelines> (accessed 25 September 2015)

153 n 152 above, 7.

154 Interview with the DPP's Deputy Public Relations Officer Ms. Irene Nakimbugwe, Kampala, 14 June 2016.

*to sanction charges irrespective of whether the (case is anticipated to) be successfully prosecuted or not.'*

This practice seems not to be in line with the Prosecution Policy which requires that:

*'In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution**. There must be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.'*<sup>155</sup>

Seasoned human rights lawyer, Ladislaus Kizza Rwakafuuzi stated that in practice, state attorneys rarely deeply peruse the files before sanctioning them. That for persons who have no lawyers following up their cases, the charges are likely to be sanctioned.<sup>156</sup>

This is not in line with the policy that the DPP has established for their staff and as such charges of 'idle and disorderly' offences will continue to be prosecuted even though there is no complainant in the case and little evidence on file to prove the respective elements of the crimes.

### 3.4 Trends in convictions or acquittals in 'idle and disorderly' cases

This part concerns the fate of cases that are taken to the courts. Idle and disorderly offences are taken before Magistrates Courts. Out of the courts that serve the Kampala metropolitan area, the five magistrates court of Buganda Road, Kiira, Makindye, Mengo and Nabweru were selected for inclusion. Cases that are brought before courts are usually prosecuted successfully and concluded, resulting in either convictions, acquittals or dismissals. The trends in each of the five courts over the five-year period are as follows:

**Table 3: Outcomes in 'Idle and disorderly' cases handled from 2011-2015 and how they ended**

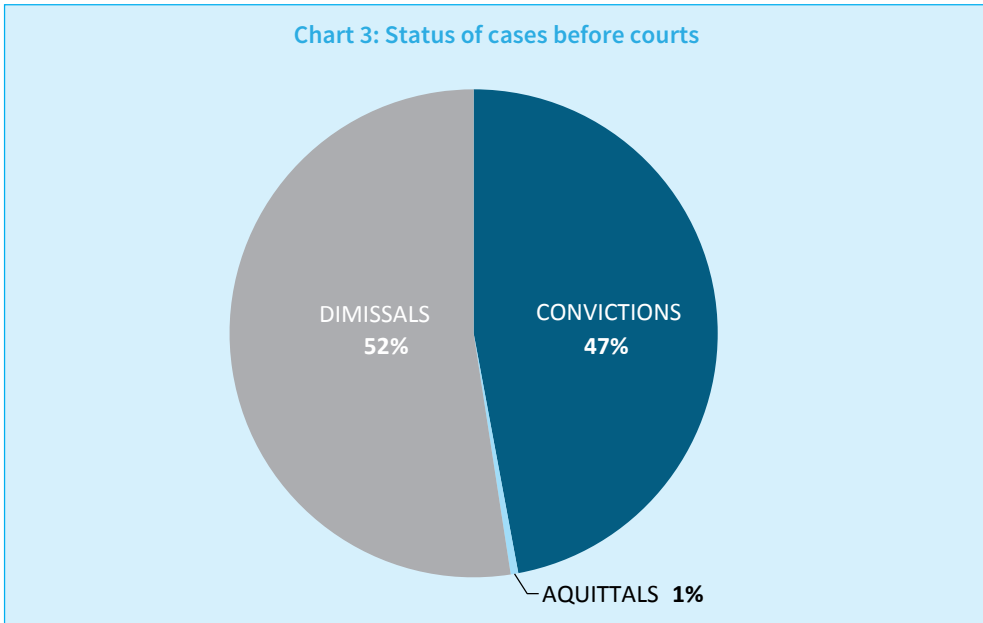
Magistrates Court	STATUS OF CASES			
	Total number of cases	No. of Convictions	No. Of acquittals	No. of Dismissals
Buganda Road	26	23	0	3
Kiira	163	44	2	117
Makindye	122	33	0	89
Mengo	19	10	0	9
Nabweru	267	171	1	95
<b>Total</b>	<b>597</b>	<b>281</b>	<b>3</b>	<b>313</b>

<sup>155</sup> DPP (n 151above) 2

<sup>156</sup> Interview with Mr. Ladislaus Kiiza Rwakafuuzi, 12 September 2016.



Chart 3: Status of cases before courts



Slightly more than half (52%) of the ‘idle and disorderly’ cases that are brought before courts are dismissed for want of prosecution under section 119 of the Magistrates Court Act.<sup>157</sup> Slightly less than a half of the rest result into convictions (47%) and only a very small number result into acquittals (1%). The high dismissal rate can be explained by the fact that there are usually no complainants in these cases and that the ingredients of ‘idle and disorderly’ offences are very difficult to identify, let alone prove beyond reasonable doubt. Interviews with Magistrates and State Attorneys revealed a perception that ‘idle and disorderly’ cases are dismissed in the great majority of cases because of these reasons. One state attorney noted:

*‘...cases like rogue and vagabond hardly succeed because the law itself is ambiguous, and so they usually end up in dismissals. ... There are two reasons for this: first, there is no direct victim to testify against the accused and second such cases require resources, both human and financial, for the purpose of investigations. The government has not shown keen interest in allocating resources for such cases’<sup>158</sup>.*

One Magistrate had the following to say regarding the difficulty to try these cases:

*‘...these are offences which are difficult to prove because there is no test to prove that one is actually idle and disorderly, rogue and vagabond. ....’<sup>159</sup>*

Therefore the high dismissal rate is not surprising. What is surprising is the fact that the conviction rate is also high. This seems to indicate that actually in some cases, the prosecution proves their case. This is however not necessarily true since it seems that for most cases where there are convictions, they actually result out of persons pleading guilty. Again, even if the conviction did not result out of pleading guilty, the fact that these offences are petty offences renders it unnecessary to record the evidence adduced since section 142(1) of the Magistrates Courts Act allows the magistrate to dispense with recording of evidence.<sup>160</sup> As such, it would

157 Magistrates Courts Act Cap 16 of the Laws of Uganda.

158 Interview with Jonathan Muwaganya, State Attorney at Buganda Road Court, 4 May 2016.

159 Interview with Richard Mafabi, Chief Magistrate at Makindye Chief Magistrates Court, 15 April 2016.

160 Section 142(2) of the Magistrates Court Act includes all offences whose punishment does not exceed

not take much to actually convict the accused person, and it would be difficult to question the decision since no evidence was recorded.

The issue of pleading guilty is particularly of concern since it is apparently not done willingly and the procedure is most likely abused by both the courts and the accused persons. Section 124(2) of the Magistrates Court Act provides that:

‘If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by him or her, and the court shall convict him or her, and pass sentence upon or make an order against him or her, unless there shall appear to it sufficient cause to the contrary.’

As it is, for a plea of guilt to be considered valid, the person must plead to all the different ingredients of the offence.<sup>161</sup> This is rarely done, as indeed the offences themselves are too vague for one to accurately plead to each of them. In the case of *Tibemanzi Deus*,<sup>162</sup> the charge and the facts of the case were read to the accused to which he responded ‘Facts are correct’ and the magistrate recorded this as a plea of guilt and convicted the accused person. The High Court found that this conviction was bad in law as the facts of the offence as put to the accused did not reveal the ingredients of the offence and in fact did not amount to the offence of being idle and disorderly at all. The same thing happened in the *Nabakoza Jackline case*<sup>163</sup> where again the facts were put and once the accused agreed to them, they were convicted on their own plea of guilt and again the High Court quashed the conviction. As these cases illustrate, pleading guilty is convenient for both the court and the accused.

A magistrate at Nabweru Chief Magistrates Court confirmed that indeed in many cases, the accused plead guilty and when they do so, they are convicted on their own plea and then sentenced. He conveyed that in such cases, they are usually sentenced to a lesser punishment: a caution, community service, or a fine.<sup>164</sup> Therefore the reasons for accused persons pleading guilty to charges of ‘being rogue and vagabond’ and yet these charges may not be proved by the prosecution does not seem to lie in the actual guilt of the person but rather in the benefits that this has compared to pleading not guilty. According to the magistrate, once the person pleads guilty, they are given light sentences since they have not wasted court’s time.<sup>165</sup> This was confirmed by Ms. Patricia Kimera,<sup>166</sup> a lawyer who provides legal aid services to marginalised persons, ‘some cases are not fully tried but clients plead guilty in order to get leaner sentences and quick justice’. She says that she finds this to be one of the most difficult aspects of her work because although pleading guilty ensures that her client goes free almost immediately and has to only do community service, be cautioned or made to pay a fine, it leaves a permanent record of a conviction under the client’s name, and it is an admission of guilt and thus a validation of the legality and even necessity of these offences. As a public interest lawyer, she would not be inclined to advise clients to take this route, but unfortunately as an advocate she also has to act in the best interests of the client, which in this case would mean securing their immediate release. She therefore advises the clients on the merits and demerits of each of options and leaves them to decide. In most cases however, the clients choose to plead guilty and thus go free.

The alternative involves serving long periods on remand in prison since in most cases, sex

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six months, which is the category in which ‘idle and disorderly’ offences fall.

161 *Tugume & Another v Uganda* (HCT-00-CR-CN-0112-2014) [2015] UGHCCRD 7

162 *Tibemanzi case* (n 45 above)

163 *Nabakoza Jackline case* (n 46 above).

164 Interview with Kercan Prosper, Magistrate Grade II at Nabweru Chief Magistrates Court, 26 May 2016.

165 As above.

166 Interview with Ms. Patricia Kimera, is a lawyer and head of sexual minorities unit at HRAPF, 26 April 2016.

workers, drug users or LGBTI persons cannot easily secure release on bail as they are regarded as being at risk of absconding from court hearings, and also very few people are willing to stand surety for them. Therefore pleading guilty is the easier option for most people and it is very common advice given to the accused persons by the police, lawyers and magistrates.

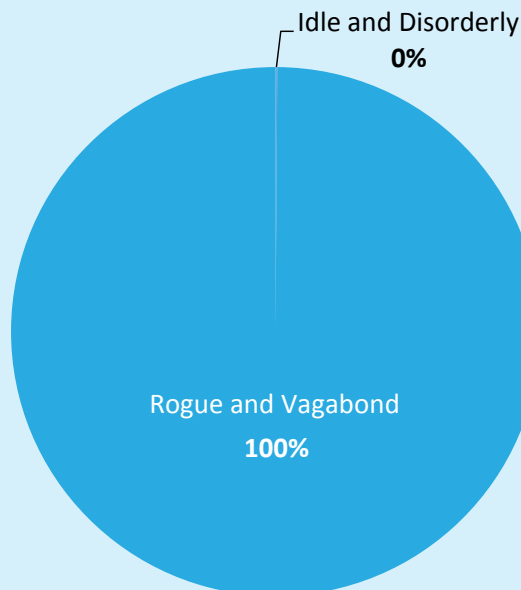
Unfortunately, pleading guilty sometimes leads to longer sentences as it cannot be determined beforehand what the punishment will be. CM, a sex worker who was arrested and charged with being rogue and vagabond stated that *'I was advised to plead guilty by a police officer and I did and was convicted to a term of three months in prison.'* Three months is quite a long sentence since the maximum sentence provided for under the law is six months imprisonment. Indeed Section 142(4) of the Magistrates Courts Act provides the sentence of three months as the maximum punishment that can be given when the magistrate chooses not to record the evidence.

The low numbers of acquittals indicate the few instances where full trials are held and a person is found not guilty. The fact that they are few can be explained by the high numbers of dismissals and the high numbers of convictions on a plea of guilt.

### 3.4.1 Convictions for specific offences

In terms of comparing conviction rates for the separate 'Idle and disorderly' offences, it is clear that the vast majority of convictions are for 'being a rogue and vagabond' (99.9%) and only 0.1% for being 'idle and disorderly'. These numbers rhyme with those of the charges made under the different offences.

**Chart 4: Convictions for 'idle and disorderly' offences (2011-2015)**



Therefore, even for convictions, rogue and vagabond offences stand out. This is not a surprise since any way, they are the charges mostly brought before the courts rather than ‘idle and disorderly’.

### 3.5 Legal representation for marginalised persons charged under ‘idle and disorderly laws’

Most persons who are charged with ‘idle and disorderly’ offences do not get legal representation while in court. Private lawyers do not usually represent people in these cases and this may be because they are poor and they cannot afford to pay. Ladislaus Kiiza Rwakafuuzi, a human rights lawyer who usually handles cases involving poor and marginalised persons pro bono, admitted that he has not handled a single case of involving ‘idle and disorderly’ laws in his career.<sup>167</sup> He gives the reason as ignorance of the persons arrested of the free legal aid services available.<sup>168</sup> Justice Centres, a state funded legal aid scheme also provides services to such persons at the courts where they are located.<sup>169</sup>

Despite this, it emerged that LGBTI persons and sex workers in particular usually have legal representation. This is because there is a dedicated legal aid service provider, Human Rights Awareness and Promotion Forum (HRAPF) which has been providing free legal services to these groups since 2010. They however have only started providing similar services to drug users, and they do not provide such services to street vendors or any other groups of poor and marginalised groups.<sup>170</sup> As a result, it emerged that longer periods of time are spent in police custody before drug users and street vendors are charged and taken to court in comparison with sex workers and LGBTI persons.

In some cases however, despite the presence of free legal services, sex workers and LGBTI persons arrested under ‘Idle and disorderly’ laws sometimes do not seek the services of lawyers opting to ‘settle’ the cases. According to Ms. Kimera, the Police usually tell sex workers and other persons arrested not to involve lawyers as they will ‘complicate’ the case.<sup>171</sup>

There are a number of public defenders who can provide services to arrested persons including the pro bono scheme of the Uganda Law Society but these services usually cater for more serious offences and not petty offences.

### 3.6 Trends in sentencing

Under Section 162 of the Magistrates Court Act, on conviction, the magistrate may pass a sentence depending on their sentencing powers as laid down in that provision and in accordance with the sentences provided by law, and now also in light of the sentencing guidelines.<sup>172</sup> Magistrates intimated that when passing sentences for ‘idle and disorderly’ offences, they look at the elements of the offence and circumstances surrounding the arrest.

<sup>167</sup> Interview with Mr. Rwakafuuzi, n156 above.

<sup>168</sup> As above.

<sup>169</sup> According to Justice Centres website, they it is ‘a project of the Government of Uganda under the Justice Law and Order Sector. Started in December 2009, JCU was established and operationalized in the Judiciary. JCU is a one stop-shop legal aid clinic that seeks to bridge the gap between the supply and demand sides of justice. This is done through the provision of a broad range of legal aid services to indigent and vulnerable persons in Uganda.’ <http://www.justicecentres.go.ug/index.php/2014-11-27-11-30-03/about-us>

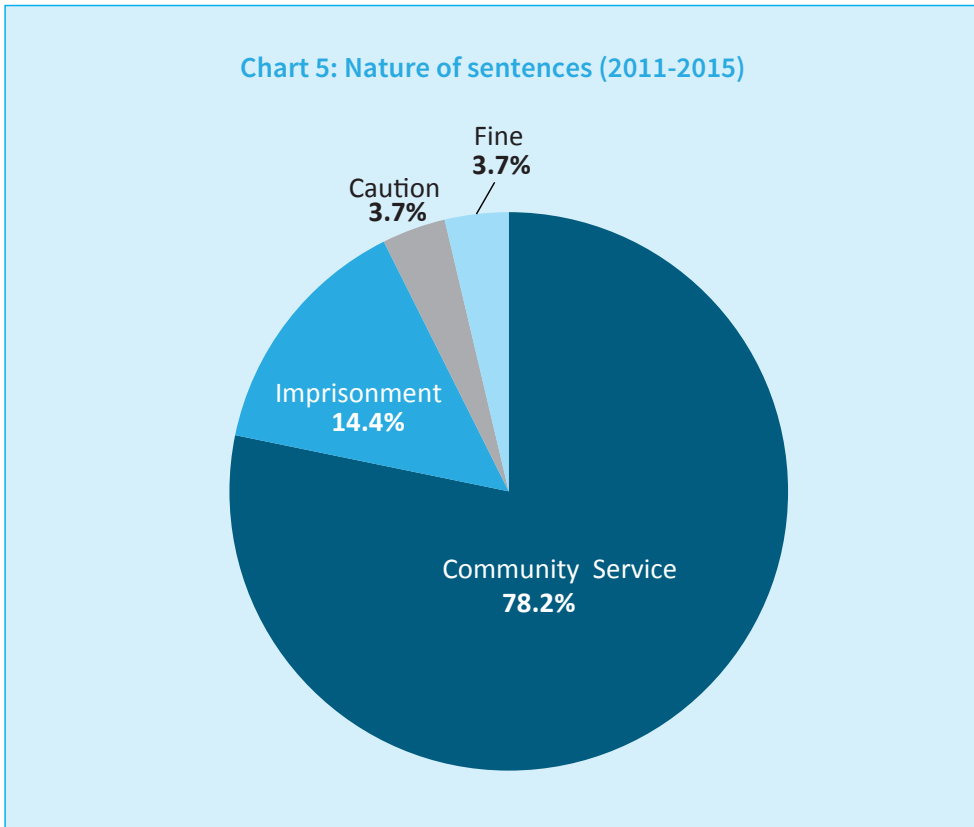
<sup>170</sup> As above.

<sup>171</sup> As above.

<sup>172</sup> The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 <https://www.jlos.go.ug:442/index.php/document-centre/sentencing-guidelines/264-sentencing-guidelines/file>

One of them said that, ‘those found wandering or walking without identification documents are usually given lighter sentences such as community service, caution or small fines than those who are accused of drug abuse, prostitution or theft.’<sup>173</sup>

What this implies is that persons who are sex workers, LGBTI persons, and people who use drugs are likely to be given harsher sentences than other people who may be arrested under these laws. The most common sentences following conviction under the ‘idle and disorderly’ laws are fines, community service or imprisonment for less than three months.

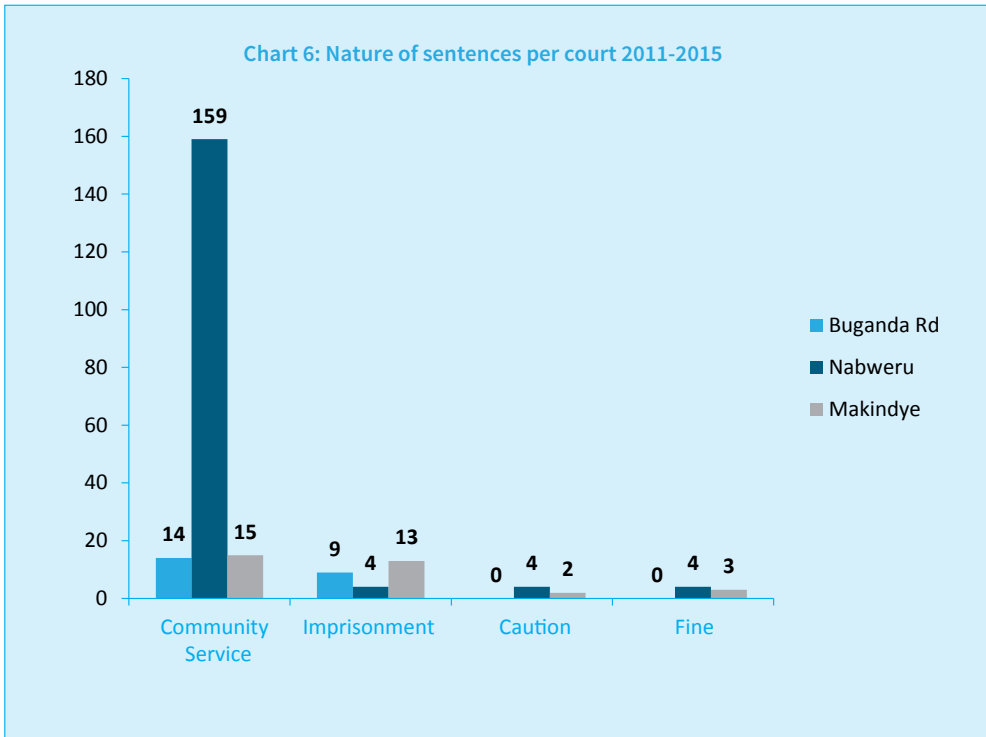


In terms of sentencing patterns of different courts, Nabweru court seemed to skew the statistics in favour of community service, while the three other courts made almost equal use of fines, imprisonment, community service and cautions in sentencing people convicted under the ‘idle and disorderly’ offences. The sentence given seems to depend on the particular magistrate handling the cases and what they prefer.

Sometimes, magistrates go beyond the laid down guidelines and the law in passing sentences and making orders. In the *Nabakoza Jackline* case, the magistrate made statements that showed the contempt with which she treated the accused persons. She stated that ‘It was, and is a shame to the nation! The girls are almost naked! The involved are all young and have better chances to make good use of their time, talents and bodies.’ She then proceeded to sentence them to the highest punishment and also made orders for their ‘skimpy wear’ to be handed to the police and destroyed through burning and that their big weaves should be

<sup>173</sup> Interview with Kercan Prosper, Magistrate Grade II at Nabweru Chief Magistrates Court, 26 May 2016. As above.

undone and their heads shaven, and the engine of the vehicle they were using be forfeited to the state, 'as a deterrent step to such activities.' These orders were way out of line with what the law provided. Okumu Wengi J found the orders to be improper, strange and unprecedented 'given the nature of the offence with which the accused persons were charged.' Many such decisions are made in the courts and sentences and orders made depending on the presiding magistrates' prejudices about the people involved.



### 3.7 Persons in prison under 'idle and disorderly' laws

Luzira Prison is the main prison that serves Kampala district. Data was obtained from the prisons authorities on the number of persons who are on remand in the prison under 'idle and disorderly' charges. Cases under the charge of being 'idle and disorderly' contributed 7.4% of the total remand population in Luzira Prison in 2012 and 3.7% in 2013 while those under 'rogue and vagabond' offences contributed 3.5% in 2012 and 5% in 2013.<sup>174</sup> This is a total of 9.9% in 2012 and 8.7% in 2013 for both offences combined which is a sizeable percentage of the prison population.

What is interesting is that there are more persons remanded on charges of being idle and disorderly than those for rogue and vagabond and yet the police and court records show otherwise. The reason for this is because Luzira Prison serves many more courts than this study covered. What the data therefore helps to shed light on is that there are many people on pre trial remand in prisons under the 'Idle and disorderly' offences and they make up a sizeable population of the prison.

The public relations officer of the Uganda Prisons Services suggested that if there are alternative punishments and ways of handling 'Idle and disorderly' offences, these ought to

<sup>174</sup> Interview with Mr. Frank Baine, the Public Relations Officer of the Uganda Prisons Service (May 2016)

be followed<sup>175</sup>. Considering that 'Idle and disorderly' crimes are, at best, petty, there seems little justification to imprison those found guilty of committing them.

### 3.8 Conclusion

Despite all the calls from the highest offices in the country to stop the enforcement of the 'idle and disorderly' laws in Uganda, these laws are frequently enforced. This section shows that people are frequently arrested in police swoops and operations and sent to police stations. Many of these are released while others are sent to courts of law, where many of them have their cases dismissed but others plead guilty and find themselves convicted. Many of these persons are mainly sex workers, others LGBTI persons and others drug users. The main offence which is prosecuted is 'being a rogue and vagabond' rather than that of being idle and disorderly.

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<sup>175</sup> As above.

# SECTION IV



## IMPLICATIONS OF THE ENFORCEMENT OF 'IDLE AND DISORDERLY' LAWS ON MARGINALISED GROUPS

### 4.0 Introduction

This section discusses the finding as regards the implications of the enforcement of 'Idle and disorderly' laws on the marginalised persons affected. The section focuses on four specific groups: LGBTI persons, sex workers, and drug users. The violations are: human rights and other violations.

### 4.1 Violations of human rights

Fundamental rights and freedoms are protected in the regional and international instruments to which Uganda is party, as well as in Chapter four of Uganda's supreme Constitution. Due to the fact that 'Idle and disorderly' laws are vague, overbroad and capable of subjective application, the inevitable result of their enforcement is the violation of a myriad of individual rights as discussed below:

#### 4.1.1 The right to equality and non-discrimination

Article 21(1) of the Constitution provides that '(a)ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.' Article 21(2) prohibits discrimination on the grounds of 'sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.' Article 21(3) in turn defines 'discrimination' as giving different treatment to persons, primarily on the basis of their inherent attributes as listed in Article 21(2).

As already seen, 'Idle and disorderly' laws are usually enforced through police swoops which target people basing on their status as sex workers, LGBTI persons, and drug users. Although all these persons are marginalised, those targeted among them are those who are poor, who in most cases are almost all of them. The enforcement of these offences is thus on the basis of economic status. Arresting a person on the basis of their status as a sex worker, drug user or LGBTI person or on the basis of being poor amounts to unfair discrimination and unequal treatment before the law on the basis of economic and social status which are protected grounds under Article 21 of the Constitution.

Members of these groups are often arrested under these provisions purely to target and punish them simply for being poor. A street vendor arrested during a night swoop near the taxi park on her return from selling simple merchandise aptly summarised the unequal nature of 'Idle and disorderly' laws:

*'the laws are unfair, they target us who do not have visible means of subsistence, who cannot afford moving in cars, who go home late at night because we have to come to work in the evening when KCCA has gone off the street...we cannot move freely because we are poor, how will we feed our children?'*

HRAPF exists to serve the poor and marginalised and they assert that their clients who are arrested are almost always arrested under the rogue and vagabond provisions.<sup>176</sup> Of the 22 cases handled by HRAPF in 2014 alone, 15 were for being 'rogue and vagabond' and seven

<sup>176</sup> Interview with ms. Patricia Kimera, is a lawyer and head of sexual minorities unit at HRAPF, 26 April 2016.

were arrests without charges, which arose out of police swoops.<sup>177</sup> Therefore the ‘idle and disorderly’ laws by treating people differently based on their social or economic status constitutes a breach of the right to non-discrimination and equality before the law.

#### 4.1.2 The right to liberty

A person can only be deprived of their liberty within the limits of Article 23(1) of the Constitution. One of the acceptable reasons is for ‘the purpose of bringing that person before a court ... upon reasonable suspicion that the person has committed or is about to commit a criminal offence.’<sup>178</sup> However, a criminal offence can only be valid if such a criminal offence is well defined within the ambit of Article 28(12) of the Constitution which requires every criminal offence to be defined. The ingredients of being idle and disorderly or rogue and vagabond are vague and wide sweeping and as such cannot be defined with any certainty. Arresting someone under any of these offences violates their liberty as it would amount to arbitrary arrest, which is arrest without a legal justification.

Someone standing on the street, or walking is not necessarily idle and this should not be the basis upon which they should be arrested. Targeting people for arrest on the basis of their perceived status violates their right to liberty. A transgender woman, NZ, who was charged with being rogue and vagabond made it clear that she was arrested while walking at 8.00pm and picked up for no other reason but being transgender and walking on the street.

*‘I was arrested on 31<sup>st</sup> December 2012 in Bwaise at about 8:00 pm by police. This is when I met the then District Police Commander (DPC) of Kawempe who regarded me as a homosexual and who informed other police officers that he had been looking for me because I am homosexual.’<sup>179</sup>*

It is not a crime for a transgender person to walk on the street and this cannot be reason enough to arrest them and charge them with an offence like being rogue and vagabond.

Another violation of the right to liberty emerges from the long periods of detention without trial. Most people arrested who do not have access to lawyers and money to pay bribes usually spend more than the constitutionally mandated 48 hours in police custody before being taken to court.<sup>180</sup> Participants in the FGD for drug users explained that one can take up to a week in police custody before being taken to court. Even when taken to court, when they plead not guilty they are remanded to prison where they spend months on remand awaiting trial.<sup>181</sup>

#### 4.1.3 The right to freedom from torture, inhuman and degrading treatment

Article 24 of the Constitution provides that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. Sex workers, LGBTI persons, and drug users are usually mistreated upon arrest. NZ recounted that in the process of being

177 See HRAPF (n 7 above) 20.

178 Constitution (n 25 above) Art 23(1)(c).

179 As narrated by a transgender woman during the Focus Group Discussion with LGBTI persons conducted on the 9<sup>th</sup> April 2014..

180 According to the latest report of the Uganda Human Rights Commission, long and arbitrary detention in police detention facilities remains a serious problem. The report found that suspects are detained from 3 to 38 days due to the lack of magistrates and delays in the investigation as well, on the part of the resident state attorney. See Uganda Human Rights Commission ‘18<sup>th</sup> Annual Report of the Uganda Human Rights Commission’ (2016) available at <http://uhrc.ug/reports> (accessed 23 September 2016).

181 Focus Group Discussion with persons who use drugs conducted on the 1<sup>st</sup> April 2016 at UHRN offices, Makindye Division.

arrested and detained, she was humiliated, disrespected and mistreated. She was made to drive around with police for nine hours and was called disparaging names. Sex workers also reported being beaten, undressed and having their photos taken after being arrested. An officer at Uganda Harm Reduction Network (UHRN), Mr. Syrus Ajuna, recounted a story where a drug user was beaten during arrest until his hand was broken.<sup>182</sup>

Those who spend longer in police custody and those who are sent on remand told stories of being subjected to unpaid manual labour. One of the participants in the FGD for drug users explained that:

*'Once you are arrested, you take one to two weeks before you are taken to court, and during the time you are in police custody, you are subjected to manual labour such as cleaning around the police station. Once you are taken to court, you spend five months to one year on remand before your case is dismissed... I spent five months in Nkozi Prison and one year in Kigo prison before my charge was dismissed.'*

These instances clearly illustrate that the process of enforcing 'Idle and disorderly' laws leads to the violation of the right to be free from torture, inhuman and degrading treatment.

#### 4.1.4 The right to a fair hearing

Article 28 of the Constitution provides for the right to a fair hearing. It has different components.

Under article 28(1)(a), a person charged with a criminal offence shall be presumed innocent until proven guilty. Many persons who are convicted under the 'Idle and Disorderly' laws are in fact never given a fair hearing. The person should be able to plead guilty to all ingredients of the offence. The practice is, however, that an accused person simply pleads guilty so as to get a lighter sentence and not suffer for long periods on remand. Those accused under these provisions face the two grim options of either being convicted of the crime and receiving a relatively light punishment after pleading guilty or, in the alternative, pleading not guilty and risking (at the very least) being remanded for up to six months. Such pleas are forced by circumstances and therefore, the accused persons do not get a chance at a fair trial. From the very beginning, the offence is unclear and the trial itself cannot be said to be fair.

According to Article 28(3)(b) when a person is being arrested, they shall be informed immediately, in a language that the person understands, of the nature of the offence. In arrests of persons charged with 'idle and disorderly' offences, the police do not usually see a reason to inform the suspects as to why they are being arrested. A number of respondents reported not being informed of the reason for their arrest.<sup>183</sup> The Director of Programmes of WONETHA noted that violations of due process rights commonly take place when sex workers are arrested under the 'Idle and disorderly' laws *'The police will not always inform the arrestee why he or she has been arrested'*.<sup>184</sup> The case of CM also illustrates this point as she was arrested without being informed of the reasons for her arrest.

Article 28(12) provides that a person shall not be convicted of a criminal offence unless the offence is defined and the penalty prescribed by law. 'Idle and disorderly' offences suffer from

182 UHRN is a network and provides quality awareness to access to health to PWUDs.

183 During the Focus Group Discussion with persons who use drugs conducted on the 1<sup>st</sup> April 2016 at UHRN offices, Makindye Division., 4 of the 6 participants expressed that they did not understand why they were being arrested and that this was not explained to them by the arresting police officer.

184 Interview with Daisy Nakato and Flavia Kyomukama at WONETHA offices, Makindye Division, 6 April 2016.

the fundamental defect of being vague and wide sweeping, and so every person arrested under them is arrested under an offence that is incapable of proper definition. They therefore suffer a violation of their right to a fair trial.

#### 4.1.5 The right to freedom of movement

Article 29(2)(a) of the Constitution provides that '(e)very Ugandan shall have the right to move freely throughout Uganda'. Article 12(1) of the ACHPR and Article 12 of the ICCPR also protect the freedom of movement within the territory of the country.

The fact that these laws target certain categories of people especially sex workers, puts a limitation on their movement. They fear to move beyond certain hours for fear of being arrested since the swoops usually take place at night, and they also fear to go to certain places for the same reason. Despite this, sometimes arrests take place as early as 6.00pm making it even much more difficult to exercise the right to freedom of movement. For sex workers, this is a severe limitation on their work. The Executive Director of WONETHA noted the severe limitations which these laws place on the freedom of movement of their clients:

*'Sometimes people's opportunities to work are minimized because they risk being arrested if they travel to and from work during unusual hours. Though arrests under these laws are not even limited to a certain time of day ... B got arrested on 6pm on a Friday'<sup>185</sup>*

#### 4.1.6 Violation of the right to practice one's profession

Article 40(2) of the Constitution provides that 'Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.' Sex work is currently not regarded as work in Uganda, but there is a growing movement internationally to protect sex workers as they carry on their work.<sup>186</sup> Therefore the criminalisation of sex work may itself be unconstitutional.

The director of programmes of WONETHA<sup>187</sup> noted that the sex workers fear being in certain places or moving around during night time hours. Sex workers are the group who suffer the most under the enforcement of 'Idle and disorderly' offences. Street vendors also run the risk of being arrested as they move to and from their areas of work or even while they are selling merchandise in public places.

The restriction of movement and presence in certain public areas or during certain times of night limits the available work opportunities of vulnerable people and violates their right to practice their profession of choice in terms of Article 40(2) of the Constitution. This restriction furthermore exclusively applies to persons who cannot afford private means of transport.

## 4.2 Other violations

Persons arrested under the 'Idle and disorderly' laws also suffer other kinds of violations which do not fit neatly under the violation of a particular right.

### 4.2.1 Disruption of family life

The unexpected and often prolonged detention of persons under the 'Idle and disorderly'

<sup>185</sup> As above

<sup>186</sup> Amnesty International 'Global movement votes to adopt policy to protect human rights of sex workers' 11 August 2015 available <https://www.amnesty.org/en/latest/news/2015/08/global-movement-votes-to-adopt-policy-to-protect-human-rights-of-sex-workers/> (accessed 23 September 2016).

<sup>187</sup> n 178 above

laws have an immense effect on their family life. A drug user gave the following account of the disruption of his family life:

*'I spent five months in Nkozi Prison and one year in Kigo prison before my charge was dismissed ...by the time I was released, my family had disintegrated, my children were affected beyond imagination and up to now, they do not recognize me as a caring and loving father but a criminal father.'*<sup>188</sup>

A sex worker, CM, recounted that after spending three months in prison, she found that her 10-year old son had gone missing and she has not been able to trace him since.

#### 4.2.2 Loss of property

Detention under the 'Idle and disorderly' provisions also render the property of arrestees vulnerable to theft and plunder. CM, upon release found that her abandoned house had been ransacked.

#### 4.2.3 Harassment by members of the public

One troubling consequence of being arrested on the strength of 'Idle and disorderly' provisions for LGBTI people in particular, is that such an arrest could serve as an 'outing' in the community. A person could be prevented from returning to their home out of fear of being persecuted by the community. A transgender woman, NZ, stated the following: *'after that arrest, I suffered multiple violations at my former place where I was arrested from because Police had exposed me to the whole village as a homosexual during the operation that night.'*<sup>189</sup>

An arrest under the 'idle and disorderly' laws could potentially have far-reaching and ongoing negative consequences for the targeted person. Due to the level of homophobia in Ugandan society, exposing a person as a homosexual to the community could even put their life in danger.

### 4.3 Conclusion

The enforcement of 'Idle and disorderly' laws has broad-ranging effects on arrestees and violates their fundamental rights and freedoms. As illustrated in this section, sex workers, drug users and LGBTI persons are three vulnerable groups that suffer under the enforcement of these laws. In the absence of a clearly defined purpose which has been proved to be achievable through the implementation of these laws, their enforcement is simply incapable of justification under Uganda's Constitution and international human rights instruments.

188 As narrated by one of the persons who use drugs during the Focus Group Discussion with persons who use drugs conducted on the 1<sup>st</sup> April 2016 at UHRN offices, in Makindye Division.

189 As narrated by a transgender woman during the Focus Group Discussion conducted on the 9<sup>th</sup> April 2014 at Eden Service Park, Bwaise in Kawempe Division.

# SECTION V

## CONCLUSION AND RECOMMENDATIONS

### 5.0 Conclusion

In Uganda, the continued existence and use of 'Idle and disorderly' offences highlights the interplay of poverty and social exclusion on moralistic grounds. This study has considered the reason behind the retention of 'Idle and disorderly' laws on Uganda's law books to be the fact that these provisions can be used to control and oppress 'undesirable' members of society such as LGBTI persons, drug users and sex workers.

The nine 'Idle and disorderly' offences considered in this study were found to be voidable on the basis that they unjustifiably contravene Uganda's Constitution as well as the human rights standards imposed by regional and international law.

In terms of enforcement of these laws, it was found that arrests under the offences of 'being idle and disorderly' and 'being a rogue and vagabond' are a regular occurrence in Kampala. The main offence which is prosecuted is 'being a rogue and vagabond' in terms of section 168 of the Penal Code Act. Slightly more than half of the prosecutions lead to dismissal. In cases where an accused is convicted, it would almost always be the result of pleading guilty to the 'Idle and disorderly' charges. Persons convicted under these provisions are mostly sentenced to community service.

The study has found that the enforcement of 'Idle and disorderly' laws impairs the rights of LGBTI persons and sex workers in that these provisions are used to arbitrarily clamp down on these groups. While drug users are arrested and charged with drug-related offences rather than under the 'Idle and disorderly' laws, the study reveals that the absence of organisations which provide legal aid to this group leads to longer periods of time spent in police custody. Marginalised persons suffer violations of a myriad of their fundamental rights due to the enforcement of these laws.

In terms of serving a legitimate purpose, the main reason proffered for the enforcement of these laws is the prevention of crime. Ugandan law makes provision for arrest without a warrant of persons who are reasonably suspected of having committed or being about to commit a crime. The 'Idle and disorderly' laws serve no legitimate purpose in modern-day Uganda and ought to be scrapped from the law books.

### 5.1 Recommendations

#### To the Uganda Law Reform Commission

- Sections 167 and 168 of the Penal Code Act need to be reviewed in order to ascertain whether they serve a legitimate public purpose and whether these provisions ought to be repealed or amended in light of the Constitution.
- Consider the appropriateness of section 11 of the Criminal Procedure Act, 1950 on arrest of vagabonds, habitual robbers etc as an alternative measure for crime prevention involving arrests.
- Review the appropriateness of using the criminal law to address social problems arising from poverty and unemployment.

### To Parliament

- Repeal sections 167 and 168 of the Penal Code Act 1950. These sections are currently used to exploit and further marginalise vulnerable groups in Ugandan society and their utility in preventing crime is questionable.
- Alternatively, amend sections 167 and 168 of the Penal Code Act in order to ensure that these provisions comply with constitutional as well as regional and international human rights standards. The provisions could be amended to include criminal intent as one of the elements of the crime; to remove the criminalisation of people based on their status rather than their conduct and to provide clearer guidelines as to the exact conduct which is criminalised under these provisions.
- Consider the passage of less restrictive laws which will regulate crime prevention if existing laws apart from the 'Idle and disorderly' offences are deemed insufficient for this task.

### To the judiciary

- Recognise that cases brought before it under the 'Idle and disorderly' provisions are brought under provisions which are voidable under the Constitution of Uganda.
- Consider carefully whether all the elements of the crime have been proved prior to making a conviction under these provisions.
- Refrain from sentencing convicted persons under these provisions to prison but impose fines, community service and cautions instead.

### To the DPP

- Ensure that the rights of persons belonging to marginalised groups are respected and refrain from sanctioning charges under these provisions where a prosecution cannot reasonably be sustained.
- Develop a prosecutorial policy on how charges under sections 167 and 168 are to be dealt with, bearing in mind the voidable nature of these provisions in light of the Constitution of the Republic of Uganda.

### To the Attorney General

- Advise the executive on the way in which the 'Idle and disorderly' laws are being implemented in practice.
- Advise the Executive, Parliament and the Judiciary as to the illegality and non-constitutionality of the actions being undertaken in the name of implementing 'Idle and disorderly' laws.

### To the Inspector General of Police

- Set a standard national policy for the implementation of 'Idle and disorderly' laws.
- Train police officers on the exact content of the 'Idle and disorderly' provisions and provide clear guidelines as to the circumstances which would warrant an arrest under these provisions.



- Ensure the adoption of effective internal policies which could serve to prevent and punish the extortion of arrestees and corruption within the police force.
- Encourage the use of section 11 of the Criminal Procedure Act in cases where it is deemed necessary to carry out an arrest without a warrant.

### **To the Uganda Police Force**

- Refrain from arresting persons in the absence of reasonable suspicion that such a person has committed or is about to commit a crime.
- Keep proper records of all arrests made, charges instituted and cases handled.
- Cooperate with local leaders and crime preventers who may be in a better position to address issues of petty crimes, public disorder and persistent begging within their communities.

### **To civil society organisations working with marginalised groups**

- Institute a challenge against section 167 and 168 of the Penal Code Act in the Constitutional Court on the basis that these provisions are inconsistent with the Constitution and lead to the violation of the constitutional rights of marginalised groups. Alternatively, lobby for the amendment of these provisions in order to better comply with human rights standards.
- Lobby for the reform of the entire Penal Code Act, including sections 167 and 168.
- Engage the judiciary, police and government on the issue of the violation of rights of marginalised groups through the use of 'Idle and disorderly' laws.
- Conduct awareness-raising among marginalised groups in order to inform them about their rights during and after an arrest.
- Look into the expansion of targeted legal aid provision to drug users.
- Monitor and keep record of all cases of arrests of marginalised persons under the 'Idle and disorderly' provisions.

### **To researchers in the field of human rights**

Further research and studies have to be conducted into the following:

- The enforcement of 'Idle and disorderly' laws in areas of Uganda outside of Kampala.
- The legitimacy of convictions under the 'Idle and disorderly' laws, in light of the difficulty of proving all the elements of the crime and the high number of convictions.
- The trends in arrests, charges and prosecution of drug users under the 'Idle and disorderly' laws as well as under other provisions warrant further investigation.
- A comprehensive consideration of the social security measures available to Ugandan citizens.

**To the President and cabinet**

- The President and cabinet are urged to take note of the violations suffered by vulnerable Ugandans due to the implementation of 'Idle and disorderly' laws.
- The President is called upon to stay the enforcement of the 'Idle and disorderly' offences pending the reform of these laws.

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