The legal framework in Zambia

Universality of fundamental rights

“We are of the opinion that the authorities should see to it that sex workers do not face these difficulties as they are also citizens ... and have the same fundamental rights as others.” ¹⁰

All persons are entitled to fundamental rights and freedoms, including the right not to be discriminated against, harassed, or abused, and to have freedom from arbitrary arrest and detention.

The fundamental human rights of all persons are protected in regional and international instruments which Zambia has signed and ratified, including: the African Charter on Human and Peoples’ Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR).

The principle of universality of rights underlies the application of all fundamental human rights. Article 1 of the Universal Declaration of Human Rights (UDHR) provides that “all human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Similarly, Article 4 of the African Charter on Human and Peoples’ Rights provides that “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” Article 5 continues that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, states that: “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” ¹¹

The duty of courts to use international law as a guide when interpreting constitutional rights, has been confirmed in Zambian courts.\textsuperscript{12}

**Constitutional protections**

“Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.”\textsuperscript{13}

The Zambian Constitution was established in 1991, and major amendments came into force in early 2016.\textsuperscript{14} The Constitution is the supreme law of the nation, and all other written or customary law is subject to its provisions.\textsuperscript{15} The rights contained in the Bill of Rights in the Constitution are universal rights, and apply to all persons equally.

Article 11 of the Constitution provides as follows:

“It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

a) Life, liberty, security of person and the protection of the law;

b) Freedom of conscience, expression, assembly, movement and association;

c) Protection of young persons from exploitation;

\textsuperscript{12} In Michael Sata v Post Newspapers Limited and Another (HC) (1995) ZLR, 113, Ngulube CJ noted with approval the acceptance of international instruments in the interpretation of domestic law in domestic litigation, and specifically referred to the International Covenant on Civil and Political Rights and the African Charter on Human and People’s Rights. In the High Court case of Longwe v Inter Continental Hotels (1993) 4 LRC 221, Musumali J stated:  “Ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.” The African Commission on Human and Peoples’ Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties – in Legal Resources Foundation v Zambia, Comm. 211/98, noted that:  “International treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties.”

\textsuperscript{13} The Court of Appeal of Botswana was interpreting article 3 of the Botswana Constitution, which provides that “every person in Botswana is entitled to the fundamental freedoms ….” This section is very similar to article 11 of the Constitution of Zambia, which states that “every person in Zambia has been and shall be entitled to the fundamental rights and freedoms of the individual....” Attorney General of Botswana v Rammoge and Others, Court of Appeal, CACGB-128-14, 16 March 2016, para 58, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf (accessed 16 July 2016).

\textsuperscript{14} Currently, the Bill of Rights is found in the Constitution of 1991, but further constitutional reform processes are underway – which might herald a new Bill of Rights. The amendment of the Constitution by Act 2 of 2016 replaces parts of the Constitution. The Bill of Rights is contained in Part III of the Constitution, and has not been affected by these amendments. The manner of enforcement has however changed since the amendments to the Constitution introduce a new court structure – including a Constitutional Court. Article 1 of Act 2 of 2016 states that “this Act may be cited as the Constitution of Zambia (Amendment) Act and shall be read as one with the Constitution of Zambia, in this Act referred to as the Constitution.”

\textsuperscript{15} Constitution of Zambia Article 1(1).
d) Protection for the privacy of his home and other property and from the deprivation of property without compensation;

And the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

Article 11 is referred to as an umbrella section – with the extent of the various rights elaborated in the provisions that follow. Notably, the Botswana Court of Appeal when interpreting the same provision in the Botswana Constitution, remarked that “fundamental rights are to be enjoyed by every person. To deny any person his or her humanity is to deny such person human dignity – and the protection and upholding of personal dignity is one of the core objectives … of the Constitution”.16

The Constitution protects the human rights and fundamental freedoms of every person, and this includes sex workers. When interpreting the Constitution, the courts must consider the national values – which include human dignity, social justice, equality, and non-discrimination.17 “Discrimination” is defined as “directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status”.18

Article 193(2)(e) of the Constitution, as amended, specifically imposes an obligation on the Police Service to uphold the Bill of Rights, in the enforcement of their duties.

Some of the basic human rights that are important for sex workers include:

<table>
<thead>
<tr>
<th>Rights</th>
<th>What does this mean for sex workers?</th>
<th>Zambia Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equality</strong>: Everyone is equal before the law and has equal benefit and protection of the law.</td>
<td>Sex workers should be treated equally. Laws that exist to protect all persons, should also protect sex workers.</td>
<td>Article 11</td>
</tr>
<tr>
<td><strong>Human dignity</strong>: Everyone has inherent dignity and the right to have their dignity respected and protected.</td>
<td>No person or institution may insult you or take away your self-respect by words or actions.</td>
<td>Article 8(d) – human dignity is a national value that should be used to interpret all rights.</td>
</tr>
</tbody>
</table>

16 Attorney General of Botswana v Rammoge and Others, Court of Appeal, CACGB-128-14, 16 March 2016, para 60 (the underlining is by the court), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf (accessed 16 July 2016). Notably, as in Zambia, the right to dignity is not a separate right in the Bill of Rights but is used as a basis to give meaning to all other rights.
17 Article 8(d) of the Constitution, as amended by Act 2 of 2016.
18 Article 266 of the Constitution (definitions section), as amended by Act 2 of 2016.
<table>
<thead>
<tr>
<th><strong>Security of the person</strong></th>
<th>You have the right to make decisions about your body and your health, and no person may force you to undergo any medical procedures. You also have the right to be protected from violence and abuse.</th>
<th>Article 11(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Right to personal liberty</strong></td>
<td>You may not be arrested without a good reason. If you have been arrested, you must be informed about the reasons for the arrest in your language, and must either be released or brought before a court as soon as possible.</td>
<td>Article 13</td>
</tr>
<tr>
<td><strong>Freedom from inhuman treatment</strong></td>
<td>You cannot be treated badly by people or the police, simply because you are a sex worker. Service providers must respect your rights and take your complaints seriously. You cannot be treated badly while in police custody.</td>
<td>Article 15</td>
</tr>
<tr>
<td><strong>Right to privacy</strong></td>
<td>You have the right to keep your health and work information to yourself. You can also not be searched without your consent. If the police want to search you because they suspect you have committed an offence, they must follow the correct procedures.</td>
<td>Article 17</td>
</tr>
<tr>
<td><strong>Freedom of expression</strong></td>
<td>You have the right to express your views on issues, as long as they do not hurt another person.</td>
<td>Article 20</td>
</tr>
<tr>
<td><strong>Freedom of association</strong></td>
<td>You have the right to join clubs, groups or organisations, and to take part in public gatherings.</td>
<td>Article 21</td>
</tr>
<tr>
<td><strong>Freedom of movement</strong></td>
<td>You may move around the country as you wish, and may not be forced to move to a separate place. If you are detained by the police, this detention must be lawful.</td>
<td>Article 22</td>
</tr>
</tbody>
</table>
**Rights of accused persons:** Every person who has been charged with an offence, is entitled to a fair hearing within a reasonable time, by an impartial court.

<table>
<thead>
<tr>
<th>Article 18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Every person who has been charged with an offence should:</td>
</tr>
<tr>
<td>• Be presumed innocent, until proved guilty;</td>
</tr>
<tr>
<td>• Be informed in detail of the nature of the offence;</td>
</tr>
<tr>
<td>• Be allowed to ask for an interpreter;</td>
</tr>
<tr>
<td>• Be given a copy of a judgment;</td>
</tr>
<tr>
<td>• Not be forced to give evidence.</td>
</tr>
</tbody>
</table>

**Limitation of constitutional rights**

As discussed above, fundamental rights are universal and are enjoyed by every member of society – irrespective of *inter alia* race, culture, and social and economic status. In certain circumstances, however, the State may limit the fundamental rights of persons, if it is reasonable to do so.

If the State, however, seeks to limit the rights of any person, it must prove that the limitation of these rights is proportionate and reasonably justifiable in a democratic society. If the State fails to prove this, the limitation is unlawful and unjustifiable.

The State must provide evidence to justify the limitation. This evidence must show that there is no alternative or lesser means to protect the valid State interest – other than the limitation of the right. Bare assertions, suspicions or speculations by the State that a particular act or conduct is contrary to public morality, public interest, or good order, is insufficient to fulfil the requirements necessary for a justified limitation of a constitutional right.

**Recent legal developments that protect women’s rights**

The *Anti-Gender-Based Violence Act*, was passed in 2011 to protect the victims of gender-based violence. The Act applies in cases where the victim of violence is in a domestic relationship with the perpetrator. A domestic relationship includes a relationship where the victim is in an actual or perceived sexual relationship, of any duration, with the perpetrator. A domestic relationship also relates to instances where family members, parents or a spouse are the perpetrators of violence. A domestic relationship is also present where the victim and perpetrator share the same residence or are co-tenants, and where the victim is a house-helper/keeper in the household of the perpetrator.

Sex workers often experience gender-based violence, which could fall within one of the categories of a domestic relationship. In such cases, they should be able to report the abuse to the police, and should receive assistance.
Gender-based violence refers to any physical, mental, social or economic abuse against a person, because of that person’s gender. Acts which fall within this definition, include: physical abuse; sexual abuse; emotional, verbal or psychological abuse; economic abuse; intimidation; harassment; stalking; controlling behaviour; malicious damage to property; depriving a person of access to property; trafficking; and conduct that in any way endangers the safety, health or wellbeing of the person, undermines the person’s privacy, integrity or security, or detracts from the person’s dignity. A single act may amount to gender-based violence.

If a person has been a victim of gender-based violence from any type of domestic relationship, the Act places specific duties on police officers to assist him or her – including by responding promptly to any request for assistance and offering protection. Importantly, a sex worker is entitled to the same support if she has experienced gender-based violence, and the police may not discriminate against her because she engages in sex work.

The Gender Equity and Equality Act was passed in 2015. Its objectives include the establishment of a Gender Equity and Equality Commission. In terms of section 231 of the Constitution, the Commission shall:

a) Monitor, investigate, research, educate, advise and report on issues concerning gender equality;

b) Ensure institutions comply with legal requirements and other standards relating to gender equality; and

c) Take steps to secure appropriate redress for complaints relating to gender inequality.

The Gender Equity and Equality Act sets out several principles to achieve gender equality and equity including:

• Observance of women’s rights as an integral part of attaining equity and equality in all spheres of life;

• No exploitation, degrading or undermining of women;

• The elimination of gender bias;

• Justice and fairness for survivors of gender-based violence – to ensure dignity, protection and respect.

Section 15(1) of the Gender Equity and Equality Act provides that a person, public body or private body shall not discriminate against any person based on their sex. Section 16(1) further states that a person, public body or private body have a duty to uphold the rights of both sexes and to respect and safeguard the dignity of both sexes. Section 16(2) provides that a person, public body or private body, shall not exploit or subject any person to abusive, violent or degrading treatment. Any person who violates these provisions is liable for criminal punishment.

---

19 See definitions in section 3(1) of Anti-Gender-Based Violence Act, Act 1 of 2011.
20 Section 4.
21 Sections 5, 7 and 8.
22 Section 4, Gender Equity and Equality Act, 2015.
The Act specifically protects women’s sexual and reproductive rights:

“21(1) A woman has the right to adequate sexual and reproductive health, which includes the right to –

a) access sexual and reproductive health services;
b) access family planning services;
c) be protected from sexually transmitted infection;
d) self-protection from sexually transmitted infections;
e) choose the number of children and when to bear those children;
f) control fertility;
g) reproductive rights education; and
h) choose an appropriate method of contraception.”

Section 32(3) of the Act provides that a health officer shall respect the sexual and reproductive health rights and dignity of every person without discrimination.

Section 39 criminalises the act of sexual harassment. Sexual harassment is defined in the Act, as including “conduct or contact of a sexual nature, such as the following:

a) having physical contact, making advances, comments or innuendos without the consent of a person;
b) being offensive, humiliating or intimidating to a person in a suggestive manner; or
c) threatening or imposing a condition on a person for doing or undertaking anything or creating a hostile environment for an employee.”

The Criminal Procedure and Evidence Code

The Criminal Procedure Code sets out the procedures to be followed when a person is arrested. Police are obliged to follow the provisions in the Code.

Any police officer may arrest “any person whom he suspects upon reasonable grounds of having committed a cognisable offence” or a person found in circumstances where there are reasonable grounds for suspecting the person has, or is, about to commit a serious offence.

Several conditions must be met when a police officer effects an arrest:

- The person arrested shall not be subjected to more restraint than is necessary to prevent his escape;
- The police officer must place in safe custody all articles, other than clothes, found upon the person;
- When a woman is to be searched by the police, the search must be made by another woman, with strict regard to decency.

---

23 Section 26(a)
24 Section 26(f) “Any person whom he finds in any highway, yard or other place during the night, and whom he suspects upon reasonable grounds of having committed or being about to commit a felony.”
25 Section 21.
26 Section 22.
27 Section 24.
• Once arrested, a person must be brought before a court within 24 hours;28
• Once arrested, a person may apply for bail at any time,29 and the amount of bail shall not be excessive;30

Where people are arrested during sweeping exercises, there must be specific charges relating to the acts of each persons and there cannot be a joinder of persons in one charge, unless specific circumstances are met.31

These requirements are often not met when police effect arrests, especially when such arrests take place during large-scale operations, and when such arrests target marginalised groups – including sex workers. In a context where there is excessive use of pre-trial detention, it is imperative that consideration is also given to the offences which are used by the police to arrest and detain persons, and whether such detention and offences are indeed necessary.32

Criminal offences relating to sex work

“There is very little evidence to suggest that any criminal laws related to sex work stop demand for sex or reduce the number of sex workers”.33

The legal framework in Zambia can be described as one of partial criminalisation. Partial criminalisation refers to a situation where only the activities related to sex work are criminalised, and not the actual act of selling or buying sex. Some of the offences criminalising these activities are found in the Penal Code of Zambia, which means that sex work still largely takes place in a criminalised environment in Zambia.

Various studies on the impact of partial criminalisation on sex workers raise the following concerns:34

• It contributes to legal structures that tend to make sex workers responsible for their own victimisation, whereby sex workers are seen to ‘deserve what they get’;
• It makes prostitution part of an illicit market, and creates an environment in which brutal forms of exploitation can take root;
• It encourages the convergence of prostitution with other illicit markets such as the drug market;
• It institutionalises an adversarial relationship between sex workers and police – and thus deprives sex workers of the full protection of criminal law when they are victims of crime;

28 Section 33(1).
29 Section 123(1).
30 Section 126(1).
31 Section 136.
• It leads to social and political marginalisation of sex workers, and makes them targets for violence;\(^{35}\) and

• It increases the isolation of street-based sex workers and increases their health and safety risks.

**Possible legal approaches to sex work**

*Total criminalisation* – The selling and buying of sexual services and all related activities are criminalised.

*Partial criminalisation* – Some activities related to sex work are criminalised, but the sex worker is not criminalised.

*Non-criminalisation/Decriminalisation* – The selling and buying of sexual services and all related activities are decriminalised. Apply existing laws to sex work, including labour laws and business regulations.

*Legalisation* – The selling and buying of sexual services and some/all related activities are decriminalised under certain conditions – but sex work is subject to state regulation.

Discussions in this report refer to consensual adult sex work, and accordingly do not address issues related to child prostitution and trafficking – for which criminalisation is the only legal option. Child prostitution and trafficking are both coercive and exploitative, which makes them criminal and distinguishes them from consensual adult sex work.

Discussions on laws criminalising sex work are often informed by arguments on morality. Morality is a complex issue and criminal laws are seldom an appropriate avenue for addressing issues relating to sexual morality. The main “morality” arguments in favour of a continued criminalisation of sex work, are that sex work attacks the institution of marriage and encourages extra-marital sex and sex outside relationships. No research substantiates these arguments and sexual relationships outside marriage exist irrespective of sex work. These arguments reflect a particular form of ‘morality’. It can be argued that the denial of basic human rights to a specific group of persons and leaving them vulnerable to exploitation as a result of continued criminalisation of sex work, is also immoral.

---

### Offences relating to sex work

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section in Penal Code</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Procurement</strong>: It is an offence to procure any person to become a sex worker or to become an inmate of a brothel.</td>
<td>140</td>
<td>Imprisonment of 20 years to life</td>
</tr>
<tr>
<td><strong>Trafficking</strong>: It is an offence to sell or traffic any person.</td>
<td>143</td>
<td>Imprisonment for 20 years or more</td>
</tr>
<tr>
<td><strong>Detention in a brothel</strong>: It is an offence to detain any person in a brothel.</td>
<td>144</td>
<td>Imprisonment for 20 years to life</td>
</tr>
<tr>
<td><strong>Living on the earnings of prostitution</strong>: It is an offence to knowingly live off the earnings of prostitution. This section applies to people who live in an exploitative manner off the earnings of a sex worker, for their own gain. The section does not criminalise the sex worker herself, and does not prevent her from using her earnings. A person who exercises control over a sex worker is presumed to live off her earnings.</td>
<td>146(1)(a), 147(1)</td>
<td>Imprisonment for up to 15 years</td>
</tr>
<tr>
<td><strong>Persistently soliciting in a public place for an immoral purpose</strong>: This section was originally aimed at men who solicited other men for sex. The same offence is also in another section of the Penal Code. The term “immoral” is not defined.</td>
<td>146(1)(b) 178(g)</td>
<td>Imprisonment for up to 15 years</td>
</tr>
<tr>
<td><strong>Brothel-keeping</strong>: Any person who keeps a room, house or place for the purpose of prostitution.</td>
<td>149</td>
<td>Imprisonment of 15 to 25 years</td>
</tr>
<tr>
<td><strong>Obscene matters</strong>: Includes the production of obscene materials and the public exhibition of any indecent show or performance “tending to corrupt morals”. The terminology in this offence is very vague.</td>
<td>177</td>
<td>Imprisonment for up to 5 years or a fine</td>
</tr>
<tr>
<td><strong>Idle and disorderly persons</strong>: A number of acts are criminalised under this section, including “every common prostitute behaving in a disorderly or indecent manner in any public place” and “every person who without lawful excuse publicly does any indecent act”.</td>
<td>178(a) 178(e)</td>
<td>Imprisonment for one month or a fine</td>
</tr>
</tbody>
</table>
Notably, these provisions are seldom enforced – because they require police officials to investigate and provide evidence of the commission of such offences. Evidence to prove the commission of these offences is usually difficult to obtain, and requires police resources to enforce the provisions. The offences each have several elements that should be proved before a conviction can occur. Instead, police authorities often unlawfully use vagrancy provisions in the Penal Code to arrest and detain sex workers. Sex workers therefore remain a target of police enforcement, abuse, harassment and extortion – even though the substantive offences related to sex work are aimed at those who exploit sex workers.

Offences relating to indecency and vagrancy are vague, over-broad and subjectively and arbitrarily applied by police officials. They are usually enforced against poor and vulnerable groups in violation of their fundamental human rights. The Penal Code contains no guidelines on how police officials should exercise their discretion in the application of these offences – which creates a risk of arbitrary enforcement.

The Human Rights Commission of Zambia (HRC) has emphasised that the subjective and inconsistent application of existing laws in Zambia by police officials, are key issues affecting the enjoyment of fundamental rights. The UN Special Rapporteur on Extreme Poverty and Human Rights, has also noted that overly-broad police powers “increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials.”

Participants in this study were not always clear about which offence they had been charged with. They mostly reported having been charged with being “idle and disorderly” or “loitering”. In addition, some reported being charged with “common nuisance”, “soliciting”, “touting” and “rogue and vagabond”.

“Idle and disorderly”

Section 178 of the Penal Code deems a person idle and disorderly when:

- Being a ‘common prostitute’, that person behaves in a disorderly or indecent manner in any public place;
- A person without excuse does any indecent act;
- A person publicly conducts him or herself in a manner likely to cause a breach of peace;
- A person in any public place solicits for an immoral purpose.

In the case of a common prostitute behaving in a disorderly or indecent manner

The elements of the offence that need to be proved are that:

- The accused is a “common prostitute”;


• The accused behaved in a disorderly or indecent manner; and
• Such behaviour took place in public.

While there is no statutory definition for the term “common prostitute”, the term is understood in other jurisdictions to refer to “persons who habitually ply the trade of a prostitute” – as opposed to those who occasionally engage in prostitution. In order to prove the commission of this offence, police officials should provide evidence or proof that the accused has been found engaging in sex work-related offences in the past and has received warnings for doing so, or proof of previous convictions for sex work-related offences.

The reference to “common prostitute” means that any person arrested under the offence is already tainted by a defamatory label when they appear in court, and are likely to face improper prejudice as a result.

Importantly, a person who sells sex but does not engage in disorderly or indecent conduct in a public place – is not guilty of this offence merely by virtue of being a sex worker.

**King v Attorney General**

The Irish Supreme Court has held that it was unconstitutional to attribute criminal conduct to a person purely because of their status. The Court found it unconstitutional that the ingredients of an offence and the mode by which its commission might be proved, were related to “rumour or ill-repute or past conduct” and were “indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality”.

“Soliciting for immoral purposes”

Section 178(g) of the Penal Code deems a person idle and disorderly when that person, in any public place, solicits for an immoral purpose. The same conduct is also prohibited by section 146(1)(b) of the Penal Code – although that section attracts a different penalty.

These sections are vague and over-broad. They do not define “solicit” or “immoral purposes” and create a risk of arbitrary enforcement by police officials against poor and vulnerable individuals, such as sex workers.

The Zambia High Court has held that each of the three elements of the offence (soliciting, in a public place, for an immoral purpose) must be proved to secure a conviction.

The English courts have interpreted the word “soliciting” to mean conduct:

• Reflecting more than a mere act of loitering;
• Amounting to an importuning of prospective customers;40
• Which requires physical presence on the part of the sex worker;41

41 Weisz and Another v Monahan [1962] 1 All ER 664 (holding that soliciting involved the physical presence of the prostitute and
• Extending into a public place;42
• Which is constituent of persistent persuading, begging or entreating.43

The Zambian High Court has similarly held that the element of ‘soliciting’ requires evidence of “persistent importunation”.44

The phrase “immoral purpose” is vague, since it does not provide sufficient information about the conduct which is prohibited. It provides police officials with undue discretion to determine what would amount to an “immoral purpose” within particular circumstances – without providing guidelines on the exercise of this discretion. In City of Chicago v Morales, the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it invited uneven police enforcement.45

**Kaseka and Others v Republic**46

In this case, the police visited rest houses where the appellants were found in rooms. Some had male companions, but others were alone. Police assumed they were there for immoral purposes and arrested them on charges of being idle and disorderly, contrary to section 180(1) of the Malawi Penal Code. Each pleaded guilty, was convicted, and fined K20 or two months’ imprisonment with hard labour. Each of the appellants failed to raise K20 – resulting in the prison term being effected.

The Malawi High Court set aside their convictions and sentences. In doing so, the Court criticised the arbitrary manner in which the police effected the arrests. The Court held that it was wrong to think that because the appellants were found in rest houses – that such constituted immoral activity. A rest house is a business premise open for the public to stay during the day or overnight on payment of a prescribed amount. The Court held that both men and women have a right to stay in rest houses, provided that they do not breach the law – and the police cannot simply arrest persons based on assumptions of engagement in “immoral activity”: “It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity.”

“Rogue and vagabond”

There are various acts in section 181 of the Penal Code, which are used to deem a person rogue and vagabond. A person who is deemed to be rogue and vagabond, is guilty of a misdemeanour and is liable for imprisonment for three months for the first offence, and to one years’ imprisonment for every subsequent offence.
Sex workers are commonly arrested under section 181(d) of the Zambian Penal Code. It provides that “every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose; shall be deemed to be a rogue and vagabond.”

In order to be found guilty of being rogue and vagabond, the police should provide evidence and the prosecution must prove all the elements of the crime. The Malawi High Court in Republic v Lawanja held that “it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without a penny in the pocket. One does not commit an offence by simply wandering about.”

This section is vague and over-broad and likely to be arbitrarily enforced and abused by police officials. In particular, the offence violates criminal law principles, by subjecting someone to arrest without requiring proof of their criminal intent. Several courts in the United States have ruled that certain vagrancy laws are void, because of their vagueness and arbitrary enforcement. In Papachristou v City of Jacksonville, the United States Supreme Court struck down a vagrancy offence as unconstitutionally vague because it did not sufficiently curtail police discretion, which can be easily abused.

**Stella Mwanza and 12 Others v Republic**

The case concerned 13 women arrested as guests of rest houses during a police sweep. The Malawi High Court held that the convictions were improper, as there had been no indication from the facts that the women were there for a disorderly purpose. The judge noted that the English definition of a rogue is a dishonest or unscrupulous person, while a vagabond is one with no fixed home and living an unsettled and errant life. The Court commented that “surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. One would have thought it becomes State responsibility to shelter and provide for such persons than condemn them merely on account of their lack of means.”

**“Loitering”**

The police sometimes cite offences such as loitering to arrest sex workers. Loitering used to be codified in Zambian law when there was a curfew in force. However, the regulation was removed after 1991. In 2014, the Director of Public Prosecutions publicly condemned the continued arrest of people at night for “loitering” – emphasising that no such offence exists.

---

49 [2008] MWHC 228.
“Living on the earnings of prostitution”

In England, the 1885 prohibition on brothels limited the places where sex workers could work, and increased their reliance on third parties such as pimps and taxi drivers to find customers for them. In turn, third parties increasingly exploited and abused sex workers. Thus, in 1898, an amendment to the English Vagrancy Act was passed that was intended to protect sex workers by criminalising men who made a living off the earnings of a sex worker.52 The offence was extended to women who lived off the earnings of sex workers in 1912.53 The application of the living-on-the-earnings offence to women, was premised on stories circulating at the time about women’s involvement in trafficking and procuring other women for the sex trade.54 The offence does not prohibit sex workers from earning a living.55

Sections 146 and 147 of the Penal Code of Zambia makes it a felony to knowingly live wholly or in part on the earnings of the prostitution of another – or, for the purpose of gain to exercise control, direction or influence over the movements of a prostitute. Initially, section 146 applied to men and section 147 applied to women – but the offences were made gender-neutral through an amendment in 2005.56

In many countries, a presumption exists that a person is living on the earnings of prostitution when that person is habitually in the company of, or lives with, a sex worker.

Various courts have consistently sought to align the language of the living-on-the-earnings prohibition with its legislative objective – which was to protect sex workers from exploitation by others. In R v Downey,57 the Canadian Supreme Court confirmed that the prohibition of living on the earnings of prostitution is aimed at a person who lives parasitically off a sex worker’s earnings.

The Ontario Supreme Court in Canada v Bedford considered the extent to which the living-on-the-earnings prohibition played a contributory role in preventing sex workers from taking steps that could reduce the risk of violence from clients.58

52 Speaking about the object of the 1898 amendment, the Secretary of State for the Home Department, noted that “it was intended for the purpose of bringing under the operation of the Vagrancy Act, 1824, as rogues and vagabonds, those men who lived by the disgraceful earnings of the women whom they consorted with and controlled.” House of Commons Debate on the Vagrancy Act Amendment Bill, 14 March 1898, Hansard, available at http://hansard.millbanksystems.com/commons/1898/mar/14/vagrancy-act-amendment-bill (accessed 21 July 2016).

53 Discussions in the House of Lords, at the time, emphasised: “With the immoral man and immoral woman the law is not concerned. But with the procurer, the kidnapper, the souteneur, the trafficker in human life, the person, man or woman, who fattens on the proceeds and earnings of another’s degradation.” House of Lords Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 28 November 1912, Hansard, available at http://hansard.millbanksystems.com/lords/1912/nov/28/criminal-law-amendment-bill (accessed 21 July 2016).

54 The original rationale for having a different offence for men and women, was that the offence included corporal punishment as a punitive option for men – but not for women. Both sections were eventually repealed in England by the Sexual Offences Act of 2003, and replaced with a single provision dealing with any person exerting control for gain over a prostitute.


Canada v Bedford
Exchanging sex for money is legal in Canada. In 2013, the Supreme Court of Canada struck down the offence of living on the earnings of prostitution as being unconstitutional. The judge found that the offence violated the rights of sex workers under article 7 of the Constitution, which protects the right to life, liberty and security. The Court relied on the doctrine which says that, when limiting a right, a law cannot be arbitrary, over-broad, or have a grossly disproportionate impact compared to the State’s objective. The judge ruled that the offence of living on the avails of prostitution was over-broad, and criminalised legitimate business partners of sex workers – when it was originally aimed at pimps and other exploitive relationships.

The above offences stem directly from English law and have often been criticised for being ineffective in curbing sex work. Instead, these laws are being used to stigmatise and unfairly discriminate against sex workers. They leave sex workers vulnerable to extortion, loss of property, and harassment – by both police officials and clients. In addition to the offences’ subjective, arbitrary and indiscriminate application by police, they also unreasonably and unjustifiably limit several constitutional rights – including the right to dignity, equal protection under the law, and freedom and security of the person. These offences perpetuate the vulnerability of sex workers to violence, stigmatisation and abuse, and contribute to their marginalisation.

The UNAIDS Advisory Group on HIV and Sex Work noted that:

“There is very little evidence to suggest that any criminal laws related to sex work reduce demand for sex or the number of sex workers. Rather, all of them create an environment of fear and marginalisation for sex workers, who often have to work in remote and unsafe locations to avoid arrest of themselves or their clients. These laws can undermine sex workers’ ability to work together to identify potentially violent clients and their capacity to demand condom use of clients ... Where sex work is criminalised, sex workers are very vulnerable to abuse and extortion by police in detention facilities and elsewhere ...”

Although the act of selling sex is not criminalised in Zambia, the subjective and arbitrary application of provisions in the Penal Code by police officials, creates a culture of impunity in which sex workers remain a target of police enforcement, harassment and abuse. In this regard, UNAIDS has also noted that the application of vagrancy laws “give police wide latitude to arrest and detain sex workers. Even if they do not generally result in long periods of detention, they contribute to an atmosphere of fear and marginalisation”.

---
