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**SUBMISSION BY THE SOUTHERN AFRICA LITIGATION
CENTRE ON THE REVIEW OF THE PENAL CODE AND
CRIMINAL PROCEDURE CODE**

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REVIEW OF THE ZAMBIAN PENAL CODE

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Summary of recommendations for reform of Penal Code and Criminal Procedure Code

The Southern Africa Litigation Centre (SALC)'s mission is to promote and advance human rights, democratic governance, rule of law and access to justice in Southern Africa through strategic litigation, advocacy and capacity strengthening. SALC works in Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia and Zimbabwe. SALC makes the below submissions based on our technical expertise in the area of criminal law.

SALC draws the Commission's attention to the **Advisory Opinion issued by the African Commission on Human and Peoples' Rights issued on 4 December 2020**. The Advisory Opinion of the African Court relates specifically to sections 178 and 181 of the Penal Code and section 27 of the Criminal Procedure Code of Zambia. The African Court's Advisory Opinion encouraged States to reconceptualise the basis of criminal laws and made the following observations:

- Offences which use the terms 'rogue', 'vagabond', 'idle' and 'disorderly' to label persons, are a reflection of an outdated and largely colonial perception of individuals without any rights and their use dehumanises and degrades individuals with a perceived lower status.
- Common terminology used in framing vagrancy offences include expressions such as 'loitering', 'having no visible means of support' and 'failing to give a good account of oneself' does not provide sufficient indication to the citizens on what the law prohibits while at the same time confers broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws.
- The enforcement of vagrancy laws often results in pretextual arrests, arrests without warrants and illegal pre-trial detention.
- Arrests for vagrancy-related offences, where they occur without a warrant, are not only a disproportionate response to the socio-economic challenges but also discriminatory since they target individuals because of their economic status.

The African Court concluded that States Parties to the Charter have a positive obligation to "take all necessary measures, in the shortest possible time, to review all their laws and by-laws especially those providing for vagrancy-related offences, to amend and/or repeal any such laws and bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Charter."

The African Court, in reaching its decision, relied on the African Commission on Human and Peoples' Rights' Principles on the Decriminalisation of Petty Offences, which set out the legal requirements against which any criminal offences should be measured.¹

This submission further covers the following sections of the Penal Code and Criminal Procedure Code:

Section	Offence	Recommendation
PENAL CODE		

2	Saving of certain laws	Repeal section 2(a) and replace with new provision. Repeal section 2(c).
Chapter IV – GENERAL RULES AS TO CRIMINAL RESPONSIBILITY		
14	Immature age	Amendment of sections 14(1) and (2) to ensure that no child under the age of 12 can be found criminally responsible for any act or omission.
	Trivial nature of offence	Insert new provision on trivial nature of offence.
Chapter VI – PUNISHMENTS		
25	Sentence of death	The repeal of section 25.
Chapter VII – TREASON AND OTHER OFFENCES		
53	Prohibited publication	The amendment of section 53 to remove the power to declare a publication prohibited by the President, and give that power to a board, and to create formal mechanisms for appealing a declaration of prohibition.
54	Offences in respect of prohibited publications	The amendment of section 54 to introduce an element of intent to the offences, so as to require knowledge of the prohibition in order to be liable.
55	Delivery of prohibited publication to police station	The amendment of section 55 to introduce an element of intent to the offences, so as to require knowledge of the prohibition in order to be liable.
60	Seditious intention	The repeal of subsections 60(1)(b) to (j) and section 60(3).
67	Publications of false news with intent to cause fear and alarm to the public	The repeal of section 67.
68	Insulting the national anthem	The repeal of section 68.
69	Defamation of the President	The repeal of section 69.
70	Expressing or showing hatred, ridicule or contempt for persons because of race, tribe, place of origin or colour	The repeal of section 70.
	Chapter on crimes against peace and humanity	Add chapter.
Chapter VIII – OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES AND EXTERNAL TRANQUILITY		
71	Defamation of foreign princes	The repeal of section 71.
Chapter XI – OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE		
116	Contempt of court	The repeal of section 116(3) and the replacement of the word “servant” in section 116(1)(g) with “employee”.
127	Disobedience of orders	The repeal of section 127.
Chapter XV – OFFENCES AGAINST MORALITY		
132	Definition of rape	Reform offence to be gender-neutral and to broaden acts of sexual penetration. Insert proviso stating that marriage is not a defence.
137	Indecent assault	Replace offence with new offence of sexual assault.
138	Defilement of child	Replace offence with range of new offences relating to sexual abuse of children.
139	Defilement of imbecile or person with mental illness	Repeal or replace the section.
146	Person living on earnings of prostitution or persistently soliciting	The repeal of section 146.
147	Person living on, aiding etc, prostitution of another for gain	Insert the phrase “in an exploitative manner”.
149	Brothels	The repeal of section 149.
152	Abortion by pregnant woman or female child	The repeal of section 152.
155	Unnatural offences	The repeal of section 155.
157	Harmful cultural practices	Reformulate offence to apply to adults who did not consent, and to broaden list of harmful cultural practices.

158	Indecent practices between persons of the same sex	The repeal of section 158.
Chapter XVII – NUISANCES AND OFFENCES AGAINST HEATH AND CONVENIENCE		
178	Idle and disorderly persons	Reform section 178.
178(a)	Common prostitute behaving disorderly	The repeal of section 178(a).
178(b)	Begging in public	Insert the word “persistently” or repeal offence.
178(c)	Games of chance	Repeal the offence or narrow its application.
178(d)	Exposure of wounds for alms	Insert the word “persistently” or repeal offence.
178(e)	Public indecency	Move offence to chapter XV and apply only in serious cases.
178(f)	Breach of peace	Limit application of offence to serious cases.
178(g)	Soliciting for immoral purposes	The repeal of section 178(g).
181	Rogues and vagabonds	The repeal of section 181.
Chapter XVIII – DEFAMATION		
191	Libel	The repeal of section 191.
192	Definition of defamatory matter	The repeal of section 192.
193	Definition of publication	The repeal of section 193.
194	Definition of unlawful publication	The repeal of section 194.
195	Cases in which publication of defamatory matter is absolutely privileged	The repeal of section 195.
196	Cases in which defamatory matter is conditionally privileged	The repeal of section 196.
197	Explanation as to good faith	The repeal of section 197.
198	Presumption as to good faith	The repeal of section 198.
Chapter XXII – OFFENCES ENDANGERING LIFE OR HEALTH		
	Torture	Add offences relating to torture
CRIMINAL PROCEDURE CODE		
Part III – GENERAL PROVISIONS		
27	Arrests of vagabonds, habitual robbers etc.	The repeal of section 27(b).
33	Detention of persons without warrant	Define the word “practicable”.
	Chapter on pre-trial custody time limits	Add chapter.
Part IV – PROVISIONS RELATING TO ALL CRIMINAL INVESTIGATIONS		
123	Bail	Review list of offences for which bail restricted.
132	Appeal from and revision of orders	Add provision allowing subordinate courts to amend their own bail decisions.
	Access to information held by prosecution	Add provision placing responsibility on prosecution to disclose evidence to defence in advance.
Part VI – PROCEDURE IN TRIALS BEFORE SUBORDINATE COURTS		
	Child justice	Add various provisions relating to children.
	Admission of unlawfully obtained evidence	Add provision limiting admission of evidence which were obtained in manner that violated constitutional rights, including through torture.
Part X – SENTENCES AND THEIR EXECUTION		
303	Sentence of death	The repeal of section 303.
304	Authority for detention	The repeal of section 304.
305	Record and report to be sent to President	The repeal of section 305.
306	Procedure where woman convicted of capital offence alleges she is pregnant	The repeal of section 306.

Application of common law

Section 2(a) of the Penal Code currently states that the Penal Code does not replace offences under common law. We submit that this is contrary to article 18(8) of the Constitution which provides that “a person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in written law.”

A fundamental principle in criminal law is the principle of *nullum crimen sine lege* ("no crime without law"). Broadly, this principle requires that a person should not face criminal punishment if the act s/he is accused of was not, at the time, criminalised by law. Increasingly, this principle has been adapted to recognise that, all crimes should, in fairness, be declared in unambiguous statutory text so that people know exactly what conduct is prohibited.

In this regard, we recommend that the Commission follows the example of recent Penal Codes in Lesotho (Penal Code Act, 2010)² and Zimbabwe [Criminal Law (Codification and Reform) Act]³, which both rescinded offences under common law and make clear that an individual can be found guilty of only those offences provided for in the Penal Code or other written laws.

Recommendation: The repeal of section 2(a) of the Penal Code and its replacement with a provision which states that no person shall be tried or convicted of an offence not specified in the Penal Code or other statute in force in Zambia.

Contempt of court

Section 116 of the Penal Code currently provides for instances in which a person can be found guilty of contempt of court.

The circumstances set out in section 116 in which a person can be convicted of contempt of court relate to acts which would harm a particular case. These include, for example, showing disrespect to judicial officer or parties in court; failing to attend as witness; obstructing proceedings; misrepresenting proceedings in any speech or writing; publishing information about proceedings held in camera; interfering with witnesses; dismissing an employee who gave evidence; or disregarding a court order.

In addition, section 116(3) says that “the provisions in this section shall be deemed to be in addition to and not in derogation from the power of the court to punish for contempt of court. Similarly, section 2(c) of the Penal Code says that nothing in this Code shall affect “the power of any court to punish a person for contempt of court”.

We are aware that the offence of contempt of court, if too widely applicable, has been used to curb freedom of speech. The purpose of the contempt of court offence is not to shield the judiciary or judicial system from criticism. The offence of contempt of court requires that the conduct complained of must have been calculated to undermine public confidence in the proper functioning of the courts.

The offence is no longer applicable in the United States, where the courts described it as an offence of “English foolishness” which interfered with the right to freedom of expression.⁴ Vocal public scrutiny of the courts constitutes a “democratic check on the judiciary” and the offence of contempt of court should be reserved for the most exceptional cases only where the contempt is serious and where it is in the public interest to apply the offence.⁵

Recommendation: The repeal of sections 116(3) and 2(c) of the Penal Code. The word “servant” in section 116(1)(g) should be replaced with “employee”.

Age of criminal responsibility

Section 14(1) of the Penal Code provides that a person under the age of eight years should not be held criminally responsible for any act or omission. Section 14(2) states that a person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved at the time of doing the act or making the omission that s/he had capacity to know that s/he ought not to do the act or make the omission.

The UN Human Rights Committee, in its concluding observations on Zambia’s third periodic report, urged that the minimum age of criminal responsibility be raised to an acceptable level under international standards. The same observation was made by the Committee on the Rights of the Child when it considered Zambia’s initial report.⁶

In General Comment 10, the Committee on the Rights of the Child concludes that ‘a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.’⁷

Rule 4 of the Beijing Rules recommends that any minimum age of criminal responsibility ‘shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’. The Commentary to this Rule states that “the modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour...”⁸

The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002, recommended that States should “establish laws and procedures which set a minimum age below which children will be presumed not to have the criminal capacity to infringe criminal law. The age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.”

Recommendation: Sections 14(1) and (2) should be amended to ensure that no child under the age of 12 can be found criminally responsible for any act or omission.

Trivial nature of an offence

We recommend that Chapter IV of the Penal Code relating to general rules such as those of criminal responsibility, include a provision relating to trivialities. Such a provision should provide that a court should acquit an accused if the conduct is of a trivial nature in relation to the most serious conduct prohibited by the particular provision. This would be in line with the application of the principle *de minimis non curat lex* (“the law does not concern itself with trifles”).

In Zimbabwe, section 270 of the Criminal Law (Codification and Reform) Act makes provision for an accused to be acquitted if the harm to a person or the community occasioned by the crime in question is so trivial as not to warrant a conviction. Section 270(2) sets out the factors

to be considered in deciding whether the crime is of a sufficiently trivial nature to justify an acquittal, including:

- The extent of any harm done by the commission of the crime to any person or to the community as a whole; and
- The extent to which it appears, from the enactment which created the crime, that the lawmaker wished to prohibit conduct such as that perpetrated by the accused; and
- Whether or not an acquittal will encourage other persons to commit the crime concerned.

Recommendation: Insert new provision on trivial nature of offence.

Abolishing the death penalty

Section 25 of the Penal Code currently allows the courts to impose the death sentence, by hanging. The death penalty is excluded in cases where the offender was under eighteen when the offence was committed, and where the offender is pregnant.

The procedures for the execution of the death penalty are provided for in sections 303 to 306 of the Criminal Procedure Code.

Zambia currently has a de facto abolitionist stance to the death penalty as a result of its de facto moratorium on executions since 1997. We argue that there is currently no proof that the death penalty deters crime, and its continued existence runs contrary to the move towards a rehabilitative approach to crime. Furthermore, we argue that the penal code should reflect the current reality in Zambia, which is one where executions are not taking place.

A defining case in the region, was that of the *State v Makwanyane and another*, 1995 (3) SA 391, where the South African Constitutional Court declared the death penalty to be a violation of the rights to life, dignity and freedom from cruel, inhuman and degrading treatment. The judgment critiques a number of pro-death penalty arguments relating to deterrence and retribution.⁹

In its Study on the Death Penalty in Africa, the African Commission on Human and Peoples' Rights, noted that the death penalty does not deter criminals more than would do, say, life imprisonment, that it violates human rights, that it entails the risk of executing a wrongly convicted person, and that punishment that allows criminals to reflect and reform themselves is more appropriate than execution. The Study asks whether a system based on the rule of law can continue to run the risk of depriving persons of the right to life; whether it is acceptable to apply the death penalty where there is appropriate alternative punishment; and whether it is really humane to keep a person on the death row for years, with him/her not knowing if the next day will be his/her last.

The African Commission on Human and Peoples' Rights noted in a recent statement:¹⁰

“Scientific research on the impact of the death penalty has shown that its dissuasive aspects are not more effective than those of other forms of punishment, such as life in prison. By executing murderers, child rapists and other perpetrators of barbaric acts in order to calm the grief of families of victims, we are moving closer to the notion of vengeance which brings to mind the ancient era of private justice when victims and their families took the law into their own hands. The death penalty, by its absolute and irreparable nature, is incompatible with any policy to reform offenders, is against any system based on respect for human beings, impedes the unity and reconciliation of people emerging from conflict or

serious crimes, and jeopardises criminal justice by making it absolute whereas it has to remain attentive to possible errors.”

We note that the Committee against Torture in its concluding observations and recommendations made in respect of Zambia’s second periodic report, recommended that Zambia should consider taking measures to restrict the application of the death penalty.¹¹

Similarly, the UN Human Rights Committee, in its concluding observations on Zambia’s third periodic report reiterated “its view that mandatory imposition of death penalty for aggravated robbery in which a firearm is used is in violation of article 6 (2) of the Covenant.”¹²

We further note that the African Commission on Human and People’s Rights passed a resolution urging States observe a moratorium on the execution of death sentences with a view to abolishing the death penalty.¹³

We submit that the time has come to abolish the death penalty and urge Zambia to join the many States in Africa which have legally abolished the death penalty, in particular Angola, Benin, Burundi, Cape Verde, Côte d’Ivoire, Djibouti, Gabon, Guinea-Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tomé and Príncipe, Senegal, Seychelles, South Africa and Togo.

Recommendation: The repeal of section 25 of the Penal Code and sections 303 to 306 of the Criminal Procedure Code.

Creating offences relating to torture

Article 15 of the Constitution provides that “a person shall not be subjected to torture, or to inhuman and degrading or other like treatment”.

We note that Zambia acceded to the Convention against Torture and Other Cruel Inhumane and Degrading Treatment or Punishment (CAT) in November 1998 and note that the Committee against Torture, in its concluding observations and recommendations made in respect of Zambia’s second periodic report, urged Zambia to include in its criminal legislation, provisions criminalising acts of torture and appropriate penalties that take into account the grave nature of such acts. The crime of assault is currently used to prosecute cases of torture.

The UN Human Rights Committee, in its concluding observations on Zambia’s third periodic report, stated that:

“The State party should ensure that each case of torture or ill-treatment is seriously investigated, prosecuted and punished in an appropriate manner under its criminal legislation, and that adequate reparation, including compensation, is granted to the victims. In order to facilitate such policy, the State party should envisage criminalizing torture and cruel, inhuman and degrading treatment as such.”

We submit that Zambia should have an absolute prohibition against torture, as provided for in international law (*jus cogens*), whereby no exceptional circumstances whatsoever may be invoked to justify it.

We further submit that the CAT obliges Zambia to establish universal jurisdiction over perpetrators of torture in circumstances where the torture was not committed in Zambia, by Zambians, or against Zambians, and the perpetrator is present in Zambia but cannot be legally

extradited to the appropriate country for prosecution. The principle of universal jurisdiction in this situation ensures that perpetrators do not avoid accountability.

Recommendation: All acts of torture should be included as substantive offences in the Penal Code.

Creating offences relating to crimes against peace and humanity

We note that Zambia ratified the Rome Statute of the International Criminal Court (Rome Statute) on 13 November 2002. In order to uphold the country's obligation to domesticate this important treaty, we recommend the inclusion of specific crimes related thereto in the Penal Code.

As an example, it is useful to consider Angola's Penal Code. Article 372 of the Penal Code prohibits torture, cruel, inhuman or degrading treatment, carried out by person law enforcement and criminal justice personnel. It imposes a penalty of 1 to 6 years, unless another Penal Code provision imposes a more severe penalty for the person's actions. Article 374 provides that persons superior to those who carried out the torture or cruel treatment, can be held criminally liable where they failed to denounce such actions once they became aware of it, and in instances where they expressly or tacitly allowed the practice by a subordinate, in which case they are liable to an aggravated sentence. The Angola Penal Code criminalizes crimes against humanity, and genocide, and has gone further to criminalize "other crimes against humanity", and "other war crimes" under international law, thus ensuring that these provisions are not cast in stone and incorporates developments in international law (Articles 386 and 390).

The Lesotho Penal Code also incorporates the crimes of genocide,¹⁴ crimes against humanity,¹⁵ and war crimes.¹⁶

We recommend that the definitions of the crimes of genocide, war crimes and crimes against humanity in the Rome Statute¹⁷ be incorporated into the Penal Code so as to make those acts crimes under Zambian domestic law.

We recommend that, to ensure full cooperation with the complementarity principle in the Rome Statute,¹⁸ the definitions of the Rome Statute crimes in the Penal Code make it clear that acts of genocide, war crimes, and crimes against humanity are crimes under Zambian law irrespective of where they were committed, and by and against whom. This will ensure that Zambia will be competent to prosecute Rome Statute crimes in situations where extradition to another country and referral to the International Criminal Court is inappropriate.

Recommendation: Insert a new chapter in Penal Code which addresses obligations under the Rome Statute and creates various new crimes, including genocide, war crimes and crimes against humanity.

Offences relating to freedom of expression

There are a number of offences in the Penal Code which are contrary to the right to freedom of expression as protected in article 20 of Zambia's Constitution. Rand J in the case of *Boucher v The King*¹⁹ notes that:

“There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty’s subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.”

The African Commission, in the case of *Constitutional Rights Project and Others v Nigeria*²⁰ held that “freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions”.²¹

The African Commission on Human and Peoples’ Rights’ *Declaration of Principles on Freedom of Expression in Africa* (2002) states the following:

- “Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human rights and an indispensable component of democracy.
- Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.
- No one shall be subject to arbitrary interference with his or her freedom of expression.
- Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.
- Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.”

The UN Human Rights Committee’s General Comment 34 provides that restrictions on the exercise of freedom of expression “may not put in jeopardy the right itself” (para 21). The law “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly” and “may not confer unfettered discretion for the restrictions of freedom of expression on those charged with its execution” and laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not” (para 25). Restrictions must be “necessary for a legitimate purpose” (para 33), must not be overbroad (para 34), must conform to the principle of proportionality, must be appropriate to achieve their protective function, must be the least intrusive instrument amongst those which might achieve their protective function and must be proportionate to the interest to be protected (para 34).

Prohibited publications

Chapter VII of the Penal Code relates to treason. Under this chapter, section 53 allows the President to declare any publication a prohibited publication if he deems it to be contrary to the public interest. The discretion of the President is absolute.

The section is overly broad. Section 53(3) for example states that if an order declares all publications made by a specific person or organisation prohibited publications, then all future publications of these persons or organisations would also be prohibited publications. Section 53(5) provides that, where a class of publications have been declared prohibited, an application can be made for approval to import a publication falling within that order. However, where such approval is refused, an appeal lies only to the President, whose decision is final.

Section 54(1) relates to offences in relation to prohibited publications, and makes it an offence to import, publish, sell, offer for sale, distribute, or reproduce any prohibited publication or extract of a prohibited publication. Section 54(1) makes it an offence to possess a prohibited publication or extracts therefrom. Section 55 deals with individuals who are sent prohibited publications, or are in possession of publications which are subsequently declared prohibited. This section makes it an offence to not deliver such a publication to the nearest police station.

For all these offences there is punishment of up to a year for a first offence.

Recommendation: We recommend that the procedure by which publications are declared prohibited be amended. The power to declare a publication prohibited should be in the hands of a body composed of members with specific expertise in media and related activities. There should also be a thorough appeal process, with new decision makers hearing the appeal. As an example it is useful to consider the Film and Publications Board in South Africa. The Board was established by the Film and Publications Act, 65 of 1996 which was enacted to regulate the creation, production, possession, and distribution of publications and films. We also recommend that the element of intent be added to the offences related to possession and distribution of prohibited publications by requiring knowledge that a publication is prohibited.

Seditious practices

Section 57 of the Penal Code relates to offences in respect of seditious practices. In terms of the section, any person who does anything with a seditious intention, including uttering seditious words or producing seditious publications is guilty of an offence and liable to seven years imprisonment or a fine for a first offence.

Section 60 elaborates on which acts would constitute a seditious intention would consist of and broadens seditious intention beyond intention to unlawfully overthrow government (the normal definition of sedition).²² Section 60 accordingly includes as seditious, acts which would better fall under other crimes, such as incitement of violence. Section 60 further includes acts which violate freedom of expression, such as advocating for a part of the State to be independent.

Common law offences of sedition have been abolished in England, Wales and Scotland. The offence of sedition has been held to be unconstitutional by Nigeria²³ and Uganda²⁴ on the basis that it was vague and rooted in the purpose that “colonialists did not want to be criticised”. The Eswatini High Court declared some sedition provisions unconstitutional in 2016.²⁵

The crime of sedition is contrary to modern principles of international human rights. For example, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995) affirms that, “expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.” The

offence has been declared in violation of the right to freedom of expression by the ECOWAS Court of Justice, in 2018, and East African Court of Justice, in 2019.

Recommendation: In order to bring this section in line with the Constitution we recommend that the subsections 1(b) to (j) be deleted. Section 60(3) relates to section 60(1)(f) and so should be deleted as well.

Alarming publications

Section 67 of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence and is liable, upon conviction, to a period of imprisonment.

This provision is in direct conflict with the constitutional protection of the right to freedom of expression, which includes the freedom to impart and communicate ideas and information. The wording of section 67 is too broad to be justifiable under section 20(3) of the Constitution which provides circumstances in which the right may be permissibly infringed.

These concerns were also raised by the UN Human Rights Committee in its concluding observations on Zambia's third periodic report:

“The Committee notes with particular concern that under the Penal Code, defamation against the President as well as publication of false news are still considered as criminal offences. The Committee reiterates its concern over reports of arrests and charges brought against journalists for the publication of articles critical of the Government, which are used as harassment and censorship techniques.

The State party should repeal the above-mentioned provisions of the Penal Code. It should find other means to ensure accountability of the press, so as to be in full compliance with the Covenant, in particular the right to freedom of expression.”

In Zambia, the High Court declared the false news offence unconstitutional in 2014 in **Chipenzi v Attorney General** [2014] ZMHC 112. The Court recognised the colonial history of the offence, and that the context in which the offence was introduced differed markedly from the present day. The Court explained that the flaw in the offence was that it presupposed knowledge of the falsity of the statement, and placed a reverse onus on an accused that, notwithstanding its objective falsity, they had made efforts to verify its truth, thus infringing the presumption of innocence. In addition, the Court highlighted that the existence of the offence can contribute to a culture of fear amongst journalists.

Recommendation: Formally repeal section 67 of the Penal Code.

Criminalisation of insults

Insulting the national anthem

Section 68 criminalises saying or publishing anything with the intent to insult the national anthem. This provision is in direct conflict with the constitutional protection of the right to freedom of expression, which protects the freedom to impart and communicate ideas. The permissible limitations of the right contained in article 20(3) cannot be interpreted to cover the situation of insulting the national anthem, and so this provision is an unjustifiable limitation to the right.

Recommendation: That section 68 be repealed in its entirety.

Defamation of the President

Section 69 of the Penal Code states that: “Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”

This provision is in direct conflict with the constitutional protection of the right to freedom of expression, which includes the freedom to impart and communicate ideas and information. The reputation of the President is not enough to trump the exercise of the right to freedom of expression by others, and so section 69 is not justifiable under article 20(3) of the Constitution which provides circumstances in which the right may be permissibly infringed.

We note the concerns expressed by the UN Human Rights Committee, in its concluding observations on Zambia’s third periodic report, about the offence of defamation against the President, and its recommendation that it should be repealed.

The offence of defamation of the President often does not contain the explicit defences that exist in the offence of criminal defamation. This offence is archaic and does not fit in a democracy where a President is elected and as a public officer should be willing to face criticism. Public figures ought to be required to tolerate a greater degree of criticism. The sanction is further so severe as to inhibit freedom of expression.

Recommendation: That section 69 be repealed in its entirety.

Defamation of foreign princes

Section 71 of the Penal Code criminalises the defamation of foreign princes, ambassadors or other foreign dignitary in a way that intends to disturb the peace and friendship between Zambia and that person’s country. We are of the view that other mechanisms can be used to deal with the publication of material that genuinely defames such persons, such as civil defamation. This provision also unjustifiably limits the right to freedom of expression.

Recommendation: That section 71 be repealed in its entirety.

Disobedience of order

Section 127 of the Penal Code Act provides that: “Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.”

The primary concern with the offence is its broad framing: It makes it an offence to disobey the order of any person “acting in any public capacity” even if the person who is alleged to have disobeyed the order was not aware of the public capacity of the person or his/her duty to

obey that person's orders. This amounts to a person being found guilty of conduct which they would not have known to be an offence at the time, and then being liable to 2 years' imprisonment.

In the Supreme Court of Nigeria case of **Chief Olabode George and Others v Federal Republic of Nigeria** SC 180/2012, the Court considered the offence of "Disobedience to lawful order issued by Constituted Authority" in section 203 of the Criminal Code of Nigeria. The Court held that the section of the Criminal Code is at variance with provision of section 36(12) of the Constitution. They therefore declared it unconstitutional and null and void. Section 36(12) of the Constitution provides: "(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law."

Recommendation: That section 127 be repealed.

Criminal defamation

Chapter XVIII of the Penal Code makes criminal defamation an offence. Section 191 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 192 as matter 'likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation') concerning another person, with the intent to defame that person.

The African Commission on Human and Peoples' Rights and the Pan African Parliament have called for the repeal of criminal defamation laws because of the chilling affect that these laws have on the media. Journalists, facing a criminal charge, can be arrested, detained awaiting trial and can be sentenced to periods of imprisonment if found guilty.

We are of the view that all of the provisions of the Penal Code relating to criminal defamation do not comply with international standards for freedom of expression and should be repealed. We are of the view that other mechanisms can be used to deal with the publication of material that genuinely defames such persons, such as civil defamation as well as enforcement of media codes of ethics by self-regulatory bodies such as the Zambia Media Council.

Courts in Africa have found that the offence of criminal defamation is disproportionate in its limitation of freedom of expression because of the chilling effect of the offence, the existence of a civil remedy, and the severe impact of imprisonment. This position was taken by the Zimbabwe Constitutional Court,²⁶ by the African Court on Human and Peoples' Rights,²⁷ by the Kenya High Court²⁸ and by the Lesotho Constitutional Court.²⁹

Recommendation: The following sections should be repealed – Section 191 (Libel); section 92 (Definition of defamatory matter); section 193 (Definition of publication); section 194 (Definition of unlawful publication); section 195 (Cases in which publication of defamatory matter is absolutely privileged); section 196 (Cases in which defamatory matter is conditionally privileged); section 197 (Explanation as to good faith) and section 198 (Presumption as to good faith).

Sexual offences and consent

Chapter XV of the Penal Code deals with offences against morality. It creates offences in cases where consent was absent and in cases where consent was present. We do not recommend the criminalisation of acts committed between consenting adults.

Criminal law is the law's ultimate threat and should only be utilised where there is evidence of harm to society resulting from the specific conduct. We submit that there is no evidence that decriminalising consensual sexual conduct between adults will harm society in any tangible way.

Much of the law on sexual offences dates from more than a hundred years ago when society and the roles of men and women were perceived very differently. Loving sexual relationships form a rich and fulfilling part of life. Where sex occurs without consent or abusively it is harmful and degrading. Criminal law sets the boundaries for what is culpable and deserving of punishment. The law should deter and prevent sexual violence from happening, enable perpetrators to be prosecuted fairly and provide justice to victims.

Where criminal law makes no distinction between acts of a consensual and non-consensual nature and imposes harsh penalties irrespective of whether consent was present, it has overstepped its boundaries.

We submit that individuals have the right to make their own decisions about consensual behaviour and that the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause.

The South African Constitutional Court recently discussed the criminalisation of consensual sexual activity between children aged between 12 and 16 years of age. The court made the following general points which are relevant for this discussion:

“It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive... If one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has severe effect on the social lives and dignity of those targeted... When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her.”³⁰

It is our submission that rape and sexual assault are primarily crimes against the sexual autonomy of others. Every adult has the right and the responsibility to make decisions about their sexual conduct and to respect the rights of others. No other approach is viable in a society that values equality and respect for the rights of each individual. We conclude that consent is the essential issue in sexual offences, and that the offences of rape and sexual assault are essentially about violating another person's freedom to withhold sexual contact.

Sexual offences involving absence of consent

We deal in this section with some of the offences where consent was absent, and recommend reformulation of these offences.

Rape

Section 132 of the Penal Code states the definition of rape as follows:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed ‘rape’.”

Each aspect of the definition of rape is discussed below:

The definition of rape should be gender neutral

Currently, the definition of rape in the Penal Code states that only a woman or girl can be raped and the courts have interpreted the term “unlawful carnal knowledge” to apply specifically to penetration of the vagina by a penis. This is problematic.

Of all sexual offences, rape is the most serious. Rape is a crime different from other violent crimes because it not only violates the victim’s physical safety, but also their sexual and psychological integrity. The act of rape is invasive, dehumanising and humiliating and its consequences can be severe.

Non-consensual anal intercourse is a severe type of indecent assault comparable to rape and deserving of similar penalties. There is currently an absence of adequate legal protections for men who have experienced non-consensual anal penetration.

The definition of rape has gradually been reformed in many jurisdictions to acknowledge that all acts of forced sex must be treated equally, that not only women experience rape and that rape is not only committed through vaginal penetration by the penis.³¹ Thus, in many jurisdictions the definition of rape was extended to cases of penetration per anus or mouth.³²

In the United Kingdom, the Criminal Justice and Public Order Act of 1994 acknowledged that a man could be a victim of rape and the definition of the *actus reus* was amended to cover vaginal and anal intercourse against a woman or another man without his or her consent. The Sexual Offences Act of 2003 overhauled sexual offences legislation. The offence of rape is committed, in terms of section 1 of the Sexual Offences Act of 2003, when a man intentionally penetrates the vagina, anus or mouth of another person with his penis, and where the other person does not consent to such penetration. A penalty of life imprisonment attaches to rape.

Similarly, the Law Reform Commission in South Africa was of the view that the essence of rape is the sexual penetration of a person any another person without consent, and such sexual penetration comes in many forms. The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 accordingly extended the definition of rape to all forms of sexual penetration, and stated that men and women can be victims and perpetrators of the offence.

The Constitutional Court of South Africa in the *Masiya* case³³ considered the constitutional validity of the common law definition of rape to the extent that it excluded anal penetration and was gender-specific. The majority held that the “extension of the definition of rape to include anal penetration will not only yield advantages to the survivor but will also express the abhorrence with which our society regards these pervasive but outrageous acts.”³⁴

In the *Masiya* case, then Chief Justice Langa (with Sachs J concurring) argued that the development of the definition of rape should include anal rape of men.³⁵ He held that it should be recognised that anal penetration is as severe an attack on a person's dignity, bodily integrity and privacy as vaginal penetration. To not treat the anal penetration of a male the same as the anal penetration of a female "fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims."³⁶

The South African Constitutional Court's reasoning is also in keeping with the protection provided for under the Zambian Constitution which prohibits discrimination on the basis of gender under section 23.

Recommendation: The definition of rape should be gender-neutral and be broadened to include other acts of sexual penetration.

Marital rape should be criminalised

The Anti-Gender-Based Violence Act, 1 of 2011, is an important step to address gender-based violence. The Act defines "sexual abuse" to include "the engagement of another person in sexual contact, whether married or not, which includes sexual conduct that abuses, humiliates or degrades the other person or otherwise violates another person's sexual integrity, or sexual contact by a person aware of being infected with HIV or any other sexually transmitted infection with another person without that other person being given prior information of the infection". Thus, marital rape can be seen as a form of sexual abuse falling within the ambit of the Act. The Act however falls short of criminalising marital rape.

The criminalisation of marital rape was recommended by the Committee on the Elimination of Discrimination Against Women as part of its concluding observations regarding Zambia's sixth periodic report.³⁷

Recommendation: The definition of rape be amended to specifically provide that the existence of marriage between the victim and the perpetrator is not a defence.

Consent and coercive circumstances

Lack of consent is central to the offence of rape. The essence of the crime is that sexual penetration took place without the consent of the complainant. It is vital that the law is as clear as possible about what consent means. The law sets the ground rules of what is and is not criminal behaviour, and all citizens need to know and understand what these are. This is particularly important because consent to sexual activity is so much part of a private relationship where verbal and non-verbal messages can be mistaken and where assumptions about what is and is not appropriate can lead to significant misunderstanding and, in extreme cases, to forced and unwelcome sex. To have the definition of consent elucidated only in case law is insufficient as this is not clear to many people and new judgments can change things.

The offence of rape currently recognises that consent obtained through coercive circumstances should not be seen as consent if it is obtained:

- By force or by means of threats or intimidation of any kind;
- By fear of bodily harm;
- By means of false representations as to the nature of the act;
- By personating her husband.

Recommendation: The list of circumstances in which consent would be seen as coercive, should be non-exhaustive and include, in addition to the circumstances mentioned above:

- By threats of fear of serious harm or detriment of any type to themselves or another person or property;
- There is an abuse of power which inhibits person's ability to indicate unwillingness or resistance;
- The person was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;
- The person did not understand the purpose of the act, whether because they lacked capacity to understand or were deceived as to the purpose;
- Was mistaken as to the identity of the person;
- Was unable to resist because they are abducted or unlawfully detained;
- A third party consented on their behalf.

Indecent assault

Section 137 of the Penal Code provides for the offence of indecent assault:

“(1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years.

(2) It shall be no defence to a charge for an indecent assault on a girl under the age of twelve years to prove that she consented to the act of indecency:

Provided that it shall be a sufficient defence to any charge under this subsection if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of twelve years.”

This offence is gender specific and fails to recognise that indecent assault can be perpetrated against men and boys. The offence is a generic crime comprehending unlawful sexual encounters other than rape. Lack of consent renders the act unlawful. The offence further suggests that a child under 12 cannot consent to an indecent act.³⁸

The nature and effect of sexual assaults of all kinds on the victim, both men and women, are not sufficiently understood by the law. Our starting point is that the law should offer protection to all children under the age of 16, irrespective of whether they are boys or girls.

South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, created a new offence of sexual assault, which was gender neutral and related to acts of sexual violation (sexual acts excluding penetration).

Recommendation: Replace indecent assault with the gender-neutral offence of sexual assault.

Defilement

Section 138 of the Penal Code makes it an offence for any person to unlawfully and carnally know a child (defilement of child). The offence applies to sex with girls or boys under the age of 16.

Section 138(4) provides that where a child over 12 commits the offence, the child would be liable to community service or counselling.

This offence is wholly inadequate for a number of reasons:

- The offence is incoherent in that it provides for rape of a child, yet girls are covered under the offence of rape already.³⁹
- Section 138(4) fails to distinguish between cases where the children consented and cases where there was no consent. It also fails to recognise that some children were merely experimenting and would benefit from counselling and community service, whilst others are sex offenders who require a more structured intervention. This section should be subject to a report from a social worker.

It is submitted that this offence should be repealed and the offence of rape should be broadened to be gender neutral. In addition, cases where a child between 13 and 16 years of age were claimed to have consented to sex, the perpetrator should be charged with the offence of “statutory rape”.

The United Kingdom, in its reform of its sexual offences legislation, recommended the inclusion of a new offence aimed at adults who sexually abuse children under the age of 16 years. Sexual abuse in this context, can include sexual penetration with a child under 16; or any sexual act towards or with a child under 16; or inciting or compelling a child to carry out a sexual act, whether on the accused, another person or the child himself; or to force a child to witness a sexual act (whether live or recorded). The only person who is criminally liable for this offence is the adult. There is no criminal liability on the child, whether boy or girl, however much they may appear to have consented, aided or abetted the offence. This offence is essentially about the adult’s responsibility towards the child.⁴⁰

The South African Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 created specific offences related to sexual grooming and exploitation of children which are worth considering for inclusion in the Penal Code.

Section 139 refers to defilement of a person with a mental illness. The wording of this offence is offensive and should be adapted to refer to a person with a mental disability. A mental disability can be permanent or temporary and for the purpose of this section, should have the effect of making the person unable to appreciate the nature of the sexual act or unable to resist the commission of such an act, or unable to communicate his or her unwillingness to participate in such an act.

In October 2017, the High Court in **Mwewa and Others v Attorney General and Another**, Case 2017/HP 204 (2017) ruled that section 5 of the Mental Disorders Act was unconstitutional, offensive and discriminatory, as it created categories for persons regarded as

mentally “disordered”, “mentally infirm”, an “idiot”, “imbecile”, “feeble-minded” and a “moral imbecile”. The same would apply to similar wording in the PC and CPC.

It is essential that section 139 is not overly broad in that it makes any sex with a person with a mental disability an offence. The law must balance two competing interests: protecting people with mental impairments from exploitation, and recognising their sexual rights.⁴¹

Recommendation: Reformulate sexual offences pertaining to sexual abuse of children and persons with mental disabilities.

Decriminalising consensual sexual acts

Offences relating to sex work

Living off the earnings of prostitution

Sections 146 and 147 of the Penal Code relate to the offence of living on the earnings of prostitution and being involved in providing clients for a sex worker. The offences essentially cover the same conduct and, for consistency, one of the offences should be deleted.

The offences derive from an 1898 amendment to the English Vagrancy Act intended to protect sex workers by criminalising persons who made a living on the earnings of a prostitute. 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.”⁴²

Various courts have consistently sought to narrowly interpret the language of the living-on-the-earnings prohibition so as to align it with its legislative objective, which was to protect sex workers from exploitation by others.⁴³ Thus, the courts have said that the provision should only apply to persons who exploit sex workers, and not to persons who assist sex workers to make their environment safer, such as bodyguards. This was also the position of the Malawi High Court in **Republic v Pempho Banda and others** (Review Order) (Review Case No. 58 of 2016) [2016] MWHC 589 (8 September 2016), which took note that “Courts in interpreting (living on the earnings) have maintained that the mischief that it was curbing was protecting prostitutes from those who exploit them.” Ntaba J emphasised that “the manner in which the 19 women were arrested and tried (...) was based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such (a) charge but was done merely to embarrass, label and harass the 19 women.”

Recommendation: Repeal section 146 and amend section 147 to include the phrase “in an exploitative manner”.

Decriminalise brothels

Section 149 is aimed at prohibiting brothels. The wording of the section is however overly broad:

“Any person who keeps a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and not exceeding twenty five years.”

Since it is not an offence to sell sex in Zambia, and since it is often safer for sex workers to work within establishments, than on the streets, we recommend the repeal of section 149 and suggest that the locality, size and practices of brothels instead be regulated in terms of local government legislation. The offence of detaining a child or person against their will in a brothel should be retained.

A similar brothel prohibition was recently repealed by the Canadian Supreme Court on the basis that the prohibition increased sex workers risk of disease, violence and death and amounted to a violation of their right to personal security.⁴⁴

Recommendation: Repeal section 149 of the Penal Code.

Consensual same-sex sexual acts

Section 155 of the Penal Code includes under “unnatural offences” any person who as carnal knowledge of another person against the order of nature, or carnal knowledge of an animal. Punishment for this offence is 15 years to life imprisonment. The penalty is increased to 25 years in cases where a person has carnal knowledge of a child against the order of nature.

Section 158 of the Penal Code criminalises “indecent practices” between persons of the same sex. This offence is overly broad and includes consensual and non-consensual acts, acts with children and acts with adults, acts in public and acts in private. The penalty for such offences is 7 to 14 years imprisonment. The offence criminalises indecent practices between men and indecent practices between women.

The UN Human Rights Committee, in its third periodic report of Zambia, noted with concern that the Penal Code criminalizes same-sex sexual activities between consenting adults and recommended the repeal of these provisions. We concur with these observations.

Section 155 includes within its ambit anal intercourse between two adults of a consensual nature and anal intercourse between two adults of a non-consensual nature. It is this lack of differentiation which makes the section discriminatory. The section equates cases of rape through anal penetration of a man or a woman, with cases of consensual anal intercourse taking place between two adults. The selective enforcement of section 155 in cases of consensual anal intercourse between homosexual but not heterosexual couples, adds to the discriminatory nature and effect of the section. The offence has become a source of justification for a whole range of discriminatory acts perpetrated against sexual minority groups, irrespective of whether they actually engage in the acts prohibited by the offence. It is this discriminatory effect which deters male victims of non-consensual anal penetration from reporting such crimes.

To the extent that section 155 of the Penal Code applies to consensual acts, the concerns expressed by the South African High Court and Constitutional Court in its assessment of a similar provision are worth repeating. In the *National Coalition for Gay and Lesbian Equality* case, the South African Constitutional Court noted that:

“Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep

level. It occurs at many levels and in many ways and is often difficult to eradicate. The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with moral or religious views of a section of society. The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.”⁴⁵

“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of privacy.”⁴⁶

Article 3 of the African Charter on Human and Peoples’ Rights (ACHPR) provides that every individual shall be equal before the law and shall be entitled to equal protection of the law. The African Commission has interpreted article 3 of the ACHPR to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under law.⁴⁷ The African Commission has further held in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe*⁴⁸ that article 3 “guarantees fair and just treatment of individuals within the legal system of a given country.” It has further clarified that “the aim of [article 3] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age *or sexual orientation*”⁴⁹ (our emphasis).

We further note that the sections contain a mandatory sentence, which obstructs judges’ ability to differentiate between the facts of different cases and impose appropriate penalties.

Recommendation: Sections 155 and 158 should be repealed in their entirety. Non-consensual cases of anal penetration which currently fall under the ambit of section 155 should fall within the ambit of the offence of rape.

Decriminalising abortion

It should be noted that Zambia’s law currently allows women to undergo safe abortions.⁵⁰ The Penal Code accordingly deals with cases that fall outside the ambit of the Termination of Pregnancy Act.

Section 151 of the Penal Code deals with cases where a person unlawfully administers a substance to a woman or uses another means to procure her abortion. Section 153 of the Penal Code deals with cases where a person unlawfully supplies anything knowing that it will be used to procure a miscarriage. These sections should be retained.

We submit that there is incongruence between section 151 and 153. It does not make sense that the person who forces a woman to abort is liable to 7 years imprisonment, but the person who supplied the method of abortion gets 14 years.

Section 152 criminalises the act of a woman or female child to induce her own abortion. This section is aimed at preventing unsafe abortions and to dissuade women from utilising this option instead of following procedures under the Termination of Pregnancy Act. The Termination of Pregnancy Act recognises that a person can seek a valid termination of

pregnancy on several grounds including potentially for socio-economic reasons.⁵¹ However, the Act provides for numerous exceptions, including for freedom of conscience, and requires complicated procedures, including a requirement for the certification of three medical practitioners.⁵² As a result, research has shown that an unacceptable number of women are accessing unsafe abortions and are thus being treated for complications resulting from those unsafe abortions.

Where a woman in desperate circumstances without an option of seeking a safe abortion accesses an unsafe abortion, it is unclear what benefit criminalising such an act would have. It makes even less sense to apply a penalty of 14 years to such a woman, when a person who would have forced her to terminate in terms of section 151 would only be liable to 7 years imprisonment. We further are concerned with the criminalisation of a female child who seeks to access an unsafe abortion given that in most cases her ability to access a termination under the Termination of Pregnancy Act would be minimal. There is no clear benefit in further punishing a young child in these circumstances.

Recommendation: Section 152 should be repealed in its entirety.

Furthermore section 152 of the Penal Code only refers to girl children, and excludes women who need abortions after being raped or as a result of incestuous relations, which effectively leaves women in that situation with no choice but to resort to unsafe and illegal abortions. Should some version of that section be retained we recommend that the last part of the section read: “Provided that where a woman or female child is raped or defiled or falls pregnant as a result of incestuous relations, the pregnancy may be terminated in accordance with the Termination of Pregnancy Act. This is in accordance with article 14(2)(c) of the Maputo Protocol as ratified by Zambia.

Harmful cultural practices

Section 157 of the Penal Code prohibits harmful cultural practices committed against a child. We submit that this should be extended to harmful cultural practices committed against an adult who did not consent to such practices.

Currently, the definition of “harmful cultural practice” includes sexual cleansing, female genital mutilation or an initiation ceremony that results in injury, the transmission of an infectious or life threatening disease or loss of life to a child but does not include circumcision on a male child. We submit that this list should be a non-exhaustive one. We further submit that circumcision which takes in coercive circumstances can be considered a harmful cultural practice.

The Committee on the Elimination of Discrimination Against Women, in its consideration of Zambia’s fifth and sixth periodic report, argued that property grabbing was also a harmful cultural practice.

Recommendation: List of harmful cultural practices should be non-exhaustive. The section should also apply to adults who did not consent to practice.

Nuisance-related offences

Chapter XVII of the Penal Code relates to nuisances and other offences against health and convenience. Our submission relates to those minor nuisance related offences whose criminalisation has the potential to violate human rights.

The UN Special Rapporteur on Extreme Poverty and Human Rights noted:

“Penalisation policies reflect a serious misunderstanding of the realities of the lives of the poorest and most vulnerable and ignorance of the pervasive discrimination and mutually reinforcing disadvantages that they suffer... Asymetries of power mean that persons living in poverty are unable to claim rights or protest their violation.”⁵³

Historically, vagrancy-related offences have often been vague, over-broad and arbitrarily applied by police in order to target persons whose existence or actions are deemed undesirable.⁵⁴

The UN Special Rapporteur on Extreme Poverty and Human Rights has noted the disproportionate effect of nuisance laws on the poor. Such laws:

- Undermine the right to an adequate standard of physical and mental health;
- Constitute cruel, inhuman and degrading treatment;
- Deny life-sustaining measures to the poorest (e.g. by burdening the ability of the poor to engage in activities such as street-vending);
- Lead to harassment or bribery by police, especially of vulnerable groups;
- Impose fines on the poor, the enforcement of which is inefficient and reflects a waste of state financial and administrative resources, contributing to perpetuating social exclusion and economic hardship;
- Force street children into dangerous and abusive situations by barring their engagement in street-vending, touting and begging; and
- Lead to arrest, which affects the poor particularly negatively because indigent populations are frequently detained for longer periods of time than their more affluent counterparts and do not have access to legal representation.⁵⁵

Penal Code offences such as being an idle and disorderly person and being a rogue and vagabond are sometimes used indiscriminately to arrest persons, contributing to overcrowding in police cells and placing a strain on resources in the criminal justice system. These laws tend to give law enforcement officials a wide discretion in application, which increases the vulnerability of persons living in poverty to violence and harassment.

These offences can be traced back to English vagrancy laws. Early English vagrancy laws created a climate unsympathetic to the plight of the poorest and most marginalised persons in society. In countries such as Zambia, where the majority of the population is poor, the effect on society of incorporating English vagrancy laws into its Penal Code is profound and requires consideration.

The development of English vagrancy laws was by no means an objective or democratic exercise. Essentially, vagrancy laws amounted to the exercise of control over a marginalised group in society by a more privileged class, primarily for its own interests and based on its own notions of the bounds of appropriate social behaviour.⁵⁶ Vagrancy laws over centuries have typically featured a characterisation of targeted individuals as indolent, lazy, worthless, unwilling to work, or as habitual criminals, outcasts or morally depraved individuals.⁵⁷ The development of vagrancy laws generally did not consider the rights of individuals to freedom

of movement, human dignity, liberty, equality, fair labour practices or a presumption of innocence.

The English Vagrancy Act of 1824 has lost much of its power in Britain over the years as its various provisions were repealed or narrowed in line with changing notions of fairness and justice. In a number of countries where the English Vagrancy Act provisions have been incorporated into domestic law, there has also been movement toward either abolishing vagrancy provisions entirely or ensuring that offences specifically relate to a suspect's activities rather than his or her status.^{58 59} These amendments and conceptual shifts reflect the recognition that the original vagrancy laws are archaic and anachronistic. Furthermore, the changes to and repeal of vagrancy laws reflect in part different cultures' evolving views on indigence, dignity, and respect for human rights.

Over the past two decades, there has been increasing calls for the repeal of outdated offences. The main argument for this has been that many persons in pre-trial detention in Africa, are detained for being poor, homeless or a "nuisance". This was the argument made in the Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa.⁶⁰ These arguments culminated in the development of the African Commission's Principles on the Decriminalisation of Petty Offences and influenced the Advisory Opinion of the African Court issued in December 2020, which urged States to repeal vagrancy related offences and to scrutinise offences to ensure that they do not inadvertently target poor and vulnerable groups in society.

Common nuisance

Section 172 of the Penal Code deals with the offence of common nuisance. This offence originates from the English common law offence of public nuisance. Under common law, a person who a) performs an act not warranted by law, or b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of their rights, is guilty of a public or common nuisance.⁶¹ Under common law, an individual act causing nuisance to another may be liable for performing a private nuisance for which civil action is appropriate, but it does not amount to a criminal public nuisance.⁶² Interference with the public's rights must be substantial and unreasonable.⁶³

Section 172 specifically states that it is immaterial that the act or omission complained of is "convenient" to a larger proportion of the public than to whom it is "inconvenient", and further provides that if the act or omission facilitates the lawful exercise of their rights by a part of the public, a defendant may show that it is not a nuisance to any of the public.

Section 172 is clearly aimed at nuisances affecting the public at large. English jurist Lord Denning held that a "public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large".⁶⁴ Similarly, English jurist Charles Romer has noted that "it is not necessary in my judgment to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."⁶⁵

Referring to the common law offence of common nuisance, Lord Bingham identified the following general principles that should be applicable to laws:

“The offence must be clearly defined in law ... and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail ... It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts ... But the law-making function of the courts must remain within reasonable limits ... existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence ... But any development must be consistent with the essence of the offence and be reasonably foreseeable ... and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.”⁶⁶

For this offence to satisfy international human rights standards, observers contend that it should be invoked only in rare circumstances, such as when no other applicable statutory offence exists, where commission of the offence would have a sufficiently serious effect on the public, and/or where the defendant knew or should have known of the risk that his actions would result in a nuisance.⁶⁷

We submit that the nuisances which this offence seeks to deter, should instead be dealt with under local government by-laws.

Recommendation: Insert element of intent into offence and limit offence to serious cases.

Idle and disorderly persons

Common prostitute behaving in disorderly or indecent manner

Section 178(a) makes it an offence for a common prostitute to behave in a disorderly or indecent manner in any public place. This offence originated in the English Vagrancy Act of 1824.

The elements of the offence that need to be proved are: That the accused is a “common prostitute”; that the accused behaved in a disorderly or indecent manner; and that such behaviour took place in public.

Whilst 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.⁶⁸ The evidentiary standard requires the submission of proof that the accused had been found engaging in sex work-related offences in the past and received warnings for so doing, or proof of previous convictions for sex work-related offences.

The disparaging reference to “common prostitute” means that any person arrested under this offence is already tainted by a defamatory label upon their appearance in court and is likely to face improper prejudice as a result thereof. This concern was highlighted in the United Kingdom, and the Policing and Crime Act of 2009 accordingly removed the word “common prostitute” in a similar offence, and inserted the word “persistently”.⁶⁹

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.

Essentially, the offence does not deal with soliciting others for the purpose of prostitution, but is rather a public order provision aimed specifically at sex workers based on the outdated assumption that sex workers as a group are more likely to engage in disorderly behaviour.⁷⁰ Thus, the offence is status-based, rendering it archaic and obsolete. Equivalent provisions have been abolished in South Australia, the Australian Capital Territories, New South Wales and New Zealand.

In Ireland, the Supreme Court has held it 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”.⁷¹

We submit that section 178(a) is status-based and uses past conduct or reputation as an element of the offence. The stigma attached to the offence violates the presumption of innocence principle.

The Canadian Royal Commission on the Status of Women noted in 1970 that the vagrancy laws which applied to prostitutes were discriminatory and counter-productive: “Young [and marginalised] girls move from rural areas to the urban centres alone and without money . . . and ill-equipped to find a job. In many cases, they are picked up by the police on vagrancy charges and may consequently acquire the stigma of a criminal record.” The Royal Commission’s report highlighted the problems associated with the way women were charged, as well as the fact that this practice was inherently gender biased.⁷²

Section 178(a) violates the right to dignity, and the right to equality since it discriminates based on status. Since the offence is a duplication of existing offences dealing with breach of peace, its limitation of the above rights is neither necessary nor reasonable.

Recommendation: Section 178(a) should be repealed.

Prohibition of begging

Section 178(b) makes it an offence for a person to beg in a public place or to cause a child to beg. To constitute an offence within the meaning of the statute, the prosecution must demonstrate that the accused acted in a public place to beg or gather donations.

English courts have held that a single act of asking for money does not amount to begging.⁷³ The offence is targeted at persons who seek to make a living from begging and engage in it as a recurrent and frequent activity; it must be shown that the accused had adopted begging as a persistent activity. Notably, courts view street entertainers in general as offering a service in return for the money given by passers-by, and will not therefore be regarded as beggars.⁷⁴

Similar provisions have been repealed in other commonwealth countries, including New South Wales, New Zealand and the Australian Capital Territory.⁷⁵ In other countries, the offence has

been amended to refer only to an act of persistent begging or to acts of begging in which the suspect failed to heed warnings to stop the activity.⁷⁶

Critics have offered several justifications for repealing this offence. It has been argued, for example, that the general prohibition of begging need no longer exist where instances of disruptive begging can be addressed under other offences related to disorderly conduct.⁷⁷ Similarly, the Irish Law Reform Commission supports the repeal of offences relating to begging by noting that criminalising begging amounts to the inappropriate penalisation of poverty; that no serious nuisance results in most cases of begging; and that it is neither efficient nor effective to impose fines as punishment when an offender is destitute, and that imprisonment serves only to create hardship on the family of the accused.

Criminalisation of this offence is ineffective since a sentence of imprisonment or a fine is likely to increase hardship.

Section 178(b) is overly broad since it is not limited to cases of persistent begging and thus criminalises acts arising from poverty. Because section 178(b) potentially criminalises persons who have no choice but to beg because of poverty, it constitutes a violation of their right to dignity. Such limitation would be justifiable only where the offence deals with persistent acts of begging and where the State can show that it has put in place social measures to address the causes of begging.

Recommendation: Insert the word “persistently” into section 178(b) or repeal section.

Playing games of chance

Section 178(c) prohibits a person playing at a game of chance for money in a public place. This offence was criminalised prior to the English Vagrancy Act of 1824. This offence was repealed in England as early as 1888.⁷⁸ Similar provisions, however, continued to be included in the penal codes enforced in British colonies.

Section 178(c) is overly broad as it includes games of chance which are not aimed at making a profit or defrauding a person. Section 178(c) potentially violates the right to dignity in that it imposes a criminal sanction on a person who takes part in an activity which does not cause harm to anyone.

The offence is limited to games of chance that take place in public, excluding lotteries. Gaming and betting houses are addressed in sections 174 and 175 of the Penal Code. This offence is overly broad, as it includes in its ambit mere games of chance not aimed at making a profit and those that are not conducted through fraud or false pretences.

To the extent that section 178(c) seeks to regulate activities in a public space it would be better placed in municipal by-laws.

Recommendation: Section 178(c) should be repealed.

Exposure of wounds to obtain alms

Section 178(d) prohibits “wandering abroad and endeavouring by the exposure of wounds or deformity to obtain or gather alms.”

This particular offence is not restricted to begging in a public place.⁷⁹ The prosecution must show that the accused person attempted to obtain donations by exposing his/her wounds or deformities.

The reality is that begging is often so prevalent that criminalising such behaviour can be of symbolic value only. It is unlikely that police in developing states would ever have sufficient resources to enforce such provisions on a scale that would deter such behaviour.

Section 178(d) is overly broad since it applies to both public and private places and is not limited to persistent acts which cause a nuisance. Because section 178(d) potentially criminalises persons who have no choice but to beg because of poverty and inability to work, it constitutes a violation of their right to dignity. Such limitation would be justifiable only where the offence deals with persistent acts of begging and where the State can show that it has put in place social measures to deal with the causes of begging and to assist persons with serious disabilities to obtain work or benefit from social services.

Recommendation: Insert the word “persistently” in section 178(d) or repeal section.

Public indecency

Section 178(e) prohibits a person from publicly doing an indecent act. The prosecution must demonstrate that the accused performed an indecent act that could be seen by a member of the public. The onus is on the accused to prove that he or she performed the act with a lawful excuse.

It has been held by courts in Commonwealth countries that nudity itself is not obscene, but rather that such a determination is dependent upon the circumstances of a particular case.⁸⁰ The English Criminal Law Revision Committee in 1984 recommended that it should be an offence to commit sexual acts in public only in circumstances where the act is likely to be seen by members of the public or where the conduct was reckless as to that fact.⁸¹

Zimbabwe’s Criminal (Codification and Reform) Act limits prosecution of public indecency - In terms of section 77(2) of that Act, a person shall not be convicted of public indecency unless the words or conduct in question are sufficiently serious to warrant punishment. To determine if the conduct is sufficiently serious to warrant punishment, the courts will take into account the following factors:

- The nature of the words or conduct;
- The extent to which the words were repeated or the conduct was persisted in;
- The age and gender of the person who heard the words or witnessed the conduct;
- Any previous relationship between the parties; and
- The degree of offence caused to the person who heard the words or witnessed the conduct.

Whilst case law provides some guide on the interpretation of the term “indecent act” it is important to recognise that contemporary Zambian society does not have a uniform view on what constitutes an “indecent act”. The offence remains relevant in contemporary society provided that it is not applied in a discriminatory manner. This section would be better placed as an individual section in the chapter dealing with offences against morality.

The term “indecent act” is not defined in the Penal Code and this creates the risk that the offence is applied arbitrarily and in instances where the indecent behaviour has not caused distress to any person. The term “indecent act” is vague and does not provide sufficient information for a person to know what behaviour would be unlawful. The offence does not differentiate between acts done with a sexual motivation, sexual acts in public and nudity.

Recommendation: Section 178(e) should be moved to Chapter XV and should include a limitation which states that it will only be applied in sufficiently serious cases.

Breach of peace

Section 178(e) prohibits a person from publicly conducting himself in a manner likely to cause a breach of peace.

Breach of peace was historically considered riotous behaviour disturbing the peace of the King.⁸² Breach of peace was not traditionally a criminal offence in England insofar as proceedings under that charge did not lead to a conviction and the offence was not punishable by imprisonment or a fine.⁸³ Police in England were, however, allowed to arrest a suspect in order to prevent a breach of peace. This power could only be exercised where the police officer believed on reasonable grounds that a breach of peace, involving violence, was about to occur.⁸⁴

The courts in other commonwealth jurisdictions have narrowly interpreted a breach of peace to mean that a suspect should only be charged in cases causing alarm or amounting to a threat of serious disturbance:

- Scottish courts have defined breach of peace as “conduct severe enough to cause alarm to ordinary persons and threaten serious disturbance to the community.”⁸⁵
- In the English case of *R v Howell*⁸⁶ the Court of Appeal held that “there is a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. Agitated or excited behaviour, not involving any injury or threat of injury, or any verbal threat, is not capable of amounting to a breach of peace.”⁸⁷

Recommendation: Limit application of offence to cases which are sufficiently serious.

Soliciting for immoral purposes

Section 178(g) makes it an offence to solicit for immoral purposes in public.

A similar offence was included in the English Vagrancy Act in 1898 which contained an offence prohibiting a male, in any public place, from persistently soliciting or importuning another for immoral purposes; the law similarly targeted males who lived off the earnings of female prostitution.⁸⁸

English courts have interpreted the word “soliciting” to refer to persistent acts of persuading.⁸⁹

The definition of “soliciting” in terms of the specific offence of soliciting for an immoral purpose was discussed in the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*.⁹⁰ In this case, the appellant was convicted of soliciting in public for an immoral purpose after approaching an under-cover police officer and seeking to engage in acts of prostitution in exchange for money. In evaluating the appellant’s contention that the evidence at hand was insufficient to establish the solicitation of the police officer, the court cited the Shorter Oxford English Dictionary. In dismissing the appeal, the High Court stated –

The Shorter Oxford English Dictionary defines the word ‘solicit’ in a number of ways. The most apt of these definitions would appear to involve an individual seeking to obtain something or some response from another, or to persuade them to do something. In my view to solicit someone for an immoral purpose within the terms of [the applicable law, which parallels that at issue in our case] would include enticing or persuading that person to do some act or thing, or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral.⁹¹

In the Supreme Court of Canada case of *Hutt v the Queen*⁹² the court considered the offence of soliciting for the purpose of prostitution in the Criminal Code. The case concerned a sex worker who had smiled to an officer and then voluntarily got into his car. The Supreme Court noted that the offence was located under the section Disorderly Houses, Gaming and Betting, and considered that this means the section dealt with “offences which do contribute to public inconvenience or unrest and again I am of the opinion that Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest. The conduct of the appellant in this case cannot be characterised as such.” The Supreme Court held that the word “solicit” carries with it an element of persistence and pressure and that there was no evidence of such an element in the evidence presented of the appellant’s activities.

Case law supports a position that “immoral purposes” necessarily involve actual sexual activity.⁹³ The phrase “immoral purposes” is nevertheless vague. In the United States case of *Papachristou v City of Jacksonville*,⁹⁴ the Supreme Court held that a vagrancy ordinance was void for vagueness, “both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute’ . . . and because it encourages arbitrary and erratic arrests and convictions”.⁹⁵ Similarly, in the case of *City of Chicago v Morales*,⁹⁶ the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it invited uneven police enforcement.⁹⁷ Similarly, the terminology used in the Zambia Penal Code to describe this offence does not provide a clear indication of the conduct that is prohibited.

We submit that section 178(g) dates from an era which sought to criminalise acts which ran contrary to Victorian notions of morality. Specific acts of sexual impropriety are already covered under other sections of the Penal Code e.g. section 146(1) makes it an offence for a person to “in any public place persistently solicit or importune for immoral purposes”. Section 178(g) encourages arbitrary enforcement, which risks the infringement of a range of rights including the right to dignity and freedom of expression.

Recommendation: Section 178(g) should be repealed.

Rogues and vagabonds

Section 181(a) provides that a person previously convicted of being an idle and disorderly person, as per an offence under section 178, can, on a second occasion be convicted of being a rogue and vagabond.

This is contrary to the principles of criminal law and the provisions of the Constitution, which provides for the presumption of innocence [article 18(2)(a)] and the right not to be punished for the same offence again [article 18(5)].

Recommendation: Section 181(a) should be repealed.

Gathering alms under false pretences

Section 181(b) provides that every 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 can be deemed a rogue and vagabond.

Section 181(b) is a duplication of section 309 of the Penal Code which deals with obtaining anything capable of being stolen through false pretences. Since section 309 and section 181(b) are similar, section 181(b) is more likely to be used to obtain a quick conviction where a thorough investigation has not been done. This would be contrary to the principles of criminal law.

Recommendation: Section 181(b) should be repealed.

Suspected person without visible means and not able to give good account

Section 181(c) deems as a rogue and vagabond, every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself.

The African Court on Human and Peoples' Rights, in its Advisory Opinion on Vagrancy Laws, issued on 4 December 2020, found that vagrancy laws, "effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights." The Court found that no reasonable justification exists in the distinction that the law imposes between those classified as vagrants and the rest of the population, except their economic status. The individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary and unlawful. The Court concluded that these laws violated a range of rights under the African Charter on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, and Protocol on the Rights of Women.

Where a person is suspected of criminal behaviour, that person should be charged under the appropriate section in the Penal Code.

We submit that section 181(c) is vague and overly broad. There is a substantial risk that the section would be applied arbitrarily and not within the narrow confines suggested by various courts. Section 181(c) is further contrary to the principles of criminal law, including the presumption of innocence, in that a person can be targeted by police under this section purely on the basis of the person's appearance or failure to engage in any immediate productive activity.

We accordingly submit that section 181(c) violates the right to dignity, the right not to be discriminated against based on social status, and the right to freedom of movement. It has not been shown that the limitation of these rights is reasonable or necessary in a democratic society.

The elements of the offence are vague and capable of giving rise to arbitrariness of enforcement. The Irish Law Reform Commission Report on Vagrancy and Related Offences commented that the offence appears to discriminate against the impoverished and to be “out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed course of conduct”.⁹⁸

An Irish court declared a similar offence unconstitutional in *King v the Attorney General and Director of Public Prosecutions*⁹⁹ for over-breadth, vagueness and arbitrariness. In January 2017, the Malawi High Court, in the case of **Mayeso Gwanda v State** [2017] MWHC 23, ruled that section 184(1)(c) of the Penal Code is unconstitutional.

The potentially wide geographic scope of this section, the application of which is not confined to particular public spaces, is particularly concerning.

Recommendation: Section 181(c) should be repealed.

Wandering in a public place under suspicious circumstances

Section 181(d) of the Penal Code states 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.

The offence was considered in the Malawi High Court in the case of *Stella Mwanza*.¹⁰⁰ The matter concerned thirteen women arrested as guests of rest-houses during a police sweep. The 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.¹⁰¹ In *Mwanza*, the judge noted that the English definition of a rogue is a dishonest or unscrupulous person, whilst a vagabond is one with no fixed home 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.”¹⁰²

The objective of section 181(d) would be better dealt with under section 306 of the Penal Code which deals with criminal trespass. The section is invariably used against the poor who do not make use of private transport.

Section 181(d) is vague and overly broad and creates a risk of arbitrary enforcement. The offence violates criminal law principles in that it subjects someone to arrest who has not been shown to have any criminal intent. We accordingly submit that section 181(d) violates the right to dignity, the right not to be discriminated against based on sex or social status, and the right

to freedom of movement. It has not been shown that the limitation of these rights is reasonable or necessary in a democratic society.

Recommendation: Section 181(d) should be repealed.

Rights of arrested persons

Limiting use of powers of arrest

The African Commission on Human and Peoples' Rights has noted its concern at the abusive use of police custody and pre-trial detention in Africa which severely infringes on the rights of individuals in custody.¹⁰³

We submit that arrest should be used as last resort and note that:

- Arrest and detention is often not proportionate to the conduct of the person arrested.
- Persons continue to be detained for longer than a day for very minor offences.
- Arrests at night tend to disproportionately target the poor.
- Sweeping exercises risk arrests without proper procedures or probable cause for arrest.
- Alternatives to arrest such as cautioning, public awareness, communication and counselling would often be a more appropriate response to minor nuisance-related offences.
- Conditions in detention often do not comply with international standards, including being unhygienic, lack of food, risk of transmission of diseases due to overcrowding and lack of hygiene, and cold.

In order to reduce the prison population, the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002, recommended the use of alternatives to penal prosecution such a diversion in cases of minor offences with particular attention to young offenders and people with mental health or addition problems. It recommended that detention of persons awaiting trial should only be used as a last resort and for the shortest possible time, including: increased use of cautioning, improved access to bail through widening of police powers of bail and involving community representatives in the bail process; restricting the time in police custody; setting time limits for people on remand in prison; considering restitution as a sentencing option.

We suggest a need to look at the purpose of arrest in the Criminal Procedure Code and developing methods to reduce inappropriate use of the discretion to arrest.

Section 27(b) of the Criminal Procedure Code allows the police to arrest “any person, within the limits of such station, who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself.” We submit that this section is unconstitutional and should be repealed. This section was also attacked by the African Court in its Advisory Opinion issued in December 2020. Section 26 allows the police to arrest someone where they have a reasonable suspicion that an offence has, or will be committed. To allow the arrest of persons when there is no suspicion of crime, is unconstitutional as it violates a person’s rights to freedom of movement and personal liberty.

Recommendation: Repeal section 27(b) of Criminal Procedure Code.

Developing alternatives to arrest

It is suggested that the police should first caution a person and instruct them to cease particular conduct, before exercising their power to arrest the person.¹⁰⁴ A police officer could also issue a formal caution as opposed to arrest. Arrests should really be a last option since it takes up significant police time.¹⁰⁵ The law requires that the police should only proceed with arrest when a summons would not be effective to bring the person before the court. It appears that police often fail to give adequate consideration to the option of a summons. It can be argued that any form of custody should be avoided unless the safety of the community is at stake.

We recommend taking note of section 32A of Malawi's Criminal Procedure and Evidence Code which allows caution and release procedures to take place after an arrest. Section 32A(4) provides that a police officer must, when exercising his or her discretion to caution and release an arrested person, bear in mind the following: the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity. Section 32A(5) provides that the Chief Justice may issue guidelines to police on the exercise of the power to caution and release. We further argue that caution should also be considered a viable option in lieu of the arrest of a person.

Another option instead of arrest is the recording of a person's name. If the person committed a minor offence, the taking of the person's name, instead of arresting the person, might well act as a deterrent. However, if the person has not committed any offence, the taking of names could cause tension between the police and the community. Some jurisdictions have held that a police officer is not permitted to seek a person's name and address unless the officer suspects that the person has committed an offence or may be a witness to the commission of an offence.¹⁰⁶ Section 29 of the Criminal Procedure Code allows the police to arrest someone who does not give his or her name when requested to do so.

On-the-spot fines or administrative fines are used in some jurisdictions and would discharge a person from further criminal process. Such fines should be limited to minor offences where there is little scope for a court to find that the offence was not committed. However, where police corruption is prevalent, the introduction of such fines is likely to increase police harassment of vulnerable groups such as sex workers. The imposition of a fine does not mean that the person has to pay immediately. Payment of the fine would mean that the person does not have a criminal conviction. Such fines should not be imposed on children.¹⁰⁷ The problem with administrative fines is that the amount is not tailored to the individual offender, the tendency is to lower the standard of proof in such cases and it would not work where the police are not able to identify the offender and thus not able to enforce non-payment.¹⁰⁸ A significant problem in Zambia is that many persons would be unable to pay such fines, thus again resulting in the criminal justice process being applied to the poor in particular.

Pre-trial custody time limits

Section 108 of the Criminal Procedure Code requires a police officer executing a warrant of arrest to, without unnecessary delay, bring an arrested person before court. Similarly, section 30 of the Criminal Procedure Code provides that a police officer making an arrest without a warrant shall, without unnecessary delay, take or send a person arrested before a magistrate, but where a person is retained in custody, he shall be brought before court as soon as practicable. The section further provides that the officer in charge may release a person arrested

on suspicion when, after due police inquiry, there is insufficient evidence on which to proceed with the charge.

Section 33 of the Criminal Procedure Code deals with detention of persons. In the case of *Daniel Chizoka Mbandangoma v the Attorney General* (1979) ZR 45 HC, it was held that:

“Under Section 33 of the Criminal Procedure Code, the release on bond of a person arrested without a warrant is mandatory if it does not appear feasible to bring the person concerned before an appropriate competent court within 24 hours of his being taken into custody, unless the offence is one of a serious nature. Where a person is retained in custody, he must be brought before such court as soon as practicable.”

We submit that a police officer’s powers to determine which matter is serious enough to justify detention under section 33(1) is subjective and need to be defined properly. The word “practicable” in section 33 is also too wide. In practice people are often detained for a few days before being brought to court because of delays in police investigations. This is not acceptable.

Recommendation: Define the word “practicable” in section 33(1) of Criminal Procedure Code.

Article 18(1) of the Zambia Constitution provides that every person facing criminal charges should be prosecuted within a reasonable time. It is however well known that remand detainees often spend years in prison.¹⁰⁹ Commenting on this provision, the Human Rights Committee has said that the right to be tried within a reasonable time, relates not only to the time when a trial should commence, but also the time by which it should end and judgment be entered, all stages must take place without undue delay.¹¹⁰

Malawi’s Criminal Procedure and Evidence Code was amended by Act 14 of 2010 to include a chapter on Pre-trial Custody Time Limits.¹¹¹

Recommendation: Insert a chapter on pre-trial custody time limits in the Criminal Procedure Code.

Right to bail

The right to bail emanates from the presumption of innocence and is enshrined in the Constitution. The procedure currently is that, where the accused has been denied bail in a subordinate court, he can apply for bail in the High Court [section 123(3)]. Currently, the case law in Zambia states that the Supreme Court does not have the power to consider a bail application pending trial in a subordinate court.¹¹² The case law further provides that a magistrate cannot impose bail after he has refused bail on a previous occasion.

Deprivation of liberty is a serious matter and impacts on the fundamental rights of the person. We submit that the court should be obliged to consider bail each time an accused who is entitled to bail appears before it. The defendant has a right to make a bail application at any stage. It should be noted that practically, at the first bail application, the accused might not have had legal representation or had sufficient time to prepare legal and factual arguments and should be given the opportunity to raise arguments regarding bail on subsequent occasions in proceedings before a subordinate court, especially where there has been a change of circumstances. We submit that, if a subordinate court has made a decision refusing bail, an

accused should, in a subsequent appearance before that court, be able to again ask for bail. It is not viable for poor accused to have to make an application for bail in the High Court and the effect of not allowing subordinate courts to change their orders regarding bail, impacts disproportionately on poor accused.

Recommendations: Review offences listed in section 123 for which bail is restricted. Provide explicitly in section 132 that a subordinate court can change an order it imposed regarding bail.

Sentencing

Angola's new Penal Code sets important examples on how prison overcrowding can be reduced through a rights-based approach to incarceration:

- Article 40(2) states that the execution of the prison sentence should be directed towards reintegration of the prisoner into society.
- Article 40(4) emphasizes that convicted persons who are deprived their liberty still retain their fundamental rights.
- Article 44(2) states that a prison sentence may never exceed 35 years, even in the case of recidivism.
- Article 45(1) states that where a sentence is to less than 6 months' imprisonment, it must be substituted with a fine unless imprisonment is required to prevent commission of future crimes.
- Article 56 provides that where a sentence is for less than 1 year, it can be replaced with community service, provided that the length of work may not exceed those of a normal working day.
- Article 58 provides that judicial admonition can be a sufficient sentence.
- Article 71 provides that it is an aggravating factor in sentencing, where the crime was committed in circumstances of discrimination; through an abuse of power; against a child, older person or pregnant woman or against person experiencing misfortune.

Recommendations: Insert a section relating to considerations in sentencing. This section should also remove mandatory sentencing provisions.

Right to a fair trial

Article 18(1) of the Zambian Constitution provides that "if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Access to information held by prosecution

The United Nations Human Rights Committee's General Comment 32 on the right to equality before courts and to a fair trial, emphasises the principle of equality of arms in cases before the courts.¹¹³ The right to equality of arms includes the right for each side to be given an opportunity to contest all the arguments and evidence adduced by the other party. This right is compromised when the accused does not have access to witness statements of the prosecution.

The African Commission on Human and Peoples Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, includes as essential elements of a fair

trial, equality of arms between the parties to proceedings; and an adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.

We are concerned that subordinate courts in Zambia do not recognise an accused's right to be given access to information about the State's case, a principle which is recognised in the High Court. The failure to be given evidence in advance leads to postponements, which prolongs the trial. We submit that a trial by ambush, where the State is able to lead evidence and the defence is not prepared in advance to cross-examine it, gives the State an unreasonable advantage.

As noted by the Namibian High Court in *S v Angula; S v Lucas*:¹¹⁴

“There is not a different brand of fairness in the lower courts in comparison to that applicable in any of the superior courts. After all, it is in the magistrate's courts that most members of the public come(s) (sic) into contact with the law and, on the strength of their experience there, they form their perceptions of justice and fairness. The same rules of evidence and procedure apply, with certain exceptions, in all courts of law. Where there are distinctions it concerns practice rather than rules that are designed to ensure fairness and justice to all parties.”

Article 18(2)(c) of the *Zambian Constitution* provides that “every person who is charged with a criminal offence **shall** be given adequate time and facilities for the preparation of his defence”.

The UN Human Rights Committee's General Comment 32, comments on the meaning of “adequate facilities”. “Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).”¹¹⁵

The African Commission on Human and Peoples Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa includes under the “right to adequate time and facilities for the preparation of a defence”:

- “The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.”
- “It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.”

The Botswana Court of Appeal confirmed the definition of “adequate facilities” in *Attorney General v Ahmed*.¹¹⁶ The Court noted that “facilities” covered “the acquisition by the defence of statements from witnesses and the acquisition of copies of any documents relevant to the charge. The only person in a position to authorise the supply of such statements and documents was the prosecutor and the prosecutor had to supply them. In order to ensure a fair hearing and the provision of adequate facilities for the preparation of the defence, the prosecution should disclose to the defence all witnesses' statements and the documents on which the prosecution intends to found.” Heath J noted that “in most of the international jurisdictions, discovery as of right has been accepted in criminal cases. Any limitation of this right is strictly construed”.¹¹⁷

In *Juma and Others v Attorney General*¹¹⁸, the Kenya High Court discussed the meaning of “facilities”:

“[10] ...for a hearing to be fair a person charged with a criminal offence must be afforded among other things ‘facilities for the preparation of his defence’ and ‘facilities to examine the witnesses called by the prosecution and to obtain attendance and carry out the examination of witnesses to testify on his behalf’. He must be given and afforded the facilities to do those things. In practical terms his constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses by the prosecution and securing witnesses to testify on his behalf. He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to defend the charge. In general terms it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impeded, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen an bottleneck his fair attack on the prosecution case.

[11] We say so because we believe that the framers of our Constitution intended the expression ‘facilities’ in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bending of that word. In its ordinary connotation that word means the resources, conveniences, or means which make it easier to achieve a purpose; an unimpeded opportunity of doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to ‘facilitate’ and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward, assist, aid or lessen the labour of one; to make less difficult; or to free from difficulty.

[17] The fullest possible pre-trial access to information held by or in the control of the prosecution helps the accused or his advocate to determine precisely what case the accused has to meet, to prepare for cross-examination, to determine what witnesses are available to him, to make further inquiries if necessary and generally to explore such other avenues as may be available to him. Obviously the constitutional right to be represented by a lawyer of one’s choice would be meaningless if it did not mean informed representation. Moreover, an accused’s right to adduce and challenge evidence cannot be exercised properly unless he can determine from the statements and exhibits of the prosecution’s witnesses whether there are any witnesses favourable to him who can be either those who had already made statements to the police or others who were mentioned in such statements.”

The arguments in *Juma v Attorney General*, were cited with approval by the Constitutional Court in Uganda in the case of *Soon Yeon Kong Kim and Kwanga Mao v Attorney General* (Constitutional Reference No 6 of 2007) – “We agree ... that the right to a fair hearing contains in it the right to a pre-trial disclosure of material statements and exhibits. We also agree that in an open and democratic society, courts cannot approve of trial by ambush. The right to a fair trial envisages equality between the contestants.”

We submit that the refusal of the prosecution in subordinate courts to give access to information about its case to the defence, is unconstitutional and should be addressed in the Criminal Procedure Code. It is not the function of the prosecution to conduct proceedings in such a manner that the accused is ambushed and kept in the dark about critical issues before and during trial until at the last possible moment, whereby the ability to prepare and mount a proper defence is severely hampered right from inception.

Recommendation: Insert a specific provision in Criminal Procedure Code which provides that the prosecution must give the defence prior access to its evidence in all courts.

Admission of unlawfully obtained evidence

We are concerned that there is no specific provision in the Criminal Procedure Code which provides that any statement made as a result of torture cannot be invoked as evidence in

proceedings. This is contrary to the article 15 of the Convention Against Torture which states that “each State party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

Police officers still rely on torture as an interrogation technique and the evidence obtained from such torture should automatically be inadmissible in court.¹¹⁹

Recommendation: Insert a section which limits the admissibility in court of evidence obtained in a manner which violates constitutional rights, including evidence obtained through torture.

Child justice

We concur with the recommendations of the UN Committee on the Rights of the Child, in its concluding observations of Zambia’s initial report, that Zambia should take all appropriate measures to implement a child justice system in conformity with the Convention on the Rights of the Child, in particular articles 37, 39 and 40 and with other UN instruments such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the UN Rules of the Protection of Juveniles Deprived of their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System.

Angola’s Penal Code provides for reduced sentencing in the case of minors and that their sentences be served in facilities for child offenders aimed at recovery, education and training. The provision prohibits the incarceration of children with adults.

We suggest the inclusion of provisions relating to children in the Criminal Procedure Code. Here, the Commission might want to refer to some sections in Malawi’s Criminal Procedure and Evidence Code:

- Section 20D of the Criminal Procedure and Evidence Code of Malawi provides that, where a child or young person is arrested, “such steps as are necessary shall be taken to ascertain the identity of a person responsible for his welfare”. The person identified, must be informed as soon as practicable that the child or young person has been arrested, the reasons for the arrest and the place where the person is being held.¹²⁰
- Section 32A(3) of the Criminal Procedure and Evidence Code provides that where a child voluntarily admits commission of a non-serious offence, the child may be released on caution if the parent or guardian consents to the disposal of the case in this manner.
- Section 90 of Malawi’s Child Care, Protection and Justice Act, provides that a police officer or any person executing the arrest of a child shall ensure that:
 - a) The child has been informed of his or her rights in relation to the arrest or detention and the reasons for the arrest in a manner appropriate to the age and understanding of the child;
 - b) There is no harassment or physical abuse of the child;
 - c) The child is provided with medical attention where necessary;
 - d) There is no use of handcuffs, except if the child is handcuffed to the arresting police officer or the person effecting the arrest;
 - e) The child is not mixed with adults;
 - f) The child is provided with nutritious food;
 - g) The child is accompanied by a parent, guardian or appropriate adult as far as it is practicable to do so;
 - h) A parent, guardian or appropriate adult is informed immediately after the arrest if such parent, guardian or appropriate adult was not present at the time of the arrest;
 - i) In serious offences, the child is provided with legal representation; and
 - j) The child has been provided with counselling services where possible.”¹²¹

Endnotes

¹ For ease of reference, both the Advisory Opinion and Principles are annexed to this Submission. The Opinion is available online at <https://www.african-court.org/cpmt/storage/app/uploads/public/5fd0c6/49b/5fd0c649b6658574074462.pdf>; and the Principles are available online at

[file:///C:/Users/annekem/Downloads/principles_on_the_decriminalisation_of_petty_offences_efpa%20\(2\).pdf](file:///C:/Users/annekem/Downloads/principles_on_the_decriminalisation_of_petty_offences_efpa%20(2).pdf)

² Section 2(2) of the Penal Code provides that no person shall be tried, convicted or punished for an offence other than an offence specified in this Code or in any other written law or statute in force in Lesotho.

³ Section 9 of the Criminal Law (Codification and Reform) Act provides that a person can only be found guilty of a crime that is defined in the Code or any other enactment.

⁴ *Bridges v State of California* 314 US 252 (1941).

⁵ *S v Mamabolo* 2001 (3) SA 409 (CC).

⁶ The Committee considered the initial report of Zambia (CRC/C/11/Add.25) at its 869th and 870th meetings (see CRC/C/SR.869 and 870) held on 22 May 2003, and adopted its observations at the 889th meeting (CRC/C/SR.889) held on 6 June 2003.

⁷ UN Committee on the Rights of the Child (CRC), General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, paragraph 32.

⁸ UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985, Rule 4.

⁹ "In the debate as to the deterrent effect of the death sentence, the issue is sometimes dealt with as if the choice to be made is between the death sentence and the murder going unpunished. That is of course not so. The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which, in an appropriate case, could be a sentence of life imprisonment. Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect, and whether the Constitution sanctions the limitation of rights affected thereby." "One of the reasons for the prohibition of capital punishment is that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society." "The imposition of the death penalty is inevitably arbitrary and unequal. For one person to receive the death sentence, where a similarly placed person does not, is, in my assessment of values, cruel to the person receiving it. To allow chance, in this way, to determine the life or death of a person, is to reduce the person to a cypher in a sophisticated judicial lottery."

¹⁰ Statement of the African Commission on World Day against the Death Penalty, 10 October 2013, <http://www.achpr.org/press/2013/10/d177/>.

¹¹ The Committee Against Torture (CAT) considered the second periodic report of Zambia (CAT/C/ZMB/2) at its 824th and 827th meetings, held on 8 and 9 May 2008 (CAT/C/SR.824 and 827), and adopted, at its 831st meeting and 832nd meeting, on 14 and 15 May 2008 (CAT/C/SR.831 and 832).

¹² The Human Rights Committee considered the third periodic report of Zambia (CCPR/C/ZMB/3) at its 2454th and 2455th meetings, held on 9 and 10 July 2007 (CCPR/C/SR. 2454 and 2455).

¹³ Resolution ACHPR/Res 42 (XXVI) of the African Commission and General Assembly resolution 62/149.

¹⁴ Section 93 (Genocide)

A person commits an offence of genocide if by his or her act or omission he or she commits any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious group or any other identifiable group -

- a) killing members of the group;
- b) causing serious bodily or mental harm to members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) imposing measures intended to prevent births within the group; and
- e) forcibly transferring children of the group to another group.

¹⁵ Section 94 (Crimes against Humanity)

(1) A person commits an offence of a crime against humanity if he or she engages in the following acts as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack -

- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation or forcible transfer of population;
- e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) torture;

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- g) rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual or comparable gravity;
 - h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, 'gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - i) enforced disappearance of persons;
 - j) the crime of apartheid;
 - k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health of another person.
- (2) For the purpose of subsection (1) -
- a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in subsection (1) against any civilian population, pursuant to or in furtherance of a State or organization policy to commit such attack;
 - b) "extermination" includes the intentional infliction of conditions of life, among other things, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intention of affecting the ethnic composition of any population or carrying out other grave violations of international law;
 - g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in subsection (1) committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
- ¹⁶ Section 95 (War Crimes)
1. A person commits a war crime if he or she engages in acts involving the following -
 - a) grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention -
 - i. willful killing;
 - ii. torture or inhuman treatment, including biological experiments;
 - iii. willfully causing great suffering, or serious injury to body or health;
 - iv. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v. compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
 - vi. willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii. unlawful deportation or transfer or unlawful confinement;
 - viii. taking of hostages;
 - b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts -
 - i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

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- ii. intentionally directing attacks against civilian objects, that is, objects which are not military objects;
 - iii. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - v. attacking or bombarding, by whatever means, towns, villages, dwelling or buildings which are undefended and which are not military objects;
 - vi. killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - vii. making improper use of a flag of truce or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - viii. the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - ix. intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objects;
 - x. subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xi. killing or wounding treacherously individuals belonging to the hostile nation or army;
 - xii. destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - xiii. declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - xiv. compelling the nationals of the hostile party to take part in the operation of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - xv. pillaging a town or place, even when taken by assault;
 - xvi. employing poison or poisoned weapons;
 - xvii. employing asphyxiating poisonous or other gases, and all analogous liquids, materials or devices;
 - xviii. employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xix. employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute;
 - xx. committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - xxi. committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in section 95 (2), enforced sterilization, any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - xxii. utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xxiii. intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - xxiv. intentionally using starvation of civilians as a method of warfare, depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
 - xxv. conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

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- c) in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause -
- i. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii. committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii. taking of hostages;
 - iv. the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;
- d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts -
- i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - iii. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v. pillaging a town or place, even when taken by assault;
 - vi. committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in section 95 (2), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - vii. conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - viii. ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix. killing or wounding treacherously a combatant adversary;
 - x. subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xi. destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

2. Subsection (1)(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

3. Subsection (1)(d) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups

4. Nothing in subsection (1)(c) and (d) shall affect the responsibility of the Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

¹⁷ Articles 6, 7, and 8 of the Rome Statute.

¹⁸ The Complementarity Principle in the Rome Statute confers primary jurisdiction and responsibility for prosecuting international crimes (as defined in the Rome Statute) on states. Only in cases where individual states are unwilling or unable to prosecute these crimes will the International Criminal Court have jurisdiction. The Principle therefore requires States, as part of their measures to domesticate the Rome Statute, to provide mechanisms in the domestic criminal justice systems to prosecute the Rome Statute crimes.

¹⁹ [1951] SCR 265 at 288.

²⁰ (2000) AHRLR 227 (ACHPR 1999).

²¹ At para 26. See also the case of *Law Office of Ghazi Suleiman v Sudan (II)*²¹ in which the African Commission emphasised the right to freedom of expression as a cornerstone of democracy. Citing the Inter-American Court of Human Rights, the African Commission notes that “when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to ‘receive’ information and ideas” (para 50).

²² A seditious intention is an intention-

- a. to advocate the desirability of overthrowing by unlawful means the Government as by law established; or
 - b. to bring into hatred or contempt or to excite disaffection against the Government as by law established; or
 - c. to excite the people of Zambia to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zambia as by law established; or
 - d. to bring into hatred or contempt or to excite disaffection against the administration of justice in Zambia; or
 - e. to raise discontent or disaffection among the people of Zambia; or
 - f. to promote feelings of ill will or hostility between different communities or different parts of a community; or
 - g. to promote feelings of ill will or hostility between different classes of the population of Zambia; or
 - h. to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the Republic; or
 - i. to incite violence or any offence prejudicial to public order or in disturbance of the public peace; or
 - j. to incite resistance, either active or passive, or disobedience to any law or the administration thereof:
- Provided that an intention, not being an intention manifested in such a manner as to effect or be likely to effect any of the purposes mentioned in the foregoing provisions of this subsection, shall not be taken to be seditious if it is an intention-

- i. to show that the Government have been misled or mistaken in any of their measures; or
- ii. to point out errors or defects in the Government or Constitution as by law established or in legislation or in the administration of justice, with a view to the reformation of such errors or defects; or
- iii. to persuade the people of Zambia to attempt to procure by lawful means the alteration of any matter in Zambia as by law established; or
- iv. to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill will or hostility between different classes of the population of Zambia.
- v. In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

²³ *Chief Arthur Nwankwo v State* (1985) NCLR 228. “The whole idea of sedition is the protection of the person of the sovereign... The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing the constitutional protective cloaks of their predecessors in 1963 Constitution...” “Those who occupy sensitive posts must be prepared to face public criticisms in respect of their office so as to ensure that they are accountable to the electorate... They are within their constitutional rights to sue for defamation but they may not use the machinery of the government to invoke criminal proceedings to gag their opponents as the freedom of speech guaranteed by our constitution will be meaningless.”

²⁴ *Andrew Mujuni Mwenda and Another v Attorney General* [2010] UGCC 5.

²⁵ *Maseko v Prime Minister of Swaziland and Others*, 2016 SZHC 180.

²⁶ *Madanhire and Another v Attorney General* CCZ 2/2014, [2014] ZWCC 2.

²⁷ *Lohé Issa Konaté v The Republic of Burkina Faso*, (2014) App 004 of 2013.

²⁸ *Okuta and Another v Attorney General and Others*, Petition No. 397 of 2016 [2017] eKLR.

²⁹ *Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and Others* (CC 11/2016) [2018] LSHC 3.

³⁰ *Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions* [2013] ZACC 35 at paras 55 and 56.

³¹ In the case of *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (2 September 1998) the International Criminal Tribunal of Rwanda considered rape a form of aggression and held that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. In the case of *Prosecutor v. Musema*, the Trial Chamber affirmed the broad definition of rape asserted in *Akayesu*. The Chamber stated that, “the

essence of rape is . . . the aggression that is expressed in a sexual manner under conditions of coercion. . . . [T]here is a trend in national legislation to broaden the definition of rape” and “a conceptual definition is preferable to a mechanical definition of rape” because it will “better accommodate evolving norms of criminal justice.” *Prosecutor v. Musema* (Musema Trial Chamber Judgment and Sentence), Case No. ICTR-96-13-A, Judgment and Sentence, paras 226–229 (Jan. 27, 2000).

³² The Queensland Criminal Code defines rape as “any person who has carnal knowledge of another person without that person’s consent”. In Victoria, the Crimes Act defines sexual penetration as the introduction by a person to any extent of a penis or object or body part, into the vagina, anus or mouth of another person. The International Tribunal for former Yugoslavia defined rape as the sexual penetration, however slight, of the vagina or anus or mouth of the victim by the penis or an object of the perpetrator through coercion or threat or force.

³³ *Masiya v The Director of Public Prosecutions and Minister of Justice and Constitutional Development (Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre intervening)* [2007] ZACC 9.

³⁴ At para 44.

³⁵ Langa CJ pointed out that “the groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based. The gendered basis of rape, rightly identified by Nkabinde J, requires that male victims are given equal rather than lesser protection” (para 86).

³⁶ At paras 79, 80.

³⁷ The Committee considered the combined fifth and sixth periodic report of Zambia (CEDAW/C/ZMB/5-6) at its 980th and 981st meetings, on 13 July 2011 (see CEDAW/C/SR.980 and 981). The Committee’s list of issues and questions are contained in CEDAW/C/ZMB/Q/5-6, and the responses of Zambia are contained in CEDAW/C/ZMB/Q/5-6/Add.1.

³⁸ In other countries, the age is 16 years. In South Africa, the age of consent is 16 years, but there is a grey area where acts are committed between children and they are both between 12 and 16 years of age. In South Africa, the definition of a child is 18 years, in cases where exploitation is present.

³⁹ See for example, that case of *Chibuta v The People* [2012] ZMHC 57, where a 7 year old girl was raped, but the perpetrator was charged with defilement.

⁴⁰ UK Home Office (2000) Setting the boundaries, reforming the law on sexual offences, Volume 1, July 2000.

⁴¹ UK Home Office (2000) Setting the boundaries, reforming the law on sexual offences, Volume 1, July 2000.

⁴² 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>

⁴³ The House of Lords in the case of *Shaw v Director of Public Prosecutions* 1961 UKHL 1, 1962 AC 220 dealt with the meaning of the phrase “living in whole or in part on the earnings of prostitution”. The court held that “a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes”. Applying the mischief rule, the court concluded that “living on” refers to “living parasitically.”⁴³ It is important to note that the court held that despite the existence of this offence, “prostitution [itself] is not an offence: it is not said that the woman or any man resorting to her is guilty of any offence”. In *R v Downey* 1992 2 SCR 10 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 prostitute’s earnings. *Downey* rejected the presumption that a person living with or habitually being present in the company of prostitutes lives on another person’s prostitution. See also *Canada (Attorney General) v Bedford* 2012 ONCA 186. This decision was subsequently confirmed on appeal by the Supreme Court of Canada, 2013 SCC 72. The court noted that, in the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity. The court held that the section was grossly disproportionate to the extent that it criminalised even non-exploitative relationships between prostitutes and others that could have served to enhance sex workers’ safety.

⁴⁴ *Canada (Attorney General) v Bedford* 2013 SCC 72.

⁴⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, CCT 11/98 at para 26.

⁴⁶ CCT 11/98 at para 32.

⁴⁷ *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm.294/04 (3 April 2009) at para 99 [quoting *Brown v Board of Education of Topeka* 347 US 483 (1954)].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Termination of Pregnancy Act 1972, section 3(1).

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- ⁵¹ Termination of Pregnancy Act, section 3(1) a (ii) and (iii) read with section 3(2) which requires taking into account the women's environment and age.
- ⁵² The UN Human Rights Committee, in its concluding observations on Zambia's third periodic report, noted its concern that the requirement that three physicians must consent to an abortion may constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion. The Committee recommended that Zambia amends its abortion laws to help women avoid unwanted pregnancies and not have to resort to illegal abortions that could put their lives at risk.
- ⁵³ UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf>
- ⁵⁴ L Sebba "The creation and evolution of criminal law in colonial and post-colonial societies" (1999) 3 *Crime, Histoire et Sociétés*, at para. 22. Sebba notes that the imposition of criminal laws was "reminiscent of the vagrancy laws in early English history; the vagueness of which has been seen as providing a legal basis for the control of populations perceived as dangerous to the establishment".
- ⁵⁵ UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf>
- ⁵⁶ L Sebba "The creation and evolution of criminal law in colonial and post-colonial societies" (1999) 3 *Crime, Histoire et Sociétés*, at para. 4.
- ⁵⁷ P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ*, 55-94, 60-61.
- ⁵⁸ P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ*, 55-94. The Canadian Criminal Code, for example, removed some offences during the 1950s from their classification of "idle and disorderly" and inserted them elsewhere in the criminal code, seeking to address and ameliorate the stigma of being accused and/or convicted of a vagrancy crime. Offences were also redrawn to require criminal intent.
- ⁵⁹ United States courts have further held that the state "may not make it an offence to be idle, indigent, or homeless in public places." *Jones v City of Los Angeles* 444 F.3d 1118, 1137 (9th Cir. 2006), vacated on other grounds in *Jones v City of Los Angeles* 505 F.3d 1006, 1006 (9th Cir. 2007).
- ⁶⁰ Second Pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18-20 September 2002.
- ⁶¹ J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2010) 2864.
- ⁶² D Ormerod et al (eds) *Blackstone's Criminal Practice* (2008) 658.
- ⁶³ JC Smith & B Hogan *Smith and Hogan Criminal law* 9 ed (1999) 755.
- ⁶⁴ *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169.
- ⁶⁵ J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2010) 2865. *Goldstein* [2004] 2 All ER 589 at [3]; *Johnson* [1996] 2 Cr App R 434.
- ⁶⁶ *Rimington* [2006] 1 ACC 459 cited in *Blackstone's Criminal Practice* (2008) 660.
- ⁶⁷ *Rimington* [2006] 1 AC 459.
- ⁶⁸ M Cowling & JRL Milton *South African Criminal Law and Procedure III* 2 ed (1988) E3-136.
- ⁶⁹ Section 16 of the Policing and Crime Act of 2009.
- ⁷⁰ Law Reform Commission of Western Australia *Project 85: Police Act Offences, Report* (1992) 91.
- ⁷¹ *King v Attorney General* [1981] I.R 233.
- ⁷² The Commission noted that the vagrancy provision pertaining to prostitution failed to "respect the liberty of the individual to move about in freedom. Furthermore, it opens the door to arbitrary application of the law by the police and it favours setting up traps, sometimes using police officers as agent provocateurs to arrest so-called prostitutes." P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ*, 55-94.
- ⁷³ *R v Dalton* [1982] Crim. L. R. 375.
- ⁷⁴ *Gray v Chief Constable of Greater Manchester* [1983] Crim. L. R. 45.
- ⁷⁵ Law Reform Commission of Western Australia *Project 85: Police Act Offences, Report* (1992) 156.
- ⁷⁶ Section 65(3) of the Western Australia Police Act.
- ⁷⁷ Law Reform Commission of Ireland *Report on Vagrancy and Related Offences* (1985) 51 and 63. The Irish Law Reform Commission recommended that the offence not fall under the "pejorative terminology of 'rogues and vagabonds'". The Commission further recommended drawing a distinction between begging in public, door-to-door begging and aggressive begging causing annoyance, fear or the obstruction of passers-by.
- ⁷⁸ Statute Law Revision (No 2) Act 1888, 51 & 52 Vict c 57.
- ⁷⁹ *Smith v McCabe* (1912) Q.B.D 306.
- ⁸⁰ For a brief overview of Western Australian case law on this subject, see Law Reform Commission of Western Australia *Project 85: Police Act Offences, Report* (1992) 60.
- ⁸¹ United Kingdom Criminal Law Revision Committee *Fifteenth Report: Sexual Offences* (1984), Part X, at para. 10.

⁸² Justices of the Peace Act 1361, 34 Edw 3 c 1.

⁸³ *R v County of London Quarter Sessions Appeals Committee, ex parte Metropolitan Police Commissioner* [1948] 1 KB 670; *Williamson v Chief Constable of West Midlands Police* [2004] 1 WLR 14.

⁸⁴ Community Law Reform Committee of the Australian Capital Territory, “Preventative Justice” in *Report on Street Offences*, CLRC 15 (1993).

⁸⁵ *Smith v Donnelly* [2002] JC 65; *Jones v Carnegie* [2004] SLT 609.

⁸⁶ [1982] QB 416.

⁸⁷ *Jarrett v Chief Constable of West Midlands Police* [2003] All ER (D). English courts have further held that there had to be an incident of violence for an arrest to be justified on the basis that actual breach of peace had taken place. J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2010) 2739-40.

⁸⁸ The exact wording of the 1898 Vagrancy offence is now section 146(1) of the Zambia Penal Code, showing that section 178(g) is redundant.

⁸⁹ JC Smith & B Hogan *Smith and Hogan Criminal law* 4 ed (1978) 434.

⁹⁰ [2008] 2 HKCFI 142.

⁹¹ *Id* at paras 13-14.

⁹² [1978] 2 SCR 476.

⁹³ *R v Kirkup* [1993] 2 All ER 802; *HKSAR v Cen Zhi Cheng* [2008] 2 HKCFI 142.

⁹⁴ 405 US 156 (1972).

⁹⁵ *Id* at para. 162.

⁹⁶ 527 US 41 (1999). See also *NAACP Anne Arundel County Branch v City of Annapolis* 133 F Supp 2d 795 (D Md 2001).

⁹⁷ See also *Commonwealth of Pennsylvania v Asamoah* 809 A2d 943 (Pa Super Ct 2002).

⁹⁸ Law Reform Commission of Ireland *Report on Vagrancy and Related Offences* (1985), 26.

⁹⁹ [1981] IR 233.

¹⁰⁰ *Stella Mwanza and 12 others v Republic* [2008] MWHC 228.

¹⁰¹ *Id.* (“Perhaps they were hoping for some stray and weak-minded men to come around and spend the night with them. But what offence would that be on their part? As a matter of fact this was an invasion of privacy on the part of the police officers.”)

¹⁰² *Id.*

¹⁰³ Resolution of the African Commission on Human and People’s Rights meeting adopted at its 52nd Ordinary Session in Yamoussoukro, Cote d’Ivoire, 9 to 22 October 2012.

¹⁰⁴ Community Law Reform Committee of the Australian Capital Territory, *Report on Street Offences*, CLRC 15 (1993), 5.

¹⁰⁵ *Id* 6.

¹⁰⁶ Law Reform Commission of Western Australia, Project 85, *Police Act Offences*, Report (1992) 181.

¹⁰⁷ Community Law Reform Committee of the Australian Capital Territory *supra* note 469, 9.

¹⁰⁸ *Id.* 10.

¹⁰⁹ OSISA, Community Law Centre and Zambia Human Rights Commission (2011) Pre-trial detention in Zambia, research report.

¹¹⁰ UN HRC General Comment 13; *Lubuto v Zambia* (1995) Communication 390/1990, CCPR/C/55/D/390/1990/Rev 1.

¹¹¹ PART IVA: PRE-TRIAL CUSTODY TIME LIMITS

161A. Pre-trial custody time limits

An accused person may be held in lawful custody in relation to an offence while awaiting the commencement of his trial in accordance with the periods specified under this Part.

161B. Interpretation

In this Part, unless the context otherwise requires, “lawful custody” means custody sanctioned by a court order pending trial.

161C. Reckoning of time

(1) For the purposes of this Part, time shall run upon the expiry of forty-eight hours after the arrest of an accused person, or if the period of forty-eight hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry.

(2) Notwithstanding subsection (1), where an accused person is in lawful custody in relation to one offence and is subsequently charged with another offence not arising on the same facts or in the course of the same transaction, the time in relation to the subsequent offence shall run from the date when the accused person is charged with the offence.

161D. Custody time limit for offences triable in subordinate courts

The maximum period that a person accused of an offence triable in a subordinate court may be held in lawful custody pending commencement of his trial in relation to the offence shall be thirty days.

161E. Custody time limit in relation to committal proceedings

The maximum period that a person accused of an offence triable in the High Court may be held in lawful custody pending his committal for trial to that Court under Part VIII or Part IX of this Code in relation to that offence shall be thirty days.

161F. Custody time limit for offences triable in the High Court

Where a person accused of an offence triable in the High Court is committed to the High Court for trial, the maximum period that he may be held in lawful custody pending commencement of his trial in relation to that offence shall be sixty days.

161G. Custody time limit for serious offences

The maximum period that a person accused of treason, genocide, murder, rape, defilement and robbery may be held in lawful custody pending commencement of his trial in relation to that offence shall be ninety days.

161H. Extension of custody time limit

(1) The prosecution may, at least seven days before the expiry of the custody time limit imposed under this Part, make an application to the subordinate court or the High Court, as the case may be, for extension or further extension of that time limit.

(2) Upon an application under subsection (1), the subordinate court or the High Court, as the case may be, may extend or further extend the custody time limit imposed under this Part if it is satisfied that there is good and sufficient cause for doing so.

(3) Any extension or extensions of custody time limits under this section shall not exceed in total a period of thirty days.

161I. Bail on expiry of custody time limit

At the expiry of a custody time limit or of any extension thereof, the Court may of its own motion or on application by or behalf of the accused person or on information by the prosecution, grant bail to an accused person.

161J. Application of general law on bail

Nothing in this Part shall preclude an accused person in lawful custody from otherwise applying for bail under any other law during the subsistence of a custody time limit.

¹¹² *Oliver John Irwin v the People* (1993) SC; *Lanton, Edwards and Thewo v the People* (1998) SC.

¹¹³ General Comment 32, CCPR/C/GC/32, 2007, para 13.

¹¹⁴ 1997 (9) BCLR 1314 (NM).

¹¹⁵ General Comment 32, CCPR/C/GC/32, 2007, para 33.

¹¹⁶ 2003(1) BLR 158 (CA).

¹¹⁷ *S v Majavu* 1994 (4) SA 268 (Ck)

¹¹⁸ *Juma and Others v Attorney-General* (2003) AHRLR 179 (KeHC 2003), paras 10, 11, 17.

¹¹⁹ Zambia HRC (2004) Lusaka Prisons report, p10.

¹²⁰ Section 20D(2) and (3) of the Criminal Procedure and Evidence Code, inserted by Act 14 of 2010.

¹²¹ Section 90 of Malawi's Child Care, Protection and Justice Act, 22 of 2010.