

# PUNISHED FOR BEING POOR: OUT-DATED OFFENCES IN THE DEMOCRATIC REPUBLIC OF CONGO (DRC)

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## 1. INTRODUCTION

Being a vagabond and a beggar in the Democratic Republic of Congo (DRC) is an offence criminalised by a Decree issued by the King Sovereign of Belgium in 1896.<sup>1</sup> As defined by the Decree, which remains on the statute books, "*any person who, by laziness, drunkenness and disordered state of manners, lives in a permanent state of vagrancy*"<sup>2</sup> and "*any non-impaired person who uses charity and begging as a profession*"<sup>3</sup> will be arrested and sent to the competent tribunal<sup>4</sup> where he/she will be convicted to a punishment not exceeding seven years' imprisonment.<sup>5</sup> In a country where poverty prevails at high rates,<sup>6</sup> 59% of the national population lives on less than US\$ 1.25 a day<sup>7</sup> and 54% are deprived of basic services such as safe water, food, and education,<sup>8</sup> the number of persons likely to be covered by the offence of vagrancy and begging is thus not insignificant. Not only does the Decree criminalise poverty, but it provides for imprisonment as punishment.

Offences such as vagrancy, begging, prostitution, loitering, disobedience to parents, and non-payment of civil debts are contentious and for good reason. Various organisations are advocating for the repeal of these offences considered

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<sup>1</sup> Decree of the King Sovereign of 23 May 1896 on vagrancy and begging (here in after Decree on vagrancy of 1896).

<sup>2</sup> Art. 1 of the Decree on vagrancy of 1896.

<sup>3</sup> Art. 3 of the Decree on vagrancy of 1896.

<sup>4</sup> Art. 1 of the Decree on vagrancy of 1896.

<sup>5</sup> Art. 3 of the Decree on vagrancy of 1896.

<sup>6</sup> The DRC is ranked last (187<sup>th</sup> out of 187) by the UNDP's Human Development Index 2011. UNDP Human Development Report 2011: Sustainability and Equity- A better future for all (2011) p. 2 &14.

<sup>7</sup> An estimated 71.3% of the population lives under the national poverty line, and 46.5% lives in severe poverty. UNDP "Human Development Report 2011: Sustainability and Equity- A better future for all" (2011) p. 45.

<sup>8</sup> UNDP "Human Development Report: Towards a Food Secure Future" (2012) p. 45; Moser A "Women Count: Security Council Resolution 1325: Civil Society Monitoring Report" (2010) Global Network of Women Peace Builders p. 73.

*"out-dated"* and prejudicial to the poor. Created in the European bourgeois epoch of the 15<sup>th</sup> century, offences such as vagrancy, begging, loitering and prostitution were aimed at maintaining law and order<sup>9</sup> and at removing poverty and the effects of economic dislocation, out of sight.<sup>10</sup> Critics of the laws on vagrancy argue that these laws mostly target marginalised groups such as migrant labourers, the poor, the homeless, beggars, and street children.<sup>11</sup> These persons are consequently punished for who they are, not for what they might have done.<sup>12</sup>

During the colonial era, the laws against poverty were exported to Africa and used for racial and discriminatory purposes.<sup>13</sup> They were aimed at regulating the movements and conduct of the non-white population,<sup>14</sup> giving police the power to punish any behaviour defined as detrimental to law and order by removing any undesirable person from the public sphere.<sup>15</sup>

Offences such as vagrancy and loitering remain on the statute books of many African countries, despite the obvious contradistinction with realities of the contemporary world and universal human rights. Often, these laws are enforced in a manner that results in violation of human rights,<sup>16</sup> such as unlawful and arbitrary detention of persons for their economic situation, and exacerbates existing overcrowding in African prisons and police cells. Contemplating the challenges facing detention facilities in Africa, the African Commission on Human and Peoples' Rights adopted the Ouagadougou Declaration in 2003, calling for the decriminalisation of out-dated offences such as "*being a rogue and vagabond*,

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<sup>9</sup> Human Rights Watch "This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism" (2008) p. 27.

<sup>10</sup> Jutte R Poverty and Deviance in Early Modern Europe (1994) Cambridge University Press; McStay AT *Bureaucrats and Beggars: French Social Policy in the Age of the Enlightenment* (1990) Oxford University.

<sup>11</sup> See generally Sherry AH "Vagrants, Rogues and Vagabonds: Old Concepts in Need of Revision" (1960) 48 *California Law Review* p. 557-580.

<sup>12</sup> Lacey WF "Vagrancy and other Crimes of Personal Condition" (1953) 66 *Harvard Law Review* p. 1203.

<sup>13</sup> Human Rights watch "This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism" (2008) p. 27.

<sup>14</sup> Human Rights watch "This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism" (2008) p. 27.

<sup>15</sup> Chambliss WJ "A Sociological Analysis of the Law of Vagrancy" in Galliher (ed.) *Deviant Behaviour and Human Rights* (1964) Prentice Hall p. 116.

<sup>16</sup> U.N. General Assembly "Report by the Secretary-General on the report submitted by Magdalena Sepúlveda Carmona, Special Rapporteur on Extreme Poverty and Human Rights" (2011) A/66/265, p.2.

*loitering, prostitution, failure to pay debts and disobedience to parents*".<sup>17</sup> This the Commission saw as a strategy to reduce prison populations and thus alleviate overcrowding. Nevertheless, close to a decade later, most States are yet to repeal these offences.

This article discusses the status of out-dated offences in the DRC, and its interconnectedness with imprisonment and poverty. The first section of the article provides an overview of out-dated offences in the domestic laws of the DRC. The second section navigates the interconnection between poverty, and imprisonment for out-dated offences in the DRC. The article concludes with a number of recommendations.

## **2. OUT-DATED OFFENCES IN THE LEGISLATION OF THE DRC**

As stated above, vagrancy and begging are offences punishable to a maximum of seven years' imprisonment in the DRC. The Decree of 1950 on Juvenile Delinquency pays special attention to the vagrancy of minors. It stipulates that any minor living in a state of vagrancy or begging, will either be handed back to his/her parents with an injunction to the parents to better control the child, or be placed under the custody of another person or organisation, or detained in a specialised governmental institution until he/she is 21 years of age.<sup>18</sup>

Disobedience to parents is another out-dated offence mentioned in the legislation of the DRC referring to "any child who, by his/her misconduct, gives trouble to his/her parents or guardian".<sup>19</sup> Such a child, considered by the law as a child in difficult situation, will be subjected to a punishment not exceeding six-months placement in a governmental social institution.<sup>20</sup> This provision in the Protection of the Child law of 2009, provides for offences that are not consistent with contemporary human rights norms and standards. While such behaviour should rather be addressed from the perspective of a child in need of care, the law criminalises behaviour that is in all likelihood not a threat to public safety

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<sup>17</sup>See generally "Ouagadougou Declaration and a Plan of Action on Accelerating Prison and Penal Reform in Africa" of 2003.

<sup>18</sup> Art. 2 & 4 of the Decree on Juvenile Delinquency of 1950.

<sup>19</sup> Art. 62(2)of the law on the Protection of the Child of 2009.

<sup>20</sup> Art. 64 of the law on the Protection of the Child of 2009.

and may indeed be indicative of a child in need of a more constructive intervention.

Although begging, vagrancy and disobedience to parents are the only clearly mentioned out-dated offences in the legislation of the DRC, the poor are often detained for numerous other offences. The following section examines the interconnection between poverty, out-dated offences and detention in the DRC. The offences discussed in this article are in some cases outdated since they were enacted by the colonial powers and have remained in force subsequently in African states, but repealed in the domestic laws of the erstwhile colonisers. Furthermore, these offences are, in their enforcement, highly discretionary. It depends by and large on an individual police officer to make a judgement call on whether a person is a vagrant or living off begging. Lastly, it is generally the poor and marginalised who are arrested for transgressions of these laws.

### ***III. POVERTY, OUT-DATED OFFENCES AND DETENTION IN THE DRC***

Reviewing the situation in respect of out-dated offences in the DRC helps us to understand the inappropriateness of offences such as vagrancy in the contemporary world, and illustrates the disproportionate burden vagrancy offences place on the poor and economically marginalised.

While individuals may be arrested and sentenced to imprisonment for vagrancy, there is the possibility of earlier release. However, the law sets such an absurd requirement that the possibility of earlier release is a remote possibility at best. The Ordinance on the detention regime of 1965 provides that only the Minister of Justice have the authority to decide on the conditional release of persons convicted of vagrancy and begging.<sup>21</sup> The decision to release is taken on the basis of written recommendations made by the prison authorities, stating that the convicted person will not return to vagrancy or begging once released.<sup>22</sup> No information about such a decision by the Minister of Justice of the DRC emerged during the last decade. This requirement poses a significant obstacle to the release of persons convicted for vagrancy and begging. It is, firstly, irrational to expect of a prison officer to attest to the capacity, or not, of the convicted person

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<sup>21</sup> Art. 104 of the Ordinance on Detention Regime of 1965.

<sup>22</sup> Art. 104 of the Ordinance on Detention Regime of 1965.

to provide for his/her basic needs and eventually the needs of his/her dependents. Put simply: how would the prison official know this? Secondly, it is equally irrational to expect of a convicted person to prove that he/she will not resort to vagrancy once released when poverty was the main reason for his/her arrest and conviction in the first instance and this has not yet been addressed. Poverty is not a lifestyle choice: one does not choose to live in poverty and should therefore not be punished for that condition:<sup>23</sup>

*"Persons living in poverty are not to blame for their situation...States must not punish or penalise them for it. Rather, States must adopt wide-reaching measures and policies designed to eliminate the conditions that cause, exacerbate or perpetuate poverty, and ensure the realisation of all economic, social, cultural, civil and political rights of those living in poverty".<sup>24</sup>*

Apart from the harsh punishment of imprisonment, the requirement for a conditional release of persons convicted of vagrancy and begging penalises the poor a second time by placing upon them the obligation to prove their economic independence prior to release. While it is the responsibility of the State to ensure and advance the enjoyment of the minimum core of socio-economic rights by its population,<sup>25</sup> the poor are punished for the State's failure to address socio-economic disparities. Although enshrined in the 2006 Constitution,<sup>26</sup> socio-economic rights are not justiciable in the DRC.

Fortunately the Decree on vagrancy is not strictly enforced in the DRC as a result of the defective judicial system. Members of the judiciary are notoriously corrupt, the police often arbitrarily arrest and detain persons without filing charges, and suspect can remain in custody for three to six years.<sup>27</sup> However, the weak enforcement of the Decree on vagrancy does not suggest more security for the poor living in a state of vagrancy or using begging as a means of survival.

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<sup>23</sup> Report of the Special Rapporteur on Extreme Poverty and Human Rights (2011) at para. 74.

<sup>24</sup> Report of the Special Rapporteur on Extreme Poverty and Human Rights (2011) at para.5

<sup>25</sup> Art. 2 International Covenant on Economic Social and Cultural Rights, ratified by the DRC on 1 November 1976, ratification status available at

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (accessed 28 May 2012).

<sup>26</sup> Arts. 34 to 49 of the Constitution of the DRC (2006).

<sup>27</sup> International Legal Assistance Consortium and International Bar Association Human Rights Institute Report "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo"(2009) p.19 -25; Boya Kiteti L, *D.R. Congo: The Darkness of the Heart* (2010) Xlbris Corporation p.145.

Rather, the malfunctioning of the judicial system exposes them to more abuse. For instance, the poor are often detained for non-payment of civil debts, an outdated offence prohibited by the 2006 Constitution of the DRC.<sup>28</sup>

## **Women**

In the DRC, women and children are the most vulnerable groups running the risk of arrest and conviction for poverty related offences. Persistent deep-rooted discrimination against women in Congolese society holds back their economic independence and subsequently impedes their capacity to provide for the needs of their dependents, deepening their poverty and vulnerability.<sup>29</sup> For instance, an estimated 69% of widows in the DRC have been dispossessed of their property at the death of their spouses,<sup>30</sup> indicating the strong convergence of patriarchal and economic power.

Armed conflicts in the DRC have exacerbated the poverty of women. Approximately 60% to 80% of women became single heads of households and extended families as a result of the conflicts, and are burdened with the responsibility to address, in addition to the needs of their own children, the needs of war orphans from relatives and war casualties.<sup>31</sup> The increase in the number of people they have to provide for, requires women to increase their financial income. With no support, many Congolese women often have no other choice but to resort to prostitution as a mean of survival.<sup>32</sup> Sexual intercourse in the course of prostitution in the DRC is often unprotected and may result in unwanted pregnancies.<sup>33</sup> For instance, 39% of expected births for the year 2009

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<sup>28</sup> Art. 61(6) of the Constitution of the DRC (2006).

<sup>29</sup> The country was ranked 142/187 on the UNDP Gender Inequality Indicators, UNDP Human Development Report 2012p. 142.

<sup>30</sup> UN "Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Democratic Republic of the Congo" (2006) at para.15

<sup>31</sup> Caroline D "Rape, Poverty, and War: Congo and Beyond, by Women Thrive Worldwide" Women Thrive Worldwide, available at <http://www.divinecaroline.com/22353/52083-rape-poverty-war-congo> (accessed 05 July 2012).

<sup>32</sup> 83% of women interviewed in Bisie mine affirmed to be "*afraid that, alone, they would not be able to meet their own or their children's needs*" if they had leaved life of prostitution, "The Congo Report Slavery In Conflict Minerals" (2011) Free The Slaves, p. 17; "DRC Rape and Prostitution" available at <http://www.irinnews.org/Report/60947/DRC-Rape-and-prostitution-in-Goma> (accessed 04 July 2012).

<sup>33</sup> See generally "Add unwanted pregnancy to travails of women in war-torn lands" (2011) Columbia University School of Public Health; Mubalama Passy, Ground Report "Democratic Republic of Congo: Clandestine Abortions on the Rise in Goma" (2012) Global Voices.

were unwanted.<sup>34</sup> Abortion is prohibited under all circumstances,<sup>35</sup> and only 6.7% of the female population have access to, and use modern contraceptive methods.<sup>36</sup> Unsafe abortions were estimated at 36 per 1 000 women between 15 and 44 years in 2008. However, there are no available statistics on the number of women imprisoned for abortion. The above data nevertheless indicate that a large number of women run the risk of arrest and conviction for abortion. As mentioned in the report of the Special Rapporteur on extreme poverty,

*"while poverty may not in itself be a violation of human rights, often States' actions or omissions cause, exacerbate or perpetuate poverty and amount to violations of human rights. In this context, penalisation measures represent a serious threat to States' observance of their human rights obligations."*<sup>37</sup>

### **Street children**

Poverty of women has had the effect of increasing the number of street-children. There is, in the DRC, no governmental programme providing assistance to families to raise and support their children. However, there are in the DRC, international non-governmental organisations and UN agencies that provide assistance to some categories of vulnerable children.<sup>38</sup> Yet, these programmes are designed only for specific groups of children such as child soldiers, victims of abuse, and so forth. However, the need for support to children and families at risk is much broader than the limited number of categories alluded to above.

According to 2010 data an estimated 30 000 to 50 000 children live in a permanent state of vagrancy on the streets of DRC cities and towns relying on, amongst others, begging as a way to survive.<sup>39</sup> This estimate includes orphans and abandoned children, as well as large numbers of children accused of

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<sup>34</sup> Prince Yassa "Planification Familiale en RDC: Olive Lembe Kabila Interpelle le Gouvernement" (2009) available at <http://remastp.wordpress.com/2009/12/09/planification-familiale-en-rdc-olive-lembe-kabila-interpelle-le-gouvernement/> (accessed 25 July 2012).

<sup>35</sup> Arts. 165, 166 & 178 of the Congolese Penal Code of 1940 as amended by 2004.

<sup>36</sup> Prince Yassa "Planification Familiale en RDC: Olive Lembe Kabila Interpelle le Gouvernement" (2009) available at <http://remastp.wordpress.com/2009/12/09/planification-familiale-en-rdc-olive-lembe-kabila-interpelle-le-gouvernement/> (accessed 25 July 2012).

<sup>37</sup> Report of the Special Rapporteur on extreme poverty and human rights (2011) at para. 74

<sup>38</sup> For example UNICEF and Save the Children.

<sup>39</sup> 70% of the street children live in the streets of the capital city Kinshasa. United States Department of State "Country Reports on Human Rights Practices for 2011" (2012) p. 37.

sorcery.<sup>40</sup> Allegations of child sorcery are an increasing phenomenon in the DRC. Children with a disability and/or a slight impairment are often regarded to be the cause of the misfortune of their families.<sup>41</sup> Chased from home or running away from maltreatment, these children end up on the streets where they engage in acts such as prostitution, begging, and various petty crimes.<sup>42</sup> It has furthermore been reported that the police is often complicit in the crimes committed by street children.<sup>43</sup> It has also been alleged that in some instances the police arrest and abuse street-children because they refuse to share the proceeds of their crimes.<sup>44</sup> Other reports mentioned the use of street children by the police in gathering information or to perform menial tasks. Without recourse to their families and at the mercy of law enforcement officials, they find themselves in an extremely vulnerable situation.<sup>45</sup>

## **CONCLUSIONS AND RECOMMENDATIONS**

Domestic laws in the DRC still include out-dated offences, such as being a vagrant or a beggar, inherited from the colonial era. These offences are assigned harsh punitive measures that disproportionately target and affect the poor, exposing them to more abuse, deepening and prolonging the cycle of poverty and exclusion. Against this background a number of recommendations can be made to the government and civil society.

To address the issue of out-dated offences and mitigate their impact, it is recommended to government as follows:

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<sup>40</sup> U.N. General Assembly "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston" (2010) at paras. 88-91.

<sup>41</sup> Art. 41 of the Constitution of 2006 ban accusations of child sorcery and abandonment of children for such cause. However, no information that local authority arrested and punished parents for abandonment of children transpired.

<sup>42</sup> An estimated 26% of street-children are girls among which 9/10 were engaged in prostitution, with or without third-party involvement. United States Department of State "Country Reports on Human Rights Practices for 2011" (2012) p. 37.

<sup>43</sup> United States Department of State "Country Reports on Human Rights Practices for 2011" (2012) p. 37.

<sup>44</sup> United States Department of State "Country Reports on Human Rights Practices for 2011" (2012) p. 37

<sup>45</sup> "What future? Street Children in the Democratic Republic of Congo" (2006) Vol.18 No2 *Human Right Watch* p. 20&21

- At a policy level the government needs to adopt a stronger pro-poor position that would see removed from the legal framework all measures used to discriminate against the poor. Furthermore, economic development should be inclusive in nature, targeting especially single headed households.
- Parliament should repeal the offences of vagrancy and begging (both of adults and minors), and the offence of abortion;
- The law should recognise poverty as a prohibited ground for discrimination and render it justiciable;
- Legislation prohibiting the abandonment of children should be enforced;
- An emergency national programme and plan of action to ameliorate the socio-economic rights and conditions of women and children living in extreme poverty and using begging and prostitution as a mean of survival should be adopted;
- Public education campaigns on the punishable violations of the rights of the child, such as using children for begging and prostitution, abandonment of children, or accusing children of sorcery, should be implemented;
- Child support grants to assist parents of children living in extreme poverty should be implemented.

With regard to the NGO and academic community it is recommended that institutions make available detailed and reliable information on the detention of people for out-dated offences, and on abuses and discrimination on the ground of poverty.

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