

**COMMUNIQUE ON CRIMINALISATION OF POVERTY:  
A DRIVER OF POVERTY?  
1 November 2021**

1. On 28 October 2021, the Kenyan Section of the International Commission of Jurists (ICJ Kenya) held a webinar to discuss the intersectionality of poverty and crime.
2. The criminalization of petty offences has amounted to the criminalization of poverty over a long period, which inordinately affects the vulnerable people in society. The continued enforcement of petty offences curtails social-economic growth, creating a permanent poverty loop.
3. The webinar provided an opportunity to highlight the gaps and challenges in the criminal justice system to further advocate for the decriminalization of petty offences.
4. ICJ Kenya sincerely appreciates the participation of all the distinguished panelists and participants drawn from diverse fields of expertise representing all sectors. The participants and the general public joined the webinar on our social media platforms and online streaming services.

**The panelists and participants acknowledged and noted THAT:**

- I. Enforcement of petty offences laws targets low-income earners who cannot afford representation and is compounded by the majority being vulnerable and marginalised. These include the poor and mentally challenged.
- II. Most petty offenders opt to abscond bail because the amounts in most instances are equivalent to the court fines or opt to have the bail terms converted to the fine. Others consider bribing officers to avoid going through the system altogether.
- III. Petty offences cases often clog the criminal justice system and create a backlog of cases for Judicial Officers.
- IV. In return, the detention of petty offenders creates prison overcrowding increasing costs for the government.
- V. Criminalising petty offences creates opportunities for corruption through bribery and extortion.
- VI. Arrests of petty offenders seldom meet human rights standards, with numerous violations documented in various media platforms. Further, the prosecution of the errand arresting officers is difficult due to the absence of witnesses and lack of proper evidence.
- VII. Many petty offenders are processed every day at the City Court in Nairobi. Yet, there are alternative means to divert petty offences from the mainstream court system, including handling them administratively.
- VIII. Prosecutors ought to evaluate cases and use discretion to promote access to justice for the vulnerable and the poor in line with the Diversion Policy<sup>1</sup> and Plea Bargain Guidelines<sup>2</sup>, amongst others.

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<sup>1</sup> <https://www.odpp.go.ke/wp-content/uploads/2019/10/DIVERSION-POLICY-grided-A4-final.pdf>

<sup>2</sup> <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Plea-Bargaining-Guidelines.pdf>

- IX. There is limited awareness on the Principles on Decriminalisation of Petty Offences, which guide States on the decriminalisation of petty offences in Africa.
- X. The COVID-19 pandemic and ensuing government directions aimed at curbing the spread of the virus enhanced the enforcement of petty offences and, by extension, criminalisation of poverty.

**Therefore, and given the foregoing, ICJ Kenya calls upon:**

**A. Civil Societies to:**

- i. Continue exercising oversight on compliance by States on commitments to ratified instruments that promote the rights and freedoms of citizens and which mainly prioritise the needs of the vulnerable and poor;
- ii. Enhance the creation of awareness of progressive judicial decisions and relevant regional legal instruments, including the Regional Principles on the Decriminalisation of Petty Offences as well as national legislation, including the Alternative Justice Systems Policy (AJS), which aim to enhance access to justice while reducing case backlog;
- iii. Continue advocating for the implementation of progressive policies and enactment of legislation that are responsive to the needs of the vulnerable, marginalised and poor;
- iv. Collaborate with the relevant criminal justice actors that are undertaking a comprehensive review of the penal code.

**B. Law Enforcement Officers including Police and Prosecutors to:**

- i. Exercise discretion in the evaluation and consideration of petty offences;
- ii. Enhance inter-agency collaboration and cooperation to avoid working in cross purposes;
- iii. Engage the community towards a common understanding on how to deal with petty offenders as well as interrogate the underlying reason for repeat offenders;
- iv. Participate in the creation of awareness aimed at sensitising the community on petty offences;
- v. Engage with representatives of the various groups targeted in the continued criminalisation of petty offences and promote harmonious working relations; and
- vi. Prioritise enhancing the capacity of all officers on conflict resolution mechanisms to ensure that cases are resolved amicably at the station and documented for accountability and follow up.

**C. The Kenyan Judiciary to:**

- i. Issue equitable and affordable bail and bond terms in matters concerning petty offenders;
- ii. Consider non-custodial sentencing when handling petty offences; and
- iii. Encourage other criminal justice actors to implement policies that divert cases from the mainstream court system.

**D. National and County/Local governments to:**

- i. Prioritise the policy implementation of economic and social rights in accordance with Article 43 of the Constitution of Kenya ;
- ii. Allocate adequate funding to the National Legal Aid Service to enhance access to justice;

- iii. Ensure that government developmental projects, particularly the market places, prioritise areas that consider street vendors and hawkers as small-scale business owners;
- iv. Refrain enacting legislation that discriminates against citizens based on economic status or which promote the criminalisation of petty offences;
- v. Promote collaboration amongst criminal justice actors and prioritise public participation in legislative drafting;
- vi. Rework all the economic and social policies to ensure that they are progressive and prioritise inclusivity in development; and
- vii. Ensure compliance to ratified human rights instruments that promote citizens' rights and freedoms and particularly prioritise the needs of the vulnerable and poor.

**E. ICJ Kenya commits and undertakes to:**

- i. Sustain policy dialogues at the sub-national, national and regional level to inform interventions aimed at decriminalisation of petty offences in Kenya and Africa;
- ii. Collaborate with relevant institutions and continue with interventions that aim to the decriminalisation of petty offences;
- iii. Support and represent the poor and the vulnerable who are unfairly targeted by the continued existence of petty offences within our laws;
- iv. Lobby the legislative arm of government to review the laws that create petty offences;
- v. Create awareness on Advisory Opinion No. 001/2018 on ***The Compatibility of Vagrancy Laws With The African Charter On Human And Peoples' Rights And Other Human Rights Instruments Applicable In Africa***<sup>3</sup> which calls for the decriminalisation of petty offences in African states; and
- vi. Advocate for the legal drafting reform to be more mindful of the impact of enhanced/hefty fines on the poor and the vulnerable.

**Signed,**

**Kelvin Mogeni**  
**Chairman**  
**ICJ Kenya**

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<sup>3</sup> <https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018 - PALU-Advisory Opinion.pdf>