

POVERTY IS NOT A CRIME

DECRIMINALISING PETTY BY-LAWS IN SOUTH AFRICA

APCOF
RESEARCH PAPER

SERIES

30

JUNE 2021



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JUNE 2021

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ISBN: 978-1-928332-73-2

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Designed, typeset and proofread by COMPRESS.dsl | 800412 | www.compressdsl.com

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ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
APCOF	African Policing Civilian Oversight Forum
AU	African Union
CBD	Central Business District
CID	City Improvement District
CPFs	Community Policing Forums
CSFs	Community Safety Forums
DSD	Department for Social Development
ECD	Early Childhood Development
HSRC	Human Sciences Research Council
ISCPS	Integrated Social Crime Prevention Strategy
IDP	Integrated Development Plan
IUDF	Integrated Urban Development Framework
LGBTIQA+	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual
NCPS	National Crime Prevention Strategy
NDP	National Development Plan
PALU	Pan African Lawyers
PSIRA	Private Security Industry Regulatory Board
SAPS	South African Police Service
SDG	Sustainable Development Goal



FRAMING THE CHALLENGE:

CRIMINALISING
POVERTY IN
SOUTH AFRICA

Louise Edwards

South Africa may be classified as an upper middle-income country¹ but it remains amongst the most unequal societies in the world, with high income and wealth inequality and low intergenerational mobility remaining as marked legacies of the historic entrenchment of economic and social exclusion.² The United Nations Human Development Report ranked South Africa 114 out of 189 countries assessed in 2020 on measurements including average life expectancy, education and income inequality.³ This was a declining rank as standards of living and inequality had worsened since the 2014 assessment.⁴

Addressing these development challenges is the cornerstone of the National Development Plan (NDP) which aims to eliminate poverty and reduce inequality by 2030⁵ with planning and implementation efforts informed by the broader constitutional imperative to promote equality both as a substantive right and as a key measure of the achievement of all other rights. This includes not only key socio-economic rights, such as access to income, health, nutrition, clean water and housing, but also civil and political rights, including liberty, security and access to justice.

However, across South African metros, laws exist that have the effect of making the poorest and most marginalised in society criminally responsible for their status by making it a criminal offence to perform life-sustaining activities in public spaces. This includes, for example, sleeping, bathing, washing, urinating or defecating, collecting money, washing any object, or drying/spreading washing or bedding in a public space. In other words, those without shelter are criminalised for

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- 1 See, The World Bank, Data for South Africa, Upper middle income. Available at: <https://data.worldbank.org/?locations=ZA-XT>.
 - 2 The World Bank (2018), *Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities*. Available at: <http://documents1.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf>. See also, The World Bank (2021), *The World Bank in South Africa*. Available at: <https://www.worldbank.org/en/country/southafrica/overview#2>.
 - 3 United Nations Development Programme (2020), *Human Development Report 2020: The next frontier – human development and the Anthropocene*. Available at: <http://report.hdr.undp.org/index.html>.
 - 4 United Nations Development Programme (2014), *Human Development Report 2014: Sustaining human progress – reducing vulnerabilities and building resilience*. Available at: <http://hdr.undp.org/en/content/human-development-report-2014>.
 - 5 South African Government (2012), *National Development Plan 2030: Our future – make it work*. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf.

undertaking the bare necessities of life in public. This includes cities like Cape Town where the number of homeless people outnumber shelter beds by 5 to 1.⁶ Research in South Africa and other countries clearly shows that punishing the poor does not have the effect of ending the criminalised conduct, but further entrenches exclusion, discrimination and marginalisation.⁷ Research also demonstrates that these laws are often used by law enforcement officials as a means to harass, intimidate, extort and otherwise mistreat people who are marginalised or vulnerable to human rights abuses in a law enforcement context because of their status.⁸

The contradictory approach by South Africa of criminalising conduct that is a by-product of the very poverty and inequality that it seeks to eliminate through the NDP is not unique on the continent, nor globally. The African Commission on Human and Peoples' Rights (ACHPR), the human rights mechanism of the African Union (AU), has recognised this challenge and, in 2017, adopted the Principles on the Decriminalisation of Petty Offences in Africa (the Principles).⁹ These Principles identify the criminalisation of poverty and status as a critical human rights and development issue, and as confirmed in a recent Advisory Opinion by the African Court on Human and Peoples' Rights,¹⁰ contrary to the guaranteed rights of equality, dignity and freedom from arbitrary arrest, detention and ill-treatment. As a signatory to the international and regional human rights instruments that underpin the Principles, and the Advisory Opinion, South Africa must now take urgent steps to end the routine deployment of the law and its enforcers against the poor and marginalised for reasons that have less to do with public safety than reserving the use of public spaces for the privileged and wealthy.

For several years, the African Policing Civilian Oversight Forum (APCOF) has worked to promote a more rights-based approach to the use of arrest, such as through the decriminalisation of petty offences. This includes, as part of the Regional Campaign to Decriminalise Petty Offences¹¹ at the African regional level, work to promote the implementation of the Principles and Advisory Opinion. This effort is finding traction in more than 12 countries and counting. In South Africa, APCOF is working in coalition with organisations operating at the intersection of justice and development to strategise for the repeal of these laws and to promote the reinvestment of resources to address the underlying causes of poverty, not punish it.

To support these efforts, APCOF has produced this publication which seeks to explore the two key threshold issues in the work to promote the implementation of the Principles and the Advisory Opinion in South Africa:

1. What are the laws that criminalise life-sustaining activities in public spaces, and are they consistent with South Africa's international, regional and national human rights obligations?
2. What is the alternative framework for addressing the behaviours currently criminalised?

6 J Hopkins, J Reaper and S Vos (2020), The cost of homelessness in Cape Town: Summary Report. Available at: https://homeless.org.za/wp-content/uploads/2020/11/24_Nov_Cost-of-homelessness-in-Cape-Town_Report-Summary-1.pdf. See also, Cape Town's homeless people square up to fight City's by-laws, *Cape Argus*, 12 April 2021. Available at <https://www.iol.co.za/capeargus/news/cape-towns-homeless-people-square-up-to-fight-citys-by-laws-c8e11801-ede0-4f7a-b21c-ba6207797879>.

7 L Muntingh and K Petersen (2015), Punished for being poor: Evidence and arguments for the decriminalisation and declassification of petty offences, Cape Town: Africa Criminal Justice Reform. Available at: <https://acjr.org.za/resource-centre/punished-for-being-poor-evidence-and-arguments-for-the-decriminalisation-and-declassification-of-petty-offences>.

8 Ibid.

9 African Commission on Human and Peoples' Rights (2017), Principles on the decriminalisation of petty offences in Africa, adopted at its 61st Ordinary Session, held from 1 to 15 November 2017 in Banjul, Gambia. Available at: <https://www.achpr.org/legalinstruments/detail?id=2>.

10 African Court on Human and Peoples' Rights (2020), Advisory Opinion No. 001/2018, 4 December 2020. Available at: <https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/0c6/49b/5fd0c649b6658574074462.pdf>.

11 Campaign to Decriminalise Petty Offences in Africa – www.pettyoffences.org.

This first question is explored by APCOF Project and Research Officer, Abdirahman Maalim Gossar, who, using research contributed by Clare Ballard of Lawyers for Human Rights, analyses the types of laws in South Africa that criminalise life-sustaining activities in public spaces and their potential legal standing. Gossar makes a clear argument that the current use of by-laws across a number of South African metros that relate to public places and prohibited behaviours are inconsistent with South Africa's human rights obligations. He also raises concerns that the manner in which these offences are enforced, poses a risk to the rights and dignity of those who are often disproportionately targeted for enforcement on the basis of their status.

The second question is the basis of the thought piece provided by Patrick Burton and Chumile Sali, which identifies an alternative framework for addressing homelessness and poverty using a safety planning framework, rather than criminalisation through municipal by-laws. As foreshadowed in this introduction, the framework is centred on the NDP and is found in existing obligations of government – from national to municipal level – to engage in developmental and public health approaches to community safety planning. The approach recommended by Burton and Sali is particularly timely, given the recent application by 11 people experiencing homelessness in both the Western Cape High Court and the Equality Court challenging the constitutionality and discriminatory impact of Cape Town's municipal by-laws.¹² The Equality Court action could result in an order directing that specific action be taken to stop the unfair discrimination and the City of Cape Town will need to rethink its current approach to the management of public spaces. Reframing the approach to divest from law enforcement and reinvest in mandated safety planning will prove key.

With the estimated loss of between 2 and 3 million jobs in South Africa during the Covid-19 pandemic, more acute income inequality and a decline in other key socio-economic measures are expected in the coming years,¹³ which makes efforts to address these challenges particularly urgent. The decriminalisation of offences that penalise poverty is part of a multitude of actions required to promote the full implementation of the NDP, and the realisation of the rights to dignity and equality for all. The work being done at the African regional level, through the adoption of the Principles on the Decriminalisation of Petty Offences, and the Advisory Opinion, provides a useful blueprint for identifying which offences should be repealed or declassified. This report will hopefully contribute to the discourse in South Africa about how to translate this emerging regional normative framework into legal and policy changes that prioritise the safety and developmental needs of the people against whom these laws are currently enforced.

12 Marecia Damons (2021), Homeless people challenge Cape Town by-laws in court, *GroundUp*, 8 April 2021. Available at: <https://www.groundup.org.za/article/homeless-people-challenge-cape-town-laws-courts/>.

13 Business & Human Rights Resource Centre (2020), South Africa: Three million South Africans have lost their jobs as a result of the Covid-19 pandemic, women most affected. Available at: <https://www.business-humanrights.org/en/latest-news/so-africa-three-million-south-africans-have-lost-their-jobs-as-a-result-of-the-covid-19-pandemic-women-most-affected/>.



DECRIMINALISING PETTY BY-LAWS IN SOUTH AFRICA

Abdirahman Maalim Gossar

INTRODUCTION

Across South Africa, municipalities have adopted measures to criminalise urban poverty and homelessness, including the enactment of by-laws for infringements known broadly as ‘petty offences’. This approach manifests itself in the enactment and enforcement of laws that seek to prohibit the occupation of public spaces and the performance of certain activities in public. To achieve their objectives, these laws prescribe the imposition of fines, or imprisonment, or both for their infringement. In 2019, the decision by the City of Cape Town to impose fines against homeless people for occupying communal places attracted a public outcry and brought to the fore issues at the intersection of criminal justice, poverty and development. This decision revived the pushback by civil society organisations and other stakeholders against the coordinated imposition of criminal sanctions on these vulnerable groups for behaviours that are necessary for survival.

The City of Cape Town – like other municipalities in the country – is constitutionally entitled to enact and enforce laws that are necessary for the effective administration of its affairs, as provided in section 156 of the Constitution of the Republic of South Africa, 1996 (the Constitution). However, the existence and enforcement of many laws that criminalise what are essentially life-sustaining activities and efforts to institute and maintain a decent life are now subject to debate and possible legal action.

The question of penalising the urban poor for occupying public spaces and engaging in certain activities in the open is not unique to South Africa. At the African Union level, the African Commission on Human and Peoples’ Rights (ACHPR), in the execution of its mandate to protect and promote human rights on the continent, has acknowledged the existence of laws across the continent that prohibit behaviours that are necessary to survive and sustain decent living conditions and emphasised that the enactment and enforcement of such laws have a serious impact on fundamental human rights and freedoms.

It is for this reason that in 2017, ACHPR adopted the Principles on the Decriminalisation of Petty Offences in Africa (the Principles),¹ a normative soft law instrument, aimed as a guiding tool to African states to facilitate the decriminalisation of these offences. In these Principles, the ACHPR recognises that these laws tend to aggravate the situation, rather than address the causes and underlying factors that instigate people to occupy public spaces and perform certain activities in the open, and prescribes the adoption of anti-poverty measures that are progressive, adequate and sustainable. In particular, the ACHPR is gravely concerned about the impact of these laws on citizens' rights to be treated with dignity and to equality and freedoms from discrimination, ill-treatment and arbitrary arrest – all of which are guaranteed by the African Charter on Human and Peoples' Rights (the African Charter) as well as the South African Constitution.

The position and approach spearheaded by the ACHPR have been complemented by the African Court on Human and Peoples' Rights (the African Court), another human rights body within the continental human rights system, which produced a landmark ruling – at the end of 2020 – that reinforces the belief that the existence and enforcement of laws against petty offences, particularly laws that purport to criminalise vagrancy, undermine established principles of human rights and do not serve any legitimate purpose.

Although the continent has seen a progressively growing movement towards challenging the enactment and enforcement of by-laws that create petty offences, very little has been written about the adoption and implementation of these laws in South Africa. This is despite the widespread existence of petty offences established by national and provincial legislation and municipal by-laws across the country which are inconsistent with the spirit of the Constitution and Bill of Rights, and out of touch with reality.

It is against this backdrop that the African Policing Civilian Oversight Forum (APCOF), as part of its continuous commitment to promote the implementation of the Principles in Africa, seeks to produce this report in which it analyses the effects of the existence and enforcement of such laws within South Africa, with a specific focus on vagrancy-related laws. It aims to do this by examining these laws against the requirements of domestic and international human rights law and other authoritative pronouncements and reviewing the experience of those against whom enforcement measures are most frequent, to highlight the impact of their enforcement on the rights and welfare of those experiencing social marginality.

METHODOLOGY

This report employs a qualitative method of research. It is based on desktop research and sources utilised include journal articles, court cases, relevant legal framework, regional soft law instruments and other electronic publications. Its content is also informed by the outcome of a roundtable discussion on the decriminalisation of petty offences in South Africa, facilitated by APCOF. This study, though, comes at a period when there are limited publications on vagrancy laws in South Africa. There is also a scarcity of data from relevant institutions, such as municipal law enforcement and the South African Police Service (SAPS), with which to work.

1 African Commission on Human and Peoples' Rights (2017), Principles on the decriminalisation of petty offences in Africa, adopted at its 61st Ordinary Session, held from 1 to 15 November 2017 in Banjul, Gambia. Available at: <https://www.achpr.org/legalinstruments/detail?id=2>.

PRINCIPLES ON THE DECRIMINALISATION OF PETTY OFFENCES IN AFRICA

The desire to challenge the existence and enforcement of by-laws that create petty offences in South Africa is part of a continental campaign towards decriminalisation and declassification of petty offences. Essentially, the aim of the campaign is to secure the decriminalisation of offences that criminalise the status of an individual and the performance of certain life-sustaining activities in public spaces, and the declassification of those that, although they can persist, are insignificant and do not promote any legitimate law enforcement purpose. The campaign has gained traction on the continent and has, in at least two instances, succeeded in obtaining court judgments declaring the existence and application of these laws inconsistent with the free exercise of inalienable human rights.

In the latter, more recent, instance, the African Court offered a judicial pronouncement at a continental level, which further heightens concerns that these offences are incompatible with domestic and regional human rights laws. The judgement follows the earlier adoption by the ACHPR of the Principles which underscore the negative impact that the enforcement of these laws have on the rights and freedoms of the poor, vulnerable and marginalised. The Principles also offer targeted and rights-based guidance to African states on the need to decriminalise petty offences in Africa, in terms of articles 2, 3, 5 and 6 of the African Charter. These provisions draw their form and purpose from universal human rights systems and safeguard inalienable human rights, which are also protected in domestic human rights systems across the continent.

The significance of these Principles is threefold. Firstly, they are intended to offer authoritative guidance to African states on the interpretation and implementation of the provisions of the African Charter, an instrument that is binding on South Africa under section 231 of the Constitution. Secondly, they establish regional standards against which petty offences, created by domestic laws, should be assessed. Finally, they advance and explain measures that should be adopted by African states to ensure that domestic laws do not target individuals on the basis of their social origin, status or fortune by criminalising life-sustaining activities.

According to the Principles, petty offences are minor offences which include, but are not limited to, being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and other offences such as washing clothes in public. The punishments prescribed by law for these offences include a warning, community service, a low-value fine or a short term of imprisonment, often for failure to pay the fine.

The Principles are divided into six parts. The content of each part is explained below.

Part 1: Definitions

Part 1 contains definitions of the terms and concepts used in the document. This part serves as an “internal dictionary” and provides meanings of technical terms such as “decriminalisation”, “petty offences” and “performance of life-sustaining activities”.

Part 2: Purpose

This part sets out the purpose for which the Principles were adopted. It underlines the objective of the Principles, which is to assist African states in the decriminalisation of petty offences on the continent, in line with the provisions of the African Charter.

Part 3: Petty offences are inconsistent with articles 2, 3 and 18 of the African Charter on the right to equality and non-discrimination

Part 3 provides a detailed analysis of the scope and application of the right to equality and non-discrimination, as contained in articles 2, 3 and 18 of the African Charter. It reiterates that everyone is entitled to exercise the rights and freedoms guaranteed in the African Charter without distinction of any kind which, inter alia, include social origin, fortune, birth or other status, and that everyone is equal before the law and enjoys equal protection of the law. This part also requires African states to ensure that they eliminate all form of discrimination against vulnerable groups such as women, children and those with a disability, and protect and promote the rights of these groups. Part 3 further reminds states of their obligations to ensure that the adoption and enforcement of all laws, including laws that create petty offences, respect, protect and promote the rights of all persons to equality before the law and non-discrimination, as required by the African Charter.

Significantly, it cautions states that laws creating petty offences are inconsistent with the principle of equality before the law and non-discrimination, because they either target or have a disproportionate impact on, amongst others, those experiencing poverty, sex workers, the homeless, street children and those that face vulnerability on the basis of their sexual orientation.

Lastly, Part 3 reminds states that the implementation of petty offences punishes, isolates, controls and undermines the dignity of individuals on the basis of their status. It further stresses that, by restricting the performance of life-sustaining activities in public, the enforcement of petty offences also violates the autonomy of persons and sustains the stigmatisation of poverty by authorising a criminal justice solution to what are social-economic and sustainable development matters. For these reasons, it concludes that petty offences strengthen discriminatory attitudes against marginalised persons.

Part 4: Petty offences are inconsistent with article 5 of the African Charter on the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment

This part focuses on the incompatibility of petty offences with the right to dignity and freedom from ill-treatment. It underlines the protection guaranteed by article 5 of the African Charter, which safeguards the right of everyone to have their dignity respected, and their freedom from torture, cruel, inhuman or degrading punishment or treatment protected. It also sets out the minimum standards to which all places of deprivation of liberty should conform, to ensure humane conditions in places of detention, and requires states to ensure that conditions in these places meet the minimum standard as postulated in regional and international human rights law, which includes respect for the inherent dignity of detainees and the protection of their freedom from ill-treatment.

It also highlights that overcrowded detention facilities lead to ill-treatment and underscores that the enactment and enforcement of petty offences violate the right to dignity and freedom from ill-treatment by virtue of the fact that their implementation promotes overcrowding in places of detention. Additionally, it notes that the enforcement of these offences will have a similar impact in instances where their enforcement involves mass arrest operations.

Part 5: Petty offences are inconsistent with article 6 of the African Charter on the right to liberty and security of the person and freedom from arbitrary arrest and detention

Part 5 reaffirms that everyone has the right to liberty and security as an individual, and freedom from arbitrary arrest and detention. It stresses that individuals can only be arrested for reasons and conditions previously set by law, and only pursuant to the exercise of power accorded to law enforcement agents in a democratic society.

This part also establishes minimum rules that the adoption and implementation of petty offences should comply with, in order to uphold the rights and freedoms of people. It requires the adoption of petty offences to respect the rule of law, be legitimate, necessary and proportionate, and uphold regional and international human rights standard, particularly the right to equality and non-discrimination.

Part 5 further emphasises that petty offences are often worded in broad and vague language, and declares that the enactment of broad and vague laws makes them vulnerable to abuse through an arbitrary application, as law enforcement officials have a wide discretion to determine their enforcement. In addition, it provides that the implementation of petty offences has the undesired effect of diverting scarce governmental resources away from addressing serious crimes, and expresses concerns that laws that prescribe the arrest and imprisonment of persons for petty offence create a disproportionate response mechanism, and are contrary to the universally accepted standard of arrest as a measure of last resort.

Part 6: State Parties to the African Charter should decriminalise petty offences in accordance with these Principles and other regional and international human rights standards

The final part of the Principles urges states to decriminalise petty offences and proposes a number of viable alternative measures that they should adopt as a substitute for the practice of adopting and implementing laws that criminalise the status of an individual. These measures include, inter alia, addressing the underlying causes and factors that promote poverty, homelessness and other conditions that compel people to occupy public places. It also requires states to promote the wide dissemination of the Principles, including among others, to lawmakers and other justice and security sector actors.

ADVISORY OPINION BY THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The adoption of the Principles by the principal human rights body on the continent and the ACHPR's targeted interventions to facilitate the decriminalisation of petty offences on the continent have been reinforced with a judgement by the African Court which further underlines concerns raised by the ACHPR and other relevant actors within the civil society landscape on the continent. Arguably, the judgement also strengthens the call and efforts of the ACHPR and clarifies the obligation of African states to adopt legislative and other measures to decriminalise these offences, particularly vagrancy-related offences.

In an advisory opinion, requested by the Pan African Lawyers Union (PALU), the African Court assessed the compatibility of the existence and enforcement of vagrancy-related laws against continental human rights systems and made the following findings and observations that further emphasise the unconstitutional nature of petty offences, and the need for a specific focus on interventions that respect, protect and promote inalienable human rights and dignity.

Finding 1: Vagrancy-related by-laws violate the right to equality and non-discrimination

The Court ruled that the existence and enforcement of vagrancy-related laws violate the principle of equality and non-discrimination, as embodied in articles 2 and 3 of the African Charter, on the basis that they criminalise the status of an individual, rather than specific conducts that satisfy all the elements of a crime, and effectively punish the poor and underprivileged. This group, the court stressed, include, inter alia, the homeless, sex workers, the disabled, and street vendors, who are already experiencing challenges in exercising other human rights, such as social-economic rights, a condition that exacerbates their circumstances by further depriving them of their right to be treated equally.²

Significantly, the Court also set out the scope of the right to be treated equally without any discrimination. It observed that:

Admittedly, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.³

Finding 2: Vagrancy laws are inconsistent with the right to be treated with dignity

The Court also established that vagrancy-related laws violate the dignity of the marginalised and underprivileged members of society by unlawfully interfering with their efforts to maintain or build a decent life. It further ruled that the practice of labelling an individual as a “vagrant” or “rogue” or the use of any other derogatory word to describe them or subjecting them to forceful relocation and removal to other areas violates their dignity.⁴

Finding 3: Vagrancy laws are inconsistent with the right to liberty and security of the person

The Court also held that vagrancy-related laws infringe the right to liberty and security of the person on the basis that they are often framed in overly broad and vague language, and do not clearly and sufficiently specify the reasons and condition under which arrest and detention can be carried out. Consequently, this use of vague and imprecise language, the court ruled, deprives the public of the benefit of understanding what conduct is prohibited and the specific elements of the offences, thereby granting law enforcement officials wide discretion to enforce laws, which often results in arbitrary arrests and application of laws.⁵

Finding 4: Vagrancy laws are inconsistent with the right to fair trial

The Court further re-affirmed the existence of linkages between the right to fair trial and privilege against self-incrimination, which is also guaranteed under the Constitution. It concluded that because vagrancy laws criminalise and punish the status of an individual, such as being “idle” or “disorderly”, which do not lend themselves to any objective definition, law enforcement officials can use their power to arbitrarily arrest individuals without any proof that they committed a crime. Once under arrest, and in order to secure their release, they would have to explain themselves to law enforcement officials to demonstrate that

2 African Court on Human and Peoples’ Rights. Request for Advisory Opinion by Pan African Lawyers Union, 001/2018, pp. 17-20.

3 Ibid., pp. 17-18.

4 Ibid., pp. 21-22.

5 Ibid., pp. 22-23.

they are not “idle” or “disorderly”. This, the Court held, gives room to law enforcement officials to exert undue pressure on suspects by arresting them under the guise of enforcing vagrancy laws and then soliciting self-incriminatory evidence, even in relation to crimes which have no connection to vagrancy, which violates protections against self-incrimination.⁶

Finding 5: Vagrancy laws are inconsistent with the right to freedom of movement

The Court also ruled that the enforcement of vagrancy laws undermines the right to freedom of movement, primarily because the laws limit the right of persons to move freely without complying with the requirements of justifiable limitations of human rights. It determined that, in addition to the requirement that all limitations of the freedom of movement must be provided by the law, any restriction must also be necessary to protect national security, public order, public health or morals or the rights and freedom of others, and that they be consistent with other rights guaranteed in the African Charter. It concluded that, while the law may provide for the enforcement of vagrancy laws, such enforcements do not satisfy the other requirements of justifiable limitations. This, the Court intimated, is because vagrancy laws are not necessary for any of the purposes for which they are ordinarily cited, but are often deployed for crime prevention purpose, despite concerns that there is no established correlation between vagrancy and the criminal propensity of an individual.⁷

JUDICIAL DECISIONS IN OTHER DOMESTIC JURISDICTIONS

In addition to decisions and interventions by human rights bodies at continental level, at domestic level, in some jurisdictions, efforts by campaign members to promote the decriminalisation of petty offences have achieved notable progress, reflected in favourable judicial pronouncements and outcomes.

For instance, in 2017, the High Court of Malawi in, *Mayeso Gwanda v the State*, delivered a judgement in which it set a positive standard in the jurisprudence of Malawi, in relation to petty offences. The court, while examining the constitutionality of section 184(1)(c) of the Penal Code, which created the offence of rogue and vagabond, held that the existence of the offence in Malawian statutory laws and its enforcement violated fundamental human rights, including the right of an individual to be treated with dignity, freedom from inhuman and degrading treatment and punishment, freedom from discrimination, and the right to equal protection of the law.⁸

In declaring section 184(1)(c) of the Penal Code invalid, the Court reiterated the overly broad nature of the section and its failure to provide clarity to police officers, which allowed law enforcement officials wide discretion to apply the law.

It concluded that: “therefore, the time for action is now upon us to declare section 184(1)(c) of the Penal Code unconstitutional to alleviate the plight of marginalised groups.”⁹

Similarly, in *Mohammed Feisal & 19 others v Henry Kandie, Chief Inspector of Police & others*, the High Court of Kenya made the following observation while addressing the enforcement of petty offences in the country:

6 Ibid., pp. 23–25.

7 Ibid., pp. 25–27.

8 *Mayeso Gwanda v the State*; 2015, pp. 23–27.

9 Ibid., p. 25

I do not know how one can criminalise idleness. Gone are the days when the marginalised members of our society were bundled into police cells under this rubric of offences, incapable of constituting any criminal elements. One wonders the sustainability of the offence of being idle and disorderly in our statute books save for the reason of being a fertile provision for the police to use it as a tool to infringe and or violate the right to equality and non-discrimination under Article 27 of the constitution. Undoubtedly, none of the middle income or economically advantaged class of our society finds himself or herself being arrested or indicted with these kinds of offences.¹⁰

THE ENACTMENT AND ENFORCEMENT OF BY-LAWS IN SOUTH AFRICA

Background

In many African countries, criminal codes trace their origin to colonial rule, with the British Empire deliberately shaping the contents of penal codes in many countries.¹¹ Despite the end of colonialism, these laws continue to exist in almost identical wording in most penal codes of former British colonies in Africa.¹² The introduction of laws that prohibit vagrancy-related activities followed a similar process. Colonial states in Africa imported European vagrancy law in the nineteenth and early twentieth centuries.¹³

From a sociological context, it is submitted that the adoption of vagrancy laws was motivated by three main reasons. Firstly, they were meant to curtail the movement of people and criminalise begging, which then ensured the availability of cheap labour to landowners and industrialists while limiting the presence of undesirable persons in cities. Secondly, they were aimed at reducing the cost incurred by municipalities to look after the poor. Finally, they were intended to prevent property crimes by creating broad offences that provided wide discretion to law enforcement officials.¹⁴

In South Africa, their historical origin is linked to that of pass laws. Both sets of laws were enacted to control the actions and behaviours of the indigenous people of the Cape.¹⁵ As their influence and impact spread across the country, they continued to entrench segregation and subjugation of the poor and destitute.

Petty offences are mainly established by provincial legislation and municipal by-laws. Municipalities enjoy express constitutional authority to pass by-laws and regulate the administration of their affairs. While there are various by-laws that create petty offences, the scope of this report is limited to the enactment and enforcement of laws that prohibit vagrancy-related activities.¹⁶

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- 10 Mohammed Feisal & 19 Others v Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 Others. Available at: <http://kenyalaw.org/caselaw/cases/view/166361/>.
- 11 Southern Africa Litigation Centre (2013), No justice for the poor: A preliminary study of the law and practice relating to arrests for nuisance-related offences in Blantyre, Malawi. Chapter 3: The persistence of colonial vagrancy laws in Southern Africa, pp. 23-28. Available at: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/No-Justice-for-the-Poor-A-Preliminary-Study-of-the-Law-and-Practice-Relating-to-Arrests-for-Nuisance-Related-Offences-in-Blantyre-Malawi.pdf>.
- 12 Ibid.
- 13 Jocelyn Alexander (2012), Hooligans, spivs and loafers? The politics of vagrancy in 1960s Southern Rhodesia, *The Journal of African History*, 53:3, 346.
- 14 As cited in African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African Lawyers Union, 001/2018. p. 15.
- 15 M Killander (2019), Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality, *South African Journal on Human Rights*, 35:1, 73-78.
- 16 The others are those that seek to regulate informal trading and those that target the keeping of domestic animals and sanitation.

Constitutional power of municipalities to adopt by-laws

Until the adoption of the Constitution of 1996, the power of municipalities to enact by-laws did not stem directly from the Constitution. It was rather conferred on them through legislative enactments.¹⁷ This meant that municipalities did not enjoy the independence to effectively administer their affairs, and could only legislate within the powers provided to them by legislation.¹⁸ The adoption of the Constitution of South Africa in 1996 changed this. The Constitution expressly sets out functions for which municipal by-laws may be enacted and enforced. Section 156(1)(a) of the Constitution gives municipalities the authority to enact by-laws to administer local matters, as listed in part B of schedule 4 and part B of schedule 5 of the Constitution. This section also allows municipalities to pass by-laws to administer any other matter allocated to them by national or provincial legislation.

The purpose of this power is to allow municipalities to effectively and successfully administer local affairs and deliver critical public services at the local level of government.

However, municipalities are not allowed to pass laws that are in conflict with national or provincial legislation. Section 156(3) of the Constitution provides that any by-law that is in conflict with national or provincial legislation is invalid.

Section 2 of the Constitution also establishes the Constitution as the supreme law of the country and notes that any law or conduct that is inconsistent with its provisions and values is invalid. The section further provides that any obligation imposed by the constitution must be fulfilled.

In the exercise of their legislative power, municipalities cannot, therefore, pass any by-law that contradicts the provisions of the Constitution and the values enshrined in it, such as the right to be treated with dignity and the right to equality and non-discrimination. In addition, the preambular paragraphs of the Constitution explicitly state that the people of South Africa adopt the Constitution to, inter alia, establish a society based on democratic values, social justice and fundamental human rights.

Enforcement of by-laws

Municipal by-laws are largely enforced by the South African Police Service, Metropolitan Police and City Law Enforcement. In addition, it has been established that City Improvement Districts (CIDs) and private security companies also participate in the enforcement of by-laws. The latter two groups, and their respective roles, are examined in detail below.

City Improvement Districts

CIDs are not-for-profit organisations – consisting of business and property owners – operating within specific geographical areas to provide supplementary local services in order to protect commercial and residential areas. They derive their funding from imposing levies payable by property and business owners that seek their services.¹⁹

The City of Cape Town's CID by-law, for instance, permits the establishment of CIDs to, inter alia, enhance and supplement municipal services provided by the City of Cape Town.²⁰ In

17 M Killander (2019), pp. 76 and 78.

18 Ibid.

19 S Dedier, E Peyroux and M Morange (2012), The spreading of the City Improvement District model in Johannesburg and Cape Town: Urban regeneration and the neoliberal agenda in South Africa, *International Journal of Urban and Regional Research*, 36:5, 1.

20 City of Cape Town City Improvement District By-Law, (2013).

providing supplementary municipal services, some CIDs also engage in the enforcement of by-laws, especially those that seek to prevent people from occupying public places and performing certain activities in public.²¹ Their role and power do not include the authority to arrest or issue fines, although Cape Town's Central CID employs dedicated Law Enforcement officers to perform these functions, giving the organisation the full reach of the law.²²

Private security

The private security sector in South Africa is regulated by the Private Security Industry Regulation Act 56 of 2001. The Act established, amongst other things, the Private Security Industry Regulatory Authority (PSIRA) and empowers it to conduct the registration of private security companies to provide security services. Private security companies are not entitled to enforce municipal by-laws. They do not have the power granted to police officers to effect arrests or issue fines. However, in some circumstances, the law permits private citizens to conduct arrests. Under specific, limited conditions, section 42 of the Criminal procedure Act 51 of 1977 allows private individuals to carry out an arrest without a warrant. It also authorises any person in charge of a property on which another person is committing an offence to arrest such person without a warrant. Private security providers have a large and visible presence in the country. According to PSIRA's annual report for the financial year 2019/2020, the private security industry has a total of 548 642 registered active private security officers.²³ This outnumbers the combined number of SAPS and South African National Defence Force members.

In the provision of their services, it has been established that they constantly harass and threaten the homeless and other persons that perform certain activities in public spaces.²⁴

Available reports detail the ill-treatment of homeless persons by private security guards for begging or sleeping in public places. Complaints range from allegations of assault to threats and harassment to being sprayed with pepper spray for begging or occupying public space.²⁵ In some instances, these private companies are contracted by cities to complement their police officers.²⁶ In addition, there are increasing examples of the use of private security providers, including during the coronavirus pandemic, to evict people from their homes, specifically those living in peri-urban spaces.²⁷

Nature and scope of petty offences in South Africa

In 2019, APCOF, as part of its continuing and progressive efforts to promote law enforcement practices and strategies that comply with domestic and regional human rights standards and their interpretative and soft law instruments, commissioned a review study of existing offences under the South African legal framework that can be classified as petty offences.

21 This came out clearly at the roundtable discussion on decriminalisation of petty offences in South Africa.

22 <https://www.capetownccid.org/about-ccid/departments/safety-and-security>.

23 PSIRA (2020), Annual Report 2019/2020, p. 58.

24 Daniel Friedman (2019), Concern for the homeless starts at home, *The Citizen*, 5 July 2019. Available at: <https://citizen.co.za/news/opinion/2150247/concern-for-the-homeless-starts-at-home/>. See also Ian Broughton (2016), Homeless in Durban dumped outside the city, *GroundUp*, 9 December 2016. Available at: <https://www.groundup.org.za/article/homeless-durban-dumped-outside-city/>.

25 Fatima Asmal (2014), Durban's homeless face of harassment, *Mail & Guardian*, 14 February 2014. Available at: <https://mg.co.za/article/2014-02-13-durbans-homeless-face-of-harassment/>. See also Raymond Parrier (2019), Killing them softly with our indifference, *iol.co.za*, 26 June 2019. Available at: <https://www.iol.co.za/mercury/news/opinion-killing-them-softly-with-our-indifference-27648925>.

26 Fatima Asmal (2014).

27 Agence France-Presse (2020), Red Ants continue to tear down Johannesburg shacks, *The South African*, 12 May 2020. Available at: <https://www.thesouthafrican.com/news/forced-evictions-red-ants-johannesburg-gauteng-shacks-lockdown-2020/>.

This review study was intended to, inter alia, explore national, provincial and municipal legal frameworks within the country's three spheres of government, and identify petty offences whose existence and application are inconsistent with South Africa's obligations, under domestic and international human rights law, to conceive and address poverty, homelessness and other conditions that promote marginalisation as a social justice concern and not as criminal justice issues that are to be prevented and contained through the application of criminal law.

The study established the existence, across the country, of petty offences that can be classified into three main categories. They include:

- Offences relating to public places and prohibited behaviour;
- Offences relating to informal trading;
- Offences relating to the accommodation of animals and sanitation.²⁸

Common denominator in the laws that establish petty offences

Two common factors are discernible in these laws and are highlighted by the study and its findings:

- First, they seem to criminalise the occupation of public spaces and the performance of certain life-sustaining activities in public places. The policing and enforcement of these laws, therefore, disproportionately affect and penalise poor, marginalised and vulnerable persons, and promote discriminatory law enforcement practices.

The practice of occupying public places and the performance of certain activities in the open are primarily actuated by social-economic conditions in which the poor, vulnerable and marginalised find themselves. Structural inequality and discrimination, which have been exacerbated and made more visible by the Covid-19 outbreak and its broader health, social and economic consequences, are the main drivers of these undesired conducts and behaviours. It is primarily on this basis that the African Court imposed a positive obligation on African states to facilitate legal reform, amend and repeal discriminatory laws and policies, and reinforce the ACHPR's normative articulation in the Principles.

The policing and application of these laws can, therefore, promote and support indirect discrimination against the poor and marginalised. Our human rights law recognises the notion of indirect discrimination. According to Currie and De Waal:

The prohibition of indirect unfair discrimination is based on the realisation that, though the basis of differentiation may, on the face of it, be innocent, the impact or effect of the differentiation is discriminatory ... any law which has an unfairly discriminatory effect or consequences or which is unfairly administered may amount to prohibited discrimination even if the law appears on the face of it to be neutral and non-discriminatory ... a law may also be neutral on its face and in its impact but it is administered unfairly.²⁹

- A second factor that is evident from these laws is that they are developed and worded in broad, vague and ambiguous language. In addition, there is an absence of definitions

28 For greater and more specific detail of the offences, see Annexure 1.

29 Ian Currie and Johan De Waal (2014), *The Bill of Rights Handbook*. Sixth edition. Cape Town: Juta, p. 238.

of key terms that is necessary to illustrate and set out all the elements of an offence and provide legal clarity and certainty to the public, which raises concerns about arbitrary enforcement of laws and exercise of policing discretion.

The necessity of adopting clear and precise rules and laws to administer the affairs of the public has been recognised as cardinal to South Africa's constitutional democracy. In *Bertie Van Zyl & Another v Minister for Safety and Security & others*, the court noted that:

It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules.³⁰

Similarly, Currie and De Waal submit that the rule of law has implications for the content of law and government conduct. They argue that the rule of law has both procedural and substantive components. The procedural component prohibits arbitrary decision making, while the substantive element requires the government to respect basic human rights, such as the right to equality and respect for human dignity.³¹ They conclude that:

A further implication of the rule of law is that laws must be clear and accessible. A law that does not indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly is vague and accordingly unconstitutional and invalid.³²

Other findings embodied in the study

The study further established that petty offences are overwhelmingly contained in municipal by-laws. This emphasises the real and concrete impact that legal and policy reform will have on the exercise of basic human rights and freedoms, given that municipalities are the immediate providers of essential public services and support.

In the acknowledgement of the critical role played by municipalities in the provision of safety and security, the 2016 White Paper on Safety and Security – which also recognises the significance of initiatives that aim to reduce poverty, inequality and unemployment within its broader approach of identifying and addressing the underlying factors that cause crime and violence – requires municipalities to adopt a number of measures to successfully implement its vision and purpose. These measures include that municipalities, inter alia:

- Allocate budgets for strategy, plans, roles, programmes and interventions for safety, crime and violence prevention at local and district municipality levels;
- Align resources to objectives of safety, crime and violence prevention outcomes; Ensure alignment of key performance indicators in strategies, plans, norms and standards with the White Paper.³³

Although public authorities and policymakers may seek to justify the existence and application of these laws as necessary for the prevention of crime or the protection of public health and safety, it is questionable whether they have any discernible effect in achieving that objective. An objective and evidence-based assessment of the cause and trend of crime and violence may be appropriate to determine whether those against whom enforcement

30 Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others (2009) ZACC. P 12.

31 Ian Currie and Johan De Waal (2014), pp. 12-13.

32 Ibid., p. 14.

33 Government of South Africa (2016). White Paper on Safety and Security, pp. 42-43. Available at: <https://www.saferspaces.org.za/uploads/files/2016-WPSS.pdf>.

mechanisms are recurrent can be deemed responsible for any increase in the rate of crime, or whether they exacerbate a trend that has been building. Presently, there is no known research study that has established that these groups are responsible for a higher degree of serious offences than others in society.³⁴

A more complete account of petty offences in South Africa and a comprehensive review of the three categories in greater and more specific detail are set out in the annexure of this report.

IMPACT OF THE ENFORCEMENT OF VAGRANCY-RELATED BY-LAWS ON CONSTITUTIONALLY PROTECTED RIGHTS AND FREEDOMS

Background

As has already been declared by two regional human rights bodies, the application of vagrancy-related laws and petty offences, in general, has gross ramifications for the free exercise of human rights. They unjustifiably restrict human rights and freedoms, as enshrined in regional human rights laws and, by extension, the Bill of Rights in the Constitution. These rights include: i) the right to equality and non-discrimination, ii) the right to be treated with dignity, and iii) the right to freedom and security of the person.

This section explores the impact of the enforcement of these laws against the provisions of the Constitution, with a specific focus on the three rights identified above, as interpreted by South African courts and academics. In addition, to obtain practical knowledge and reflection of the full extent of their impact on the rights and welfare of those who have suffered as a result of their enforcement, it features the experiences of these groups, as articulated by them, at the hands of law enforcement officials.

Compatibility of vagrancy-related laws with section 9 of the Constitution

Section 9 of the Constitution enshrines the right to equality and non-discrimination. It provides that everyone is equal before the law and has equal protection and benefit of the law and that equality includes the full and equal enjoyment of rights and freedoms. It also prohibits any discrimination on the basis of, amongst others, social origin and birth. In addition, it empowers the state to take legislative and other measures aimed at advancing individuals, or groups, disadvantaged by unfair discrimination, to promote the achievement of equality. It is submitted that our law differentiates between formal and substantive equality. Formal equality, it is contended, simply requires that all persons are equal holders of rights, and does not take disparity in the social-economic status of groups into consideration.³⁵ It can be achieved by extending the same rights and entitlements to all.³⁶

Substantive equality, on the other hand, requires an actual assessment of the social and economic circumstances of the groups to establish whether the right to equality is being upheld.³⁷ Consequently, it is argued that a purely formal approach to the interpretation of the right to equality risks abandoning deep-seated values of the Constitution and that a substantive understanding of the right to equality *must* be preferred (emphasis added), as it is supportive of the normative values embodied in the Constitution.³⁸

34 https://www.up.ac.za/news/post_2749965-its-time-to-rethink-by-laws-that-criminalise-poverty-says-up-centre-for-human-rights-professor.

35 Ian Currie and Johan De Waal (2014), p. 213.

36 Ibid.

37 Ibid.

38 Ibid., p. 214.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*, the constitutional court confirmed that, at the very least, equality means equal concern and respect across differences. The court also emphasised that the right to equality dictates that differences should not be the reason for exclusion, marginalisation, stigma and punishment.³⁹ In *Brink v Kitshoff*, the court held that the equality clause was included in the Constitution with the acknowledgement that discrimination against individuals who are members of marginalised groups can establish patterns of group disadvantage and harm. It concluded that such discrimination is unfair because it builds and entrenches inequality between different groups in society.⁴⁰

As already highlighted elsewhere in this report, the notion of indirect discrimination supports the invalidity of laws the enforcement of which results in unfairly discriminatory consequences, or which is administered unfairly, both occurrence of which can be regarded as engendering unfair discrimination, even in conditions under which the law in question appears to be neutral and non-specific. Additionally, it has been established that academic writings emphasise a substantive understanding of the right to equality.⁴¹ This, dovetailed with the interpretation of the right to equality as prescribed by the courts, leads to a distinct conclusion that vagrancy-related by-laws are inconsistent with the right to equality and non-discrimination on the basis that they either target or have a disproportionate impact on one of the most marginalised groups in the country, including the poor and homeless. This is against the provisions of section 9 of the Constitution, as and interpreted and amplified by the courts and the Principles.

Compatibility of vagrancy laws with section 10 of the Constitution

Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. The right to be treated with dignity is one of the foundational tenets of South Africa's constitutional democracy. Section 1 of the Constitution provides that South Africa is founded on the values of, inter alia, human dignity, the achievement of equality and the advancement of human rights and freedoms.

The recognition of the significance of the right to dignity, and its centrality in promoting the exercise of all other human rights, is evident in judicial interpretation of the right to be treated with dignity. In *S v Makwanyane*, the court held that the right to dignity is the basis of many other rights guaranteed by the constitution. It concluded that without respect for dignity, human life is significantly diminished.⁴² In *President of the Republic of South Africa v Hugo*, the court noted that central to the prohibition of unfair discrimination in the country, is the acceptance that the purpose of our new constitutional order is the formation of a society in which everybody will be granted equal dignity and respect, irrespective of their affiliation to any group.⁴³

In addition to the conclusion arrived at by the African Court, there is judicial precedent in South Africa that supports the contention that the enforcement of vagrancy-related laws violates the right of the poor and marginalised to have their dignity respected and protected. In *Ngomane & others v City of Johannesburg Metropolitan*, for instance, the court held that the decision of Johannesburg Metropolitan Police Department to confiscate and

39 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998) (ZACC) 15 para 132.

40 *Brink v Kitshoff* (1996) (ZACC) 9 para 42.

41 Ian Currie and Johan De Waal (2014), p. 214.

42 *S v Makwanyane* (1995) (ZACC) 3 para 326–328.

43 *President of the Republic of South Africa and another v Hugo* (1997) (ZACC) 4 para 41.

destroy properties belonging to homeless people resulted in the violation of their right to have their dignity respected and protected.⁴⁴

In *Port Elizabeth v Various Occupiers*, the court cautioned that:

*It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.*⁴⁵

Available academic writings also intensify arguments that vagrancy-related by-laws violate the right to dignity, primarily because they authorise the treatment of individuals as objects that should be removed from view.⁴⁶

The Constitution regards the right to dignity as a non-derogable one. This right is also recognised as inalienable under regional and international human rights systems. The court in *Makwanyane* also affirmed that the right to dignity, together with the right to life, are the most important of all human rights. This, the court concluded, must be seen in everything the state does.⁴⁷

Compatibility of vagrancy laws with section 12 of the Constitution

Section 12(1) of the Constitution protects the right of everyone to freedom and security of the person. This right includes, amongst others, the right not to be deprived of freedom arbitrarily or without just cause and the right not to be subjected to any cruel, inhuman or degrading treatment or punishment.

It is observed that section 12(1) offers both procedural and substantive protections. The substantive part obliges the state to have good reasons for depriving individuals of their freedom, while the procedural requirement mandates the state to ensure that the deprivation takes place in accordance with fair procedures.⁴⁸

Although SAPS crime statistics and records do not offer any specific detail in relation to arrest for infringement of by-laws, it is submitted that thousands of arrests take place each year.⁴⁹ Many arrests for violations of vagrancy-related by-laws, it is argued, are conducted for purposes of intimidation rather than prosecution.⁵⁰

In *Minister of Safety and Security v Sekhoto*, the court held that the decision to arrest must be based on the intention to bring the arrested person to justice.⁵¹ Our courts have also cautioned that where an arrest is meant to frighten or harass persons, or where it is meant to punish the suspect by means of an arrest, or where the arresting official knows that the state will not proceed to prosecute, it is against the law because the official has used his power of arrest for an ulterior purpose.⁵²

44 Ngomane and others v City of Johannesburg Metropolitan Municipality and Another (2019)(SCA) 57 para21.

45 Port Elizabeth Municipality v Various Occupiers (2004) (ZACC) 7 para 18.

46 M Killander (2019), p. 85.

47 S v Makwanyane (1995) (ZACC) 3 para 144.

48 Ian Currie and Johan De Waal (2014), p. 270.

49 M Killander (2019), p 86.

50 Ibid., p. 87.

51 Minister of Safety and Security v Sekhoto and Another (2011)(SCA) 1 para 30.

52 Ibid. para 30–31.

Experiences of those against whom enforcement measures are frequent

- On 25 of July 2019, APCOF facilitated a roundtable discussion on decriminalisation of petty offences in South Africa, which was attended by, amongst others, groups who are marginalised in society because of their status, and against whom enforcement measures are frequent. This section outlines their narration and experiences in the hands of law enforcement officials mandated to enforce vagrancy laws. To obtain their views, they were asked to explain the experiences they have had with Law Enforcement Officials as they enforce these laws. The following are some of their responses: One morning in 2017, while sleeping with my boyfriend on the streets of Observatory outside of Spar Supermarket, Law Enforcement officials fined me and my boyfriend R300 each for sleeping on the streets. One Law Enforcement official asked, "Who told you to sleep here?" I told him that it is not a criminal offence to sleep on the street, and I did not sign the fine form. My boyfriend signed the fine form. It is not right for Law Enforcement officials to fine us for sleeping on the streets. The Law Enforcement officials were not friendly at all. They looked down upon us. They were aggressive and did not respect us. Because I refused to sign the fine form, the Law Enforcement officials pulled down the structure we were sleeping on. They were very rude. I am not the only victim of the Law Enforcement. Law Enforcement victimises us every month-end when they do a clean-up campaign. My plea is for the Law Enforcement to have mercy on us because we are also human beings. We are not criminals.
- One time, after SWEAT had sponsored us for groceries after our dwelling had burnt down, the groceries we bought from Spar were confiscated by Law Enforcement. We had done nothing wrong when they stopped us. When we deal with Law Enforcement they are not friendly to us. They are aggressive, and don't see us as people. They see us like animals. Law Enforcement abuse us in the mornings, waking us up at 5am, saying things like, "You're naaiers." They pull our blankets off us and make us get up and chase us away from where we are sleeping. Being a sex worker also makes it more difficult because it is another way for law enforcement to arrest and harass me.
- I lost my job and my accommodation. Law Enforcement officers and police keep harassing us where we live in Observatory. They raid us and take our personal possessions. During one raid, they stood on my dentures and broke them. I reported it to the police station, but they said they don't see any need for me to have dentures. Having dentures can get me work and food.
- In 2007 I moved to Observatory with my partner to Black River Park. We slept in the park, and the police (including Metro and the old Metrorail police) discovered us. We built a shack at the back of the park. In February 2008, we were attacked by the police physically and verbally. I managed to escape.
- Two weeks ago, our place burned down in Salt River. The Fire Department did not want to come out. We lost everything. We moved to a field in Observatory. On the first night, security officers told us, "You two bitches must move away from here."
- The place where I live with my daughter burned down. We moved to the green field near Spar. The first time we were seen by security, they swore at us, they took our IDs and our blankets.
- I was raped and made a complaint at Cape Town Central SAPS. The detectives never followed up with me, and I was not told when the court date would be. I later found out that my rapists were out of jail.

- In 2016, the harassment really started. For the last three years, private taskforce (Fly Squad) have moved into our area. They stand on the corner with trucks and arrest homeless people for “nuisance and loitering” (e.g. walking up and down the street). They lock you up on a Friday, so that they can keep you the whole weekend. Some instances of general arrests are when police would tell the homeless people that there was a curfew (11pm), and if you don’t comply they will lock you up. Also, when you get arrested, you sign a charge sheet. On the sheet, there is a section to write down all of the possessions that have been confiscated from you. But the police do not document everything that they take from you.

From the above illustrations, it is clear that the treatment to which the poor and marginalised are subjected, in the course of the enforcement of vagrancy-related laws, has the effect of undermining their rights and freedoms, as protected in the Constitution and other regional and international human rights instruments. It is precisely for this kind of treatment and conduct that two regional human rights bodies have declared vagrancy laws, and petty offences broadly, as inconsistent with fundamental human rights and freedoms.

Challenges associated with using City Improvement Districts and private security companies to enforce vagrancy-related by-laws

The use of non-state security services providers, such as CIDs and private security companies, to enforce governmental laws has been associated with a number of challenges, which further undermine and impede the fulfilment of fundamental human rights, and enhance existing concerns about the regulation and governance of non-state security companies. These concerns include:

Monitoring, oversight and accountability challenges

Non-state security providers are not subject to the same oversight and accountability architecture as public police officers. In the context of private security companies in the country, although a legislative framework establishes and empowers PSIRA to, among other things, promote a transparent and accountable private security industry, and despite their large presence, their services and operations are not subjected to the same systems of accountability and strict public scrutiny that state security services providers are.

Furthermore, it is likely that the outbreak of Covid-19 will have a negative impact on the operations and provisions of private security services in the country, which reinforces prevailing concerns about the industry’s ability to provide accountable and transparent services. In its 2019/2020 annual report, PSIRA notes that: *“Slow economic recovery and the effect of the Covid-19 pandemic poses a serious threat to the private security industry.”*⁵³

Poor training and inadequate remuneration

In addition to accountability concerns, it is submitted that many problems in the private security landscape are caused by the fact that the industry’s staffing component largely consists of low-paid, under-educated and poorly trained personnel.⁵⁴ The challenge of poor remuneration is specifically reflected by PSIRA in its annual report. In its 2019/2020 annual report, it reported that, as of the end of March 2020, there were 831 improper conduct dockets pending against private security services providers for failing to pay the statutory minimum wage to security officers.⁵⁵

53 PSIRA (2020), Annual report 2019/2020, p. 15.

54 S Wildhorn (1975), Issues in private security, Santa Monica: The Rand Corporation, p. 10. Available at: <https://www.rand.org/content/dam/rand/pubs/papers/2008/P5422.pdf>.

55 PSIRA (2020) Annual Report 2019/2020, p 49.

A further challenge associated with using private security providers to protect public spaces is grounded in public safety concerns. It is argued that non-state security personnel, who are not subjected to the same training system as public police officers, are likely to display poor judgment or overreact to situations, thereby endangering public safety.⁵⁶

Other rights that are potentially affected by the enforcement of vagrancy-related by-laws

The Principles promote the decriminalisation of petty offences in Africa on the basis that their existence and enforcement violate three core human rights and freedoms: The right to equality and non-discrimination; the right to dignity and freedom from ill-treatment; and the right to liberty and freedom from arbitrary arrest and detention. The call and objectives of the Principles have been strengthened by the African Court judgment, which has reinforced this list by ruling that, in addition to the three key human rights listed by the Principles, vagrancy-related laws also violate other human rights, which include the right to the protection of the family. This section examines other human rights that are potentially implicated by the enforcement of vagrancy laws, within South Africa's domestic legal and human rights framework.

Freedom of movement

Section 21 of the Constitution guarantees everyone the right to freedom of movement. Vagrancy-related laws, particularly those that seek to prohibit certain activities such as loitering, are inconsistent with the right to freedom of movement on the basis that they limit and restrict the right to freedom of movement, without complying with the requirements of justifiable limitations of human rights, as prescribed under section 36 of the Constitution.

The right to healthcare and social security

Section 27 (1)(a)&(c) of the Constitution provides that everyone has the right to healthcare and social security. In enforcing vagrancy-related laws, law enforcement officials regularly confiscate and destroy properties belonging to those who occupy public spaces, as was the case in *Ngomane & others v City of Johannesburg Metropolitan*. In most instances, these properties also contain self-identification documents. The deprivation of means of identification, in turn, deprive these individuals of access to critical public services and support, such as medical and social security services. This is contrary to the protections guaranteed by section 27(1)(a)&(c) of the Constitution.

The right to privacy

Section 14 of the Constitution grants everyone the right to privacy, which includes the right not to have their person or home searched. There is increasing evidence that law enforcement officials have established a practice of stopping and searching – on some occasions even strip-searching – those they suspect of violating these vagrancy-related laws.⁵⁷ This practice is inconsistent with the right to privacy, as enshrined in section 14 of the Constitution.

56 M K Sparrow (2014), *Managing the boundary between public and private policing*, New Perspectives in Policing Bulletin, Washington DC: National Institute of Justice, p. 9. Available at: <https://www.ojp.gov/pdffiles1/nij/247182.pdf>.

57 This was revealed at the roundtable discussion on decriminalisation of petty offences in Africa.

CONCLUSION

It is clear that the existence and enforcement of vagrancy-related laws have a grave impact on the exercise of inalienable human rights and dignity. This has been found to be the case by two premier continental human rights bodies. It has also been established that these laws encourage stigmatisation of poor and other historically disadvantaged groups by authorising a criminal justice approach to what are social-economic and sustainable development affairs.⁵⁸ As a regional soft law standard on petty offences, the Principles were adopted with the aim of guiding African states on a rights-based approach and practices of addressing challenges at the interplay between poverty, criminal justice and human rights; and recommends the adoption and implementation of measures and strategies that are aimed at addressing the underlying conditions that compel people to perform certain activities in public. The UN Special Rapporteur on Extreme Poverty and Human Rights has also highlighted the realities of poverty and stigmatisation and urged states not to chastise or punish people for being poor but to instead adopt extensive measures and policies that are designed to address the underlying causes of poverty and promote the realisation of fundamental human rights and freedoms.⁵⁹ These recommendations align with the objectives and vision of the 2016 White Paper on Safety and Security, which is also informed by the values embodied in the Constitution and the National Development Plan (NDP).

RECOMMENDATIONS

This report set out to determine the impact of the existence and implementation of vagrancy-related laws in South Africa, by assessing their compatibility with domestic and regional human rights mechanisms. In fulfilling this objective, it has established a number of gaps and challenges that require a focus on targeted legislative, policy and other interventions and reform initiatives to effectively address them. Below are some recommendations proposed to address these shortcomings.

The enactment and enforcement of by-laws

Municipalities and provinces should:

- Ensure that all legislative enactments comply with established human rights norms and principles;
- Ensure that all laws are worded in clear and precise terms, setting out all the elements of a crime in clear and understandable language, to facilitate the public's understanding of the precise conduct that is prohibited by the law;
- Prioritise the adoption of targeted measures that are specifically aimed at addressing the determinants of crime and violence;
- Give effect to the vision of the White Paper on Safety and Security by adopting anti-poverty measures and addressing underlying conditions that compel people to occupy public spaces;
- As part of recovery from the effects of coronavirus, draw inspiration from resolution 449 of the ACHPR as a central pillar of a successful response to Covid-19 and recover from

58 The Principles on the Decriminalisation of Petty Offences in Africa, 2017.

59 United Nation (2011), Report of the Special Rapporteur on Extreme Poverty and Human Rights, pp. 4-5. Available at: <https://undocs.org/A/66/265>.

the social-political impact, and adopt long-term, comprehensive and sustainable measures, rather than a purely criminal law approach, to address vagrancy-related activities; Establish effective monitoring and accountability architecture over the outsourcing of any law enforcement functions to non-state actors.

Scarcity of data

The South African Police Service should:

- In its annual crime report, include statistics on the number of people arrested for violations of municipal by-laws desegregated by age, gender, race and nationality, nature of the offence and the length of period they were kept in custody.

Municipalities should:

- Regularly release statistics on the number of fines issued and arrests made for violation of municipal by-laws desegregated by age, gender, race, nationality, type of the offence committed and length of time the offenders were kept in custody.

The Department of Correctional Services should:

- Release regular statistics indicating the number of people held in remand for the violation of municipal by-laws desegregated by age, gender, race, nationality and nature of the offence for which they are held.



**DECRIMINALISING
PETTY BY-LAWS IN
SOUTH AFRICA:
APPROACHING
VAGRANCY AND
HOMELESSNESS
WITHIN A
DEVELOPMENTAL
SAFETY PARADIGM**

Patrick Burton and Chumile Sali

INTRODUCTION

The National Development Plan (NDP) of South Africa states unequivocally that safety, for all, is a core human right. The introduction of Chapter 12 of the NDP, directly addressing the building of safe communities, notes that safety is a precondition for human development, improving quality of life, and enhancing productivity.

Safety, therefore, is a common good and is viewed in social, economic and health terms. Homelessness and associated vagrancy are, conversely, viewed as undesirable and are often perceived as a threat to the safety and wellbeing of those who are not homeless and responsible for the failure and lack of realisation of other human rights relating to homeless individuals. Yet, homelessness should rather be seen as a reflection of the failure of different systems within society to ensure the rights of all who live in it.

Homelessness is commonly associated with a plethora of other social deprivations and exclusions, including lack of access to basic services, accessible health care, formal justice systems, social welfare and support systems, and education. However, homelessness may be exacerbated, and the pathway to homelessness escalated, through such deprivations.

This chapter will explore the relationship between the risk factors and drivers associated with homelessness using a safety lens. It will provide an analysis of how the existing safety, and crime and violence prevention framework, approaches and mechanisms available to local government, in particular, can be used to address the underlying risk and correlates of homelessness from a developmental perspective. This perspective should balance the prevention of homelessness at a local level with the reduction and response to homelessness once individuals (and, at times, families) find themselves trapped within a continuum of homelessness.

The chapter will start with an exploration of the relationship between safety and homelessness. It will then move on to look at the current legislative and policy environment, before examining the practical implications for government, and the practical tools and processes that are available for fostering safe and resilient communities, and which can be used to address homelessness.

The relationship between safety, and homelessness and vagrancy

Homelessness and vagrancy are integrally linked to matters of safety, community development and well-being. Chapter 12 of the NDP recognises that safety is a fundamental human right and a necessary condition for human development and well-being.¹

Safety (as differentiated from security) requires approaches and interventions that seek to address the broader social and environmental conditions under which people live that contribute to violence. These may include high levels of inequality, family or individual violence, lack of access to educational opportunities, lack of social cohesion, and drug and alcohol abuse. Community safety, as envisaged in the NDP, is concerned with the collective lived experiences of all individuals within a community – the community collective – and seeks to improve the social, economic and political conditions in which people live, while also seeking to reduce crime and violence. Fundamental to this is the recognition that there are different stakeholders and constituents within communities whose interests may be aligned or who may be competing, all of whom have an important responsibility to ensure the safety of both the individual and the community as a whole.²

In envisaging safe communities for all, the NDP does not exclude those who may be marginalised from formal systems – economic and market systems – or those whose other fundamental rights – to housing, healthcare, and education – might not yet be realised. Rather, the NDP, and subsequent legislation giving effect to the processes and outcomes envisaged in the NDP and, at the international level, the Sustainable Development Goals (SDGs), recognise the need to ensure that all constituents, including those who are most marginalised and excluded, are consulted in the development of policies and processes, and that their needs are considered in legislation, including at local government level. This translates into two inter-related sets of laws and policies: those that address the drivers and correlates of homelessness and vagrancy and seek to prevent homelessness and vagrancy, including factors that lead to these negative social outcomes; and those that seek to respond and support those who are already without homes or families; or who find themselves living on the street.

Defining homelessness³

While the term “homelessness” is used in this paper to denote any person living without shelter, it is also taken to embody elements of social exclusion and marginalisation. It has been noted by researchers and policy-makers that the homeless are not a homogenous collective – and this is emphasised throughout this paper – and that even the term itself may be difficult to define. Often defined purely by a lack of shelter on a medium-term to permanent basis, the social and economic aspects of homelessness may be neglected and the experience of homelessness not fully understood and thus not fully catered for in policies and appropriate response and support services. Further, even self-ascribed notions of homelessness may themselves become exclusionary of other homeless individuals. For

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- 1 National Planning Commission (2012), National Development Plan 2030. Available at: <https://nationalplanningcommission.wordpress.com/the-national-development-plan/>.
 - 2 Civilian Secretariat for Police and SALGA (2018), Developing community safety plans: A guidebook for provincial and municipal officials.
 - 3 It should also be noted that, while not discussed here, definitional issues of homelessness may also assume a temporal aspect. It has been noted elsewhere that even with this aspect, there is little consensus; with definitions ranging from first time, short term, situational, transitional, episodic, and chronic (see Nooe and Patterson, 2010). However, it should be noted that the temporal nature of homelessness is also important in assessing appropriate remedies and interventions, as well as the location and nature of these, and so should also be considered in order to better understand the dynamics of homelessness within any specific community, as advocated later in this paper.

example, Kriel (2017) notes that amongst some homeless people in South Africa, notions of “home” (and thus homelessness) are connected to citizenship; and that non-South Africans are portrayed as “outsiders” rather than legitimate homeless individuals.⁴

There is substantial evidence that the drivers and correlates of unsafety, and crime and violence, intersect with the drivers of homelessness and vagrancy. Research points to the intersection of individual, family, relationship and community factors in increasing the risk of both adults and children becoming homeless.⁵ Much like the risk of victimisation and the perpetration of violence, the experience of any one of these factors does not determine or predetermine whether an individual will become homeless; rather, it is the interaction of factors in specific ways that increase the likelihood of homelessness or predispose an individual to become homeless. For example, in developing an “ecology” of homelessness, Nooe and Patterson (2010) point to the individual factors that increase the risk of homelessness, including age, marital status, exposure to domestic violence, mental illness, sexual abuse, family conflict and violence, substance abuse, and education.⁶ All of these factors have been identified as significant risk factors within a violence paradigm.⁷ At a societal level, as with the ecology of violence, Nooe and Patterson point to factors such as employment insecurity, inequality, discrimination and poverty, among others, as significant risk factors for homelessness and vagrancy, again aligned with the substantial evidence of societal or structural risk of violence.

While these have all been identified as significant risk factors for homelessness, living on the streets and vagrancy also have significant negative individual and societal outcomes that are not dissimilar to the correlates themselves. These harmful outcomes serve to further trap individuals within a cycle of homelessness. For example, homeless people have been shown to be at a significantly higher risk of criminal and violent victimisation, of experiencing sexual abuse themselves, and of further marginalisation and exclusion when trying to enter the formal or informal job market, on physical and mental health.⁸ In South Africa, homeless people living in urban centres are often victims of assault, sexual violence, and discrimination. A recent study in the United States shows that homeless people are three to six times more likely than those living in homes to become ill or experience negative health outcomes. Moreover, illness is significantly more likely to lead to permanent disability, which serves as a further barrier to employment.⁹

Furthermore, and importantly:

... homeless children are sick four times more often than children who are not homeless, and have increased incidence of ... emotional and behavioural problems (e.g. anxiety, depression, withdrawal) ... four times more likely to demonstrate delayed development ... have twice the expected rates of learning disabilities ... more likely to experience hunger, abuse, neglect [and] separation from family.¹⁰

4 I Kriel (2017), Engaging with homelessness in the City of Tshwane. *Development South Africa*, 34:4, 468–481. Available at: <https://doi.org/10.1080/0376835X.2017.1310026>.

5 RM Nooe and DA Patterson (2010), The ecology of homelessness. *Journal of Human Behavior in the Social Environment*, 20:2, 105–152. Available at: <https://doi.org/10.1080/10911350903269757>.

6 Ibid.; also D Smart (1991), Homeless youth in Seattle. *Journal of Adolescent Health*, 12:7, 519–527.

7 EG Krug et al. (2002), *World Report on Violence and Health*. Geneva: World Health Organisation, 2002.

8 Nooe and Paterson (2010).

9 D Maness and M Khan (2014), Care of the homeless: An overview. *American Family Physician*, 89:8, 634–640.

10 Ibid., p. 635.

These last points are critical from a safety and prevention perspective. Each of these negative outcomes is a significant risk factor for violence and the perpetration of violence, both globally and within the South African context. They also relate directly to a number of explicit country obligations and commitments, enshrined in various international treaties and conventions including the Convention on the Rights of the Child, and feature on the international development agenda, as articulated by the SDGs. Much more immediate and practical, they relate specifically to obligations and responsibilities placed on all spheres of government, including municipal.

While similar data does not exist in South Africa, there is little to suggest that there is any reason for dissimilar negative outcomes here. This leads to a self-perpetuating cycle in which homeless people are trapped, and which is likely to lead to increased experiences of harmful outcomes for the individuals themselves.

It is also important to note that while reference is made broadly to homeless people and vagrants, the homeless are not a homogenous collective of individuals or families, but rather espouse and reflect different needs, vulnerabilities, and interests. These may be influenced by characteristics that are commonly found more broadly in communities: race, gender, age, ethnicity or cultural background, as well as disability, sexual orientation, and gender identity. Correlates of the drivers and outcomes of homelessness may be influenced as much by these differences as they are by the shared characteristics or circumstances of homelessness. These factors need to be taken into consideration when looking at the intersection and drivers of homeless people and homeless groups in any community. For example, the specific needs and drivers relating to homeless children may vary from those of adults, similarly with youth, or homeless women as opposed to men, or those identifying as LGBTIQ+. Homelessness and related further marginalisation may impact more or less on any particular individual or set of individual homeless people, depending on any number of factors (see shaded text below).

In describing the situation of homeless youth, Karabanow (2008)¹¹ noted that:

They are a traumatized population located outside of the formal market economy, describe experiences of marginalization and stigmatization within civil society, are continually surveilled and harassed by both social control agents and members of civil society by their very nature of 'being homeless', are poor and isolated, have little in terms of social capital and social margin, appear 'different' in looks and attire, have the added burden of being young in terms of locating employment and shelter, and spend much of their street existence within the public arena, concerned with basic survival needs such as shelter, food, clothing, and social support.

Homelessness and vagrancy are often a product of the failure of many of the mainstream institutions and services at local, provincial and national government level. The above discussion has already highlighted the influence of economic factors and broader meso- and macro-economic processes, and how these translate at a local level into driving homelessness. A four-year study on street homelessness conducted by the Human Sciences Research Council (HSRC) emphasises three common paths to homelessness in the South African context.¹² These include:

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- 11 J Karabanow (2008), Getting off the street: Exploring the processes of young people's street exits, *American Behavioral Scientist*, 51:6, 772-788. Available at: <https://doi.org/10.1177/0002764207311987>.
- 12 C Cross and JR Seager (2010), Towards identifying the causes of South Africa's street homelessness: Some policy recommendations. *Development Southern Africa*, 27:1, 143-158.

- Loss of the respondent's previous economic position (including the loss of housing or employment);
- Inability to secure an *initial* foothold in the economy;
- Displaced youth and children (often escaping dysfunctional and violent families) without alternative shelter options.

The role of local government in addressing homelessness, specifically through addressing many of the associated risk factors from a safety perspective, is clearly defined in various pieces of legislation, each of which is discussed in more detail below.

Legislative framework

There are several pieces of legislation and related policies that speak directly to the role of local government in addressing the factors relating to both homelessness and safety detailed above, and the intersection between the two. These include legislation and policies that provide guidance to municipalities on their role and mandate in consulting and representing their communities, but also in terms of transversal and vertical lines of service delivery. This summary is not intended to be comprehensive but provides an overview of the most significant policies and laws. The following pieces of legislation are directly relevant.

1. National Development Plan (NDP)

The NDP: Vision 2030 is a blueprint and a guiding document for South Africa's development.¹³ Chapter 12, entitled *Building Safer Communities*, promotes a holistic view on violence and crime, and cross-sectoral cooperation between government and non-government actors to address the root causes of crime and violence in communities. The NDP advocates for an integrated approach by state and non-state actors to safety and security and is strategically located in the Presidency, in the Department of Planning, Monitoring and Evaluation.

The opening paragraph of the NDP reads:

The National Development Plan aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.

2. The Municipal Systems Act

Section 23 of the Municipal Systems Act¹⁴ obliges local government to use available resources to promote and create a safe and healthy environment through developmentally-oriented planning as required by Article 152 of the 1996 Constitution of the Republic of South Africa (the Constitution). The Constitution empowers local government to lead crime and violence prevention initiatives in order to promote a safe and healthy environment,¹⁵ and the Municipal Systems Act refers to the developmentally-oriented Integrated Developmental Plan (IDP).

The IDP guides the development of a particular municipality for a period of five years, and thus requires municipal councils to align their resources and budgets to ensure effective implementation. Although IDPs have been traditionally used for identifying priorities for critical

13 South African Government (2012), National Development Plan 2030: Our future – make it work. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf.

14 South African Government (2000), Municipal Systems Act 32 of 2000. Pretoria: Government Printer.

15 Section 152 of the Constitution of the Republic of South Africa, Act 108 of 1996.

infrastructure, basic services and land use management, there is growing recognition that safety principles need to be integrated into IDPs in order to effectively promote an integrated and sustainable approach to creating a safe and healthy environment, strengthening the social and economic development of communities, and improving the quality of life for community members – specifically the poor and other disadvantaged groups.¹⁶ This is important for several reasons, not least that it recognises and emphasises the focus on poor and disadvantaged community members, which include both homeless and vagrant individuals and families, while recognising that there may be specific needs and priorities that exist for different community constituents. It also falls within the call by the African Commission on Human and Peoples' Rights' (ACHPR's) Principles on the Decriminalisation of Petty Offences to directly address the conditions that lead to and exacerbate poverty, one measure of which is homelessness (see shaded text), and to mandate the role of local government in achieving these outcomes.

Much of the focus of municipalities in promoting safety and addressing crime and violence in the past has arguably been placed on traffic policing, such as arrests, roadblocks and issuing of fines as a prevention approach, and not on the integration of safety, crime and violence prevention outcomes. The Municipal Systems Act is important in that, together with related legislation and the development of IDPs, it emphasises the more developmental approaches to preventing violence, including those that relate to poverty, inequality and other exclusionary and disempowering negative outcomes.

3. The Municipal Structures Act

The Municipal Structures Act 117 of 1998 emphasises the role of municipal structures to account for the involvement of communities and community organisations in the affairs of the municipality, including reviewing the needs of communities, and their involvement.¹⁷ This is a critical and foundational requirement for community safety planning and initiatives, and for ensuring that communities are safe for all. The Municipal Systems Act defines community in the context of municipalities where the community is the body of persons comprising the residents, the ratepayers of the municipality, any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality, and includes, more specifically, the poor and other disadvantaged sections of such body of persons.¹⁸

The African Commission on Human and Peoples' Rights' Principles on the Decriminalisation of Petty Offences provides an authoritative interpretation of South Africa's binding obligations under the African Charter on Human and Peoples' Rights and calls on African Union member states to:

*Adopt measures that aim to address the conditions that cause, exacerbate or perpetuate poverty, rather than criminalise poverty, in accordance with the State obligation to respect, protect and promote human rights, which includes the right to development in Article 22 of the African Charter.*¹⁹

16 GIZ (2019), King Sabata Dalindyebo Local Government: Community Safety Plan 2019–2022. Available at: <https://www.saferspaces.org.za/resources/entry/king-sabata-dalindyebo-local-municipality-safety-plan>.

17 Government of South Africa (1998), Municipal Structures Act 117 of 1998. Available at: <https://www.gov.za/documents/local-government-municipal-structures-act#>; See also, (2019).

18 Government of South Africa (2000), Municipal Systems Act 32 of 2000. Available at: <https://www.gov.za/documents/local-government-municipal-systems-act>.

19 African Commission on Human and Peoples' Rights (2017), Principles on the decriminalisation of petty offences in Africa, adopted at its 61st Ordinary Session, held from 1 to 15 November 2017 in Banjul, Gambia. Available at: <https://www.achpr.org/legalinstruments/detail?id=2>.

In addressing a public seminar in Stellenbosch in 2016, Justice Sisi Khampempe perfectly summarised meaningful participation:

When I speak of meaningful participation as [sic] transformative process, I therefore mean it in this relational sense. I am suggesting to you that the two concepts are intimately associated. In my view, transformation is a vessel of empty rhetoric without meaningful participation. Similarly, meaningful participation is necessarily a transformative process.²⁰

Engagement and meaningful participation of the community in safety planning and other affairs of the municipality is fundamental to local government affairs, decision-making processes relating to the development of communities, and the integration of safety and violence prevention outputs in the IDP and service delivery, including the creation of a safe and healthy environment. The services provided by the municipality should be responsive to the needs of the community and the community should play an active role in monitoring and evaluating the work of the municipality. This reflects both the approach to safety and the outcome envisaged in the NDP and is echoed in other relevant pieces of legislation and policies. Homeless people are members and constituents of the community. In practice, however, community engagements and consultations largely take place in their absence. When planning and developing IDPs, municipalities must consult the homeless and poor as important constituents, for these groups to meaningfully participate in the development and planning of their municipalities. However, it is important to note that like any other group that has been socially categorised within communities, homeless people are not necessarily homogenous, although there may be commonalities among homeless people as a collective. Care must be taken to ensure that different interest groups and a wide range of homeless people are included in community consultations.

4. The Integrated Urban Development Framework

The Integrated Urban Development Framework²¹ (IUDF) was developed in 2016. The IUDF encourages municipalities to plan for spatial transformation to create compact, connected and coordinated cities and towns, manage urbanisation, and manage the goals of economic development, job creation and better living conditions in municipalities.

To achieve this transformative vision, four overall strategic goals are introduced in the IUDF:²²

- Spatial integration – to forge new spatial forms in settlement, transport, social and economic areas;
- Inclusion and access – to ensure people have access to social and economic services, opportunities and choices;
- Growth – to harness urban dynamism for inclusive, sustainable economic growth and development;
- Governance – to enhance the capacity of the state and its citizens to work together to achieve spatial and social integration.²³

20 S Khampempe (2016), Meaningful participation as transformative process: The challenges of institutional change in South Africa's constitutional democracy, 12th Annual Human Rights Lecture of the Law Faculty of Stellenbosch University.

21 Government of South Africa (2016), Integrated Urban Development Framework of 2016. Available at: <https://housingfinanceafrica.org/documents/south-africa-integrated-urban-development-framework-iudf-of-2016/>.

22 GIZ (2019).

23 Government of South Africa (2016).

The major bulk of South Africa's economy is concentrated in major cities such as Johannesburg, Durban and Cape Town. The lack of economic activity in the rural provinces of South Africa continues to lead to increased urbanisation. People leave their hometowns and settle in major cities to access better economic opportunities. In major cities, the apartheid government constructed Black townships in areas remote from Central Business Districts (CBDs). One would rarely find a homeless person in a township like Khayelitsha in Cape Town or Tembisa in Johannesburg, but will surely find homeless persons and people begging on the streets in the CBDs where there is active economic activity.

The IUDF calls on municipalities to deal with racialised spatial planning, increase access to local economies, and sustain economic growth and social integration. One form of social integration includes building low-cost housing in CBDs for the labour force to easily access workplaces; another is deracialised CBDs.

5. The Integrated Social Crime Prevention Strategy

The Integrated Social Crime Prevention Strategy (ISCPS) of 2011, developed by the Department for Social Development (DSD), promotes the provision of an integrated service delivery approach to facilitate community safety and social crime prevention. Community participation, the implementation of developmental and preventative diversion programmes, improving community safety, strengthening families, building social cohesion and improving the quality of life of all people are included as priority issues in the strategy.²⁴

The location of the ISCPS within the DSD rather than the South African Police Services (SAPS) signified that crime and violence prevention is the responsibility of all government departments and non-state actors, and reflects a shift back to a developmental approach to crime and violence prevention. The 1996 National Crime Prevention Strategy (NCPS) laid a foundation for the adoption of the ISCPS. The two strategies move away from the single approach of arrest and conviction as an approach to fight crime and include the social crime prevention approach led by state and non-state entities.

The ISCPS identifies 13 themes as focus areas appropriate to the DSD and other government departments' social crime prevention mandates: families; early childhood development (ECD); social assistance and support for pregnant women and girls; child abuse, neglect and exploitation; domestic violence and victim empowerment programmes; victim support and dealing with trauma; community mobilisation and development; dealing with substance abuse; HIV & AIDS, and feeding and health programmes; social crime prevention programmes; extended public works programmes; schooling; and gun violence prevention, reduction and law enforcement.

The themes, while developed in relation to crime and violence prevention, reflect the common factors and correlates identified above, both as risks leading to, and resulting from, homelessness. As an alternative to the criminalisation of vagrancy, municipalities, through participation in Community Safety Forums (CSFs), should champion the themes identified by the DSD and use available municipal financial and human resources to address the 13 themes.

24 Department of Social Development (2011), Integrated Social Crime Prevention Strategy. Available at: <https://www.gov.za/documents/integrated-social-crime-prevention-strategy#>.

6. The 2016 White Paper on Safety and Security

The White Paper on Safety and Security, adopted by Cabinet in 2016, is a policy on safety, crime and violence prevention, aligned with the NDP, that promotes a holistic and integrated approach to safety, crime and violence. The White Paper seeks to provide an overarching policy for safety, crime and violence prevention that will be articulated in a clear legislative and administrative framework to facilitate synergy and alignment of policies on safety and security; and to facilitate the creation of a sustainable, well-resourced implementation and oversight mechanism that will coordinate, monitor, evaluate and report on the implementation of crime prevention priorities across all sectors.²⁵ The objectives of the White Paper include clarifying the roles and responsibilities of individual government departments and different spheres of government; mechanisms for cooperation between government departments and different spheres of the state for integrated planning and service delivery; monitoring and evaluation systems; resources; and accountability. The clarification of the roles and responsibilities of government departments is important because government departments and different spheres of government tend to work in silos.

The White Paper calls on municipalities to align municipal by-laws to safety, crime and violence prevention outcomes. It seeks to encourage municipalities not to isolate the enforcement of by-laws to the broader safety, crime and violence prevention approaches and it recognises that municipalities, which are the direct interface of government with communities, are key role players in the creation of safer and secure communities. The constitutional mandate of municipalities represents an inclusive range of interventions that are required to create an enabling environment for service delivery that impacts the safety and wellbeing of communities.

Relevant implementing community structures

The above legislative framework speaks directly to the developmental imperative of approaching crime and violence prevention from an ecological model perspective that allows all of society to address the multiple risk factors that lead to crime and violence and the lack of safety within communities. There are several community structures that can facilitate local-level engagement, prescribed in various pieces of legislation, such as CSFs, detailed in the Community Safety Forum Policy of 2016, and Community Policing Forums (CPFs), provided for by section 18 of the South African Police Service Act of 1995. CSFs have a particularly important role to play in ensuring that the interests of all community members, including the homeless, are integrated into community safety initiatives and local safety planning. Local government can utilise CSFs, which are multi-sectoral forums headed by Mayoral Committee members responsible for Safety and Security at a municipal level, to create an enabling environment for the delivery of services that impact the safety and wellbeing of communities.

How does this legislative and policy framework translate meaningfully into managing homelessness and vagrancy within the local context?

As with crime and violence prevention, internationally, countries that have had the greatest success in addressing AND responding to homelessness are those where specific models of intervention are embedded within broader systems integration, and where both the drivers and the prevention and response to homelessness and vagrancy are addressed by all levels of

25 Government of South Africa (2016). White Paper on Safety and Security. Available at: <https://www.saferspaces.org.za/uploads/files/2016-WPSS.pdf>.

government, including local.²⁶ Existing legislation in South Africa complemented with various policies aimed at addressing crime and violence, provide a similar framework for integration in the prevention and response to homelessness, including a specific mandate for municipalities. It has been noted that in South Africa, through the existing policy and legislative framework shaped by the DSD, the existing approach to homelessness at a local level has been largely dependent on effective collaboration and coordination between government departments and the broader government system.²⁷

Given the intersection and commonalities of drivers, risk, and effective response and support systems, addressing the needs of homelessness and vagrants within existing safety processes will promote the delivery of services to homeless people while promoting and fostering safer communities for all community members. The development of safety audits and safety plans is one tool that municipalities can use to achieve these outcomes. It has been noted above that there is increasing recognition of the need to integrate safety into municipal IDPs. Safety audits collect data on the concerns and experiences of community members relating to safety, and by definition include and consult with those who are particularly vulnerable to crime and violence, including people with disabilities, children, women, young people, and other marginalised populations. Homeless people are essential participants in this process, and safety audits must ensure that the concerns and lived daily experiences of homeless people within any community are considered and integrated into safety plans. Safety audits also collect data on existing services, ranging from ECD centres to shelters and refuges, government services (including SAPS stations and DSD offices) and those offered by civil society, education facilities, and training services, and allow the integrated assessment of the specific needs and requirements at a community level to be assessed in an integrated manner against available and planned services.

Safety audits allow for a diagnostic of safety from a developmental perspective at a local level, and through the development of subsequent community safety plans, ensure that the developmental needs of community constituents are addressed through the provision of adequate and appropriate services, the provision of safety measures, appropriate and contextualised urban design, data collection, and appropriate monitoring and evaluation systems. These plans are formulated within an ecological model paradigm that identifies the risk and protective factors at an individual, family or relationship, community and societal level, and formulates appropriate responses at each of the levels. Safety plans should, through the auditing and consultation process, identify the needs and priorities of homeless people, and be able to locate these in relation to existing or planned services and interventions; and through the planning and intervention stage, improve services to both prevent homelessness and support those already on the street without shelter. Specific interventions that are formulated in response to safety needs, as identified through safety audits, may be of particular importance to those living without shelter. These could include access to adequate ablution and sanitation facilities close to their location; shelters and safe spaces that are equally accessible to homeless people who may not be able to afford or take any form of public transport; and easy access to psycho-social support facilities. These interventions do not necessarily equate to the need for the provision of new services or facilities by municipalities, who are operating under tight budget and resource constraints but may rather be managed through the better targeting and location of services through existing facilities.

26 S Gaetz and E Dej (2017), *A new direction: A framework for homelessness prevention*. Toronto: Canadian Observatory on Homelessness Press. Available at: https://homelesshub.ca/sites/default/files/attachments/COHPreventionFramework_1.pdf.

27 V Naidoo (2010), Government responses to street homelessness in South Africa, *Development South Africa*, 27:1. 129-141. Available at: <http://dx.doi.org/10.1080/03768350903519408>.

Targeted skills training and alternative education and employment opportunities are often identified as being important in the development of safety plans and in addressing particularly at-risk youth and the broader young population. Similarly, research shows that one of the major challenges faced by many homeless people is accessing skills training and employment opportunities, including informal employment. Indeed, access to these opportunities is often prioritised by homeless people over access to basic services, as they are seen as (and should be) routes to development and a way out of homelessness. This may mean the provision of planned or existing skills and training programmes within easy access of homeless persons living in particular communities. There are also opportunities to better support skilled homeless people in accessing formal employment opportunities through partnerships between the government and the private sector.

Homeless people are often excluded from mainstream psycho-social support and services. Yet, these are essential in addressing both the risk factors that drive homelessness and in breaking the entrapment of individuals in homelessness. The provision of expanded psycho-social support services could – through the safety plan process and partnerships with DSD, civil society service providers and local shelters – be better targeted to homeless people, within reach of where specific homeless clusters may congregate within communities, and be better linked to other social and economic services (including addiction treatment and rehabilitation programmes, many of which, de facto, exclude homeless people). Where shelters are provided, these shelters should be safe (recognising that shelters themselves may pose a risk of victimisation for homeless people), low-threshold, focused on harm-reduction, and offer a range of psycho-social services.²⁸

CONCLUSION

The rights of homeless people and vagrants are provided for in the Constitution of South Africa and in the range of international conventions to which South Africa is a signatory. Like any other constituents at a community level, homeless people are not a homogenous category of individuals, but rather embody both commonalities and key differences in their needs, situations and priorities. They may be at varying or different degrees of risk for victimisation, negative health outcomes, and other adverse social and economic outcomes. As discussed in this paper, there is substantial evidence that shows that while the specific needs and characteristics of homeless people may vary both within and between communities, the homeless commonly face marginalisation and exclusion from social as well as economic opportunities.

It is also common cause that to create and foster safe communities for all, the safety concerns and priorities of all within communities, from children and young people, to the homeless, are understood, represented and addressed. Municipalities already have several existing processes and mandates that allow them to address the specific safety needs of homeless people and families, in a way that simultaneously addresses the risk factors and pathways into homelessness, and offer pathways out of homelessness. By considering the intersection of the spatial, temporal, social and economic aspects of homelessness, through an ecological model approach that identifies risks and interventions that deal with individual, family relationship, and broader societal factors, municipalities are able to address homelessness in a developmental manner consistent with South Africa's human rights obligations and Vision 2030 of the NDP. Through a consultative process that includes homeless people and different

28 S McKenzie-Mohr, J Coates and H McLeod (2012), Responding to the needs of youth who are homeless: Calling for a politicized, trauma-informed intervention. *Children and Youth Services Review*, 34:1, 136-143.

constituents or interests within homeless communities as part of the safety planning process, municipalities will be better equipped to identify specific needs and develop appropriate responses utilising existing services, to meet the safety and broader developmental needs of those living on the street. This approach, already provided for in existing legislation as well as the broader developmental approaches envisaged in the NDP, will allow for a focus on both the prevention of homelessness and pathways into homelessness and a response to and reduction of existing homelessness, while simultaneously enhancing community safety.



ANNEXURE
ACCOUNT OF PETTY
OFFENCES UNDER
SOUTH AFRICAN LAW

Clare Ballard

INTRODUCTION

This annexure is an account of offences under South African law that could reasonably be described as “petty”. The purpose of such an account is to identify petty offences that should be repealed, either through a process of amendment or decriminalisation. One of the primary justifications for the proposed law reform is the concern that the policing of such offences penalises disproportionately and discriminately the poor, vulnerable and marginalised.

This annexure identifies petty offences established by the following sources of South African law:

- National legislation;
- Provincial legislation;
- The by-laws of the metropolitan municipalities:¹
 - Buffalo City;
 - City of Cape Town;
 - City of Ekurhuleni;
 - City of Johannesburg;
 - City of Tshwane;
 - eThekweni Metropolitan;
 - Mangaung Metropolitan;
 - Nelson Mandela Bay Metropolitan.

The above-mentioned eight metropolitan municipalities are referred to as “metros” because they constitute the largest metropolitan areas in South Africa. Approximately 22 196 701 persons reside within these combined metros.²

1 Indeed, we accept that an account of the petty offences contained in the metropolitan municipalities by-laws cannot purport to be exhaustive of all municipal by-laws in the country. Given the expectation that there is much repetition amongst municipalities and the additional amount of time needed to consider every municipality in the country, an account of the metros, we expect, will nevertheless provide a representative account of the content of municipal by-laws generally.

2 Municipalities of South Africa Demographics (2016). Available at: <https://municipalities.co.za/municipalities/type/1/metropolitan>. Note: South Africa’s mid-year population estimate in 2018 was 57.73 million. See Statistics South Africa (2018), Mid-year population estimates 2018. Available at: <https://www.statssa.gov.za/publications/P0302/P03022018.pdf>.

DEFINITIONAL ASPECTS

This annexure incorporates the definition of “petty offence” adopted by the African Commission on Human and Peoples’ Rights in its *Principles on the Decriminalisation of Petty Offences in Africa*.³

...minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine. Examples include, but are not limited to, offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending. Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanors, summary offences or regulatory offences.

This annexure is also guided by the definition of “regulatory offences” in Hoctor et al.’s *South African Criminal Law and Procedure*, which lists the following identifying features:⁴

- *the prohibited conduct lacks moral turpitude; it is mala in prohibita rather than mala in se;*
- *the prohibited act in itself causes little or no harm to other persons individually and is considered harmful only because of the cumulative effect of widespread transgressions;*
- *the penalty for contravention is light, involving usually only a fine;*
- *the object of the legislation is to prevent what is thought to be a threat of danger, harm, inconvenience or disorganization affecting the public at large, the administration of public, social, economic or political affairs or the welfare of the public;*
- *the prohibition is usually aimed at persons engaged in particular specialized activities rather than at persons in general;*
- *the effective enforcement of the legislation requires that offenders be held liable without proof of fault.*

STRUCTURE

The body of this annexure contains a taxonomy and brief analysis of petty offences in metropolitan municipality by-laws, simply because this body of law contains by far the greatest number of petty offences. Thereafter it describes petty offences established by provincial and national legislation. Given the textual repetition of the description of petty offences amongst the by-laws of the various metros, the annexure organises the offences according to thematic rather than geographic categories.

The categories used are as follows:

- Offences relating to public places and prohibited behaviour;
- Offences relating to informal trading;
- Offences relating to the accommodation of animals and sanitation.

3 African Commission on Human and Peoples’ Rights (2017), *Principles on the Decriminalisation of Petty Offences in Africa*. Available at: <http://www.achpr.org/instruments/decriminalisation-petty-offences/>.

4 SV Hoctor et al. (1995), *South African Criminal Law and Procedure Volume III: Statutory Offences*, 2nd ed. Cape Town: Juta, Ch. 1 at 8.

PART 1

PETTY OFFENCES ESTABLISHED BY THE BY-LAWS OF THE METROPOLITAN MUNICIPALITIES

Public places and prohibited behaviour

CITY OF CAPE TOWN

The following activities are prohibited in public places⁵ by *Province of Western Cape (2007). City of Cape Town: By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances. Western Cape Provincial Gazette, No. 6469, 28 September 2007:*⁶

- Intentionally blocking or interfering with the safe or free passage of a pedestrian or motor vehicle;
- Intentionally touching or causing physical contact with another person, or his or her property, without that person's consent;⁷
- Approaching or following a person individually or as part of a group of two or more persons, in a manner or with conduct, words or gestures intended to or likely to influence or to cause a person to fear imminent bodily harm or damage to or loss of property or otherwise to be intimidated into giving money or other things of value;
- Continuing to beg from a person or closely following a person after the person has given a negative response to such begging (otherwise referred to as "aggressive begging");
- Urinating or defecating (unless in a toilet);⁸
- Bathing or washing (unless in a shower or as part of a cultural ceremony);
- Spitting;
- Engaging in gambling;
- Starting or keeping a fire (unless in a designated area);
- Sleeping or camping overnight or erecting a shelter (unless in a designated area or as part of a cultural ceremony);
- Causing a disturbance by shouting, screaming or making any other loud or persistent noise or sound, including amplified noise or sound;
- Permitting noise from a private residence or business to be audible in a public place (except for the purposes of loudspeaker announcements for public meetings or due to the actions of street entertainers);

5 Section 1 "Definitions": "Public place" is defined as:

- a) "a public road;
 - b) any parking area, square, park, recreation ground, sports ground, sanitary lane, open space, beach, shopping centre on municipal land, unused or vacant municipal land or cemetery which has (i) in connection with any subdivision or layout of land into erven, lots or plots, been provided, reserved or set apart for use by the public or the owners or occupiers of such erven, lots or plots, whether or not it is shown on a general plan, plan of subdivision or diagram, (ii) at any time been dedicated to the public, (iii) been used without interruption by the public for a period of at least thirty years expiring after 31 December 1959, or (iv) at any time been declared or rendered as such by the City or other competent authority; or
 - c) a public transportation motor vehicle.
 - d) but will not include public land that has been leased or otherwise alienated by the City."
- 6 Ss 2(1)(a)(i)(ii), (b), (c); Ss 2(3)(c), (d)(i)(ii), (e), (l), (m); Ss 3(a), (b); S 4; Ss 7(a); Ss 13(a); Ss 14 and S 23(1) and (3). See also: Mangaung Metropolitan Municipality, Public Nuisance By-law, Local Government Notice No. 35, 24 June 2016 at Ss 6.1.6, 6.1.7 and S 9.1. Note: The penalty in the Mangaung Metropolitan By-law is a R3 000 fine or two months' imprisonment and is therefore less stringent than the penalties contained in other similar by-laws. See also: Mangaung Metropolitan Municipality.
- 7 It is important to note here that South African criminal law deals with the offences of theft, assault and harassment. Accordingly, the purpose behind the incorporation of provisions such as these into the by-laws is unclear.
- 8 It is common knowledge that public toilet facilities are often locked at night.

- Collecting money or attempting to collect money;
- Organising or assisting in the organisation of the collection of money (without permission from the Municipality);
- Depositing, packing, unpacking or leaving goods or articles lying around in excess of a reasonable time during the course of the loading, off-loading or removal of such goods or articles;
- Washing, cleaning or drying any object (including clothing) outside of designated areas;
- Drying or spreading washing or bedding, including on a fence beyond the boundary of a public road (except where conditions in an informal settlement are such that it is not possible to do otherwise).

Those that contravene the contents of these by-laws are guilty of an offence. The penalties in respect of these offences range from a fine to imprisonment or the imposition of a term of imprisonment not exceeding six months (or the maximum penalty as provided for in analogous national legislation). A court may also impose alternative sentencing instead of these penalties.

The following activities are prohibited in public parks (when executed without the permission of City Parks) by *City of Cape Town: Public Parks By-law. Province of the Western Cape Provincial Gazette, No. 6788, 10 September 2010*:⁹

- Trading or operating a business;
- Displaying, selling or renting wares or articles;
- Lying, sitting or using benches in such a manner that prevents others from using them;
- Using foul, lewd or indecent language;
- Dumping and littering.

Any person that contravenes these directives, or disobeys an instruction from a peace officer to cease engaging in such activities, is guilty of an offence. The penalties in respect of these offences range from a fine to imprisonment or the imposition of a term of imprisonment not exceeding six months.

In addition to a fine or period of imprisonment, a court has the power to order any person convicted of an offence in terms of this by-law to make good the harm caused, or to pay damages for the harm caused to another person or their property, and such an order will have the effect of a civil judgment.

The application of graffiti to any property, natural surface, wall, fence, street or anything in any street or other public place without a permit issued by the City is prohibited and an offence in terms of *City of Cape Town: Graffiti By-law. Province of the Western Cape Provincial Gazette, No. 6767, 9 July 2010*.¹⁰

Penalties for the breach of these by-laws range from fines of up to R15 000 or three months' imprisonment for a first offence, to R30 000 or six months' imprisonment for a second offence. In addition, a convicted person may be liable to pay for the removal of the graffiti and to a further penalty. If the offence continues, an additional penalty may be imposed. A court also has the power to impose an alternative sentence as a penalty.

9 S 6; Ss 9(d), (e); Ss 11(j); Ss 15(b) and Ss 18(1) and (2). Note: Similar provisions in by-laws for Buffalo City, City of Ekurhuleni and City of Tshwane.

10 Ss 3(1)(a), (b), (c) and S 11. Note: Similar provisions in by-laws for City of Tshwane and Mangaung Metropolitan.

CITY OF EKURHULENI

The following behaviour is prohibited by *Ekurhuleni Metropolitan Municipality Police Services By-laws, Council Resolution PS 33/2002, 25 June 2002 (as amended by Council Resolution:*

*A – CP (01-2016), 30 March 2017):*¹¹

- Defacing, marking or painting any Council property, road signs, street or portion thereof, without the written consent of the Council and except if executing his/her duty to do so;
- No person exercising control or supervision is allowed to leave a trolley on the street or any public space (except where provided for);
- Littering;
- Drying/airing any article of clothing or fabric by hanging it on the wall of a veranda or from a window;
- Shaking out a carpet/rug/mat on the street before 8 am;
- Committing an indecent act or behaving in an indecent manner;¹²
- Spilling a substance;
- Spitting;
- Acting as a parking attendant without Council's written permission.

A person who contravenes these by-laws shall be liable on conviction for payment of a fine of R2 000 or if payment is not made, to imprisonment for no more than six months, or both. In the case of continuous contravention, liability for payment of any expense incurred by the Council shall be imposed.

CITY OF JOHANNESBURG¹³

Selling, hawking, trading or conducting any business without permission in designated camping areas or designated sports facilities is prohibited by *Gauteng Province (2005). City of Johannesburg: Culture and Recreation By-Laws. Province of Gauteng Provincial Gazette, No. 213, 23 May 2005. (Amendment published under Notice No. 803 in Gauteng Provincial Gazette, No. 108, 16 June 2010).*¹⁴

A person who contravenes these by-laws may be guilty of an offence and liable to a fine or a sentence of imprisonment for up to six months. Where an offence continues, a convicted person may be liable to pay a further fine or if payment is not made, imprisonment of one day per continuation of the offence (after written notice). If a second offence occurs, the convicted person is liable to a fine or if no payment is made, imprisonment for no longer than six months.

The following activities are prohibited in public spaces by *Gauteng Province (2004). City of Johannesburg: Public Open Spaces By-laws. Province of Gauteng Provincial Gazette, No. 179, 21 May 2004:*

- Conduct that would cause a "nuisance";¹⁵
- Behaving in an indecent or offensive manner;¹⁶

11 S 20, Ss 25(1), S 33, Ss 34(1), S 35, Ss 43(2), Ss 44(1) – (2), Ss 103(1) and S 113. Note: Eastern Cape Province (2009), Nelson Mandela Metropolitan Municipality: By-laws for Roads, Traffic and Safety, Provincial Notice No. 2230, 13 November 2009, contains similar prohibited actions. See specifically: Ss 27(2) and Ss 39(1)(j), (p), (q), (v) and (dd).

12 "Indecent" is not defined.

13 The City of Johannesburg's by-laws are, overall, less restrictive than the City of Cape Town and eThekweni Metropolitan.

14 Ss 69(1) – (2) and S 99.

15 S 1 "Definitions": "'Nuisance' means an unreasonable interference or likely interference with (a) the health or well-being of any person; (b) the use and enjoyment by an owner or occupier of his or her property; or (c) the use and enjoyment by a member of the public of a public open space."

16 "Indecent" and "offensive" are not defined.

- Washing and bathing oneself, clothing or animals;
- Camping.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine or a sentence of imprisonment for up to six months. Where the offence continues, a convicted person is liable to a further fine of no more than R50, or if payment is not made, then imprisonment of no more than one day for each day that the offence continues (after written notice has been served on the person concerned).

The following activities are prohibited on public roads by *City of Johannesburg: Public Roads and Miscellaneous By-laws. Province of Gauteng Provincial Gazette, No. 832, 21 May 2004 (as amended, 2011)*:¹⁷

- Loitering;
- Touting;
- Urinating;
- Behaving in an indecent or disorderly manner;¹⁸
- Begging;¹⁹
- Appearing unclothed or indecently clothed.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine or a sentence of imprisonment for up to six months. Where the offence continues, a convicted person is liable for a further fine of no more than R50, or if payment is not made, then imprisonment of no more than one day for each day that the offence continues (after written notice has been served on the person concerned).

ETHEKWINI MUNICIPALITY

It is an offence to disobey an order from the Municipality to cease from the following activities when in a public or municipal location in terms of *KwaZulu-Natal Province (2015) eThekweni Municipality: Nuisances and Behaviour in Public Spaces By-Law, KwaZulu-Natal provincial Gazette, No. 1490, 11 September 2015*²⁰ (which repealed the *Durban Transitional Municipality Control of Public Behaviour By-law (2000) on 11 September 2015*):

- Behaving in a manner which is disorderly, indecent or unseemly;
- Begging;²¹
- Camping or sleeping in a vicinity not designated for such purposes;
- Lying and sleeping on any beach or seat provided for the use of the public;
- Causing a nuisance;

17 Ss 14(1) – (2); and Ss 15(1) – (4). Note: Similar provisions in by-laws for City of Tshwane and Mangaung Metropolitan. See also: Nelson Mandela Metropolitan Municipality: By-laws for Roads, Traffic and Safety, Eastern Cape Provincial Gazette, No. 2230, 13 November 2009, which contains similar prohibited actions – specifically Ss 30(1)(b), Ss 39(1)(cc) and Ss 39(1)(bb).

18 “Disorderly” and “indecent” are not defined.

19 “Begging” here is not characterised as “aggressive begging” as per paragraph 8.4 above.

20 Note: Similar provisions in the by-laws for the City of Tshwane and Mangaung Municipality. See specifically: Mangaung Metropolitan Municipality, Public Amenities By-law, Local Government Notice No. 35, 24 June 2016 at Ss 6.1(g), (h); Ss 12(1)(g), (h), (m); S 14 and S 17. See also: Mangaung Metropolitan Municipality, Municipal Parks By-law, Local Government Notice No. 35, 24 June 2016.

21 “Disorderly” and “indecent” are not defined.

- Being intoxicated in a public place when, in the opinion of the Municipality, that person is intoxicated;
- Loitering in a public place when, in the opinion of the Municipality, a person is loitering for the purpose of committing an offence.²²

A person found to be guilty of any of these by-laws is liable for a fine or imprisonment for a period not exceeding six months.

The following conduct is prohibited on beaches in terms of *KwaZulu-Natal Province (2015). eThekweni Municipality: Beaches By-law. KwaZulu-Natal Provincial Gazette, No. 1523, 12 October 2015*:²³

- Using obscene, indecent or foul language or otherwise behaving in an offensive, improper or disorderly manner;
- Wilfully or negligently doing anything which may cause danger, discomfort or inconvenience to any person or in any way cause a nuisance in any part of the beach;
- Playing any game or indulging in any pastime which is likely to cause nuisance, annoyance, injury or discomfort to any person;
- Sleeping, camping, entering a structure or entering the beach for the purpose of sleeping;
- Begging;
- Urinating or defecating (unless in a toilet);
- Bathing whilst suffering from a contagious or infectious skin condition.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine of up to R40 000 or a sentence of imprisonment for up to two years, or both. Should the offence continue, an additional fine of no more than R100 or imprisonment for no longer than ten days, for each additional day that the offence continues, or both, will be imposed.

The following behaviour is prohibited in public places in terms of *KwaZulu-Natal Province (2015). eThekweni Municipality: Nuisances and Behaviour in Public Places By-law. KwaZulu-Natal Provincial Gazette, No. 1490, 11 September 2015*:²⁴

- Causing a nuisance;
- Behaving in an indecent, offensive or objectionable manner;
- Urinating or defecating (unless in a toilet);
- Bathing or washing (unless in a bath or shower or as part of a cultural ceremony);
- Washing clothes, animals or other articles;
- Spitting;
- Using or being under the influence of drugs;
- Starting or keeping a fire (unless for the purpose of making a braai in a designated area);
- Depositing, packing, unpacking or leaving any goods or articles in a public place for a longer than reasonable period during the course of the loading or removal of such goods;

²² The incorporation of criminal intent into this provision is concerning. Without guidelines or factors with which to guide discretion, a provision like this one is particularly susceptible to abuse.

²³ Ss 10(1)(h), (i), (o), (aa); S 2 and S 17.

²⁴ Ss 1)(d), (d); Ss 2)(c); (d)(i)(ii), (m), (n), (q), ®, (u), (v); Ss 7(a) – (d); S 9 and S 22. Note: Similar provisions in by-laws for City of Tshwane and Mangaung Metropolitan.

- Lying or sleeping on a bench or seat, street or sidewalk or using it in such a manner that it prevents others from using it;
- Begging;
- Loitering with the intention of committing an offence;²⁵
- Causing a nuisance;
- Dying, spreading or hanging washing bedding, carpet, rags or other items, including on or over a fence or wall which borders the verge of a public road or on premises in such a manner that it is visible from a public road, or from a balcony or veranda in such a manner that it is visible from a public road;
- Littering.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine of up to R40 000 or a sentence of imprisonment for up to two years. In the case of a continuing offence, an additional fine of an amount not exceeding R200 or imprisonment for a period not exceeding ten days, for each day on which such offence continues or both such fine and imprisonment, will be imposed.

The following activities are prohibited in public parks²⁶ in terms of *KwaZulu-Natal Province (2015). eThekweni Municipality: Municipal Parks and Recreational Grounds By-law. KwaZulu-Natal Provincial Gazette, No. 1524, 12 October 2015*:²⁷

- Conducting him/herself in a manner which is inappropriate, improper or indecent;
- Causing a nuisance, annoyance or disturbance to any other person visiting the park;
- Lying on a bench or using it in such a manner that it prevents others from using it;
- Using any park facility or water resources, including a fish pond, fountain, stream, dam or pond to swim, bathe, walk, or place or wash clothes or other things;
- Selling or displaying for sale or hire any commodity or article or distributing any pamphlet, book, handbill, or other printed or written matter without prior written consent of the Municipality;
- Sleeping over or camping in the park.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine of up to R40 000 or a sentence of imprisonment for up to two years, or both. Should the offence continue, a further fine not exceeding R200 or imprisonment of ten days for each continuing day, will be imposed.

25 The incorporation of criminal intent into this provision is concerning. Without guidelines or factors with which to guide discretion, a provision like this one is particularly susceptible to abuse.

26 In S 1 (“Definitions”) the by-law describes “park” broadly: “‘park’ means any park, recreational ground, open space, square, reserve, bird sanctuary, botanic or other garden which is under the control or ownership of the Municipality, and includes all buildings, facilities, equipment, trees and natural vegetation within such park.”

27 Ss 21(2)(a), (b), (i), (j), (n), (q) and S 22. Note: Similar provisions in by-laws for City of Tshwane and Mangaung Metropolitan.

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

The following behaviour is prohibited in public amenities in terms of *Eastern Cape Province (2010). Nelson Mandela Bay Municipality: Public Amenities By-law, Eastern Cape Provincial Gazette, No. 2322, 24 March 2010.*²⁸

- Being drunk or under the influence of drugs;
- Throwing or rolling a rock, stone or other object;
- Washing crockery or laundry or hanging out clothes, except at designated places;
- Acting indecently, improperly or in an unbecoming fashion;²⁹
- Defecating, undressing or urinating, except in designated buildings/places;
- Lying on a bench or seating area and making it impossible for others to use that area;
- Acting in any way that may be detrimental to the health of another;
- Entering or using a toilet which is indicated by a notice for the use of the opposite sex.

A person convicted of violating these by-laws is liable to a fine and if not paid, to a period of imprisonment, or only the latter, or both. Should the offence continue, such person is liable for payment of a fine for each continuing day, or if such fine is unpaid, to a period of imprisonment.

The following “noise nuisances”³⁰ are prohibited in terms of *Eastern Cape Province (2010). Nelson Mandela Bay Metropolitan Municipality: Noise Control By-law, Eastern Cape Provincial Gazette, No. 2322, 24 March 2010.*³¹

- Offering any item for sale by “shouting, ringing a bell or making other sounds...”;
- Allowing an animal to cause a noise nuisance.

Any person convicted of contravening these by-laws shall be liable for payment of a fine or imprisonment, or both, and if such offence continues, to a fine for each continuing day, or to both a fine and imprisonment for each continuing day, or if payment is not made, to imprisonment.

The following “public nuisances” are prohibited in terms of *Nelson Mandela Bay Metropolitan Municipality (Eastern Cape Province): By-law relating to prevention of public nuisances and public nuisances arising from the keeping of animals, Provincial Gazette No. 2322, 24 March 2010.*³²

- Allowing any property to become overgrown so that it may be used for the purposes of shelter by “vagrants, wild animals or vermin or may threaten the safety of any member of the community”;
- Erecting, on any premises, a structure that causes a nuisance to people;
- Creating a nuisance;
- Washing him/herself or an animal or any clothing in a public stream, pool, water trough, hydrant or fountain, or anywhere that has not been designated by the Municipality for such purposes;
- Loitering;
- Being drunk in public.

28 Ss 12(1)(a), (b), (ii), (xiii), (xvi), (xvii), (xviii), (xxii), (xxiii) and S 28. Note: Certain by-laws contained herein are duplicates of those mentioned in other municipal by-laws above and were therefore excluded.

29 “Indecent”, “improper” and “unbecoming” are not defined.

30 S 1 – “Definitions”: “Noise Nuisance” is defined as “any sound, which disturbs or impairs or may disturb or impair the convenience or peace of any person...”

31 Ss 6 (b), (c) and S 15. See also: Eastern Cape Province (2010), Buffalo City Municipality: Noise By-law, Provincial Gazette No. 2459, 22 October 2010, which contains the same noise nuisances. See specifically: Ss 5(b), (c) and S 9.

32 Ss 3(1)(k), (l), (m), (n), (p) and (u).

CITY OF TSHWANE

When making use of public amenities, the following behaviour is prohibited in terms of *City of Tshwane Metropolitan Municipality, By-laws Pertaining to Public Amenities*:³³

- Refusing to provide his/her full name and address to an authorised municipal officer when requested to do so;
- Loitering, or lacking any “legal and determinable place of refuge” or makes a habit out of sleeping in a public street/place or begging or persuades others to beg, is allowed to “loiter or linger in a public amenity.”

Any person convicted of contravening this by-law shall be liable to pay a fine not exceeding R2 000, or if no payment is made, to imprisonment for no longer than 12 months. Should the offence continue, such person will be liable to pay a portion of the fine for each continuous day and if no payment is made, to a proportionate period of imprisonment.

MANGAUNG METROPOLITAN MUNICIPALITY

The following conduct is prohibited in public streets by *Mangaung Metropolitan Municipality: Public Streets By-law, Local Government Notice, No. 35, 24 June 2016*:³⁴

- Drying or spreading washing on a fence or on a street boundary;
- Drying clothes, blankets or other articles;
- Spitting;
- Annoying or inconveniencing anyone by yelling, shouting or making any noise.

Any person convicted of contravening these by-laws is liable to a fine of no more than R3 000 or imprisonment of no longer than three months, or both. Should the offence continue, such person is liable to a further fine of no more than R1 500 or imprisonment not exceeding one month, or both, for each day that the offence continues. Such person may also be liable for the Municipality’s costs and charges related to the offence.

ANALYSIS

The prohibition of the behaviour and activities extracted from the above-mentioned by-laws is problematic because it criminalises everyday behaviour in the case of poor, homeless and indigent persons. Such prohibition is therefore too broad in scope. The extensiveness, vagueness and the fact that certain key descriptive terms remain undefined, leave these laws open to abuse and discriminatory application by the entities with the power to impose them.

33 Available at: <http://www.tshwane.gov.za/sites/business/Bylaws/Pages/Promulgated-By-Laws.aspx>, accessed at S 11 and Ss 25(1) – (2).

34 S 16; Ss 27(1)(c), (g) and (h) and S 41.

INFORMAL TRADING

CITY OF CAPE TOWN

In terms of *Western Cape Province (2009). City of Cape Town: Informal Trading By-law, Western Cape Provincial Gazette, No. 6677, 20 November 2009 (as amended by City of Cape Town: Informal Trading Amendment By-law, 6 December 2013)*,³⁵ traders operating with permits are subject to the following restrictions, which, if breached, render the trader liable to a conviction of an offence and a penalty of up to three months' imprisonment or a fine of up to R5 000.³⁶

- Obstructing access to:
 - Fire-fighting equipment;
 - An entrance or exit from a building;
 - The use of a sidewalk;
 - Vehicular traffic in a manner which creates a traffic hazard;
 - Bus stop benches, queuing lines, refuse disposal bins or other facilities intended for the use of the general public;
 - The visibility of a display window of business premises, and if the person carrying on business in that business premises objects thereto;
 - A pedestrian crossing;
 - Automatic teller machines;
 - Parking or loading bays;
 - Pedestrian or arcade mall.
- In addition, traders are prohibited from the following:
 - Staying overnight at the place where trading is conducted;
 - Erecting any structure, other than as stipulated in the relevant trading area plan and/or permit conditions, for the purpose of providing shelter;
 - Carrying on business in a manner which:
 - ~ Creates a nuisance;
 - ~ Damages or defaces the surface of any public road or public place;
 - ~ Creates a traffic hazard;
 - ~ Attaching an object to any building or structure, pavement, footway, parking meter, lamp pole, telephone booth, post box, traffic sign, bench or any other street furniture or device in or on a public road or public place that is generally intended for public use;
 - ~ Delivering or providing goods or equipment to an informal trader if that trader is in contravention of the trading by-laws.

35 Ss 11.3.1, 11.3.2, 11.3.3, 11.3.4, 11.3.6, 11.3.7, 11.3.8, 11.3.12, 11.3.13, 12.2.1, 12.2.2, 12.3.1, 12.3.2, 12.3.3, 12.4, 12.6 and S 19. Mangaung Metropolitan Municipality, Informal Trading By-law, Local Government Notice No. 35, 24 June 2016, contains most of the above by-laws; See: Ss 10.1(d), (e), (f), (g) and Ss 11.1(a), (b), (j), (i), (ii) and (iii). Furthermore, see: Section 7 of the Manugang Trading By-law for restrictive trading hours (especially over weekends). Note: Buffalo City Metropolitan Municipality (Eastern Cape Province): Draft By-law on Informal Trading (2018) contains the same by-laws as those applying in the City of Cape Town above, but are currently in draft form. This means that the By-laws have not yet been promulgated by way of publication in the Eastern Cape Provincial Gazette, and until such time as they are, the provisions contained therein are not yet of force and effect and binding on the public.

36 A trader's goods may also be impounded (S 19).

CITY OF JOHANNESBURG

The *Informal Trading By-laws, 2012 / Street Trading By-laws, 2004* place the same restrictions as set out in paragraph 41 above on informal traders within the City of Johannesburg.³⁷

CITY OF EKURHULENI

The *Informal Trading By-laws as set out in the Police Services By-laws, 2002*, set out similar restrictions as set out in paragraph 41 above on informal traders within the City of Ekurhuleni.³⁸

ETHEKWINI MUNICIPALITY

Informal traders are prohibited from the following activities in terms of *KwaZulu-Natal Province (2014). eThekweni Municipality: Informal Trading By-law. KwaZulu-Natal Provincial Gazette, No. 1173, 27 June 2014*:³⁹

- Sleeping overnight at the trading location;
- Leaving goods at the trading site on the concluding of the day if it is part of a public road or public place;
- Leaving goods on a public road or public place, with the exception of his/her motor vehicle or trailer from which informal trading is conducted;
- Allowing his/her goods or area of activity to cover an area of a public road or a public place which (i) is greater than 6 m² in area, or (ii) is greater than 3 m in length, unless otherwise approved by the Municipality;
- Trading on a sidewalk or verge where the (i) width of the sidewalk or verge is less than 3 m, (ii) sidewalk or verge is next to a public building, a place of worship such as a church, synagogue or mosque, or a national monument, or (iii) sidewalk is contiguous to a building in which business is being carried on by any person who sells goods of the same or of a similar nature to the goods being sold on such sidewalk by the trader, if that person objects to informal trading taking place at that location;
- Trading on the half of a public road which is next to a building that is being used for residential purposes, if the owner or occupier of that building objects to informal trading taking place at that location;
- Obscuring any road traffic sign;
- Obstructing traffic or access to a pedestrian crossing, pedestrian arcade or mall;
- Obstructing access to refuse disposal bins or other facilities intended for the use of the public;
- Obstructing access to automatic teller machines;
- Limiting access to parking or loading bays or other facilities for vehicular traffic;
- Trading within 5 m of an intersection or fire hydrant or any other fire-fighting equipment;
- Trading in a park, unless such area has been declared by the council as an informal trading area;

37 See Gauteng Province (2012), City of Johannesburg Metropolitan Municipality Informal Trading By-laws. Gauteng Province Provincial Gazette, No. 328, 14 March 2012 and Gauteng Province (2012). City of Johannesburg Metropolitan Municipality Street Trading By-laws. Gauteng Province Provincial Gazette, No. 179, 21 May 2004.

38 See Chapter IV in Ekurhuleni Metropolitan Municipality Police Services By-laws, Council Resolution PS 33/2002, 25 June 2002 (as amended by Council Resolution: A – CP (01-2016), 30 March 2017).

39 Ss 20(1), (2), Ss 21(1), (a), (i), (iii), Ss 21(1)(c)(i), (ii), (iii); Ss 21(1)(d), (e), (f), (g), (i), (j), (l), (m), (o); Ss 21(2) (a), (b); S 23; S26 and Ss 28(b)(i), (ii), (v) and S 38. Note: The City of Tshwane's Street Trading By-laws set out the same provisions as those in paragraph 41 above.

- Failing to leave an unobstructed space for pedestrian traffic of not less than (i) 2 m wide when measured from any contiguous building to his or her goods or area of activity, and (ii) 0.5 m wide when measured from the kerb line to his or her goods or area of activity;
- Obstructing access to street furniture or any other facility designed for the use of the public;
- Attaching any of his or her goods by any means to any building, structure, pavement, tree, parking meter, lamp, pole, electricity pole, telephone booth, post box, traffic sign, bench or any other street furniture in or on a public road or public place;
- Carrying on business in a manner that:
 - Creates a nuisance, damages or defaces the surface of any public road or public place, or any public or private property;
 - Creates a traffic or health hazard or a health risk;
 - Disturbs the reasonable peace, comfort or convenience and well-being of any other person.

Any person convicted of violating this by-law shall be liable to pay a fine of R1 000 or be imprisoned for a period of up to six months, or both. Should the offence continue, a further fine of R150 or imprisonment not exceeding ten days, for each day that the offence continues, or to both a fine and imprisonment, will be imposed.

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

The Nelson Mandela Bay Metropolitan Municipality *Street Trading By-laws* are currently in a second draft form. This means that the by-laws have not yet been promulgated by way of publication in the Eastern Cape Provincial Gazette, and until such time as they are, the provisions contained therein are not yet of force and effect and binding on the public. The prohibited conduct contained in the draft by-law reflects that of the prohibited conduct listed in the by-laws of other municipalities.⁴⁰

ANALYSIS

Informal trading is an important economic activity, which allows South African nationals, refugees, asylum seekers and foreign nationals to make a living. The behaviour and activities extracted from the above-mentioned by-laws have the potential to hinder the viability of informal trading as an economic activity by criminalising behaviour that invariably relates to informal trading in South Africa.

ANIMALS AND SANITATION

CITY OF CAPE TOWN

The following activities are prohibited in terms of *Western Cape Province (2011). City of Cape Town: Animal By-law. Western Cape Province Provincial Gazette, No. 6896, 5 August 2011*:⁴¹

- Keeping a dog on heat in any public street or public place;
- Keeping any dog which does not have on its collar or micro-chip a name, telephone number and physical address or reference to a society for the prevention of cruelty to animals or registered animal welfare organisation;

40 The Buffalo City Municipality Informal Trading By-law (2018) is also currently in draft form.

41 Ss 6(1), (i); S 8; S 11(2) and S 24(1)(4)(a) – (b). Certain of these provisions are also included in the Nelson Mandela Bay Metropolitan Municipality: By-law relating to prevention of public nuisances and public nuisances arising from the keeping of animals, Provincial Gazette No. 2322, 24 March 2010. See specifically: Ss 19(1) and Ss 20(1)(c). Certain of these provisions are also included in the Mangaung Metropolitan Municipality, Keeping of Animals, Poultry and Bees By-law, Local Government Notice, No. 35, 24 June 2016. See specifically: Ss 6.1(a), (i), Ss 12.1., Ss 5.1 – 15.2 and S 56.

- Keeping a dog if his or her premises are not properly and adequately fenced to keep such dog inside when it is not on a leash unless the dog is confined to the premises in some other manner, provided that such confinement is not inhumane in the assessment of the authorised official;
- Walking a dog, other than a guide dog, in a public street, public place or public road, without carrying a sufficient number of plastic or paper bags or wrappers, within which to place the excrement of the dog, in the event of the dog defecating;
- Keeping any animal or poultry without the permission of the Council, who can require detailed plans for the structure in which they will be housed, including the requirement that the structure cannot be close to other residential erf, roads, shops, or public spaces and must be screened in.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine or a sentence of imprisonment for up to two years. If the offence continues, a further fine or imprisonment for a time not exceeding ten days for each day that the offence is further committed, or both, may be imposed. The animal concerned may also be destroyed.

CITY OF JOHANNESBURG

In terms of *Gauteng Province (2004). City of Johannesburg: Public Health By-laws, Notice No. 830, Province of Gauteng Provincial Gazette, No. 179, 21 May 2004 (as amended, 2011)*,⁴² cattle, horses, mules or donkeys may not be kept unless the following requirements are met:

- Every wall and partition of the stable must be constructed of brick, stone, concrete or other durable material;
- The internal wall surfaces of the stable must be constructed of smooth brick or other durable surface brought to a smooth finish;
- The height of the walls to the wall plates of the stable must (i) if the roof is a pitched roof, be 2.4 m, (ii) if the roof is a flat roof, be 2.7 m, (iii) if the roof is a lean-to roof, be a mean height of 3 m with a minimum of 2.4 m on the lowest side, (iv) in the case of a stable which has an opening along the entire length of one of its long sides, be not less than 2 m;
- The stable must have a floor area of at least 9 m² for each head of cattle, horse, mule or donkey accommodated in it;
- Lighting and ventilation must be provided by openings or glazed opening windows or louvres totalling at least 0.3 m² for each animal to be accommodated in it except in the case of a stable open along the entire length of one of its long sides;
- The lowest point of every opening, window or louvres must be at least 1.8 m above floor level;
- The floor of the stable must be constructed of concrete or other durable and impervious material brought to a smooth finish graded to a channel and drained;
- Any enclosure must have an area of at least 10 m² for each head of cattle, horse, mule or donkey accommodated in it and the fencing must be strong enough to prevent the animals from breaking out;
- No enclosure or stable may be situated within (i) 15 m of the boundary of any land, property, dwelling or other structure used for human habitation, or (ii) 50 m of any water resource or water supply intended or used for human consumption, and (iii) there must be a water supply adequate for drinking and cleaning purposes next to every stable or enclosure.

A person who contravenes these by-laws may be guilty of an offence and liable to a fine or a sentence of imprisonment not exceeding six months. Where the offence continues, a convicted

⁴² Ss 119(1)(a), (b), (c)(i) – (iv), (d), (e), (f), (g), (h), (i)(i) – (ii), (j) and S 165. Note: Similarly stringent provisions apply in relation to goats, poultry and pigs.

person is liable for a further fine of no more than R50, or if payment is not made, then imprisonment of no more than one day for each day that the offence continues (after written notice has been served on the person concerned).

CITY OF EKURHULENI

No person shall permit an animal to annoy, offend or inconvenience anyone in any street.⁴³ This is in terms of *Ekurhuleni Metropolitan Municipality Police Services By-laws, Council Resolution PS 33/2002, 25 June 2002 (as amended by Council Resolution: A – CP (01-2016), 30 March 2017)*.⁴⁴ This by-law also includes similar provisions as those of the City of Johannesburg above.

If this by-law is contravened, the person shall be liable on conviction for payment of a fine of R2 000 or if payment is not made, to imprisonment for no more than six months, or to both. In the case of continuous contravention, the person shall be liable to pay the Council for any expense incurred.

Note: The same restrictions that apply in the City of Johannesburg with regard to cattle, horses, mules and donkeys apply in the City of Ekurhuleni and the City of Tshwane and similarly stringent provisions apply in relation to goats, poultry and pigs.⁴⁵

ANALYSIS

The above by-laws impose severe penalties for behaviour that does not warrant such penalties and is also difficult for many poor and indigent persons living in South Africa, who own animals, to abide by.

BY-LAWS SPECIFICALLY RELATING TO INDIGENT PERSONS

Buffalo City Metropolitan Municipality is one of South Africa's municipalities that has started the process of drafting by-laws or policies aimed at supporting indigent persons living within such areas.⁴⁶ The objectives of this by-law is to attempt to decrease the gap between indigent and other citizens of the Buffalo City Municipality, by providing free electricity, water and other services, as well as access to housing, community services, employment initiatives and basic health care.⁴⁷ The more long-term objective is for indigent persons to move from requiring free services to becoming rate-paying members of the community.⁴⁸

In order to qualify for these free services, a person will need to live on a property, the value of which is "less than or equal to the value of a new RDP house."⁴⁹ The secondary qualification is that the combined gross income of one household must not equate to more than the poverty threshold value.⁵⁰

This by-law, therefore, fails to fully grapple with the complexities of indigent persons in South Africa and provide support to homeless persons who may not be able to qualify for municipal support.

43 "Annoyance", "offence" and "inconvenience" are not defined.

44 S 20, Ss 25(1), S 33, Ss 34(1), S 35, Ss 43(2), Ss 44(1) - (2), Ss 103(1) and S 113.

45 See: Gauteng Province (South Africa) (2009), *Ekurhuleni Metropolitan Municipality: Public Health By-laws, Council Resolution: A-ET (01-2009)*, 23 September 2019 and Gauteng Province (South Africa) (2017) and *City of Tshwane Metropolitan Municipality: By-laws relating to the keeping of animals, birds and poultry and to businesses involving the keeping of animals, birds, poultry and pets*. Gauteng Province Provincial Gazette, No. 242, 4 October 2019.

46 Buffalo City Metropolitan Municipality: *Indigent Support By-law (draft)* February 2014. The City of Ekurhuleni Metropolitan Municipality has approved an "Indigent Support Policy". Available at: <https://www.ekurhuleni.gov.za/3460-annexure-d7-indigent-support-policy-reviewed/file>.

47 *Supra* (Buffalo City) at S 6.

48 *Supra*.

49 *Supra* at Ss 10.1.1.

50 *Supra* at Ss 10.1.2.

PART 2

PETTY OFFENCES ESTABLISHED BY PROVINCIAL LEGISLATION

The Regulation of Liquor and Gambling

EASTERN CAPE

*The following conduct is prohibited by the Eastern Cape Liquor Act No. 10 of 2003:*⁵¹

Being drunk and disorderly in or on (i) any road, street, lane, through fare, square, park or market; (ii) any shop, warehouse, or public parking garage; (iii) any form of public transport; or (iv) any place of entertainment, café, eating-house or racecourse or any other premises of place to which the public has or is granted access, irrespective of whether access is granted against payment or is restricted to any category of persons or not.

A penalty of imprisonment of a maximum of three months is applicable only to persons found to be “continuously contravening” the provision.⁵²

GAUTENG

A person that is intoxicated or disorderly in a public or in a liquor-licenced establishment is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to ten years in terms of the *Gauteng Liquor Act, No. 2 of 2003*.⁵³

KWAZULU NATAL

A person that is intoxicated or disorderly in a public or in a liquor-licenced establishment is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to five years in terms of the *KwaZulu-Natal Liquor Licensing Act, No. 6 of 2010*.⁵⁴

MPUMALANGA

A person that is intoxicated or disorderly in a public or in a liquor-licenced establishment is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to two years in terms of the *Mpumalanga Liquor Licensing Act, No. 5 of 2006*.⁵⁵

NORTHWEST

A person that is intoxicated or disorderly in a public or in a liquor-licenced establishment is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to five years in terms of the *North West Liquor Licensing Act, No. 6 of 2016*.⁵⁶

51 Ss 28(5).

52 It is not stated how many instances would constitute “continuous” contravention.

53 S 127 (b) and (c) and S 133.

54 Ss 93(b) and (d) and S 96.

55 Ss 59(b), (c) and S 66.

56 Ss 85(b), (d) and S 88.

NORTHERN CAPE

A person that is consuming alcohol or being drunk in or at any public place is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to ten years in terms of the *Northern Cape Liquor Act, No. 2 of 2008*.⁵⁷

WESTERN CAPE

A person that is intoxicated or disorderly in a public or in a liquor-licensed establishment is liable to be convicted of an offence and to a penalty including a term of imprisonment of up to 30 days in terms of the *Western Cape Liquor Act, No. 4 of 2008*.⁵⁸

ANALYSIS

The above-mentioned penalties severely criminalise drunken and disorderly conduct. The penalties should be amended or repealed to decriminalise such behaviour and instead impose a sentence without the possibility of imprisonment.

PART 3

PETTY OFFENCES ESTABLISHED BY NATIONAL LEGISLATION

*The safety at sports and recreational Events Act No. 2 of 2010 prohibits:*⁵⁹

- Delinquent and anti-social behaviour inside a stadium or venue or along a route of an event;
- Commercial activities at the event without authorisation of the event organiser.

A person who contravenes these by-laws may be guilty of an offence and liable to pay a fine, or to a sentence of imprisonment of up to five years, or both. Any person who fails to comply with these by-laws is guilty of an offence and if convicted, may be fined or sentenced to a period of imprisonment, or both.

The *Second-Hand Goods Act No. 6 of 2009* prohibits anyone from dealing in second-hand goods, including scrap metal, without registration. An exception to the prohibition is goods with a value of less than R100.⁶⁰

A person who contravenes these by-laws is guilty of an offence and may be fined or sentenced to a period of imprisonment. Should the offence continue, a court may impose further penalties, including a fine, imprisonment, cancellation of registration, or forfeiting of second-hand goods to the State.

57 Ss 46(h) and S 48.

58 S 76 and Ss 87(2).

59 Ss 44(1) and Ss 44(2)(c).

60 Ss 2(1), Ss 32(1) – (3) and see definition of “Second-hand goods” in S 1 - “Definitions”.

CONCLUSION

The legislation contained within this annexure is problematic because it criminalises petty offences and has the effect of discriminating against indigent and impoverished persons in South Africa, who would in most cases be unable to pay the fines imposed, and would therefore in all likelihood become criminal offenders. In De Waal et al.'s *Bill of Rights Handbook*,⁶¹ the principle of the rule of law and its relationship to legislation is explained as follows:

“All law or conduct must be rationally related to a legitimate government purpose”⁶² and “the absence of a rational relationship indicates that the legislation is arbitrary, which is inconsistent with the rule of law.”⁶³ In addition, “a further implication of the rule of law is that laws must be clear and accessible. A law that does not indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly is vague and accordingly unconstitutional and invalid.”⁶⁴

The penalties imposed for contravention of these offences are disproportionate to the petty crimes that they are linked to and are in certain cases also inconsistent, overly-severe, unclear, and are not accessible to the general public. In this sense, these laws arguably violate the rule of law and should be revised and/or repealed.

61 Ian Currie and Johann de Waal (2016), *The Bill of Rights Handbook*, 6th ed., Cape Town: Juta.

62 Ibid at 11.

63 Ibid at 13.

64 Ibid at 14.

ABOUT THIS REPORT

South Africa's Constitution, reflective of regional human rights law, embodies values and principles that mandate the adoption and implementation of measures that promote a more inclusive and egalitarian society. To achieve this, the state is compelled to identify and address the underlying and social determinants of poverty, inequality and socioeconomic marginalisation. However, across all nine provinces, laws exist, primarily enshrined in metropolitan municipal by-laws, that criminalise the status of individuals and entrench discrimination, exclusion and marginalisation.

As part of APCOF's ongoing efforts to promote a rights-centred approach to the use of arrest and detention, this policy-relevant research study highlights problematic municipal by-laws that have the effect of criminalising urban poverty and the performance of life-sustaining activities in public places, and recommends the adoption of an alternative framework to criminalisation.

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*This publication is No. 30 in the APCOF Research Series.
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This publication was made possible through the support of the Sigrid Rausing Trust.

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