



# African Policing Civilian Oversight Forum

**Submission in response to the call for submissions by the South African Legal Reform Commission on its investigation to identify and repeal colonial and apartheid era legislations (SALRC Project 149).**

## 1. Overview

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this written submission in response to the call for submissions by the South African Legal Reform Commission on its investigation into existing legislations enacted prior to 1994, and which, although on the face of it appear neutral and consistent with the values enshrined in the Constitution, are designed to foster colonial and apartheid era policies. We commend the SALRC for seeking to expunge the last vestige of colonial-era legislative instruments.

Our submission highlights problematic municipal by-laws that have the effect of criminalising urban poverty, and entrenching discrimination and social-economic marginalisation. These laws are relevant to the SALRC's call for submission on the basis that they:

- have their origin in colonial and apartheid era legislation;
- exist across the country and are apparent in the municipal by-laws of most, if not all, of South Africa's major metros; and
- violate constitutionally protected rights, and in particular:

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- equality and non-discrimination
- dignity
- freedom from arbitrary arrest and detention.

We recommend that the SALRC conduct an investigation into these by-laws, and make a proposal to government that they be repealed.

## **2. Background to the enactment of municipal by-laws that criminalise poverty and homelessness**

To promote constitutionally compliant legislation, in the past 27 years, South Africa's policy and legislative environment has been a subject of sustained and progressive reform. These efforts and interventions, across the three spheres of government, have been shaped by the norms and values embodied in the Constitution and our constitutional jurisprudence, and the public's collective aspiration to break with the past, marred with systemic inequality and discrimination.

However, across all nine provinces, laws still exist that criminalise the status of individuals, and penalise the performance of life-sustaining activities in the public places, effectively punishing the poor and marginalised. These laws include, for instance, those that criminalise sleeping, bathing, washing, urinating or defecating, collecting money, washing any object, or drying or spreading washing or bedding in public places.

In addition to constitutional obligations to review and replace all legal instruments that promote discrimination and marginalisation, South Africa's obligations and responsibilities to reform outdated criminal laws are expressed in binding regional and international law, as interpreted and clarified by key continental human rights bodies<sup>1</sup>. This includes, significantly, the adoption by the African Commission on Human and Peoples' Rights (ACHPR) of the Principles on the Decriminalisation of Petty Offences in Africa (the Principles), which are **attached as annexure 1**.

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<sup>1</sup> This includes the African Charter on Human and Peoples' Rights, as interpreted by the ACHPR in the Principles on the Decriminalisation of Petty Offences, and jurisprudence of the African Court on Human and Peoples' Rights; the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

APCOF has assessed these laws, in a research report to be formally launched on 1 July, against the prescripts of relevant national, regional and international laws, including the Principles which provide an authoritative interpretation of South Africa's binding regional human rights commitments as expressed in the African Charter on Human and Peoples' Rights. This submission draws on the findings of the research report to make the three observations and, and two recommendations, each of which is discussed in turn below.

**3. Observation 1: Petty by-laws that criminalise the individuals on the basis of their status have their origin in colonial and apartheid era legislation.**

APCOF's research to determine the origin of petty by-laws that criminalise people on the basis of their status confirmed that they have their foundation in colonial era legislation. The overarching legislative framework that shaped these laws, at a broader regional level, is the English Vagrancy Act of 1824, which was adopted with the broad purpose of exerting social control of the poor. In South Africa, their historical origin is also linked to that of apartheid era pass laws, with both sets of laws designed and implemented to subjugate, punish and exclude the poor and marginalised from public view.<sup>2</sup>

The African Court on Human and Peoples' Rights (the African Court), in a landmark judgement delivered on 4 December, 2020 – **attached as annexure 2** – emphasised that the terms and diction used in legal texts to describe persons that frequently occupy public places, to perform life sustaining activities, are a reflection of an outdated and largely colonial perception of individuals without any rights, and that their continued use degrades and dehumanises individuals with a perceived lower status.<sup>3</sup>

In their present formulation, these laws represent updated versions of the earlier colonial era laws, while retaining their initial underlying purpose and objective of ensuring social control and exclusion of the poor from public view.

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<sup>2</sup> M Killander "Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality". (2019) South African Journal on Human Rights. Page 73

<sup>3</sup> African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Page 21.

#### **4. Observation 2: Petty by-laws exist across the country**

The criminalisation of poverty and marginalisation is enshrined in metropolitan municipal by-laws across all nine provinces, with distinctive textual repetition in their description of the offences of concern. The three main categories of these by-laws include those that create:

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

For a more complete account and description of these offences, **see annexure 3**, which is a review study – commissioned by APCOF – on existing offences under South African legal framework that penalise urban poverty, and further entrench inequality and marginalisation.

#### **5. Observation 3: The existence and enforcement of petty by-laws violate constitutionally protected rights**

In its forthcoming research, APCOF has also explored the impact of the existence and enforcement of petty by-laws on constitutionally guaranteed rights and freedoms, and protections enshrined in other regional and international human rights documents – and their subordinate instruments. This includes the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, as interpreted by the Principles on the Decriminalisation of Petty Offences in Africa, and jurisprudence of the African Court.

We note with concern that petty by-laws violate a number of fundamental human rights and freedoms, as guaranteed by the Constitution and other regional and international human rights framework. In particular, we are concerned about their impact on the core constitutional values of dignity, equality and non-discrimination and freedom from arbitrary arrest and detention, as we explain below.

## 5.1. Incompatibility with the right to equality and non-discrimination

Although petty by-laws appear to have been formulated in neutral and objective language, APCOF and other stakeholders, including the ACHPR and the African Court, have observed that they either target or have disproportionate impact on the poor and marginalised. As the SALRC is aware, legal principles and provisions may appear neutral in their formulation but might be, in some instances, administered in a discriminatory manner, or their enforcement yields discriminatory consequences, which we note engenders indirect discrimination.

Accordingly, Ian Currie and Johan De Waal (2014), in their seminal work on our Bill of Rights, note that:

*...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.<sup>4</sup>*

The African Court also ruled that these laws are incompatible with the right to equality and non-discrimination on the basis that they criminalise the status of an individual and enable discriminatory treatment, re-affirming concerns raised by the ACHPR in the Principles.<sup>5</sup>

## 5.2. Incompatibility with the right to dignity

The right to be treated with dignity is one of the foundational tenets of our constitutional democracy, and is classified as a non-derogable right. APCOF notes that petty by-laws violate the right to be treated with dignity because they permit the treatment of the poor as objects that should be penalised and removed from public spaces. To fully understand the impact of the enforcement of these laws, APCOF, on 25 of July 2019, facilitated a roundtable discussion on decriminalisation of petty offences in South Africa, which was attended by, amongst others, those

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<sup>4</sup> Ian Currie & Johan De Waal “ The Bill of Rights Handbook” sixth edition, 2014. P 238.

<sup>5</sup> African Court on Human and Peoples’ Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Pages 17-20.

against whom enforcement measures are frequent. One recurrent complaint that we observed from the group was allegation that law enforcement officials regularly confiscate and destroy their property.

As the SALRC may be aware, in *Ngomane & others v City of Johannesburg Metropolitan*, the court held that the decision of Johannesburg Metropolitan Police Department to confiscate and destroy property belonging to homeless people resulted in the violation of their right to have their dignity respected and protected.<sup>6</sup>

Similarly, 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.*<sup>7</sup>

The African Court also determined that petty by-laws deprive the poor and marginalised of their dignity by unlawfully interfering with their efforts to maintain or build a decent life, reinforcing observations made by the ACHPR in the Principles.<sup>8</sup>

### **5.3. Incompatibility with freedom from arbitrary arrest and detention**

APCOF notes with disappointment that continued arrest and detention of the poor and marginalised, as a means of enforcing petty by laws, is a disproportionate and unnecessary response to what are social-economic challenges.

Although South African Police Service (SAPS) crime statistics and records do not offer any specific detail in relation to arrest for infringement of by-laws, research has established that thousands of

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<sup>6</sup> *Ngomane and others v City of Johannesburg Metropolitan Municipality and Another* (2019)(SCA) 57 para21.

<sup>7</sup> *Port Elizabeth Municipality v Various Occupiers* (2004) (ZACC) 7 para 18.

<sup>8</sup> African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Pages 21-22

arrests take place each year.<sup>9</sup> Many arrests for violations of petty by laws, it has been determined, are conducted for purposes of intimidation rather than prosecution.<sup>10</sup>

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.<sup>11</sup> Our courts have also cautioned that where 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 ulterior purpose.<sup>12</sup>

The African Court, while also declaring these laws inconsistent with freedom from arbitrary arrest and detention, underlined that, since petty by-laws are incompatible with several human rights principles enshrined in the African Charter and other international human rights instruments, they cannot be the basis for lawful law enforcement activities.<sup>13</sup>

Another serious concern about petty by-laws is that they are often vague and overly broad, and do not clearly and sufficiently set out all the elements of the offences and the reasons and circumstances under which arrest and detention are to effected, giving wide discretion to law enforcement officials.

## **6. Recommendations**

Based on its submission, APCOF recommends that the SALRC:

- Investigate municipal by-laws, as set out in annexure 3 of this submission, on the basis that they have their foundation in colonial and apartheid era laws, and pose a significant threat to the Constitutional rights protections of dignity, equality and freedom from arbitrary arrest and detention, particularly for the most poor and marginalised in South African society.

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<sup>9</sup> M Killander (2019). Page 86

<sup>10</sup> Ibid. Page 87

<sup>11</sup> Minister of Safety and Security V Sekhoto and Another (2011)(SCA) 1 para 30.

<sup>12</sup> Ibid para 30-31.

<sup>13</sup> African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Page 28

- Based on its investigation, make proposals to government for the repeal of municipal by-laws that criminalise poverty and status, to give effect to the African Court judgment, the Principles, and South Africa's Constitutional rights guarantees of dignity, equality and freedom from arbitrary arrest and detention.

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