



African Policing Civilian Oversight Forum

The criminalisation of poverty and status in South Africa

Submission in response to the invitation by the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights

30 November 2021

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights (the Special Rapporteurs) on information concerning laws and regulations that prohibit or sanction begging, staying, sleeping, eating or undertaking any other life sustaining activities in public spaces.

Our submission focuses on the criminalisation of poverty and status in South Africa, and is based on our recent research report on this issue, which is entitled ['Poverty is Not a Crime: Decriminalising Petty By-Laws in South Africa' \(June 2021\)](#).

Our report identifies laws that criminalise the performance of life sustaining activities in public spaces in South Africa, and explains how they are inconsistent with South Africa's international, regional and national human rights obligations. The manner in which these laws are enforced also raise significant human rights concerns, and our report highlights the impact of enforcement on the rights and dignity of those who are often disproportionately targeted for enforcement on the basis of their status.

Our report also sets out the alternative framework that currently exists, under our National Development Plan, to address the underlying causes of the behaviours that are currently criminalised. This framework for addressing homelessness and poverty utilises safety planning, rather than criminalisation through municipal by-laws. As explained in the report, the framework is centred on South Africa's National

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Development Plan and is found in the existing obligations of government – from national to municipal level – to engage in developmental and public health approaches to community safety planning.

We hope that the analysis and findings of our report will provide useful information for the Special Rapporteurs.

The interest in this issue is particularly timely for South Africa, 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.

From an African-regional perspective, APCOF also welcomes the interest by the Special Rapporteurs in this issue. For the past few years, APCOF has been working in coalition with approximately 36 organisations on the [Regional Campaign to Decriminalise Petty Offences in Africa](#). The work of the Campaign aligns thematically with the issues raised in the call for submissions by the Special Rapporteurs. The Campaign partners have produced a range of research reports and other advocacy documents that may provide additional useful information for the Special Rapporteurs – all of which is available on the [Campaign's website](#). The Campaign has also actively supported the development of an emerging normative standard for the decriminalisation of petty offences at the African regional level:

- In 2017, the Campaign provided technical support to the African Commission on Human and Peoples' Rights to develop the [Principles on the Decriminalisation of Petty Offences in Africa](#). The Principles were adopted by the Commission in response to growing concern that certain categories of people, including those who are poor or who otherwise experience social exclusion, are unfairly targeted by petty offences. In particular, the Commission was concerned about the impact of the existence and enforcement of these offences on rights protected by the African Charter on Human and Peoples' Rights – in particular, equality and non-discrimination (Article 2), freedom from ill-treatment (Article 5) and freedom from arbitrary arrest and detention (Article 6).
- Campaign partners, the Pan African Lawyers Union and the Southern African Litigation Centre, brought an application for an [Advisory Opinion](#) on petty offences to the African Court on Human and Peoples' Rights, receiving a favourable decision by the Court in December 2020. The Court noted that offences which label a person 'vagrant', constitute an outdated and largely colonial perception of individuals without rights, and directed States to immediately review these laws which 'effectively punish the poor and underprivileged'.

In addition to the information we provide below about South Africa, we hope that the efforts of the Regional Campaign will also provide the Special Rapporteurs with information to inform their work, and their recommendations to States to end the practice of using criminal laws to punish poverty.

- 2. Issue 1: Information on laws or regulations that prohibit begging, eating, sleeping, or performing personal hygienic activities in all or certain public places, including their texts and whether they are still in force and enforced AND Issue 2: Information on laws or regulations that allow for petty offences the detention or imprisonment of individuals who are unable to pay the respective fine**

2.1 Overview

APCOF's study reviewed existing offences under the South African legal framework that have the effect of criminalising poverty and homelessness at the national, provincial and municipal levels. It confirmed the existence of petty offences in current municipal laws, including those which criminalise homelessness, poverty and other forms of marginalisation through the creation of offences related to public places and prohibited behaviour, and offences relating to informal trading. A taxonomy and brief analysis of petty offences in metropolitan municipality by-laws is set out below. For more information, please see from page 41 of our report, ['Poverty is Not a Crime: Decriminalising Petty By-Laws in South Africa' \(June 2021\)](#).

The laws set out below are all in force, and as our research report explains, are all regularly enforced by the relevant law enforcement agencies. The prohibition of the behaviour and activities extracted from the below-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.

2.2 Petty offences established by the by-laws of metropolitan municipalities¹ relating to public places and prohibited behaviour

2.2.1 City of Cape Town

The following activities are prohibited in public places² by the 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 2007.³

¹ The 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 metros combined. Indeed, we accept that an account of the petty offences contained in the metropolitan municipality 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 metro's, we expect, will nevertheless provide a representative account of the content of municipal by-laws generally.

^{2 2} Section 1 "Definitions": "Public place" is defined as:

- 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.⁴
- 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).⁵
- 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 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).
- Collecting money or attempting to collect money.
- Organising or assisting in the organisation of the collection of money (without permission from the Municipality).

- 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.”

³ 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 Manguang 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 Manguang Metropolitan By-law is a R3000 fine or 2 months’ imprisonment and is therefore less stringent than the penalties contained in other similar By-laws. See also Manguang Metropolitan Municipality.

⁴ 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.

⁵ It is common knowledge that public toilet facilities are often locked at night.

- 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 6 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;⁶

- 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 6 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.

2.2.2 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.):⁷

⁶ 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.

- 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.⁸
- 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 R 2000 or if payment is not made, to imprisonment for no more than 6 months, or both. In the case of continuous contravention, liability for payment of any expense incurred by the Council shall be imposed.

2.2.3 City of Johannesburg⁹

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".¹⁰
- Behaving in an indecent or offensive manner.¹¹
- 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 6 months. Where the offence continues, a convicted person is liable to a further

⁷ 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).

⁸ "Indecent" is not defined.

⁹ The City of Johannesburg's By-laws are, overall, less restrictive than the City of Cape Town and eThekweni Metropolitan.

¹⁰ 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.'

¹¹ "Indecent" and "offensive" are not defined.

fine of no more than R50, or if payment is not made, then imprisonment of no more than 1 day for each day that the offence continues (after written notice has been served on the person concerned).

2.2.4 eThekweni 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 2015¹² (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.
- Begging¹³
- 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.
- 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 offence¹⁴

A person found to be guilty of any of these By-laws is liable for a fine or imprisonment for a period not exceeding 6 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 2015.¹⁵

- 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.

¹² Note: similar provisions in the By-laws for City of Tshwane and Mangaung Municipality. See specifically Manguang 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 Manguang Metropolitan Municipality, Municipal Parks By-law, Local Government Notice No. 35, 24 June 2016.

¹³ See footnote 18 above.

¹⁴ 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.

¹⁵ Ss 10(1)(h),(i),(o),(aa); S 2 and S 17.

- 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 2 years, or both. Should the offence continue, an additional fine of no more than R100 or imprisonment for no longer than 10 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 2015:¹⁶

- 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.
- 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.¹⁷
- 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

¹⁶ 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.

¹⁷ See comment in footnote 22.

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 2 years. In the case of a continuing offence, an additional fine of an amount not exceeding R200 or imprisonment for a period not exceeding 10 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 parks¹⁸ in terms of KwaZulu-Natal Province (2015). eThekweni Municipality: Municipal Parks and Recreational Grounds By-law. KwaZulu-Natal Provincial Gazette, No. 1524, 12 October 2015.¹⁹

- 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 2 years, or both. Should the offence continue, a further fine not exceeding R200 or imprisonment of 10 days for each continuing day, will be imposed.

2.2.5 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 2010.²⁰

¹⁸ 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.'

¹⁹ 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.

²⁰ 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.

- 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 fashion²¹
- 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 ‘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 2010.²²

- 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.

2.2.6 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:²³

- Refusing to provide his/her full name and address to an authorised municipal officer when requested to do so.

²¹ “Indecent”, “improper” and “unbecoming” are not defined.

²² Ss 3(1)(k), (l), (m), (n), (p) and (u).

²³ Available at: <http://www.tshwane.gov.za/sites/business/Bylaws/Pages/Promulgated-By-Laws.aspx>, accessed on 24 April 2019 at S 11 and Ss 25(1) – (2).

- 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.

2.2.7 Manguang Metropolitan Municipality

The following conduct is prohibited in public streets by Manguang Metropolitan Municipality: Public Streets By-law, Local Government Notice, No. 35, 24 June 2016.²⁴

- 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 3 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 1 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.

2.3 By-laws specifically relating to indigent persons

Buffalo City Metropolitan Municipality is one of South Africa’s municipalities that has started on the process of drafting by-laws or policies aimed at supporting indigent persons living within such areas.²⁵ 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.²⁶ The long-term objective is for indigent persons to move from requiring free services to becoming rate paying members of the community.²⁷

²⁴ S 16; Ss 27(1)(c), (g) and (h) and S 41.

²⁵ Buffalo City Metropolitan Municipality: Indigent Support By-law (draft) February 2014.

²⁶ Supra (Buffalo City) at S 6.

²⁷ Supra.

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...”²⁸ The secondary qualification is that the combined gross income of one household must not equate to more than the poverty threshold value.²⁹

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.

2.4 Analysis

In our report, our analysis of these laws identified a number of challenges with their existence and enforcement. First, they have the effect of criminalising poverty, homelessness, 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. Second, it is evident from these laws is that they are developed and worded in broad, vague and ambiguous language. The absence of definitions of key terms, which is necessary to define and set out all the elements of an offence and provide legal clarity and certainty to the public, raises concerns about arbitrary enforcement of laws and the exercise of policing discretion. Finally, the penalties imposed for violation of these laws range from a fine to a sentence of imprisonment of up to 6 months, or both, which we argue in our research is a disproportionate and unjust.

3. Issue 3: Comments on whether any of these laws and regulations may violate international human rights law

3.1 Overview

APCOF has examined the above-mentioned municipal by-laws against human rights standards embodied in relevant national, regional and international human rights laws. This includes the African Charter on Human and Peoples’ Rights, the [Principles on the Decriminalisation of Petty Offences in Africa](#) (the Principles) , and [jurisprudence](#) of the African Court on Human and Peoples’ Rights (the African Court). These regional human rights instruments draw their form and purpose from, and are reflective of the norms and values enshrined in, international human rights documents, including the International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political

²⁸ Supra at Ss 10.1.1.

²⁹ Supra at Ss 10.1.2.

Rights. For more information, please see from page 5 of our report, [‘Poverty is Not a Crime: Decriminalising Petty By-Laws in South Africa’ \(June 2021\)](#)

We observe with concern that the existence and enforcement of these laws violate various human rights and freedoms, as protected in regional and international human rights framework. In particular, while acknowledging the indivisibility and interdependence of all human rights and that the enforcement of these laws potentially affects other rights, we are concerned about their impact on the core human rights values of dignity, equality and non-discrimination and freedom from arbitrary arrest and detention. In addition to our findings, two regional human rights organs have made pronouncements on the compatibility of these laws with continental human rights standards that form the normative foundation upon which the African human rights system is based. We draw on the observations of these human rights bodies, together with our own research findings, to provide the following brief analysis of the impact of these laws on the free exercise of fundamental human rights and freedoms.

3.2 These laws are inconsistent with the right to equality and non-discrimination

As is evident from their texts, although these laws appear to have been drafted in neutral and objective language, APCOF and other key regional stakeholders, including the ACHPR and the African Court, have observed that they either target or have disproportionate impact on the poor, homeless and other historically marginalised persons. As you are aware, legal standards and provisions may appear neutral in their development and formulation but might be, in some instances, applied in a discriminatory manner, or their enforcement concomitantly yields discriminatory outcome, which we note, under South African human rights laws, produces indirect discrimination.

In addition, the African Court, in an [Advisory Opinion](#) issued on 4 December, 2020 established that these laws are inconsistent with the right to equality and non-discrimination on the basis that they criminalise the status of an individual and enable discriminatory treatment, reinforcing the views expressed by the African Commission on Human and Peoples’ Rights in the [Principles on the Decriminalisation of Petty Offences in Africa](#).

3.3 These laws are inconsistent with the right to dignity

Under the African and international human rights systems, the right to be treated with dignity is a core human rights value, and one from which, in many national jurisdiction, no derogation is permitted. As the ACHPR has emphasised in the Principles, we note with concern that the enforcement of these laws is inconsistent with the right to dignity and freedom from ill-treatment on the basis that their enforcement contributes to overcrowding in places of detention or imprisonment.

The African Court further resolved that these laws strips the poor, homeless and other marginalised groups of their dignity by unlawfully interfering with their efforts to maintain or build a decent life, re-affirming declarations made by the ACHPR in the Principles.³⁰

3.4 These laws are inconsistent with freedom from arbitrary arrest and detention

We note with concern that, as an enforcement mechanism, law enforcement officials arrest and detain of the poor and homeless, primarily to intimidate and discourage them from occupying urban spaces and performing life sustaining activities in the open. We observe that arrest for the purpose of enforcing these laws is a disproportionate and unnecessary approach, and is inconsistent with the internationally recognised principle of arrest as a measure of last resort.

In addition, the African Court, while also declaring the enforcement of these laws inconsonant with freedom from arbitrary arrest and detention, underscored that, since petty by-laws are inconsistent with several human rights values enshrined in the African Charter and other international human rights instruments, they cannot be the basis for lawful law enforcement activities.³¹

Another serious concern about these laws, which further underline the challenges inherent in these laws and strengthens our call for their review and repeal, 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.

4. Issue 4: Information about attempts made or planned to decriminalise begging, eating, sleeping or performing personal hygienic activities in public places.

4.1 Overview

The process of repealing existing laws is always a lengthy one. While substantive progress has been made, since the promulgation of the 1996 Constitution, to repeal colonial era laws and align all legal and regulatory instruments with international standards, limited effort has been made to develop meaningful legal and policy responses that effectively address urban poverty. This is despite sustained and coordinated advocacy efforts by APCOF and other stakeholders in the field of social justice, including intervention by the ACHPR, to encourage policymakers and legislative organs to develop and implement targeted measures that promotes a rights-centred, developmental and public health approach to the alleviation of poverty in urban spaces. In some cases, decisionmakers have actively sought to enact new legal rules that

³⁰ African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018 Pages 21-22

³¹ Ibid. Page 28

are designed to further marginalise the poor, even amid increased public pressure to address the challenge of urban poverty as a social justice concern. For instance, the recent adoption of two laws by the City of Cape Town is increasingly viewed as an overt attempt to increase the powers of law enforcement officials to remove homeless people from public spaces and confiscate their possessions.³²

It is hoped that an impending legal action against the City of Cape Town will provide an opportunity for judicial intervention, assert constitutionally protected rights of the poor, and establish a trend that will facilitate and guide the review and repeal of these laws across the country.³³

5. Issue 5: Information on measures and services available at municipal, regional or national level to support people living in poverty from having to resort to beg, sleep, wash, defecate or perform other hygienic activities in public places, because they lack access to employment, social assistance, adequate housing, public showers and toilets

As APCOF's report explores in detail, the role and obligation of local governments to address poverty and homelessness, particularly through identifying and addressing the related risk factors from a safety and developmental perspective, is clearly set out in existing local governance framework that regulate development and safety planning. This includes the obligation and guidance embodied in key legislative and policy instruments such as the National development Plan 2030; the Municipal Systems Act 32 of 2000; the Municipal Structure Act 117 of 1998; the Integrated Urban Development Framework of 2016; the Integrated Social Crime Prevention Strategy 2011; and the 2016 White Paper on Safety and Security. To effectively understand and respond to the underlying factors that promote poverty and homelessness, there is need for the government of South Africa to invest in the implementation of this development and safety planning framework.

At the practical level, the main form of state-based intervention, largely at local governance level, has been the provision of shelter for people experiencing homelessness. However, in addition to the fact that a large majority of the homeless experience unsheltered homelessness³⁴, available shelters are inadequate, poorly equipped and do not provide integrated services.³⁵ These gaps have, to some extent, been filled by non-profit organisations working with the homeless.

³² <https://www.groundup.org.za/article/cape-town-passes-unlawful-occupations-law-despite-protest/>.

³³ <https://www.groundup.org.za/article/homeless-people-challenge-cape-town-laws-courts/>.

³⁴ For instance, a research study has found that there are an estimated 14,357 street people in Cape Town. The study also established that, as of March 2020, there were 20 shelters providing a total of 2180 shelter beds in the City of Cape Town. The report is accessible at: https://homeless.org.za/wp-content/uploads/2021/02/THE-COST-OF-HOMELESSNESS-CAPE-TOWN- Full-Report_ Web.pdf.

³⁵ <https://allafrica.com/stories/202103310737.html>. <https://www.dailymaverick.co.za/article/2021-11-24-leading-operator-in-cape-towns-multimillion-rand-homelessness-industry-is-accused-of-failing-at-its-core-objectives/>.

Furthermore, although suggestions for the introduction of a permanent and sustainable unemployment benefits are under consideration, South Africa does not have a permanent unemployment benefits programme. Following the outbreak of COVID-19, and as part of measures adopted to mitigate the broader social economic impact of the pandemic, the government introduced a special R350 a month grant for unemployed adults who do not qualify for other social grants, as a temporary relief scheme. Apart from having a defined, specific duration, this temporary social assistance programme also does not cover undocumented immigrants, as it only accessible to South African citizens, permanent residents and refugees registered with the Department of Home Affairs³⁶.

6. Conclusion

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, homeless and marginalised groups find themselves. Structural inequality and discrimination, which have been exacerbated and made more visible by the outbreak of COVID-19 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.

There is need for South Africa to adopt legislative and other measures to decriminalise these offences, and compliment this with a specific focus on interventions that respect, protect and promote inalienable human rights and dignity. Existing legislative and policy arrangements contain sufficient guidance to local governments to address poverty and homelessness as a human rights issue.

³⁶ <https://www.gov.za/covid-19/individuals-and-households/social-grants-coronavirus-covid-19>.