



DECRIMINALISING POVERTY IN SOUTH AFRICA

1 July 2021 | 10h00 – 11h30 SAST
Webinar Report



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1. Introduction

On 1 July 2021, the African Policing Civilian Oversight Forum (APCOF), together with the South African Human Rights Commission (SAHRC), hosted a webinar to launch APCOF's latest research paper, *Poverty is Not a Crime: Decriminalising Petty By-laws in South Africa*. The paper examines metropolitan municipal by-laws that have the effect of criminalising poverty and entrenching social and economic marginalisation, and recommends the adoption of alternative frameworks for dealing with poverty rather than criminalisation. The event was moderated by APCOF Trustee Annelize van Wyk, with the keynote address by SAHRC Commissioner, Chris Nissen.

Presentations from experts addressed various interrelated topics which, together, underlined existing concerns that the existence and enforcement of petty by-laws¹ are inconsistent with the free exercise of basic democratic rights and freedoms. Submissions also underpinned the need to review and repeal petty by-laws to give effect to the values that are foundational to our Constitution and other regional and international norms and standards that are legally binding on South Africa.

Contributions by the panellists included the following:

- Chris Nissen, in his keynote address, discussed the centrality of ensuring sustained implementation of the Bill of Rights to existing interventions to promote substantive equality in the country;
- Abdirahman Gossar of APCOF explored the nature of petty by-laws in South African municipal by-laws and viable alternatives to criminalising poverty and the status of individuals;
- Magnus Killander, Professor at the University of Pretoria's Centre for Human Rights, examined the colonial origin of the by-laws;
- Donald Deya, Chief Executive Officer of the Pan African Lawyers Union, analysed judicial-level action within the African Union human rights system to repeal the by-laws;
- Jonty Cogger, Attorney at Ndifuna Ukwazi, assessed impending strategic litigation to challenge the adoption and implementation of the by-laws in South Africa;
- Musa Gwebani, Project Manager in the Social and Economic Rights Cluster of the Open Society Foundation for South Africa offered reflections on the institution's support for non-profit organisations working to achieve decriminalisation.

This report draws on the inputs of the panellists to provide the following thematic summary of the origin and nature of petty by-laws in South Africa, their enforcement and impact on the human rights and dignity of the poor and marginalised. It also explores the availability of rights-centred alternatives to criminalisation within the framework of existing obligation on the three spheres of government to address structural inequality, poverty and exclusion.



2. The colonial legacy of petty by-laws

The practice of criminalising poverty and the status of individuals has its roots in colonial laws and policies. Generally, it has been observed that, from a sociological context, the adoption and implementation of laws that prohibit vagrancy-related activities and criminalise urban poverty and the status of individuals were motivated by three primary reasons.² Firstly, they were meant to curtail the movement of people and criminalise begging, which then facilitated the availability of cheap labour to landowners and industrialists while limiting the presence of persons regarded as ‘undesirable’ in cities. Secondly, they were aimed at reducing the cost incurred by municipalities to provide care and support programmes to the poor. Finally, they were intended to prevent property-related crimes by creating broad offences that provided wide discretion to law enforcement officials to enforce them.

In South Africa, their origin is linked to that of pass laws. Both sets of laws were enacted to control the conduct and behaviours of the indigenous people of the Cape.³ The first law that regulated vagrancy in South Africa was the Caledon Code of 1809 which required the Khoi, the inhabitants of the region, to work for the White residents or be treated as ‘vagrants’ and ‘vagabonds’. In the 1800s, vagrancy laws were adopted across South Africa with the objective, mainly, of ensuring the continuous availability of black labour to the White population, or offering protection to the wealthy White elites living in the cities and countryside.

In addition to municipal by-laws, there were vagrancy laws that were implemented in various pass laws that were already in the Caledon Code, which required all the Khoi to wear passes. This meant that vagrancy was regulated by various legislative instruments, but the underlying attitude that informed their adoption was set out in the Stallard Commission of 1922, in relation to urban areas, which provided that ‘native’ inhabitants of the area should only be allowed to enter urban areas to provide for the needs of White inhabitants, and should depart therefrom when they cease to so administer.

In the context of democratic South Africa, the national legislation adopted in the pre-apartheid and apartheid-era made national vagrancy laws unnecessary and were abolished in the 1960s and 1970s, but the provisions that were still in the by-laws and apartheid legislation remained until the early 1990s.

From the nature of by-laws adopted by various municipalities in the country since democracy, it is clear that they are illustrative of a linguistically updated class of the earlier set of vagrancy laws. An example of provisions contained in two sets of by-laws which exemplify two legal instruments from two distinct historical periods with the latter instrument representing a linguistically updated version of the former can be found in Johannesburg 1934 Traffic By-laws and Johannesburg 2004 Public Road and Miscellaneous By-law.

In light of the deference that the courts generally have in relation to what is considered criminal, it might be difficult, Prof. Killander observed, to successfully challenge the constitutional validity of these by-laws in South Africa, but regional and international developments, including relevant outcomes within the African human rights system, will have a positive influence at domestic level.



3. Nature of petty by-laws in South African metropolitan municipal by-laws

Under South Africa's constitutional rules, municipalities enjoy express constitutional authority to pass by-laws and regulate the administration of their affairs. Section 156(1)(a) of the Constitution gives municipalities the authority to enact by-laws to administer local affairs, as listed in part B of schedule 4 and part B of schedule 5 of the Constitution, and deliver public services and programmes at the local sphere of government.

It is on this basis of exercising this constitutionally enshrined legislative power, that South African municipalities, in all nine provinces, adopt petty by-laws to regulate, inter alia, the occupation of public spaces and the performance of life-sustaining activities in the open. Generally, the three main categories of by-laws that criminalise poverty and entrench marginalisation 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.

One common denominator in these laws is their disproportionate impact on poor and vulnerable persons. Some of the conduct prohibited by the former set of offences, for instance, include, among others, sleeping, bathing, washing, urinating or defecating, collecting money, washing any object, or drying or spreading washing or bedding in a public space, with the prescribed penalty for engaging in these behaviours, that are necessary for survival, being a fine or a sentence of imprisonment for up to 6 months.

In the absence of urgent legal reform needed to bring these laws in line with domestic, regional and international standards, the poor and other marginalised groups will continue to experience the impact of criminalisation of poverty, which further intensifies their daily challenges and hardships.



4. Enforcement of petty by-laws in South Africa

The policing and enforcement of municipal by-laws, including petty by-laws, are conducted by the South African Police Service (SAPS), Metropolitan Police and City Law Enforcement. In addition, there is increasing evidence that non-state security services providers, such as private security companies and City Improvement Districts (CIDs), also play a key role in the enforcement of by-laws.

The use of non-state security service providers to enforce laws and regulations adopted by metropolitan municipalities poses a number of challenges, which further undermines the fulfilment of human rights and social justice and the values and obligations embodied in the Constitution, and reinforces existing concerns about the regulation and governance of non-state security establishments. A fundamental challenge associated with their use, in particular, is that non-state security companies are not subjected to the same oversight and accountability architecture as public law enforcement officials. In addition, non-state actors do not, as compared to public police officers, receive continuous and comprehensive training on their obligations to respect and promote the rights and freedoms of all persons, regardless of their perceived status in society.

In his contribution at the event, Commissioner Chris Nissen acknowledged the challenge introduced by the deployment of non-state security providers to enforce governmental laws as a serious concern. He recounted a meeting he had earlier in the year with the Minister of Police and the Chairperson of the Command Council,⁴ at which they discussed, inter alia, the powers and functions of law enforcement officers to conduct eviction procedures. He reflected that the Chairperson of the Command Council was concerned about granting participation in the Command Council to some law enforcement agencies on the basis that they were not properly constituted and registered. In this regard, he suggested that it is necessary to initiate a meeting with the Acting Provincial Commissioner of Police of the Western Cape to discuss and explore the legitimacy of law enforcement agencies within the City of Cape Town.

It was also agreed that there is a need to engage with the regulators of the private security industry in the country, to ensure that, in their provision of security services, non-state actors operate in a manner that is compliant with non-derogable human rights and freedoms, as protected in the Constitution and other regional and international human rights instruments.



5. Impact of the enforcement of petty by-laws on constitutionally guaranteed rights and freedoms

The existence and enforcement of petty by-laws have serious impacts on the free exercise of inalienable human rights and freedoms. They unlawfully and unjustifiably limit the enjoyment of constitutionally protected human rights, which are reflective of values enshrined in international and regional human rights standards. This includes, inter alia, the African Charter on Human and Peoples' Rights, as interpreted by the Principles on the Decriminalisation of Petty Offences in Africa (the Principles), and jurisprudence of the African Court on Human and Peoples' Rights.

There was consensus at the webinar that petty by-laws have a negative impact on the rights of those against whom enforcement measures are frequent – who are also historically marginalised groups – and undermines existing efforts to end exclusion and marginalisation and promote greater equality in the country. In particular, presenters re-affirmed their concerns about the impact on inalienable constitutional rights to dignity, equality and non-discrimination and freedom from arbitrary arrest and detention, as explained below.

5.1. *Inconsistency with the right to equality*

Section 9 of the Constitution enshrines the right to equality and non-discrimination. It stipulates 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, inter alia, social origin and birth. In *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*, our Constitutional Court held that:

Equality means equal concern and respect across difference... At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment.⁵

In interpreting and implementing the right to equality, it is argued that it is important to distinguish between formal and substantive equality.⁶ Formal equality, it is underlined, simply requires that all persons are equal holders of rights, and does not take disparity in the social-economic status of groups into consideration.⁷ It can be achieved by extending the same rights and entitlements to all.⁸

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.⁹ Consequently, it is observed 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.¹⁰

While petty by-laws appear to have been drafted in objective and non-specific language, many stakeholders, including key regional human rights bodies, have highlighted that they either target or have a disproportionate impact on those living in vulnerable situations. It is well established that legal principles and provisions may appear neutral in their formulation but might be, in some instances, administered in a discriminatory manner, or their enforcement produces discriminatory consequences, which then result in indirect discrimination.

The African Court on Human and Peoples' Rights (the African Court), in a landmark Advisory Opinion delivered on 4 December 2020 also ruled that laws criminalising vagrancy-related conduct 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 African Commission on Human Peoples' Rights (the ACHPR) in the Principles.¹¹

In his keynote address, Commissioner Chris Nissen also emphasised the need to strengthen commitments designed to achieve greater equality and inclusion in South Africa, and the significance of section 9 of the Constitution to ensuring the realisation of all other rights and freedoms enshrined in the Bill of Rights, while also stressing that metropolitan municipalities are constitutionally enjoined to provide equitable and non-discriminatory services to all member of the public, regardless of their social status or origin.

5.2. *Inconsistency with the right to dignity*

Section 10 of the Constitution provides 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. In *S v Makwanyane*, the Constitutional Court, while addressing the nexus between the rights to dignity and life, held that:

*The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished.*¹²

Section 1 of the Constitution also notes 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. Petty by-laws are incompatible with the right to be treated with dignity as they authorise the treatment of the poor and marginalised as objects that should be removed from public places. There is also evidence that, in the enforcement of petty by-laws, law enforcement officials regularly confiscate and destroy properties belonging to the poor and homeless. In *Ngomane and others v City of Johannesburg Metropolitan*, the court held that the decision of the 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.¹³

The African Court also established that petty by-laws violate the right of the poor and vulnerable to be treated with dignity by unlawfully interfering with their efforts to maintain or build a decent life, intensifying observations made by the ACHPR in the Principles.¹⁴

5.3. Inconsistency with the right to freedom from arbitrary arrest and detention

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.

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.¹⁵ Many arrests for violations of vagrancy-related by-laws, it is argued, are conducted for purposes of intimidation rather than prosecution.¹⁶ Arrest for purposes of intimidation is arbitrary and unlawful.

A further challenge posed by 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 be affected, giving wide discretion to law enforcement officials.



6. Challenging the criminalisation of homelessness: Judicial action as a possible solution

Within our constitutional system, distinguished by the supremacy of the Constitution, courts are empowered to exercise the power of judicial review and assess, inter alia, legislative outputs against the values that underpin the Constitution.

In strategic litigation designed to challenge laws that criminalise homelessness and poverty in South Africa, Ndifuna Ukwazi are assisting seven street-based people in legal action, taken at both the Western Cape High Court and Equality Court, to challenge the constitutional validity of two sets of petty by-laws which resulted in the issuance of fines in 2019 against the applicants.

The two by-laws that have been identified as problematic are the City of Cape Town's *Street, Public Places and Prevention of Noise Nuisances By-law* of 2007; and the City of Cape Town's *Integrated Waste Management By-law* of 2009. Ndifuna Ukwazi's submission for the judicial invalidation of the by-laws is based on their inconsistency with constitutionally guaranteed rights to, among others, equality and non-discrimination, dignity, right to security of the person and freedom of movement.

In his submission, Jonty Cogger underscored that there is an underlying, but inaccurate, assumption that, by criminalising poverty and homelessness, local governments will succeed in making conditions intolerable for groups it considers undesirable and eventually compel them to move, thereby removing them from public view. The practice of criminalising poverty and homelessness does not address the underlying causes of the challenge, and it is largely a misconceived approach to the problem, particularly in the light of shortages in shelter beds in large metropolitan municipalities.

Against the backdrop of a successful judicial action at the African Court to challenge laws that criminalise vagrancy-related activities within the jurisdiction of State Parties to the African Charter on Human and Peoples' Rights, Donald Deya, on behalf of the Regional Campaign to Decriminalise Petty Offences in Africa (which includes both the Pan African Lawyers' Union [PALU] and APCOF as members), reflected on the significance of the Court's decision to existing national efforts to challenge petty by-laws. He pointed out that the Court authoritatively determined that petty offences violate several provisions of the African Charter on Human and Peoples' Rights, its protocol on the rights of women in Africa and the African Charter on the Rights and Welfare of the Child. Significantly, the Court also established that African states have a positive obligation to review, repeal or amend petty offences that have the effect of criminalising poverty and homelessness.



7. Alternative framework to criminalisation

There is an emerging trend and consensus that the most effective and sustainable approach to addressing poverty and community safety is through the design and implementation of alternatives to criminalisation within a development, public health and rights-centred framework. In the context of South Africa, existing safety, and crime and violence prevention frameworks and mechanisms available to local government, in particular, can be used to address the underlying risk and correlates of homelessness from a developmental perspective.

There are several legislative instruments and related policies that speak directly to the role of local government in addressing the factors relating to both homelessness and safety and the intersection between the two. These include: the National Development Plan (NDP) 2030; the Municipal Systems Act 32 of 2000; the Municipal Structures Act 117 of 1998; the Integrated Urban Development Framework of 2016; the Integrated Social Crime Prevention Strategy (ISCPS) of 2011; and the 2016 White Paper on Safety and Security, among others.

Section 23 of the Municipal Systems Act, for instance, requires 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.

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. 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 marginalised populations. Homeless people are essential participants in this process, and safety audits must ensure that the concerns and lived experiences of homeless people within any community are considered and integrated into safety plans.

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, but may rather be

managed through the better targeting and location of services through existing facilities. 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.

In support of the adoption of alternative frameworks to criminalisation, Commissioner Chris Nissen stressed the necessity of ensuring that national, provincial and local governments have clear and coherent policies to address the challenges within the frameworks of promoting human rights and social justice in rural and urban areas. This can be done through, inter alia, the provision of training and skills development to affected individuals to facilitate their reintegration into a lifestyle in which they are able to sustain themselves. To achieve long-term and sustainable outcomes to the challenge, there is an urgent need to create an enabling environment through relevant legislative and policy reform to create sustainable development programmes for the poor and marginalised.



8. Conclusion

In conclusion, Annelize van Wyk reiterated concerns about the impact of the enforcement of petty by-laws on the rights and dignity of the poor and vulnerable. She emphasised the need for policymakers to move with speed and review and reform the by-laws to give effect to their human rights obligations under the Constitution and other binding regional and international human rights documents. In addition, she urged duty bearers, within the three spheres of government, to develop and implement specific and integrated measures that are designed to address poverty, exclusion and other conditions that promote marginalisation, rather than criminalising poverty and homelessness.

Endnotes

- 1 Petty by-laws are municipal by-laws that create petty offences. The African Commission on Human and Peoples' Rights define petty offences as 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.
- 2 As cited in African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African Lawyers Union, 001/2018. p. 15.
- 3 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.
- 4 Provincial Coronavirus Command Council established to oversee the adoption and implementation of preventive and containment measures at provincial level.
- 5 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (1998) (ZACC) 15 para 132.
- 6 Ian Currie and Johan De Waal (2014), *The Bill of Rights Handbook*, Sixth edition. Cape Town: Juta, p. 213.
- 7 Ibid.
- 8 Ibid.
- 9 Ibid.
- 10 Ibid., p. 214.
- 11 African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018, pp. 17-20.
- 12 S v Makwanyane (1995) (ZACC) 3 para 327.
- 13 Ngomane and others v City of Johannesburg Metropolitan Municipality and Another (2019)(SCA) 57 para21.
- 14 African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018, pp. 21-22.
- 15 M Killander (2019), p. 86.
- 16 Ibid. p. 87.

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.

ABOUT APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

ABOUT SAHRC

The South African Human Rights Commission is the national institution established to support constitutional democracy. It is committed to promote respect for, observance of and protection of human rights for everyone without fear or favour.



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